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Attorneys React To High Court's Arbitration Ruling

Law360, New York (June 20, 2013, 7:25 PM ET) -- The U.S. Supreme Court ruled 5-3 Thursday that courts can't overturn a class arbitration waiver simply because it would cost plaintiffs more to arbitrate the claim than they could possibly recover. Here, attorneys tell Law360 why this ruling is significant.

Alden Atkins, Vinson & Elkins LLP
"The Supreme Court is sending a strong message that courts should not interfere with arbitration agreements and arbitration decisions. The court held in [AT&T Mobility LLC v. Concepcion] and again today in [American Express Co. v. Italian Colors Restaurant] that parties can define for themselves the procedures for an arbitration, and those agreements should be upheld in the face of arguments challenging the fairness of neutral provisions. When combined with the recent [Oxford Health Plans LLC v. Sutter] decision, which upheld an arbitrator's questionable decision, the Court is telling lower courts not to interfere with the arbitration process."

Ed Berbarie, Littler Mendelson PC
"The court's opinion today removes a judicially created hurdle to the enforcement of arbitration agreements according to their terms under the Federal Arbitration Act. As Justice Scalia points out, under the Second Circuit's analysis, every time a party seeks to compel arbitration it would require a court to 'determine the legal requirements for success on the merits claim by claim and theory by theory, the evidence necessary to meet those requirements, the cost of developing the evidence and the damages that would be recovered in the event of success.' This approach would be completely unworkable and inconsistent with the text of the FAA and Supreme Court precedent. As a result of the court's opinion, parties should be able to enforce valid arbitration agreements more expeditiously and move cases into arbitration without 'destroy[ing] the prospect of speedy resolution that arbitration ... was meant to secure.'"

Brian Berkley, Pepper Hamilton LLP
"This decision is in line with the court's recent precedent and reinforces the court's general distaste for class action arbitration. This is good news for companies facing potential class action liability for contract-based claims, including potential liability from customer and employment agreements. This opinion, however, must be read in conjunction with the court's other decision addressing arbitration this term, Oxford Health v. Sutter, which was released last week. There, the court upheld an arbitrator's ruling that permitted class arbitration to go forward, where the contract did not expressly waive class arbitration. Thus, the court's message to companies and employers everywhere is this: Parties can waive their right to class action arbitration, but that waiver must be clear and express in the contract. Parties wanting to take advantage of Italian Colors while following Oxford Health should revisit their arbitration agreements and make sure those agreements contain clear waivers of class action arbitration."

Russ Bleemer, International Institute for Conflict Prevention and Resolution
"In today's decision, the court continued its strong support for individual arbitration, and expanded its views strongly disfavoring class processes. And it may have set the stage for corrective legislation. Also, the court may have previewed its view on a significant remaining category of arbitration class actions likely coming next term, in the employment area. [Justice Elena Kagan's] dissent notes that the opinion disallows plaintiffs' cost-sharing, even outside of formal class processes. One of the employer's justifications in a pending Fifth Circuit case for allowing its workplace class arbitration waiver is that workers may act concertedly to put on their cases."

Gaspare J. Bono, McKenna Long & Aldridge LLP
"Based on my experience, antitrust claims may be fairly litigated either in federal court or before an arbitration panel. Today's decision does not really address the policy question of an appropriate forum to litigate antitrust claims. Instead, the court focused on the legal question of whether parties can, by contract, give away their right to bring claims on a class action basis, whether in federal court or in arbitration. The Supreme Court has now decided that class action rights can be waived by contract."

Joseph M. Callow Jr., Keating Muething & Klekamp PLL
"The American Express decision reinforces two trends in recent Supreme Court jurisprudence. First, the court has enforced agreements to arbitrate and respected the arbitration process (AT&T Mobility and Oxford Health). Second, the court has restricted the use of the class action procedure by heightening the standards for class certification (Wal-Mart and Comcast) and now broadly enforcing a general waiver of class arbitration. Businesses will review and tighten the language of their arbitration provisions and likely add class action/mass action waivers to their standard agreements, which will significantly reduce the number of class action arbitrations, and cases generally, in the future."

