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Consumer Protection Defense and Unfair Competition Law

ALERT

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Second Circuit Refuses to Review Decision That Class Action Waiver in Arbitration Agreement Is Unenforceable

The Second Circuit has refused to grant enbanc (full court) review of its earlier decision barring the enforcement of class action waiver provisions in business arbitration agreements involving federal statutory claims. The court's May 29, 2012 denial means that its earlier decision, *In Re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012) (*Amex III*), remains the law of the Second Circuit.

In *Amex III*, the Court of Appeals invalidated a class action waiver provision in the parties' arbitration agreement, finding that the "substantial upfront expenditures" required by individual proceedings would effectively bar the plaintiffs from vindicating their rights under federal antitrust law. The case arose from two consolidated class actions filed by merchants and supermarkets doing business with American Express (Amex). Plaintiffs claimed that the provision in Amex's Card Acceptance Agreement, requiring them to accept all Amex credit and debit cards, violated antitrust law as an unlawful tying arrangement.

After the lower court granted Amex's motion to compel arbitration, in 2009 the Second Circuit reversed in *Amex I*, finding that plaintiffs would be unable to vindicate their federal statutory rights in arbitration due to the high costs associated with proving liability on a case-by-case basis. The case returned twice more to the Second Circuit, once after the U.S. Supreme Court held in *Stolt-Nielsen v. Animal Feeds Int'l*, 130 S.Ct. 1758 (2010), that the Federal Arbitration Act (FAA) dictates that a party can only be required to submit to arbitration where the party clearly agreed to arbitrate, and then again after *AT&T Mobility v. Concepcion*,131 S.Ct. 1740 (2011), in which the high court held that the FAA preempted California state law declaring that class action waivers in consumer contracts were unconscionable. On both occasions, the Second Circuit based its decisions that the class action waivers were unenforceable on public policy reasons.

Circuit Judge Rosemary Pooler, who, along with Judge Robert Sack, decided *Amex III* and concurred in the circuit court's denial of enbanc rehearing, wrote a short opinion explaining how the court distinguished the seemingly contrary holding in *Concepcion*. Judge Pooler noted that while *Concepcion* addressed state contract rights under California law, *Amex III* dealt with federal statutory rights. Furthermore, *Concepcion* dealt with the issue of preemption rather than a statutory rights analysis.

Chief Judge Dennis Jacobs' dissenting opinion, joined by Judges Jose Cabranes and Debra Ann Livingston, asserted that the weight of authority requires arbitration of federal statutory claims, that public policy reasons are not sufficiently important to ignore the FAA's strong policy favoring arbitration, that the court relied on "dubious" grounds when it distinguished *Concepcion*, and that the court relied on dicta and language taken out of context to support its argument that high costs would prevent plaintiffs from adequately pursuing their claims. Judge Reena Raggi, joined by Judge Richard Wesley, and Judge Cabranes also issued their own brief dissents.

The decision creates a potential split between the Second and Ninth Circuits. Earlier this year, the Ninth Circuit ruled in *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012), that, under the FAA, whether customers have a "sufficient incentive" to vindicate their rights is immaterial. The *Coneff* case involved wireless customers from eight states who signed contracts with clauses that precluded class action arbitrations. The contracts also required fee shifting, so

that customers would ultimately be made whole if they filed a claim. The *Coneff* court held that under *Concepcion* the fact that many customers would not bother to file their small claims did not trump the FAA's preemption of the Washington state law that invalidated class action arbitration waivers.

Whether the Supreme Court will grant certiorari in *Amex III* to resolve this potential split is uncertain, but given the Court's steadfast defense of arbitration as a vehicle for resolving business and consumer disputes alike under the FAA, it seems likely that the justices will eventually take the opportunity to address this issue once the right case comes along.

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