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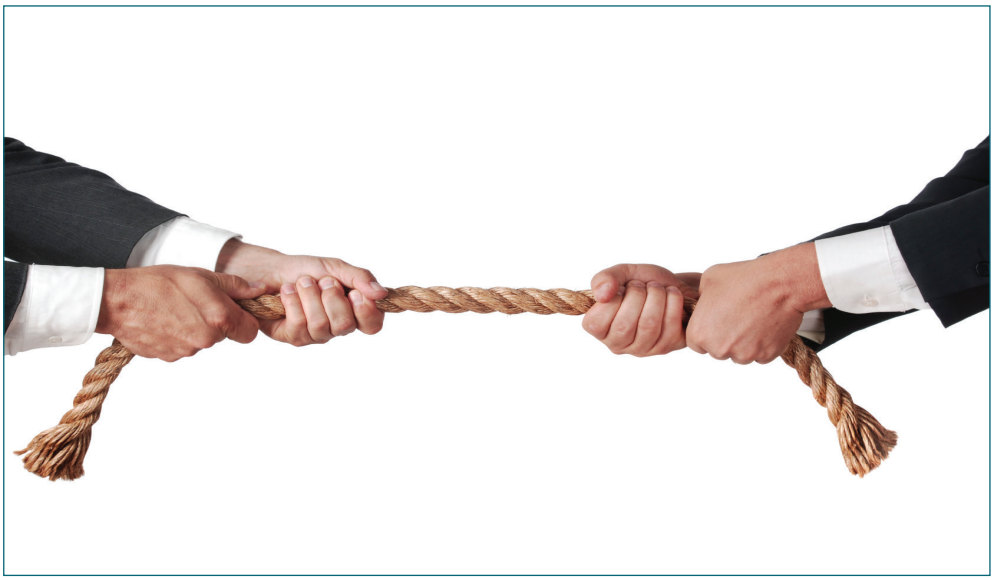

SUPREME COURT BUTTRESSES CLASS ACTION WAIVERS

By James Boddy, Jr.

In its recent decision in *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), the U.S. Supreme Court further buttressed the use of class-action waivers in arbitration agreements, finding such waivers enforceable even if they would effectively prevent vindication of a federal statutory right. The decision both reinforces prior Court rulings involving class actions and arbitration, and removes some uncertainty as to the bounds of those decisions.

Previously, in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), the Court held that a party may not be compelled to submit to class arbitration absent an agreement to do so. In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Court held a class-action waiver in an arbitration agreement enforceable, notwithstanding state law barring such waivers. In rejecting the argument that the class-action waiver amounted to an unlawful exculpatory clause because small claims of the kind involved in the case would not be worth pursuing, the Court in *AT&T Mobility* noted various provisions in the agreement

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making such claims worth pursuing, notwithstanding the waiver. This created some uncertainty as to whether such provisions were necessary to make class waivers enforceable. The *Am. Express* opinion now removes that uncertainty. Class-action waivers are enforceable even if they effectively insulate a party from claims for violation of federal law. While the Court noted some possible limits to its holding, it made clear that preclusion of class procedures is not one of those limits.

The *American Express* Decision

Though not an employment case, *Am. Express* eliminates a major source of potential challenge to class-action waivers in the employment context, and eases the drafting requirements for such waivers.

The case involved a class action brought by merchants against American Express Company. The merchants alleged that American Express used its monopoly power in one product market to force uncompetitive terms in another product market, in violation of federal antitrust laws. In the District Court, American Express moved to compel arbitration under the Federal Arbitration Act (FAA), pursuant to an arbitration agreement that provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." 133 S. Ct. at 2308. The agreement also disallowed any kind of joinder or consolidation of claims or parties, and required that any arbitration be confidential. 133 S. Ct. at 2316 (dissent). In opposing the motion to compel arbitration, the merchants argued that enforcement of the class waiver would effectively preclude vindication of their claims, since the maximum recovery a merchant could obtain on an individual basis would be $12,850 (or $38,549 if trebled under the Clayton Act), whereas the cost of expert analysis necessary to prove the antitrust claims would be "'at least several hundred thousand dollars, and might exceed $1 million.'" 133 S. Ct. at 2308 (quoting an expert declaration submitted by the merchants). The District Court granted the motion to compel arbitration, but the Second Circuit Court of Appeals reversed, holding that the merchants had established that "'they would incur prohibitive costs if compelled to arbitrate under the class action waiver,' [and that] the waiver was unenforceable and the arbitration could not proceed." 133 S. Ct. at 2308, *quoting In re American Express Merchant's Litigation*, 554 F. 3d 300, 315-316 (2d Cir. 2009).

The Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Stolt-Nielsen*, which, as noted above, held that a party cannot be compelled to submit to class arbitration absent an agreement to do so. The Court of Appeals stood by its reversal, stating that its prior ruling did not compel class arbitration. Subsequently it reconsidered its prior ruling *sua sponte* in light of the *AT&T Mobility* decision that the FAA preempted a state law barring enforcement of class waivers in arbitration. Finding *AT&T Mobility* inapplicable because it addressed pre-emption, the Court of Appeals again stood by its ruling. The Supreme Court granted certiorari to consider the question of "[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim." 133 S. Ct. at 2308.

The Supreme Court reversed, finding the class waiver enforceable. It reiterated from its prior decisions the "overarching principle" under the FAA that "arbitration is a matter of contract," 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 . . . ." Id. at 2309 (internal quotes and citations omitted). This "holds true," the Court observed, "unless the FAA's mandate has been 'overridden by a contrary congressional command.'" Id. at 2309 (citations omitted).

The Court found no such congressional command. The merchants argued that requiring them to litigate their claims individually would contravene the policies of the antitrust laws, effectively insulating American Express from liability. In effect, as characterized by the dissent, the majority's response was, "too bad." Id. at 2313. As the majority itself put it, "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Congress has taken some measures to facilitate the litigation of antitrust claims such as treble damages, the Court noted, but "Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice." Id. at 2309. Those "normal limits," in the majority's view, in effect mean non-class proceedings.

The Court also rejected the "effective vindication" rationale advanced by the merchants, where they argued that the courts, in attempting to harmonize the competing federal polices between the FAA and federal substantive law, have invalidated agreements that prevent the effective vindication of a federal statutory right. Such was the case in the present action, the merchants argued, since the class-action waiver effectively precluded them from bringing their claims at all, given the costs of proving the claims. Characterizing as "dicta" the references in its prior decisions to affirm an "effective vindication" exception to the FAA, the

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Court declined to apply it in the present case. The exception had its "origins," the Court observed, "in the desire to prevent prospective waiver of a party's right to pursue statutory remedies." Id. at 2310 (internal quotes and citations omitted). "That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." Id. But the exception (were it recognized) would not apply to the present case, the Court reasoned, because the class-action waiver did not limit the right to bring the federal claims; it merely made it "not worth the expense" to prove them. Id.

The majority noted that the Court's prior decision in *AT&T Mobility*, where it invalidated a state law "conditioning enforcement of arbitration on the availability of class procedures" "all but resolves this case." Id. at 2312. It described *AT&T Mobility* as establishing that "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." Id. at 2312, n.5.

The dissent characterized the majority's decision in stark terms: "The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse." Id. at 2313.

What This Means for Employment Arbitration

The *American Express* decision buttresses the use of class-action waivers in the employment context, and removes any lingering uncertainty from the *AT&T Mobility* decision as to the circumstances under which a waiver will be enforceable.

American Express makes clear that class-action waivers are enforceable, notwithstanding arguments that this makes small-value employment claims not worth pursuing and thus effectively insulates an employer from liability. Although the Court in *American Express Co*. characterizes its decision in *AT&T Mobility* as having so held (the FAA trumps any interest in vindicating small-value claims), there was some uncertainty following the prior decision itself as to whether it was that sweeping.

