

U.S. Supreme Court Enforces Class Action Arbitration Waivers Despite Claim That Cost of Arbitrating Exceed Potential Recovery

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The Federal Arbitration Act (“FAA”) does not permit courts to invalidate a contractual waiver of class arbitration where the costs of pursuing an individual federal statutory claim in arbitration would exceed the potential recovery, the U.S. Supreme Court ruled on June 20, 2013, in *American Exp. Co. v. Italian Colors Restaurant*.

Several merchants were parties to commercial contracts with American Express that required the parties to resolve all disputes by arbitration, but did not permit class action arbitrations. Notwithstanding the arbitration agreement, the merchants filed a putative class action lawsuit alleging violations of federal antitrust laws. Opposing a motion to compel arbitration, the merchants submitted a declaration from an economist who estimated that the cost of providing an expert analysis to prove the antitrust violations would greatly exceed the maximum recovery for each individual plaintiff. The district court granted American Express’s motion to compel arbitration and dismissed the case, but the Second Circuit reversed and remanded, finding that class action waiver was unenforceable because the merchants had established that they would incur prohibitive costs if compelled to arbitrate.

The Court began its analysis by reiterating that “arbitration is a matter of contract” and that “courts must ‘rigorously enforce’ arbitration agreements according to their terms.” It then held that there was no congressional command that required the rejection of the class action waiver, concluding that “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”

The Court then determined that a “judge-made exception to the FAA,” which permits courts to invalidate agreements that prevent the “effective vindication” of a federal statutory right, did not apply. According to the Court, “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 further explained that its decision in *AT&T Mobility LLC v. Concepcion* “all but resolves this case,” because the Court there “specifically rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’”

Why is this case important for employers? Although American Express is an antitrust case, it continues the Supreme Court’s recent trend of enforcing class action waivers and its ruling provides employers with a potential tool to minimize the risk of class action lawsuits. Employers should continue to evaluate existing arbitration agreements to take full advantage of these rulings.

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