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## Class Action's Last Hope: The Argument for Federal Statutory Rights Preemption of the Federal Arbitration Act: In Re American Express Merchants' Litigation

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## NOTES

# Class Action's Last Hope: The Argument for Federal Statutory Rights Preemption of the Federal Arbitration Act

*In re American Express Merchants' Litigation*<sup>1</sup>

### I. INTRODUCTION

Interpretation of arbitration agreements and class action waivers has been a point of confusion among the United States Circuit Courts<sup>2</sup> following the U.S. Supreme Court's class action decisions in 2010.<sup>3</sup> These decisions dealt with contractual silence as to class arbitration<sup>4</sup> and state laws voiding arbitration agreements,<sup>5</sup> but the issue of federal statutory rights as they relate to arbitrable class actions is still unresolved by the Supreme Court.<sup>6</sup> The Supreme Court has yet to decide whether the Federal Arbitration Act (FAA) preempts other federal statutes, such as federal antitrust statutes and civil rights statutes.<sup>7</sup> The "Effective Vindication Doctrine," recently coined by one scholar,<sup>8</sup> is a doctrine under which the Supreme Court has articulated that essential federal statutes are not preempted by the FAA.<sup>9</sup>

The Supreme Court has an opportunity to resolve the question of whether federal statutory rights may preempt the FAA with the Court's grant of certiorari in the case of *In re American Express Merchants' Litigation*.<sup>10</sup> While other appellate courts have chosen not to directly address the questions created by the Effec-

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1. 667 F.3d 204 (2d Cir. 2012).

2. Compare *In re Am Express Merch. Litigation*, 667 F.3d 204 (2d Cir. 2012) (Permitting class action or arbitration because antitrust action would be so expensive that no plaintiff would seek to vindicate their federal statutory rights) with *Coneff v. AT&T Corp.*, 673 F.3d 1155 (9th Cir. 2012) (Holding under the FAA it is immaterial whether customers have a sufficient incentive to vindicate their state rights).

3. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

4. *Stolt-Nielsen*, 130 S. Ct. 1758 (2010).

5. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

6. Ellen Meriwether, *Class Action Waiver and the Effective Vindication Doctrine at the Antitrust/arbitration Crossroads*, ANTITRUST, Summer 2012, at 67 ("Concepcion appears for now at least to have largely (if not completely) foreclosed arguments that public policy interests under state law in allowing access to class action procedures are a sufficient basis to avoid what would otherwise be an enforceable arbitration agreement to which the FAA applies.").

7. *Id.*

8. *Id.* at 70 (stating Ellen Meriwether is a litigation partner at Cafferty Faucher LP and concentrates her practice in antitrust class action litigation. She is an associate editor of ANTITRUST).

9. *Id.* at 67.

10. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012).

tive Vindication Doctrine,<sup>11</sup> *American Express* squarely presents the issue for review.<sup>12</sup> This note will examine the history behind several recent federal decisions on class arbitration<sup>13</sup> as well as federal antitrust laws and how antitrust laws should be enforced in the shadow of the FAA.

## II. FACTS AND HOLDING

The Defendant, American Express, is the leading issuer of charge cards to consumers and businesses.<sup>14</sup> A charge card submits the balance to the cardholder at the end of the billing cycle and requires full payment of the amount outstanding.<sup>15</sup> In contrast, a credit card allows the cardholder to pay only a portion of the amount outstanding at the close of the billing cycle and subjects the remaining amount outstanding to interest charges.<sup>16</sup> The charge card is a method of payment, whereas the credit card is a way for consumers to finance their transaction.<sup>17</sup> Because the average charge card user is more affluent than the average credit card user,<sup>18</sup> American Express is able to charge a high merchant discount fee<sup>19</sup> on all charge card purchases.<sup>20</sup>

In *American Express*, plaintiffs allege American Express is violating the anti-trust protections of the Clayton Act by tying their charge card merchant discount fees and agreements to their growing credit card brand.<sup>21</sup> Plaintiffs argue this tying action makes American Express credit cards far more costly to merchants than other credit card companies who charge a more competitive merchant discount rate.<sup>22</sup>

Plaintiffs are the National Supermarkets Association, Inc. (NSA),<sup>23</sup> as well as California and New York corporations that operate businesses and have contracted

11. Meriwether, *supra* note 6, at 70 (Stating "Other courts of appeals have not yet squarely addressed whether the effective vindication doctrine continues to apply to federal claims following Conception. In *Kilgore v. Key Bank National Association*, the Ninth Circuit implied in dictum that the effective vindication doctrine continues to apply to federal claims following Conception, but the court had no occasion to directly address the issue because the case involved only state law claims and state public policy concerns. . . . In *Coneff v. AT&T*, the Ninth Circuit considered the exact same arbitration clause at issue in Conception. Although one federal claim (among many state law claims) was at issue and the plaintiff expressly raised the effective vindication doctrine, the court decided the case on preemption grounds, holding that state public policy concerns, however worthwhile, could not, consistent with Conception, undermine the FAA.").

12. *Id.* at 69.

13. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *In re Am. Express Merch. Litigation*, 667 F.3d 204 (2d Cir. 2012); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

14. *Am. Express*, 667 F.3d at 207.

15. *In re Am. Express Merchs.*, 2006 WL 662341, at \*1 n.6.

16. *Id.*

17. *Id.*

18. *Id.*

19. A merchant discount fee is the "rate charged to a merchant by a bank for providing debit and credit card services." *Merchant Discount Rate Definition*, INVESTOPEDIA, <http://www.investopedia.com/terms/m/merchant-discount-rate.asp> (last visited Nov. 11, 2013).

20. *Am. Express*, 667 F.3d at 208.

