PUBLICATION

Supreme Court's American Express Decision Impacts Businesses Seeking to Avoid Being Sued in a Class Action

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Businesses often use arbitration agreements as a tool to lessen the burden and cost of future litigation. On June 20, 2013, the Supreme Court released its opinion in *American Express Co. v. Italian Colors Restaurant*, which confirms that agreements between parties to resolve their disputes individually and in arbitration are enforceable. The Court held that an arbitration agreement was enforceable regardless of the fact that the cost of pursuing a successful claim individually (rather than as a class) could effectively kill a party's incentive to bring that claim. This ruling has far reaching implications and will likely lead to an increased use of arbitration agreements as a means to secure individualized treatment of potential future claims and avoid the cost of class litigation by consumers, merchants, employees and the like.

Background and Holding

Italian Colors Restaurant brought suit against American Express in a purported class action alleging that American Express violated antitrust law by forcing merchants to accept its debit cards as a condition of accepting its charge cards. American Express moved to compel arbitration on an individualized basis because the arbitration agreement in the parties' contract contained a class action waiver. The plaintiffs opposed the motion on the grounds that the expert evidence needed to prevail in the case would cost more than an individual plaintiff's likely average recovery. While the trial court granted the motion to compel individual arbitration, the Second Circuit reversed, reasoning that the plaintiffs' claims "cannot reasonably be pursued as individual actions, whether in federal court or in arbitration," because the cost of doing so would be prohibitive and therefore the class action waiver would "effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs." *In re Am. Express Merchs.' Litig*., 554 F.3d 300, 304 (2d Cir. 2009); *see also See In re Am. Express Merchs.' Litig.,* 634 F.3d 187 (2d Cir. 2011); *See In re Am. Express Merchs.' Litig.,* 667 F.3d 204 (2d Cir. 2012).

The Supreme Court reversed the Second Circuit, and upheld the arbitration agreement containing the class waiver. The opinion, written by Justice Scalia, starts from the basic tenet that arbitration is a matter of contract law. Consistent with contract interpretation principles, the Supreme Court has stated its support for "'rigorously enfor[cing]' arbitration agreements according to their terms." Slip Op. at 3 (citing *Dean Witter Reynolds Inc. v. Byrd,* 470 U. S. 213, 221 (1985)). In this case, the contract between the parties stated that there "shall be no right or authority for any Claims to be arbitrated on a class action basis." While the plaintiffs claimed that "requiring them to litigate their claims individually – *as they contracted to do* – would contravene policies of the antitrust laws," (Slip Op. at 4, emphasis added), the Court noted that the antitrust laws neither guarantee an affordable path to bringing a successful claim, nor evidence an intention to preclude a waiver of the use of class actions.

The Court also addressed what is known as the "effective vindication" exception to enforcing an arbitration agreement where for "public policy" reasons the Court may still invalidate the agreement if it operates "as a prospective waiver of a party's *right to pursue* statutory remedies." Slip Op. at 6 (emphasis in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U. S. 614, 628 (1985)). Here, the plaintiffs claimed that enforcing the class action waiver impairs the effective vindication of their rights under the antitrust laws because they have no economic incentive to pursue their claims individually in arbitration. However, the

Court found no prospective waiver of the right to pursue an antitrust claim: the plaintiffs clearly have the opportunity to bring their claims, just not in court and not joined together as a class. If the parties had prospectively waived any right to bring a claim, or the filing fees and administrative costs of arbitration were so high that the plaintiffs did not have access to the forum, then the "effective vindication" exception to enforcing the arbitration provision may apply. However, the Court distinguished the opportunity to *pursue* a claim from the opportunity to *successfully pursue* a claim: the fact that "it is not worth the expense involved in *proving* [the claim] does not constitute the elimination of the *right to pursue* that remedy." Slip Op. at 5, 7 (emphasis in original).

Implications on Business and Consumer Law

Consumer transactions often involve the signing of a standardized agreement with a company in order to engage the company's services or purchase its product. Already many of these agreements require arbitration. Like in *American Express*, arbitration agreements can now also be used to contract with consumers and other businesses to avoid costly class actions.

In addition to consumer transactions, arbitration agreements including class waivers are also likely to become prevalent in contracts for the purchase of products to avoid class action cases related to defective products. Another type of case likely to be impacted by this decision is securities class actions, where a group of investors who have allegedly been injured as a result of alleged corporate mismanagement or wrongdoing sue the company on behalf of the investors.

Implications on Employment Law

In recent years, Fair Labor Standards Act collective actions over employee wages and overtime have risen in popularity due primarily to the relative ease of getting class certification, and the availability of attorneys' fees and large penalties. Other popular class actions in the employment realm include claims for discrimination or harassment, safety violations and the like. Given the *American Express* holding, employers can craft arbitration agreements with employees that secure arbitration as the forum for the lawsuit, and also secure individualized treatment of any claim, rather than class or collective treatment. However, companies considering such an agreement with their employees should be careful to avoid the "effective vindication" exception to enforcing the agreement. In particular, the agreement should ensure that employees still have the right to *pursue* their claims by lessening any financial or other burdensome hurdles to bringing individual claims in arbitration.

For questions about these or any employment-related issue, please reach out to any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.