Client Alert

pillsbury

Consumer & Retail

Arbitration & Alternative Dispute Resolution
Restaurant, Food & Beverage
Litigation
Employment

July 1, 2013

Supreme Court: Class Action Waiver Trumps Federal Statutory Right

by Paula M. Weber, Roxane A. Polidora, Sarah A. Good, Christine A. Scheuneman, Connie J. Wolfe, Amy L. Pierce & Ellen C. Cohen

Continuing its string of recent pro-arbitration decisions, the U.S. Supreme Court handed down a decision enforcing class action waivers in arbitration agreements, even where the plaintiff's cost of proceeding on an individual basis would exceed the potential recovery for vindicating a federal statutory right. The high court's decision in American Express Co. v. Italian Colors Restaurant *could impact class action litigation in a broad range of contexts, including employment, antitrust, securities, and consumer class action suits.*

The U.S. Supreme Court, in *American Express Co. v. Italian Colors Restaurant*, — U.S. — (Jun. 20, 2013), in a 5-3 decision (Justice Sotomayor took no part in the consideration of the case), issued another decision that will be welcome news to those seeking to enforce class action waivers. The Court rejected the plaintiffs' argument that in light of the high cost of pursuing their claims on an individual basis, class-wide arbitration was necessary to ensure the "effective vindication" of their statutory rights. Harkening back to its decision in *AT&T Mobility v. Concepcion*, 563 U.S. ____ (2011), the Court noted that it had already "specifically rejected the argument that class arbitration was necessary to prosecute claims that might otherwise slip through the legal system"—*Concepcion* "all but resolves this case."

In 2003, a group of merchants who accept American Express Co. ("AmEx") cards for customer purchases filed a class action lawsuit against AmEx and its subsidiary, claiming violations of federal antitrust law. According to the merchants, AmEx used its monopoly power in the charge card market to force the merchants to pay excessive rates on credit card purchases by tying the acceptance of charge cards and credit cards together.[1] The merchants claimed that this tying arrangement violated the Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq*., and they sought treble damages for the class under the Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12, *et seq*. Prior to filing suit, the merchants had entered into arbitration agreements with AmEx, which included a class action waiver. AmEx and the subsidiary moved to dismiss the class action lawsuit and compel individual arbitration under the Federal Arbitration Act ("FAA").

In opposing AmEx's motion to compel arbitration, the merchants offered testimony from an economist who estimated that the cost of expert analysis necessary to prove the antitrust claims would be at least several

[1] The balance on a charge card must be paid in full at the end of the billing cycle, while a credit card requires payment on only a portion of the balance, with the remainder subject to interest.

hundred thousand dollars and possibly more than $1 million, while the maximum recovery for any individual plaintiff would be $12,850 (or $38,549, if trebled).

The District Court granted AmEx's motion to compel arbitration and dismissed the lawsuit. The Second Circuit reversed, holding that because the merchants had established that the costs of arbitrating their antitrust claims on an individual basis would be prohibitive, the class action waiver was unenforceable. In light of Supreme Court decisions in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (holding that a party may not be compelled to submit to class arbitration absent an agreement to do so) and *Concepcion* (holding that the FAA preempts state law barriers to enforcement of class arbitration waivers), the Second Circuit reconsidered its *AmEx* decision, but stuck by its initial ruling.

Court Reiterates That Enforcing Class Action Waiver Does Not Prevent Effective Vindication

Justice Scalia, writing for the majority, began by reaffirming the principle that courts must "rigorously enforce" arbitration agreements according to their terms, even in cases alleging violation of a federal statute, unless the FAA's mandate has been "overridden by a contrary congressional command." The Court found no such contrary command here, observing that federal antitrust laws "do not guarantee an affordable path to the vindication of every claim." Moreover, the fact that Congress approved the class action procedures set forth in the Federal Rules of Civil Procedure does not establish an "entitlement to class proceedings for the vindication of statutory rights."

The Court also rejected the merchants' argument that in light of the prohibitive costs of proceeding on an individual basis, forcing individual arbitration would prevent the "effective vindication" of their rights under federal antitrust law. The "effective vindication" exception protects a party's "right to pursue" statutory remedies, and would certainly be triggered if an arbitration agreement prohibited outright the assertion of certain statutory claims, the court explained. Additionally, exorbitant filing and administrative fees that make access to an arbitral forum impracticable might be found to impermissibly prevent "effective vindication" of statutory rights. "But 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* the remedy" (emphasis in original).

