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Sweet Vindication: The Second Circuit Strikes a Blow to Companies that Use Class-Action Waivers in Arbitration Agreements to Avoid the Law

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NOTES

Sweet Vindication: The Second Circuit Strikes a Blow to Companies That Use Class-Action Waivers in Arbitration Agreements to Avoid the Law

In re American Express Merchants' Litigation[1]

I. INTRODUCTION

It is easy to see why a company might want to limit a plaintiff's ability to bring a class-action suit. Class actions, after all, expose defendants to substantial damage awards for relatively minor infractions,[2] and due to the relative ease of joining a class action lawsuit, lead to far more plaintiffs than there would be otherwise were plaintiffs forced to bring lawsuits on an individual basis.[3] It is unsurprising, then, that many companies have begun to include class action waivers in their binding arbitration agreements.[4] These waivers force potential plaintiffs to bring arbitration claims on an individual basis instead of as a class.[5] Many courts have upheld these waivers, holding that to do otherwise would narrow the application of the Federal Arbitration Act.[6]

Other scholars and courts have concluded that when a class action waiver prevents a plaintiff from vindicating his statutory rights, that waiver should be unenforceable. The U.S. Court of Appeals for the Second Circuit took this approach in *In re American Express Merchants' Litigation*.[7] The court, however, was careful to point out that these class-action waivers should not be considered unenforceable per se, but that courts must examine each waiver on a case-by-case basis. This note will examine the court's reasoning and will discuss what courts and Congress should do to protect consumers when companies use class-action waivers to avoid liability when they break the law.

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1. 554 F.3d 300 (2d Cir. 2009).

2. Daniel R. Higginbotham, Note, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 DUKE L.J. 103, 111 (2008).

3. F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 381-82 (2009).

4. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 5-6 (2000).

5. *Id.*

6. *See* Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007); Bommer v. At&T Corp., 309 F.3d 404 (7th Cir. 2002).

7. *In re* Am. Express Merchs.' Litigation, 554 F.3d 300, 320 (2d Cir. 2009).

II. FACTS AND HOLDING

In 2003, a group of merchants came together in an attempt to bring a class-action lawsuit against American Express Travel Related Services Company, Inc. (Amex).[8] The proposed class consisted of "all merchants that have accepted American Express charge cards . . . and have thus been forced to agree to accept American Express credit and debit cards . . . ."[9]

The plaintiffs claimed that Amex charged merchants significantly higher "merchant discount fees" than other popular credit card companies.[10] These merchants originally agreed to pay the higher fees charged by Amex because Amex centered its business on the issuance of corporate and personal charge cards used by affluent people who spend relatively large amounts of money.[11] The plaintiffs grew to resent these higher fees because Amex began to issue new credit cards to college students, young adults, and others who perhaps did not justify the higher fees charged by Amex.[12] Due to the nature of the agreement between the merchants and Amex, the plaintiffs were compelled to honor all cards issued by Amex and to pay the same high fees for each purchase, regardless of the type of card being used.[13] The plaintiffs contended that this "amount[ed] to an illegal 'tying arrangement,' in violation" of [the Sherman Act].[14]

Unfortunately for the plaintiffs, the contract between the merchants and Amex not only compelled arbitration but also contained a class action waiver.[15] The plaintiffs would not have taken issue with the mandatory arbitration clause if it had allowed for class arbitration.[16] The plaintiffs brought their suit as a class action because the damages that each merchant could anticipate would not justify the cost.[17] They argued that "enforcement of the class action waiver would effec-

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8. *Id.* at 304-05.

9. *Id.* at 305. The plaintiffs in the suit included California and New York corporations that operated businesses that have contracted with Amex and the National Supermarkets Association, Inc. (NSA), "a voluntary membership-based trade association that represents the interests of independently owned supermarkets." *Id.*

10. *Id.* at 307-08. According to the plaintiffs, these fees are at least thirty-five percent higher than the rates of credit card companies such as Visa, MasterCard, and Discover. *Id.* at 308.

11. *Id.* at 307.

12. *Id.* at 308.

13. *Id.*

14. *Id.* Specifically, the plaintiffs allege this violates section 1 of the Sherman Act. *Id.*; *see* 15 U.S.C. § 1 (2006). The Second Circuit Court of Appeals made clear in its decision that it would not take a position on the merits of the case. *In re Am. Express*, 554 F.3d at 305 ("And, needless to say, we take no position on the merits of these claims.").

