

The United States Supreme Court issued a decision recently that will almost certainly curtail numerous meritorious claims. In the case of American Express Co. v. Italian Colors Restaurant, the U.S. Supreme Court ruled in a 5-3 decision that corporations can force arbitration on small businesses and individuals even when it can be proven that the forced arbitration clause in the contract is too costly or inherently unfair.

The Supreme Court's Opinion in the American Express case follows its decisions in CompuCredit v. Greenwood and AT&T Mobility v. Concepcion, two decisions that have made it much more difficult for consumers and employees to challenge mandatory arbitration clauses. Although those decisions were decidedly pro-business, the Supreme Court suggested that arbitration is acceptable only so long as parties can "effectively vindicate their substantive rights," leading consumer advocates to hope that the Supreme Court would strike down any arbitration clause which worked as a "liability shield" by effectively precluding the pursuit of legal claims. With the American Express ruling, the Supreme Court has now made clear that the "effective vindication" verbiage is of no consequence. The Supreme Court will uphold an arbitration clause even if it means that a party will not be able to challenge unfair or overreaching conduct.

In the American Express case, a group of small business merchants brought a class action in court alleging that American Express is violating antitrust laws with a tying arrangement by using its monopoly power over charge cards to force merchants to take all AmEx credit cards and pay higher fees. The merchants sought to pursue claims against American Express jointly in a class action lawsuit. American Express moved to force the case into individual arbitration with no class action possible. The merchants presented evidence showing that the costs of an individual arbitration would have been many times more than the possible maximum amount of damages that each would recover. For example, the costs of a single antitrust market study necessary for each arbitration would exceed \$1 million, while each claimant's potential damages would be no more than \$5,000. Because the arbitration clause prevented the sharing of costs that a class action would allow and did not provide any other means for the merchants to recover those costs, it would be impossible for the merchants to vindicate their rights under federal antitrust law through individual arbitrations. The Supreme Court majority held that the arbitration clause would control, despite the evidence that it effectively precluded the merchants from challenging violations of the antitrust laws and shielded AmEx from any

challenge to its business practices.

In dissent, Justice Elena Kagan said the ruling allows wrongdoers to immunize themselves against lawsuits. She noted that American Express had used its market power to impose the contract on retailers. "If the arbitration clause is enforceable, AmEx has insulated itself from antitrust liability - even if it has in fact violated the law," Justice Kagan wrote. "The monopolist gets to use its monopoly to insist on a contract effectively depriving its victims of all legal recourse."

The Supreme Court's steady stream of pro-business, pro-arbitration decisions heightens the importance of Congress passing the Arbitration Fairness Act. The Act would provide individuals with a choice to arbitrate a claim rather than forcing them into arbitration simply because the party with superior bargaining power, usually a large corporation or an employer, wants it that way. Additionally, the Consumer Financial Protection Bureau has the power to ban or regulate forced arbitration and is in the process of completing an arbitration study mandated under the Dodd-Frank Act. Concerned consumers and employees should contact their elected representatives and urge them to pass the Arbitration Fairness Act. Additionally, the Consumer Financial Protection Bureau is accepting input on the issue in determining whether that agency should take action to prohibit or restrict mandatory arbitration clauses in certain consumer agreements.