21. *Id.*

22. *Id.*

23. *Id.* at 207. National Supermarkets Association, Inc. is a "voluntary membership-based trade association that represents the interests of independently owned supermarkets." *Id.*

with American Express.<sup>24</sup> Plaintiffs allege American Express has used an “Honor All Cards” provision contained in the Card Acceptance Agreement for their popular charge cards to compel merchants to not only accept American Express credit and debit cards, but also to apply the agreed upon charge card fees to American Express credit and debit card transactions.<sup>25</sup> The Honor All Cards provision of the agreement provides that acceptance of American Express Cards “shall mean any card or other account access device issued by American Express...bearing the American Express name or trademark, service mark or logo.”<sup>26</sup> American Express’s Card Acceptance Agreement is a standard form contract that may be terminated at any time by any party by sending written notice.<sup>27</sup> The Agreement also contains a mandatory arbitration clause, and class arbitration waiver.<sup>28</sup>

Plaintiffs bring a class action with a class consisting of all merchants that have accepted American Express charge cards and have therefore effectively agree to accept credit and debit cards that bare the American Express Logo.<sup>29</sup> Plaintiffs assert that by compelling merchants to apply the Honor All Cards provision, merchants are faced with the choice of paying supracompetitive merchant discount fees on American Express credit and debit cards, or losing a significant portion of sales they receive from traditional charge card users,<sup>30</sup> who are considered highly desirable to merchants due to their affluence and large volume of purchases.<sup>31</sup> Procedurally, this case represents the third time the Second Circuit had reviewed the *American Express* case.<sup>32</sup>

Plaintiffs in *American Express* filed their original class action in the United States District Court for the Southern District of New York seeking average damages of \$5,000 per plaintiff.<sup>33</sup> American Express moved to compel enforcement of the arbitration agreement pursuant to their Card Acceptance Agreement. American Express’ motion to compel arbitration was granted by the District Court leading

24. *Id.*

25. *Am. Express*, 667 F.3d at 208.

26. *Id.*

27. *Id.*

28. *Id.* (“IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR HAVE A JURY TRIAL ON THAT CLAIM.... FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION. THE ARBITRATOR’S DECISION WILL BE FINAL AND BINDING. NOTE THAT OTHER RIGHTS THAT YOU WOULD HAVE IF YOU WENT TO COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION. There shall be no right or authority for any Claims to be arbitrated on a class action basis or on any basis involving Claims brought in a purported representative capacity on behalf of the general public, other establishments which accept the Card (Service Establishments), or other persons or entities similarly situated. Furthermore, Claims brought by or against a Service Establishment may not be joined or consolidated in the arbitration with Claims brought by or against any other Service Establishment(s), unless otherwise agreed to in writing by all parties”).

29. *Id.* at 207.

30. *Am. Express*, 667 F.3d at 208.

31. *Id.* at 207.

32. In re *Am. Express Merchants’ Litig.* (*Amex I*), 554 F.3d 300 (2d Cir. 2009); In re *Am. Express Merchants’ Litig.* (*Amex II*), 634 F.3d 187 (2d Cir. 2011); In re *Am. Express Merch. Litigation* (*Amex III*), 667 F.3d 204 (2d Cir. 2012).

33. *Amex I*, 554 F.3d at 308. (Plaintiffs argue that each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only \$5000.).

plaintiffs to appeal the decision due to the prohibitive costs of arbitrating an anti-trust dispute bilaterally.<sup>34</sup> Plaintiffs' appeal was heard before the Second Circuit in a case now referred to as *American Express I*.<sup>35</sup>

In *American Express I*,<sup>36</sup> the Second Circuit found that the Southern District of New York erred in upholding the class arbitration waiver because the District Court did not view the case in light of the Clayton Act's<sup>37</sup> statutory antitrust protections against tying products together to gain an unfair competitive advantage.<sup>38</sup> Plaintiffs argued that if they were not allowed to proceed as a class, the cost of proceeding bilaterally would be prohibitive.<sup>39</sup> The Second Circuit agreed with Plaintiffs' argument and found the arbitration agreement led to a significant risk that enforcement of the class waiver would effectively deprive plaintiffs of their rights to vindication under federal antitrust statutes.<sup>40</sup> American Express appealed the Second Circuit's decision, and the Supreme Court granted American Express's petition for certiorari.<sup>41</sup> However, the Supreme Court remanded for consideration in light of the then recently decided *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*<sup>42</sup> decision.<sup>43</sup> The remanded case is now referred to as *American Express II*.

In *American Express II*, the Second Circuit distinguished *American Express I* from *Stolt-Nielsen*, also an antitrust class dispute.<sup>44</sup> In *American Express*, the Second Circuit found that enforcement of the class waiver would practically preclude antitrust claims due to the cost of bringing even a small antitrust claim.<sup>45</sup> The Supreme Court decision in *Stolt-Nielsen* on the other hand, was decided on grounds that the Supreme Court found the panel of arbitrators to have exceeded its power by creating class arbitration where none was contracted for.<sup>46</sup> The Second Circuit interpreted *Stolt-Nielsen* a standing for the principle that "parties cannot be forced to arbitrate disputes in class action arbitration unless the parties agree to class action arbitration."<sup>47</sup>

The Second Circuit found its analysis in *American Express I* to be unaffected by *Stolt-Nielsen*.<sup>48</sup> The Second Circuit placed a hold on *American Express II* in

34. *In re Am. Express Merchs.*, 2006 WL 662341, at \*1.

35. *Id.*

36. *Id.*

37. 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 138, ("The Clayton Act, as an antitrust law, is intended for the protection of competition, not competitors.").

38. *Amex III*, 667 F.3d at 210.

