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ALERT

UNITED STATES SUPREME COURT ENFORCES CLASS ARBITRATION WAIVER IN A COMMERCIAL AGREEMENT

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Last week, in *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (June 20, 2013), the United States Supreme Court held that an arbitration provision in a commercial agreement prohibiting the parties from arbitrating matters on a class-wide basis was enforceable under the Federal Arbitration Act (FAA) even if the cost of arbitrating individual claims was economically prohibitive. *American Express* is the latest in a series of Supreme Court decisions holding that the terms of an arbitration agreement must be strictly enforced. The Court's opinion is likely to embolden employers who seek to avoid class and collective actions by requiring employees to arbitrate employment disputes.

Background

Since 1999, American Express has had a mandatory provision in its contracts with merchants that requires disputes between the merchant and American Express to be submitted to arbitration. The arbitration provision at issue states that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." Believing that American Express was using its market power to increase rates that it charged merchants, a group of businesses filed a class action complaint in federal court in New York claiming that American Express was violating federal antitrust laws.

American Express moved to compel arbitration of the dispute pursuant to the merchant agreement it had with each of the plaintiff-merchants. The merchants opposed American Express' motion by arguing that the arbitration agreement prohibited class-wide arbitration and that the cost to pursue claims on an individual basis, as compared to the limited amount of potential damages that are available to any individual merchant, was so high that it was not feasible to pursue the claims. Specifically, the plaintiffs submitted a declaration from an economist who estimated that in order to prove the antitrust claims, plaintiffs would have to have an expert conduct an analysis, which would be at least several hundred thousand dollars; the maximum that each individual plaintiff could recover was under $40,000. The district court granted American Express' motion and compelled arbitration. Plaintiffs appealed to the Second Circuit.

The Second Circuit reversed the district court holding that the prohibition on class arbitration in the agreement was unenforceable because plaintiffs "would incur prohibitive costs if compelled to arbitrate under the class action waiver." Indeed the Second Circuit noted that if it were to enforce the class action waiver it "would grant [American Express] *de facto* immunity from antitrust liability by removing the plaintiffs' only reasonably feasible means of recovery." American Express then petitioned the Supreme Court to hear the case.

After a series of procedural moves in which the Supreme Court asked the Second Circuit to review its decision in light of intervening Supreme Court decisions concerning arbitration, the Supreme Court granted American Express' petition. The Supreme Court agreed to hear and decide the issue of "whether the [FAA] permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim."

The Supreme Court's Decision

Writing for a 5-3 majority (Justice Sotomayor had recused herself), Justice Scalia rejected the assertion that requiring the merchants to arbitrate their claims individually would "contravene the policies of the antitrust laws." Justice Scalia noted that absent "congressional command" to the contrary, the FAA requires that courts enforce the terms of an arbitration agreement as they have been written.

Next, the Court considered the merchants' claim that the class action waiver prevents them from vindicating their rights because they would have no economic incentive to do so due to the high

litigation costs. The Court rejected this argument as well holding that the litigation costs do not prevent the merchants from pursuing their claims; rather the class action waiver only inhibits the merchants' ability to prove a statutory remedy. As Justice Scalia wrote "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* the remedy" (emphasis in original). According to the Court, this difference was critical. If American Express' arbitration agreement had prevented the merchants from asserting certain statutory rights, the agreement might not be enforceable. However, the arbitration agreement did no such thing. It did not prohibit or prevent the merchants from bringing any claims that they had against American Express; rather, it only required the parties to bring those claims individually and in arbitration. Accordingly, the Court reversed the Second Circuit decision.

Practical Implications

American Express is a strong statement by the Court in favor of mandatory arbitration provisions and class action waivers in the business sector. Although *American Express* is not an employment case, it should still have profound implications for employers as well. The Court's decision clearly states that arbitration agreements that prohibit class-wide arbitration are enforceable even if the cost of pursing individual claims is so high that it would not be economically feasible for an individual to do so. Under *American Express* and earlier Supreme Court decisions such as *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*., 559 U.S. 662 (2010) and *AT&T Mobility LLC v. Concepcion*, 563 U.S. __ (2011), employers should be confident that the Court will likely enforce agreements that require employees (and former employees) to arbitrate discrimination and state wage and hour claims on an individual basis. However, it should be noted that currently before the California Supreme Court is a case addressing whether such agreements are valid under California law, which has historically been hostile to employment-based arbitration agreements notwithstanding pronouncements made by the United States Supreme Court in *Stolt-Nielsen*, *AT&T Mobility*, and other cases.

The impact on claims brought by aggrieved individuals under statutes such as the Fair Labor Standards Act (FLSA) is less certain, however. The right to pursue claims on a class-wide basis under most statutes stems from Rule 23 of the Federal Rules of Civil Procedure or its analogous state law provision. However, under the FLSA, the right to pursue claims on a collective basis comes directly from the statute itself. As such, if an arbitration agreement requires individuals to pursue claims on an individual basis (thus prohibiting class-wide or collective arbitrations) a few courts may find that by preventing employees from arbitrating their claims on a collective basis the agreement prevents individuals from vindicating their substantive statutory rights under the FLSA. While virtually all courts that have addressed this argument have rejected it and compelled arbitration on an individual basis, it will likely require another Supreme Court decision before employers will know with certainty whether all state and federal courts will enforce arbitration agreements that prohibit collective actions.

Finally, the impact of *American Express* on the National Labor Relations Board (NLRB) decision in *D.R. Horton*, 357 NLRB No. 184 (2012) is also less certain. In *D.R. Horton*, the NLRB held that an arbitration agreement prohibiting class actions violated the National Labor Relations Act (the Act) because it prevented employees from engaging in concerted activity for their mutual aid and protection. The case is currently on appeal to the Fifth Circuit and most practitioners believe that the Fifth Circuit will overrule the NLRB and hold that arbitration agreements containing class action waivers do not violate the Act. Indeed, after *American Express*, the vitality of *D.R. Horton* is certainly questionable as there is nothing in the Act that creates an exception for arbitration agreements or supersedes the FAA. However, the NLRB has been known to disregard decisions of Circuit Courts. Therefore, as with the FLSA, until the Supreme Court directly addresses the issue, it is likely that the NLRB will continue to find that arbitration agreements that prohibit class or collective actions violate the Act notwithstanding the strong language in *American Express* that should lead to a contrary result. It is also possible that other administrative agencies like the U.S. Equal Employment Opportunities Commission could avoid the issue of class action waivers contained in individual arbitration agreements by bringing suit in the name of the agency rather than an individual employee. Therefore, we can expect that class action waivers may ultimately wind up before Congress.

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