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ANTITRUST TRADE AND PRACTICE

Expert Analysis

'American Express': A Deal Is a Deal For Class Action Waivers

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On June 20, 2013, the U.S. Supreme Court issued the latest in a string of cases explaining that class actions are the exception to the usual rule of individualized actions, not an entitlement, and that parties cannot escape the clear terms of binding arbitration agreements. It began with *Stolt-Nielsen S.A. v. AnimalFeeds International*, where the court ruled that companies could not be forced into class arbitration if they had not agreed to it; that is, mere silence on the issue of class arbitration is not enough.[1] Then, in *AT&T Mobility v. Concepcion*, the court held that the Federal Arbitration Act, 9 U.S.C. §1 et seq. (FAA), preempted a California judicial rule barring as unconscionable waivers of class action arbitration.[2]

And while some had speculated that *Concepcion* was limited in scope to preemption of state laws inconsistent with the goals of the FAA, the Supreme Court's most recent decision in *American Express v. Italian Colors Restaurant* has put an end to that speculation, holding that American Express' class action waivers in its arbitration agreements could not be invalidated simply because the cost of individually arbitrating federal antitrust claims would exceed any potential individual recovery.[3] Now there can be no doubt: A deal is a deal when it comes to parties' arbitration agreements relinquishing their class action rights for federal claims as well.

The Class Action Waiver

The factual and procedural background of *American Express* is as follows. In 2003, a class of merchants filed an amended complaint in the U.S. District Court for the Southern District of New York alleging that charge-card issuer American Express had violated the federal antitrust laws by using its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30 percent higher than competing credit cards. The merchants' contracts with American Express contained a clause requiring that all disputes between the parties be resolved by arbitration, and also provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."

American Express moved to compel individual arbitration. The merchants opposed the motion on the ground that the cost to arbitrate for any individual merchant vastly exceeded that merchant's potential recovery. An economist had estimated that the expert analysis necessary to prove the antitrust claims would cost several hundred thousand dollars, while the maximum individual recovery was $38,549. The district court rejected the merchants' argument and granted the motion to compel individual arbitration.[4]

The U.S. Court of Appeals for the Second Circuit reversed, holding that the class action waivers were unenforceable because the merchants had established that they would incur "prohibitive costs" if compelled to arbitrate on an individual basis.[5] The Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Stolt-Nielsen*.[6] The Second Circuit stood by its reversal, but subsequently reconsidered its ruling sua sponte in light of the Supreme Court's opinion in *Concepcion*. Finding *Concepcion* inapposite because the case addressed preemption of state law, the circuit court again stood by its reversal.[7] 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."[8]

Supreme Court's Decision

Justice Antonin Scalia, writing for the court's majority,[9] rejected the Second Circuit's view that an agreement prohibiting class arbitration is invalid

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when the cost of proving federal claims in individual arbitration exceeds the potential recovery. The court began by stating that, as a general rule, "arbitration is a matter of contract" and courts therefore 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.'"[10] The court recognized two limited exceptions to the general rule: first, if the applicable statute commands the rejection of a class arbitration waiver; or second, if the waiver would prevent the "effective vindication" of a statutory right.

The court then determined that the "congressional command" exception was inapplicable because "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[11] The court reasoned that the antitrust laws do not evince an intention to preclude a waiver of class action procedure because the Sherman and Clayton Acts make no mention of class actions. In fact, the federal antitrust laws were enacted decades before Rule 23 of the Federal Rules of Civil Procedure. Further, the court found no such contrary congressional command in Rule 23 because the rule "imposes stringent requirements for certification that in practice exclude most claims."[12]

The court also rejected the applicability of the "effective vindication" doctrine, a judge-made exception to the FAA which allows courts to invalidate agreements that prevent the effective vindication of a federal statutory right. The merchants had argued that enforcing the waivers of class arbitration in this case would bar effective vindication because the merchants would have no economic incentive to pursue their antitrust claims individually. The court, however, reasoned that the exception was limited to those cases where an arbitration agreement operates as a "prospective waiver of a party's right to pursue statutory remedies."

