Washington Legal Foundation

On the Merits:

AMERICAN EXPRESS COMPANY, et al.,

Petitioners,

v.

ITALIAN COLORS RESTAURANTS, ON BEHALF OF ITSELF AND ALL SIMILARLY SITUATED PERSONS, et al.,

Respondents.

U.S. Sup. Ct. No. 12-133

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

Oral Argument: February 27, 2013

Question Presented: Whether the Federal Arbitration Act permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.

Summary of the Case: Plaintiffs are several retail businesses who accept American Express cards for their customers' purchases. Plaintiffs each entered into an agreement with American Express that contains, among other things, a class-arbitration waiver.

Plaintiffs filed a class action complaint alleging that American Express's "Honor All Cards" policy, which requires those merchants who accept American Express charge cards to accept American Express credit cards as well, constitutes an unlawful tying arrangement under § 1 of the Sherman Act. The named plaintiffs purported to bring suit on behalf of "all merchants that have accepted American Express charge cards."

When American Express moved to compel arbitration according to the agreement, plaintiffs argued that, because of the prohibitive costs of proceeding individually, the class action waiver precluded them from effectively vindicating their federal statutory rights under *Green Tree Fin. Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000). The district court rejected that argument, holding that Randolph applied only to "costs which would not be incurred in a judicial forum." Because the costs about which the plaintiffs complained (expert and attorneys' fees) would be incurred whether in court or in arbitration, the district court held that they provided no basis to avoid arbitration. The U.S. Court of Appeals for the Second Circuit reversed, holding that an arbitration agreement containing a class-arbitration waiver cannot be enforced if, in the court's view, a class action is the "only economically feasible means" for the plaintiff to pursue its federal law claim. The Second Circuit denied rehearing en banc, and a petition for certiorari was subsequently granted.

On The Merits:
Judgment for Petitioners
Mary-Christine Sungaila
Snell & Wilmer L.L.P.

This case, now before us for the second time, requires us to revisit our decision last Term in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), in which we held that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*., preempted the application of California's unconscionability doctrine to a class action waiver provision in an arbitration agreement, and reaffirmed the FAA's overarching policy of enforcing arbitration agreements according to their own terms. The Second Circuit Court of Appeals in this case interpreted *Concepcion* to be limited to cases in which state common law governing the enforceability of class action arbitration waivers is invoked. The appeals court concluded, therefore, that class action arbitration waivers that invoke federal statutory claims and therefore rely solely on the "federal substantive law of arbitrability" instead of state law may be invalidated. *In re Am. Express Merchs.' Litig.* (*AmEx III*), 667 F.3d 204, 213 (2d Cir. 2012). We reverse. Neither the FAA nor *Concepcion* supports such a limited reading.

The FAA's central purpose "is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (internal quotation marks omitted); *see* 9 U.S.C. § 4. That is true "*even when the claims at issue are federal statutory claims*, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (emphasis added). The Sherman Act, 15 U.S.C. § 1 *et seq*, which provides the basis for Respondents' claims, contains no such overriding contrary command for class arbitration. Moreover, "class arbitration, to the extent it is manufactured" by force of law rather than by agreement of the parties, is "inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1750-51; *Stolt-Nielsen*, 130 S. Ct. at 1773-76 (recognizing that imposing class arbitration on parties who have not agreed to that procedure is inconsistent with the FAA); *see Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989) (reiterating the basic precept that arbitration "is a matter of consent, not coercion").

The Second Circuit concluded that "*Concepcion* and *Stolt-Nielsen*, taken together, stand squarely for the principle that parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration." *AmEx III*, 667 F.3d at 213. With that much we agree. But the Second Circuit went on to conclude that "*Stolt-Nielsen* and *Concepcion* do not require that all class-action waivers be deemed per se enforceable." *AmEx III*, 667 F.3d at 214. This latter conclusion is correct only to the extent that the federal statute that forms the basis for a party's claim proscribes a class action waiver; here, no such statutory proscription exists. Accordingly, to hold the arbitration clause at issue unenforceable would impair the FAA's strong federal policy favoring the enforcement of arbitration agreements. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (holding that the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration").

Nor is there any reason to carve out an exception to our decision in *Concepcion* because the cost of pursuing individual claims in an arbitral forum would be prohibitive. As we explained in *Concepcion*, rules inconsistent with the FAA cannot be imposed "even if . . . desirable for unrelated reasons," such as the purportedly "prohibitive cost" imposed by being required to pursue individual rather than class claims. 131 S. Ct. at 1753; *see also Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012). Although we have suggested in dictum that large arbitration costs could preclude a litigant from effectively vindicating his federal statutory rights in an arbitral forum, we specifically referred to the costs of gaining *access* to an arbitral forum, not to any and all costs of arbitration. *See Green Tree Fin. Corp. – Alabama v. Randolph*, 531 U.S. 79, 90 & n.6 (2000).

