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Commercial Litigation Alert - Class Action Waivers In Commercial Arbitration Provisions Are Enforceable, U.S. Supreme Court Rules

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On June 20, 2013, the U.S. Supreme Court held that class arbitration waivers in commercial contracts are enforceable to prevent class arbitrations, even those based on alleged violations of federal statutes.

In *American Express Co. v. Italian Colors Restaurant*, a purported class of retailers alleged that American Express violated both the Sherman Act and the Clayton Act by conditioning retailers' access to American Express' standard credit card upon the retailers' acceptance of American Express' other credit cards. The contract between the petitioners and the respondents mandated arbitration and contained a class action waiver that stated there "shall be no right or authority for any claims to be arbitrated on a class action basis." American Express moved to compel individual arbitrations – and prevent class arbitration – based upon that arbitration clause.

The retailers argued that the class action waiver was unenforceable because enforcement would contravene the congressional intent of the Sherman Act and the Clayton Act and because the waiver of class arbitration would prevent the "effective vindication" of a federal statutory right since the harm to individual retailers would not justify the cost of individual actions.

The Court, in a 5-3 opinion (Justice Sotomayor recused herself.) written by Justice Scalia, rejected the retailers' arguments and enforced the arbitration provision and its class action waiver. The Court ruled that a party is not prevented from vindicating his or her rights simply because recovery on a claim may not be worth the expense of prosecuting it, and that there is no right to an "affordable path to the vindication of every claim."

American Express follows other recent Supreme Court decisions enforcing arbitration provisions. Those decisions provide businesses with confidence that their arbitration clauses should be enforced and a mechanism to avoid the expense of litigations, including costly class actions.

If you would like additional information on the American Express decision or to discuss other issues involving the negotiation, drafting or use of arbitration provisions, please contact a member of Barnes & Thornburg's

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