Ron Chapman Jr., Ogletree Deakins Nash Smoak & Stewart PC
"The court's ruling bodes extremely well for employers looking to class action waivers as a line of defense against the onslaught of often wholly meritless class and collective actions, especially in the wage and hour arena. While American Express is not an employment case, the court adopted the exact same arguments raised by D.R. Horton in its appeal of the National Labor Relations Board's highly controversial decision finding that class action waivers violate the National Labor Relations Act. In effect, while D.R. Horton's appeal remains pending with the Fifth Circuit Court of Appeals, the Supreme Court has given us the answer and validated the company's position."

Christin Choi, Fisher & Phillips LLP
"Today's U.S. Supreme Court ruling in American Express v. Italian Colors has significant import in the employment arena, even though it arose out of an arbitration provision contained in a corporate contract. The court held today that courts are prohibited from invalidating arbitration agreements containing class action waiver provisions. The decision is significant to employers who enter into arbitration agreements with their employees because it reinforces the longstanding principle that the Federal Arbitration Act requires an arbitration agreement to be enforced according to its terms. It resolves an open question that had allowed employees to avoid the enforcement of arbitration clauses and pursue class and collective actions. This ruling makes utilizing arbitration agreements to resolve employment-related claims even more attractive to employers. However, despite the decision in favor of employers, employees are likely continue to claim that the costs of pursuing an individual claim in arbitration are so high as to prevent them from pursuing their rights in arbitration. Therefore, employers who utilize arbitration agreements should consider including class and collective action waivers in their agreements, including provisions that address the payment of any arbitration-specific costs."

Linda Coberly, Winston & Strawn LLP
"This decision is perhaps the court's clearest statement yet that an arbitration clause is a contractual term that must be enforced. In the future, arguments against arbitration will have to focus on whether a contract was formed in the first place, which is generally a matter of state law. Once the court finds that a contract was formed, however, any contractual terms about arbitration must be enforced, even if they waive class treatment and leave individual claims that are really too small to pursue."

Jeff Crane, Edwards Wildman Palmer LLP
"The Supreme Court severely curtailed the 'effective vindication' exception, which had been invoked to prevent parties from contracting to preclude effective vindication of a federal statutory right. The Second Circuit had relied on the effective vindication rule to invalidate the class action waiver, because the plaintiffs had no rational economic incentive to pursue their federal antitrust claims individually. Essentially, the costs of proving antitrust claims, including expert reports, would have been far greater than any potential recovery for an individual plaintiff who might prevail on the antitrust claims. Thus, unless the plaintiffs were permitted to pursue a class action, no individual plaintiff would be able to afford the costs associated with vindicating federal statutory remedies. Justice Scalia, writing for the five-judge majority, squarely addressed this point: 'But the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue the remedy.' And that is the upshot of the court's decision with respect to the effective vindication rule — it is limited to arbitration agreements that operate as a prospective waiver of a party's right to pursue statutory remedies. The Supreme Court has left no doubt that parties are free to agree that class actions may be prohibited in arbitration. Unless Congress acts to override this decision, businesses that want to avoid class actions have very wide latitude to include waivers of class actions in arbitration clauses. Prior to American Express, some thought that the AT&T Mobility decision was perhaps limited to waivers of class actions involving state law claims, which were at issue in that case. The court in American Express, however, found that enforcing parties' bilateral arbitration agreements in accordance with their terms was no different for plaintiffs claiming violations of federal statutes. The dissenting opinion warns that the majority enables companies to de facto insulate themselves from liability for violations of federal antitrust laws. Without question, the Supreme Court has made it clear that there is no inherent, substantive right to bring class actions. Rather, the class action is a procedural vehicle available to parties who satisfy exacting standards under Rule 23 as explained in Wal-Mart v. Dukes and other recent precedent. Moreover, parties can agree to terms in contracts that include waivers of class actions in arbitration. Given the decision in American Express, one would expect to see many more companies incorporating class action waivers into their standard contracts."

