American Express Co. v. Italian Colors Restaurant: Supreme Court Upholds Contractual Provision Waiving Class Arbitration

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I. The Basics

On June 20, 2013, the Supreme Court decided a case regarding waivers of class arbitration that could have potentially wide-ranging implications in antitrust and other cases. *See American Express Co. v. Italian Colors Rest.*, Slip Op. No. 12-133 (S. Ct. June 20, 2013) ("*AMEX III*").[1] The case involved the question of whether a contractual arbitration provision waiving the right to arbitrate on a class basis is enforceable under the Federal Arbitration Act ("FAA"), even when a plaintiff can demonstrate that the cost of prevailing on the claim in individual arbitration would likely exceed any potential recovery.

In recent years, the Supreme Court has decided several cases upholding the enforceability of arbitration agreements. Most recently, in *AT&T Mobility LLC v. Concepcion*, 563 U.S. __ (2011), the Supreme Court held that the FAA preempted a state law precluding enforcement of a class arbitration waiver. The validity of class arbitration waivers for claims alleging violation of federal statutes, such as the Sherman Act, remained an open question.

In a 5-3 decision,[2] the Supreme Court held that the FAA's strong mandate favoring arbitration was not overcome where arbitrating a federal antitrust claim on an individual basis would be prohibitively expensive. The Court reasoned that the antitrust laws evince no congressional command to bar class waivers. The Court also rejected the plaintiffs' argument that forcing them to arbitrate their claims individually would prevent "effective vindication" of the antitrust laws because the costs of prevailing in the arbitration proceeding would greatly exceed any potential recovery available in the arbitration. Because the waiver provision did not foreclose pursuit of the statutory remedy, but only affected the cost of proving the remedy, the arbitration proceeding still provided an avenue to vindicate federal rights.

The *AMEX III* decision will likely provide a basis for courts to dismiss many pending and future antitrust class actions. It also will likely bolster the enforceability of class arbitration waivers in class action lawsuits alleging violations of other federal laws. As a result, arbitration agreements with class waivers may likely become even more commonplace.

II. The Details

The case before the Court involved a dispute between American Express and merchants who entered into card acceptance agreements with American Express. Those agreements contain a provision requiring that all disputes be subject to arbitration on a bilateral (i.e., non-class) basis. The agreements also require the merchants to "honor all cards"—merchants must accept both American Express charge cards and American Express credit cards. The merchants (including the owner of a small restaurant,

[1] The earlier decisions of the U.S. Court of Appeals for the Second Circuit are reported at: *In re Am. Express Merchs. Litig.*, 667 F.3d 204 (2d Cir. 2012); *In re Am. Express Merchs. Litig.*, 634 F.3d 187 (2d Cir. 2011); *In re Am. Express Merchs. Litig.*, 554 F.3d 300 (2d Cir. 2009).

[2] Justice Sotomayor did not participate in the decision.

Italian Colors) sued American Express, alleging that the company used its monopoly power in charge cards to force merchants to accept American Express credit cards at inflated fee rates. They alleged that this constituted an unlawful tying arrangement in violation of Section 1 of the Sherman Act.

American Express moved to compel arbitration under the FAA. In opposing that motion, the merchants submitted a declaration from an economist estimating that preparing an expert report to prevail in arbitration would range in cost from several hundred thousand to over a million dollars. Because the most that any individual merchant could recover in arbitration was $38,549, the merchants argued that being compelled to arbitrate on an individual basis would effectively preclude them from vindicating their federal antitrust claims. The district court granted the motion to compel arbitration and dismissed the cases.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed and remanded, holding that because the merchants would incur "prohibitive costs" if forced to arbitrate individually, the class arbitration waiver was unenforceable. The Supreme Court vacated that judgment and remanded in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), which held that a party cannot be compelled to submit to class arbitration without agreeing to do so. On remand, the Second Circuit reached the same conclusion, reasoning that it had not compelled American Express to submit to class arbitration.

Following the Supreme Court's decision in *Concepcion*, the Second Circuit *sua sponte* granted a rehearing to address the impact of that decision. On rehearing, the Second Circuit reached the same result for the third time, concluding that *Concepcion* did not alter the court's prior decisions because *Concepcion* dealt only with whether state law is preempted by the FAA. The Supreme Court granted certiorari.