15. *In re Am. Express*, 554 F.3d at 306. The relevant clause in the arbitration agreement reads:

> 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.

Id.

16. *See id.* at 310.

17. This damage estimate was calculated by an economist who stated that:

> [A] small merchant with $10 million of annual sales, on average, might calculate and expect $754 of economic damages for the year 2001, which is roughly the midpoint of the damage period covered by this litigation . . . . Multiplying the $754 damage figure by four, gives a rough estimate of $3,015 total damages for the whole four-year damage period, or $9,046 when trebled, assuming that the merchant's sales remain constant at $10 million for the four-year period.

tively strip [the plaintiffs] of the ability to assert their claims because" the costs associated with bringing a lawsuit would far outweigh the potential reward.[18] To counter the plaintiffs' argument, Amex contended that the plaintiffs, their attorneys, and their experts "could reach an agreement as to how the experts' cost of preparation could be shared," and thus lower the total cost for each plaintiff.[19]

The district court agreed with Amex, and determined that, under the Clayton Act,[20] each merchant could recover threefold damages and the cost of the suit, including a reasonable attorney's fee.[21] Despite this, the District Court held that "the enforceability of the collection action waivers is a claim for the arbitrator to resolve."[22] The Second Circuit Court of Appeals reversed the decision of the district court, holding that although class action waivers are not unenforceable per se, the waiver in this case was unenforceable because it would effectively bar the plaintiffs from bringing suit against Amex.[23]

III. LEGAL BACKGROUND

The Federal Arbitration Act (FAA)[24] was enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts."[25] In the instant decision, the Second Circuit Court of Appeals acknowledges the expression of "a strong federal policy favoring arbitration as an alternative means of dispute resolution."[26] This policy is tempered by the fact, though, that enhancing the federal policy favoring arbitration is largely a matter of "mak[ing] arbitration agreements as enforceable as other contracts, *but not more so*."[27] The U.S. Supreme Court illustrated this point in *Perry v. Thomas*,[28] for example, by stating that a court may not construe an arbitration agreement in a different way than it construes other contracts under state law.[29] The opinion went on to say that a court cannot "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable."[30]

Id. at 317.

18. *Id.* at 308. An expert that testified for the plaintiffs, for instance, estimated that the total cost for an individual plaintiff to bring action against Amex to resolve this controversy would be at least several hundred thousand dollars, and could cost as much as one million dollars. *Id.* at 317.

19. *Id.* at 318. The Second Circuit Court of Appeals did not buy this argument, though, because a separate clause in the arbitration agreement specifies that an individual plaintiff cannot share any information relating to an arbitration with *anyone*. *Id.*

20. 15 U.S.C. § 15(a) (2006).

21. *In re Am. Express*, 554 F.3d at 309.

22. *Id.* at 309.

23. *Id.* at 304.

24. *See* 9 U.S.C. §§ 1-16 (2006).

25. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

26. *In re Am. Express*, 554 F.3d at 311 (quoting Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir. 2001)).

27. *Id.* (quoting Opals on Ice Lingerie v. Bodylines, Inc., 320 F.3d 362, 369 (2d Cir. 2003)) (alteration in original) (emphasis in original).

28. 482 U.S. 483 (1987).

29. *Id.* at 492 n.9.

30. *Id.*

The FAA can be said to offer only "minimalist guidance" to class arbitration[31] due to the fact that class arbitration in the United States has existed for only approximately twenty-five years.[32] The first known case in the United States to address class arbitration is *Keating v. Superior Court*.[33] In that case, the California Court of Appeals found that there was "no insurmountable obstacle to conducting an arbitration on a class-wide basis."[34] Since then, the process of class arbitration has become more standardized "through the creation of several sets of specialized arbitral rules."[35]

While the U.S. Supreme Court has never ordered parties to proceed in class arbitration, it could be said to have implicitly permitted class arbitration in *Green Tree Financial Corp. v. Bazzle*.[36] In *Bazzle*, the Supreme Court was asked to decide whether an arbitration agreement that was silent as to class arbitration implicitly allowed the plaintiffs to proceed in class arbitration.[37] In a plurality decision, the Court held that because the parties had agreed to submit to an arbitrator "all disputes, claims, or controversies arising from or relating to" the contract, it was up to an arbitrator, and not a court, to decide whether the contract allowed for class arbitration.[38] After *Bazzle*, it is not surprising that many companies revised their standard arbitration agreements "to expressly prohibit class arbitration."[39] In fact, this was foreseen by Justice Stevens during oral arguments, where he stated that *Bazzle* would have no future significance because "isn't it fairly clear that all the arbitration agreements in the future will prohibit class actions?"[40]

The Supreme Court has not yet directly faced the question of whether there are conditions under which an arbitration agreement that contains a class action waiver would be incompatible with the FAA.[41] The Supreme Court has, however, provided some guidance on the conditions that need to be met in order to invalidate an arbitration agreement due to excessive costs. In *Green Tree Financial*

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31. Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 335 (2004) (citing Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 178-79 (2002).

