

SUPREME COURT ENFORCES CLASS ACTION WAIVER IN ARBITRATION PROVISION

Business Litigation Alert
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Practices & Industries

Business Litigation

On June 20, 2013, the U.S. Supreme Court held that a contractual arbitration provision waiving the right to bring an arbitration as a class action is enforceable. In light of this decision, businesses desiring to avoid class actions should re-examine the language of arbitration provisions to be included in their contracts.

The Case

Italian Colors, a small restaurant, and other merchants believed that American Express had used its monopoly power over charge cards to force merchants to accept credit cards at rates considerably higher than the fees on competing credit cards. American Express' contract with these merchants included a provision that:

- Required all disputes to be resolved by arbitration
- Prohibited any merchant from arbitrating claims on a class basis, and prohibited consolidation of individual arbitrations
- Prohibited an arbitrator from shifting any costs and
- Imposed confidentiality on each merchant

The merchants brought a class action against American Express in federal court, claiming a violation of the antitrust laws. The contractual arbitration provision was unenforceable, the merchants argued, because it wasn't economically feasible for a merchant to arbitrate the antitrust claim individually; an expert witness in the antitrust arbitration would cost between \$300,000 and \$1 million, while an individual merchant would recover less than \$40,000 if it won. The non-cost-shifting provision meant that arbitrator could not require American Express to pay for the expert if a merchant won, and the confidentiality provision prevented merchants in separate arbitrations from sharing information that would allow them to jointly commission an expert report.

In holding that the arbitration provision was enforceable, the Supreme Court stated that while the merchants had a right to bring an arbitration, nothing in the Federal Arbitration Act or the antitrust laws guaranteed that an arbitration must be economical to conduct. The fact that the class action waiver made it more expensive for an individual merchant to conduct an arbitration did not mean that the waiver should not be enforced.

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What This Decision Means for You

Class actions represent a big risk for many businesses because they permit hundreds or thousands of individuals or entities to bring relatively small claims against a business in a single proceeding. Because each individual claim is relatively small, it is likely that many or even most of the claims would never be brought if each individual or entity had to act individually.

Businesses wishing to reduce the risk of being sued in a class action should consider whether contractual arbitration provisions with class action waivers are appropriate for their contracts and what other arbitration-clause provisions might reduce the chance that even an individual arbitration will be commenced.