39. *Id.*

40. *Id.*

41. *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401, 176 L. Ed. 2d 920 (2010)

42. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

43. *Amex III*, 667 F.3d at 212, 218. The Second Circuit relied on expert witness affidavits which asserted that "even a relatively small economic antitrust study will cost at least several hundred thousand dollars, while a larger study can easily exceed \$1 million." The Second Circuit, after reviewing expert witness' information, found "the only economically feasible means for enforcing [Plaintiff's] statutory rights is via a class action." Evidence presented by Plaintiffs showed that the highest expected damage for any individual plaintiff was "\$38,549 when trebled" and it "would not be worthwhile for an individual plaintiff ... to pursue individual arbitration or litigation." *Id.*

44. *Id.*

45. *Amex III*, 667 F.3d at 212 (citing *Amex II*, 634 F.3d 197-198).

46. *Id.* at 211 (citing *Stolt-Nielsen*, 559 U.S. at 676).

47. *Id.* at 213.

48. *Id.* at 212.

order for American Express to file another writ of certiorari.<sup>49</sup> While on hold, the Supreme Court issued a new class action arbitration decision, *AT&T Mobility LLC v. Concepcion*,<sup>50</sup> leading the Second Circuit to revisit *American Express* in a case now referred to as *American Express III*.<sup>51</sup>

In *American Express III*, the Second Circuit acknowledged that it would be tempting to read *Stolt-Nielsen* and *Concepcion* as rendering class waivers per se enforceable.<sup>52</sup> The Court distinguished *American Express III* from *Concepcion* because the *Concepcion* decision offered a way to analyze whether a state contract law is preempted by the FAA while in *American Express I* and *II*, the Second Circuit's holding rested on a vindication of federal statutory rights analysis.<sup>53</sup> The Court found its analysis to be unaltered by the Supreme Court decisions and again remanded to the Southern District of New York.<sup>54</sup> American Express filed a writ certiorari which was granted by the Supreme Court on November 9, 2012.<sup>55</sup>

The Second Circuit did not order class arbitration in any of the *American Express* cases, finding such an order to be barred by the *Stolt-Nielsen* decision.<sup>56</sup> The Court stated that *Stolt-Nielsen* precluded any court from compelling the parties to submit to class arbitration when the parties have not agreed to class arbitration.<sup>57</sup> Rather, the Court permitted American Express the option of class arbitration and class action by finding the class waiver to be unenforceable.<sup>58</sup>

The Second Circuit held that class waivers should not be enforced when doing so would prevent plaintiffs from vindicating their federal statutory right to bring certain lawsuits.<sup>59</sup> Having again granted certiorari, the Supreme Court now has the opportunity to review the Second Circuit's reasoning in *American Express III*.<sup>60</sup>

### III. LEGAL BACKGROUND

#### *A. When a Contract is Silent on Class Arbitration*

The Supreme Court has stated the FAA was enacted with the express purpose of making written agreements for arbitration of contract disputes valid and enforceable.<sup>61</sup> Due to the desire to make arbitration agreements enforceable, the issue of silence in arbitration clauses has often left courts in a difficult situation. The issue remained unresolved until the Supreme Court decided *Stolt-Nielsen*.<sup>62</sup> In *Stolt-Nielsen*, a class of shipping company plaintiffs sued Stolt-Nielsen, an

49. *Id.* at 204.

50. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

51. *Amex III*, 667 F.3d at 204, 206.

52. *Id.* at 212.

53. *Id.*

54. *Id.* at 219.

55. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012).

56. *Id.* at 219 (citing *Amex I*, 554 F. 3d at 321; *Stolt-Nielsen*, 559 U.S. at 684).

57. *Id.*

58. *Id.*

59. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010).

60. Meriwether, *supra* note 6, at 68.

61. *Stolt-Nielsen*, 559 U.S. at 681-682.

62. *Id.* at 1758.

international shipping company, alleging an antitrust violation of conspiring to restrain competition in the global tanker transportation industry.<sup>63</sup> An arbitration panel ruled that claimants were entitled to class arbitration, a decision the Supreme Court ultimately struck down.<sup>64</sup>

In *Stolt-Nielsen*, the Supreme Court held that an arbitrator may not create class arbitration absent consent to class arbitration.<sup>65</sup> The *Stolt-Nielsen* claimants had argued for a reading of a previous decision, *Green Tree Fin. Corp. v. Bazzle*,<sup>66</sup> as creating a test requiring arbitrators to look to the language of the parties' agreement, and then ascertain the parties' intention regarding class arbitration.<sup>67</sup> The Court in *Stolt-Nielsen* rejected this reading of *Green Tree*, remarking that *Green Tree* did not establish a rule for deciding whether class arbitration is permitted but left that question unanswered.<sup>68</sup> Instead the *Stolt-Nielsen* Court stated that while "interpretation of an arbitration agreement is generally a matter of state law," certain rules are imposed by the FAA, including that "arbitration is a matter of consent, not coercion."<sup>69</sup> The Court held that due to the consensual nature of arbitration agreements, generally parties are free to structure their arbitration agreements in any way they see fit.<sup>70</sup>

In *Stolt-Nielsen*, an arbitration panel found an agreement to class arbitration because the parties failed to expressly preclude class arbitration.<sup>71</sup> However, the Supreme Court found the differences between bilateral and class-action arbitration to be too material to allow such a finding by an arbitrator.<sup>72</sup> Specifically, the Supreme Court distinguished class arbitration from bilateral arbitration with respect to differences in privacy, cost, efficiency, speed and availability of arbitrators with the skill and knowledge needed to resolve class disputes.<sup>73</sup>

The Supreme Court found that under FAA principles,<sup>74</sup> an arbitrator may not compel class arbitration without a contractual basis for concluding that the parties agreed to permit class arbitration.<sup>75</sup> Agreeing to arbitrate is not a sufficient basis for an arbitrator to infer an implicit agreement to class arbitration because class

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

67. *Stolt-Nielsen*, 559 U.S. at 1772.

68. *Id.*

69. *Id.* at 1773.

70. *Id.* at 1774.

71. *Id.* at 1775.

