

7-1-2012

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THE BATTLE OVER CLASS ACTION: SECOND CIRCUIT HOLDS THAT CLASS ACTION WAIVER FOR ANTITRUST ACTIONS UNENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT

Dustin Morgan*

I. INTRODUCTION

In *In re American Express Merchants Litigation*, the Second Circuit held that the class action waiver clause within the arbitration agreement between American Express and corporations found in both New York and California made the agreement unenforceable because recourse to class action was essential to protecting the corporations' statutory rights under the federal antitrust statutes.¹ The court also decided that under the Supreme Court's decision in *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.*, the court, not the arbitrator, continued to be responsible for determining the validity of a class action waiver in an agreement to arbitrate.² The court reasoned that the class action waiver in the arbitration agreement would disincentivize plaintiffs from bringing individual suit under the federal antitrust statutes because of the high costs associated with antitrust litigation and the marginal recovery that each individual plaintiff would receive if successful.³ Because the court viewed the private enforcement of the antitrust laws as essential to the underlying congressional intent, any attempt to limit this intent would go against public policy, and would be void as such.⁴ By disincentivizing private enforcement, the class action waiver in the arbitration provision prevented plaintiffs from enforcing their rights under federal antitrust statutes, voiding the agreement as against public policy.⁵

II. BACKGROUND

The named Plaintiffs in this litigation, California and New York corporations that operate businesses who have accounts with American Express and the National Supermarkets Association, Inc. ("Plaintiffs"), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets,"⁶ sought to represent a class of litigants against American Express, challenging the terms and conditions they were forced to accept by opening a charge account with the Defendant financing company as a violation of the federal antitrust statutes.⁷ The class the Plaintiffs sought to certify was defined as: "[A]ll merchants that have accepted American Express charge cards (including the American Express corporate card),

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¹ *In re Am. Express Merchs. Litig.*, 634 F.3d 187, 199 (2d Cir. 2011), *aff'd on reconsideration* by 667 F.3d 204 (2d Cir. 2012).

² *Id.* at 191.

³ *Id.* at 198.

⁴ *Id.* at 199.

⁵ *Id.*

⁶ *Id.* at 189.

⁷ *Id.*

and have thus been forced to agree to accept American Express credit and debit cards, during the longest period of time permitted by the applicable statute of limitations . . . throughout the United States . . .”⁸

In order to receive a charge or debit card from American Express, the parties had to agree to a standard form agreement supplied by American Express.⁹ Impliedly, the plaintiffs agreed to these terms by opening an account with American Express. The standard form contract contained provisions allowing either party to terminate the agreement and reserving with American Express the right to change the agreement upon written notice to the contracting parties.¹⁰ The contracting parties were advised of their right to terminate the agreement within the provision allowing for modification of the standard form.¹¹ In 1999, American Express exercised its right of modification and inserted an arbitration agreement which stated:

For the purpose of this Agreement, Claim means any assertion of a right, dispute or controversy between you and us arising from or relating to this Agreement and/or the relationship resulting from this Agreement. Claim includes claims of every kind and nature including, but not limited to, initial claims, counterclaims, cross-claims and third-party claims and claims based upon contract, tort, intentional tort, statutes, regulations, common law and equity. We shall not elect to use arbitration under this arbitration provision for any individual Claim that you properly file and pursue in a small claims court of your state or municipality so long as the Claim is pending only in that court.¹²

The arbitration agreement also contained the following provision which forbade both American Express and the contracting parties from participating, either in a representative or participatory fashion, in class action lawsuits.¹³ The provision specifically stated:

IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM . . . FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.¹⁴

In the district court proceeding, American Express moved to compel arbitration pursuant to the standard for agreement signed by the Plaintiffs.¹⁵ The district court granted American

⁸ *Id.* (omissions in the original).

⁹ *Id.* at 190.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* (omission in the original).

¹⁵ *Id.* at 191.

Express' motion.¹⁶ In so doing, the district court held that "the agreement was 'a paradigmatically broad clause' which was certainly applicable to the dispute between the parties."¹⁷ The district court, justifying its ultimate conclusion, also held that "[t]he enforceability of the of the collective action waivers is a claim for the arbitrator to resolve. Issues relating to the enforceability of the contract and its specific provisions are for the arbitrator, once arbitrability has been established."¹⁸ Given these findings, the district court decided that the Plaintiffs' antitrust claims and the enforceability of the class action waiver were to be settled in arbitration; the district court dismissed the Plaintiffs' claims.¹⁹