David M. Eisenberg, Baker Sterchi Cowden & Rice LLC
"This is a milestone in the law of class actions. [Justice Antonin Scalia], writing for the court's 5-3 majority, succinctly stated the issue as 'whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.' The answer: yes. The court held that arbitration agreements are binding contracts that the courts must rigorously enforce, with only two exceptions: first, if the applicable statute commands the rejection of a class arbitration waiver; second, if the waiver provision would prevent the 'effective vindication' of a statutory right. The latter could occur if the waiver clause forbade the assertion of statutory rights; and 'perhaps' if filing and administrative fees were so high as to make access to the forum impracticable. This decision is likely to have a substantial impact on commercial agreements, consumer agreements, and employer-employee agreements, and how disputes are resolved under those agreements."

Jose Ferrer, Bilzin Sumberg
"The Supreme Court's decision earlier today is a continuation of a long line of cases, including the court's decision earlier this month in Oxford Health Plans LLC v. Sutter, intended to protect the efficacy of arbitration as a practical alternative to traditional litigation. By holding that the Federal Arbitration Act does not permit courts to invalidate an arbitration provision, regardless of how costly arbitration may be in relation to the potential recovery, the court reiterated a strongly held belief that private arbitration agreements must be 'rigorously enforced' according to their terms even if doing so may result in piecemeal litigation or make the expense of pursuing a remedy not worthwhile. To have held otherwise would have undermined the contractual rights of the parties and opened the door, however slightly, to the widespread judicial hostility to arbitration which the FAA was enacted to curtail."

Thomas P. Gies, Crowell & Moring LLP
"The Court's decision is welcome news for employers seeking to enforce mandatory arbitration agreements that include class action waivers. The majority imposed significant limitations on the 'effective vindication' rule by rejecting the dissent's arguments that the terms of the arbitration agreement would make it financially impractical to pursue a statutory claim. The decision suggests that the Court's majority would take a similar approach to the 'effective vindication' issue presented in several pending(and closely watched) cases involving the National Labor Relations Act(and the NLRB's decision in D.R. Horton), Title VII and the Fair Labor Standards Act. That said, textual differences between these statutes make it difficult to predict the ultimate outcome of those cases."

Lawrence T. Gresser, Cohen & Gresser LLP
"The other shoe has dropped. We knew from AT&T Mobility LLC v. Concepcion that arbitration agreements containing class action waivers will be enforced when the arbitration agreement includes customer-friendly terms designed to make it inexpensive to file valid claims. The lesson of Justice Scalia's majority opinion in American Express is that class action waivers will be enforced even when the arbitration clause is not customer friendly and the individual plaintiff's cost of arbitrating a claim is certain to exceed the potential recovery. Expect to see class action waivers in many more arbitration agreements in the future — and to see plaintiffs' counsel using coordinated individual arbitrations and other cost-sharing arrangements to get around the practical implications of this decision."

Jeffrey D. Hedlund, Faegre Baker Daniels
"In essence, the court's decision reaffirms the basic principle that arbitration agreements between private parties mean what they say and will not be rewritten by courts after the fact. And that means that contracting parties need to be very aware of the terms of their agreements and should expect them to be enforced if they sign on. If they enter into such agreements without using that level of care and later want to change the terms, it is indeed — as Justice Kagan wrote in dissent — just too darn bad."

Tom Kaufman, Sheppard Mullin Richter & Hampton LLP
"The decision seems to be written to clear away various arguments that had been asserted in the wake of Concepcion intended to limit the scope of that decision. Instead, Justice Scalia reaffirms how sweeping the Supreme Court majority had intended the decision to be. Justice Scalia even says near the end that if people just read the Concepcion decision, they would not continue to assert the arguments they have been asserting about how limited is allegedly was. As applied to [wage and hour], I think this case drives a stake through the heart of several popular arguments: one, that Concepcion was limited to cases where the arbitration agreement contained overgenerous provisions designed to make individual arbitration economically viable; two, that [Fair Labor Standards Act] collective actions are immune from class or collective action waivers because the FLSA, like the [Age Discrimination in Employment Act] in [Gilmer v. Interstate/Johnson Lane Corp.], itself provides for collective actions is also dead; and three, that Gentry is distinguishable from Concepcion because it involved some kind of unwaivable statutory right."

