06-1871-cv

United States Court of Appeals

for the

Second Circuit

In re: AMERICAN EXPRESS MERCHANTS' LITIGATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS' BRIEF SEEKING REVERSAL OF DISTRICT COURT DECISION

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CIRCUIT RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae American Antitrust Institute is a tax exempt Washington, DC corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

CIRCUIT RULE 29(a) CONSENT

Pursuant to Federal Rule of Appellate Procedure 29(a), the American Antitrust Institute has received consent from all parties to submit this amicus-curiae brief for the Court's consideration.

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STATEMENT OF IDENTITY OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition, protect the interests of consumers in a competitive economy, and challenge abuses of concentrated economic power. *See* www.antitrustinstitute.org. AAI is managed by a Board of Directors[1] which has authorized the filing of this brief in the *In re American Express Merchants' Litigation* because it believes that the District Court's decision to enforce the arbitration provision with its bar to collective actions runs counter to America's antitrust laws and threatens competition. Permitting corporations to circumvent the antitrust laws through the use of collective action waivers like the one at issue in this case will have a dramatic and negative impact on consumers and small businesses, eviscerating their ability to vindicate the important statutory rights granted them by Congress pursuant to the Sherman and Clayton Acts.

[1] The Directors are Jon Cuneo (partner in Cuneo, Waldman, Gilbert & LaDuca), Albert Foer (President, The American Antitrust Institute), and Robert Lande (Venable Professor of Law, University of Baltimore). Approximately 85 antitrust experts serve on the AAI's Advisory Board in a consulting capacity. The positions taken by the AAI should not be imputed to any individual members of the Advisory Board.

ARGUMENT

I. CONTRACT PROVISIONS BARRING COLLECTIVE ANTITRUST ACTIONS ARE UNENFORCEABLE WHERE PLAINTIFFS CAN ESTABLISH THAT THE PROVISIONS EFFECTIVELY PRECLUDE VINDICATION OF THEIR RIGHTS UNDER THE ANTITRUST LAWS

A. The Antitrust Laws Were Carefully Crafted To Encourage And Foster Private Enforcement Actions

Congress enacted the Sherman Act in 1890 as the first of several antitrust laws aimed at protecting consumers from perceived abuses in the marketplace. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979). The Act gave responsibility for enforcing the laws to both the Department of Justice[2] and private parties. Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (2004)). To ensure the latter had sufficient incentives to detect and file actions against antitrust violators, the Act included a treble damages remedy and allowed recovery of attorney's fees and costs for successful plaintiffs. *Id.* (codified as amended at 15 U.S.C. § 15 (2000); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 & n.10 (1977) (recounting the history of the Sherman Act and observing that treble damages were conceived primarily as a remedy for "'(t)he people of the United States as individuals.'" (quoting 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George))).

The Sherman Act has successfully encouraged private enforcement actions, with the Supreme Court describing such actions as "an integral part of the

[2] While the Department of Justice originally was responsible for government enforcement of the antitrust laws, the Federal Trade Commission was later given shared responsibility in Section 5 of the FTC Act, 15 U.S.C. § 45 (1914).

congressional plan for protecting competition." *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990). Private lawsuits have become the dominant means by which antitrust violations are remedied and deterred, acting sometimes as a supplement to government enforcement, but mostly as a substitute. As the Supreme Court put it,

> Without doubt, the private cause of action plays a central role in enforcing this regime [of the antitrust laws]. . . . "'A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.'"

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634-35 (1985) (quoting *Mitsubishi Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 168 (1st Cir. 1983) (quoting *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968)) (other citations omitted); *see also Rotella v. Wood*, 528 U.S. 549, 557 (2000) (referring to private parties bringing antitrust suits as "private attorneys general"); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 542 (1983) (describing private enforcement plaintiffs as "perform[ing] the office of a private attorney general").[3] William Baxter, former Assistant Attorney General, has suggested that the executive branch has even come to rely on private enforcement because this "common-law approach to antitrust law adopted by Congress requires that the executive branch have discretion to select the particular cases it prosecutes . . . [and to] the extent that

[3] Today, private enforcement accounts for 90-95% of all antitrust actions. Joseph P. Bauer, *Multiple Enforcers and Multiple Remedies:, Reflections on the Manifold Means of Enforcing the Anti-trust Laws: Too Much, Too Little, or Just Right?*, 16 Loy. Consumer L. Rev. 303, 308 & n.22 (collecting data).

suits by private plaintiffs produce an efficient development of antitrust law, it becomes less critical for the executive branch to ensure that the courts have appropriate cases and arguments before them." William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the 'Common Law' Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 678, 682 (1982).