The Second Circuit received the case for the first time after the Plaintiffs filed an appeal.²⁰ The court decided that the validity of the class action waiver was a question for the court, and not the arbitrator, to decide.²¹ The court reasoned that *Green Tree Financial Corp. v. Randolph* controlled their analysis regarding the enforceability of the class action waiver.²² The Supreme Court in *Green Tree* found that "where . . . a party seeks to invalidate an arbitration agreement on the grounds that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."²³ Applying this principle, the Second Circuit found that the district court erred in ruling the Plaintiffs failed to carry this burden because they "ignore[d] the statutory protections provided by the Clayton Act."²⁴ The Second Circuit found that the record supported a finding that the Plaintiffs would incur prohibitive costs if they were compelled to arbitrate under the agreement.²⁵ Given these findings, the court held that the class action waiver invalidated the arbitration agreement.²⁶ Their decision was grounded in Section 2 of the Federal Arbitration Act ("FAA"), allowing for non-enforcement of arbitration agreements where a ground for invalidation of a contract exists at common law; since the court believed such a ground existed here, non-enforcement was proper.²⁷ American Express filed a petition for certiorari, which was granted by the Supreme Court.²⁸ The Supreme Court granted the petition, vacated the Second Circuit's decision, and remanded the decision for proceedings consistent with its recent decision in *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.*²⁹

¹⁶ *Id.*

¹⁷ *Id.* (citing *In re Am. Express Merchs. Litig.*, No. 03 CV 9592 (GBD) 2006 U.S. Dist. LEXIS 11742, at *4 (S.D.N.Y. Mar. 16, 2006)).

¹⁸ *Id.* (citing *In re Am. Express Merchs. Litig.*, 2006 U.S. Dist. LEXIS 11742, at *6).

¹⁹ *Id.* (citing *In re Am. Express Merchs. Litig.*, 2006 U.S. Dist. LEXIS 11742, at *10).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000)).

²⁴ *Id.* (citing *In re Am. Express Merchs. Litig.*, 2006 U.S. Dist. LEXIS 11742, at *5).

²⁵ *Id.* (citing *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 315-16 (2d Cir. 2009)).

²⁶ *Id.* at 192.

²⁷ *Id.* (citing *In re Am. Express*, 554 F.3d at 320).

²⁸ *Id.*

²⁹ *Id.*

III. COURT'S ANALYSIS

A. The Effects of *Stolt-Nielsen* on the Class Action Waiver

The Second Circuit first discussed the effects that *Stolt-Nielsen* had on the case, as was required by the Supreme Court when it remanded the case. The court concluded that the Supreme Court's holding in *Stolt-Nielsen* was that "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."³⁰ American Express urged that the Supreme Court's decision required the court to "faithfully enforce the parties' arbitration agreement."³¹ The Second Circuit distinguished the question here as one of whether a class action waiver is enforceable when it would "effectively strip the plaintiffs of their ability to prosecute alleged antitrust violations."³² As such, the question was not one of giving intent to the parties' agreements; instead, the Second Circuit viewed the issue as whether Section 2 of the FAA allowed for non-enforcement through common law contract grounds.³³ In doing so, the court would examine the enforceability of class action waivers under the federal substantive arbitration law.³⁴

The court's analysis of the federal arbitration law governing this issue was influenced by the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*³⁵ In *Gilmer*, the Supreme Court held that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," the arbitration clause was enforceable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."³⁶ The Second Circuit, referencing *Gilmer*, framed the relevant inquiry as "whether the mandatory class action waiver in the Card Acceptance Agreement is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement of the waiver would be to preclude their bringing Sherman Act claims against Amex in either an individual or collective capacity."³⁷

The court also examined the Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph* in framing its analysis.³⁸ In *Green Tree* the Supreme Court held that "when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."³⁹ This decision, along with the one articulated by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, holding that "public policy concerns might bar an agreement to arbitrate,"⁴⁰ would allow for the Second Circuit to invalidate the agreement to arbitrate if the class action waiver would force parties to participate in an arbitral procedure that was prohibitive expensive or would violate public policy.⁴¹

³⁰ *Id.* at 193 (citing *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010)) (emphasis in the original).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 194.

³⁶ *Id.* at 195 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

³⁷ *Id.* at 196.

³⁸ *Id.*

³⁹ *Id.* at 197 (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000)).

