

Expert Analysis

Consumer Class Actions Take Another Hit: Supreme Court Rules Class-Action Arbitration Waiver Covers Antitrust Claims

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In *American Express Co. v. Italian Colors Restaurant*, No. 12-133, 133 S. Ct. 2304 (June 20, 2013), the U.S. Supreme Court dealt another blow to consumer class actions. The high court ruled that federal courts cannot overturn a class-action arbitration waiver simply because it would cost plaintiffs more to arbitrate the claim than they could possibly recover.

In a 5-3 decision, the justices held that the Federal Arbitration Act, 9 U.S.C. § 1, bars courts from invalidating such waivers even where pursuing a federal antitrust claim on an individual basis would be prohibitively expensive.

The decision is a critical extension of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which enforced a class-action waiver in an arbitration clause in a standard customer agreement. The *Concepcion* decision was criticized as a “devastating blow to consumer rights” and a major setback for people who lack the resources to challenge big companies.¹ The other shoe has now dropped.

The Supreme Court’s decision in *American Express* removes the last significant defense to avoiding an individual arbitration clause when a consumer would prefer to pursue a class action. Counsel for plaintiff Italian Colors Restaurant, Deepak Gupta of Gupta Beck, said the Supreme Court’s most recent term “was a near blood-bath for class-action plaintiffs’ lawyers.”²

Justice Elena Kagan was only slightly less dramatic, observing: “To a hammer, everything looks like a nail. And to a court bent on diminishing the usefulness of [Federal Rule of Civil Procedure] 23, everything looks like a class action, ready to be dismantled.”

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AMEX V. ITALIAN COLORS RESTAURANT

The case began when a group of merchants sued American Express over the fees they had to pay each time a customer charged a purchase. Italian Colors Restaurant, an eatery in Oakland, Calif., sought to team up with other merchants to argue that American Express was violating antitrust laws.

According to the merchants, American Express used its monopoly power in the charge cards market to force merchants to accept its less popular credit cards. Charge card transactions must be paid in full each billing cycle. Credit cards allow customers to carry a balance based on making a required minimum payment. The merchants asserted that American Express credit cards force them to pay rates that are 30 percent higher than Visa's and MasterCard's.

American Express violated the Sherman Act, 15 U.S.C. § 1, by "tying" the less popular credit cards to the charge cards, according to the merchants.

American Express has a standard agreement with merchants requiring all disputes between the parties be resolved by arbitration. The agreement also provides that "[t]here shall be no right or authority for any claims to be arbitrated on a class action basis." So when the merchants filed their antitrust action in federal court, American Express moved to compel individual arbitration under the Federal Arbitration Act.

The merchants argued that the costs associated with pursuing individual antitrust cases far exceeded any potential recovery. They sought judicial approval to pursue the claim as a class action in federal court as the only means to effectively vindicate federal statutory rights.

THE 2ND CIRCUIT SIDES WITH THE MERCHANTS

The 2nd U.S. Circuit Court of Appeals sided with the merchants — three times — before the Supreme Court took the last word. And the dialogue between the Supreme Court and the 2nd Circuit tells us a lot about the Supreme Court's reasoning.

In *Amex I*, 554 F.3d 300 (2d Cir. 2009), the 2nd Circuit said the merchants could proceed in federal court. The appeals court relied on a "vindication of statutory rights" analysis, finding that enforcing the class-action waiver "would grant Amex de facto immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." For this proposition, the court relied on its determination that the plaintiffs had successfully shown they would incur prohibitive costs in individual actions.

The Supreme Court granted Amex's petition for *certiorari*, and vacated and remanded, instructing the 2nd Circuit to reconsider in light of the high court's then-recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010).

Stolt-Nielsen said class-action arbitration cannot be compelled where the arbitration clause makes no mention of class arbitration. The Supreme Court reasoned that class-action arbitration changes the nature of the proceedings so much that it cannot be presumed the parties consented to it when they agreed to arbitrate.

The 2nd Circuit in *Amex II*, 634 F.3d 187 (2d Cir. 2011), responded that *Stolt-Nielsen* did not affect its original decision. *Stolt-Nielsen* said parties cannot be forced into class

arbitration when they have not agreed to it. But according to the 2nd Circuit, that did not mean the presence of a class arbitration waiver made the clause per se enforceable. And the appeals court concluded Amex's clause was unenforceable because the prohibitive costs of individual action effectively denied the merchants the opportunity to vindicate their rights.

The Supreme Court responded again, this time through *Concepcion*.

Concepcion held that the Federal Arbitration Act preempts state contract law that conditions enforceability of arbitration clauses on the availability of certain procedures. At issue was California's common-law unconscionability doctrine, the *Discover Bank* rule.³ This doctrine invalidated many class-action waivers if the court found they were included in adhesion contracts involving claims of relatively small amounts. The Supreme Court concluded this doctrine was preempted by the FAA's liberal policy favoring arbitration, declaring "states cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

The 2nd Circuit requested the Amex parties to submit briefs on the impact of *Concepcion*: In *Amex III*, 667 F.3d 204 (2d Cir. 2012), the appeals court concluded (for the third time) that the class-action waiver in the arbitration clause was unenforceable.

The court distinguished *Concepcion* based on the nature of the underlying right: *Concepcion* dealt with FAA preemption of state law doctrine, but the Amex case was about vindication of a federal statutory right. So in *Amex III*, the 2nd Circuit reasoned *Concepcion* has no application where the class-action waiver precludes plaintiffs' ability to vindicate a federal statutory right.

