CLEARY GOTTLIEB

ALERT MEMORANDUM

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Supreme Court Upholds Class Arbitration Waivers

On June 20, 2013, the Supreme Court issued *American Express v. Italian Colors Restaurant*, a 5-3 opinion delivered by Justice Scalia reaffirming that federal courts must enforce arbitration agreements strictly according to their terms, including agreements containing class arbitration waivers. The Court emphasized that such waivers are enforceable even where the cost of pursuing an individual claim would be prohibitively expensive.[1]

The Supreme Court's Decision

Merchants who accepted American Express card products filed class action suits against American Express in the District Court for the Southern District of New York alleging violations of federal antitrust law. The merchants claimed that their agreements with American Express, which contained a clause requiring them to honor all American Express products, including both charge and credit cards, represented an illegal tying arrangement.

In defending itself, American Express argued that the provision in the merchants' agreements requiring individual, and not class, arbitration precluded the merchants from proceeding as a class in federal court and instead required individual arbitrations.

The question before the Supreme Court was whether a court could invalidate the arbitration agreement on the ground that the agreement did not permit class arbitration. In requiring arbitration in accordance with the agreement, the Supreme Court reversed the Court of Appeals for the Second Circuit, which had held the class action waiver made the arbitration agreement unenforceable based on the merchants' submission of an expert affidavit purporting to show that the expense of individually prosecuting their antitrust claims would preclude vindication of their federal statutory rights.[2]

In its opinion, the Supreme Court focused on the Federal Arbitration Act ("FAA"), which requires courts to "rigorously enforce arbitration agreements according to their terms," including terms that specify with whom and according to which rules the arbitration will be conducted, unless the FAA's mandate has been "overridden by a contrary congressional command." The Court held that no such "contrary congressional command" required rejection of the class arbitration waivers here. The Court rejected plaintiffs' arguments that requiring plaintiffs to pursue relief via prohibitively expensive individual arbitrations contravened the policies of

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1 *American Express v. Italian Colors Rest.*, 570 U.S. ___ (2013) (available at http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf). Justice Kagan filed a dissenting opinion, in which Justices Ginsburg and Breyer joined. Justice Sotomayor took no part in the consideration or decision of the case.

2 *In re American Express Merchants' Litigation*, 554 F.3d 300 (2d Cir. 2009); *In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011); *In re American Express Merchants' Litigation,* 667 F.3d 204 (2d Cir. 2012).

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federal antitrust laws, because, in the view of the Court, those laws "do not guarantee an affordable procedural path." Nor, in the Court's view, do the antitrust laws "evince an intention to preclude a waiver" of class procedures, because the antitrust laws existed long before the promulgation of Federal Rule of Civil Procedure 23, which enables class actions. The Court rejected the Second Circuit's invocation of the judicially-created doctrine that arbitration would be refused if it would preclude the "effective vindication" of plaintiffs' federal rights. The Court dismissed this doctrine as founded in judicial dictum, and noted that the Court had never previously applied it to invalidate an arbitration agreement.

At bottom, the Court emphasized that its prior decision in *AT&T Mobility, LLC v. Concepcion*,[3] in which it held class arbitration waivers to be enforceable, "all but resolve[d] this case." As in *AT&T Mobility*, the regime advocated by the merchants and adopted by the Second Circuit would have sacrificed the advantages of arbitration, including informality, speed, and finality. The Court refused to condone a "judicially created superstructure" requiring extensive pre-arbitration analysis of every claim, theory, and cost in an action to decide whether arbitration should proceed.

Conclusion

The Supreme Court's decision in *American Express* is the latest in a long line of cases holding that "arbitration is a matter of contract" and that arbitration agreements should be enforced strictly according to their terms. This opinion, like *AT&T Mobility*, builds on *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[4] in which the Court held that a party may not be compelled to submit to class arbitration unless there is a "contractual basis" for determining that the party agreed to do so.[5] These recent decisions, taken together, show that class claims may be blocked by adopting advance agreement to waive class actions as part of a well-drafted arbitration agreement.

Please feel free to contact any of your regular contacts at the firm or Jonathan Blackman (jblackman@cgsh.com), Howard Zelbo (hzelbo@cgsh.com), Matthew Slater (mslater@cgsh.com), or Carmine Boccuzzi (cboccuzzi@cgsh.com) if you have any questions.

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[3] 563 U.S. ___ (2011) (available at http://www.supremecourt.gov/opinions/10pdf/09-893.pdf).

[4] 599 U.S. ___ (2010) (available at http://www.supremecourt.gov/opinions/09pdf/08-1198.pdf).

[5] On June 10, 2013, the Supreme Court decided *Oxford Health Plans, LLC v. Sutter*, in which it expanded on *Stolt-Nielsen* by adding that where parties dispute whether an arbitration clause permits class arbitration and agree to submit that question to an arbitrator, the Court must defer to the arbitrator's contractual interpretation, so long as the arbitrator "arguably construe[s]" the agreement. 569 U.S. ___ (2013) (available at http://www.supremecourt.gov/opinions/12pdf/12-135_e1p3.pdf). The Court also suggested in *Oxford* that a party could challenge the availability of class arbitration as a "gateway" arbitrability question, noting that such questions are "presumptively for courts to decide," but the defendant in that case failed to do so and instead had agreed to allow the arbitrator to decide it.

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