Private enforcement actions serve an important and unique role in Congress' overall enforcement scheme. Private parties are often best situated to discover and pursue antitrust violations given their "prior specialized knowledge of . . . the putative antitrust violation or the environment in which it allegedly occurred, [and they] may have a comparative advantage over the [government] in the cost of and efficiency in prosecuting a given case." *Id.* at 690. Private party lawsuits do not require a large expenditure of government resources, thereby shifting "the expense of enforcement away from the governmental agencies." Joseph P. Bauer, *Multiple Enforcers and Multiple Remedie: Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 Loy. Consumer L. Rev. 303, 310-11 (2004).

In many instances, private enforcement is the only available means to redress an antitrust violation. Government enforcement is "inevitably selective and not always likely to concern itself with local, episodic, or less than flagrant violations." Spencer Weber Waller, *Symposium: Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 Chi.-Kent. L. Rev. 207, 211 (2003). Government objectives also shift over time, resulting in uneven enforcement of certain antitrust provisions. *Id.* at 230 ("[E]nforcement priorities

change from administration to administration, or with appointment of a new Assistant Attorney General or FTC chair. For ideological reasons, budgetary constraints, staff workloads, cases may never be brought that would have been a front-burner issue at another time."). Private enforcement ensures that all types of antitrust violations will be pursued and the enforcement system will remain stable, regardless of the political leadership in power at the time. *See* Spencer Weber Waller, *The Future of Private Rights of Action in Antitrust*, 16 Loy. Consumer L. Rev. 295, 299 (2004) ("[v]igorous private enforcement has lent the system a certain stability in the United States in comparison to the more centralized systems of competition law"). The government may also choose to devote its resources to cases where criminal sanctions are particularly desirable[4] or cases that would promote the public interest but are unlikely to be brought by private parties (e.g., a new area of the law where the prospects for success are uncertain). *See* William F. Baxter, 60 Tex. L. Rev. at 687 (the executive branch focuses on cases that "promote the public interest, not merely cases for which success at trial may be expected").

Extensive private enforcement also serves the overlapping goals of the antitrust laws, particularly its deterrence and compensation functions. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 472-73 (1982) (identifying compensation and deterrence as the twin goals of the antitrust laws); Williams F. Baxter, 60 Tex. L. Rev. at 691 ("Private litigation, particularly in cases in which the injuries

[4] The Department of Justice may pursue criminal penalties while private litigants may only pursue civil damages. 15 U.S.C. §§ 1-2 (2006).

resulting from the unlawful conduct are not widespread, is an effective tool both in identifying existing violations and in deterring future violations by the offender or by others similarly situated."). Private enforcement actions often provide guidance as to what conduct is acceptable in a given industry or produce positive externalities important to the public at large. Without private enforcement actions, "a defendant could well escape all liability if the government chooses, for whatever reason, not to proceed in a particular matter." Waller, 78 Chi.-Kent. L. Rev. at 221.

B. Class Actions Are An Essential Element Of Statutory Private Antitrust Enforcement

The Supreme Court has repeatedly emphasized the important role that class actions play in enforcing the federal antitrust laws. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.'") (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262, 266 (1972) (recognizing that by enacting the antitrust laws, "Congress encouraged [private parties] to serve as 'private attorneys general,'" and "Rule 23 . . . provides for class actions that may enhance the efficacy of private actions"); *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) ("[L]ong ago the Supreme Court recognized the importance that class actions play

in the private enforcement of antitrust actions . . . . Accordingly, courts have repeatedly found antitrust claims to be particularly well suited for class actions.").

Class actions are responsible for much of the antitrust laws' deterrence value. *See Reiter*, 442 U.S. at 344 (recognizing that class actions "provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations"). Without class actions, certain antitrust violations will not be pursued because of the small recovery an individual plaintiff may expect to recover. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("A critical fact . . . is that petitioner's individual stake . . . is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."); *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 59 n.21 (1st Cir. 2006) ("In any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an attorney could ever begin to justify being made whole by the court. . . . Moreover, being made whole is hardly a sufficient incentive for an attorney to invest in a case such as this when time spent on more predictable cases would be advantageous, and frankly, rational.").