To adopt a rule of law (as urged by Respondents) in which the FAA disallows the invalidation of class action waivers in the face of competing state substantive law, but allows the invalidation of an arbitration

provision as a matter of federal substantive law, would run counter to Congress's intent in enacting the FAA. We will not undermine that intent by adopting such a rule here.

Dissenting View:
Scott Nelson
Public Citizen

Can an arbitration clause than bans class actions be enforced when plaintiffs prove that it will be impossible for them to present their federal antitrust claims in individual arbitration under the clause? That is the question posed by this case. If this Court means what it has repeatedly said in its decisions under the Federal Arbitration Act (FAA) — that arbitration agreements are enforceable *if* they permit the effective vindication of statutory rights — then the answer to that question must be no.

The Federal Arbitration Act provides that agreements to *resolve claims through arbitration* are enforceable to the same extent as other contracts. Nothing in the FAA, however, says that agreements to *waive* claims are enforceable. After all, such agreements are the opposite of agreements to arbitrate: They are actually agreements not to arbitrate (or litigate) at all. Thus, this Court, beginning in its seminal opinion in *Mitsubishi Motors v. Soler Chrysler Plymouth Co.*, 473 U.S. 614 (1985), has said over and over again that an arbitration agreement, to be enforceable, must preserve plaintiffs' substantive rights under federal statutes.

What, then, about an agreement that doesn't expressly waive a substantive claim but imposes conditions that effectively make it impossible for a plaintiff to assert that claim? We have repeatedly stated that such an agreement is as improper as an agreement that purports to nullify statutory rights expressly. And it is well settled that arbitration must permit "effective vindication" of statutory rights. That is why this Court has recognized that arbitration clauses imposing onerous fees that would make it impossible to assert federal statutory claims would be unenforceable. Such agreements fall outside the FAA because they are not really agreements to resolve disputes by arbitration, but agreements to *prevent* the resolution of disputes by any means.

In this case, a class of merchants — retail businesses — sought to bring an antitrust class action against American Express for illegally tying different products together by requiring merchants who wished to accept American Express charge cards to accept American Express credit cards as well. (American Express charge cards, which must be paid in full each month, are typically used by more well-to-do consumers than credit cards, which can be used to borrow money to be repaid over time. Because customers who use charge cards are perceived as more desirable, and because American Express credit cards are much less popular than other credit cards, many retailers would prefer to accept American Express's charge cards without making the additional payments to American Express necessitated by accepting its credit cards as well.)

The rub was that the merchants' agreements with American Express contained arbitration clauses prohibiting class actions. And because a tying claim under federal antitrust law requires complicated proof, including expert economic testimony that the defendant has "market power" in a defined market for the "tying" product that it exploits to make sales of the "tied" product that would not occur if there were a competitive market for the tying product, a class action—or some other mechanism for spreading the costs of the proceeding—was the only practical way to present the antitrust claims. The plaintiffs presented proof that asserting their antitrust claims would require expenditures of hundreds of thousands of dollars on economic experts that dwarfed the amount of recovery any single plaintiff would be entitled to receive even if it prevailed fully on its antitrust claims. And the arbitration clause included no other way for a plaintiff to recover the costs that would necessarily be required to pursue the tying claim.

In *Mitsubishi Motors*, we recognized that rights under the antitrust laws are not waivable. Indeed, it would defeat the purpose of the antitrust laws — to protect consumers and competitors against the exploitation of market power — if a company could use the very market power the antitrust laws are aimed at to require its customers to agree to waive the protection of those laws. Thus, American Express could not require merchants not only to take its credit cards, but also to waive any antitrust tying claims, as the price of accepting its charge cards.

But enforcing the arbitration clause in the circumstances of this case would allow American Express to do just that. American Express could obtain indirectly what it cannot obtain directly — immunity against antitrust treble damages actions — merely by requiring its customers to agree to arbitration proceedings that made antitrust claims impossible when they agreed to the allegedly illegal tying arrangement.

That result runs squarely against this Court's repeated insistence that arbitration clauses must permit effective vindication of statutory rights. Moreover, it is by no means compelled by the result in *AT&T Mobility v. Concepcion*, where the question the Court was asked to — and ultimately did —decide was whether a class action ban in an arbitration clause is enforceable when a class action is *not necessary* to vindicate the plaintiff's rights. This Court, in answering that question, stressed that because of the features of the arbitration clause in question, there was little likelihood that the plaintiff's claim would not be fully satisfied in individual arbitration proceedings.

But this Court has never held that an arbitration agreement can be enforced when its procedures demonstrably make it impossible to assert a non-waivable federal statutory claim. A holding that an arbitration clause banning class actions is unenforceable in the narrow set of circumstances where plaintiffs *prove* that it prevents vindication of their rights would not undermine the FAA's goals (i.e., to make arbitration available as a means of resolving disputes) but rather would fulfill them by permitting arbitration only when it in fact *allows* the resolution of disputes. *Preventing* assertion of claims in the guise of requiring them to be arbitrated is no part of the FAA's purpose. I respectfully dissent.

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