Liz Kramer, Leonard Street and Deinard
"AmEx narrows the application of the 'effective vindication' doctrine. Going forward, the only acceptable arguments for invalidating an arbitration agreement due to its impact on federal statutory rights are arguments related to a plaintiff's ability to assert the claims at all. Arguments about the cost of proving the plaintiff's claim are insufficient. This decision will encourage more companies to preclude class actions in their arbitration clauses. The clauses can be drafted to avoid obstacles to initiating arbitration, to comply with the reduced 'effective vindication' doctrine. Any efforts to use the arbitration clause to make arbitration onerous will be focused on the procedural/proof aspects of arbitration — the inability to join claims with anyone else, reduced rights to obtain discovery, limitations on use of experts, etc."

Michael Leffel, Foley & Lardner LLP
"Even after the Supreme Court's decision in AT&T Mobility v. Concepcion, plaintiffs continued to mount attacks on arbitration provisions with class action waivers. They did so based on the purported high cost associated with pursuing individual statutory claims or based on state law theories of unconscionability. The unconscionability attacks may continue, for a while, though they too face little likelihood of prevailing in all but the rarest of cases. For now, American Express makes clear that attacks based on the prohibitive cost of 'proving' an individual's statutory claim, as opposed to proof of excessive costs of arbitration fees, are doomed."

Mike Lennon, Baker Botts LLP
"The implications of the court's ruling will be hotly disputed. Going forward, lower courts might be less inclined to accept the argument that the terms of an arbitration agreement are invalid because they render it economically impractical to successfully prove claims based on statutory rights. Much less certain is the fate of other provisions that limit the ability of an individual to prove statutory claims — for instance, by limiting the type of proof permissible at arbitration."

Brian Murray, Jones Day
"AmEx continues the work of [Stolt-Nielsen SA v. AnimalFeeds International Corp.] and Concepcion, closing off escape routes from binding arbitration clauses with class action waivers. Stolt-Nielsen said any classwide arbitration had to be agreed upon, silence is not enough; Concepcion said state laws that stand as a barrier to arbitration, including blanket bans on class action waivers, don't pass FAA muster. And AmEx continues in that trajectory, clarifying that even if federal laws might be too expensive to enforce absent a class action, that doesn't trump an arbitration clause with a class action waiver."

Scott O'Connell, Nixon Peabody LLP
"The majority opinion brings to mind a popular cellular carrier's recent ad campaign: 'Do you hear me now?' The troika of Stolt-Nielsen, Concepcion and AmEx opinions make plain that precious few grounds will invalid class action waivers in arbitration agreements. AmEx renders further efforts by lower courts to read Concepcion narrowly and find ways around class action waivers almost futile. Indeed, the dissent has virtually decimated any colorable arguments that state statutes can be the basis of a waiver under a vindication of rights theory. Such arguments are easily dispatched by Supremacy Clause principles. Recent decisions in California and Massachusetts relying on state policies to invalidate class waivers are effectively reversed by this decision."

Michael R. Pennington, Bradley Arant Boult Cummings LLP
"This decision will make it nearly impossible for plaintiffs to avoid arbitration clauses with class waivers on any type of external public policy grounds. This impact is underscored most emphatically by the statement in footnote 5 that 'the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.' The message is that the FAA must be enforced as written, and if it goes too far in requiring courts to enforce arbitration, then it is up to Congress, and not the courts, to fix it. While this is — for now, at least — very good news for business interests desiring to limit claims against them to individual arbitration, there is a potential backlash. It will be interesting to

see if this decision, so starkly requiring enforcement of individual arbitration even when it means that the cost of individual arbitration exceeds the potential recovery, actually adds new momentum to the efforts of consumer groups to convince Congress and relevant federal regulators to repeal, modify or displace the FAA."

