American Express Co., et al. v. Italian Colors Restaurant, et al.: In a 5-3 Decision, the United States Supreme Court Upholds Contractual Waiver of Class Arbitration under the Federal Arbitration Act

On June 20, 2013, the United States Supreme Court, in a five-to-three decision, held that the Federal Arbitration Act (FAA), 9 U.S.C. §1 *et seq*., does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the cost of individually arbitrating a federal statutory claim exceeds the potential recovery. The Court's ruling in *American Express Co., et al. v. Italian Colors Rest., et al.*, 570 U.S. __ (2013) affirms that contracting parties may bargain away their ability to pursue a class action even if it would be economically infeasible for individuals to pursue arbitration on their own.

The respondents are a purported class of merchants who entered into agreements with American Express (and its wholly owned subsidiary) to accept American Express cards for payment. The merchants' agreement with American Express contained a clause that required all disputes between the parties relating to the agreement be resolved by arbitration. The agreement also provides that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." *In re American Express Merchants' Litig.*, 667 F.3d 204, 209 (2d Cir. 2012). Despite the contractual waiver in their agreements, the merchants filed a putative class action in federal court against American Express alleging, among other things, that American Express "used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit," in violation of the Sherman Act. Petitioners moved to compel individual arbitration under the FAA and, in response, the merchants argued that the contractual waiver of class actions was unenforceable because the cost of individually arbitrating the claim exceeded any potential recovery. The District Court granted the motion to compel arbitration under the FAA and dismissed the case.

The Court of Appeals for the Second Circuit reversed, finding the waiver unenforceable because respondents had established that "they would incur prohibitive costs if compelled to arbitrat[e] under the class action waiver." *In re American Express Merchants' Litig.*, 554 F.3d 300, 315-16 (2d Cir. 2009). The Supreme Court granted *certiorari* and remanded for further consideration in light of its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), which held that a party may not be compelled to submit to class arbitration absent an agreement to do so. *See American Express Co. v. Italian Colors Rest.*, 559 U.S. 1103 (2010). On remand, the Second Circuit again found the class action waiver unenforceable. The Second Circuit then *sua sponte* considered its decision in light of the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. __ (2011), which held that the FAA pre-empted a state law barring enforcement of a class arbitration waiver. The Second Circuit found *AT&T* inapplicable, and denied a rehearing *en banc*. The Supreme Court then granted *certiorari* again and reversed.

In an opinion delivered by Justice Scalia, and joined by Chief Justice Roberts and Justices Alito, Kennedy, and Thomas, the Supreme Court emphasized that arbitration is a "matter of contract" and that courts must "rigorously enforce" an arbitration agreement unless it has been "overridden by a contrary congressional command." In the instant case, the Court found no contrary congressional command requiring it to reject the waiver of class arbitration and rejected the respondents' argument that individual arbitration would contravene the policies of the antitrust laws. In so holding, the Court found that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim" and do not "evinc[e] an intention to preclude a waiver of class action procedure." The Court further found that congressional approval of Rule 23 of the Federal Rules of Civil Procedure, which established class actions, did not establish an entitlement to class proceedings because any such entitlement would be an "abridgment" of a "substantive right" forbidden by those same rules.

Respondents further argued that enforcing the waiver would bar "effective vindication" of their claims because they had no economic incentive to pursue their claims individually in arbitration. The Court rejected this argument, reasoning that the "effective vindication" exception, which was designed to prevent "prospective waiver of a party's right to *pursue* statutory remedies," was inapplicable because "the fact that it [was] not worth the expense in *proving* a statutory remedy d[id] not constitute the elimination of the *right to pursue* that remedy." In the instant case, the class action waiver merely limited the arbitration to the two contracting parties and did not, in any way, limit their ability to pursue those claims individually. In sum, the Supreme Court found that the individual suit, which "was considered adequate to assure 'effective vindication' of a federal right before adoption of class action procedures," did not suddenly become "ineffective vindication" merely because the class action procedures were adopted.