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AmEx Opens Door For Justices To Build On Concepcion

By **Melissa Lipman**

Law360, New York (February 26, 2013, 7:49 PM ET) -- The U.S. Supreme Court on Wednesday will hear American Express Co.'s bid to force a proposed antitrust class action into arbitration in a case that gives the justices a chance to expand on their string of pro-arbitration decisions in recent years.

The Second Circuit repeatedly has refused to let AmEx force merchants pursuing class antitrust claims against the credit card company into arbitration in the long-running dispute, even after the Supreme Court's 2011 ruling in AT&T Mobility v. Concepcion came down in favor of arbitration.

In that case, the court ruled that the Federal Arbitration Act preempted state laws barring the enforcement of class action waivers. The question now is whether the court will extend that same logic to federal claims.

"The Supreme Court has issued some pretty significant pro-arbitration rulings recently, so it'll be interesting to see if the American Express case reverses that trend or if it continues that trend," Weil Gotshal & Manges LLP partner Eric Hochstadt said. "This has pretty much divided a lot of people."

The case goes back to 2003, when a group of merchants filed a proposed antitrust class action against AmEx in New York federal court, claiming that when AmEx decided to get into the standard commodity credit card business, it illegally forced merchants to pay excessive rates equal to AmEx's more attractive business and personal charge cards by tying the acceptance of the credit and charge cards together.

Although the district court ordered arbitration for all of the merchants whose contracts with AmEx included mandatory arbitration clauses, the Second Circuit repeatedly has sided with the merchants.

After the appeals court initially ruled for the plaintiffs, the high court vacated the decision and remanded it in light of the decision in Stolt-Nielsen SA v. AnimalFeeds International Corp. In that case, the justices ruled that class arbitration cannot be forced on parties that have not agreed to it.

On remand, the Second Circuit once again voided the arbitration agreement, but took a second look after Concepcion came down.

The current Supreme Court appeal stems from that third and final ruling that AmEx couldn't force the merchants' claims into arbitration even though their agreements with the credit card company contained class action waivers. In that decision, the panel found the waivers unenforceable because it would be financially impossible for the plaintiffs to bring their claims as individuals.

But even the Second Circuit remains split on the issue. Before turning to the Supreme Court, AmEx asked the circuit court to rehear the case en banc. The court refused, but the chief judge and several others dissented from that decision.

"You don't usually see that for just a rehearing en banc request," Hochstadt said.

Part of that division may stem from the particular colliding policy issues that are at play in this particular case, which even drove the U.S. Department of Justice and the Federal Trade Commission's staff to weigh in on the plaintiffs' behalf.

Not only did the agencies file an amicus brief saying that arbitration should only be available if parties are given a practical opportunity to vindicate their rights under the Sherman Act, but the government also sought and won the chance to join the arguments Wednesday.

"You have the Federal Arbitration Act which Congress passed which embodies the public policy in favor of arbitration of disputes, but then you have the competing public policy demand of Congress passing the Sherman Act and then the Clayton Act," Hochstadt said. "In the Concepcion case, you did not have that."

Still, there is nothing in the FAA itself that should make it apply any differently to federal claims than it does to state claims, according to Mayer Brown LLP's Andy Pincus, who successfully argued Concepcion for AT&T.

"The critical thing for the purposes of this case is that Concepcion specifically said that 'class arbitration is not arbitration as envisioned by the Federal Arbitration Act,' so that's why the court said in Concepcion that you couldn't condition the enforcement of an arbitration clause upon availability of class procedures," Pincus said.

It's difficult to claim that that rationale applies only to state claims because "nothing in the FAA draws that distinction," according to Pincus, who also filed an amicus brief in the current case for the Chamber of Commerce and several other business groups.

"Congress could certainly create a cause of action and say it's not arbitrable or say it's arbitrable and you have to have class procedures," Pincus said. "You have to look at the federal law that creates the cause of action and they quite clearly didn't do that in the antitrust laws."

Another issue is how broadly the court will rule in the case. While part of the concern at the Second Circuit focused on whether it would still be financially feasible for the plaintiffs to pursue their claims without a class mechanism, the AmEx dispute brought by small businesses does not involve typical consumer claims worth only a few dollars.

"They may not be multimillion dollar claims but they're not $50 claims," Hochstadt said. "It'll be interesting to see if they keep it limited to the facts at issue, to see if they talk about things like whether the plaintiffs in this particular case satisfied the burden of proof to show using this particular arbitration agreement that this did preclude an individual merchant from bringing a case."

There is also at least the possibility that the court could end up split 4-4 in the case, because Justice Sonia Sotomayor sat on the original Second Circuit panel that ruled for the plaintiffs and has not been participating in the current case. Concepcion was decided by a narrow 5-4 vote, but Justice Sotomayor fell in the minority dissenting from the opinion.

Michael Kellogg of Kellogg Huber Hansen Todd Evans & Figel PLLC will be arguing the case for AmEx.

Former Solicitor General Paul D. Clement of Bancroft PLLC is arguing the case for the plaintiffs.

Deputy Solicitor General Malcom L. Stewart will be arguing on behalf of the federal government.

The case is American Express Co. et al. v. Italian Colors Restaurant et al., case number 12-133, in the U.S. Supreme Court.

--Additional reporting by Abigail Rubenstein and Jonathan Randles. Editing by Sarah Golin and Richard McVay.