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Second Circuit Rules on Class Action Waivers for a Third Time

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In Re American Express Merchants' Litigation, No. 06-1871 (2d Cir. Feb. 1, 2012)

In a case that has seen the U.S. Court of Appeals for the Second Circuit three times and the Supreme Court once, the Second Circuit held that a class action waiver in an arbitration agreement "must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the [Federal Arbitration Act ("FAA")] 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.'"

This appeal stems from an antitrust tying claim against American Express Company ("AmEx"). In summary, AmEx contracts with merchants requiring that all disputes be resolved via arbitration and forbidding class actions. The plaintiffs in the action opposed enforcement of the arbitration clause on the ground that the waiver in the arbitration agreement precludes a merchant from bringing a class action lawsuit, and it also precludes the signatory from having any claim arbitrated on anything other than an individual basis. The case made its way to the Second Circuit, and then ultimately to the Supreme Court, where the Supreme Court vacated and remanded the case for reconsideration based on its recent decision, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). There, the Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."

On remand from the Supreme Court, the Second Circuit found that *Stolt-Nielsen* did not require the Court to depart from its original analysis. According to the Court, the key issue was "whether the mandatory class action waiver in the [arbitration agreement] was enforceable, even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex." *In re American Express Merchants' Litigation*, 634F.3d 187, 196 (2d Cir. 2011) ("Amex II"). In deciding this issue, the Second Circuit concluded that "enforcement of the class action waiver would indeed bar plaintiffs from pursuing their statutory claims because the 'record evidence before us establishe[d], as a matter of law, that the cost of plaintiffs' individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.'"

Shortly after the Second Circuit issued its opinion in Amex II, the Supreme Court handed down its opinion in *ATandT Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). In response, the Second Circuit placed a hold on its Amex II decision in order for the parties to consider the new precedent. In *Concepcion*, "the Supreme Court held that the

FAA preempted California common law deeming most class-action arbitration waivers in consumer contracts unconscionable." In the Second Circuit's third opinion, the court determined that *Concepcion* and *Stolt-Nielsen*, when taken together, "stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration." However, what those decisions did "not do is require that all class-action waivers be deemed per se enforceable," which leaves open the question of the Court's third decision: "whether a mandatory class action waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to bring federal antitrust claims."

In deciding this issue, the Court noted that neither of the intervening Supreme Court cases overruled precedent established over 22 years ago in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985), which says that an arbitration agreement was enforceable only "so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum" Relying on this principal, the Second Circuit found that,

> *Amex has brought no serious challenge to the plaintiffs' demonstration that their claims cannot reasonably be pursued as individual actions, whether in federal court or in arbitration. The enforcement of the class action waiver in the [arbitration agreement] "flatly ensures that no small merchant may challenge [AmEx] arrangements under the federal antitrust laws." Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes*

Thus, as the class action waiver in this case precludes the plaintiffs from enforcing their statutory rights, the Court concluded that the arbitration provision was unenforceable. However, the court made sure to note that this holding does not mean, "class action waivers in arbitration agreements are per se unenforceable, or even that they are per se unenforceable in the context of antitrust actions. Rather, as demonstrated by the different outcomes in our sister Circuits, we hold that each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA 'is a congressional declaration of a liberal federal policy favoring arbitration agreements.'"

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