III. The Decision

The Supreme Court reversed the Second Circuit's judgment, holding that the class arbitration waiver is enforceable. The majority opinion was authored by Justice Scalia, who was joined by Chief Justice Roberts and Justices Kennedy, Thomas,[3] and Alito.

The Court began by emphasizing the FAA's strong policy favoring arbitration and reiterated that courts must rigorously enforce the terms of arbitration agreements, including terms relating to the eligible parties and rules governing the manner in which the arbitration will be conducted. That is true, the Supreme Court reasoned, even where claims allege violations of federal law unless a "contrary congressional command" requires the rejection of particular arbitration provisions.

In rejecting the merchants' argument that forcing them to arbitrate individually would contravene the policies of the antitrust laws, the Supreme Court stated that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." There is no indication, the Court reasoned, that Congress intended to preclude waivers of antitrust class actions. The antitrust laws make no mention of class actions. Nor does Federal Rule of Civil Procedure 23 entitle plaintiffs to the class action mechanism in antitrust cases.

The Court also rebuffed the merchants' argument that enforcing the class waiver would preclude "effective vindication" of their federal statutory rights because the low value of the potential individual

[3] Justice Thomas also authored a concurring opinion in which he stated that because the merchants had not provided grounds to revoke the underlying contract, the arbitration agreement must be enforced. Justice Thomas explained: "Italian Colors voluntarily entered into a contract containing a bilateral arbitration provision. It cannot now escape its obligation merely because the claim it wishes to bring might be economically infeasible."

recovery would make it unlikely or economically infeasible for any individual merchant to pursue arbitration. The Supreme Court reasoned that the "effective vindication" rule[4] could void arbitration provisions "forbidding the assertion of certain statutory rights" and also perhaps "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." But the Court held that the "effective vindication" rule does not disallow class waivers like this one where "the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." In fact, the Court stated that its decision in *Concepcion*, which "specifically rejected the argument that class arbitration was necessary to secure claims 'that might otherwise slip through the legal system,'" effectively resolves this case as well. In short, the "FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low value claims."

Justice Kagan dissented, joined by Justices Ginsburg and Breyer. The dissent's overriding criticism is that the majority has effectively allowed American Express to "insulat[e] itself from antitrust liability—even if it has in fact violated the law." The dissent also invoked its interpretation of the "effective vindication" rule set forth in *Mitsubishi*, under which courts should decline to enforce "not just . . . a contract clause explicitly barring a claim, but . . . others that operate to do so" as well.

IV. Implications

Arbitration provisions with class action waivers have come to be used widely, particularly in connection with the sale of products or services to consumers. Following *AMEX III*, defendants will have a much greater likelihood of successfully enforcing such provisions. Some commentators have suggested that the decision will have serious adverse implications for plaintiffs in antitrust and other class actions. In some cases, a decision granting a motion to compel arbitration may effectively dispose of the case where plaintiffs elect not to pursue their claims on an individual basis in arbitration. There is also the possibility, however, that plaintiffs will seek—or threaten to seek—to pursue multiple individual claims in arbitration.

In responding to motions to compel arbitration going forward, plaintiffs may well need to fall back upon "contract formation" arguments—concerning, for example, the process by which an arbitration provision was distributed to customers. In this regard, companies employing arbitration agreements will want to review their procedures carefully to ensure that they can properly invoke these agreements in subsequent litigation. In addition, some plaintiffs' lawyers and consumer advocates are urging that Congress or other federal agencies take steps to limit the use of arbitration agreements.

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[4] The majority viewed the "effective vindication" language from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614 (1985), as mere dictum.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Arthur J. Burke	**212 450 4352** **650 752 2005**	**arthur.burke@davispolk.com**
Joel M. Cohen	**212 450 4592**	**joel.cohen@davispolk.com**
Arthur F. Golden	**212 450 4388**	**arthur.golden@davispolk.com**
James W. Haldin	**212 450 4059**	**james.haldin@davispolk.com**
Ronan P. Harty	**212 450 4870**	**ronan.harty@davispolk.com**
Christopher B. Hockett	**650 752 2009**	**chris.hockett@davispolk.com**
Michael N. Sohn	**202 962 7145**	**michael.sohn@davispolk.com**
David B. Toscano	**212 450 4515**	**david.toscano@davispolk.com**

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