The Supreme Court granted *certiorari* to consider "[w]hether 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."

EFFECTIVE VINDICATION OF THE RIGHT TO PURSUE A CLAIM

Since it has been more than four years since *Amex I*, it would be reasonable to assume there was a thicket of issues for the Supreme Court to untangle. Not really. The majority opinion is relatively simple and short.

In overturning the 2nd Circuit, Justice Antonin Scalia wrote for the majority that the individual arbitration requirement in the American Express clause was not a barrier to pursuing claims, but a limitation on the means of pursuit. "The antitrust laws do not guarantee an affordable procedural path to the vindication of every claim," Justice Scalia reasoned. He further observed that the antitrust laws make no mention of class actions: "The fact that it is not worth the expense involved" to prove a claim does not eliminate the right to pursue such a claim.

The "effective vindication" exception relied upon by the 2nd Circuit is not so elastic as to encompass the costs of proving a particular claim, the majority wrote. Instead, it is limited to the right to pursue statutory remedies. The Supreme Court explained the exception would "certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights."

The exception could also cover "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." But so long as the

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parties have a *right to pursue* their federal statutory rights in an arbitration forum, a class-action waiver will stand.

Writing for the three dissenters, Justice Kagan found this reasoning unpersuasive, bordering on the outrageous. She explained that the Amex arbitration clause “imposes a variety of procedural bars that would make pursuit of the antitrust claims a fool’s errand.”

“So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability — even if it has in fact violated the law,” she wrote. “The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”

She summarized the majority’s holding as “admirably flaunted rather than camouflaged: Too darn bad.”

LOOKING TO THE FUTURE

The *American Express v. Italian Colors* ruling is the “worst Supreme Court arbitration decision ever,”⁴ according to some consumer advocates, “The Supreme Court took another big step down the road of permitting companies to use arbitration agreements to entirely insulate themselves from class-action liability,” professor Brian Fitzpatrick of Vanderbilt Law School said. “The writing is on the wall now more clearly than ever: There is little future for consumer and employment class actions, and even shareholder class actions may not survive.”⁵

Are consumer class actions really over? No. But we can expect the following trends to accelerate.

Expect increase in class-action waivers in consumer and employment contracts.

Given *Concepcion* and *American Express*, we can anticipate the increased use of class-action waivers in a broad variety of business contracts. It is already happening. This development will likely strain administering organizations such as the American Arbitration Association, which are generally ill-equipped to handle identical claims in different jurisdictions. Interests of confidentiality pose further obstacles to ensuring consistent, predictable results. Expect to see redesigned due process protocols from alternative dispute resolution organizations for arbitration of consumer disputes.

Consumer-friendly provisions in arbitration agreements are not necessary.

AT&T designed its consumer arbitration procedures to ensure that individual customers would be motivated to bring their claims. This was accomplished through a series of cost-shifting provisions, minimum recovery for consumers and other measures. Although the 9th Circuit noted these provisions in its analysis in *Concepcion*, the Supreme Court paid little attention to them. *American Express* makes it clear these protections are of no consequence. While such protections may have salutary benefits in terms of customer relationships, it is irrelevant to the issue of enforceability under the FAA or application of the “effective vindication” exception.

Offer and acceptance will be the principal battleground.

In light of the Supreme Court’s narrowing of the “effective vindication” exception, we can expect to see increased attacks on issues relating to contract formation. In

both *Concepcion* and *American Express*, the court reaffirmed its position that the FAA is not implicated when a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. In the consumer arena, proving offer and acceptance is often complicated given the varied distribution channels: online, third-party distribution partners, brick-and-mortar stores. Expect to see increased scrutiny from courts that may be reluctant to send claims to private dispute resolutions systems where there is no clear manifestation of assent.

Expect increase in class actions for products that do not involve adhesion contracts.

In recent years, there has been an increase in class actions alleging misrepresentation and unfair business practices involving everyday products, such as toiletries, cosmetics and food. Expect that trend to continue. As claims over certain categories of products are directed to individual, private dispute resolution procedures, there likely will be a shift to those products that do not have standard terms of sale.

More regulations are likely from Consumer Financial Protection Bureau.

Recent efforts to restrict arbitration in the consumer context have stalled in Congress. But expect to see increased pressure on the Consumer Financial Protection Bureau to propose regulations that limit or restrict the use of arbitration in consumer financial services agreements.

NOTES

- ¹ Editorial, *Gutting Class Action*, N.Y. TIMES, May 12, 2011, at A26, available at <http://www.nytimes.com/2011/05/13/opinion/13fri.html>.
- ² Brent Kendall, *High Court Comes to Defense of Business*, WALL ST. J., June 24, 2013, at A1.
- ³ *Discover Bank v. Super. Ct.*, 36 Cal. 4th 148 (Cal. 2005).
- ⁴ Paul Bland, *The Worst Supreme Court Arbitration Decision Ever*, PUBLIC JUSTICE (June 20, 2013), <http://publicjustice.net/blog/worst-supreme-court-arbitration-decision-ever>,
- ⁵ Robert Barnes, *Supreme Court Sides with American Express on Arbitration*-WASH. POST, June 20, 2013, available at http://articles.washingtonpost.com/2013-06-20/politics/40090009_1_arbitration-agreements-federal-arbitration-act-individual-arbitration.



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