



# CLASS ACTION LITIGATION



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**REPORT**

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## Antitrust

### **Stolt-Nielsen Doesn't Sway Second Circuit: Class Waiver Void if Single Suits Too Pricey**

**O**n remand from the U.S. Supreme Court, the Second Circuit didn't budge from its original decision: A class action waiver is unenforceable when it would effectively shut down an action seeking to vindicate statutory rights, the appeals court said Mar. 8 (*In re American Express Merchants' Litig.*, 2d Cir., No. 06-1871-cv, 3/8/11).

The Supreme Court remanded the case in light of its decision last year in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (11 CLASS 432, 5/14/10), but the Second Circuit said that decision didn't change its analysis. The appeals court held that a plaintiff can challenge a class action waiver clause on the ground that it would be cost prohibitive to pursue a statutory right on an individual basis, so long as the plaintiff provides sufficient supporting proof.

The court also "again conclude[d] that (1) the question of the enforceability of the class action waiver provision is properly decided by the court and (2) the class action waiver provision is unenforceable under the Federal Arbitration Act."

This, the court made clear, is not a bright line rule that all class action waivers in arbitration agreements (or in antitrust actions) are unenforceable: Each case, the appeals court said, must be examined on its own merits.

Last year, the Second Circuit came to a similar conclusion applying *Stolt-Nielsen* in a different context in *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124 (2d Cir. 2010) (11 CLASS 651, 7/23/10). There, the Second Circuit found a class action waiver unconscionable under state law.

**Attorneys Weigh In.** F. Paul Bland Jr., staff attorney at Public Justice, who litigates class action waiver issues extensively told BNA that the decision is an extremely important victory for consumers and employees.

There is no serious dispute in the record that if Amex's class action ban was enforced, it would free the company of any exposure to liability from private parties whether it violated the antitrust laws or not, Bland said.

"Amex's explanation that this result—gutting the statute—is OK because it stuck the class action ban in

an arbitration clause was always counter to the U.S. Supreme Court's insistence over many years that arbitration clauses are 'just another means of letting people vindicate their rights,' they are not a Get Out of Jail Free Card," Bland said.

Andrew S. Tulumello, partner at Gibson Dunn & Crutcher LLP in Washington, D.C., and vice-chair of the firm's Class Actions Practice Group, told BNA, "*Stolt-Nielsen* left the question open, but there is little doubt that the 'vindication of statutory rights' theory adopted by the Second Circuit eventually will need to be resolved by the Supreme Court."

Tulumello said that class action waivers are under assault on two fronts—one from state-law unconscionability doctrines (at issue this term in the U.S. Supreme Court in *AT&T v. Concepcion*), and the other under the Second Circuit's test.

In many settings, plaintiffs presumably will claim that it is prohibitively expensive for them to litigate federal claims on an individual basis, he continued. "If that argument is treated as a trump card, and can void an arbitration agreement that is otherwise valid under state law, class action waivers are in for a bumpy ride."

**To the Second Circuit and Back Again.** This case involves a would-be class of businesses charging that American Express's merchant fees run afoul of antitrust laws.

In 2009, the Second Circuit decided that the class action waiver in the parties' card acceptance agreement was unenforceable because it provided immunity to the defendant from antitrust claims which are too costly for individuals to pursue. *In re American Express Merchants' Litig.*, 554 F.3d 300 (2d Cir. 2009) (10 CLASS 122, 2/13/09).

In *Stolt-Nielsen*, the Supreme Court said that a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless the contract indicates that the parties agreed to proceed as a class.

Granting Amex's petition for certiorari, the Supreme Court remanded the decision for further consideration in light of its decision in *Stolt-Nielsen*.

**Stolt-Nielsen Doesn't Apply.** On remand, Amex argued that the Second Circuit's earlier decision could not stand because *Stolt-Nielsen* emphasized a court's obligation to faithfully enforce (not just construe) the parties' arbitration agreement.

But the Second Circuit disagreed. *Stolt-Nielsen* does not mean that a contractual clause barring class arbitration is per se enforceable, it said.

“Indeed, our prior holding focused not on whether plaintiffs’ contract provides for class arbitration, but on whether the class action waiver is enforceable when it would effectively strip plaintiffs of their ability to prosecute alleged antitrust violations,” the Second Circuit said.

**Applying Other SCOTUS Precedents.** Neither party took issue with the court’s previous holding that the class action waiver’s enforceability was a matter for the court, not the arbitrator, and the Second Circuit found that this holding survives *Stolt-Nielsen*. The Second Circuit said it was evaluating the enforceability of class action waivers under the federal substantive law of arbitrability, which is created by Section 2 of the Federal Arbitration Act.

The Second Circuit cited the U.S. Supreme Court’s decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), for the proposition 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.”

The Second Circuit said that the Supreme Court has also recognized that public policy concerns might bar enforcement of an agreement to arbitrate in dicta in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985).

“While dicta, it is dicta based on a firm principle of antitrust law 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.”

The Second Circuit rejected Amex’s argument that *Stolt-Nielsen* expressly rejects the use of public policy as a basis for finding contractual language void. *Stolt-*

*Nielsen*, the Second Circuit said, prohibits the use of public policy for divining the parties’ intent, but says nothing that would bar a court from using public policy to find a contract void.

In the present case, the plaintiffs provided expert testimony showing that individual litigation was not feasible for this claim even with the treble damages and cost-shifting available under the Clayton Act. The stakes for the plaintiffs were a few thousand dollars each while the cost of an expert report would be at least several hundred thousand dollars, and perhaps over \$1 million, the expert opined.

Because the class action waiver precludes the plaintiffs from enforcing their statutory rights, the Second Circuit found the arbitration provision unenforceable.

*Stolt-Nielsen* precludes the court from ordering class-wide arbitration, the appeals court said. Instead, the Second Circuit remanded the case to the district court for further proceedings consistent with this opinion. The Second Circuit said that Amex had already withdrawn its motion to compel arbitration.

The opinion was written by Rosemary S. Pooler, and joined by Robert D. Sack. Justice Sonia Sotomayor was originally a member of the panel, but was elevated to the U.S. Supreme Court on Aug. 8, 2009.

The plaintiffs were represented by Gary B. Friedman, Tracey Kitzman, Aaron Patton and Warren Parrino of the Friedman Law Group LLP in New York.

The defendants were represented by Bruce H. Schneider of Stroock & Stroock & Lavan LLP in New York; Julia B. Strickland and Stephen J. Newman of Stroock & Stroock & Lavan LLP in Los Angeles; and Michael K. Kellogg and Derek T. Ho of Kellogg Huber Hansen Todd Evans & Figel PLLC in Washington, D.C.

BY JESSIE KOKRDA KAMENS

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The full text of the opinion is available at: <http://op.bna.com/class.nsf/r?Open=jkas-8errpe>.