



April 13, 2009

## Second Circuit Update

by Andrew J. Entwistle and Robert M. Trivisano

- Affiant's "To My Knowledge" Statement Sufficient to Defeat Summary Judgment
- Class Action Waiver Clause in Arbitration Agreement Is Unenforceable



### Affiant's "To My Knowledge" Statement Sufficient to Defeat Summary Judgment

*SCR Joint Venture L.P. v. Warshawsky*, 2009 WL 647352 (2d Cir. Mar. 12, 2009)

The Second Circuit recently held that an affiant's statement made "to my knowledge," unlike a statement made "upon information and belief," is sufficient to assert personal knowledge and create a genuine issue of material fact to defeat a summary judgment motion.

In *SCR Joint Venture L.P.*, plaintiff alleged that defendants had defaulted on their obligations to pay the principal and interest on three notes issued by defendants' business that defendants had personally guaranteed. The district court concluded that, pursuant to a subordination agreement among plaintiff, defendants and a third party, plaintiff could not collect its debt from defendants until they had repaid a senior debt to the third party. Nonetheless, the court granted summary judgment in favor of the plaintiff because it found that defendants "had submitted no admissible evidence to show that the senior creditor had not been paid in full."

Defendants moved for reconsideration. The evidence that the district court had apparently overlooked was an affidavit by defendant Jerome Warshawsky in which he stated, in relevant part: "To my knowledge, [the senior creditor] has not been paid in full." The district court denied defendants' motion, concluding that "statements made 'to my knowledge,' or similar statements made upon information and belief or upon speculation are generally insufficient to raise a triable issue of fact sufficient to defeat summary judgment." Defendants appealed.

### The Second Circuit Reverses

The Second Circuit disagreed with the district court. The appeals court found that the defendants had, in fact, submitted admissible evidence that the senior creditor had not been paid in full. The court recognized that, for summary judgment purposes, an affidavit must be based on personal knowledge. However, the court held that defendant Jerome Warshawsky's assertion "to my knowledge" fit into the statutory requirement of personal knowledge in a way that the wording "upon information and belief" did not and therefore was sufficient to defeat summary judgment.

Looking at the totality of the affidavit, the court found that it satisfied the personal knowledge requirement of Federal Rule of Civil Procedure 56(e) because defendant stated that he was a vice president of the debtor company and "fully familiar with the facts and circumstances set forth" in the affidavit. He then testified, "[t]o my knowledge, [the senior creditor] has not been paid in full." The Second Circuit viewed the "perhaps unfortunate" addition of the "to my knowledge" phrase as a mere redundancy. "In this context," the court stated, "the phrase 'to my knowledge' . . . clearly meant 'I know that . . . .' It does not mean that the asserted fact was made only 'upon information and belief,' the ordinary suggestion of which is: 'I have reason to believe this fact but do not have personal knowledge of it.'" The court further opined that any confusion may be due to the similarity of the phrase "to my knowledge" with the phrase "'to the best of my knowledge,' which seems to inject a level of uncertainty into" whether the affiant is sure that the asserted fact is true.

## Questions Raised

This hair-splitting interpretation of what the court essentially deemed surplus wording raises more questions than it answers. It is unclear why the “to my knowledge” phrase was included in the first place, when the affiant could just as easily have made an unequivocal factual statement. An evasive statement by a biased witness such as this defendant should not suffice to defeat summary judgment without more, i.e., a payment schedule or affidavit or other documents from the senior creditor regarding payment. Perhaps the Second Circuit should have remanded for the purpose of directing that the affiant be deposed to determine what he meant. Hopefully, this opinion will not be the foundation upon which a new form of litigation gamesmanship is built.

## Class Action Waiver Clause in Arbitration Agreement Is Unenforceable

*In re American Express Merchants’ Litigation*, 554 F.3d 300 (2d Cir. 2009)

In a matter of first impression, the Second Circuit recently held that a class action waiver provision in an arbitration agreement was unenforceable. The court also held that this was a question for the courts, and not an arbitrator, to decide.

*In re American Express Merchants’ Litigation*, the plaintiff merchants filed a putative class action against defendant charge card issuer. At the heart of plaintiffs’ dispute is that the “Honor All Cards” provision of their agreement with the defendant forces them to choose between either paying heavy merchant discount fees on the newer “mass-market” credit cards or losing a significant portion of sales from defendant’s corporate and affluent cardholders. Plaintiffs claim that this is an illegal tying arrangement in violation of the Sherman Act.

Defendant moved before the district court to compel arbitration. The court granted defendant’s motion, holding that the relevant arbitration clause was sufficiently broad to apply to the dispute at hand. While the court expressed skepticism with plaintiffs’ argument that the class action waiver provision would prevent them from bringing their claims because of the huge costs involved compared to the limited damages available, it ultimately held this was a question for the arbitrator. The court dismissed the complaint. Plaintiffs appealed.

Before turning to the main issue of the enforceability of the class action waiver provision, the Second Circuit had to determine whether it, rather than the arbitrator, could decide this question. The court noted that by challenging the enforceability of the class action waiver provision plaintiffs were, by extension, disputing the validity of the parties’ agreement to arbitrate. Therefore, since the appeal involved “a gateway dispute about whether the parties are bound by a given arbitration clause,” it was a dispute for the court to decide.

As a touchstone matter, the Second Circuit recognized the strong federal policy favoring arbitration. The court also pointed out that the right to bring a class action is a procedural right that is ancillary to substantive issues. “Nevertheless, the Supreme Court has repeatedly recognized the utility of the class action as a vehicle for vindicating statutory rights,” the appeals court noted.

Here, the court found that plaintiffs had sufficiently demonstrated that their claims could not reasonably be pursued as individual actions. The court agreed with plaintiffs and their expert, an economist, that the class action waiver provision “flatly ensures that no small merchant may challenge [defendant’s] tying arrangements under the federal antitrust laws.” The clause effectively operates to negate private suits due to prohibitive litigation costs relative to the limited individual damages, the court noted. With this reasoning as a foundation, the court held that the class action waiver provision in the arbitration agreement could not be enforced. “[T]o do so,” the court stated, “would grant [defendant] de facto immunity from antitrust liability by removing the plaintiffs’ only reasonably feasible means of recovery.”

Notwithstanding this positive holding for putative class action plaintiffs, the Second Circuit cautioned that not all class action waivers in arbitration agreements are per se unenforceable. Each case must be assessed on its own merits, the court stated.

## About the Authors

*Andrew J. Entwistle is a partner of Entwistle & Cappucci LLP, New York, New York. He can be reached at 212-894-7200 or [aentwistle@entwistle-law.com](mailto:aentwistle@entwistle-law.com). Robert M. Travisano is a partner in the firm’s Florham Park, New Jersey and New York, New York offices. He can be reached at 973-236-0666 or [rtravisano@entwistle-law.com](mailto:rtravisano@entwistle-law.com).*