The court explained that the exception, so defined, clearly prohibits provisions forbidding the assertion of statutory rights, and in fact might also extend to cases where arbitration filing and administrative fees are so high as to make access to the forum impracticable. The court rejected the merchants' argument that the exception extended to cases where the cost of proving one's claim exceeds the potential recovery because "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."[13] The court reasoned that individual antitrust actions had been adequate to assure "effective vindication" of federal rights well before the adoption of class action procedures, and had not suddenly become "ineffective vindication" upon adoption of class action procedures.

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Despite the detailed analysis, Justice Scalia stated that the court's decision in *Concepcion* "all but resolves this case," because the court in *Concepcion* already had rejected the argument that class arbitration is necessary to prosecute claims "that might otherwise slip through the legal system." The court rejected attempts by the merchants and the dissent to distinguish *Concepcion* on the grounds that the case involved preemption principles rather than the effective vindication doctrine, and this time left no room for doubt as to the reach of *Concepcion*: "[*Concepcion*] established…that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims," even when "absence of litigation…is the consequence of a class-action waiver."[14]

The majority concluded with a brief, but important, discussion of the policy concerns informing the court's opinion. Specifically, the court declined to impose a "superstructure" requiring parties preliminarily to litigate the costs associated with proving the elements of plaintiffs' claims and the potential damages that might be recovered in order to determine the enforceability of an arbitration agreement; such a hurdle, the court explained, "would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure."[15]

Despite the majority's view that *Concepcion* "all but resolves" the case, Justice Elena Kagan, writing for the dissent, vehemently disagreed with the majority's approach, stating that the effective vindication doctrine "fits this case hand in glove."[16] The dissent expressed serious concerns that the majority's approach enables companies to de facto insulate themselves from liability for federal antitrust violations by including clauses that indirectly exclude antitrust liability, noting that while such clauses are "less direct than an express exculpatory clause," they are "no less fatal."[17] Relying on *Green Tree Financial-Alabama v. Randolph*,[18] the dissent also agreed with the Second Circuit that the effective vindication exception should apply to agreements thwarting federal law by making arbitration "prohibitively expensive." Here, where the expense of proving an antitrust claim amounted to 10 times an individual's potential recovery, the dissent reasoned that the effective vindication exception should bar enforcement of the class action waiver because of the prohibitive cost of individual arbitration.

The dissent took particular issue with clauses in the arbitration agreement disallowing joinder or consolidation of claims or parties, preventing plaintiffs from collectively arranging the production of an expert report, and precluding any shifting of costs. When combined with American Express' refusal to enter into a stipulation miti-

gating the need for economic analysis, the dissent concluded that the agreement, as applied, not only cut off class arbitration, but also any avenue for sharing, shifting or shrinking the costs of individual arbitration, thus rendering individual pursuit of the antitrust claims "prohibitively expensive."

Considerations for Drafting

The Supreme Court's decision in *American Express* all but invites businesses to include broad, explicit class action waivers in their arbitration agreements with customers, and we would expect to see many more businesses including such waivers in their arbitration agreements in the future. In light of the court's decision, parties wishing to draft arbitration agreements containing effective class action waivers should keep several considerations in mind.

First, the court's decision in *American Express* should be read in conjunction with *Oxford Health Plans v. Sutter*, the court's other decision addressing arbitration from this past term.[19] There, the court upheld an arbitrator's ruling that permitted class arbitration to go forward because the contract did not expressly preclude class arbitration. The court's two arbitration decisions from this term make clear that arbitration agreements and class action waivers will be enforced according to their terms, but that the waiver must be express and unambiguous.

Second, we would expect to see significantly more cost-sharing arrangements among plaintiffs to cover the costs of legal and expert fees in light of the Supreme Court's opinion in *American Express*. While the majority's opinion seems to permit class action waivers even absent the kinds of pro-consumer provisions many have suggested saved the arbitration agreement in *Concepcion*,[20] businesses may wish to adopt a cautious approach before relying on *American Express* to prevent plaintiffs from entering into cost-sharing arrangements.