32. S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating International Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1018 (2009).

33. Keating v. Superior Court, 167 Cal. Rptr. 481, 492 (Cal. Ct. App. 1980), *vacated*, 645 P.2d 1192 (Cal. 1982), *rev'd in part*, Southland Corp. v. Keating, 465 U.S. 1 (1984); Sternlight, *supra* note 4, at 38.

34. *Keating*, 167 Cal. Rptr. at 492.

35. Strong, *supra* note 32, at 1026 (referring to the American Arbitration Association's Supplementary Rules for Class Arbitration, JAMS Class Action Procedures, and the National Arbitration Forum's Class Action Procedures).

36. 539 U.S. 444 (2003) (plurality opinion); *see also* Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 186-87 (2006).

37. *Bazzle*, 539 U.S. at 447.

38. *Id.* at 448, 451-52.

39. Laurence Z. Shiekman, Stephen S. Harvey, & Angelo A. Stio, III, *Another Federal Circuit Knocks Out Class Action Waiver Provisions in an Arbitration Agreement Based on Public Policy Under Federal Antitrust Laws*, 62 CONSUMER FIN. L.Q. REP. 169, 169 (2008).

40. Elizabeth M. Avery, Green Tree Financial Corp. v. Bazzle: *Class Actions and the Future of Arbitrating Antitrust Disputes*, 19 ANTITRUST 24, 26 (2004) (quoting Transcript of Oral Argument, Greentree Fin. Corp. v. Bazzle, No. 02-634, 2003 WL 1989562 at *55 (Apr. 22, 2003)).

41. *In re* Am. Express Merchs.' Litigation, 554 F.3d 300, 313 (2d Cir. 2009).

Corp.-Alabama v. Randolph,[42] the Supreme Court addressed "whether an arbitration agreement that does not mention arbitration costs and fees is unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs."[43] In upholding the petitioner's motion to compel arbitration, the Supreme Court held that a party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs.[44]

The U.S. Court of Appeals for the Fourth Circuit applied this principle to class action waivers in arbitration agreements in the case *In re Cotton Yarn Antitrust Litigation*.[45] In that case, purchasers of cotton and poly-cotton yarn brought action "alleging that [yarn] manufacturers had engaged in a price-fixing conspiracy in violation of the Sherman Act."[46] All of the arbitration clauses at issue in the case prevented multiple plaintiffs from joining their claims against the defendants.[47] The court found that the plaintiffs in the case did not establish how much money it would cost to bring a suit individually against the defendants.[48] It also declared that the burden of showing that the terms of an arbitration agreement preclude a plaintiff from vindicating her statutory rights "is a substantial one and cannot be satisfied by a mere listing of ways that the arbitration proceeding will differ from a court proceeding, or by speculation about difficulties that *might* arise in arbitration."[49] The court held that the arbitration agreements in this case were enforceable because, while bringing arbitration claims individually could be prohibitively expensive in some situations, the plaintiffs failed to establish that this was the case for them.[50]

The U.S. Court of Appeals for the Eighth Circuit reached a similar conclusion in *Pleasants v. American Express Co.*[51] In that case, the plaintiff brought a suit on behalf of herself and others similarly situated, alleging that American Express had violated the Truth in Lending Act.[52] American Express moved to compel arbitration on an individual basis, but the plaintiff argued that the contract's class action waiver was unconscionable.[53] The court disagreed, stating that if the plaintiffs

42. 531 U.S. 79 (2000).

43. *Id.* at 82.

44. *Id.* at 91-92. In this case, the Supreme Court found that the respondent did not meet this burden due to the fact that she relied on "unfounded assumptions" that could not provide the basis "to ascertain the actual costs and fees to which she would be subject in arbitration." *Id.* at 90 n.6.

45. 505 F.3d 274 (4th Cir. 2007).

46. *Id.* at 277.

47. *Id.* at 283.