72. *Stolt-Nielsen*, 559 U.S. at 1775.

73. *Id.*

74. *Id.* at 1763. The court looked at the following FAA provisions: 9 U.S.C.A. § 2 (1947) (providing "a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.") and 9 U.S.C.A. § 4 (1947) (providing a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.").

75. *Stolt-Nielsen*, 559 U.S. at 1775.

arbitration and bilateral arbitration are fundamentally different.<sup>76</sup> Therefore, the Court found the arbitration panel exceeded its power by compelling class arbitration where the parties had not agreed to any class arbitration provision.<sup>77</sup>

Ultimately, *Stolt-Nielsen* delivered a new rule for interpreting silence on class arbitration by framing the question as being “whether the parties agreed to authorize class arbitration.”<sup>78</sup> However, the *Stolt-Nielsen* ruling did not resolve the potential issue of a state or federal policy in conflict with the FAA.

### *B. Explicit Waiver of Class Arbitration and State Public Policy*

Whether state laws can render class action waivers in arbitration agreements void came under review by the United States Supreme Court in the 2011 decision, *AT&T Mobility LLC v. Concepcion*.<sup>79</sup> The *Concepcions* brought a class action against AT&T because AT&T charged \$30.22 in sales tax for cell phones that had been advertised as free.<sup>80</sup>

AT&T’s arbitration clauses expressly denied the ability of plaintiffs to bring class arbitration suits.<sup>81</sup> The *Concepcions* attempted to attack the clause as invalid under California public policy and the FAA’s Savings Clause.<sup>82</sup> The FAA’s Savings Clause states that arbitration agreements are valid and enforceable except upon such grounds as exist at law for the revocation of any contract.<sup>83</sup> The California public policy involved in *Concepcion* was created by the California Supreme Court’s opinion in *Discover Bank v. Superior Court*.<sup>84</sup>

*Discover Bank* allowed California consumers to invalidate arbitration agreements under the FAA’s Savings Clause when the arbitration provision was found in a contract of adhesion, the parties predictably request small damages, and it is “alleged that the party with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”<sup>85</sup> The *Concepcions* attempted to use *Discover Bank*<sup>86</sup> with the FAA’s Savings Clause to void their arbitration agreement with AT&T,<sup>87</sup> but the Supreme Court held that a federal statute’s savings clause cannot be construed as allowing a

76. *Id.*

77. *Id.* at 1776.

78. *Id.*

79. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011).

80. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852 (9th Cir. 2009).

81. *Concepcion*, 131 S. Ct. at 1744, (Arbitration agreement stated claims must be brought in “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding”).

82. *Id.* at 1743.

83. 9 U.S.C.A. § 2 (1947).

84. *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (holding class arbitration waivers “found in consumer contracts of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money,” the class arbitration waive is void due to unconscionability).

85. *Id.*

86. *Discover Bank*, 113 P.3d at 1100.

87. *Concepcion*, 131 S. Ct. at 1743.



state right to exist when it would be inconsistent with the purposes of the federal statute.<sup>88</sup>

The Supreme Court found that the FAA's primary purpose is to ensure that arbitration agreements are enforced according to their terms.<sup>89</sup> Further, arbitration is a matter of contract.<sup>90</sup> Therefore arbitration waivers are generally enforced according to their terms.<sup>91</sup> Similar to the opinion in *Stolt-Nielsen*, the *Concepcion* Court found bilateral arbitration to be fundamentally different from class arbitration.<sup>92</sup> In *Concepcion*, the Supreme Court also found class arbitration to present increased risks to defendants that errors will not be corrected due to the lack of multilayered review, which a defendant would have in our court systems.<sup>93</sup> The Supreme Court found *Discover Bank*, to the extent it led to the creation of class arbitration, to be in conflict with arbitration's fundamental characteristic of being consensual because an agreement to arbitration is fundamentally different from agreement to class arbitration.<sup>94</sup>

Ultimately, the Supreme Court in *Concepcion* ruled that state law is preempted by the FAA whenever it stands at odds with the execution of the objectives of Congress.<sup>95</sup> The main objective of the FAA, as stated by the Supreme Court, is to ensure that private agreements to arbitrate are enforced according to their terms; therefore, state law may not preempt an arbitration agreement.<sup>96</sup> However, the *Concepcion* decision did not address how a court should approach federal statutes, like federal antitrust statutes, that are in conflict with the FAA.

### C. Antitrust Acts

The first federal legislation to attempt to regulate antitrust actions was the Sherman Act, passed in 1890.<sup>97</sup> Some scholars believe the Sherman Act was brought about due to a desire to maximize efficiency<sup>98</sup> while others believe that Congress sought to protect consumers,<sup>99</sup> or to protect smaller competitors from being run out of the market.<sup>100</sup> While the exact reasons behind the passage of the Sherman Act are unclear today, it is clear that the Sherman Act was designed to

88. *Id.*

89. *Id.*

90. *Id.* at 1745 (citing *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010)).

91. *Concepcion*, 131 S. Ct. at 1745 (citing *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

92. *Id.* at 1750.

93. *Id.* at 1752.

94. *Id.* at 1751.

95. *Id.* at 1753.

96. *Concepcion*, 131 S. Ct. at 1748.

97. The Sherman Act, 15 U.S.C. §§ 1-7 (1980).

98. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act, Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (stating that goals of legislation were consumer welfare and efficiency).

99. All these factors indicate that the ultimate goal of antitrust is not to increase the total wealth of society, but to protect consumers from behavior that deprives them of the benefits of competition.

John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008) (stating that the ultimate goal of antitrust is not to increase the total wealth of society, but to protect consumers from behavior that deprives them of the benefits of competition).

