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class actions lawflash

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Supreme Court Again Enforces an Arbitration Agreement with a Class Action Waiver

In American Express*, Court rules that class action waivers may not be invalidated on the ground that individual arbitration is too expensive.*

On June 20, the U.S. Supreme Court issued its decision in *American Express Co. v. Italian Colors Restaurant*,[1] ruling that (i) the Federal Arbitration Act (FAA) requires the enforcement of an arbitration agreement in accordance with its terms, including a class action waiver, and (ii) the alleged fact that proving an individual claim in arbitration is too expensive or exceeds the value of the claim is not a basis to refuse to enforce the arbitration agreement. In so ruling, the Supreme Court put to rest any notion that an "effective vindication" argument can be used to invalidate class action waivers in arbitration agreements.

Background and Decision

The *American Express* case concerned agreements between American Express and various merchants that accepted American Express cards. The agreements contained an arbitration clause requiring all disputes between the parties to be resolved by arbitration and further provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."

A group of merchants subsequently brought a class action suit against American Express, alleging violations of federal antitrust laws related to charges by American Express. American Express moved to compel individual arbitration under the FAA. In opposing the motion, the merchants claimed that the cost of an expert analysis necessary to prove an antitrust violation would range from several hundred thousand to more than one million dollars, while the maximum recovery for any individual plaintiff would be $38,549 when trebled.

The U.S. District Court for the Southern District of New York granted American Express's motion to compel individual arbitration, but the U.S. Court of Appeals for the Second Circuit reversed and remanded for further proceedings, holding that the class action waiver was unenforceable because the merchants had shown they would incur prohibitive costs if forced to pursue their claims individually in arbitration.[2]

The Supreme Court granted certiorari and reversed the Second Circuit in a 5–3 decision (with Justice Sonia Sotomayor recused). The Court held that the FAA does not permit courts to invalidate arbitration agreements because the cost of proving an individual claim in arbitration may be too expensive or exceed the value of the claim. Writing for the majority, Justice Antonin Scalia rejected the argument that requiring individual arbitration contravened the policy behind the antitrust laws. The Court observed that Congress had "taken some measures to facilitate the litigation of antitrust claims—for example, it enacted a multiplied-damages remedy."[3] However, nothing in the antitrust laws guarantees plaintiffs "an affordable procedural path to the vindication of every claim," and the Court determined that the antitrust laws do not contain any "contrary congressional command" to

1. *Am. Express Co. v. Italian Colors Rest.*, No. 12-133, 2013 U.S. LEXIS 4700 (U.S. June 20, 2013), *available at* http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf.

2. *In re Am. Express Merchs.' Litig.*, 667 F.3d (2d Cir. 2012).

3. *Am. Express*, 2013 U.S. LEXIS 4700, at *8–9 (citing 15 U.S.C. § 15).

preclude a waiver of the class action procedure.[4]

Justice Scalia also observed that "congressional approval of Rule 23" does not "establish an entitlement to class proceedings for the vindication of statutory rights."[5] According to the majority, "such an entitlement . . . would be an 'abridg[ment]' or 'modif[ication]' of a 'substantive right' forbidden to the Rules."[6] Indeed, in so doing, Justice Scalia emphasized that class certification should be the exception rather than the rule for most cases.[7]

More broadly, the Court rejected the argument that the judicially created "effective vindication" exception to the enforcement of arbitration agreements applied to this case. The Court observed that the exception has "its origin in the desire to prevent 'prospective waiver of a party's **right to pursue** statutory remedies.'"[8] Justice Scalia wrote that the exception would "certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights" and "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[9] "But the fact that it is not worth the expense involved in **proving** a statutory remedy does not constitute the elimination of the **right to pursue** that remedy."[10]

Justice Clarence Thomas joined the majority's opinion in full, but he wrote a concurring opinion to argue that the result is required by the plain language of the FAA, which requires that an arbitration agreement be enforced unless a party successfully challenges the formation of the agreement. In dissent, Justice Elena Kagan, joined by Justices Ruth Bader Ginsburg and Stephen Breyer, argued that the majority's decision failed to follow the "effective-vindication rule" to "prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights."[11] Justice Kagan argued that the rule is not limited to "baldly exculpatory provisions" but also to other provisions drafted to avoid liability, and the majority provided no adequate explanation as to why the arbitration agreement at issue in the case did not meet that standard. Justice Kagan claimed that the arbitration agreement "bars not just class actions, but also all mechanisms . . . for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses" and accused the majority of styling the case as one solely about class waivers because it is "a Court bent on diminishing the usefulness of Rule 23[.]"[12]

Practical Implications and Conclusion

The Supreme Court's message in *American Express* is clear: Courts are required to enforce arbitration agreements in accordance with their terms, including class action waivers. Although some lower courts read the Supreme Court's 2011 ruling in *AT&T Mobility LLC v. Concepcion*[13] as leaving the viability of the "effective vindication" argument as an open question, *American Express* makes clear that this argument fails as a matter of law. While plaintiffs still may have other avenues to attack the enforceability of class action waivers—for example, under both *Concepcion* and *American Express*, they still can raise arguments about contract formation and procedural unconscionability—the *American Express* decision means that any efforts to assert an "effective vindication" argument should be rejected out of hand without the need for time-consuming and expensive discovery related to the cost of pursuing an individual claim.

Moreover, *American Express* extends a trend—along with *Concepcion*, *Comcast Corp. v. Behrend*,[14] and *Wal-*

4. *Id.* at *8–10.
5. *Id.* at *10.
6. *Id.* (quoting 28 U.S.C. § 2072 (b)) (alteration in original).
7. *Id.* ("The Rule imposes stringent requirements for certification that in practice exclude most claims.")
8. *Id.* at *12–13 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)) (emphasis in original).
9. *Id.* at *13.
10. *Id.* (emphasis in original).
11. *Id.* at *20–21 (Kagan, J., dissenting).
12. *Id.* at *37, 42.
13. 131 S. Ct. 1740 (2011).
14. No. 11-864 (U.S. Mar. 27, 2013), *available at* http://www.supremecourt.gov/opinions/12pdf/11-864_k537.pdf.

Mart Stores, Inc. v. Dukes[15]—in which the Supreme Court has made it easier for companies to (i) significantly reduce their risk of class action exposure via class action waivers and (ii) defeat class certification via the Court's stringent application of Rule 23's requirements. *American Express* gives companies considering alternative dispute programs with class action waivers more reason to believe that such programs will be enforced consistent with the parties' agreements.

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15. 131 S. Ct. 2541 (2011).

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