

## APPELLATE &amp; FINANCIAL SERVICES LITIGATION

## A L E R T

JULY  
2013THE "EFFECTIVE VINDICATION" DOCTRINE IS A  
VIRTUAL DEAD LETTER AFTER *AMERICAN EXPRESS CO. V.*  
*ITALIAN COLORS RESTAURANT*

By Stephen A. Fogdall and Christopher A. Reese

On June 20, 2013, the U.S. Supreme Court, in *American Express Co. v. Italian Colors Restaurant*, No. 12-133, held that the Federal Arbitration Act (FAA) requires courts to enforce a contractual waiver of class action procedures in an arbitration clause, even where the practical effect of such a waiver is to bar claimants from asserting claims under federal law because they have no economic incentive to arbitrate them on an individual basis. Some courts, including the U.S. Court of Appeals for the Second Circuit in *Italian Colors*, had refused to enforce such class action waivers on the ground that they prevent the "effective vindication" of a federal statutory right. The Court rejected that argument, declaring that "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims."

The groundwork for the *Italian Colors* decision was laid two years ago, in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In that case, the Court held that the FAA preempted a California state court rule invalidating class arbitration waivers where the plaintiff alleged that the defendant had "carried out a scheme to deliberately cheat large numbers of consumers out of small amounts of money." Some commentators speculated that the impact of that holding might be limited by two factors. First, *Concepcion* involved claims under state, not federal, law, and there was speculation that the Supreme Court might be more willing to strike down a class action waiver if it barred enforcement of a federal claim. Second, the arbitration clause in *Concepcion* included several consumer-friendly provisions, including provisions that required AT&T to pay a minimum amount of \$7,500 plus twice the amount of the claimant's

attorney's fees in the event that the claimant were to win an award larger than AT&T's final written settlement offer. Some commentators wondered whether the Court would refuse to enforce a class action waiver that did not contain these or other features that preserved a financial incentive to arbitrate individual claims.

*Italian Colors* removed any doubt on these issues: class action waivers are enforceable under the FAA, even when they effectively bar the prosecution of federal claims because individual claimants have no incentive to bring them in arbitration. The plaintiffs in *Italian Colors* submitted compelling evidence that they had no such incentive. They asserted complex antitrust claims. They offered a declaration from an economist estimating that the expert analysis necessary to prove these claims would cost up to \$1 million, while each individual plaintiff's maximum potential recovery would be \$12,850, or \$38,549 when trebled. The arbitration agreement between the plaintiffs and American Express prohibited class arbitration, and did not contain any of the consumer-friendly provisions contained in the arbitration clause in *Concepcion*. Based on these facts, the Second Circuit held that the arbitration clause was unenforceable because the plaintiffs could not "effectively vindicate" their federal antitrust claims in arbitration. The Supreme Court disagreed.

The Court noted that the "effective vindication" doctrine originated in dicta, and had never been applied to invalidate an arbitration agreement. The Court explained that while the doctrine would "cover a pro-

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vision in an arbitration agreement forbidding the assertion of certain statutory rights,” and might “cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable,” the arbitration clause here contained no such provisions. Instead, it merely “limit[ed] arbitration to the two contracting parties.” The “fact that it was not worth the expense involved in *proving* a statutory remedy [did] not constitute the elimination of the *right to pursue* that remedy.”

In sum, the Supreme Court’s decision in *Italian Colors* demonstrates that class arbitration waivers are enforceable, even when the underlying claims are based on federal statutes and the arbitration provision does not contain consumer-friendly provisions. Some vestige of the “effective vindication” doctrine may survive the decision. As the Court noted, prohibitive arbitration fees, or a provision barring the assertion of a federal claim altogether, might still be unenforceable. But such provisions are presumably rare. For practical purposes the “effective vindication” doctrine is a dead letter. ♦

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