LEGAL UPDATES

PUBLISHED: JUNE 24, 2013

Class Action Waivers in Arbitration Agreements Are Enforceable Even in Cases Involving "Small Dollar" Claims

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Recently, the U.S. Supreme Court held that class action waivers contained in arbitration agreements are enforceable under the Federal Arbitration Act (FAA) even in cases involving "small dollar" claims that might otherwise not be prosecuted on an individual basis. In the court's decision – *American Express Co. v. Italian Colors Restaurant*, No. 12-133 – a five-justice majority held that the FAA requires that class action waivers in arbitration agreements be enforced according to their terms even when the class action procedure presents the only economically viable means of prosecuting small dollar claims. Although *Italian Colors* involved an attempt to assert claims under federal antitrust laws, the Supreme Court's broad holding that class action waivers in arbitration agreements are enforceable under the FAA will make it easier for all kinds of business and institutions, including colleges and universities, to enforce class action waivers in arbitration agreements with students, staff, and adjunct faculty and thereby reduce the risk of having to litigate multimillion-dollar class action claims.

Italian Colors involved a putative class action lawsuit filed by certain merchants against American Express. The merchants claimed that American Express violated federal antitrust laws by using a tying arrangement to force the merchants to accept American Express credits cards and debit cards at rates higher than market competitors. American Express moved to compel arbitration on an individual basis pursuant to an arbitration clause in the merchant agreements that precluded arbitration on a class action basis.

The merchants argued the arbitration clause should not be enforced because the cost of expert analysis necessary to prove their antitrust claims would greatly exceed the maximum recovery for any individual plaintiff, making a

class action the only means of effectively vindicating the claims. The district court compelled arbitration, but the U.S. Court of Appeals, Second Circuit, reversed and found the arbitration clause unenforceable because of the prohibitively high cost of proving the claims in individual arbitration. The Supreme Court reversed the Second Circuit, holding that the arbitration clause is enforceable despite its class action waiver.

In an opinion written by Justice Antonin Scalia, the Supreme Court began its analysis by explaining that the FAA "reflects the overarching principle that arbitration is a matter of contract," and, consistent with the text of the FAA, courts must " 'rigorously enforce' arbitration agreements according to their terms." The court then determined there is no language in the federal antitrust laws or federal rules of civil procedure that evidences congressional intent to preclude a waiver of class action procedures. Thus, the high court justices determined that neither the federal antitrust laws nor the federal rules of civil procedure override the FAA's requirement that arbitration agreements (including those with class action waivers) be enforced according to their terms.

Next, the court addressed the merchants' argument that the arbitration clause should not be enforced because the class action waiver precludes the merchants from effectively vindicating their rights under federal antitrust laws. Specifically, the merchants argued that the class action waiver bars the effective vindication of their rights because the low value of individual claims, compared to the high cost of expert testimony needed to prove an antitrust claim, gives them no economic incentive to pursue their claims on an individual basis.

The court rejected the merchants' "effective vindication" argument. The court explained that the effective vindication basis for invalidating arbitration agreements is limited to circumstances where an arbitration agreement operates as a prospective waiver of a party's right to pursue statutory remedies, such as were an arbitration agreement expressly forecloses assertion of statutory rights or where the filing and administrative fees of arbitration are so high as to make access to the forum impracticable. The effective vindication basis is *not triggered*, explained the court, by the fact "that it is not worth the expense involved in *proving* a statutory remedy."

A class action waiver does not operate as a prospective waiver of a party's right to pursue statutory remedies because the class action waiver merely limits the arbitration to the two contracting parties and, in that sense, leaves the parties in the same position as before federal rules of civil procedure creating the class action procedure were enacted. To hold that bilateral arbitration precludes the effective vindication of the merchants' claims, explained the court, would require it to conclude that individual suits – once considered adequate before adoption of the class action procedure – are now inadequate. The court rejected this conclusion.

The court went on to clarify that its 2011 decision in *AT&T Mobility LLC v. Concepcion*, "all but resolves this case." In *Concepcion*, as Justice Scalia explained, the court invalidated a state law that

conditioned enforcement of arbitration agreements on the availability of class procedure. Through *Concepcion*, the court rejected the argument that class arbitration is necessary to prosecute claims "that might otherwise slip through the legal system." Thus, explained Justice Scalia, enforcement of an arbitration agreement should not be based on a "claim-by-claim and theory-by-theory" analysis of the "evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success." In this way, explained the court, the FAA actually favors the "absence of litigation when that is the consequence of a class action waiver" contained in an arbitration agreement.

The court's decision in *Italian Colors* makes it extremely difficult, if not outright impossible, for a plaintiff to invalidate an arbitration agreement on the basis that its class action waiver forecloses the effective vindication of small value claims. *Italian Colors* makes clear that such a consideration is simply irrelevant under the FAA and that arbitration agreements, including those with class action waivers, must be enforced according to their terms. In this respect, *Italian Colors* likely overrules, at least in part, state court decisions, such as the Missouri Supreme Court's decision in *Brewer v. Missouri Title Loans*, which expressly consider the cost, expense and difficulty of a plaintiff proving small dollar claims as part of a broader analysis of whether an arbitration agreement, including a class action waiver, is unconscionable under state law. Such considerations should no longer be relevant in light of *Italian Colors*.

What This Means to You

Although *Italian Colors* involved claims under federal antitrust laws, the Supreme Court's decision has wide-ranging implications for all arbitration agreements governed by the FAA. This means plaintiffs in both state and federal court will find it significantly more challenging to invalidate arbitration agreements with class action waivers. As a result, colleges and universities that utilize arbitration agreements with students, adjunct faculty or other parties should have more confidence that those arbitration agreements will be enforced despite the fact that they contain a class action waiver. And colleges and universities that have not included class action waivers in arbitration agreements out of fear a court would invalidate the arbitration agreement should re-evaluate this decision.

Colleges and universities that do not currently use arbitration agreements should consider doing so in light of *Italian Colors*. An arbitration agreement containing a class action waiver is a powerful tool that can help limit an institution's exposure to multimillion-dollar class action claims, including class action claims arising from recruitment, advertising, compensation policies, employment practices and student employability. However, the ability to limit exposure to class action claims is only one of several factors that an institution should consider before using arbitration agreements. If your

institution wishes to consider using arbitration agreements, Husch Blackwell attorneys can discuss these other factors in the context of your institution's specific needs.

Contact Information

If you have questions or require more information about the implications of this rapidly developing trend for your institution, please contact your Husch Blackwell attorney or Derek Teeter at 816.983.8331.

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