⁴⁰ *Id.* at 197 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

⁴¹ *Id.*

B. The Court's Analysis of the Particular Agreement Between American Express and the Plaintiffs

The Second Circuit began its analysis of the validity of American Express' arbitration clause by noting "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."⁴² The second of the factors articulated by the Second Circuit was met; the class action waiver was in violation of public policy. The court next turned to the issue of whether the arbitration agreement would inflict prohibitive costs upon the Plaintiffs, effectively robbing them of their ability to protect their rights under the federal antitrust statutes.⁴³

The court here found that there was ample evidence in the record to support a finding that arbitrating their disputes would effectively act as a bar to the Plaintiffs asserting their statutory rights under the federal antitrust statutes.⁴⁴ The court based their assertion on expert testimony submitted by the Plaintiffs at the district court level.⁴⁵ The Plaintiffs' expert asserted that the Plaintiffs expected awards would be notably less than the expected costs they would incur if forced to individually arbitrate their antitrust claims.⁴⁶ The court viewed the expert's testimony as demonstrative that "the only economically feasible means for enforcing their [the Plaintiffs'] statutory rights is via class action."⁴⁷ Even with the trebling of damages and the shifting of attorney's fees, which must include an assessment of likelihood on the merits, the Plaintiffs would not be able to recover more than the costs associated with the experts and would be discouraged from bringing suit.⁴⁸

The court concluded that the private enforcement of the antitrust statutes was essential to protecting the statutory rights protected by the antitrust statutes.⁴⁹ Strong private incentives were included within the statutes to encourage private enforcement; the prohibitive costs associated with individual arbitration cut inapposite to these incentives and could not stand when taking into account this congressional intent.⁵⁰ Because the class action waiver was found to be both in violation of public policy and a strong congressional intent favoring private enforcement, the class action waiver provision was ruled to be void.⁵¹ The court refused to articulate a per se rule forbidding the inclusion of a class action in an agreement to arbitrate; instead the ruling court must rule on the enforceability of the waiver on a case-by-case basis, considering the merits.⁵² Finally, the court did not view the Supreme Court's decision in *Stolt-Nielsen* as prohibiting this result; it noted that this decision merely prevented the court from ordering class-wide arbitration.⁵³ Because the court did not do this, it was clearly within the scope of its powers in

⁴² *Id.*; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (reasoning that a waiver of the right to litigate under the federal antitrust statutes could be found to be against public policy).

⁴³ *Id.* at 197–98.

⁴⁴ *Id.*

⁴⁵ *Id.* at 198.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 198–99.

⁴⁹ *Id.* at 199.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 200.

making its ruling. The court remanded the decision to the district court for proceedings consistent with their decision here.⁵⁴

C. The Court's Analysis in Light of AT&T Mobility – Amex III

The Supreme Court severely called the Second Circuit's analysis when it rendered its decision in *AT&T Mobility LLC v. Concepcion*.⁵⁵ The Second Circuit addressed this concern in the third iteration of *In re American Express Merchants Litigation* (“*Amex III*”).⁵⁶ The court found that neither *AT&T Mobility*, nor *Stolt-Nielsen* affected its previous analysis.⁵⁷ It argued that neither decision addressed the narrow issue presented by the Plaintiffs: “whether a class-action arbitration waiver clause is enforceable even if the plaintiffs are able to demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights.”⁵⁸ The court reasoned that class action lawsuits are an effective mechanism for the vindication of statutory rights.⁵⁹ Arbitration can also provide an effective mechanism for litigants to litigate their rights, but this vindication can only come where the agreement to arbitrate does not act as a de facto waiver of the statutory right; the litigant must be able to effectively protect their rights in the arbitral forum.⁶⁰ The court found that the Plaintiffs had proven that arbitrating their antitrust claims would be prohibitively expensive and effectively prevent them from vindicating their rights under the federal antitrust statutes.⁶¹ The court relied heavily on expert testimony opining that seeking individual lawsuits would lead to a negative value outcome; this testimony was seen as essential proof that any individual suit would be prohibitively expensive.⁶² The court continued to warn that they were not expressing the opinion that class action waivers are per se unenforceable, instead the court ruled that “each waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA ‘is a congressional declaration of a liberal federal policy favoring arbitration agreements.’”⁶³ The Second Circuit remanded the case to the district court with instructions to deny the Defendant’s motion to compel arbitration under the FAA.⁶⁴

⁵⁴ *Id.*

⁵⁵ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that California’s *Discover Bank* rule invalidating arbitral clauses containing class action waivers as unconscionable is incompatible with the FAA and therefore preempted).

⁵⁶ See *In re Am. Express Merchs. Litig.*, 667 F.3d 204 (2d Cir. 2012) (“*Amex III*”).

⁵⁷ *Id.* at 212.