48. *Id.* at 285 ("The plaintiffs in this case developed no evidentiary record below establishing how much it would cost to proceed individually against each defendant or how those increased costs would affect their ability to proceed in arbitration. The absence of an evidentiary record on this issue leaves us with mere speculation about the actual cost of individual proceedings and something little better than a wild guess about the ability of the corporate plaintiffs to bear those speculative costs.").

49. *Id.* at 286-87 (emphasis in original).

50. *Id.* at 293.

51. 541 F.3d 853 (8th Cir. 2008).

52. *Id.* at 855. *See generally* Truth in Lending Act, 15 U.S.C. § 1640(a)(1-4) (2006).

53. *Pleasants*, 541 F.3d at 857. The plaintiff argued that the contract was:

> substantively unconscionable because claims of this type 'involve small recoveries for which consumers are unlikely to arbitrate absent the class device,' and procedurally unconscionable because AEIS had superior bargaining power, presented the arbitration clause on a take-it-or-leave-it basis, and did not send the agreement to Pleasants until after she had completed the surveys.

were successful, the Truth in Lending Act allowed the plaintiffs to win the costs of the action and a reasonable attorney's fee.[54] Therefore, despite the fact that the amount in question for each plaintiff was very small, the court held that because the plaintiffs could recover the costs of arbitration, the class action waiver in the arbitration agreement was not unconscionable.[55]

Class action waivers in arbitration agreements are also sometimes upheld on the grounds of federal preemption.[56] In what some have considered a "surprise victory" for corporate defendants,[57] the U.S. Court of Appeals for the Third Circuit went further than the Eighth or Fourth Circuits in upholding a class action waiver in *Gay v. CreditInform*.[58] In its decision, the court stated that the right to a class action is "'merely a procedural one'" and that "the right 'may be waived.'"[59] The court went on to hold that the FAA preempted state law, and that federal courts could not use unconscionability standards to modify arbitration agreements.[60] Furthermore, the court pointed out that even if this obstacle could be overcome, because the plaintiff had not been misled or coerced into accepting the arbitration agreement, there was no procedural unconscionability and therefore the class action waiver should still be upheld.[61]

The court in *Boomer v. AT&T Corp.*[62] also used the concept of federal preemption to uphold a class action waiver. In that case, the plaintiff attempted to bring a class action lawsuit against AT&T because AT&T allegedly overcharged its customers for contributions to the federal Universal Services Fund.[63] The U.S. Court of Appeals for the Seventh Circuit proved to be another court "unmoved by arguments that an arbitration clause lacks minimal fairness"[64] by declaring the Federal Communications Act[65] preempted state laws of unconscionability.[66] The court reasoned that the purpose of the act was to create uniform rates throughout the country; if in some states arbitration clauses are stricken as unconscionable or illegal under those states' consumer protection laws—whereas in other states such

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Id.

54. *Id.* at 859 ("In this case, Pleasants's total recovery of attorney's fees, costs, and statutory damages of $2000 would likely exceed the costs of pursuing her claim."). The court also found that the class-action waiver was very clear, and therefore was not procedurally unconscionable.

55. *Id.*

56. For a broader discussion on this point, see Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 799 (2004).

57. *See* Bland & Prestel, *supra* note 3, at 389.

58. 511 F.3d 369 (3d Cir. 2007).

59. *Id.* at 392 (quoting Johnson v. W. Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000)).

60. *See id.* at 395. In its decision, the Third Circuit rejected the holdings of two Pennsylvania Superior Court decisions which declared that the inclusion of a waiver to bring a judicial class action in an arbitration agreement was unenforceable and unconscionable. In rejecting these holdings, the Third Circuit reasoned that because these waivers did not exist "upon such grounds as exist at law or in equity for the revocation of *any* contract" pursuant to section 2 of the FAA, courts could not prevent the enforcement of these arbitration provisions. *Id.* at 394-95.

61. *See id.* at 395.

62. 309 F.3d 404 (7th Cir. 2002).

63. *Id.* at 408.

64. *See* Stempel, *supra* note 56, at 765.

65. *See* 47 U.S.C. §§ 201(b), 202(a) (2006).

