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Expert Analysis

Supreme Court Shuts Down Latest Challenge to Class-Waiver Provisions

Courts must rigorously enforce arbitration agreements according to their terms

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The U.S. Supreme Court has closed a potential loophole to the enforcement of class-action waiver provisions in arbitration agreements, a loophole that could have made enforcing these provisions much more costly and difficult.

The high court, in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (June 20, 2013), held that a class-action waiver provision in an arbitration agreement governed by the Federal Arbitration Act, 9 U.S.C. § 1, is enforceable, even if the plaintiff's costs of individually arbitrating the claim exceed the potential individual recovery.

In a 5-3 decision,[1] the Supreme Court reiterated that courts "must rigorously enforce" arbitration agreements according to their terms, including those 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 American Express case, the court next considered whether the class-action waiver precluded the plaintiffs from effectively vindicating their federal statutory rights because of the high cost of individually arbitrating their claims.

Writing for the majority, Justice Antonin Scalia rejected the 2nd U.S. Circuit Court of Appeals' analysis, saying parties' rights are not eliminated simply because it would be expensive to prove a claim. Holding otherwise would be contrary to the Federal Arbitration Act and Supreme Court precedent, he said.

BACKGROUND

The road to the high court's opinion has been a long one. The plaintiffs are merchants who accept American Express cards. They signed agreements requiring that all

disputes with Amex be resolved by arbitration and that "there shall be no right or authority for any claims to be arbitrated on a class basis."

Despite this waiver provision, the plaintiffs brought a class action alleging federal antitrust claims under the Sherman Act, 15 U.S.C. § 1, and Clayton Act, 15 U.S.C. § 12. Amex moved to compel individual arbitration of the plaintiffs' claims. The plaintiffs resisted, arguing that expert testimony to support their claims would cost anywhere from several hundred thousand dollars to more than $1 million, while the maximum recovery for any individual plaintiff would be $38,549.

The trial court granted Amex's motion and dismissed the Lawsuit. The 2nd Circuit reversed it, concluding the class-action waiver provision was unenforceable because the plaintiffs "would incur prohibitive costs if compelled to arbitrate under the class action waiver."[2]

In 2010 the Supreme Court vacated that opinion and remanded the case for further consideration in Light of its ruling in *Stolt-Nielsen S.A.* v. *Animo/feeds International Corp.,* 559 U.S. 662 (2010), which said a party cannot be compelled to submit to class arbitration in the absence of an agreement to do so.[3]

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However, the 2nd 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.[4] Then, in Light of the Supreme Court's ruling in *AT&T Mobility* v. *Concepcion,* 131 S. Ct. 1740 (2011), the 2nd Circuit *sua sponte* reconsidered its ruling. But it nevertheless refused to enforce the arbitration agreement, finding the practical effect of enforcing the waiver would preclude the plaintiffs from being able to vindicate their statutory rights under federal antitrust Laws.[5]

The 2nd Circuit concluded the cost of arbitrating each plaintiff's individual dispute would be cost-prohibitive and would deprive them of federal statutory protections.

THE SUPREME COURT'S RULING

Rejecting the 2nd Circuit's analysis, the Supreme Court distinguished situations where a *right to pursue* a *claim is eliminated* (e.g., a provision forbidding the assertion of certain statutory rights or "perhaps" a high filing fee that makes access to the forum impracticable) from situations, such as in the Amex case, where it may not be worth the expense to *pursue* a statutory remedy.

The court also noted that antitrust statutes existed before class actions were available, and individual suits were considered adequate to ensure effective vindication of rights before the adoption of class-action procedures.

The court then relied upon reasoning from two cases that "bring[] home the point," according to Justice Scalia.

He noted that in *Gilmer* v. *Interstate/Johnson Lone Corp.,* 500 U.S. 20 6 (1991), the court enforced a class-waiver provision in an arbitration agreement even though the Age Discrimination in Employment Act, 29 U.S.C. § 623, permitted collective actions.

Justice Scalia then compared the respondents' arguments to those made in *Vimor Seguros y Reoseguros S.A.* v. *M/V Sky Reefer,* 515 U.S. 528 (1995), in which the court said requiring arbitration in a foreign country was compatible with a federal statute prohibiting 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 defendants' Liability and found "[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." [6]

Leaving no room for doubt, Justice Scalia wrote that *Concepcion* had already resolved the issue and had specifically rejected the argument that class arbitration was necessary to prosecute claims "that might otherwise slip through the Legalsystem:[17]

THE DECISION'S IMPACT

The high court's opinion is perhaps most significant for removing what would have been a major hurdle in enforcing arbitration agreements. Had the court accepted the 2nd Circuit's analysis, it could have dramatically changed the Landscape of enforcing class-action waiver provisions in FAA-governed arbitration agreements, potentially Leading to mini-trials every time a party wanted to enforce a class-action waiver.

As Justice Scalia recognized, the 2nd Circuit's approach would have required a court to "determine the Legalrequirements 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."

