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Ross et al. v. American Express et al.

The Story Behind the Spread of Class Action-Barring Arbitration Clauses in Credit Card Agreements

Nancy A. Welsh and Stephen J. Ware

A recent case from the Southern District of New York, *Ross et al. v. American Express et al.*, is an antitrust case, but it also is an important case for arbitration. *Ross* consolidated several class actions in which plaintiffs alleged that major credit card issuing banks, including American Express (Amex), First USA, Bank of America, Citibank, Chase, Discover, and others “violated the Sherman Act by agreeing with their competitors to implement and maintain mandatory class action-barring arbitration clauses as a term or condition for holding their general purpose credit cards.”¹

Several defendants settled, but Judge William H. Pauley III conducted a bench trial for the remainder. He ruled in favor of the remaining defendants, finding that a conspiracy in violation of the Sherman Act “requires proof of joint or concerted action as opposed to unilateral action”² and that plaintiffs did not sustain their burden of proof. In May 2014, the plaintiffs filed an appeal in the Second Circuit.

Judge Pauley’s 90-plus page opinion details four years of activity among the credit card issuers, including their participation in 28 organizational meetings, email exchanges, telephone calls, in-person conversations, and other events in which representatives discussed the benefits of class action-barring arbitration clauses, public relations, pending litigation, and clauses likely to survive judicial review. Before this series of meetings and communications, two of the defendant banks had adopted class action-barring arbitration clauses. By the time the meetings ended, all the defendant banks had adopted such clauses, with approximately 87% of all general-purpose credit card transactions subject to both arbitration and a prohibition against class action.³

According to Judge Pauley’s opinion, First USA, which implemented a credit card arbitration clause in 1998 (becoming the first defendant bank to do so), hired “an outspoken advocate against class action lawsuits” as its “arbitration consultant” and assigned him to “create some sort of forum to talk about arbitration issues.”⁴ About 18 months later, Amex adopted its own credit card arbitration clause, reasoning that it “would benefit Amex by lowering litigation costs in the short term and [avoiding] very expensive class action suits in the medium to longer term.”⁵

During this time period, partners at two law firms began working with First USA and Amex to hold meetings with other banks’ senior in-house credit card counsel. The partners’ goal was to “show [their] stuff” on “issues of common concern,” including arbitration and later, to “round up other businesses that might want to join a coalition to defend and foster arbitration.”⁶ Meetings of the “Arbitration Coalition” grew to include a “phalanx”⁷ of

lawyers from top firms as well as representatives from various banks, consumer lenders, trade associations, and public relations firms.⁸

The attendees apparently agreed to share arbitration-related thoughts and materials, including FAQ responses, customer identification materials, legal briefs, arbitration clauses, and change-in-terms notices.⁹ The organizers also sought contributions from the participants to fund *amicus* briefs filed in arbitration matters pending before the US Supreme Court.¹⁰ The Arbitration Coalition spawned two other groups – the “Consumer Companies Class Action Working Group” and the “In-House Working Group,” which consisted entirely of in-house counsel and met several times by teleconference. On an *ad hoc* basis, in-house counsel also questioned each other about arbitration clause adoptions. Occasionally, dispute resolution organizations were involved.

From these and other facts, Judge Pauley concluded that the banks had reached “an agreement to explore collective advocacy efforts aimed at expanding the enforceability of arbitration clauses and to establish class action-barring arbitration as an industry norm.”¹¹ Indeed, he observed that “[d]irect evidence of this agreement abounds in meeting agendas, solicitations to fund *amicus* briefs and research, and willingness to explore joint action such as the FAQs project or self-regulation efforts.”¹² Arbitration clauses were “not salient” (i.e., “visible or meaningful”) to consumers during the relevant period,¹³ and Judge Pauley concluded the banks had “a motive to conspire in the adoption of arbitration clauses”¹⁴ because “collusion would ensure that no Issuing Bank facilitated a rise to salience before arbitration was firmly entrenched as the industry norm. Collusion would also help to ensure that each bank’s clause was [of] sufficient quality [to] withstand legal challenges that could undermine the enforceability of every bank’s clause.”¹⁵

Judge Pauley examined the concept of salience, observing that late fees, over-the-limit fees, and foreign currency exchange fees in the credit card and banking industries became salient only when issuers began offering credit cards that did not include such fees. Thus, competitors forced “obscure terms to salience in order to distinguish and market their products.” Judge Pauley also highlighted consumers’ ability to learn about such terms through personal experience, the experience of other consumers, and advice from consumer groups and advocates that “facilitate[s] a term’s rise to salience....”¹⁶

