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SUPREME COURT STRIKES DOWN ANOTHER BAR TO ENFORCEMENT OF ARBITRATION PROVISIONS

The Supreme Court rejects the "vindication of rights" bar to enforcement of arbitration clauses with class action waivers.

On Thursday, June 20, the Supreme Court held that under the Federal Arbitration Act ("FAA"), arbitration clauses with class action waivers are enforceable even where the cost to plaintiffs of individually arbitrating federal statutory claims exceeds their likely recovery. *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (June 20, 2013). The Court explicitly rejected the "vindication of rights" rule that some courts had followed in refusing to enforce arbitration agreements with class action waivers where to do so would effectively preclude a claimant from vindicating federal statutory rights.

American Express is the latest in a line of cases in which the Supreme Court in recent years has eliminated nearly all judicially erected barriers to the enforcement of arbitration agreements with class action waivers, including the landmark *AT&T Mobility LLC v. Concepcion* opinion of 2011.

Background

Many standard consumer contracts include clauses that require the contracting parties to submit any disputes to binding arbitration. These arbitration clauses often include "class waivers," which prohibit customers from pursuing claims through class actions. Over time, courts developed rules that prevented the enforcement of many such agreements. Many courts disapproved of class waivers as effectively constituting exculpatory provisions in situations in which individual claims were likely to involve only small amounts, rendering it impractical to pursue arbitration on a non-class basis. This "unconscionability" principle, which was enforced as a matter of state law, was struck down by the Supreme Court in *AT&T Mobility v. Concepcion*, which held that the Federal Arbitration Act preempted any such state-law unconscionability rules. However, some courts had also held that arbitration agreements with class waivers should not be enforced where the costs of arbitrating claims on an individual basis exceeded the size of the potential recovery, potentially preventing plaintiffs from vindicating federal statutory rights such as those provided under the antitrust laws. This "vindication of rights" rule was the subject of the *American Express* decision.

American Express was a putative class action asserting antitrust claims against American Express in connection with certain charges imposed on merchants. The Second Circuit held that the arbitration clause in American Express's contract, which included a class action waiver, was unenforceable, because the plaintiffs could not effectively vindicate their rights under the federal antitrust laws without incurring expert and other costs that would be prohibitive for an individual claimant proceeding on a non-class basis. The Second Circuit reaffirmed this holding after the Supreme Court's decision in *AT&T Mobility.* The Supreme Court granted certiorari, and in a 5-3 decision (with Justice Sotomayor not participating), reversed.

The Supreme Court's Decision in *American Express v. Italian Colors Restaurant*

In an opinion written by Justice Scalia, the Supreme Court reaffirmed its holding in *AT&T Mobility* that the potentially high cost of arbitration – even if effectively prohibitive for an individual claimant – does not trump the FAA's mandate that courts "rigorously enforce" arbitration agreements on their terms as written. The Court flatly rejected the existence of a "vindication of federal rights" exception to this rule, observing that that there is no "congressional command" entitling plaintiffs to pursue their federal antitrust claims in a class action. The antitrust laws, the Court held, "do not guarantee an affordable procedural path to the vindication of every claim." Slip Op. at 4.

Addressing prior jurisprudence on the "vindication of rights" exception, the Court observed that this "judge-made" rule, which originated in dictum in an earlier case, was meant to apply only to provisions that waived a party's "*right to pursue* statutory remedies." *Id.* at 6 (emphasis in original). The Court declined to apply the exception where the barrier to pursuit of remedies arose, not from a prohibition in the contract, but from the practical expense involved, reasoning 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." *Id.* at 7 (emphasis in original).

With this issue of federal law resolved, the Court concluded that *AT&T Mobility* "all but resolves this case." *Id.* at 8. The Court reasoned that under *AT&T Mobility*, a practical need for a class action mechanism to make a claim cost-effective does not trump the strong federal policy favoring enforcement of arbitration agreements embodied in the FAA.

Throwing one small bone in the direction of parties that might seek to resist arbitration, the Court observed that some arbitration provisions could genuinely bar a party's "right to pursue" a statutory remedy, and that this might "perhaps" include "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 6. Exactly what "so high" means in this context is likely to be the subject of future litigation, but the low fees most major arbitral forums now charge consumers seem unlikely to qualify.

By rejecting the "vindication of rights" argument, the Court has now removed the last substantial barrier to the enforcement of arbitration agreements with class waivers. Although the plaintiff in *American Express* was a business rather than a consumer, neither the majority nor the dissent appeared to regard this circumstance as a basis for limiting the scope of the Court's decision.

Conclusion

American Express eliminates one of the last defenses to enforcement of arbitration provisions with class action waivers. For consumer-facing businesses with standardized contracts, the decision reaffirms the potential advantage of including arbitration clauses with class action waivers in those contracts. However, those agreements should not bar any statutory remedies outright, and businesses would do well to select or designate arbitral forums with low consumer fees. Going forward, we anticipate more litigation over the exact scope of *American Express*, but there can be little question that its impact will be broad.

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