Challenging Class Action Waivers Post-Concepcion

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As antitrust practitioners are no doubt aware, the Supreme Court recently ruled in AT&T Mobility v. Concepcion that "collective-arbitration waivers" (also called "class action waivers") in AT&T's consumer contracts — i.e., provisions which required all claims to proceed in arbitration but which prohibited classwide arbitration — could not be invalidated on the basis of the California public policy considerations as embodied in the so-called Discover Bank rule. 563 U.S. ___ (Slip Op. 3, 5).

Of course, it will take some time for all implications of Concepcion to be determined by the lower courts. Practitioners handling antitrust class actions involving potential class action waivers, however, should be aware that recent decisions have continued to hold that federal common law provides a basis for invalidating such waivers under a "vindication of statutory rights" analysis, and that the Second Circuit may soon shed further light on the continued viability of this argument.

AT&T is already testing the boundaries of Concepcion in its attempt to ward off arbitration claims by private plaintiffs challenging its proposed merger with T-Mobile, which has just come under fire by the U.S. Department of Justice. DOJ Press Release Aug. 31, 2011. Reuters reported, for example, that AT&T customers have "filed 26 arbitration demands and more than 900 notices of dispute ... oppos[ing] [AT&T's proposed] merger" with T-Mobile. Reuters Aug. 17, 2011.

In response, AT&T has filed several complaints in the Southern District of New York seeking declaratory judgments that plaintiffs' injunctive relief claims may not proceed in arbitration because they are really "representative claim[s] seeking class-wide [injunctive] relief," and are "beyond the scope" of their arbitration agreements. Complaint at ¶¶43, 46.

AT&T's lawyer is reported as stating that "Our arbitration agreement prohibits any form of class-wide relief. The Supreme Court upheld that." Reuters Aug. 17, 2011. Of course, because AT&T's contracts require that "all disputes" proceed through arbitration, the declaratory judgments AT&T seeks would appear to eliminate any possibility of obtaining classwide injunctive relief. See AT&T Arbitration Provision, Section 2.2

As one district court recently noted, however, Concepcion does not completely answer the question of

whether class action waivers are enforceable in antitrust cases. Dina Nicole D'Antuono v. Service Road Corp., 2011, *79-80 (D. Conn. May 25, 2011) ("D'Antuono I"). According to that court, Concepcion left open the issue of whether such waivers may be invalidated on the basis of the "federal common law" due to their deterrent effect on private enforcement of the federal antitrust laws, and the corresponding risk that enforcing them may prevent consumers from "vindicating their federal statutory rights." Id.

Even though the court applied the doctrine, it expressed "uncertainty" as to its "continuing validity" following Concepcion, and ultimately certified several questions to the Second Circuit to gain further clarification on this issue. See Dina Nicole D'Antuono v. Service Road Corp., 2011 U.S. Dist., *2 (D. Conn. June 7, 2011) ("D'Antuono II").

Other district courts have continued to apply the vindication of statutory rights analysis since Concepcion, albeit outside the antitrust context. See, e.g., Chen-Oster v. Goldman, Sachs & Co., 2011 U.S. Dist., *39 (S.D.N.Y. Apr. 28, 2011) (finding a class action arbitration waiver unenforceable in a putative class action alleging gender discrimination under Title VII); Gildea v. Bldg Management, 2011 U.S. Dist., *8-9 (S.D.N.Y. Aug. 16, 2011) (applying vindication of statutory rights analysis in an individual action under Labor Management Relations Act); see also Chad H. Hamby v. Power Toyota Irvine, 2011 U.S. Dist., *3 (S.D. Cal. July 18, 2011) (permitting discovery on the issue of unconscionability and stating that "AT&T Mobility LLC does not stand for the proposition that a party can never oppose arbitration on the ground that the arbitration clause is unconscionable").

One district court has applied Concepcion to compel arbitration in an antitrust case, but the arbitration provision in that case was silent of the issue of classwide arbitration and the plaintiffs did not invoke the vindication of statutory rights doctrine. See In re California Title Insurance Antitrust Litigation, 2011 U.S. Dist., *10-11 (N.D. Cal. June 27, 2011).

The vindication of statutory rights analysis was initially developed by the Second Circuit in In re: American Express Merchant's Litigation, Italian Colors Restaurant v. American Express, 554 F.3d 300 (2d Cir. 2009) ("AMEX I") and its predecessor In re American Express Merchants' Litigation, Italian Colors Restaurant v. American Express, 634 F.3d 187, 189 (2d Cir. Mar. 8, 2011) ("AMEX II").

AMEX I was an antitrust class action under Sherman §1 in which the Second Circuit reversed an order from the Southern District of New York compelling arbitration and held that the "class action waiver" at issue was unenforceable. See 554 F.3d at 302. The court found the waiver invalid because the plaintiffs demonstrated through the use of an expert report and other evidence, as was their burden, that it would be "prohibitively expensive" to pursue individual arbitration, and the "practical effect" of enforcing the arbitration provision would function as a "prospective waiver" of their federal statutory rights under the

Sherman Act. 554 F.3d at 314-315, 319.

The court explained that "Section 2 [of the Federal Arbitration Act] creates a body of federal substantive law of arbitratability, applicable to any arbitration agreement within the coverage of the FAA," and noted that other courts had joined it in evaluating the enforceability of the "class action waivers under the federal substantive law of arbitratability." Id.; see also, e.g., Kristin v. Comcast Corp., 446 F.3d 25, 63 (1st Cir. 2006).

The Second Circuit noted its concern that enforcing the collective-arbitration waivers would undermine the deterrent aspects of the federal antitrust laws, and stated that "[e]radicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong public enforcement mechanisms and incentives in the antitrust statutes." 554 F.3d at 320.

The court found that enforcing the waiver at issue would "flatly ensure[] that no small merchant may challenge American Express's tying arrangements under the federal antitrust laws," and would "grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." Id. at 320, citing Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 319, 322, 329 (1955) (holding that agreements which confer "partial immunity from civil liability for future violations" of the Sherman Act violate public policy). Given these facts, the court held that the waiver was unenforceable because it "entails more than a speculative risk that enforcement of the ban [on class actions] will deprive them of substantive rights under the federal antitrust statutes." Id. at 316.

The Second Circuit found support for its approach in prior statements from the Supreme Court attesting to the importance of the effective enforcement of the antitrust laws, and suggesting that arbitration provisions could be invalidated if they effectively stripped individuals of their federally protected statutory rights. See AMEX I, 554 F.3d at 320 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n. 19 and 651 (1985) and Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 82 (2000)).

The court recognized that the statements from Mitsubishi and Green Tree were dicta, but found that "it is nevertheless dicta grounded upon a firm principle of antitrust law to the effect 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." 554 F.3d at 319.

Until the Supreme Court, or Second Circuit in D'Antuono II, revisits this issue, the vindication of statutory rights analysis remains a viable basis for challenging class action waivers. As a result, antitrust practitioners in class cases involving such provisions, should be aware of and consider the "vindication of

statutory rights" doctrine if and when the class action waiver at issue may have the practical effect of stripping claimants of their rights to bring federal antitrust claims as either individual or collective actions.