⁵⁸ *Id.*; see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that California’s *Discover Bank* rule invalidating arbitral clauses containing class action waivers as unconscionable is incompatible with the FAA and therefore preempted); *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1782 (2010) (finding that parties may not submit their claims to class arbitration unless the arbitral agreement explicitly references this procedural device).

⁵⁹ *Amex III*, 667 F.3d at 214.

⁶⁰ *Id.*

⁶¹ *Id.* at 215–17; see also *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) (“when a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs”).

⁶² *Amex III*, 667 F.3d at 217-18.

⁶³ *Id.* at 219 (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

⁶⁴ *Id.* at 219–20.

IV. SIGNIFICANCE

In re American Express Merchants Litigation is one of the rare cases that significantly impacts numerous aspects of arbitration law. The Second Circuit's decision not only affects the status of class action waiver clauses within arbitral agreements, it also touches on arbitrator autonomy and the arbitrability of antitrust suits. Each of these issues have arguably been settled by the Supreme Court, but the Second Circuit's decision here strongly calls into question this assertion. While the Second Circuit agrees with the Supreme Court regarding arbitrator autonomy, its ruling regarding the arbitrability of antitrust suits is seemingly in direct opposition with the Supreme Court's ruling in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁶⁵ The court's ultimate holding, that the class action waiver included by American Express voids the agreement to arbitrate, is also now called into question by the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*.⁶⁶ All three of these issues present interesting questions concerning the continued validity of the Second Circuit's decision in *In re American Express Merchants Litigation*, and how courts in this jurisdiction, and maybe even the Supreme Court, resolve these questions will determine the ultimate impact of the Second Circuit's decision here.

The Supreme Court effectively limited arbitrator autonomy in *Stolt-Nielsen S. A. v. AnimalFeeds International Corp.* Here, the Supreme Court held that the question of whether class arbitration was appropriate was a question for the court, not the arbitrator, to decide.⁶⁷ By overruling the arbitrator's decision, the Court implicitly reserved the right to determine the nature of class action provisions within an arbitral agreement.⁶⁸ *In re American Express Merchants Litigation* reinforces this idea. In fact, both parties in the litigation agreed that this matter was a non-issue; neither party challenged the Second Circuit's assertion that they were the proper body to determine the enforceability of the class action waiver in light of *Stolt-Nielsen*.⁶⁹ This decision is the least contentious matter decided by the Second Circuit, but it is nonetheless significant. It signals that this jurisdiction has effectively moved with the Supreme Court from a regime that recognizes a high degree of arbitrator autonomy, evidenced in *Green Tree Financial Corp. v. Bazzle*, to one that restricts the arbitrator autonomy, at least within the context of decided questions regarding class action, as advanced in *Stolt-Nielsen*.⁷⁰ It now falls squarely within the authority of the court to decide issues regarding class action within the arbitration context; the Second Circuit directly recognizes this proposition here.

The Second Circuit advances several policy justifications for holding the class action waiver clause unenforceable; among these the court reasons that the class action waiver provision places a burden upon individual litigants preventing the kind of private enforcement envisioned in

⁶⁵ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635-37 (reasoning that international arbitration provides an effective mechanism through which American antitrust statutes can be enforced).

⁶⁶ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that California's *Discover Bank* rule invalidating arbitral clauses containing class action waivers as unconscionable is incompatible with the FAA and therefore preempted).

⁶⁷ *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010).

⁶⁸ See *id.* at 1774-76 (citing *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989)) ("It falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.")

⁶⁹ *In re Am. Express Merchs. Litig.*, 634 F.3d 187, 191 (2d Cir. 2011), *aff'd on reconsideration by In re Am. Express Merchs. Litig.*, 667 F.3d 204 (2d Cir. 2012).

⁷⁰ Compare *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452-453 (2003) (holding whether parties agreed to class arbitration was a question of contract interpretation properly settled by the arbitrator), with *Stolt-Nielsen* 130 S. Ct. at 174 (citing *Volt*, 489 U.S. at 479).

and fundamental to the antitrust statutes.⁷¹ These findings seem to call into question the arbitrability of antitrust claims, an issue that was effectively decided by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁷² The Second Circuit here employs reasoning that has been explicitly forbidden by the Supreme Court; questions of antitrust arbitrability have been settled, and the controversies are to be sent to arbitration where the parties have agreed as such. Even though the court cites *Mitsubishi* to show agreement with their ultimate conclusions, it seems to misunderstand the proper application of the precedent; it must be viewed in terms of its ultimate conclusion that antitrust suits are, at their core, arbitrable. The divergence from Supreme Court precedent severely calls into question any long-term impact that this decision will have, making any significant impact, at the very least, questionable.