66. *AT&T*, 309 F.3d at 418-19, 421, 423; *see also* 47 U.S.C. §§ 201(b), 202(a).

provisions are validated—the rates could be different throughout the country.[67] Without considering whether the arbitration claims at issue were unconscionable, the Seventh Circuit held that the Communications Act implicitly preempted state laws of unconscionability because to rule otherwise would defeat the purpose of the act.[68]

In reaching the opposite conclusion, the U.S. Court of Appeals for the Eleventh Circuit, in *Dale v. Comcast Corp.*,[69] did not even consider federal preemption.[70] In that case, subscribers of the cable television provider Comcast attempted to bring a class action lawsuit because they felt Comcast was overcharging for various franchise fees.[71] Each plaintiff, though, had previously signed a contract containing a mandatory arbitration clause that included a class action waiver.[72] After considering the fact that each plaintiff could potentially recover only a small amount of money and that attorneys' fees could only be awarded upon a showing of bad faith, the court held that the class action waiver in the contract was unconscionable because it prevented the plaintiffs from enforcing their statutory rights under the Cable Act's[73] franchise fee provisions.[74] The court admitted that while it used an unconscionability standard to rule that the class action waiver in this case was unenforceable, it was persuaded by the reasoning of cases that used a vindication of statutory rights standard.[75]

The vindication of statutory rights standard helped the the U.S. Court of Appeals for the First Circuit decide *Kristian v. Comcast Corp.*[76] In that case, customers of the cable provider attempted to form a class in order to bring suit against Comcast for violating antitrust laws.[77] In order to make its decision in this case, the First Circuit relied upon the principle that the legitimacy of the arbitral forum "rests on 'the presumption that arbitration provides a fair and adequate mechanism for enforcing statutory rights.'"[78] The court held that without the availability of class-wide arbitration or litigation,[79] the plaintiffs could not vindicate their statutory rights.[80] While the court based its decision on the vindication

67. *AT&T*, 309 F.3d. at 418-19.

68. *Id.* at 421, 423.

69. 498 F.3d 1216 (11th Cir. 2007).

70. *Id.* at 1224.

71. *Dale*, 498 F.3d at 1218, 1220. The plaintiffs claimed that Comcast overcharged each of them $10.56 in excess fees over a four year period. *Id.* at 1220.

72. *Id.* at 1218.

73. Cable Communications Policy Act of 1984, 47 U.S.C. § 521 (2006).

74. *Dale*, 498 F.3d at 1224.

75. *Id.*

76. 446 F.3d 25 (1st Cir. 2006).

77. *Id.* at 29. The plaintiffs alleged that Comcast illegally traded customers with its competitors. *Id.* at 30.

78. *Id.* at 54 (quoting Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 14 (1st Cir. 1999).

79. *Id.* (noting that the "mandatory arbitration regime" created by the arbitration provision in question "effectively forecloses the use of any class-based mechanism").

80. *Id.* at 54-55. ("[E]ach putative class member's estimated recovery-assuming the damage award was trebled pursuant to the applicable antitrust statute-would range from a few hundred dollars to perhaps a few thousand dollars. By contrast, the expert fees alone are estimated to be in the hundreds of thousands of dollars; and attorney's fees could reach into the millions of dollars."). The court noted that each class member's award would be not greater than a few thousand dollars while the agent fees would be in the hundreds of thousands of dollars and attorney's fees potentially in the millions of dollars. *Id.* at 54.

of statutory rights, it points out the vast similarities between this analysis and an unconscionability analysis.[81] In fact, the court states that because it found that class arbitration could proceed using a vindication of statutory rights analysis, it did not feel that it was necessary to proceed with an unconscionability analysis at all.[82]

There is clearly a split among the Circuit Courts of Appeals regarding the standards used to determine whether a class action waiver in an arbitration agreement should be enforced. The Circuit Courts of Appeals for the Fourth, Eighth, Third, and Seventh Circuits appear to be more likely to enforce these waivers, while the Courts of Appeals for the Eleventh and First Circuits appear to be less likely to enforce them. In *In re American Express Merchants' Litigation*,[83] the Court of Appeals for the Second Circuit aligned itself with the Eleventh and First Circuits in holding that the class action waiver at issue was unenforceable.[84]

IV. INSTANT DECISION

The issue before the Second Circuit in *In re American Express Merchants' Litigation* (hereinafter, *American Express*) was whether a mandatory class action waiver provision contained in an arbitration clause should be enforceable.[85] The court began its opinion by stating that "it is difficult to overstate the strong federal policy in favor of arbitration . . . ."[86] It later tempered this by stating that, while arbitration agreements are as enforceable as other contracts, they are not more so.[87] The court supported this proposition by quoting from section 2 of the FAA, which provides that an agreement to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[88]

