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In Re Amex: Law, Economics And A Call For Reform

Law360, New York (March 16, 2012, 1:23 PM ET) -- For antitrust plaintiffs bound by class action waivers, the U.S. Court of Appeals for the Second Circuit's latest opinion in In re American Express Merchants' Litigation (Amex)[1] offers a ray of hope amid recent unfavorable U.S. Supreme Court precedent.

Perhaps more importantly, it also highlights the need to reform the Clayton Act to prevent private antitrust enforcement from becoming an option reserved for the well-heeled.

BACKGROUND

Amex originally was filed in the Southern District of New York in 2003.[2] Plaintiffs are a putative class of merchants alleging that Amex engaged in tying practices in violation of Section 1 of the Sherman Act. Amex moved to compel arbitration based on its card acceptance agreements with the merchants, which require arbitration of disputes but preclude class arbitration (the class waiver).[3]

In March 2006, the district court granted Amex's motion to compel.[4] The merchants appealed and the Second Circuit reversed (Amex I).[5]

The Second Circuit held that the class waiver was unenforceable because it "would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery."[6] This was because plaintiffs "would incur prohibitive costs if compelled to arbitrate [individually] under the class action waiver."[7]

In its analysis, the Second Circuit applied the rule stated by the Supreme Court in Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 92 (2000), that a party challenging arbitration based on economic infeasibility has the burden of demonstrating such infeasibility.

The Second Circuit held that the Amex plaintiffs had carried this burden by providing the "compelling" affidavit of economist Gary L. French, Ph.D.[8] French calculated that treble damages for the median volume plaintiff merchant in Amex would be around $5,000, and around $38,000 for the largest volume merchant.[9] French then compared those potential damage awards to the out-of-pocket costs a plaintiff would incur if he proceeded on an individual basis.

In particular, French considered the cost of an expert, which alone could surpass several hundred thousand or even a million dollars.[10] From this comparison, French concluded that "it would not be worthwhile" for a plaintiff to pursue individual litigation or arbitration against Amex.[11]

Amex petitioned for a writ of certiorari. Thereafter, the Supreme Court decided Stolt-Nielsen SA v. AnimalFeeds International Corp.[12], which held that if an arbitration provision is silent on class arbitration, a party may not be compelled to arbitrate on a class

basis.[13]

In light of that decision, the Supreme Court granted Amex's cert petition, vacated Amex I, and remanded it to the Second Circuit for further consideration consistent with Stolt-Nielsen.[14]

On remand, the Second Circuit concluded that Stolt-Nielsen did not alter its original Amex holding, and affirmed it (Amex II).[15] Then the Supreme Court decided AT&T Mobility LLC v. Concepcion.[16]

Concepcion was a putative class action alleging false advertising and fraud against AT&T in connection with its phone sales. The case did not involve federal antitrust claims, as the Amex plaintiffs alleged. AT&T moved to compel arbitration and was denied, based on California common law "deeming most class action arbitration waivers in consumer contracts unconscionable."[17]

Ultimately, the Supreme Court held that the Federal Arbitration Act (FAA) preempted the California law. Justice Antonin Scalia's majority opinion relied heavily on the "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract."[18]

The four-justice dissent led by Justice Stephen Breyer, on the other hand, echoed the reasoning of the Second Circuit.[19] It objected that a class vehicle was necessary in Concepcion because without it, the small sum of each plaintiff's claim would likely preclude resolution: "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[20]

AMEX III

In August 2011, the Second Circuit sua sponte considered whether rehearing in Amex was warranted in light of Concepcion. On Feb. 1, 2012, the Second Circuit once again reaffirmed its Amex I conclusion, holding that Concepcion had no impact (Amex III).

First, it distinguished Concepcion on the ground that it addressed only a state's right to condition the enforceability of arbitration agreements on the availability of class arbitration — but not the issue in Amex, of whether a class waiver is enforceable where plaintiffs present evidence that it would have the practical effect of preventing vindication of federal statutory rights.[21]

Then the court held that the plaintiff merchants had established as a matter of law that their class waiver was unenforceable. They achieved this by providing French's report as evidence that "individually arbitrating their dispute with Amex would be [cost-]prohibitive, effectively depriving [them] of the statutory protections of the antitrust laws."[22]

THE SIGNIFICANCE OF AMEX III

Amex III carves out an exception from recent Supreme Court class arbitration decisions for plaintiffs who can establish that individual proceedings would be economically infeasible. So the key question for plaintiffs has become how to establish this. The Second Circuit has answered, "not eas[il]y."[23]

The court cites several cases from other circuits where class action waivers were challenged on economic grounds, but where those challenges failed.[24] The court posits, however, that "[t]heir failures speak to the quality of the evidence presented, not the viability of the legal theory," and concedes that assembling the necessary evidence "is not easy."[25]

As Amex III demonstrates, however, it is not impossible, and one way to do it is through expert evidence.[26] But all three Second Circuit Amex decisions also highlight a fact that renders their reliance on expert analysis for this point ironic: Although French's conclusion that individual proceedings were infeasible was based primarily on plaintiffs' expected expert fees, if plaintiffs ultimately prevail, they will likely not recover the bulk of those fees.

