

University of Michigan Journal of Law Reform Caveat

Volume 46 | Issue 1

2012

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Recommended Citation

Gregory C. Cook, Comment, *Why American Express v. Italian Colors Does Not Matter and Coordinated Pursuit of Aggregate Claims May Be a Viable Option After Concepcion*, 46 U. MICH. J. L. REFORM CAVEAT 104 (2012).

Available at: https://repository.law.umich.edu/mjlr_caveat/vol46/iss1/21

This Comment was originally cited as Volume 2 of the University of Michigan Journal of Law Reform Online. Volumes 1, 2, and 3 of MJLR Online have been renumbered 45, 46, and 47 respectively. These updated Volume numbers correspond to their companion print Volumes. Additionally, the University of Michigan Journal of Law Reform Online was renamed Caveat in 2015.

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JOURNAL of LAW REFORM ONLINE

COMMENT

WHY AMERICAN EXPRESS v. ITALIAN COLORS DOES NOT MATTER AND COORDINATED PURSUIT OF AGGREGATE CLAIMS MAY BE A VIABLE OPTION AFTER CONCEPCION

Gregory C. Cook*

This Comment suggests that the upcoming decision by the Supreme Court in *American Express Co. v. Italian Colors Restaurant*¹ will not change the class action landscape. While the plaintiff bar contends that certain public policy goals will be lost as a result of *American Express* and *AT&T Mobility LLC v. Concepcion*,² this Comment argues that, in the correct circumstances, coordinated individual arbitrations can address at least some of these public policy goals and plaintiff counsel should focus on such coordination efforts (including, for instance, ethically recruiting actually-injured plaintiffs, the use of common plaintiff counsel, the use of common experts, and shared discovery).

To begin with, I believe that American Express will likely win its motion to compel arbitration. This is not surprising in light of the breadth of *Concepcion*, which appeared to foreclose any attack upon an arbitration clause with a class action waiver simply because “small dollar claims ... might ... slip through the legal system.”³ Moreover, the two major prior discussions by the Supreme Court of the vindication of rights doctrine at issue in *American Express* were likely dicta, and such dicta appears narrowly targeted to cases where the arbitration clause, rules, or

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1. 133 S. Ct. 594 (2012) (granting cert.).
2. 131 S. Ct. 1740 (2011).
3. *Id.* at 1753.

procedure expressly limited a remedy or a right.⁴

Even if American Express were to lose, however, the class action landscape would probably not change significantly. *American Express* involves a federal statutory claim under the Sherman Act.⁵ Therefore, it does not concern preemption like *Concepcion*, but rather a conflict between two federal statutes: the Federal Arbitration Act⁶ and the Sherman Act. A decision for the plaintiff would likely not translate into state law causes of action because such an argument would seem to be virtually indistinguishable from a state law unconscionability analysis. Both arguments are simply different articulations of the argument that enforcement of the arbitration clause would be exculpatory for the defendant (and likewise would appear to be another articulation of the “public policy” argument rejected by many lower courts).⁷

Even the field of federal causes of action that might be impacted by *American Express* appears to be small because of the substantial incentives to bring most federal statutory claims—including attorney fees, treble damages and statutory damages.⁸ These types of remedies (particularly attorney fees) have historically been sufficient to satisfy many state law unconscionability tests and would therefore likely defeat most vindication of rights exculpatory arguments made by plaintiffs in

4. *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (explaining that there’s no indication that international arbitration is unsuitable to handle certain unfair competition claims arising out of national law); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (rejecting as speculative the plaintiff’s argument that the high costs of arbitration will prevent the plaintiff from vindicating her rights).

5. 15 U.S.C. § 1, et seq. *See generally* Transcript of Oral Argument, *American Express*, 2013 WL 705521 (Feb. 27, 2013).

6. 9 U.S.C. § 1 et seq.

7. *See Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011) (rejecting an effort to avoid arbitration based upon a public policy argument—involving a state law claim—but reserving the vindication of rights argument while appearing to question its application to state law claims); *Booker v. Robert Half Int’l, Inc.*, 413 F.3d 77, 79, 81–83 (D.C. Cir. 2005) (using language that might apply this doctrine more broadly); *Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo.) (en banc), cert denied, 133 S.Ct. 191 (2012) (applying vindication of rights to state law claims).

8. Examples include Truth in Lending Act (TILA), 15 U.S.C. §1601, et seq.; Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, et seq.; Title VII of the Civil Rights Act 1964, 42 U.S.C. 2000e et seq.; or the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601 (among others).

federal claims as well. In other words, any decision for the plaintiffs in *American Express* would likely be relegated to unique circumstances where the costs (such as expert witness fees, as argued in *American Express*) to pursue a federal claim alone would be prohibitive for plaintiffs.

