

Antitrust Claims That Credit Card Companies Conspired To Insert Arbitration Clauses in their Customer Agreements Survives Summary Judgment

February 17, 2012 by [Louis M. Solomon](#)

[In re Currency Conversion Fee Antitrust Litigation](#), MDL No. 1409 (WHP) (S.D.N.Y. 2012), provides a good example on summary judgment of the intersection between arbitration clauses and the antitrust laws and illustrates several issues that arise in international litigation.

A part of the case involves novel claims by the plaintiffs that part of the antitrust conspiracy included a group boycott forcing customers of the credit card companies to adopt form contracts that required card holders to arbitrate rather than litigate claims but precluded the use of class actions in such clauses. Evidence opposing summary judgment included meetings of a so-called “Arbitration Coalition”, of a “Class-Action Working Group”, and of documents and drafts circulated and exchanged between and among the defendants.

The District Court rejected all the arguments proffered by the defendants in aid of summary judgment, holding that there were disputed issues of fact requiring a trial. Meaningful was the Court’s statement that “the presence of class action waivers in Defendants’ arbitration clauses could support an inference of collusion”. The Court found that there was contrary evidence — for example, evidence that one competitor did or did not adopt the language being challenged, or that one competitor did so at different times — but the Court concluded that, drawing inferences in favor of the plaintiffs, the motions for summary should be denied.

Another interesting part of the decision related to whether an earlier release precluded evidence from being offered to show the conspiracy and the alleged acts taken in furtherance of it. Here the question was whether the corporate attorney or draftsman intended the use of the term “claim” to include future use of evidence in a judicial proceeding rather than claims themselves. The Court held that the standard release language could not be stretched as far as the defendants wished. The settlement agreement, “read as a whole, plainly releases Defendants from liability arising from the [released] conduct, rather than prohibiting the use of [the released claim] evidence in this proceeding”.

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