The court also pointed out that the Supreme Court has recognized that class actions can serve as a vehicle for vindicating statutory rights.[89] The court additionally stated that the availability of class actions is especially important when a large group of individuals or entities has suffered an alleged wrong that is too small to justify bringing individual actions.[90] The court illustrated this point by quoting from a Seventh Circuit case that stated, "[T]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.00."[91] In *American Express*, the court found that the plaintiffs had adequately demonstrated that the costs associated with bringing an individual suit against Amex would prevent the plaintiffs from vindicating their

81. *Id.* at 63-64.
82. *Id.* at 64.
83. 554 F.3d 300 (2d Cir. 2009).
82. *Id.* at 320.
85. *Id.* at 302.
86. *Id.* (quoting Arciniago v. Gen. Motors Corp., 460 F.3d 231, 234 (2d Cir. 2006)).
87. *Id.* at 311-12.
88. *Id.* at 312 (quoting the F.A.A., 9 U.S.C. § 2 (2000)).
89. *Id.* at 312.
90. *Id.*
91. *Id.* at 313 (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

statutory rights.[92] The court followed the First Circuit's decision in *Kristian*[93] in declaring that because the class action waiver prevented the plaintiffs from vindicating their statutory rights, the waiver was unenforceable.[94]

While the court recognized the importance of class action suits, it goes out of its way to stress that the holding of this case does not make class action waivers in arbitration agreements unenforceable per se, or even unenforceable per se in the context of antitrust actions.[95] Instead, the court points out that because the FAA favors arbitration agreements, each case must be considered "on its own merits."[96]

The court also made it clear that it analyzed class action waivers through a lens focused upon vindication of statutory rights, instead of unconscionability.[97] The court pointed out that for this type of analysis, it is not necessary to show the relative size of the merchant plaintiffs compared to Amex.[98] Instead, the court reasoned, if any individual plaintiff could demonstrate that the potential recovery would be too small to justify the expenditure of bringing an individual action, a class action waiver would be unenforceable.[99]

In this case, the court found that enforcing the class action waiver in the contract would leave the plaintiffs without a reasonably feasible means of recovery and would therefore grant Amex "de facto immunity from antitrust liability;" because of this, the Second Circuit Court of Appeals held that the class action waiver in the card acceptance agreement could not be enforced.[100]

V. COMMENT

The crux of this case rests on the balance between the ability of the plaintiffs to vindicate statutory rights on one hand with the willingness of courts to enforce contractual agreements on the other. In *American Express*, the Second Circuit essentially held that when a ban on class arbitration prevents a plaintiff from vindicating statutory rights, the original agreement banning class arbitration should

92. *Id.* at 318-19. The plaintiffs hired an economist to provide an expert opinion about the likely costs associated with a potential lawsuit against Amex. *Id.* at 316. He determined that "due to the complexity and analytical intensity of an antitrust study, total expert fees and expenses usually are substantial . . . rang[ing] from about $300 thousand to more than $2 million." *Id.* The economist went on to conclude that the total damages for each plaintiff was only approximately $3,015, and only $9,046 when trebled. *Id.* at 317.

93. Kristian v. Comcast Corp., 446 F.3d 25 (1st Cir. 2006).

94. *In re Am. Express*, 554 F.3d at 304, 311.

95. *Id.* at 321.

96. *Id.* The court lists relevant circumstances as "the fairness of the provisions, the cost to an individual plaintiff of vindicating the claim when compared to the plaintiff's potential recovery, the ability to recover attorneys' fees and other costs . . . , the practical affect [sic] the waiver will have on a company's ability to engage in unchecked market behavior, and related public policy concerns." *Id.* (quoting Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir. 2007)).

97. *Id.* at 320.

98. *Id.* The courts emphasized this point in part because the plaintiffs repeatedly refer to themselves as "small merchants." The court agreed with Amex that the plaintiffs did this because they hoped to benefit from a line of cases "where individual consumers have alleged that arbitration agreements were imposed as a result of unequal bargaining power." *Id.*

99. *Id.*

100. *Id.*

not be enforced. Both the Third Circuit and the Seventh Circuit Courts of Appeals, though, have taken opposite views.[101]

This is an important issue because of the prevalence of these agreements. One study has shown that over thirty percent of arbitration agreements contain class action waivers.[102] Some argue that companies use arbitration clauses to insulate themselves entirely from class action liability.[103] By upholding these clauses despite finding that they deny plaintiffs the right to vindicate their statutory rights, courts are helping these companies avoid important laws.

