

Enforceability of Class-Arbitration Bans Still an Open Question

AntitrustConnect Blog

March 15, 2011

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Please refer to this post as: Jeffrey May, 'Enforceability of Class-Arbitration Bans Still an Open Question', AntitrustConnect Blog, March 15 2011, <http://antitrustconnect.com/2011/03/15/enforceability-class-arbitration-bans-still-an-open-question/>

Including an arbitration agreement in a commercial or consumer contract that requires your customer to pursue only individual claims in the arbitral forum will not necessarily protect you from class-wide arbitration. You will need to ensure that individual arbitration will allow your customers to enforce their statutory rights.

The U.S. Court of Appeals in New York City recently held that a class action waiver provision contained in commercial contracts between merchants and charge card issuer/servicer American Express Company was unenforceable. The Second Circuit's decision reiterates an earlier rejection of the class action waiver provision (554 F.3d 300, 2009-1 Trade Cases ¶176,478) that was vacated by the U.S. Supreme Court in light of the High Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 130 S. Ct. 1758, 2010-1 Trade Cases ¶176,982.

***Stolt-Nielsen* Decision**

The Supreme Court held in *Stolt-Nielsen* that under the Federal Arbitration Act, the agreement of the parties was the basis for determining whether to subject claims to class arbitration. Parties could not be forced to engage in a class arbitration absent a contractual agreement to do so. Thus, the Court reversed a Second Circuit decision (548 F.3d 85, 2008-2 Trade Cases ¶176,355) concluding that an arbitration panel did not manifestly disregard the law by permitting class arbitration of antitrust claims pursuant to arbitration clauses that were silent as to whether arbitration could proceed on behalf of a class.

Antitrust Action Against American Express

In the antitrust action against American Express, the appellate court concluded that the *Stolt-Nielsen* decision did not require a different outcome. It determined that the class action waiver was void because it precluded the complaining merchants from enforcing their statutory rights under the antitrust laws. The record demonstrated that the size of any potential recovery by an individual plaintiff would be too small to justify the expense of bringing an individual action.

Two Caveats

The Second Circuit said that two caveats articulated in the court's original opinion still applied. First, the status of plaintiffs as "small" merchants was irrelevant. Instead, the size of any potential recovery by an individual plaintiff was significant. Second, there was no rule that class action waivers in arbitration agreements were per se unenforceable or per se unenforceable in the context of antitrust actions. The enforceability of a class action waiver in an arbitration agreement had to be considered on its own merits, in the court's view.

The March 8, 2011, decision of the U.S. Court of Appeals in New York City, *In Re: American Express Merchants' Litigation*, No. 06-1871-cv, will appear at 2011-1 Trade Cases ¶77,365.

Class Arbitration Case Pending in the U.S. Supreme Court

The Second Circuit's decision comes as we wait for the latest word from the U.S. Supreme Court on the enforceability of arbitration agreements that prohibit class-wide arbitration. The Court should provide additional guidance on when class arbitration bars are enforceable because individual arbitration allows an aggrieved customer to recover for an alleged injury.

In November, the High Court heard argument on a decision of the U.S. Court of Appeals in San Francisco (*Laster v. AT&T Mobility LLC*, 584 F.3d 849) holding that an arbitration clause in a telephone company's wireless service agreement barring customers from pursuing class action relief was unconscionable and unenforceable under California law.

AT&T Mobility contends that class arbitration was not necessary to vindicate the consumers' claims because the agreements contained "premium payment

clauses.” Under the premium payment clause, AT&T Mobility agreed pay a customer \$7,500 if the arbitrator issued an award in favor of the customer that was greater than AT&T Mobility’s last settlement offer.

The petition is *AT&T Mobility LLC v. Concepcion*, Dkt. 09-893.