Finally, the Second Circuit's decision to invalidate the class action waiver presents interesting questions in light of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*. In *AT&T Mobility* the Supreme Court decided that states may not enact class action waiver laws that stand as an obstacle to the enforcement of arbitration agreements governed by the FAA.⁷³ This pronouncement is arguably applicable to the federal courts. The Supreme Court, in *AT&T Mobility*, made broad statements in the decision, describing class action waivers as interfering with the FAA's mandate requiring arbitration where an underlying agreement is found.⁷⁴ This broad language hints that application will be applied broadly and call into focus all federal decisions concerning agreements to arbitrate; class action waivers will likely be viewed as part of the underlying agreement to submit disputes to arbitration. If this analysis holds true, the Second Circuit's decision here will likely be viewed as directly conflicting with Supreme Court precedent. The Second Circuit's decision here seems to be inapposite to the "liberal policy favoring arbitration" described by the Supreme Court in *AT&T Mobility*.⁷⁵ Because of this the Second Circuit's holding's continued significance and validity is significantly called into question. The court's best hope lies in its decision to not adopt a per se rule prohibiting class action waivers, instead adopting a case-by-case analysis.⁷⁶ Whether this decision will ultimately stand will depend on the course this litigation takes after remand. It is legitimate to wonder whether the Second Circuit will stand by its decision if given the chance to reverse in light of *AT&T Mobility*, or if the court will decide that it was correct and give the Supreme Court another

⁷¹ *Am. Express*, 634 F.3d at 199; see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) ("In enacting these laws [the antitrust statutes], Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as private attorneys general."). This notion of the private attorney general seems to be central to the Second Circuit's argument. A strong argument can be made that this line of decisions will likely stand because of the unique nature of the antitrust statutes and accompanying litigation.

⁷² See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 636-37 (1985) ("Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim.").

⁷³ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

⁷⁴ *Id.* at 1750.

⁷⁵ *Id.* at 1745.

⁷⁶ *Am. Express*, 634 F.3d at 199.

chance to rule on the applicability of class action waivers in arbitral clauses.⁷⁷ This decision will determine the ultimate significance of *In re American Express Merchants Litigation*.

V. CONCLUSION

The Second Circuit's decision in *In re American Express Merchants Litigation* can be viewed in one of two ways: either as an attempt to expand protection to consumers trying to avoid recourse to arbitration, or as a direct challenge to the Supreme Court's authority to shape arbitration law in the United States. Either way, the decision is unlikely to stand given the recent decision in *AT&T Mobility*. Here, the Supreme Court rejected the courts' role as protector of consumer rights. The Court stated "the times in which consumer contracts were anything other than adhesive are long past."⁷⁸ This pronouncement is an implicit pronouncement that should no longer serve as consumer protection agencies. The realities facing the consumer market dictate that businesses deal in terms of adhesion. Consumers must face this reality and not look to courts to invalidate deals they accepted as part of doing business.

The Supreme Court also showed a willingness in *AT&T Mobility* to overrule the circuit courts on issues it feels were decided wrongly. *AT&T Mobility* was decided on appeal from the Ninth Circuit; the Supreme Court showed no hesitation to overrule the Ninth Circuit when they felt the circuit decided the class action waiver issue wrongly.⁷⁹ If the Second Circuit is challenging the Supreme Court in holding the class action waiver enforceable, it should expect its decision to be overruled. If the Second Circuit gets a second chance to rule on the issue after remand to the district court it should rule in accordance with Supreme Court precedent and declare the class action waiver enforceable if it wants its decision to stand. This conflict, and the discrepancy between the Second Circuit's reasoning regarding the inarbitrability and the Supreme Court's decision in *Mitsubishi*, will need to be remedied before *In re American Express Merchants Litigation* can have any lasting effect. Inconsistency and failure to abide by precedent will only frustrate the development of arbitration law by necessitating needless appeal and clouding issues that once considered to be clear.

⁷⁷ This continues to be a question after *Amex III*. It is unclear whether the case-by-case basis test will continue to stand, or whether a doctrine will be developed that is more in line with the Supreme Court's strong presumption of favoring the recourse to individual arbitration. *Amex III* and its predecessors are unique because they involve a question of antitrust litigation; an area of law where individual litigants are unlikely to proceed with nominal claims without prohibitive costs. This is still an issue that, if pressed on it, the Supreme Court could decide that arbitration effectively vindicates statutory rights—especially if the issues arises in another area of substantive law.

⁷⁸ *AT&T Mobility*, 131 S. Ct. at 1750.

⁷⁹ *Id.* at 1745, 1753.