In responding to the dissent's view in *AT&T Mobility* that enforcing class-action waivers where small claims are involved could insulate an arbitration agreement's author from liability (131 S. Ct. at 1761), the majority in that case noted, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons[,]" but then addressed provisions of the agreement at issue that made "the claim here . . . most unlikely to go unresolved." 131 S. Ct. at 1753. These included provisions that AT&T would pay "a minimum of $7,500 and twice [the claimants'] attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer." Id. The majority elsewhere described other provisions that would make small claims most unlikely go unresolved: "AT&T must pay all costs for non-frivolous claims; . . . for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; . . . either party may bring a claim in small claims court in lieu of arbitration; and . . . [t]he agreement . . . denies AT&T any ability to seek reimbursement of its attorney's fees. . . ." Prior to *American Express*, it was not entirely clear whether such provisions were necessary in order to make class waivers enforceable, but afterward has become clear that they are not. An arbitration agreement with a class-action waiver need not provide alternative means for dealing with small claims.

While *American Express* sanctions class waivers without more, it does not provide carte-blanche authority for an arbitration agreement to contain more explicitly exculpatory devices. Thus, the Court noted that "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" could be unenforceable, as "perhaps" could "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." 133 S. Ct. at 2310-11.

Employers should therefore be careful to avoid provisions that deny claimants the right to pursue particular claims or that impose prohibitive fees. In addition, California decisions rendering arbitration agreements unenforceable if "overly harsh" or "one-sided" continue to suggest a cautious approach at least for the time being.[1]

Whether California limitations on arbitration agreements have continued validity in light of the Supreme Court's broad view of FAA preemption will be addressed in two cases presently pending before the California Supreme Court, both of which granted review to consider, among other questions, whether the doctrines involved were effectively overruled by the *AT&T Mobility* decision noted above. In the first case, *Iskanian v. CLS Transportation of Los Angeles*, 206 Cal. App. 4th 949 (2011), rev. granted, 147 Cal. Rptr. 3d 324 (2012), the California Supreme Court will consider whether *AT&T Mobility* overruled *Gentry v. Superior Ct.*, 42 Cal. 4th 443 (2007), where the California Supreme Court held that arbitration class-action waivers are unenforceable when they amount

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to a de facto waiver of state statutory rights due to the small claims involved. Whether *AT&T Mobility* itself overruled *Gentry* may not matter in light of *American Express*, since *American Express* would in any event appear to cast substantial doubt on the continued validity of *Gentry*. In the second case, *Sanchez v. Valencia Holding Co., LLC*, 201 Cal. App. 4th 74 (2011), *rev. granted*, 139 Cal. Rptr. 3d 2 (2012), the California Supreme Court will examine the continued validity, in light of *AT&T Mobility*, of the California unconscionability doctrine (contracts, including arbitration agreements, are deemed unenforceable if procedurally and substantively unconscionable). In *Sanchez*, a California Court of Appeal held a consumer arbitration agreement to be unconscionable and thus unenforceable where a car buyer was not given an opportunity to read a form agreement before signing it (procedural unconscionability), and the agreement contained multiple one-sided provisions favoring the car dealer (substantive unconscionability). Because the California doctrine applies to all contracts (not just to arbitration agreements) and because it concerns significant overreaching by the stronger party to an agreement, it seems unlikely that the California Supreme Court will find its doctrine preempted by the FAA under *AT&T Mobility* or *American Express*. Whether the U.S. Supreme Court would agree remains to be seen.

Conclusion

In the face of resistance from the lower courts, the U.S. Supreme Court has restated in the strongest terms to date the primacy of the Federal Arbitration Act. Notwithstanding inequality of bargaining strength, or even alleged exercise of monopoly power, the Act broadly requires the enforcement of arbitration agreements as written. Thus, class-action waivers must be enforced regardless of the consequences for the vindication of small-value claims, state or federal. While the Court has suggested some limits to the sweep of its decisions, it remains quite broad. For employers generally, drafting enforceable class waivers is now straightforward — no special provision for small claims is required. For California employers, the California Supreme Court's decisions in key pending cases are likely to further clarify the rules for drafting and enforcing California arbitration agreements.

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1 See "Titans Clash and Uncertainty Abounds – The Ongoing Turmoil Regarding Enforceability of Mandatory Employment Arbitration Agreements in California," 24 MoFo Employment Law Commentary No. 1 (January 2012); "Arbitration Agreements in Light of *114 Penn Plaza v. Pyett*," 21 MoFo Employment Law Commentary No. 4 (April 2009).