These courts' decisions also run counter to the idea put forth by the Supreme Court that the class action is a vehicle for vindicating statutory rights, especially when the damages due to any single individual are too small to justify bringing an individual action.[104] The Supreme Court, for instance, stated a class action may motivate plaintiffs "to bring cases that for economic reasons might not be brought otherwise . . . [thereby] vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost."[105] Because of this general principle that class actions help consumers to vindicate their statutory rights, the courts should not allow companies to avoid them in binding arbitration agreements.

Furthermore, class actions serve an important deterrent effect. Even if individual plaintiffs choose to bring small claims against large defendants through arbitration, "a statute's deterrent purpose is not served if a company obtains millions in profit from its illegal activity and balances that profit against only one or two awards of a few thousand dollars."[106] Without the fear of plaintiffs bringing class action lawsuits, companies will be more likely to break the law and hurt consumers. Myriam Gilles, a professor at the Cardozo School of Law at Yeshiva University, states that "many prudent corporate decisions are made precisely because the palpable threat of class action liability hangs in the boardroom."[107] She goes on to say that "allowing companies to simply opt out of exposure to collective litigation is no more defensible than a system in which corporations may decide whether they wish to be exposed to federal antitrust, securities, or civil rights laws."[108]

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101. *See* Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007); Bommer v. AT&T Corp., 309 F.3d 404 (7th Cir. 2002).

102. *See* Linda J. Demaine & Deborah R. Hensler, *Volunteering to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 65 (2004).

103. *See* Sternlight, *supra* note 4, at 5-6 (arguing that it would be wrong to allow companies to use arbitration clauses to shield themselves from class actions); *see also* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 397 (2005) ("This movement accelerated in 1999, when the National Arbitration Forum ("NAF"), a for-profit arbitral body designated in the arbitration provisions of many large companies, disseminated marketing materials cautioning corporate attorneys that the only way to insulate their clients from class action liability in general—and Y2K computer class action liability in particular—was to implement arbitration provisions containing terms that expressly waive the right to class treatment." (citation omitted)).

104. *In re* Am. Express Merchs.' Litigation, 554 F.3d 300, 312 (2nd Cir. 2009).

105. *See* Deposit Guarantee Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980).

106. *See* Bland & Prestel, *supra* note 3, at 379.

107. *See* Gilles, *supra* note 103, at 430.

108. *Id.*

The Second Circuit's decision in *American Express* did not outright forbid companies from including class action waivers in their arbitration agreements.[109] Instead, *American Express* held that class action waivers were not unenforceable per se.[110] Because of this, courts are left in the position of deciding whether these bans prevent the plaintiff from vindicating his or her statutory rights on a case-by-case basis. Leaving this decision to individual courts leads to conflicts and circuit splits. The Eighth Circuit's decision in *Pleasants v. American Exp. Co.*[111] particularly stands out as being in conflict with the Second Circuit's decision in *American Express* because both cases involve the same defendant.

Both courts examined the potential awards that the plaintiffs could win through individual arbitration; the Second Circuit concluded that the potential for the plaintiffs to be awarded the costs of the action and a reasonable attorney's fee *were* enough to vindicate the statutory rights of the plaintiffs,[112] while the Second Circuit found that they were not enough.[113] Unlike the Second Circuit, the Eighth Circuit failed to consider that fees paid to expert witnesses might not be reimbursed to the plaintiffs, or might be reimbursed at inadequate levels.[114] The Eighth Circuit also failed to consider the fact pointed out in *American Express* that although attorneys' fees would be awarded if the plaintiff wins the arbitration, an attorney risks being paid nothing if the plaintiff loses, and fewer lawyers would therefore be willing to commit to working on the case.[115] It is inevitable that leaving these decisions to individual courts, even if they are using the same standards, will produce different results.

Though declaring class action waivers in arbitration agreements to be unenforceable per se would solve this problem, this would probably run afoul of Supreme Court precedent.[116] The U.S. Supreme Court stated in *Perry v. Thomas*,[117] for instance, that a court may not construe an arbitration agreement in a different way than it construes other contracts under state law.[118] Furthermore, declaring class action waivers unconscionable per se would be counter to the general contract principle that "terms may be unconscionable in some contexts but not in others."[119]

Furthermore, under the FAA, state legislatures do not have the power to individually declare that class action waivers are unenforceable per se.[120] Section 2 of the FAA provides that written agreements to arbitrate are "valid, irrevocable, and

