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ALERT

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Supreme Court Enforces Arbitration Provision Barring Merchants From Bringing Class Action Antitrust Claims Against American Express

The United States Supreme Court has issued a divided (5-3) decision in *American Express Co. v. Italian Colors Restaurant*, reaffirming the Court's long-standing inclination to enforce contractual arbitration agreements. The case has been before the Court three times, and in this round the Court once again found enforceable an arbitration agreement between the merchants and American Express that requires the merchants to arbitrate their disputes with the company individually and barred them from bringing class actions, effectively ending the class action antitrust suit brought by the merchants against the financial services company. While the merchants submitted evidence that enforcing those provisions would effectively preclude them from pursuing their antitrust claims, because of the prohibitive costs of demonstrating antitrust violations relative to the potential damages that might be awarded, the majority recognized no basis under the Federal Arbitration Act (FAA) for setting aside the arbitration agreement.

The action involved a set of merchants that accept American Express cards and brought a class action for violations of federal antitrust laws, asserting that the company used its monopoly power in the charge card market to force merchants to accept charge card at significantly higher swipe fees than the fees for competing credit cards. This tying arrangement, the merchants asserted, violated the Sherman Act, and the merchants sought treble damages under Section 4 of the Clayton Act. The merchants' agreement with American Express and its subsidiary contained a clause requiring all disputes to be resolved by arbitration. Additionally – and at the core of this dispute – the arbitration clause stated that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."

American Express moved to compel the merchants to engage in individual arbitration under the FAA. In opposing the motion, the merchants submitted an economist's declaration estimating that the cost of an expert analysis necessary to prove the antitrust claims would be "at least several hundred thousand dollars, and might exceed $1 million," while the maximum potential recovery for an individual plaintiff would be $12,850, or $38,550 when trebled. The district court granted the company's motion and dismissed the lawsuits. The Second Circuit reversed and remanded, holding that, because the merchants had established that "they would incur prohibitive costs if compelled to arbitrate under the class action waiver," the waiver was unenforceable and the arbitration could not proceed.

Writing for the majority, Justice Scalia rejected the merchants' argument that enforcing the agreement and requiring them to litigate their claims individually would contravene the policies of the antitrust laws. The merchants invoked the Court's "effective vindication" exception to the FAA, contending that the class arbitration agreement should be waived because requiring individual suits would effectively eliminate the merchants' right to pursue statutory remedies under the federal antitrust laws. Given the prohibitive cost of pursuing an antitrust action – with economic experts required to make an evidentiary showing – the merchants asserted that they lacked any economic incentive to pursue their antitrust claims individually in arbitration.

Justice Scalia dismissed these arguments, asserting 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." Justice Scalia relied on the Court's recent decision in *AT&T Mobility v. Concepcion*, in which the Court "specifically rejected the argument that

class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'" Rejecting the Second Circuit's "regime," Justice Scalia ended his opinion with a statement of the public policy behind the majority's strict approach. Justice Scalia condemned the notion of a "judicially created superstructure," making the enforcement of a bilateral arbitration clause contingent upon a court's assessment of costs and prospective damages. Imposing that level of inquiry would "destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular [were] meant to secure."

Justice Kagan fired back with a vehement dissent, joined by Justices Breyer and Ginsburg (Justice Sotomayor recused herself because she served on the Second Circuit panel mentioned below), asserting that the majority opinion ignored a central tenet of the Court's precedent: that "[a]n arbitration clause may not thwart federal law, irrespective of exactly how it does so." Considering the arbitration agreement in its entirety – rather than focusing simply on the class action prohibition – Justice Kagan concluded that the agreement prevented the merchants from pursuing the "effective vindication" of their statutory rights and therefore should not be enforced. Characterizing the majority's attitude toward the merchants' situation as "[t]oo darn bad," Justice Kagan asserted that the necessity for the "effective vindication" rule is "nowhere more evident than in the antitrust context. Without the rule, a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability." Providing an extensive discussion of the Court's "effective vindication" precedent, Justice Kagan emphasized that the inquiry should not be limited to the arbitration agreement's provision against class actions: "The effective-vindication rule asks whether an arbitration agreement *as a whole* precludes a claimant from enforcing federal statutory rights. No single provision is properly viewed in isolation, because an agreement can close off one avenue to pursue a claim while leaving others open."

The Supreme Court's decision in *American Express* effectively resolves the split among the circuit courts of appeal as to the viability of the "effective vindication" argument, clarifying that this doctrine applies only in very limited circumstances – in cases in which the arbitration agreement specifically forbids a federal statutory claim, for example. From a practical perspective, the impact of *American Express* is clear: Courts will enforce arbitration agreements in accordance with their terms, including class action waivers, and will reject arguments that the cost of pursuing a claim in arbitration without a class action would serve to thwart a claimaint's statutory right to relief.

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