Arbitration Agreement Did Not Prevent Effective Vindication of Antitrust Rights

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Consumers and small businesses that are parties to contracts containing arbitration agreements will find it tougher, if not impossible, to avoid the terms of those agreements and pursue an antitrust action in court against the other contracting party, in light of a recent U.S. Supreme Court ruling.

Noting that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim," a sharply divided Supreme Court ruled on Thursday that a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act (FAA), even though the cost of individually arbitrating the federal statutory claim exceeded the potential recovery. The High Court reversed a decision of the U.S. Court of Appeals in New York City (667 F.3d 204, (CCH) 2012-2 Trade Cases ¶78,125), invalidating a class action waiver contained in the mandatory arbitration clauses of merchants' commercial contracts with American Express.

The case is *American Express Co. v. Italian Colors Restaurant*, No. 12-133. It will be published at (CCH) 2013-1 Trade Cases ¶78,432.

Arbitration is a matter of contract, and courts must rigorously enforce arbitration agreements according to their terms, Justice Antonin Scalia explained, writing for the majority. Congress had not taken measures to override this "overarching principle" in the antitrust context.

“Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice,” the Court noted. “But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational.”

The Court also concluded that congressional approval of Rule 23 of the Federal Rules of Civil Procedure did not “establish an entitlement to class proceedings for the vindication of statutory rights.”

The underlying action involved an antitrust class action brought on behalf of merchants that accepted American Express cards against the payment card company. The merchants challenged a purported illegal tying arrangement requiring merchants who accepted American Express’s charge card to also accept all of American Express’s credit cards.

The merchants’ agreements with American Express contained a clause that required all disputes between the parties to be resolved by arbitration. The agreement also prohibited arbitration on a class action basis. American Express moved to compel individual arbitration under the FAA.

The merchants had argued that the arbitration agreement prevented them from pursuing their antitrust claims against American Express because they would have to pay prohibitively high costs to engage in individual arbitration when compared to their possible recoveries. The Second Circuit (multiple times over the course of the litigation) held that dismissal based on the arbitration agreements was improper.

Effective-Vindication Exception

The Court refused to apply a judge-made exception to the FAA permitting courts to invalidate agreements that prevent the “effective vindication” of a federal statutory right. The merchants had argued that enforcing the waiver of class arbitration barred effective vindication, because they would have no economic incentive to pursue their antitrust claims individually in arbitration. The cost of an expert to prove the antitrust claims was estimated to be “at least several hundred thousand dol¬lars, and might exceed $1 million,” while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled.

The exception would cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights and, perhaps, agreements imposing filing and administrative fees that are so high as to make access to the arbitration forum impracticable, the Court explained. The Court declined to apply the exception in this case.

Justice Scalia reiterated his theory, which he raised at oral argument, that the merchants faced with arbitrating their antitrust claims individually were in the same position as plaintiffs were before class actions were permissible.

"[T]he individual suit that was considered adequate to assure 'effective vindication' of a federal right before adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption," it was noted.

The Court also rejected the "judicially created superstructure" proposed by the Second Circuit for determining when to enforce an arbitration agreement. According to the Court, the FAA does not sanction a regime that would require: "that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, 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." The Court explained that this "preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure."

Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito joined in the majority. Justice Thomas also wrote separately to note that the result was also required by the plain meaning of the FAA.

Dissent

Calling the majority's opinion "a betrayal of our precedents, and of federal statutes like the antitrust laws," Justice Elena Kagan said in her dissenting opinion that the Court's decision permits arbitration agreements "to block the vindication of meritorious federal claims and insulate wrongdoers from liability." According to the dissent, the arbitration agreement "imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand."

The dissent suggests that the effective-vindication rule, which is intended "to

prevent arbitration clauses from choking off a plaintiff's ability to enforce congressionally created rights," should be applied here, where the clause "operates to confer immunity from potentially meritorious federal claims."

Justice Sonia Sotomayor took no part in the consideration or decision of this case.