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Class & Derivative Actions and Antitrust & Competition
Client Service Groups

To: Our Clients and Friends June 21, 2013

Supreme Court Upholds Class Action Waiver in American Express Arbitration Agreement

On June 20, 2013, the Supreme Court held 5-3[1/] that a class action waiver in an arbitration agreement is enforceable even if the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the plaintiff's individual recovery. The decision in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ____ (2013) (*Amex Merchants*) is significant for any company that wishes to limit its exposure to potential class actions by customers, vendors, employees or others with whom it has written contracts.

Background

As we reported in our prior alert summarizing oral arguments in this case,[2/] plaintiffs in *Amex Merchants* are merchants in the New York city area who complain that American Express's Card Acceptance Agreement required them to accept less desirable credit cards in order to be able to accept the flagship American Express charge card. The merchants contend that this "Honor All Cards" provision was an illegal "tying arrangement" in violation of the Sherman Act. The Card Acceptance Agreement contained an arbitration clause stating that "there shall be no right or authority for any claims to be arbitrated on a class action basis." The United States District Court for the Southern District of New York originally enforced the arbitration agreement, including the class action waiver, when it granted American Express's motion to compel arbitration in 2006.[3/] The Second Circuit

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1/ Justice Sotomayor did not participate in the decision. She had been a member of the Second Circuit panel that heard and decided the appeal in this case in 2009.

2/ Supreme Court Appears Split on Enforceability of Antitrust Class Action Waivers, *available at* http://www.bryancave.com/Supreme-Court-Appears-Split-on-Enforceability-of-Antitrust-Class-Action-Waivers-03-01-2013.

3/ *In re Am. Express Merchants Litig.*, 03 CV 9592 (GBD), 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006) *rev'd and remanded.*, 554 F.3d 300 (2d Cir. 2009) *cert. granted, judgment vacated.*, 130 S. Ct. 2401, 176 L. Ed. 2d 920 (2010) ("*Amex I*") *and rev'd and remanded* 634 F.3d 187 (2d Cir. 2011) ("*Amex II*") *adhered to on reh'g.*, 667 F.3d 204 (2d Cir. 2012) *and rev'd.*, 667 F.3d 204 (2d Cir. 2012), *cert. granted,* 133 S. Ct. 594 (Nov. 9, 2012) ("*AMEX III*").

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reversed the district court in three separate opinions, holding each time that the class action waiver was unenforceable.[4/]

The Second Circuit based its decisions on evidence in the form of a declaration by the merchants' economist that the economic study required to prove plaintiffs' case would cost "at least several hundred thousand dollars and might exceed $1 million," whereas no individual plaintiff could expect to recover more than $12,850, or $38,549 after trebling.[5/] The Second Circuit opined that requiring the merchants to arbitrate their claims individually, instead of collectively in a class action, would deny them an effective antitrust remedy because no rational plaintiff would pursue a claim if the cost of litigation exceeded the potential damages. According to the Second Circuit, the class action waiver was thus unenforceable. The Supreme Court disagreed.

Majority Opinion: Enforce the Contract as Written

Writing for the majority, Justice Scalia reiterated the Court's recent holdings that arbitration is a matter of contract, and that the Federal Arbitration Act ("FAA") mandates that courts rigorously enforce arbitration agreements according to their terms. This includes agreements requiring parties to arbitrate federal statutory claims unless Congress has overridden the FAA by express command. The majority opinion found that the federal antitrust laws evidence no congressional intent to mandate the availability of class procedures in actions to enforce those laws. The Sherman and Clayton Acts make no mention of class procedures and were enacted decades before class actions were first authorized by Federal Rule 23. Further, these statutes already include incentives for litigants to pursue their claims, including treble damages. The Court reasoned that since there was an effective antitrust remedy long before class actions existed, a class action waiver does not deprive a plaintiff of that remedy. "[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."[6/] Moreover, Rule 23 itself was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. The parties here agreed to arbitrate pursuant to that 'usual rule' and it would be remarkable for a court to erase that expectation."[7/]

The majority opinion also addressed the merchants' "effective vindication" argument. Reiterating that this theory arose from *dicta* in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985) and *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), Justice Scalia declared that the principle is limited to circumstances in which an arbitration agreement would prevent a party from *pursuing* federal statutory rights, such as provisions that prohibited parties from asserting certain statutory claims, or filing and administrative fees that are so high as to prevent a litigant from pursuing arbitration at all. Per the majority, "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." (Slip op. at 7, emphasis in original).

