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American Express v. Italian Colors: US Supreme Court Expands Enforceability of Class Action Waivers in Arbitration

In *American Express Co. v. Italian Colors Restaurant,* Case No. 12-133, 570 U.S. __ (June 20, 2013), the United States Supreme Court once again held that the Federal Arbitration Act (FAA) does not permit courts to invalidate class action waivers in arbitration agreements on grounds that a plaintiff's cost of individually arbitrating his claims – this time a federal statutory claim – exceeds the potential recovery. As the Court recognized, its decision in *AT&T Mobility LLC v. Concepcion,* 563 U.S. __ (2011) "all but resolves this case." *American Express* follows on the heels of another arbitration decision issued earlier this month – *Oxford Health Plans LLC v. Sutter,* No. 12-135, 569 U.S. (June 10, 2013) – in which the Court refused to overrule an arbitrator's determination that an arbitration agreement permitted class arbitration.

These latest arbitration rulings from the Supreme Court are likely to have a significant impact on many types of litigation, placing a sharper focus on the applicability and impact of arbitration agreements in defining how disputes between parties will be resolved. They also emphasize the importance of carefully drafting arbitration agreements to appropriately reflect the nature of the arbitration proceeding anticipated by the parties.

Significant Points of the Court's Decision

American Express involved a putative class action of merchants who accept American Express credit cards. The merchants claimed that American Express violated the antitrust laws by using its monopoly power to force merchants to accept such cards at rates higher than the fees for competing credit cards. The agreements between these merchants and American Express contained arbitration agreements with class action waivers. The merchants argued that they would incur prohibitive costs if compelled to arbitrate individually and thus could not effectively vindicate their statutory rights under the federal antitrust laws.

- First, the Court held that the antitrust trust laws did not contain any "contrary congressional command" that would override the FAA's mandate to "rigorously enforce" arbitration agreements according to their terms. "[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim. . . . Nor does congressional approval of Rule 23 establish an entitlement to class proceedings for the vindication of statutory rights."
- As to the "judge-made exception" invoked by the merchants based on dictum in *Mitsubishi Motors Corp. v. Soler-Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), concerning the "effective vindication" of statutory rights, the Court held that this exception applied to the "'prospective waiver of a party's *right to pursue* statutory remedies. . . . But 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 also stated that *Concepcion* had previously rejected the argument that "class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'"
- Finally, the Court observed that requiring a court to look at the cost of individually arbitrating each claim and legal theory before determining the enforceability of an arbitration agreement would destroy the speedy resolution of claims that arbitration is meant to secure. "The FAA does not sanction such a judicially created superstructure."

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The Future of the Enforceability of Class Action Waivers

While the enforceability of class action waivers is now on solid ground, that could all change in the future for those businesses which are subject to regulation by the Consumer Financial Protection Bureau (CFPB). Under Dodd-Frank, the CFPB is currently studying arbitration and based on such study, it may seek to limit or restrict the use of arbitration agreements in consumer financial services transactions.

As parties in litigation contemplate invoking arbitration agreements, they still need to carefully consider the terms of these agreements and whether by doing so, they will merely move the class action proceeding from court to the arbitral tribunal, where the class action experience and procedures are much less developed – and where there is little or no judicial review. Similarly, in crafting arbitration terms to govern future or ongoing relationships, parties should carefully craft those provisions in light of these recent Supreme Court decisions to anticipate and guide the desired nature of the arbitration proceeding.

Squire Sanders' Class Action & Multidistrict Litigation Practice Contacts

Amy L. Brown
Leader, Class Actions & Multidistrict Litigation
Washington DC
T +1 202 626 6707
amy.brown@squiresanders.com

Mark J. Botti
Leader, Antitrust & Competition
Washington DC
T +1 202 626 6292
mark.botti@squiresanders.com

Pierre H. Bergeron
Leader, Appellate & US Supreme Court
Cincinnati, OH
T +1 513 361 1289
pierre.bergeron@squiresanders.com

Mark C. Dosker
San Francisco, CA
T +1 415 954 0210
mark.dosker@squiresanders.com