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"Don't Leave Home Without It"—Supreme Court Allows Class Action Waivers in Arbitration Agreements

By Loren D. Podwill, Daniel R. Bentson

In *American Express Co. v. Italian Colors Restaurant*, 570 U.S. __ (2013), the Supreme Court upheld the enforceability of an arbitration agreement that waived a party's ability to bring a class action lawsuit. An Italian restaurant, Italian Colors, entered into an agreement with American Express so that it could accept payment from customers using American Express credit cards. The agreement contained an arbitration clause and prohibited the arbitration of claims on a class action basis. Italian Colors later filed a class action lawsuit against American Express, alleging that it violated federal antitrust law by using its monopoly power in the credit card industry to charge merchants significantly higher fees than other credit card companies.

In response, American Express moved to enforce its agreement with Italian Colors and compel arbitration. Italian Colors opposed the motion, arguing that it would be prohibitively expensive for each merchant in the class to prove its claims individually. In support of Italian Colors' argument, the district court received expert testimony that the cost of obtaining the proof necessary to support the plaintiffs' claims could likely exceed $1 million and the maximum potential recovery for each plaintiff would be no more than $38,549. Despite this evidence, the district court upheld the enforceability of the American Express agreement and granted the motion.

On appeal, a divided Supreme Court agreed with the district court judge. A five-justice majority held that the arbitration agreement, including its class action waiver provision, was enforceable. According to the Court, the Federal Arbitration Act ("FAA") generally requires courts to enforce arbitration agreements. The Court then addressed two potential exceptions to this rule.

Under the first exception, courts will not enforce arbitration provisions if Congress says not to enforce them. But in this case, Congress had not done so. The Court determined that Congress did not intend to prohibit class action waivers by adopting antitrust legislation. Likewise, Congress's approval of a procedural rule authorizing class actions did not prohibit the enforcement of the arbitration agreement's class action waiver.

The Court also held that a second exception did not apply. The effective vindication exception is a judicially created rule, whereby courts will not enforce an arbitration agreement that, in effect, forces one party to waive its ability to later pursue its federal rights. "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" (emphasis in original). Because the class action waiver simply limited arbitration to the two contracting parties, the Court held the effective vindication exception was also inapplicable.

Based on *American Express*, prospective defendants will likely want to consider including these types of class action waivers in future arbitration agreements. Under the FAA and *American Express*, such waivers should generally be enforceable. But for some industries, including the insurance industry, *American Express* will have little impact. If a state law prohibits arbitration agreements in insurance policies, then, notwithstanding the FAA, an insurance policy's arbitration agreement, including a class action waiver, is likely unenforceable.