

Labor and Employment Alert

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Supreme Court Upholds American Express's Class Arbitration Waiver

The Supreme Court ruled for American Express today in a closely watched class action case. In *American Express v. Italian Colors Restaurant* (No. 12-133), the Court ruled on a 5-3 vote (with Justice Sotomayor recused and Justice Scalia writing for the Court) that American Express's arbitration agreement—which prevented any claims from being brought on a class basis—was enforceable under the Federal Arbitration Act (FAA), reversing a decision of the Second Circuit Court of Appeals.

American Express v. Italian Colors involves claims brought in federal court by a group of merchants who accept American Express cards. The merchants challenge their agreement with American Express, alleging it is an illegal “tying arrangement” in violation of federal antitrust laws. Because their agreement contains a clause that requires all disputes between the parties to be resolved by arbitration and also provides that there shall be no right for any claims to be arbitrated on a class action basis, American Express moved to compel individual arbitration under the FAA.

In resisting the motion to compel, the merchants introduced evidence from an expert who estimated that the cost of the expert analysis needed to prove their antitrust claims (analysis which the expert estimated would cost between several hundred thousand dollars and more than \$1 million) far exceeded the maximum individual recovery for each plaintiff (under \$40,000). Due to such costs, which would largely be unrecoverable should they prevail, the merchants argued that pursuing their claims in individual litigation was economically infeasible. The district court enforced the parties' agreement under the FAA and dismissed the action in favor of arbitration.

The Second Circuit (after considering this case in a series of opinions) reversed, holding that because the plaintiffs had shown that a class action was the “the only economically feasible means for plaintiffs enforcing their statutory rights,” the class action waiver was unenforceable. The Second Circuit applied a judicially created “effective vindication” of rights exception to the enforcement of an arbitration agreement.

The Supreme Court reversed and, in holding the agreement's class waiver enforceable, reaffirmed that the FAA “reflects the overarching principle that arbitration is a matter of contract” and “consistent with [the FAA's] text, courts must ‘rigorously enforce’ arbitration agreements according to their terms.”

The Supreme Court reasoned that there is no “contrary congressional command” in federal antitrust law that required the Court to reject the waiver of class arbitration or evinced any intention to prevent a waiver of class-action procedure.

As to the “effective vindication” of rights exception that the Second Circuit had applied, the Supreme Court ruled that, while that exception could apply in certain circumstances—such as where an arbitration agreement provision *forbade* the assertion of certain statutory rights or imposed administrative fees in arbitration that were so high as to make access to that forum impracticable—it did not apply in this case. The Court ruled that “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.” The Court reiterated that its 2011 decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, “all but resolved this case” when it rejected the argument that class arbitration was necessary to prosecute claims that might otherwise slip through the legal system.

The Supreme Court also expressed serious concerns that the tallying of the costs and burdens of a class versus an individual action at the beginning of a case (such as the Second Circuit had required) would impose a high burden on the federal courts as parties would be forced to litigate the legal requirements for their claims and put forth evidence as to the cost of pursuing them before there was any determination as to whether their arbitration agreement would be enforced.

According to the Court, “[s]uch a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.”

Justice Kagan, joined by Justices Ginsburg and Breyer dissented from the majority opinion and sharply criticized the opinion of the Court. The dissent concluded that the Second Circuit “got this case right” in refusing to enforce the agreement under the “effective vindication” of rights doctrine and criticized the Court for “undermin[ing]” the FAA as well as the federal antitrust laws. According to the dissent, the FAA conceived of arbitration as a method of “resolving disputes” but, under the majority opinion, “arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”

American Express v. Italian Colors greatly strengthens the enforceability of the contractual terms of arbitration. In addition to effectively foreclosing an argument by plaintiffs seeking to avoid an agreement to arbitrate claims individually where the cost of individual versus class actions is economically unfeasible, the Court affirms its mandate that the FAA requires courts to “rigorously enforce” arbitration agreements according to their terms.

As cases addressing similar issues are pending in state and federal courts throughout the United States, we expect to soon see decisions in many other jurisdictions applying the holding of *American Express v. Italian Colors* to similar arbitration agreement provisions, as well as considering its principles in the context of other challenges to arbitration.

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