This approach would be completely unworkable, inconsistent with the Federal Arbitration Act and Supreme Court precedent and, as the court stated, "destroy the prospect of speedy resolution that arbitration ... was meant to secure."

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As a result of the court's opinion, both employers and employees should expect that valid arbitration agreements willbe enforced as written and cases can be moved into arbitration more expeditiously.

The court's holding — that class-action waiver provisions in arbitration agreements cannot be invalidated because individualarbitration of the claims would be too costly — should apply equally to employment Law claims brought under federalstatutes, such as Title VII of the CivilRights Act of 1964, 42 U.S.C.§ 2000e, and the EqualPay Act, 29 U.S.C. § 206.

The court's opinion also appears to cut off attempts by state courts to extend the "effective vindication" rule to cases asserting state Law claims brought as class actions.[8]

The court's decision should resolve whether a class-action waiver provision is enforceable to prevent collective actions brought under the Fair Labor Standards Act, 29 U.S.C. § 201. Before the court's ruling, there was some debate as to whether this issue was resolved years ago by the decision in *Gilmer.* In a 2011 decision in the Amex case, the 2nd Circuit said *Gilmer* did not resolve whether collective action rights could be waived "because a collective and perhaps a class action remedy was, in fact, available in that case": *In reAm. Express Merchants' Litig.,* 634 F.3d 187, 196 (2d Cir. 2011). The 3rd Circuit, however, in *Johnson v. West Suburban Bank,* 225 F.3d 366, 378 (3d Cir. 2000), said *Gilmer* resolved whether collective action claims were waivable.

The Supreme Court's opinion appears to end any further debate on this subject. Justice Scalia cites *Gilmer* for the proposition that the court "had no qualms in enforcing a class waiver in an arbitration agreement," even though the law involved in *Gilmer,* the Age Discrimination in Employment Act, permits collective actions. Because the right to collective actions under the ADEA arises from the rights created by Section 216(b) of the Fair Labor Standards Act, there does not appear to be any room for argument that the Supreme Court views collective action rights any differently from rights arising under Federal Rule of Civil Procedure 23; both are waivable in an FAA-governed arbitration agreement.

The opinion further calls into question the viability of other theories erecting barriers to the enforcement of class-action waivers. For example, the National Labor Relations Board held in *O.R. Horton,* 357 NLRB No. 184 (2012), that class-action waivers violate the National Labor Relations Act right to engage in concerted activity. Also, the California Supreme Court ruled in *Gentry v. Superior Court,* 42 Cal. 4th 443 (2007), that a class-action waiver was unenforceable based on several factors, including a party's inability to vindicate statutory rights.

It is easy to foresee how the Supreme Court would react to those arguments, given its steadfast message over the years: Absent a clear pronouncement from Congress specifically excluding a certain claim from the reach of the Federal Arbitration Act, a valid arbitration agreement governed by the FAA must be enforced according to its terms.

In other words, once a finding is made that a valid agreement governed by the FAA exists, the agreement should be enforced as written.

As strongly as the court has rejected challenges to the enforcement of agreed-upon terms in valid FAA-governed arbitration agreements, parties seeking to avoid the enforcement of class-action waiver provisions or arbitration agreements may now focus their arguments on the validity of the agreements in the first instance. They can rely on more traditional contract defenses like fraud, duress or unconscionability, rather than arguing that the terms or provisions in the agreements are unenforceable.

However, courts must be wary of applying these defenses more harshly to arbitration contracts than to other contracts. The Supreme Court has signaled that it will be watching, pointing out in *Concepcion* that even generally applicable contract defenses cannot be applied in a fashion that disfavors arbitration, and noting that California courts "have been more likely to hold contracts to arbitrate unconscionable than other contracts."[9]

However, if parties ultimately are careful to use well-drafted agreements with reasonable terms, very few challenges to the enforcement of class-action waiver provisions specifically, or FAA-governed agreements generally, will be able to survive the Supreme Court's latest pronouncements.

NOTES

Justice Clarence Thomas joined the majority opinion "in full" and also issued a concurring opinion, relying upon the text and plain meaning of the Federal Arbitration Act. As he explained in *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740, Justice Thomas believes the FAA requires enforcement of an agreement to arbitrate unless a party successfully challenges the formation of the agreement. Because the plaintiffs in the Amex case did not provide any grounds for the

revocation of any contract as required under Section 2 of the FAA, he found the agreement must be enforced. Justice Sonia Sotomayor did not participate in the decision.

In reAm. Express Merchants' Litig., 554 F3d 300, 315-16 (2d Cir. 2009).

Am. Express Co. v. *Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

See In reAm. Express Merchants' Litig., 634 F.3d 187 (2d Cir. 2009).

See *In reAm. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012).

Id. at 536.

Concepcion 131 S. Ct. 1740.

See, e.g., Feeney v. Dell Inc., 465 Mass. 470 (Mass. June 12, 2013) (invalidating an arbitration agreement containing a class-action waiver provision because the plaintiffs demonstrated they could not pursue their state law claims individually, given the complexity of the case, costs to pursue it and small damages).

Concepcion 131 S. Ct. at 1747-48.

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