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CLIENT ALERT

Another Step Forward For Class-Action Waivers

Jun.21.2013

The Supreme Court Thursday took another, important step in the endorsement of class-action waivers in arbitration agreements. *American Express Co. v. Italian Colors Restaurant*, No. 12-133 (June 20, 2013). *American Express* presented the question of whether, under the Federal Arbitration Act, a court may invalidate an arbitration agreement with a class-action waiver on the ground that the agreement effectively prevented the antitrust claims asserted in that case from being effectively vindicated due to the allegedly prohibitive costs of individual arbitration. In a 5-3 decision written by Justice Scalia, the Court said "no," holding that the FAA 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's dissent argues that the outcome is inconsistent with the notion that federal courts are authorized under the FAA to invalidate arbitration agreements that prevent the "effective vindication" of a federal statutory right.

The Court's decision is welcome news for employers seeking to enforce mandatory arbitration agreements that include class-action waivers. The majority imposed significant limitations on the "effective vindication" rule, by rejecting the dissent's arguments that application of the terms of the agreement in the contract between American Express and certain merchants would make it financially impractical to pursue a statutory claim, principally because the cost of retaining an expert would be well in excess of any damages that could be recovered in an individual antitrust claim. On this point, employers should be particularly heartened by the following observation made by Justice Scalia: "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* that remedy."

For employment lawyers who litigate class actions, the next question after *American Express* will be how the majority's restriction of the "effective vindication" rule will be extended to pending cases involving other federal labor and employment statutes. *See, e.g., D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012) (finding that class waivers violate employees' right under the National Labor Relations Act to engage in "protected concerted activities"); *Sutherland v. Ernst & Young LLP*, 847 F. Supp. 2d 528 (S.D.N.Y. 2012) (denying motion to reconsider decision that arbitration agreement was unenforceable because class-action waiver would prevent employee from vindicating her rights under federal and state wage hour law). While the majority opinion suggests that these cases should be resolved in the same way as the antitrust claims at issue in *American Express,* textual differences in some of these statutes make it difficult to predict the ultimate outcome of those cases. This is particularly true with the cases involving the NLRB's decision in *D.R. Horton, Inc.* and other cases interpreting the substantive reach of Section 7 of the National Labor Relations Act.

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