A win for American Express, however, certainly does not mean that it will be released from liability. Undoubtedly, many lawyers will continue to pursue claims in arbitration against American Express for the kind of antitrust tying arrangements present in the current case.⁹ These claims involve hundreds of millions, or even billions, of dollars of potential damages (not to mention statutory attorney fees) against American Express. More importantly, a win for American Express does not mean that there is no opportunity for economies of scale of aggregated litigation in the right circumstances. As discussed below, such economies of scale might occur with the use of common plaintiff counsel, common experts, shared discovery, and the ability of plaintiff counsel to learn facts from many different plaintiffs rather than a single class representative. While some merchants may have only small claims, even smaller merchants would be entitled to attorney fees and treble damages. Additionally, larger merchants have significant claims and would certainly blaze the path for others to pursue their claims through arbitration. In past lawsuits, claims for some class members (particularly in antitrust actions) have reached or exceeded a million dollars.¹⁰ Such arbitrations can be pursued in an aggregate fashion even if not officially joined. Merchants can (and undoubtedly will) share lawyers and experts, for example.

Changes in the litigation world in the last twenty years create additional opportunities for aggregated litigation. Plaintiff firms today can routinely assemble large groups of plaintiffs (depending upon the particular circumstances),¹¹ and it is not just

9. *In re American Express Merchants' Litigation*, 667 F.3d 204, 208 (2nd Cir. 2012) (plaintiff claims that American Express has tied its "charge card" product, where it has market power to charge higher fees to merchants, to its "credit card" product with its "honor all cards" rule and argues that this is an antitrust violation).

10. *E.g., In re W. Wholesale Natural Gas Antitrust Litig.*, MDL No. 1566 (D. Nev.) (reaching multiple settlements and payouts, some into millions of dollars, for some corporate class members).

11. Jack Weinstein, *The Democratization of Mass Actions in the Internet Age*, 45 Colum. J.L. & Soc. Probs. 451, 455 (2012) (arguing that "we are seeing a shift from class

the advent of advertising that has made this possible. The Internet, electronic communications, and trade associations have dramatically improved communications and coordination between potential plaintiffs and plaintiffs' counsel. The academic literature is just now beginning to grapple with this assembly/coordination trend and the leverage that it may create for plaintiffs in the right circumstances, thereby diminishing any perceived negative impacts of an opinion in favor of American Express.¹²

An example of how such coordination can work is the large number of individual actions filed in litigation by common counsel for alleged violations of the Fair Debt Collection Practices Act (FDCPA),¹³ often against the same defendant.¹⁴ The attorneys' fees in those cases are provided for under the statute.¹⁵ There are other examples of larger volume filings of small dollar individual actions in federal court: the ATM notice cases; some ADA claims, the spam fax cases; the FACTA cases on expiration dates on receipts, although each of these claims has also sometimes been filed in a class forum.¹⁶

actions to aggregate forms of independent actions" and discussing generally examples of aggregate forms of independent actions).

12. Judge Weinstein recently wrote about this in *The Democratization of Mass Actions in the Internet Age*, 45 Colum. J.L. & Soc. Probs. 451 (2012) (noting the potential advantages of such a participatory model over the class action representative model and discussing "quasi-class actions" in response to *Concepcion*). See also Robert Klonoff, Mark Merrmann & Bradley Harrison, *Making Class Actions Work: The Untapped Potential of the Internet*, 69 U. Pitt. L. Rev. 727, 737-44 (2008) (itemizing the coordination tools, internet sites, and tools available to assemble plaintiffs and used to coordinate among plaintiffs involved in various forms of aggregate litigation); Elizabeth Burch, *Litigating Groups*, 61 Ala. L. Rev. 1, 56-57 (2009) (arguing that a community can be developed in mass litigation to lead to maximizing behavior for the entire group, including with the use of technology).

13. 15 U. S. C. §1692 et seq.

14. Chris Serres, *Debtors in Court – Suing Collectors*, Minnesota Star Tribune (Mar. 17, 2011, 4:39 PM), <http://www.startribune.com/investigators/99676349.html?refer=y> ("High-volume consumer law firms are churning out lawsuits as efficiently as the collectors they battle.").

15. 15 USC § 1692k.

