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ARBITRATION CONTRACTS ARE ENFORCEABLE TO BAR CLASS ACTION SUITS UNDER FEDERAL LAW

Local stores asked customers to go ahead and leave home without their American Express cards. A group of merchants came together to file a class-action suit in The United States District Court for the Southern District of New York against the credit-mogul American Express. The suit was filed as a violation of antitrust laws alleging that American Express was imposing a tying arrangement, thereby forcing stores that accept AmEx charge cards to also accept credit and debit cards from AmEx. The problem arose because these credit and debit cards come with a fee charged to the merchant that is roughly 30% higher in comparison to the competitor credit debit cards. Beyond these additional fees, the merchants claimed they were pushed to file suit because AmEx includes a clause in their contract that states that there "shall be no right or authority for any Claims to be arbitrated on a class action basis." *In re Am. Express Merchants' Litig., 554 F.3d 300, 304 (2d Cir. 2009).*

The merchants involved in this case argued that this clause violated federal antitrust laws under § 1 of the Sherman Act, and sought treble damages for the class under § 4 of the Clayton Act,. The merchants argued that if they were forced to arbitrate separately, as the contract states, they would be spending far more to prove their claims than they are able to recover due to the caps on payouts which arbitration allows. Additionally, the merchants stated that in order to meet the burden of proof in their claim they would need to come together and share resources. American Express countered that this clause was in the contract to which these merchants agreed, and cited 9 U.S.C.A. § 2 which states that contracts for arbitration in a transaction involving commerce were valid, irrevocable and enforceable.

On January 30th, 2009, the Second Circuit Court of Appeals ruled in favor of the merchants and said that if American Express were allowed to enforce the clause against class-action suits it would "effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs" and that "[t]he bar on class arbitration threatens the premise that arbitration can be a fair and adequate mechanism for enforcing statutory rights." This opinion was entered by circuit judges Pooler, Sack and Sotomayor. Judge Sotomayor would later be appointed to the US Supreme Court.

This battle remained in the courts until it was picked up by the United States Supreme Court in 2013, *Am. Exp. Co. v. Italian Colors Rest.,* 133 S. Ct. 2304, 2308, 186 L. Ed. 2d 417 (2013). The decision came down 5 to 3, with Justice Scalia delivering the opinion of the Court and to which Chief Justice Roberts, Justice Kennedy, and Justice Alito joined. Justice Thomas filed a concurring opinion. Justice Sotomayor took no part in the consideration or decision of the case due to her involvement as a circuit judge. The majority opinion stated that the Federal Arbitration Act "does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery."

Justice Kagan filed a dissenting opinion, in which Justice Ginsburg and Justice Breyer joined, taking up in part the merchant's invocation of the "effective vindication" rule. That rule states that an arbitration clause will be enforced only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, (1985). As noted by Justice Kagan, in the

present case the merchant could be awarded a maximum of $38,549 if it prevailed at arbitration. In order to prevail, however, the merchant would have to provide an expert economic analysis "defining the relevant markets, establishing Amex's monopoly power, showing anticompetitive effects, and measuring damages." Such an analysis would cost between several hundred thousand and one million dollars. Justice Kagan opined that "no rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands." She further noted that the arbitration agreement in question not only precludes class arbitration, but any avenue for "sharing, shifting, or shrinking necessary costs" for proving the merchant's case. As a result, "Amex has insulated itself from antitrust liability – even if it has in fact violated the law." The Supreme Court's majority decision held, however, that the doctrine of effective vindication was only to be used if the laws waived a party's *rights to pursue* the case. 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* that remedy."

The U.S. Congress is responding to the criticism of consumer groups claiming this ruling to be unfair. In 2013, during the 113th Congress's First Session, the Arbitration Fairness Act was introduced via House Resolution 1844 and Senate Bill 878. The goals of this legislation would be to combat decisions like *American Express v. Italian Colors Restaurant et al* by preventing companies from using forced arbitration clauses. These bills were seen as recently as December of 2013, but did not make it to a vote during this session.

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