The Second Circuit explains:

> "[T]he [fee-shifting provision of the] Clayton Act simply does not solve their problem. Besides the fact that the trebling of a small individual damages award is not going to pay for the expert fees that Dr. French has estimated will be necessary to make an individual plaintiff's case here, ... 'when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of 28 U.S.C. § 1821(b)' ... [of] $40 per diem."[27]

Forty dollars a day does not begin to approach the cost of antitrust experts — or any other experts, for that matter — which French estimated at a minimum of $300,000.[28] Indeed, $300,000 at the statutory rate reflects 7,500 days of expert work — every day for more than 20 years.[29]

As both French and the leading antitrust authorities note, expert evidence is necessary in antitrust cases.[30] Limiting a plaintiff's recovery for it to $40 per day undercuts the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws."[31]

As the Second Circuit noted with respect to the enforceability of the Amex class waiver, this "cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes."[32]

Legislative reform is warranted. In order to ensure that private plaintiffs can vindicate their federal antitrust rights effectively — as the Second Circuit has sought relentlessly to do throughout the Amex trilogy — the Clayton Act should be amended to expand the "cost of suit," for which reimbursement is mandated, to include reasonable expert fees.[33]

Indeed, the Supreme Court arguably suggests as much. In Crawford Fitting Co. v. J.T. Gibbons Inc., the leading case on this issue, the court noted that the limit applied "absent contract or explicit statutory authority to the contrary."[34]

Suggestion or not, Congress should take that cue to create the needed authority so that no antitrust violation goes uncorrected simply because the plaintiff would be unable to recover his necessary expert fees.

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[1] 667 F.3d 204 (2d Cir. 2012) (Amex III).

[2] 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006). "Amex" refers to defendants American Express Company and American Express Travel Related Services Company.

[3] Id.

[4] Id.

[5] In re American Express Merchants' Litigation, 554 F.3d 300 (2d Cir. 2009) (Amex I).

[6] Id. at 320.

[7] Id. at 315-16.

[8] Id. at 316.

[9] Id. at 317.

[10] Id.

[11] Id.

[12] 130 S. Ct. 1758 (2010).

[13] Id. at 1775 ("[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).

[14] Amex II, 634 F.3d 187 (2011).

[15] Amex III, 667 F.3d at 212.

[16] 131 S. Ct. 1740 (2011).

[17] Amex III, 667 F.3d at 212 (citing Concepcion).

[18] Concepcion, 131 S. Ct. at 1745 (quotations and citations omitted).

[19] Id. at 1756-62. Justice Breyer was joined in the dissent by Justices Ginsburg, Sotomayor and Kagan. Prior to Justice Sotomayor's appointment to the Supreme Court, she was an original member of the Second Circuit Amex panel. The remaining two judges on that panel, Judges Pooler and Sack, decided Amex III. 667 F.3d at n.2.

[20] Id. at 1761 (Breyer, J., dissenting).

[21] Amex III, 667 F.3d at 219.

[22] Id. at 217. On February 14, 2012, Amex moved for a rehearing en banc.

[23] Id.

[24] Id. (citing In re Cotton Yarn Antitrust Litig., 505 F.3d 274 (4th Cir. 2007); Livingston v. Assocs. Fin. Inc., 339 F.3d 553 (7th Cir. 2003); Adkins v. Labor Ready, 303 F.3d 496 (4th Cir. 2002)).

[25] Id.

[26] None of the other circuit cases cited in Amex III on this issue indicate that those plaintiffs offered expert evidence.

[27] Amex I, 554 F.3d at 317-18 (quoting Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 439 (1987) (alteration omitted, emphasis added)).

[28] Amex III, 667 F.3d at 217.

[29] In contrast, compensation of court-appointed experts is addressed by 28 U.S.C. 1920 (6). "There is no provision that sets a limit on the compensation for court-appointed expert witnesses in the way that § 1821(b) sets a limit for litigants' witnesses." Crawford Fitting, 482 U.S. at 442.

[30] See 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 309 (3d ed. 2007) ("economic testimony is both ubiquitous and essential in antitrust cases"); Amex III, 667 F.3d at 217 (noting that Dr. French estimated expert fees that are "necessary to make an individual plaintiff's case").

[31] Ill. Brick v. Illinois, 431 U.S. 720, 745 (1977).

[32] 667 F.3d at 218 (citing, inter alia, Reiter v. Sonotone).

[33] 15 U.S.C. § 15. That "cost of suit" already includes "a reasonable attorney's fee."

[34] 482 U.S. 437, 439 (1987).