16. *E.g.*, Lisa Napoli, *Technology; Crusaders Against Junk Faxes Brandish Lawsuit*, N.Y. Times 1, 1 (Dec. 16, 2003) (discussing the spam fax cases); Chris Driskill & Derek Edwards, *Senate Passes Bill (H.R. 4367) to End ATM Fee Decal Cases*, The Banking Law Connection (Dec. 20, 2012), <http://www.bankinglawconnection.com/2012/12/20/senate-passes-bill-to-end-atm-fee-decal-cases/> (discussing the wave of ATM notice lawsuits); Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, § 2(a)(4), 122 Stat. 1565 (2008) ("Almost immediately... hundreds of lawsuits were filed alleging that the failure to remove the

Such aggregate claims pursued by common plaintiff counsel may create efficiencies of scale, depending upon the facts. As the oral argument in *American Express* reflected, plaintiffs can share experts.¹⁷ Plaintiffs' lawyers can reduce or eliminate the number of necessary depositions. They may be able to use discovery and testimony from one arbitration repeatedly. Therefore, plaintiff's counsel may find that the speed and informality of arbitration is actually an advantage in pursuing such coordinated individual actions. With all of this said, some claims may be better suited than others for such a strategy. Further, defendants may regret creating such mass actions because it will be harder to settle such large inventories of individual actions as opposed to settling a single class action.

Finally, I should note that there remain some avenues around *Concepcion* that minimize any potential unfairness complained of by plaintiffs' counsel. Contract formation defenses—such as fraud, duress, and certain defenses relating to mutuality—or claims against the fact of formation at all continue to exist. For instance, there is an emerging line of mutuality cases where the corporate party tried reserving to itself the unilateral right to modify the arbitration clause, and some courts have held this to be unenforceable.¹⁸ There are also cases discussing whether or not an arbitration clause can be unconscionable for a reason other than a class action waiver.¹⁹ In addition, the question of whether the arbitration clause is even a part of the contract has been litigated heavily recently.²⁰

expiration date was a willful violation of the Fair Credit reporting Act..."); *Businesses Hit With Dubious "Handicapped Access" Lawsuits*, Broward County Bar Association (Jan. 18, 2012), <http://www.browardbar.org/articles/93.html> ("Hundreds of businesses across South Florida have been hit with Americans with Disabilities Act ("ADA premises") lawsuits ... Almost 200 lawsuits naming Carlisle Wilson as a plaintiff have targeted commercial establishments in Dade and Broward Counties. All lawsuits were filed by attorneys William Tucker or Lawrence McGuinness.").

17. Transcript of Oral Argument at 1–5, *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 594 (2012) (granting cert.), 2013 WL 705521.

18. *Morrison v. Amway Corp.*, 517 F.3d 248 (5th Cir. 2008).

19. *In re Checking Account Overdraft Litig.*, 485 Fed.Appx. 403, 406 (11th Cir. 2012).

20. *E.g.*, *NAACP of Camden Co. East v. Foulke Management Corp.*, 421 N.J. Super. 404 (N.J. Super. Ct. App. Div. 2011) (finding that confusion and inconsistency between arbitration provisions in different documents prevented formation); Plaintiffs' Response In Opposition to U.S. Bank National Association's Motion to Compel Arbitration, *In re Checking Account Overdraft Litig.*, MDL No. 2036, (S.D. Fla. May 17, 2011) (No. 1:09-md-

It is also a mistake to assert that corporate America will uniformly modify contracts to include arbitration. Making changes to an existing contract is not simple or costless. Corporate defendants make such changes cautiously and the marketplace can be a discipline on contract changes. In other words, corporations may decide not to include an arbitration clause for marketing reasons or may decide not to amend their contracts because amendment may have a marketing impact. Further, corporate defendants do not necessarily consistently maintain proof of signed contracts or amendments, meaning that plaintiffs will argue that the signed contract or amendment may be unenforceable. The Consumer Finance Protection Bureau may issue future regulations pursuant to the Dodd-Frank Act,²¹ either regulating or prohibiting arbitration clauses. The National Labor Relations Board has also recently decided in *D.R. Horton, Inc.*²² to prohibit the use of arbitration clauses in certain employee contracts.

I will finish with the admission that, as a public policy matter, arbitration can sometimes be a blunt instrument. I have defeated a number of class actions with this instrument, thereby saving my clients potentially tens of millions of dollars. I would strongly argue that these particular actions were meritless. Nevertheless, there are certainly some class actions that need to be brought, so how do we manage to sift the wheat from the chaff? As argued in this Comment, I believe that, in the right circumstances, coordinated individual arbitrations can address at least some of the public policy goals which plaintiff counsel argue may be lost as a result of *American Express* and *Concepcion*, providing a useful tool for those plaintiffs who are alleging actual injury. While there is much left to be written, it does seem that aggregate actions (whether with class actions or coordinated arbitrations) are not dead.

02036-JLK) (plaintiff brief making detailed argument on formation of contract for banking deposit agreement and formation of contract for later amendment of same).

21. 12 U.S.C. §§ 5518(a)–(b) (Supp. IV 2010).

22. 357 NLRB No. 184, (2012).