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June 2013

American Express Co. v. Italian Colors: *Supreme Court Broadens the Impact of Class Action Waivers in Pre-Dispute Arbitration Agreements*

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Extending the reach of its 2011 decision in *AT&T Mobility v. Concepcion*, the U.S. Supreme Court last week held in a 5-3 decision[1] that courts cannot refuse to enforce an arbitration agreement that precludes class-based arbitration because the cost of successfully arbitrating a federal statutory claim on an individual basis exceeds the potential recovery. In a decision authored by Justice Scalia, *American Express Co. v. Italian Colors Restaurant*, the Court explained, over a vigorous dissent, "that the [Federal Arbitration Act's] command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low value claims." (Slip Op. at 9 n. 5.) This decision will make it significantly easier for companies to avoid class litigation of all types through the use of pre-dispute arbitration agreements with class waivers.

The plaintiffs, merchants who accept American Express cards, agreed to resolve all disputes with American Express by arbitration. Their agreement contained a provision that stated "there shall be no right or authority for any Claims to be arbitrated on a class action basis." In opposing American Express motion to compel individual arbitration, the merchants submitted a declaration from an economist, demonstrating that the expert analysis needed to prove their claims "might exceed $1 million, while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled." (Slip Op. at 2.) As a result, the merchants argued, they would be effectively precluded from vindicating their rights under the antitrust laws if the class waiver were enforced. The U.S. District Court for the Southern District of New York compelled arbitration. The Second Circuit reversed, finding that the class action waiver was unenforceable, and last week the Supreme Court reversed.

It already is well-established that the FAA requires that "courts must 'rigorously enforce' arbitration agreements according to their terms . . . including terms that 'specify *with whom* [the parties] choose to arbitrate their disputes,' . . . and the rules under which that arbitration will be conducted." (Slip Op. at 3.) Quoting *CompuCredit Corp. v. Greenwood*, a pro-arbitration ruling from last term, the Court said that this holds true for federal statutory claims "unless the FAA's mandate has been 'overridden by a contrary congressional command." Observing that the antitrust laws were enacted "decades before the advent of Federal Rule of Civil Procedure 23," which provides the mechanism for class litigation, the Court found nothing in that legislation that constituted a congressional command

requiring the rejection of the class action waiver. (Slip Op. at 4.) And the Court explained that any interpretation of Rule 23 that would invalidate a private arbitration agreement would run afoul of the Rules Enabling Act, which precludes any interpretation of the Federal Rules of Civil Procedure that would abridge or modify a substantive right.

The Court also rejected an argument based upon what it described as "a judge-made exception to the FAA," that allows courts to invalidate agreements that "prevent the 'effective vindication' of a federal statutory right." (Slip Op. at 5.) On this point, the Court made clear that this is a very narrow exception that "certainly cover[s] a provision in an arbitration agreement forbidding the assertion of certain statutory rights" and "perhaps cover[s] filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." (Slip Op. at 6.) But it does not, the Court explained, cover circumstances in which litigants such as Italian Colors retain statutory rights but might find proving their claims too costly to be worth pursuing. To further illustrate the point, the decision characterizes *Gilmer v. Interstate/Johnson Lane Corp.* as a case in which the Supreme Court "had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." (Slip Op. at 8.)

Finally, the Court noted that acceptance of Italian Colors' argument would undermine the goal of speedy resolution that arbitration in general was meant to accomplish. It would require lower courts to determine the legal requirements for success on the merits, the evidence needed to support those claims, the cost of procuring such evidence, and the potential damages that could be recovered, before a decision could be reached with respect to arbitrability. "The FAA does not sanction such a judicially created superstructure," the Court concluded. (Slip Op. at 9.)

With the *Italian Colors* decision, the Supreme Court has made it significantly easier for companies to avoid class litigation through pre-dispute arbitration agreements with class waivers. To the extent the Court's 2011 decision in *AT&T Mobility LLC v. Concepcion* left any doubt about the impact of such waivers on federal statutory claims, the decision in *Italian Colors* made clear that the circumstances in which such waivers may be invalidated are extremely limited. Indeed, the reference to *Gilmer* will provide strong arguments to employers seeking to avoid collective actions under the Age Discrimination in Employment Act, the Equal Pay Act or the Fair Labor Standards Act through the use of pre-dispute arbitration agreements with class waivers.

In light of this and the continuing stream of other pro-arbitration decisions from the Supreme Court, companies that have or are considering pre-dispute arbitration agreements should take this opportunity to review with counsel all aspects of those agreements to ensure that they comport with the latest developments of state and U.S. federal law.

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[1] Justice Sotomayor served on the panel in the Second Circuit when she was a judge of that Court and, therefore, did not take part in the decision.