108. *In re Am. Express*, 554 F.3d at 321.
110. *Id.*
111. 541 F.3d 853 (8th Cir. 2008).
112. *Id.* at 859.
113. *In re Am. Express*, 554 F.3d at 318.
114. *Id.* (stating that in an antitrust case, under the Federal Rules of Civil Procedure, a federal court is bound by the limit of 28 U.S.C. § 1821(b), which is currently set at a $40 per diem.).
115. *Id.*
116. *See Federal Statutes and Regulations: C. Federal Arbitration Act*, 117 HARV. L. REV. 410, 417-18 (2003) ("because the FAA sought to make arbitration agreements as enforceable as any other contract, state courts are not free to declare any and every [no class action arbitration clause] unconscionable").
117. 482 U.S. 483 (1987).
118. *Id.* at 492 n.9.
119. *See Federal Statutes and Regulations*, *supra* note 116, at 417 (quoting the RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. e (1981)).
120. *See* Higginbotham, *supra* note 2, at 119-120.

enforceable,"[121] and the Supreme Court has been consistently expansive "with respect to section 2's effect upon state law."[122] Because the Supreme Court has held that the FAA preempts state law, courts would find that "federal law preempts any state legislation providing consumers with a right to class arbitration or prohibiting companies from including waiver clauses in arbitration agreements."[123]

Because neither courts nor individual state legislatures have the power to declare bans on class action waivers in arbitration agreements to be unenforceable per se, and because many courts have enforced class action waivers despite the fact that they would leave the plaintiffs without a practical way to vindicate their statutory rights, legislative reform is needed.

Jean R. Sternlight, a professor at the University of Nevada's William S. Boyd School of Law, argues that legislation is needed "to prevent companies from using binding arbitration clauses to eliminate class actions entirely, to the extent we decide it would be undesirable to allow companies to insulate themselves from class action, and to the extent that courts fail to accept the statutory and contractual arguments set forth in this article or elsewhere."[124] Others argue that amending the FAA to ban prospective class action waivers is particularly important because "even where courts are inclined to find the clauses unconscionable or a burden on the vindication of statutory rights, the parties seeking invalidation still bear the burden of proof."[125] Even in *American Express*, for instance, the plaintiffs had to hire an economist to prove to the court that the potential reward an individual could receive in an arbitration hearing would be less than the costs of bringing the claim in the first place.[126] Placing this burden on the plaintiffs undoubtedly prevents many from bringing claims in the first place.

Sternlight argues that if Congress is unwilling to go as far as banning class action waivers in arbitration agreements entirely, it should at the very least bar "the elimination of class actions in those cases where plaintiffs have no feasible alternative by which to present their claim."[127] While this would not make class

121. 9 U.S.C. § 2 (2006). Section 2 provides:

> 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.

Id.

122. *See* Robert S. Safi, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV. 1715, 1722 (2005) (summarizing holdings from three Supreme Court cases: Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (holding that the FAA applies in diversity cases, notwithstanding that it sets forth substantive law); Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding that the FAA applies in state courts); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) (holding that the FAA's reach is coextensive with Congress's Commerce Clause power)).

123. Higginbotham, *supra* note 2, at 119-20.

124. *See* Sternlight, *supra* note 4, at 122.

125. *See* Richard A. Bales & Sue Iron, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN ST. L. REV. 1081, 1097 (2009).

126. *In re* Am. Express Merchs.' Litigation, 554 F.3d 300, 319 (2d Cir. 2009).

127. *See* Sternlight, *supra* note 4, at 124.

action waivers unenforceable per se, it would at least bring all of the federal courts in line with the Second Circuit's decision in *American Express*.

American Express, then, represents a minimal threshold of how courts should interpret class action waivers in arbitration agreements. If future courts follow the Second Circuit's reasoning, then it will be easier for plaintiffs to proceed on a class-wide basis despite arbitration agreements that contain class action waivers. Consumers will be better protected from companies that are using class action waivers in order to defraud their customers.

VI. CONCLUSION

In declaring a class action waiver that prevents plaintiffs from vindicating statutory rights unenforceable in *American Express*, the Second Circuit has struck a blow to companies wishing to avoid consumer protection laws by including class action waivers in arbitration agreements. The court also reiterated the previously recognized deterrent effects that potential class action lawsuits have on companies. Unfortunately, some courts uphold class action waivers even when they keep plaintiffs from vindicating statutory rights; others fail to take into account all of the costs and risks associated with bringing lawsuits when determining if a ban truly prevents plaintiffs from vindicating statutory rights. Because courts cannot rule these bans to be unenforceable per se, Congress should act in order to create a uniform standard that protects consumers and prevents a company's ability to avoid laws by including class action waivers in arbitration agreements.

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