Matthew P. Previn, BuckleySandler LLP
"The Italian Colors decision continues a long line of cases expressing the Supreme Court's view of arbitration as a viable alternative to litigation. The decision in many ways follows quite naturally from the Supreme Court's 2011 decision in AT&T Mobility v. Concepcion, and Justice Scalia wrote for the same five-justice majority in both cases. While this decision focuses on antitrust law, its impact will be broader. The Supreme Court has made clear, if it wasn't already clear, that courts cannot invalidate an arbitration agreement in a putative class action simply because the costs of individual arbitration may render the case too expensive to bring. Reiterating its holding in the AT&T case, the majority held that the Federal Arbitration Act's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of small-dollar claims."

John Roesser, Alston & Bird LLP
"Today's decision in AmEx v. Italian Colors Restaurant is another in a long line of decisions championing the federal policy favoring arbitration, as reflected in the FAA. The court upheld the FAA's principles that arbitration is a matter of contract and that courts must enforce arbitration agreements as written, unless there is a contrary congressional demand. This case is a continuation of this pro-arbitration policy and thus unlikely to change. There is some indication, in dicta, that the court could envision unenforceable class arbitration waiver clauses. That said, parties that employ class arbitration waivers should continue to do their best to obtain their counterparts' informed consent to said waivers."

Scott Schutte, Morgan Lewis & Bockius LLP
"Today's Supreme Court decision in American Express v. Italian Colors clearly and unequivocally rejects one of the primary arguments that has been asserted by plaintiffs in both federal and state class action since the court's 2011 decision in AT&T Mobility v. Concepcion — that a class action waiver in an arbitration provision can be invalidated when the cost of pursuing a claim on an individual basis exceeds the amount that can be recovered. Although some courts post-Concepcion had viewed the viability of this argument as an open question, Justice Scalia makes clear that — even under Concepcion, but certainly after today's decision — this argument fails. While plaintiffs still may have other avenues to attack the enforceability of class action waivers — for example, under both Concepcion and American Express they still can raise arguments about contract formation and procedural unconscionability — today's decision means that any efforts to assert a 'vindication of rights' exception should be rejected out-of-hand without need for time-consuming and expensive discovery about the cost of pursuing an individual claim."

Gilbert R. Serota, Arnold & Porter LLP
"This decision comes as no surprise to those of us who follow Supreme Court jurisprudence on the Federal Arbitration Act. For nearly 30 years, a slim majority of the Supreme Court has regularly rejected court-made exceptions to enforcement of arbitration agreements, whether the exceptions are based on interpretations of federal statutes — e.g., the Securities Exchange Act of 1934 in Shearson v. McMahon in 1987 or the Credit Repair Organizations Act in CompuCredit v. Greenwood in 2012 — or on more creative theories. The decision in this case closes the door to state and federal decisions which have attempted to apply a 'vindication of statutory rights' exception to enforcement of arbitration agreements, including those with class action waivers. An example of such a case is the California Supreme Court's 2007 decision in Gentry v. Superior Court, which applied this 'exception' in a Labor Code case seeking overtime wages to invalidate an arbitration agreement containing a class action waiver. In Italian Colors, the Supreme Court rejects application of the exception in a class action alleging federal antitrust claims, fully recognizing that it derives from dicta in its own 1985 opinion in Mitsubishi Motors v. Soler Chrysler Plymouth. Notwithstanding this dicta, the majority opinion in Italian Colors

finds enforceable an arbitration agreement and class action waiver where the plaintiff established that his claim would not be economically viable if arbitrated on an individual basis. The court narrows the scope of its prior dicta to cover only situations where the agreement expressly forbids pursuit of certain statutory rights or where the fees of the forum 'make access to the forum impracticable.'"

Felix Shafir and John F. Querio, Horvitz & Levy LLP
"American Express will likely have a significant impact on arbitration law. The Supreme Court has previously emphasized that arbitration agreements must be rigorously enforced according to their terms. But several courts have nonetheless insisted that an arbitration clause's express terms cannot prevent plaintiffs from pursuing their claims on a classwide basis if evidence shows that individual arbitration would not effectively 'vindicate' their statutory rights. American Express decisively rejects this hostility towards arbitration, and makes clear that plaintiffs are not prevented from vindicating their rights if they must proceed with their statutory claims in individual arbitration."

