

## Do Expert Witness Fees Impact Access? High Court Considers



by [Maggie Tamburro](#)

We all know the cost of retaining an expert can be pricey. But does the price tag affect vindication of individual rights under a federal statute and impact court access?

Should the cost of expert witness fees play a role in determining whether class action waivers contained in arbitration agreements are enforceable?

A hotly-debated topic, complete with this expert question – which may be the proverbial elephant in the highest courtroom in the land – has come to a head in the case of [American Express Company v. Italian Colors Restaurant](#).

Freshly argued before all but one of the Justices last week (Justice Sotomayor recused herself), the case involves issues that have bounced back and forth between the Second Circuit and the Supreme Court in the wake of two other Supreme Court decisions ([AT&T Mobility LLC v. Concepcion](#) and [Stolt-Nielsen S.A. v. Animalfeeds Int’l Corp.](#)), and concerns the enforceability of class action waivers contained in arbitration agreements.

Specifically, the [question presented](#) before the Justices last week was the following:

Whether the Federal Arbitration Act permits courts, invoking the ‘federal substantive law of arbitrability,’ to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.”

### **The Second Circuit’s Ruling**

The case which landed the question and expert-related issue before the Supreme Court last week involved a Second Circuit ruling issued February 1, 2012, in a *sua sponte* decision on rehearing in light of the Supreme Court’s opinion in *Concepcion*.

The underlying case has a long and somewhat complex procedural history. The case has lingered in the court system – the original judgment from the S.D. of New York was issued in March of 2006 – and has already bounced back to the Second Circuit once on remand from the U.S. Supreme Court.

At the heart of the case are plaintiff business merchants, alleging that certain contract provisions in connection with accepting American Express charge cards essentially amounted to “tying arrangements” in violation of the Sherman Act. American Express

sought to compel arbitration under the terms of an arbitration agreement – thereby enforcing a mandatory class action waiver clause which would prevent parties from pursuing anything other than individual actions at arbitration.

As to American Express' motion to compel arbitration, the Second Circuit panel issued a resounding “No” in this case. The Second Circuit ruled that if the plaintiffs were unable to pursue their allegations as a class, it would be “financially impossible for the plaintiffs to seek to vindicate their federal statutory rights.” Finding that the effect of enforcement of the provision would “strip the plaintiffs of rights accorded them by statute,” the Second Circuit concluded the class action waiver clause contained in the arbitration agreement was unenforceable.

### **The Expert Piece**

One of the key pieces of evidence at the district court level that the Second Circuit panel relied on was – you guessed it – an expert who opined on the potential impact expert fees would have in precluding a plaintiff from arbitrating a dispute individually.

The plaintiffs' expert presented an opinion “concerning the likely costs and complexity of an expert economic study concerning the liability and damages,” and whether it would be “economically rational” for an individual plaintiff merchant in this instance to pursue a damage claim “given likely out-of-pocket costs of the arbitration or litigation proceeding.”

In short, the plaintiffs' expert concluded, “In my opinion as a professional economist ... it would not be worthwhile for an individual plaintiff ... to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed \$1 million.”

Based largely on this expert's evidence, the Second Circuit found plaintiffs were able to establish that, as a “matter of law,” the cost of individually arbitrating their claims would be “prohibitive” – proving too expensive when compared with the amount of damages that an individual plaintiff merchant might be able to recover in this instance.

### **A Rational Rationale?**

Should economic considerations, such as the cost of expert witness fees, be a valid rationale for finding a class action waiver unenforceable? Will the Second Circuit's ruling stand up to the scrutiny of the Justices? Or will they steer away from this touchy expert witness issue entirely?

One thing is clear – issues involving class action waivers and arbitration agreements have reached the boiling point, and many in the legal community are paying close attention, monitoring cases dealing with a variety of related issues such as “friendly” arbitration provisions in which the consumer is encouraged to bargain for and agree to arbitration

provisions which favor him or her. Time and the Justices' forthcoming opinion (which likely won't be issued for a few months) will reveal if the issues presented in this case, at least, will be decided once and for all.

Do you think a plaintiff's individual litigation costs, including expert witness fees, should be a factor in determining whether class action waivers are enforceable?

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