100. *Id.*

“safeguard consumers by protecting the competitive process.”<sup>101</sup> The Act reflects a judgment by Congress that competition will produce lower prices as well as higher quality goods and services, both of which are good for the American consumers.<sup>102</sup>

The Sherman Act creates two federal violations that reflect a legislative judgment that anticompetitive acts are against federal public policy. Section one of the Sherman Act makes it a felony for competitors to conspire to restrain trade or commerce.<sup>103</sup> Section two of the Sherman act makes it a felony to monopolize, attempt to monopolize, or conspire to monopolize in a way that restrains trade.<sup>104</sup> While the Sherman Act was the first act by Congress espousing a policy that anticompetitive acts are contrary to public welfare, the Clayton Act<sup>105</sup> was later passed to strengthen and enforce this policy.

Following the 1912 presidential election, President Woodrow Wilson responded to public opinion that the Sherman act was too lenient on corporations by requesting that Congress pass legislation to supplement and strengthen the Sherman Act.<sup>106</sup> As a result, Congress enacted the Clayton Act in 1914.<sup>107</sup> The Clayton Act established more provisions to help prohibit anticompetitive acts. Among the added protections were laws against price discrimination,<sup>108</sup> exclusive dealing,<sup>109</sup> labor union organizations,<sup>110</sup> and mergers.<sup>111</sup> Additionally, the Clayton Act permitted private lawsuits for antitrust violations where previously only the federal government could pursue antitrust acts.<sup>112</sup> Two important provisions of the Clayton Act are the provision that allows private parties to bring antitrust suits and the provision that grants treble damages to injured private parties.<sup>113</sup>

When private parties succeed on their antitrust claims, they are awarded treble damages.<sup>114</sup> Treble damages are necessary for “optimal deterrence of unlawful

101. *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 489 (2d Cir. 2004).

102. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

103. The Sherman Act § 1.

104. *Id.* at § 2.

105. The Clayton Act, 15 U.S.C. §§ 12-27 (1914).

106. *The Clayton Act*, ANTITRUSTLAWS.ORG, <http://www.antitrustlaws.org/Clayton-Act.html> (last visited Sept. 20, 2013).

107. *Id.*

108. *Id.* (stating that “the Clayton Act addresses corporate price discrimination. This prevents companies from engaging in predatory lending that might lessen competition or create a monopoly”).

109. *Id.* (stating that “the Clayton Act also prevents companies from selling products with the condition that the buyer can only use their product”).

110. *Id.* (stating that “the act also deals with the organization of labor unions stating that “the labor of a human being is not a commodity or article of commerce.” Corporations are forbidden from preventing the organization of labor unions. It also keeps labor strikes from being included in antitrust lawsuits. The result of this provision is that labor unions may organize and agree upon wages without being accused of price fixing”).

111. *Id.* (stating that “while most mergers allow the companies to create better quality goods at less expensive prices, some mergers limit competition and make price fixing easier. This part of the act was designed to prevent mergers from creating monopolies”).

112. *Id.*

113. The Clayton Act § 15.

114. *Id.* (stating that any person injured “shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee”).

conduct that may go undetected and be difficult to prove.”<sup>115</sup> The provisions allowing private suits and granting treble damages, taken together, express a federal policy that individuals should be allowed to pursue relief for antitrust acts and that violators should be settled with triple the damages they cause in order to ensure violators are not able to enjoy the “fruits of their illegality.”<sup>116</sup> Several of the federal policies within the various federal antitrust statutes are now threatened by further extension of the FAA. This issue is referred to as the Effective Vindication Doctrine and was addressed by the Second Circuit in *American Express*.

#### D. Effective Vindication Doctrine

The Effective Vindication Doctrine is a seldom-used doctrine under which courts have “articulated a requirement that effectuating the FAA policy in favor of arbitration does not come at the expense of important policies embodied in other federal statutes.”<sup>117</sup> The Effective Vindication Doctrine was first established by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>118</sup> In *Mitsubishi*, the Japanese automobile manufacturer, Mitsubishi, brought suit against an automobile dealer in Puerto Rico for “nonpayment of stored vehicles, contractual storage penalties, damage to manufacturer’s warranties and good will, expiration of distributorship, and other breaches of sales procedure agreement.”<sup>119</sup> The dealership counterclaimed for violations of the Sherman Act as well as various other Puerto Rican antitrust and unfair competition statutes.<sup>120</sup>

In *Mitsubishi*, the Supreme Court found that parties could agree to arbitrate their statutory claims because they had submitted their claim for “resolution in an arbitral, rather than a judicial, forum.”<sup>121</sup> However, the Supreme Court created the Effective Vindication Doctrine when it stated that arbitration could proceed “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.”<sup>122</sup>

The Supreme Court restated the requirement of effective vindication in another decision, *Green Tree*.<sup>123</sup> In *Green Tree*, the Supreme Court held that claims created by statutes furthering important public policy may be arbitrated “so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum.”<sup>124</sup> In *Green Tree* the Court went so far as to state that large arbitration costs could preclude a litigant “from effectively vindicating her federal statutory rights in the arbitral forum.”<sup>125</sup> Additionally, there have been

115. DIRECTORATE FOR FIN. & ENTER. AFFAIRS COMPETITION COMM., *Roundtable Discussion on Private Remedies: Passing on Defense; Indirect Purchaser Standing; Definition of Damages* (2006), <http://www.ftc.gov/bc/international/docs/RoundtableDiscussionPrivateRemedies-UnitedStates.pdf>.

116. *Hanover Shoe*, 392 U.S. at 494 (stating that “§ 4 has another purpose in addition to deterring violators and depriving them of ‘the fruits of their illegality’”).

117. *Meriweather*, *supra* note 6.

118. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

119. *Id.* at 473.

120. *Id.*

121. *Id.* at 628.

122. *Id.* at 637.

123. *Green Tree Fin. Corp. v. Larketta Randolph*, 531 U.S. 79 (2000).

124. *Id.* at 90 (citation omitted).