Jonathan Shub, Seeger Weiss LLP
"Today's Supreme Court decision reflects the court's continuing assault on Rule 23. This decision has far-reaching implications for both class actions and arbitrations. It is a sad day for consumers and others attempting to hold corporations accountable for their conduct."

James A. Stepan, Genovese Joblove & Battista PA
"In plain English, today's decision is a direct message that arbitration agreements will be enforced under most circumstances. In other words, the fact that claimants are likely to be economically deterred from bringing individual arbitration claims instead of a class action is of no import, since a deal is a deal, even in an adhesion contract. There is some give-back language that eliminating statutory rights or extreme administrative fees would not be acceptable, but, for companies that favor individualized arbitration, the court's decision will bring more certainty and will them to greater predict and budget for legal expenses and risk."

Eric Wiechmann, McCarter & English LLP
"The next shoe has dropped in the saga of whether an arbitration clause can prevent claimants from seeking class action relief for their disputes. The Supreme Court, in reversing the Second Circuit, held the Federal Arbitration Act evinces the clear congressional policy that the terms of an arbitration agreement will be rigorously be enforced even if the claims involve violation of a federal statute. The fact that pursuing an individual antitrust claim may be so expensive that there is no economic incentive to pursue such claims does not supersede this policy. Following up on their holding in AT&T Mobility, the court held that such an economic burden does not eliminate the right to pursue the claim, only limits it so that the 'effective vindication rule' does not apply. The lesson one might take out of this decision, as the dissent emphatically argues, is an arbitration clause prohibiting class and other consolidated actions might indirectly accomplish what a party cannot directly do, shield itself from many federal statutory violation claims, as such claims are becoming increasingly expensive to prosecute."

Marc L. Zaken, Ogletree Deakins Nash Smoak & Stewart PC
"In this American Express case, the Supreme Court once again confirmed its long-standing rule that arbitration clauses under the FAA will be enforced as a matter of contract in accordance with the parties' agreement. The lesson from this case and the case of Oxford Health Plans LLC v. Sutter, which the court decided earlier this month, is that employers must carefully review their arbitration agreements to clearly state what claims may be subject to arbitration. An agreement to arbitrate will generally be enforced by the courts as long as the agreement does not deprive a claimant from 'effectively vindicating' a federally protected right. The Supreme Court noted in American Express that an arbitration agreement that precluded assertion of certain federal claims or which imposed exorbitant administrative fees so as to effectively deny access to arbitration would be unenforceable. However, the fact that a claim may not be financially worthwhile to bring is not a basis to invalidate an arbitration agreement."

Des Hogan, Hogan Lovells
"The Supreme Court's decision reinforces Concepcion's core holding that arbitration agreements should and will be enforced according to their terms. The decision will have a significant impact on companies with arbitration agreements that include class arbitration waivers. Plaintiffs now cannot evade such waivers, and potentially other arbitration procedures as well, based on the economics of bringing an individual claim. Rather, unless plaintiffs show that their right to pursue a federal statutory claim — not just to prove it — has been thwarted, those plaintiffs will be held to the terms of the arbitration agreements they signed."

David M. Harris, Greensfelder Hemker & Gale PC
"In Italian Colors, the Supreme Court ruled that class action waivers contained in arbitration agreements are enforceable, even if arbitrating claims individually would be uneconomical for plaintiffs. Italian Colors is the latest in a series of arbitration-related decisions by the court, all of which have signaled that such agreements should be enforced by the courts. This decision cuts off one of the widely discussed avenues for invalidating class action waivers following the court's decision in AT&T v. Concepcion, i.e., claiming that enforcement would eliminate a plaintiff's ability to 'effectively vindicate' his rights due to the high cost of individual arbitration."

--Editing by Katherine Rautenberg.

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