The oral argument transcript shows that the justices gave significant consideration, and the parties continued to disagree, as to whether the terms of the arbitration agreement precluded plaintiffs from pooling their resources and sharing the cost of the required expert report. Several of the justices suggested that plaintiffs could have a trade association prepare such a report for use by all plaintiffs to reduce the expert costs. Because the enforceability of the provisions relating to cost-sharing and claim consolidation were not resolved in the majority opinion, businesses should consider still including various pro-consumer provisions, such as provisions allowing plaintiffs to pool resources and share the various costs of proving their claims in arbitration, to fall within the "safe harbor" of *Concepcion*.

While businesses currently should take comfort in knowing that their class action waivers likely will be enforced, parties still need to adopt a cautious, balanced approach before eliminating all pro-consumer provisions in arbitration agreements.

Third, the majority opinion in *American Express* expressly recognizes the possibility that excessive filing fees and/or forum costs might trigger the effective vindication exception to the enforceability of class action waivers. Parties, therefore, should ensure that the filing and administrative fees in the selected arbitral forum are not prohibitively expensive.

Finally, the court's decision in *American Express* does not prevent plaintiffs from arguing fraud or unconscionability in the formation of an arbitration agreement containing a class action waiver.[21] In light of these additional bases for rendering an arbitration agreement and its class action waiver void and unenforceable, businesses may wish to consider including provisions in their arbitration agreements that allow customers to opt out of arbitration within a defined period of time.[22]

With these drafting considerations in mind, businesses should be able to draft arbitration agreements containing class action waivers that will withstand judicial scrutiny. While businesses currently should take comfort in knowing that their class action waivers likely will be enforced, parties still need to adopt a cautious, balanced approach before eliminating all pro-consumer provisions in arbitration agreements. And as Justice Kagan's vehement dissent reminds us, the Supreme Court is only one appointment away from decisions such as *American Express* being resolved in the opposite direction.

1. 559 U.S. 662 (2010).
2. 131 S. Ct. 1740 (2011).
3. 133 S. Ct. 2304 (2013).
4. *In re American Express Merchants Litig.*, No. 03 CV 9592 (GBD), 2006 WL 662341, at *5, 10 (S.D.N.Y. March 16, 2006).
5. *In re American Express Merchants' Litig.*, 554 F.3d 300, 315-16 (2d Cir. 2009).
6. *American Express v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010) (Mem.).
7. *In re American Express Merchants' Litig.*, 667 F.3d 204, 212-14 (2d Cir. 2012).
8. *American Express*, 133 S. Ct. at 2308 (alterations in original).
9. Justice Scalia's majority opinion was joined by Chief Justice John Roberts and Justices Anthony Kennedy and Samuel Alito. Justice Clarence Thomas wrote a concurring opinion.
10. *American Express*, 133 S. Ct. at 2309 (emphasis and alterations in original) (citations omitted).
11. Id.
12. Id. at 2310.
13. Id. at 2311.
14. Id. at 2312 n.5.
15. Id. at 2312.
16. Id. at 2313. Justice Kagan's dissent was joined by Justices Ruth Bader Ginsburg and Stephen Breyer. Justice Sonia Sotomayor did not take part in the decision.
17. The dissent provided a number of ways in which a party drafting an arbitration agreement may effectively avoid antitrust liability without including an express exculpatory clause. For example, the dissent noted that an arbitration agreement might block a claimant from proving his antitrust claim by preventing claimant from presenting economic evidence.
18. 531 U.S. 79 (2000).
19. 133 S. Ct. 2064 (2013).
20. The arbitration provisions in *Concepcion* were extremely favorable to claimants, requiring AT&T to cover the claimant's costs of arbitration and to pay a minimum recovery and twice the amount of claimant's attorney fees if the award obtained was greater than AT&T's last settlement offer.
21. Justice Thomas' concurring opinion expressly addressed the issue, focusing on the clear language of the FAA requiring that an arbitration agreement be enforced unless a party successfully challenges the formation of the arbitration agreement. See 9 U.S.C. §2.
22. A recent decision in the U.S. District Court for the Central District of California cited such an opt-out provision favorably in granting a motion to compel arbitration. See *Carwile v. Samsung Telecomms. Am.*, No. CV 12-05660-CJC (JPRx) (C.D. Cal. July 9, 2013).