Client Alert

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American Express Co. v. Italian Colors Restaurant: The Supreme Court Reaffirms Its Commitment to Enforcing Arbitration Agreements

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Last week's Supreme Court decision in *American Express Co. v. Italian Colors Restaurant* builds on a recent line of pro-arbitration rulings – including *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp.*[1] and *AT&T Mobility LLC v. Concepcion*[2] – and reaffirms the Court's commitment to enforcing arbitration agreements. In a 5-3 opinion by Justice Scalia, the Court held in *Italian Colors* that a contractual provision mandating individual arbitration by means of a class action waiver is enforceable under the Federal Arbitration Act (FAA), even if the costs of individual arbitration outweigh the potential recovery. Plaintiffs had argued that the costs of individual arbitration were so high that they would not be able to "effectively vindicate" their federal statutory rights under the antitrust laws. But the Supreme Court shut the door on plaintiffs' repeated efforts to push for the application of this "effective vindication" exception that had been crafted by lower courts (including those in the Second Circuit). That exception had its origins in dicta and had never been applied by the Supreme Court.

In sum, it just got even harder to invalidate mandatory arbitration provisions. The Supreme Court's decision is an "*and we really mean it*" message to the lower courts when it comes to mandatory arbitration provisions.

THE *ITALIAN COLORS* LITIGATION AND THE SECOND CIRCUIT'S REPEATED ATTEMPTS TO INVALIDATE THE CLASS ACTION WAIVER

In *In re American Express Merchants' Litigation*, several merchants brought a class-action lawsuit against American Express for alleged antitrust violations under the Sherman Act. Each merchant had signed a contract—the "merchant's agreement"—in order to accept American Express credit cards, and those contracts required individual arbitration of disputes. The district court granted American Express's motion to dismiss in favor of arbitration, but the Second Circuit reversed, holding that the class action waiver in the merchant agreement was unenforceable under the FAA because it was cost-prohibitive to individually arbitrate an antitrust action, which meant that the plaintiffs could not "effectively vindicate" their federal statutory rights under the antitrust laws.

American Express filed a petition for a writ of certiorari, and the Supreme Court vacated and remanded the case for reconsideration in light of its decision in *Stolt-Nielsen*, which found that parties cannot be forced to engage in class arbitration absent a contractual agreement to do so. On remand, the Second Circuit held that *Stolt-Neilsen* did not impact its original analysis and again reversed the district court's decision. American Express filed another petition for a writ of certiorari.

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[1] 130 S. Ct. 1758 (2010).

[2] 131 S. Ct. 1740 (2011).

While American Express's second petition for certiorari was pending, the Supreme Court issued its opinion in *Concepcion* on April 27, 2011. The Second Circuit *sua sponte* directed the parties to file letter briefs addressing the impact of *Concepcion*. On February 1, 2012, a unanimous panel for the Second Circuit Court of Appeals held that even in light of *Concepcion*, the class action waiver provision in the merchant agreement was unenforceable because "it precludes plaintiffs from enforcing their statutory [antitrust] rights."[3] The Second Circuit subsequently denied American Express's petition for rehearing en banc, with five judges dissenting.[4] For the third time (the opinion was colloquially referred to as "*Amex III*"), American Express petitioned for certiorari. The Supreme Court granted certiorari on November 9, 2012.

THE SUPREME COURT'S DECISION: REAFFIRMING THAT MANDATORY ARBITRATION PROVISIONS ARE ENFORCEABLE AND THAT CLASS-WIDE ARBITRATION IS NOT NECESSARY TO "EFFECTIVELY" PURSUE CLAIMS

In the *Italian Colors* decision, the Supreme Court rejected the plaintiffs'—and the Second Circuit's—arguments that because individually arbitrating antitrust claims would be, it was alleged by plaintiffs, too expensive and not economically rational, the class action waiver thwarted the public policy goals of the antitrust laws and precluded the "effective vindication" of plaintiffs' federal statutory rights. This line of reasoning led plaintiffs to conclude that the parties' arbitration agreement was therefore unenforceable.

The Court found that nothing in the antitrust laws evidenced Congress's intent to override the FAA's policy in favor of arbitration, reasoning that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Further, the Court reiterated that Federal Rule of Civil Procedure 23's class action mechanisms are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." Here, by agreeing to individual arbitration, American Express and the merchants simply "agreed to arbitrate pursuant to that 'usual rule.'" And the Court determined that the enactment of Federal Rule of Civil Procedure 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights."

Further, although the Court acknowledged that there may be an "effective vindication" exception to the normal rule in favor of arbitration, the Court held that that exception is limited to situations in which an arbitration provision deprives a litigant of the right to bring a claim. Significantly, the Court held that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." As an example, Justice Scalia hypothesized that "a provision in an arbitration agreement forbidding the assertion of certain statutory rights" would "certainly" be unenforceable because it strips a party of its right to pursue a cause of action altogether. Justice Scalia also suggested that the effective vindication exception "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable," citing the Court's prior decision in *Green Tree Financial Corp.-Ala. v. Randolph*.[5] By contrast, the class action waiver provision in American Express's merchant agreement does not prevent merchants from pursuing their rights under the antitrust laws, it "merely limits arbitration [of those claims] to the two contracting parties."

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3 *In re Am. Exp. Merchants' Litig.*, 667 F.3d 204, 218 (2d Cir. 2012).

4 *In re Am. Exp. Merchants' Litig.*, 681 F. 3d 139 (2d Cir. 2012).

5 531 U. S. 79, 90 (2000) (stating that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights" but still holding that the arbitration agreement at issue was enforceable).

At heart, however, *Concepcion* doomed the plaintiffs' claims in *Italian Colors*. Justice Scalia explained that in *Concepcion*, "[w]e specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system.'" Thus, plaintiffs' argument that class-wide arbitration was necessary to vindicate their federal statutory rights fell flat.

Finally, the Court warned that "[t]he regime established by the Court of Appeals' decision would require . . . that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim by claim and theory by theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success." According to the Court, such a burdensome regime is contrary to the FAA, which "does not sanction such a judicially created superstructure."

CONCLUSION

The *Italian Colors* decision is not a "game-changer" like *Concepcion*. But the decision evidences the Supreme Court's continuing commitment to upholding the validity of mandatory arbitration provisions and limiting exceptions to the FAA's policy presumption in favor of arbitration. The Court's opinion sanctions the use of agreements that mandate individual arbitration, despite the fact that the costs of individually litigating the claims in arbitration may outweigh any potential recovery. Companies that employ such provisions no longer have to worry that certain types of high-stake claims brought under federal statutes – such as antitrust actions – can be carved out of an arbitration provision's class action waiver so long as the arbitration agreement does not impose burdens like high filing and administrative fees, outright bars on raising certain issues, or other procedural burdens that are deemed too onerous.

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