125. *Id.* at 93.

several circuit court decisions applying the Effective Vindication Doctrine to a variety of claims over the years.<sup>126</sup>

#### IV. INSTANT DECISION

The Second Circuit reviewed *American Express* for the third time, and for the third time it ruled that a party may not contract away their ability to bring an anti-trust claim in court if doing so would preclude them from ever bringing the anti-trust claim.<sup>127</sup> The Second Circuit made two critical findings that led to their ultimate decision that American Express' class action and arbitration clauses were invalid. First, the Second Circuit found Supreme Court precedent in *Eisen v. Carlisle & Jacquelin*<sup>128</sup> that class action devices are the only economically reasonable path when "a large group of individuals or entities has suffered an alleged wrong, but the damages due to any single individual or entity are too small to justify bringing an individual action."<sup>129</sup>

The Second Circuit found bilateral arbitration to be an uneconomical means of vindicating many individuals' antitrust injuries.<sup>130</sup> In particular, the court found that expert witness fees for an antitrust case require an expenditure in the hundreds of thousands of dollars.<sup>131</sup> While antitrust laws allow recovery of attorney's fees and treble damages, they do not grant recovery of expert witness fees, which are unlikely to be recouped by the trebling of a single antitrust injury.<sup>132</sup> The Court acknowledged that arbitration could be an effective vehicle to vindicate a federal statutory right,<sup>133</sup> however due to the uniquely high costs of antitrust attorney's fees and expert witness fees, in addition to the difficulty in winning an antitrust case, only class arbitration would be financially reasonable.

Additionally, the Court found *Green Tree v. Bazzle*'s holding controlling to the extent that when "a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."<sup>134</sup> The Second Circuit found no language in *Concepcion*, *Stolt-Nielsen* or any other case that suggests this prior precedent had been overturned.<sup>135</sup> The Second Circuit found the merchants in *American Express* had adequately showed individual arbitration would be prohibitively expensive, and that American Express had put forth no serious challenge to these findings.<sup>136</sup>

In particular, the Second Circuit focused on affidavits submitted by economist Dr. Gary French that expert assistance in individual plaintiff antitrust cases range

126. See *Blair v. Scott Specialty Gases*, 283 F.3d 595, 605 (3d Cir. 2002); *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 (1st Cir. 2006); *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1259-1260 (11th Cir. 2003); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002).

127. *In re Am. Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012).

128. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

129. *In re Am. Express Merchants' Litig.*, 667 F.3d at 214.

130. *Id.* at 219.

131. *Id.* at 218.

132. *Id.*

133. *Id.* at 214.

134. *In re Am. Express Merchants' Litig.*, 667 F.3d at 216.

135. *Id.*

136. *Id.* at 218.

from “about [\$300,000] to more than [\$2,000,000]” and after reviewing this complaint, in his opinion, the fees would “fall in the middle of that range.”<sup>137</sup> Dr. French stated in his affidavit that in his opinion as a professional economist, “it would not be worthwhile for an individual plaintiff . . . to pursue individual arbitration or litigation where the out-of-pocket costs, just for the expert economic study and services, would be at least several hundred thousand dollars, and might exceed [\$1,000,000].”<sup>138</sup> The Second Circuit found Dr. French’s affidavits to demonstrate that the “only economically feasible means for plaintiffs enforcing their statutory rights is via a class action.”<sup>139</sup>

In conclusion, the Second Circuit held that it is not financially feasible for the merchants to seek to vindicate their federal statutory antitrust rights in individual actions due to the low amount of their claims.<sup>140</sup> Since plaintiffs cannot pursue these claims in class arbitration, they can only pursue them in a class action or not at all.<sup>141</sup> If merchants are not allowed to proceed in a class action, they will have been effectively deprived of their rights under the Clayton Act.<sup>142</sup> Therefore, American Express will have effectively immunized itself against all antitrust liability by including in its contracts an arbitration clause that does not permit class proceedings.<sup>143</sup> For these reasons, Second Circuit concluded that American Express’ class action and arbitration clause was unenforceable.<sup>144</sup> The Second Circuit remanded to the district court with instructions to deny American Express’ motion to compel arbitration.<sup>145</sup>

The Second Circuit found that the circumstances required a denial of the motion to compel arbitration because it took *Concepcion* and *Stolt-Nielsen* together to mean that “parties cannot be forced to arbitrate disputes in a class-action arbitration unless the parties agree to class action arbitration,”<sup>146</sup> and the parties in *American Express* had not consented to class arbitration. Without consent to class arbitration, the Second Circuit found the only method of enforcing the merchant’s federal statutory right was via class action. American Express filed a writ of certiorari, which was granted by the United States Supreme Court on November 9, 2012.

## V. COMMENT

*American Express* presents the Supreme Court with two important issues it must resolve: first, whether a federal statute can override a conflicting federal statute of equal strength, and second, if a consumer can contractually waive his right vindicate an antitrust injury. This comment will look at the practical effect on these two issues, should the Supreme Court rule in favor of American Express.

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137. *Id.* at 217.

138. *Id.*

139. *In re Am. Express Merchants’ Litig.*, 667 F.3d at 217.

140. *Id.* at 219.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *In re Am. Express Merchants’ Litig.*, 667 F.3d at 220.

146. *Id.* at 214.

*A. Effective Vindication Doctrine*

The Supreme Court should find that arbitration agreements compelling bilateral arbitration of small antitrust disputes do not result in an effective vindication of consumers' statutory rights. Bilateral antitrust disputes are too expensive, and recoveries too limited,<sup>147</sup> to think that consumers would still try to vindicate their antitrust injuries if they were not allowed to form a plaintiff class. The most obvious issues are the complexity of antitrust litigation,<sup>148</sup> the unrecoverable and expensive expert testimony and research expenses,<sup>149</sup> the lack of mandatory treble damages in arbitration,<sup>150</sup> and the limited number of attorneys who would agree to represent a party who has suffered antitrust injury in the face of the aforementioned issues.