Finally, although none of the Justices focused on it at oral argument, the majority opinion stated that the Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___ (2011) "all but resolve[d] this case." *Concepcion* held that imposing class arbitration procedures absent the parties' agreement would eviscerate the fundamental attributes and advantages of arbitration – increased speed and

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4/ *Id.*

5/ *Amex Merchants,* 570 U.S. at ___, slip op. 2.

6/ *Id.*, slip op. 4.

7/ *Id.*, slip op. 4-5 (citation omitted).

reduced costs – and rejected the argument that class arbitration was necessary to prosecute certain claims. Requiring federal courts to determine issues such as the evidence required for each claim and theory, the costs of developing that evidence, and the likely available damages in each instance would impose a "judicially created superstructure" not sanctioned by the FAA.

The Dissent: The Door Has Opened for Corporate Immunity

In a contentious dissent, Justice Kagan, joined by Justices Breyer and Ginsburg, took issue with virtually every aspect of the majority opinion, up to and including its characterization of the genesis of the "vindication of federal rights" exception as *dicta*, which the dissent argued was "dead wrong." The dissent reframed the issue as whether the Card Acceptance Agreement as a whole prevented the merchants from pursuing federal statutory claims, not whether the merchants were entitled to pursue class arbitration. The dissent asserted that the class action waiver was not the only restrictive term, and that the agreement also prohibited joinder or consolidation of multiple claims in arbitration and contained confidentiality provisions that would effectively prevent individual claimants from sharing expert expenses. Taken together, the dissent concluded, these restrictions bar litigants from any effective pursuit of antitrust claims. In short, the dissent concluded that the majority has opened the door for drafters of arbitration agreements, who typically have far more bargaining power, to immunize themselves from liability for certain claims.

Justice Kagan's dissent also disputed the majority's application of *Concepcion* to this case. According to the dissent, *Concepcion* had no application here because that decision turned on federal preemption of a state law that conflicted with the FAA. In *Amex Merchants*, the plaintiffs did not "claim that a class action is necessary – only that [they] have *some* means of vindicating a meritorious claim." (emphasis in the original). The arbitration agreement in *Concepcion* provided effective alternatives to class arbitration, and thus did not implicate whether the plaintiffs were foreclosed from pursuing their claims. As a parting shot, the dissent accused the majority of deciding this case in a way that forwards a long-term goal of diminishing the use of class actions in general at the expense of litigants' ability to effectively pursue federal rights.

Impact on the Future

The *Amex Merchants* decision teaches more about class actions than it does about arbitration. In simplest terms, it removes any doubt that lower courts (federal and state) must enforce class action waivers that are incorporated into otherwise valid arbitration agreements covered by the FAA. The "effective vindication of federal statutory rights" doctrine does not guarantee plaintiffs a right to bring their claims as class actions. Parties can contract to resolve disputes in individual arbitration.

Despite the sometimes florid rhetoric, both the majority and the dissent more or less agree that exculpatory agreements that prevent a party from "pursuing" a claim (as the majority describes it) are probably not enforceable. The majority opinion (as the dissent observes) does not provide much detail, since it decides only the challenge to the class action waiver. The majority opinion does not discuss the other restrictions seized on by the dissent: restrictions on joinder and consolidation of claims, as well as a confidentiality clause that allegedly would prevent multiple claimants from sharing the expense of a common expert report. At some point, presumably, restrictions that go beyond a class action waiver could potentially rise to the level of preventing a claimant from "pursuing" a claim and therefore be subject to challenge even under the majority's analysis. Unfortunately neither the

majority opinion nor the dissent sheds much light on where to draw the line between permissible restrictions on "proving" a case and impermissible restrictions on "pursuing" a federal statutory claim.

In light of this decision, a corporation wishing to reduce its exposure to class actions should consider whether or not an arbitration agreement incorporating a class action waiver would be a useful risk management tool. The answer is not always obvious, since arbitration carries its own set of risks, such as the difficulty of appealing an erroneous award.[8/] In drafting the agreement, it is important to avoid either the appearance or the reality of unreasonable limits on the claimant's ability to pursue its individual claim. Many of the restrictions discussed in the dissent's parade of horribles, such as a one-day statute of limitations, fall into this category. A conservative drafter might consider including provisions that permit some level of information exchange or sharing of resources and expenses among individual claimants. Allowing limited consolidation of claims by two or more claimants is another possibility to consider.

For questions or further information, please speak to your regular Bryan Cave contact, a member of our Class and Derivative Actions and Antitrust and Competition groups, or the authors of this client alert:

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8/ *See Oxford Health Plans LLC v. Sutter*, 569 U.S. ____, 12-135 (June 10, 2013), and our report on that decision, *available at* http://www.bryancave.com/Supreme-Court-Defers-to-Arbitrators-Decision-to-Conduct-Class-Arbitration-06-11-2013.