Despite these observations, however, Judge Pauley concluded that no conspiracy or other antitrust violation was necessary to induce each bank to adopt arbitration clauses because “avoiding class actions through arbitration was in

each Issuing Bank's independent self[-]interest, regardless of whether its competitors also adopted such a provision. ... Unlike some other cost-saving measures, the benefit of arbitration – avoiding class action litigation – was not diminished if competitors were in on the secret.”¹⁷ He added that “[w]hile the tenor of the meetings was heavily slanted in favor of arbitration, the record indicates that the final decision to adopt class-action-barring arbitration clauses was something the Issuing Banks hashed out individually and internally. ... While there is evidence the Issuing Banks tried to determine their competitors' plans and experiences regarding arbitration, as would be expected in an oligopoly, this Court does not discern any concerted action arising from those inquiries.”¹⁸

Judge Pauley described the evidence as “ambiguous” – permitting an inference of illegality but also with “inferences of legitimate activity” that were “just as persuasive.”¹⁹ “While the collusive adoption and maintenance of arbitration clauses would have entrenched arbitration as an industry standard, this Court is convinced that the evidence is just as consistent with legitimate activity in furtherance of the Issuing Banks' independent self[-] interests.”²⁰ The banks did not need to conspire to “be motivated to cooperate on efforts to sway public opinion and defend the legality of their clauses in the courts and legislatures. Perceiving that class action attorneys would lobby and litigate to undermine the enforceability of arbitration clauses, the Issuing Banks networked to thwart the plaintiffs' bar. When the motive to cooperate is just as consistent with legitimate goals as non-legitimate goals, there can be no fair inference of collusion.”²¹

Ultimately, Judge Pauley issued cautionary words about the role of outside counsel and the credit card issuers' cost-benefit analysis:

When outside counsel convene meetings of competitors in the hope of propelling themselves to the forefront of an emerging trend – in this case, class-action-barring consumer arbitration agreements – they do so at their professional peril. ... It was only by a slender reed that Plaintiffs failed to demonstrate that the lawyers who organized these meetings had spawned a Sherman Act conspiracy among their clients.

In retrospect, the Issuing Banks' short-term goal of lowering litigation costs eluded them. Undoubtedly, retaining some of the most esteemed

antitrust lawyers in the nation to counter the extraordinary talents of Plaintiffs' counsel imposed a significant burden on the Issuing Banks. Only the passage of time will reveal whether the Issuing Banks' longer-term goal of avoiding the expense of class action lawsuits can be achieved.²²

Although *Ross* is an antitrust case, both of us believe it may inform policy debates about consumer arbitration. We disagree, however, on some of the ruling's other implications. One of us, Ware, believes *Ross* shows that at least some very knowledgeable and sophisticated lawyers and businesspeople think enforcement of consumers' arbitration agreements saves so much money that it is worth their while to go to great lengths to get it. For Ware, an important policy question is whether enough of these cost-savings are passed on to consumers to more than offset any negatives consumers experience from such enforcement. For Welsh, *Ross* challenges consumer advocates, agencies, and businesses to educate consumers about – and make salient – the value of “regular people's” continued access to our public courts; *Ross* also challenges the dispute resolution field (and individual service providers) to involve *both* consumer and business interests as we seek the appropriate institutionalization of consumer arbitration and other processes. ♦

Endnotes

1 *Ross v. Am. Express Co.*, Nos. 04 Civ. 5723(WHP), 05 Civ. 7116(WHP), slip-op at 49 (S.D.N.Y. Apr. 10, 2014), available at <http://sdnyblog.com/wp-content/uploads/2014/04/04-Civ.-05723-2014.04.10-Ross-v.-American-Express-Co.-Findings-fo-Fact-and-Conclusions-of-Law.pdf>.

2 *Id.* at 50.

3 *Id.* at 90.

4 *Id.* at 8, 71.

5 *Id.* at 5.

6 *Id.* at 8.

7 *Id.* at 32.

8 *Id.* at 10, 24.

9 *Id.* at 12.

10 *Id.* at 18-19.

11 *Id.* at 82.

12 *Id.*

13 *Id.* at 38-39.

14 *Id.* at 62.

15 *Id.*

16 *Id.* at 39.

17 An empirical study showed credit cards as one of the two consumer contracts (the other being cellphone service) in which arbitration clauses are most likely to include class waivers. Christopher R. Drahozal and Stephen J. Ware, *Why do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 472 (2010)..

18 *Ross*, Nos. 04 Civ. 5723(WHP), 05 Civ. 7116(WHP) at 83-84.

19 *Id.* at 67 (Supporting this, Judge Pauley wrote “The bulk of the Coalition's activities were akin to that of a fledgling special interest group cooperating to advance a mutually beneficial business initiative they felt was under siege by a well-networked enemy.”).

20 *Id.* at 63.

21 *Id.*

22 *Id.* at 90.



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