Antitrust is one of the most complex and vague branches of law in America.<sup>151</sup> This complexity leads to higher than average attorney fees for the few antitrust lawyers with the necessary experience to provide competent antitrust representation.<sup>152</sup> The vagueness of antitrust laws stems from the Sherman and Clayton Act's limited textual guidance,<sup>153</sup> despite their far reaching consequences. This statutory vagueness requires antitrust attorneys to possess extensive knowledge and dedicate thorough research to antitrust case law. While a dedicated *pro se* consumer with a few hours of research on Google and his old receipts could form a semblance of an argument against AT&T for false advertising, he could not accumulate the necessary knowledge to bring an antitrust argument against a corporation like American Express. However, complexity of litigation is not the most glaring hurdle for an injured consumer in bilateral arbitration. The biggest drawback of using bilateral arbitration to resolve antitrust disputes is the lack of recoverable expenses for expert witnesses and research.<sup>154</sup>

As the merchants in *American Express* point out, it would cost a minimum of \$300,000 to research all of the relevant market information needed to analyze an antitrust claim.<sup>155</sup> Because none of the merchants have damages in the range of \$300,000,<sup>156</sup> bringing an antitrust claim bilaterally would result in huge losses, even if a merchant were ultimately victorious and received treble damages. While

147. The Clayton Act § 15(a) (stating plaintiff can only recover the cost of suit, including a reasonable attorney's fee, in addition to treble damages).

148. *In re Cotton Yam Antitrust Litig.*, 505 F.3d 274, 288 (4th Cir. 2007) (stating "antitrust is a complex area of the law, and antitrust trials (or arbitration proceedings) can be long and involved.").

149. *In re Am. Express Merchant's Litig.*, 667 F.3d at 218.

150. *See Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002) (arbitrator "may award antitrust treble damages.").

151. *In re Cotton*, 505 F.3d. at 288.

152. State Bar of Texas: Dept. of Research & Analysis, *2009 Hourly Rate Fact Sheet* (June 2010), <http://www.texasbar.com/AM/Template.cfm?Section=Archives&Template=/CM/ContentDisplay.cfm&ContentID=11240>. (A study of hourly attorney rates completed by the Texas Bar showed antitrust attorney fees to have the highest medium hourly fee of any category at \$500 per hour.).

153. Alan Greenspan, *Antitrust Seminar of the National Association of Business Economists*, Cleveland, September 25, 1961. Published by Nathaniel Branden Institute, New York, 1962 (antitrust laws are "so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict").

154. *In re Am. Express*, 667 F.3d at 218.

155. *Id.* at 217.

156. *Id.* at 218 (median damage for a plaintiff in *American Express* was \$1,751. The highest plaintiff damage claim was \$12,850).

it is conceivable that a large group of merchants could band together to split up the research cost, it is not realistic due to needing equal motivation and resources to fund such a group endeavor without forming a class.<sup>157</sup> The inability to recover damages in excess of the cost of bringing a claim is further complicated by the lack of mandatory treble damages in arbitration.<sup>158</sup>

If parties are forced to bilaterally arbitrate, they lose the protection of automatic treble recovery.<sup>159</sup> While an arbitrator could still award treble damages, there is nothing preventing an arbitrator from awarding standard damages with no multiplier.<sup>160</sup> Consumers are in some luck in that courts have ruled that a company cannot explicitly contract around the right to treble damages.<sup>161</sup> Mandatory treble damages help compensate consumers for the high difficulty and cost in bringing antitrust claims. A ruling that antitrust acts are bilaterally arbitrable would deny consumers of the protections that Congress established for them, and further the gap between the cost of arbitration and the likely recovery.

All of the above issues culminate in the final problem: few attorneys would be willing to represent a consumer in a bilateral antitrust arbitration. It is simply not worth an attorney's time to research and formulate an argument in order to competently represent a client in a low dollar antitrust claim. The lack of monetary incentive for a competent antitrust attorney, coupled with the extreme complexity of antitrust actions, results in a fatal blow to consumers: they cannot effectively argue their claim even if they do pursue vindication of their antitrust injury.

### *B. Conflicting Federal Statutes*

The Supreme Court should not find that the FAA preempts the Sherman and Clayton Acts. The policy of *Concepcion*, that a state statute or court decision cannot overrule a federal statute or decision,<sup>162</sup> is reasonable even if somewhat unpopular. However, *American Express* presents a different issue stemming from the FAA, potentially neutralizing the Sherman and Clayton Acts. The antitrust acts passed by Congress are not unenforced or irrelevant statutes, but a crucial element in the policing of large corporations to prevent systematic abuse of consumers who lack negotiation power.<sup>163</sup>

In *Hawaii v. Standard Oil Co. of Cal.*,<sup>164</sup> the Supreme Court explained Congress' motivation for enacting antitrust laws, private enforcement rights, and treble damages. The Court stated that "every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on

157. For more information on the difficulties of parties with divergent interests, see Gray T. Culbreath, *Ethical Issues Encountered in Multi-Claimant Litigation*, The Federation of Defense & Corporate Counsel (2008), <http://thefederation.org/documents/12.%20Ethical%20Issues.pdf>.

158. *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002).

159. *Id.*

160. *Id.* (arbitrator "may award antitrust treble damages").

161. *Kristian v. Comcast Corp.*, 446 F.3d 25, 29 (1st Cir. 2006) (holding prohibitions against treble damages . . . were invalid).

162. *Concepcion*, 131 S. Ct. at 1748.

163. FTC Perspectives on Competition Policy and Enforcement initiatives in Electric Power, 97 WL 747857 (F.T.C.), 3 (stating that "it is gospel that the antitrust laws are important to maintaining a competitive marketplace").

164. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262, 265-266 (1972).

strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation.”<sup>165</sup> Removing the protection of class action antitrust suits could result in extensive harm to consumers due to corporations making a conscience choice to violate antitrust statutes, and as a result, weaken the competition in our markets.

Part of the statutory antitrust protections is that a party who successfully brings an antitrust claim will be awarded treble damages.<sup>166</sup> The Court in *Standard Oil* remarked that Congress could have chosen one of any number of possible penalties for violators of antitrust laws, however they settled on treble damages as a way to incentivize individuals to bring private suits.<sup>167</sup> Another importance of treble damages is it represents Congress’ estimation that only one out of three antitrust violators are caught, brought to court, and successfully sued.<sup>168</sup> This reduces the incentives for corporations to violate antitrust statutes, because the damages may outweigh the long-term benefit to the corporation.<sup>169</sup> In arbitration, there is no rule that arbitrators must award an injured party treble damages, only that they *may* award treble damages.<sup>170</sup> Couple this with less claims being brought overall due to a lack of effective vindication, and we are left with an equation that always rewards corporations for consistently violating antitrust laws over a number of years.

Without arbitration of antitrust disputes, if 33% of injured parties brought their claims in court and received their mandatory treble damages, anticompetitive corporations are left with a 1% gain for their anticompetitive acts.<sup>171</sup> A finding for American Express would change this balance and could be seen as a green light for corporations to act as anticompetitive as possible. If 15% of injured parties brought their claims in bilateral arbitration - likely a generous percentage given the aforementioned barriers - and those plaintiffs were awarded non-mandatory treble damages, the anticompetitive corporation would reap 55% of the proceeds procured by their anticompetitive acts. It seems unlikely that this was Congress’ intent when it enacted the FAA in 1925.<sup>172</sup> The fact that Congress created the right to bring private antitrust suits in 1914, only 11 years prior to the passage of the FAA, makes it even less likely that Congress intended this outcome.<sup>173</sup>

It is more reasonable to interpret the FAA as allowing the Sherman and Clayton Acts to permit consumers to vindicate anticompetitive injuries, as is clearly stated in the Clayton Act. By doing so, the Supreme Court would allow both the FAA, as well as our federal antitrust laws, to remain both relevant and powerful.

165. *Id.* at 262.

166. The Clayton Act § 15(a) (1914).

167. *Standard Oil*, 45 U.S. at 262.

168. Robert H. Lande, *Are Antitrust ‘Treble’ Damages Really Single Damages?*, 54 OHIO ST. L.J., 115, 118 (1993) (Antitrust violations do not actually give rise to “treble” damages. When viewed correctly, antitrust damages awards are approximately equal to, or are in fact less than, the actual damages caused by antitrust violations).

169. *Id.* at 118, 142.

170. *Inv. Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002) (arbitrator “may award antitrust treble damages”).

171. Lande, *supra* note 168.

172. 9 U.S.C. §§ 1-16.

173. *Concepcion*, 131 S. Ct. at 1751.



## VI. CONCLUSION

The Second Circuit's ruling in *American Express* was a victory for consumers after a series of recent defeats. The decision makes sense when trying to decide what is desirable to our society as a whole, as well as what was intended by Congress in 1914 and 1925. However, the current Supreme Court Justices have preferred to view the FAA as a proverbial steamroller, flattening any legal barrier that tries to slow its momentum. Indeed the Supreme Court seems to have minimal regard for the impact their arbitration decisions will have on unwary or unknowledgeable consumers. Some might say it is common sense that we should not require consumers take a \$300,000 loss for expert fees in order to potentially recover a \$5,000 judgment. It is unlikely, however, that the Supreme Court will view this obstacle as a bar to pursuing a federal right to vindicate an antitrust wrong.

There should be little doubt that the Supreme Court will once again come down on the side of big business and expand the FAA to make all arbitration agreements per se enforceable. The possibility of a victory for the merchants in *American Express* took a further hit when Justice Sotomayor recused herself from the case.<sup>174</sup> If the effective vindication argument is defeated, then consumers wishing to circumvent their arbitration agreements will be without a defense.<sup>175</sup> However there may soon be relief for consumers who are subject to mandatory arbitration agreements in the financial industry.

With the passage of the Dodd-Frank Act in 2010, Congress created the Consumer Financial Protection Bureau (CFPB),<sup>176</sup> a federal regulatory agency designed to protect consumers.<sup>177</sup> The CFPB began a study of forced arbitration provisions in April of 2012.<sup>178</sup> If the CFPB finds mandatory preemptive arbitration agreements to be an unfair financial practice, it has the ability to declare such provisions to be unenforceable.<sup>179</sup> Without the effective vindication defense available, it would be difficult for any neutral observer to classify such a system as anything but unfair to the American consumer.

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174. *Italian Colors Restaurant*, THE SUP. CT. OF THE U.S. BLOG, (2013), <http://www.scotusblog.com/case-files/cases/american-express-co-v-italian-colors-restaurant/>.

175. The Supreme Court ruled 5-3 in favor of American Express on June 20, 2013. *Am. Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2310 (2013).

176. 12 U.S.C. § 5518 (2010).

177. *About Us*, CONSUMER FIN. PROT. BUREAU (July 15, 2013), <http://www.consumerfinance.gov/the-bureau/>.

178. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 FR 25148-05. The end-date for the study is not yet known. *CFPB Launches Study Into Mandatory Arbitration, Bringing Discussion To Congress*, Kelly Grover LLP (Jan. 17, 2013), [http://www.kellergrover.com/cfpb-launches-study-into-arbitration-bringing-the-discussion-to-congress\\_8478.html](http://www.kellergrover.com/cfpb-launches-study-into-arbitration-bringing-the-discussion-to-congress_8478.html).

179. 12 U.S.C. § 5518 (2010) (authority to restrict mandatory pre-dispute arbitration).