Federal Appeals Court Refuses To Enforce Agreement To Arbitrate Antitrust Claim On An Individual Basis

On February 1, 2012, the U.S. Court of Appeals for the Second Circuit reaffirmed its earlier ruling refusing to enforce American Express's arbitration provision on the ground that, in the court's view, the plaintiffs had shown that it would be prohibitively expensive to arbitrate their antitrust tying claims on an individual basis. *In re American Express Merchants' Litig.*, 2012 WL 284518 (2d Cir. Feb. 1, 2012). The court arrived at this conclusion despite the U.S. Supreme Court's landmark holding in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that the Federal Arbitration Act (FAA) preempted California law declaring agreements to arbitrate on an individual basis to be unenforceable.

Background

The plaintiffs are merchants that process American Express card transactions. They filed a putative class action alleging that American Express's requirement that merchants "Honor All Cards"—including credit and charge cards—constitutes an illegal tying arrangement in violation of Section 1 of the Sherman Antitrust Act.

American Express sought to compel arbitration of the plaintiffs' disputes in accordance with the arbitration clause in the merchant agreements, which required that arbitration be conducted on an individual basis. The plaintiffs opposed arbitration, arguing that they could not vindicate their claims in arbitration because it would be too costly to pursue an antitrust claim on an individual basis. They presented an affidavit from an economist who estimated that each individual antitrust claim would cost hundreds of thousands of dollars to pursue, but would be worth only $5,000 on average. The district court granted the motion to compel arbitration, explaining that because antitrust plaintiffs can recover treble damages and attorneys' fees, the merchants had not shown "that arbitration would be any more costly than litigation."

The Second Circuit reversed, reasoning that when a plaintiff can show that it would not be feasible to pursue antitrust claims in an individual arbitration, the arbitration agreement at issue need not be enforced. In the case before it, the court explained, the plaintiffs had introduced testimony that the costs of each individual arbitration—chiefly expert witness fees—would be far larger than the amounts at stake and could not be recovered in arbitration. Under such circumstances, the court concluded, compelling the plaintiffs to arbitrate their claims on an individual basis would grant American Express "*de facto* immunity from antitrust liability." 554 F.3d 300, 317 (2d Cir. 2009).

The Supreme Court granted *certiorari* and remanded for further consideration in light of its decision in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), which held that an arbitration agreement that was silent about the availability of class procedures could not be presumed to permit

class arbitration, because class arbitration is fundamentally different than traditional bilateral arbitration. On remand, the Second Circuit reinstated its decision, stating that its prior analysis was "unaffected" by *Stolt-Nielsen*. 634 F.3d 187, 189 (2d Cir. 2011). Soon afterward, however, the Supreme Court issued its decision in *Concepcion*, prompting the Second Circuit to reconsider its decision once again.

After conducting that reconsideration, the Second Circuit adhered to its earlier decisions in the case. According to the Second Circuit, *Concepcion* does not dictate that agreements to arbitrate on an individual basis must "be deemed *per se* enforceable," and instead leaves intact prior Supreme Court decisions that—as construed by the Second Circuit—authorize courts to refuse to require arbitration when "the plaintiffs are able to demonstrate that the practical effect of enforcement [of their arbitration agreements] would be to preclude their ability to vindicate their federal statutory rights."

Discussion

In our view, *American Express* was wrongly decided for a number of reasons. To begin with, the Second Circuit's contention that a case-specific vindication-of-federal-rights test survives *Concepcion* is dubious. In *Concepcion*, the Supreme Court explained that "class arbitration" is "not arbitration as envisioned by the FAA," and, thus, the FAA bars state courts from imposing that procedure out of concern that "class proceedings are necessary to prosecute small dollar claims that might otherwise slip through the legal system." 131 S. Ct. at 1753. The Second Circuit previously recognized that its holding was just a "different iteration" of the state-law rule later declared preempted in *Concepcion*. 634 F.3d at 199. Because Congress has not declared that antitrust claims are categorically non-arbitrable—to the contrary the Supreme Court has held them arbitrable (*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985))—it follows that courts may not require procedures that are antithetical to "arbitration as envisioned by the FAA" (*Concepcion*, 131 S. Ct. at 1753) when the claim arises under the federal antitrust laws any more than courts may when it arises under state law.

