

A recent [article in the National Law Journal](#) highlights the critical importance of a case pending before the United States Supreme Court. The case, American Express Co. v. Italian Colors Restaurant, was argued before the Supreme Court on February 27, 2013. The case involves interpretation of the Federal Arbitration Act, and the National Law Journal framed the issue as whether the Supreme Court will interpret the Act “to give corporations a license to steal”.

A group of small merchants filed suit against American Express (AmEx), alleging violation of antitrust laws in requiring them to accept mass-marketed AmEx credit cards and then overcharging them by 30 percent. AmEx moved to compel each merchant to pursue its claim separately through arbitration. However, the evidence demonstrated that no individual merchant could possibly do so. The market study necessary to prove violation of antitrust laws would cost each merchant hundreds of thousands to millions of dollars, while each merchant’s individual claim was worth an average of \$5,200. The U.S. Court of Appeals for the Second Circuit held that AmEx’s arbitration clause banning class actions and information sharing to be unenforceable on the ground that the agreement would impermissibly prevent effective vindication of statutory rights.

The National Law Journal article persuasively makes the point that a Supreme Court decision in AmEx’s favor would essentially immunize corporations from any legal challenge. That result would harm consumers and any business entity with lesser bargaining power and would ultimately undermine the public’s faith in the legal system. The merchants have presented evidence that AmEx violated antitrust laws and cheated over 3,000,000 merchants out of approximately \$5,200 each. Total damages thus exceed \$16 billion. Visa and MasterCard recently agreed to a \$6 billion antitrust class action settlement for similar overcharging of merchants. In the case before the Supreme Court, AmEx contends that even if the merchants are right, the Federal Arbitration Act should be interpreted so it can keep the money it purportedly wrongfully took. The National Law Journal called it correctly – did Congress intend the Federal Arbitration Act to provide “such a license to steal” or must there be some opportunity for parties such as the merchants to have their dispute actually decided?