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Supreme Court's *Amex* Decision Creates High Hurdle for Plaintiffs Seeking to Invalidate Arbitration Agreements with Class Action Waivers

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In *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (June 20, 2013), the U.S. Supreme Court reversed a Second Circuit opinion and held that the Federal Arbitration Act (FAA) does not permit a court to invalidate an arbitration agreement with a class action waiver on the ground that the plaintiff's cost of individually arbitrating federal statutory claims exceeds the potential recovery.

In a 5-3 decision,[1] the Supreme Court reiterated that courts "must rigorously enforce" arbitration agreements according to their terms, including terms that "specify with whom [the parties] choose to arbitrate their disputes." Relying on its decision last year in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), the Court stated this was true even for claims brought under a federal statute, "unless the FAA's mandate has been overridden by a contrary congressional command."

Finding no such contrary congressional command in the federal antitrust laws at issue in the case, the Court then turned its attention to the argument that the class action waiver would preclude the plaintiffs from effectively vindicating their statutory rights. The Court also rejected the Second Circuit's analysis on this issue. As Justice Scalia pointed out, requiring a court to "determine the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing the evidence, and the damages that would be recovered in the event of success" would be completely unworkable and inconsistent with the text of the FAA and Supreme Court precedent.

As a result of the Court's opinion, parties should now be able to enforce valid arbitration agreements more expeditiously and move cases into arbitration without "destroy[ing] the prospect of speedy resolution that arbitration ... was meant to secure."

Background

The road to the Court's opinion today has been a long one. The plaintiffs are merchants who accept American Express ("Amex") cards. The Card Acceptance Agreements require that all disputes be

1 Justice Thomas joined the majority opinion "in full" and also issued a concurring opinion, simply relying upon the text and plain meaning of the FAA. As he explained in *AT&T Mobility LLC v. Concepcion*, he believes that the FAA requires enforcement of an agreement to arbitrate unless a party successfully challenges the formation of the agreement. Here, since Italian Colors did not furnish any grounds for the revocation of any contract as required under Section 2 of the FAA, he finds the agreement must be enforced. Justice Sotomayor did not participate in the decision.

resolved by arbitration and that "there shall be no right or authority for any Claims to be arbitrated on a class basis." Notwithstanding this class action waiver, the plaintiffs brought a class action alleging federal antitrust claims under the Sherman and Clayton Acts. Amex moved to compel individual arbitration of the plaintiffs' claims, which the plaintiffs resisted on the basis of expert testimony that the claims would cost anywhere from several hundred thousand dollars to more than $1 million, while the maximum recovery for an individual plaintiff would be $38,549 when trebled. The district court granted Amex's motion and dismissed the lawsuit, but the Second Circuit reversed, concluding that the class action waiver was unenforceable because the plaintiffs "would incur prohibitive costs if compelled to arbitrate under the class action waiver." *In re American Express Merchants' Litigation*, 554 F.3d 300, 315-16 (2nd Cir. 2009).

The Supreme Court vacated the Second Circuit's opinion and remanded the case for further consideration in light of its then recent opinion, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), which held that a party may not be compelled to submit to class arbitration absent an agreement to do so. The Second Circuit stood by its decision two more times. First, it found that *Stolt-Nielsen* was not implicated by its earlier ruling because it had not ordered class arbitration. Then, in light of the Supreme Court's ruling in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the Second Circuit *sua sponte* reconsidered its ruling, but again refused to enforce the arbitration agreement because, the court found, the practical effect of enforcing the waiver would preclude the plaintiffs from being able to vindicate their statutory rights under federal antitrust laws. The Second Circuit concluded that the cost of arbitrating each plaintiff's individual dispute would be cost-prohibitive and in effect deprive them of federal statutory protections.

Supreme Court Ruling

In rejecting this argument, the Court distinguished situations where a *right to pursue a claim is eliminated*, such as a provision forbidding the assertion of certain statutory rights, or a high filing fee that makes access to the forum impracticable, from situations like those in the instant case where it may not be worth the expense to *prove* a statutory remedy. The Court also noted that antitrust statutes existed prior to the availability of class actions and that individual suits were considered adequate to assure "effective vindication" of rights prior to the adoption of class action procedures.

The Court then relied on a pair of cases, as it put it, to "bring[] home the point." Justice Scalia pointed out that in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court had no qualms in enforcing a class waiver in an arbitration agreement, even though the federal statute at issue, the Age Discrimination in Employment Act, permitted collective actions. And, he noted, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the Court held that requiring arbitration in a foreign country was compatible with a federal statute that prohibited any agreement "relieving" or "lessening" liability. In doing so, the Court rejected the argument that the "inconvenience and costs of proceeding abroad lessen[ed]" the defendant's liability. To the contrary, the Court found that, "[i]t would be unwieldy and unsupported by the terms or policy of the statute to require courts to proceed case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier."

Lastly, Justice Scalia wrote that *AT&T Mobility LLC v. Concepcion* resolved the matter because the Court specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the legal system."

Thus, the Court's opinion removes a judicially-created hurdle to the enforcement of class action waiver provisions and arbitration agreements according to their terms under the FAA. The opinion further calls into question the viability of the NLRB's position in *D.R. Horton* as well as other decisions, such as *Gentry v. Superior Court*, 42 Cal. 4th 443 (2007), which also erected barriers to the enforcement of class waivers. The Court's application of the principle from *CompuCredit*—that arbitration agreements should be enforced according to their terms even for claims under federal statutes unless the FAA's mandate has been overridden by a contrary congressional command—support the argument that *D.R. Horton* was incorrectly decided because nothing in the NLRA, or section 7 of the Act in particular, creates an exception to arbitration or overrides the FAA.

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