Congress also has recognized the importance of class actions. In the Class Action Fairness Act, Congress found that "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims

to be aggregated into a single action." 28 U.S.C. §§ 1711-1715 (2006). The Senate Report accompanying the Act stated that "[c]lass actions were designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries. As such, class actions are a valuable tool in our jurisprudential system." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 4, 5.

This intersection between private antitrust enforcement and class actions has become more important over time: "In the context of modern commerce, in which corporate defendants often are larger and more financially powerful in comparison to the individual consumer than was true at the time of enactment of the Sherman Act, the only viable procedure for effective private enforcement of the antitrust laws is the class action." J. Douglas Richards, *What Makes an Antitrust Class Action Remedy Successful?: A Tale of Two Settlements*, 80 Tul. L. Rev. 621, 631 (Dec. 2005) (footnote omitted). To effectuate Congress' enforcement scheme, private lawsuits and class actions must both remain viable.

C. The Collective Action Ban At Issue In The Instant Case, And Those Like It, Are Unenforceable Where, As Here, The Provisions Preclude Plaintiffs From Vindicating Their Rights Under The Antitrust Laws

1. Courts, Including the United States Supreme Court, Recognize That Arbitration Provisions Are Unenforceable Where They Frustrate a Plaintiff's Ability to Vindicate Statutory Rights

In light of the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, and its "liberal" approach to arbitration agreements, the Supreme Court has held that statutory claims, including those brought pursuant to the Sherman Act, 15 U.S.C. §§ 1–7, may be subject to enforceable arbitration agreements. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25–26 (1991) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Beginning with the *Mitsubishi Motors* case, however, the Supreme Court recognized an important potential limitation to such arbitration agreements where arbitration would not permit the litigant to vindicate his or her statutory rights. 473 U.S. at 636 (finding that "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."). The Court in *Mitsubishi Motors* found that there was "no reason to assume at the outset of the dispute" that an international arbitration would frustrate the litigant's ability to vindicate statutory rights, and therefore the Court held that an arbitration provision was enforceable to compel resolution of antitrust claims through arbitration. *Id.* at 636.

Relying on the limitation noted in *Mitsubishi Motors*, the Eleventh Circuit Court of Appeals held in *Randolph v. Green Tree Fin. Corp.-Alabama*, 178

F.3d 1149 (11th Cir. 1999), *rev'd*, 531 U.S. 79 (2000), that an arbitration agreement which was silent as to which party would bear the costs of arbitration and what those costs might be was unenforceable because high costs could prevent vindication of the plaintiff's statutory rights under the Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* The Supreme Court reversed, concluding that "an arbitration agreement's silence with respect to such matters does not render the agreement unenforceable." *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 82 (2000).

The Supreme Court's analysis in *Green Tree* set out the framework for determining when an arbitration provision will be enforced. The Court restated and reaffirmed that an arbitration provision could only be enforced so long as the prospective litigant could effectively vindicate his or her statutory rights. *Green Tree*, 531 U.S. at 90 (citing *Gilmer*, 500 U.S. at 28) (quoting *Mitsubishi Motors*, 473 U.S. at 637)). Further, the Supreme Court recognized that there could be circumstances in which an arbitration agreement is unenforceable because it would not permit the vindication of a litigant's statutory rights. *Id.* at 90 ("It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum."). However, because the plaintiff had not met her burden of establishing that she would actually bear high arbitration costs and because in fact the record "contain[ed] hardly any information" at all on the question of costs, the Court in *Green Tree* found the plaintiff's argument "too speculative to justify the invalidation of an arbitration agreement." *Id.* at 90-91.

2. The Facts of This Case Demonstrate That the Plaintiffs Cannot Individually Vindicate Their Statutory Rights in Arbitration

In stark contrast to the record in *Green Tree*, there is nothing "speculative" about plaintiff-appellants' contention in the instant case that the high cost of establishing defendant-appellees' liability for antitrust violations in relation to each individual's potential recovery absolutely precludes them from vindicating their statutory rights if the arbitration agreement's collective action waiver is enforced. Plaintiffs submitted to the District Court an expert affidavit contending that the costs for expert evidence would run in the hundreds of thousands of dollars, possibly exceeding $1 million, although each individual plaintiff's damages averaged only $5,000. *In re Am. Express Merchs. Litig.*, No. 03cv9592, 2006 WL 662341, *4-*5 (S.D.N.Y. Mar. 16, 2006).

