ZELLE HOFMANN

ZELLE HOFMANN VOELBEL & MASON LLP

Using Federal Antitrust Law To Void Class Action Waivers

By Michael Christian and Demetrius Lambrinos
Published in *Competition Law360*

Last year, in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the U.S. Supreme Court held that the so-called "collective arbitration waivers" (also called "class action waivers") in AT&T's consumer contracts — *i.e.*, provisions that simultaneously required individuals to arbitrate their claims but which also prohibited any form of collective redress — could not be invalidated on the basis of California's so-called "Discover Bank" rule, because that rule was "preempted by the [Federal Arbitration Act]." ("FAA") *Id*. at 1746, 1753-55.

Concepcion's holding is limited to instances where plaintiffs attempt to use "state-law" rules to challenge class action waivers that would otherwise be permitted under the FAA. *See, e.g., id*. at 1748. The central issue discussed in *Conception* was "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures." *Id*. at 1744 (emphasis added).

Following *Concepcion*, however, it was an open question whether a collective arbitration agreement would be enforceable where it would effectively prevent the enforcement of federal statutory rights. The Second Circuit recently answered this question, holding that plaintiffs can challenge the enforceability of collective arbitration waivers in cases where they can "demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights." See *In re American Express Merchants' Litigation*, 667 F.3d 204, 212 (2d Cir. 2012) ("*AmEx III*").

The plaintiffs in *AmEx III* were merchants pursuing Sherman Act claims against American Express based on AmEx's alleged illegal tying of debit and credit cards. *See id*. at 207-08. These merchants alleged that "[b]y leveraging its market power in corporate and personal charge cards … American Express was able to compel merchants to accept 'its new revolving credit card product[s] at the same elevated discount rate, which vastly exceeded the rate for comparable Visa, MasterCard or Discover products.'" *Id*. at 208. The district court granted AmEx's motion to compel individual arbitration, and the Second Circuit reversed and remanded with instructions to deny AmEx's motion. *See In re American Express Merchants' Litigation*, 554 F.3d 300, 310 (2d Cir. 2009) ("*AmEx I*").

Shortly after the Second Circuit's opinion in *AmEx I*, the Supreme Court granted AmEx's petition for certiorari and remanded the case for reconsideration in light of its decision in *Stolt-Nielsen SA v. AnimalFeeds International Corp.*, 130 S.Ct. 1758, 1775 (2010), which 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." (emphasis in original).

On remand, the Second Circuit found that *Stolt-Nielsen* did not alter its original analysis and again reversed the district court's decision. See *In re American Express Merchants' Litigation*, 634 F.3d 187, 199-200 (2d Cir. 2011) ("*AmEx II*"). Soon thereafter, the Supreme Court granted another petition for certiorari by AmEx and remanded the case for reconsideration in light of its decision in *Concepcion*. *See AmEx III*, 667 F.3d at 206.

Upon reconsideration, the Second Circuit concluded that *Concepcion* "does not alter our analysis," and, for the third time and for the same reasons, reversed the district court's arbitration order. In the court's view, "neither [case] addresses the issue presented here: whether a class-action arbitration 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 vindicate their federal statutory rights." *Id*. at 212.

The Second Circuit held in each of these opinions that the collective arbitration waivers in the Amex merchant agreements were void as against public policy, because, if enforced, they would prevent the claimants from vindicating their federal statutory rights under the Sherman Act in any forum. *See id*. at 210-12, 214. Plaintiffs' expert economist testified that "even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed $1 million," and that in his opinion "the cost for this case will fall in the middle of the range." *Id*. at 212.

The Second Circuit concluded, based on this testimony, that "[a]lthough the Sherman Act does not provide plaintiffs with an express right to bring their claims as a class in court, forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act." *Id*. at 213 n.5 (emphasis added).

The importance of protecting the ability of individuals to enforce their federal statutory rights under the Sherman Act has been aptly described by the Supreme Court as follows: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *See United States v. Topco Associates Inc.*, 405 U.S. 596, 610 (1972).

The court has also "characterized the Sherman Antitrust Act as 'a charter of freedom' that may fairly be compared to a constitutional provision*." See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*, 473 U.S. 614, 651 (1985) (citing *Appalachian Coals Inc. v. United States*, 288 U.S. 344, 359-60 (1933), *overruled in part on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)). The *AmEx III* court found that enforcing the collective arbitration waivers at issue would violate this important public policy goal, because it would "flatly ensure[] that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws." *AmEx III*, 667 F.3d at 218.

The Second Circuit concluded that such provisions, when enforced in this manner, are void as against public policy, because "[e]radicating 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." *Id*. (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations")).

In line with this reasoning, the *AmEx III* court relied on Supreme Court dicta from *Mitsubishi*, 473 U.S. at 637 n.19, stating that if a contract term operates "as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *See AmEx III* at 214 (citing *Mitsubishi*); *see also Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) (holding that an agreement conferring even "partial immunity from civil [antitrust] liability" is void as against public policy due to the "public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action"); *Minnesota Mining and Mfg. Co. v. Graham-Field Inc.*, No. 96 CIV. 3839, at *3 (S.D.N.Y. April 9, 1997) (holding that "a prospective waiver of an antitrust claim violates public policy"). In the view of the *AmEx III* court, "[w]hile dicta, it is dicta based on a firm principle of antitrust law that an agreement which in practice acts as a waiver of future liability under the federal antitrust statutes is void as a matter of public policy." *AmEx III*, 667 F.3d at 214.

Moreover, several lower courts have followed the *AmEx* decisions and invalidated class action waivers because they conflict with federal public policy as embodied by federal statutes. *See, e.g.*, *Raniere v. Citigroup Inc.*, ___ F.Supp.2d ___, No. 11 Civ. 2448, at *13 (S.D.N.Y. Nov. 22, 2011) ("even if *AT&T* is read broadly … [it] would not alter the validity of the federal statutory rights analysis articulated in *Mitsubishi, Green Tree* [and] *American Express*"); *Chen–Oster v. Goldman Sachs & Co.*, No. 10 CIV. 6950, at *2–5 (S.D.N.Y. July 7, 2011) (declining to apply *Concepcion* because the question before the court involved the plaintiff's ability to vindicate a federal statutory right); and *Sutherland v. Ernst & Young LLP*, 768 F.Supp.2d 547, 550–51 (S.D.N.Y. 2011) (finding *AmEx I* "retains its persuasive force" following *Stolt–Nielsen*); *see also In re D.R. Horton Inc.*, 357 NLRB No. 184, at *11 (Jan. 3, 2012) (holding that "arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration").

At the moment, there is no circuit split on this issue, and the Second Circuit's holding in *AmEx III* is clearly distinguishable from *Concepcion*. Although some circuits have permitted antitrust claims to be arbitrated, they have done so because the plaintiffs failed to make the necessary factual showing that their federal rights would be effectively eliminated, not because they disagreed with the vindication of federal statutory rights analysis. *See AmEx III*, 667 F.3d at 217.

Therefore, until such a split emerges or the Supreme Court elects to review the Second Circuit's holding, *AmEx III* remains good law, and class action arbitration waivers may

be voidable if the plaintiffs can show that the enforcement of those waivers will strip them of their federal statutory rights under the Sherman Act.

--By Michael Christian and Demetrius Lambrinos, Zelle Hofmann Voelbel & Mason LLP

Michael Christian is of counsel, and Demetrius Lambrinos is an associate, in Zelle Hofmann's San Francisco office.