Supreme Court Upholds Class Action Waivers In Arbitration Agreements

Insights
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The U.S. Supreme Court held on June 20, 2013 that courts cannot invalidate arbitration agreements which waive class actions, unless there is an express congressional statement that class-action proceedings are so necessary to a federal claim as to preempt the Federal Arbitration Act (FAA). *American Express Co. v. Italian Colors Restaurant*.

The decision is significant to employers who enter into arbitration agreements with their employees because it reinforces the longstanding principle that the FAA requires an arbitration agreement to be enforced according to its terms. Moreover, it resolves an open question that had allowed employees to avoid the enforcement of arbitration clauses and instead pursue class and collective actions.

Background
American Express (Amex) issues general purpose and corporate charge cards and credit cards to consumers and businesses in the United States and internationally. Participating merchants enter into agreements with Amex to accept payments from customers who use their Amex cards. The standard agreement governing the relationship between Amex and participating merchants is a Card Acceptance Agreement.

Pursuant to the Card Acceptance Agreement, merchants are required to accept all Amex cards subject to the same "merchant discount fee," a percentage of the cardholder's purchase that the merchant pays to Amex. The Card Acceptance Agreement also contains a mandatory arbitration clause and a class action waiver.

In 2003, a group of merchants initiated a proposed antitrust class-action lawsuit against Amex. The merchants alleged that Amex unlawfully forced them to pay excessive merchant discount fees by requiring them to accept all Amex card products (including allegedly less profitable credit cards). The merchants claimed that this amounted to an illegal tying arrangement (an agreement by a party to sell one product, but only on the condition that the buyer also purchase a different, or "tied," product) in violation of the Sherman Antitrust Act.

Amex moved to compel arbitration pursuant to the terms of the Card Acceptance Agreement. A federal district court granted Amex's motion and dismissed the proposed class action. The merchants appealed, arguing that they could not reasonably pursue their claims as individual

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actions due to the prohibitive costs. In support of their argument, the merchants presented an affidavit from an economic expert who opined that the cost of an economic antitrust study would be so high as to make the pursuit of individual claims against Amex fiscally impractical, whether in arbitration or in court.

The U.S. Court of Appeals for the 2nd Circuit found that the merchants satisfied their burden of demonstrating the likelihood that they would incur prohibitive costs if they were compelled to arbitrate under a class action waiver. Thus, the 2nd Circuit held that the class-action waiver could not be enforced because to do so "would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs" (*Amex I*).

The Impact of Other Arbitration Decisions

The U.S. Supreme Court vacated *Amex I* and remanded for further consideration, based on its earlier decision in *Stolt-Nielsen S.A. v. AnimalFeeds.* In *Stolt-Nielsen*, the Court held that a party may not be compelled under the Federal Arbitration Act (FAA) to submit to class arbitration unless a contractual basis exists for concluding that the party agreed to do so. On remand, the 2nd Circuit concluded that *Stoltâ€'Nielsen* did not affect its original analysis and again held that the Amex class action waiver was unenforceable (*Amex II*). The court also noted that nothing in *Stolt-Nielsen* bars a court from using public policy to find contractual language void.

A few weeks after the 2nd Circuit decided *Amex II*, the Supreme Court decided *AT&T Mobility LLC v. Concepcion*. In *Concepcion*, the Supreme Court held that the FAA preempted the application of a California state-law rule pursuant to which most class-action waivers were deemed to be unconscionable. The Court reasoned that the state law rule was an impermissible obstacle to the execution of the objectives set forth by Congress in the FAA. The 2nd Circuit placed a hold on *Amex II* and, following supplemental briefing by the parties, issued a third opinion on February 1, 2012 (*Amex III*) analyzing the impact of *Concepcion* on the case.

In *Amex III*, the circuit court acknowledged that *Concepcion* "plainly" offered a path for analyzing whether a "state contract law is preempted by the FAA." But the court reasoned that its holding in *Amex II* was based squarely on "a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability." Reiterating that the Amex class-action waiver precluded the merchants from enforcing their federal statutory rights, the 2nd Circuit reaffirmed its holding that the arbitration provision was unenforceable.

The Supreme Court accepted the case to address whether the FAA allows courts to invalidate arbitration agreements containing class action waivers on the grounds that such waivers do not permit class arbitration of a federal claim.

The Supreme Court's Decision

In a 5-3 decision (Justice Sotomayer recused), the Supreme Court reversed the 2nd Circuit and held that the FAA prohibits courts from invalidating arbitration agreements that contain class-action

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waivers absent an express congressional statement that class-action proceedings are so indispensable to a federal claim as to override the FAA.

The Supreme Court once again reaffirmed the "overarching principle that arbitration is a matter of contract" and that the FAA requires courts to "'rigorously enforce' arbitration agreements according to their terms." The Court further held that this principle "holds true for claims that allege a violation of a federal statute," unless the FAA's mandate has been "'overridden by a contrary congressional command.'" The Court reasoned that Congress did not do so here. Specifically, the Court noted that Congress had taken certain other measures to facilitate the litigation of antitrust claims – for example, a multiplied damages remedy – but had not expressed any intent for claims arising under antitrust laws such as the Sherman Act to be exempt from the requirements of the FAA.

The Court also noted that congressional approval of Federal Rule of Civil Procedure 23 (governing class action procedures and requirements) does not establish an entitlement to class proceedings for the vindication of statutory rights. Furthermore, the Court declined to apply the judge-made exception to the FAA pursuant to which courts may, in some circumstances, invalidate agreements that prevent the "effective vindication" of a federal statutory right. The Court clarified that such an exception may be applied to prevent a prospective waiver of a party's "right to pursue" statutory remedies (such as an agreement forbidding the assertion of certain statutory rights or imposing filing fees attached to arbitration that are so high as to make access to the forum impracticable). But, the Court further explained, the existence of large expenses involved in "proving" a statutory remedy, such as the expert expenses claimed in this case, do not necessarily constitute the elimination of a "right to pursue" statutory remedies.

Justice Thomas concurred in the decision and reiterated that a party cannot escape its obligations under a valid contract merely because the claim it wishes to bring might be economically infeasible. Justice Kagan, with whom Justice Ginsburg and Justice Breyer joined, dissented from the decision, explaining that the "effective vindication" doctrine requires courts not to enforce arbitration agreements that "thwart" federal law and prevent parties from remedying the violation of a federal statutory right by making arbitration prohibitively expensive. The dissent further reasoned that the "effective vindication" rule requires an inquiry into whether an arbitration agreement "as a whole" precludes a claimant from enforcing federal statutory rights, not simply class action mechanisms.

The Significance To Employers

Although the line of Amex cases arose out of an arbitration provision contained in a commercial contract, the Supreme Court's decision has significant import in the employment arena. Employees frequently attempt to utilize class action mechanisms to pursue a variety of employment-related claims. Employers should consider utilizing arbitration agreements and including class- and collective-action waivers in such agreements. Likewise, if your company currently uses an arbitration agreement that does not address the use of class- or collective-action mechanisms, you should consider revising your agreement to include a waiver of such mechanisms.

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It is likely that employees will continue to claim that the costs of pursuing an individual claim in arbitration are so high as to prevent them from pursuing their federal rights. Thus, you should also consider including provisions that address the payment of any arbitration-specific costs.

For more information and to determine how this decision may apply to your organization, contact your regular Fisher Phillips attorney.

This Legal Alert presents an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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