

SCOTUS: Class Arbitration Waiver Enforceable Under Federal Arbitration Act

On June 20, 2013, the United States Supreme Court issued its decision in *American Express Co. et al. v. Italian Colors Restaurant et al.*,¹ ruling, in a 5-3 decision², that neither the Federal Arbitration Act nor the “effective vindication doctrine”, permits courts to invalidate contractual waivers of class arbitration provisions when a plaintiff’s cost of pursuing an individual claim is prohibitively expensive.

I. Factual Background and Procedural History

Italian Colors Restaurant, along with other merchants (the “Respondents”), contracted with American Express Co. and its wholly owned subsidiary (the “Petitioners”), to accept American Express charge-cards. Their agreement stipulated that all disputes between the parties would be resolved through arbitration and further, that Respondents waived their right to arbitration on a class action basis.³

Respondents brought suit under § 1 of the Sherman Act and § 4 of the Clayton Act, alleging that Petitioners were engaged in unlawful tying arrangements. The United States District Court for the Southern District of New York granted Petitioners’ motion to compel arbitration. The United States Court of Appeals for the Second Circuit reversed, finding the class action waiver unenforceable where Respondents had presented evidence that due to the expense of expert testimony, the cost of individually prosecuting a claim would exceed the expected payout for individual plaintiffs.

II. Supreme Court’s Decision

The United States Supreme Court reversed the Court of Appeals and enforced the class action waiver. Writing for the majority, Justice Scalia noted that the Federal Arbitration Act (the “FAA”) makes clear that arbitration is a matter of contract law. Accordingly, absent a contrary congressional command, courts must “rigorously enforce arbitration agreements according to their terms,” even when the underlying claim alleges a violation of another federal statute.⁴

Respondents argued that because pursuing individual claims was unaffordable, upholding the class action waiver contravened the antitrust laws by blocking meritorious claims. Nevertheless, the Court explained that, “the antitrust laws do not guarantee an affordable procedural path to vindication of every claim.”⁵ Furthermore, the class action device could not be necessary to vindicating antitrust claims where class action procedures did not emerge until decades after Congress passed the Sherman and Clayton Acts. Finally, the Federal Rules of Civil Procedure impose stringent requirements for class certification, which already eliminate many claims and the Court has previously declined to waive such procedural requirements merely because they make the class action process unaffordable for litigants.

The Court further declined to invalidate the class action waiver under the effective vindication doctrine. The effective vindication doctrine is a judge-made exception to the FAA, under which courts may invalidate

¹ 570 U.S. ____ (2013), No. 12-133, slip op. (June 20, 2013) (the “*Opinion*”), available at http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf.

² Justice Sotomayor did not participate in the decision.

³ The relevant language was: “There shall be no right or authority for any Claims to be arbitrated on a class action basis.” *Opinion* at 2.

⁴ *Id.* at 4.

⁵ *Id.*

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agreements that block a litigant’s ability to enforce a federal statutory right. The Court clarified that effective vindication refers to preserving a litigant’s *right* to pursue a statutory claim. Agreements that merely eliminate the financial incentive to pursue a claim do not fit within this exception.⁶ Relying on *AT&T Mobility LLC v. Concepcion*⁷, the Court emphasized that the primary goal of the FAA is the preservation of arbitration procedures and upholding the class action waiver is consistent with that goal.⁸

III. The Dissent

Writing for the dissent, Justice Kagan argued that the majority had taken too narrow a view of the effective vindication doctrine. In her view, the effective vindication doctrine should be applied, not just to invalidate plainly exculpatory provisions, but also to invalidate provisions that confer *de facto* immunity on one party. Under this reasoning, where individual litigation is unaffordable, the class action waiver effectively forecloses Respondents’ ability to seek relief and must be invalidated or else the waiver serves to insulate Petitioners from liability.

IV. Significance of the Decision

American Express narrows the effective vindication doctrine and makes it clear that arbitration agreements will, for the most part, be enforced according to their terms as contemplated by the FAA.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com.

⁶ *See id.* at 6 (explaining 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”).

⁷ 131 S. Ct. 1740 (2011).

⁸ *See Opinion* at 9 (noting that the FAA “favor[s] the absence of litigation when that is the consequence of a class-action waiver, since its ‘principal purpose’ is the enforcement of arbitration agreements”).