



## Client Alert

*The Supreme Court holds that arbitration provisions waiving class actions must be rigorously enforced, even when the cost of arbitrating on an individual basis far exceeds the potential recovery.*

### **U.S. Supreme Court Narrows Another Loophole for Escaping Arbitration**

The United States Supreme Court in [American Express Co. v. Italian Colors Restaurant](#) (Justice Scalia writing for the court), severely curtailed the judge-made “effective vindication” exception to enforcing arbitration agreements. The exception arose from the concern that arbitrations could effectively prevent plaintiffs from pursuing their claims where arbitration operated “as a prospective waiver of parties’ rights to pursue statutory remedies.” The AMEX Court held that the fact that the cost of pursuing an individual claim is substantially more than the potential amount of recovery does not operate to waive a party’s rights to pursue their remedies, and as such the challenged arbitration provision would be enforced as agreed upon.

In AMEX, a group of merchants brought a class action lawsuit against AMEX for alleged antitrust violations. Their merchant agreements required all such disputes to be arbitrated on an individual basis. AMEX filed a motion to compel arbitration. The merchants argued that they should not be held to the terms of the arbitration agreement they signed, because proving their claims could cost over a million dollars in expert fees, and their maximum recovery would be \$38,549. The merchants said they would be effectively prevented from vindicating their claims if forced to abide by their arbitration agreement. The trial court rejected the argument and compelled arbitration. The court of appeals disagreed, and reversed.



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The Supreme Court started with the proposition that under the Federal Arbitration Act, “courts must ‘rigorously enforce’ arbitration agreements according to their terms.” The Court relied on its recent landmark decision in AT&T Mobility, LLC v. Concepcion, which “rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’” As the Court saw it, the economics of the plaintiffs’ decision did not foreclose their right to bring a lawsuit, nor eliminate any of their rights.

In AMEX, as to those cases where parties seek to void an arbitration provision, arguing that it would be uneconomical to pursue individual arbitration claims, the Court was opposed to creating a “judicially created superstructure” that parties must litigate, before learning whether their arbitration agreement would be enforced. Namely, having a court determine, claim by claim, the requirements for success on the merits, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that could be recovered.

The Court noted that the antitrust laws far outdate the class action laws, and plaintiffs were presumably not effectively prevented from vindicating their anti-trust rights before the adoption of class action laws.

Finally, the Court pointed out that the antitrust laws do not require class actions, and do not “guarantee an affordable procedural path to the vindication of every claim.” And as to the affordability issue, Congress has already provided an incentive to bring such claims in the form of allowing plaintiffs to recover three times their actual damages.

In view of those principles, the Court reversed the court of appeals, i.e., any plaintiff still interested in pursuing its claim must do so in arbitration on an individual basis, and would be free to share costs amongst each other.

The enforceability of arbitration provisions has been the subject of numerous recent appellate decisions, many of which are in conflict. This Supreme Court decision is important in the effort to bring conformity to the law on the enforcement of arbitration provisions, and certainty for parties who agree to them.

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