The District Court rejected plaintiff-appellants' argument on two fronts: first, because it found that the plaintiffs had failed to establish that the cost of arbitration would be more than that of litigation, and second, on the ground that plaintiffs' argument "ignore[d] the statutory protections provided by the Clayton Act[,]" namely the provision of treble damages and the award of costs and attorney's fees if the plaintiff prevails. *Id.* at *5-*6.

With regard to the District Court's first finding, the Amicus Curiae respectfully submits that the court used an erroneous analysis. Essentially, the court summarily compared the cost of litigation with the cost of arbitration, whereas the real issue is the cost of litigation or arbitration brought as a collective action versus the cost of litigation or arbitration as an individual claim. Clearly,

the cost of either collective litigation or collective arbitration is significantly lower because resources such as expert reports and attorneys can be shared and the costs spread among litigants, while individual proceedings preclude individual consumers and small merchants from bringing claims in either forum because of the prohibitive ratio of cost to recovery.

Moreover, even if the court were to weigh the cost of litigation against the cost of arbitration, it should do so in a "realistic manner," as the Court of Appeals for the Sixth Circuit found when analyzing the issue in the employment context:

> In many, if not most, cases, employees (and former employees) bringing discrimination claims will be represented by attorneys on a contingency-fee basis. Thus, many litigants will face minimal costs in the judicial forum, as the attorney will cover most of the fees of litigation and advance the expenses incurred in discovery. . . . Reviewing courts must consider whether the litigant will incur this additional expense and whether that expense, taken together with the other costs and expenses of the differing fora, would deter potential litigants from bringing their statutory claims in the arbitral forum. The issue is not 'the fact that [the] fees would be paid to the arbitrator,' but rather whether the "overall cost of arbitration," from the perspective of the potential litigant, is greater than "the cost of litigation in court."

Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 664 (6th Cir. 2003) (internal citations omitted). The court went on to point out that "[i]n many cases, if not most, employees considering the consequences of bringing their claims in the arbitral forum will be inclined to err on the side of caution, especially when the worst-case scenario would mean not only losing on their substantive claims but also [having to pay] the imposition of the costs of the arbitration." *Id.* at 665.

This analysis holds equally true for the antitrust claimant considering whether to bring an individual claim in the arbitral forum subject to a collective action waiver. To conclude that any rational litigant or attorney would proceed with such a claim, regardless of the statute's provision for treble damages and attorney's fees, blinks at reality. *See Kristian*, 446 F.3d at 54 ("The *realistic* alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00.") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004), *cert. denied*, 543 U.S. 1051 (2005)).

In *Kristian*, the First Circuit Court of Appeals considered a case virtually indistinguishable from the case now pending before this Court. In the *Kristian* case, consumers sued their cable television provider pursuant to state and federal antitrust laws. *Kristian*, 446 F.3d at 29. When the cable provider sought to enforce its arbitration agreement, which included a bar to class action arbitration, the plaintiffs argued that the bar was unenforceable because it prevented them from vindicating their statutory rights. *Id.* at 37. The plaintiffs in *Kristian*, like the plaintiff-appellants in the instant case, offered unopposed expert testimony that individual consumers' recoveries – even with treble damages – would be no more than a few thousand dollars, whereas the costs of establishing liability through expert reports, in addition to attorney's fees, "could reach into the millions." *Id.* at 54.

After careful consideration of decisions from the Third, Fourth, Seventh, and Eleventh Circuit Courts of Appeal enforcing arbitration agreements that

included class action bars, the First Circuit Court of Appeals concluded that those cases, which primarily involved alleged Truth in Lending Act ("TILA") violations, were distinguishable in important ways from the antitrust claims involved in *Kristian*. 446 F.3d at 55-58 (analyzing and distinguishing *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553 (7th Cir. 2003); and *Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814 (11th Cir. 2001)).

As an initial matter, the First Circuit Court of Appeals noted that antitrust suits involve complicated questions of fact and the application of highly complex law, whereas determining an alleged violation of TILA is "not a particularly difficult analysis." *Kristian*, 446 F.3d at 57. Next, the First Circuit recognized that the overwhelming disparity between the cost of bringing a successful suit and the plaintiff's potential recovery, even where the statute provides for attorney's fees, would preclude plaintiffs from bringing a claim absent a collective action alternative. *Id.* at 58-59 ("A plaintiff's attorney in the consumer antitrust context would be required to invest a large initial outlay in time and money, including 'opportunity costs' – estimated in the hundreds of thousands of dollars – for only a portion of an individual plaintiff's recovery, which at most is a few thousand dollars. Then, factoring in the uncertainty of success, the appeal for an attorney to take on an individual plaintiff's antitrust claim shrinks even further." (Footnote omitted.)).