Even if a vindication-of-federal-rights test could somehow be consistent with *Concepcion*, however, the Second Circuit's conclusion that the plaintiffs in *American Express* cannot realistically vindicate their claims in individual arbitration is wrong. In assessing the feasibility of arbitrating claims on an individual basis, the Second Circuit mistakenly assumed that an informal individual arbitration would be just as costly and require as much proof as a full-blown class action in court. It also overlooked the likelihood that entrepreneurial plaintiffs' lawyers, using the Internet and other means of communication with potential claimants, could line up enough individual claims to justify incurring the cost of an expert (especially with respect to parties as organized as merchants, who participate in numerous trade associations and other groups).

A number of courts have taken a different view and compelled individual arbitration despite arguments that class procedures are needed to vindicate statutory rights. *See, e.g.*, *In re Apple & AT & TM Antitrust Litig.*, __ F. Supp. 2d __, 2011 WL 6018401 (N.D. Cal. Dec. 1, 2011); *Hendricks v. AT&T Mobility, LLC*, __ F. Supp. 2d __, 2011 WL 5104421 (N.D. Cal. Oct 26, 2011); *Kaltwasser v. AT&T Mobility LLC*, __ F. Supp. 2d __, 2011 WL 4381748 (N.D. Cal. Sept. 20, 2011); *In re Wholesale Grocery Prods. Antitrust Litig.*, No. 09-md-2090 ADM/AJB (D. Minn. July 5, 2011), *appeals filed*, Nos. 11-3768 and 11-3773 (8th Cir.).

Moreover, *American Express* will be irrelevant in many cases. To begin with, defendants have powerful arguments that the Second Circuit's analysis applies only to federal statutory claims, not to claims arising under state law. For

example, the Second Circuit noted that whereas it was applying a "rule regarding the arbitrability of federal statutory claims," "*Concepcion* plainly offers a path for analyzing whether a state contract law is preempted by the FAA." Other courts have recognized that any vindication-of-statutory-rights test likely could apply only to federal claims. *See, e.g., Cruz v. Cingular Wireless LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011); *Kaltwasser*, 2011 WL 5104421, at *5.

Even in the context of federal claims, plaintiffs would bear the burden of showing that they cannot realistically arbitrate their claims on an individual basis. Defendants in future cases should be able to introduce evidence (and refute the plaintiffs' evidence) concerning the feasibility of individual arbitration. For example, there is anecdotal evidence of lawyers successfully using web sites to attract large numbers of claimants across whom the costs of experts can be spread. Moreover, the relative simplicity and informality of arbitration make it more likely that an individual customer could pursue his or her antitrust claims without resort to extensive (and expensive) expert reports and testimony. In addition, some businesses use arbitration clauses that, like the clause upheld in *Concepcion*, provide incentives for plaintiffs to arbitrate even small claims. In cases involving such arbitration clauses, courts can be expected to be more likely to deem the rationale of *American Express* inapplicable.

At bottom, the Second Circuit's decision in *American Express* signals that the war over the enforceability of agreements to arbitrate on an individual basis is far from over. Plaintiffs can be expected to argue that *American Express* recognizes an exception to *Concepcion* whenever there is evidence that the cost of pursuing a claim would be high. Defendants will need to be prepared to respond not only that *American Express* is wrong, but also to argue that any application it might have is limited to its own unique circumstances.

For further information about the issues raised in this Legal Update, please contact any of the lawyers listed below.

Andrew J. Pincus
+1 202 263 3220
apincus@mayerbrown.com

Evan M. Tager
+1 202 263 3240
etager@mayerbrown.com

Archis A. Parasharami
+1 202 263 3328
aparasharami@mayerbrown.com

Kevin Ranlett
+1 202 263 3217
kranlett@mayerbrown.com