The Implications of AmEx for Class Action Lawsuits

AmEx has further narrowed the scope of arguments in plaintiffs' arsenal for defeating enforcement of arbitration agreements. The Supreme Court's decision has foreclosed class action plaintiffs from arguing that expensive proof issues associated with complex actions preclude enforcement of class action waivers.

Nonetheless, plaintiffs challenging class action waivers may still attempt to advance grounds of unconscionability, or based on general contractual defects under state common law. Thus, an entity wishing to enforce its arbitration agreement should exercise care in drafting the agreement and in its procedures for contract formation.

In addition, care should be taken to include express class action waivers in arbitration agreements. The Supreme Court recently confirmed in *Oxford Health Plans LLC v. Sutter,* 569 U.S. ___ (2013) that parties may be subject to class arbitration if an arbitrator interprets the contract to allow it.

The Implications of AmEx for Employers

AmEx is welcome news for many, including in particular, employers that have attempted to address the onslaught of employment class actions by requiring employees to enter into arbitration agreements that include class action waivers. The *AmEx* decision is a resounding blow to the argument, which, in the past, has been successfully asserted by employees in some jurisdictions, that employees must join together as a class to secure effective vindication of their statutory rights, such as rights conferred under wage and hour laws, where dollar amounts for individual recovery tend to be relatively low.

For California employers, the *AmEx* decision is of particular importance because it answers one of the questions squarely before the California Supreme Court in *Iskanian v. CLS Transportation of Los Angeles,* Case No. S204032, a case involving the enforceability of class action waivers in employment agreements. In *Iskanian*, the California high court is set to decide whether *Concepcion* impliedly overruled the California Supreme Court decision in *Gentry v. Superior Court*, which held that class action waivers in employment agreements are invalid where plaintiffs can demonstrate that class actions would be a "significantly more effective" way of vindicating their rights under state employment laws. *AmEx* shuts the door on this argument with respect to arbitration agreements covered by the FAA—which encompasses any arbitration agreement for an employer engaged in interstate commerce.

However, two issues unique to enforcement of class action waivers or foreclosure of representative actions in employment agreements are not expressly addressed in the *AmEx* decision: (1) does a class action waiver in an arbitration agreement violate the right to engage in concerted activity under the National Labor Relations Act; and (2) in California, can an employer require an employee to sign an arbitration agreement in which the employee waives the right to bring representative claims under the state's Private Attorneys General Act of 2004, Cal. Lab. Code §§ 2698, *et seq*. (commonly referred to as a "PAGA claim"). These questions are also set to be addressed in *Iskanian* and several related cases. While *AmEx* does not resolve these issues, the current Supreme Court's overwhelming support of individual arbitration as a method of dispute resolution provides employers with powerful ammunition to uphold contractual agreements to arbitrate claims on a non-representative, individual basis.

Click here to read a copy of *American Express Co. v. Italian Colors Restaurant*.

Click here to read earlier related Alerts, "US Supreme Court Gives Green Light to Class Action Waivers in Consumer Contracts" and "Citing *Concepcion*, FINRA Panel OKs Class Action Waivers in Broker-Dealer Customer Arbitration Agreements"

If you have questions, please contact the Pillsbury attorney with whom you regularly work, or the authors:

Paula M. Weber (bio)
San Francisco
+1.415.983.7488
paula.weber@pillsburylaw.com

Roxane A. Polidora (bio)
San Francisco
+1.415.983.1976
roxane.polidora@pillsburylaw.com

Christine A. Scheuneman (bio)
Los Angeles
+1.213.488.7487
christine.scheuneman@pillsburylaw.com

Sarah A. Good (bio)
San Francisco
+1.415.983.1314
sarah.good@pillsburylaw.com

Connie J. Wolfe (bio)
San Diego
+1.619.544.3139
connie.wolfe@pillsburylaw.com

Ellen C. Cohen (bio)
Los Angeles
+1.213.488.7313
ellen.cohen@pillsburylaw.com

Amy L. Pierce (bio)
Sacramento
+1.916.329.4765
amy.pierce@pillsburylaw.com

Michael Evan Jaffe (bio)
Washington, DC
1.202.663.8068
michael.jaffe@pillsburylaw.com