The *Kristian* court also took issue with the argument that administrative enforcement is sufficient to carry out the statute's purposes. As the court put it,

> When Congress enacts a statute that provides for both private and administrative enforcement actions, Congress envisions a role for both types of enforcement. Otherwise, Congress would not have provided for both. Weakening one of those enforcement mechanisms seems inconsistent with the Congressional scheme. Eliminating one of them entirely is surely incompatible with Congress's choice.

Id. at 59.

In sum, the *Kristian* court concluded that if the class prohibition were enforced, the defendant would be shielded from private consumer antitrust liability and plaintiffs would be unable to vindicate their statutory rights. The court recognized that this "de facto liability shield" would frustrate the goals of both state and federal antitrust laws. *Id.* at 61.

The *Kristian* court's analysis applies with equal weight to this litigation. Plaintiff-appellants' antitrust claims are complex and plaintiffs established for the record below that if they are precluded from participating in a collective action, the cost to each individual consumer to prosecute his or her claim is prohibitive relative to the consumer's potential recovery. If the collective action waiver is enforced, American Express will be shielded from liability, even where it may have violated the antitrust laws. Eradicating the private enforcement component from our antitrust law scheme cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes. Because the class action waiver precludes the plaintiff-appellants from enforcing their statutory rights, the arbitration provision is unenforceable.

II. COURTS, NOT ARBITRATORS, MUST DECIDE WHETHER COLLECTIVE ACTION BARS ARE ENFORCEABLE

Courts, not arbitrators, should decide the enforceability of collective action prohibitions for antitrust claims now frequently found in arbitration agreements. For the reasons set forth above, such provisions prevent plaintiffs in certain instances from vindicating their statutory rights. Plaintiffs who cannot vindicate their statutory rights have no incentive to bring arbitrations. Accordingly, to determine whether a collective action prohibition is enforceable (and whether an arbitration will therefore exist), a court must decide in the first instance whether the prohibition defeats the plaintiff's statutory rights. The First Circuit Court of Appeals held the same in a virtually identical case. *See Kristian*, 446 F.3d at 55 ("[b]ecause the denial of class arbitration in the pursuit of antitrust claims has the potential to prevent Plaintiffs from vindicating their statutory rights, Plaintiffs present a question of arbitrability").

Allocating these and other questions of arbitrability to courts also enhances judicial predictability. Because our system of law is based on the principle of *stare decisis*, published judicial opinions are vital to the development of a consistent body of law. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (recognizing that stare decisis promotes the even-handed, predictable, and consistent development of legal principles). Judicial opinions display a court's reasoning so that future litigants can understand (and therefore predict in future disputes) how a particular rule of law applies in a specific setting. In contrast, courts have recognized that arbitration decisions are not bound by similar

principles of *stare decisis*. *See IDS Life Ins. Co. v. SunAm. Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998) ("arbitrators' decisions are not intended to have precedential effect even in arbitration . . . let alone in courts"). In fact, arbitration decisions are rarely made public or contain the kind of written legal and factual analysis that would help inform parties seeking to conform their future conduct with the law. Sophisticated companies increasingly place arbitration clauses with class action prohibitions into agreements with consumers. Courts should decide these issues of arbitrability and create a body of law that can be relied on in the future. This is especially important in antitrust cases, where the outcome of a case may substantially affect the structure, conduct, and performance of an entire industry and where removal from courts to private arbitrations may replace with a black box the public forum in which third parties participate.

CONCLUSION

Competition is essential in our free market economy, and the antitrust laws are critical to ensuring that competition. Congress carefully crafted America's antitrust laws to include and indeed foster private enforcement, and collective actions are critical to the private enforcement of those laws. A contractual provision barring collective action is unenforceable where, as here, the provision precludes plaintiffs from vindicating their statutory rights under the antitrust laws. Finally, the question of whether a plaintiff has met its burden to establish that a collective action waiver would preclude it from vindicating its statutory rights in arbitration is a question of arbitrability for the court to

determine. Amicus Curiae respectfully submits that the District Court's decision to enforce the collective action waiver in this case should be reversed.

Dated: September 18, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rules 29 and 32, I hereby certify that there are 4,393 words in this brief. I further certify that the brief uses a proportionally spaced face of 14-point type.

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Sworn to before me on September 18, 2006

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