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U.S. SUPREME COURT UPHOLDS CONTRACTUAL WAIVER OF CLASS ARBITRATION

The United States Supreme Court has issued its opinion in *American Express Co. v. Italian Colors Restaurant*, in which it considered the question of whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act (FAA) when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. 570 U.S. ____ (2013). The case involved merchants who accept American Express cards whose agreements with American Express require that all disputes between the parties to be resolved by arbitration and that "there shall be no right or authority for any Claims to be arbitrated on a class action basis."

The merchants brought a class action against American Express for violations of federal antitrust laws. American Express moved to compel individual arbitration the district court granted the motion and dismissed the case. The U.S. Court of Appeals for the Second Circuit reversed and remanded the case holding that the class action waiver was unenforceable because the merchants had shown that they would incur prohibitive costs if compelled to arbitrate. Following a series of additional decisions that resulted in the Court of Appeals reversing three times, the U.S. Supreme Court granted *certiorari* to consider whether the FAA permits courts to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim. The U.S. Supreme Court reversed the judgment of the Court of Appeals.

The U.S. Supreme Court began its analysis with a discussion of the FAA, noting that it was enacted in response to widespread judicial hostility to arbitration. The text of the FAA, the Court stated, reflects an overarching principle that arbitration is a matter of contract and that courts must rigorously enforce arbitration agreements according to their terms. That holds true, the Court noted, for claims that allege a violation of a federal statute, unless the FAA's mandate has been "overridden by a contrary congressional command." The Court found no contrary congressional command requiring it to reject the waiver of class action. It rejected the merchants' argument that requiring them to litigate their claims individually, as they contracted to do, would violate antitrust laws. It also rejected the merchants' argument that enforcing the waiver of class arbitration bars "effective vindication" of a federal statutory right because the merchants have no economic incentive to pursue their antitrust claims individually in arbitration.

The Court concluded that its decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S., 131 S.Ct. 1740 (2011), in which it invalidated a law conditioning enforcement of arbitration on the availability of class procedure because the law "interfered with fundamental attributes of arbitration," resolves the case before it. The Court concluded that following the Court of Appeals' decision would require a federal court to determine (and the parties to litigate) a number of items before a plaintiff can be held to contractually agreed bilateral arbitration (*e.g.*, the legal requirements for success on the merits, the evidence needed to meet those requirements, the cost of developing that evidence and the damages recoverable). Having to make such determinations effectively would impede a speedy resolution that arbitration generally, and bilateral arbitration particularly, was meant to accomplish. The FAA, the Court stated, does not sanction such a judicially created superstructure. □

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