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Supreme Court Upholds Class-Action Arbitration Waiver

On June 20, 2013, the Supreme Court held in a 5-3[1] decision that the Federal Arbitration Act ("FAA") does not permit courts to invalidate a contractual waiver of class-action arbitration on the ground that the plaintiff's cost of individually arbitrating a claim exceeds the potential recovery.[2]

The plaintiffs in *American Express Co. v. Italian Colors Restaurant* were merchants who entered into contracts with American Express allowing them to accept American Express cards. Claiming that American Express "used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards,"[3] the merchant-plaintiffs filed an anti-trust class-action against American Express. However, the merchant-plaintiffs' contract also contained a pre-dispute class-action waiver provision and required all disputes to be resolved by arbitration.[4] The federal district court granted American Express's motion to compel arbitration and dismissed the lawsuit.

The merchant-plaintiffs appealed, claiming that the cost of pursuing individual claims outweighed any potential recovery. The Second Circuit Court of Appeals reversed the district court, holding that the merchants "would incur prohibitive costs if compelled to arbitrate under the class-action waiver."[5] The Supreme Court ultimately granted Certiorari to consider the question: "whether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal law claim."

In the majority opinion, written by Justice Scalia, the Court reversed the Second Circuit Court of Appeals and held that the FAA does not permit courts to invalidate an arbitration agreements because they contain class-action waivers. The Court reasoned that the FAA mandates that arbitration is a matter of contract, and that courts will "rigorously enforce" arbitration agreements in accordance with their terms.[6]

The Court also declined to afford the plaintiffs protection under the "effective vindication" exception because their right to bring a statutory claim was not destroyed, despite it being cost prohibitive.[7] According to Justice Scalia, the prospect of a speedy resolution in arbitration cases would be destroyed if a court had to compare the cost of developing evidence and the potential damages to decide whether class arbitration is appropriate.[8]

In light of the Court's narrow holding, there still remain issues that a plaintiff could raise to attack a class-action arbitration waiver. A plaintiff seeking to contravene a class-action arbitration waiver can still challenge "the formation of the arbitration agreement, such as by proving fraud or duress."[9] Arbitration agreements that include language that serves as a "prospective

1 Justice Sotomayor took no part in this decision because she had been a member of the Second Circuit panel that decided the appeal in this case in 2009.
2 *Am. Express Co. v. Italian Colors Rest.*, No. 12-188, 570 U.S. ___, slip op. (June 20, 2013).
3 *Id.* at 2.
4 *Id.* at 1.
5 *Id.* at 2.
6 *Id.* at 8.
7 *Id.* at 6.
8 *Id.* at 9.
9 *Am. Express Co. v. Italian Colors Rest.*, No. 12-188, 570 U.S. ___, slip op. (Thomas, J., concurring).

waiver of a party's right to pursue statutory remedies"[10] are also subject to invalidation. The Court also recognized that exorbitant filing and administrative fees associated with arbitration may make access to the forum impracticable and may constitute a prospective waiver of a party's right to pursue statutory remedies.[11] Therefore, while the *American Express Co.* holding restrains lower courts from invalidating a class-action waiver due to the individual expense of *proving* a remedy, companies should exercise caution when drafting and/or revising pre-dispute arbitration provisions as it remains unsettled where the line is drawn between when the right to *pursue* a remedy is eliminated, and when it is simply cost prohibitive to *prove* a remedy.

The *American Express Co.* holding reflects the Roberts Court's consistent pro-industry approach to arbitration and class -action. In 2011, the Court held in *AT&T Mobility v. Concepcion*, that the FAA preempted state laws that prohibited class-action waivers in consumer agreements.[12] Earlier this year, in *Comcast Corp. v. Behrend*,[13] the Court affirmed the stringent application of Rule 23's class certification requirements established by *Wal-Mart v. Dukes*[14] in 2011. Together, these cases make it more difficult for individuals to obtain class certification and further insulate corporations from class-actions where such corporations include class-action waivers as part of their pre-dispute arbitration provisions. ■

10 *Am. Express Co. v. Italian Colors Rest.*, No. 12-188, 570 U.S. ___, slip op. at 6.
11 *Id.*
12 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).
13 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).
14 *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

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