Supreme Court Upholds Binding Arbitration Clauses

June 21, 2013 - The US Supreme Court has affirmed its support for mandatory binding arbitration clauses even if those clauses strip consumers and businesses of other rights. This week the court handed down a 5 to 3 ruling in the case known as American Express Co. v. Italian Colors Restaurant. The ruling allows companies to include language in their binding arbitration clauses that forbid class action lawsuits. While many observers are blaming the court for an unfriendly consumer ruling, the case is actually an example of the court simply affirming an outdated law written by Congress. And since it is up to Congress and not the court to write the laws, the outcome of the case may actually present an opportunity to amend it and address some of the many class action abuses that law is currently unequipped to deal with.

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The case in question came about because Italian Colors Restaurant believed that American Express was charging them exorbitant merchant fees. The restaurant became the lead plaintiff in a class action lawsuit which pitted thousands of small businesses against American Express. NOTE: Since all credit card agreements also contain binding arbitration clauses, this case directly impacts anyone who has a credit card.

Just one problem. American Express's merchant agreement contains mandatory binding arbitration clause that specifically forbids class action lawsuits.

The merchants argued that they had no effective way to enforce their rights if the court barred them from a class action lawsuit. They determined that the average award each of the plaintiffs would receive if they won their case was approximately $5,000. But if they were forced to litigate their cases individually, they would likely have tens or hundreds of thousands of dollars in attorney fees. A class action was their only remedy.

The US Second Circuit Court of Appeals agreed with the merchants and declared the clause unenforceable. American Express appealed and the Supreme Court agreed to hear the case.

And the court sided with American Express in their decision. Writing for the majority on the subject of plaintiffs' ability to sue and the affordability of a lawsuit, Justice Antonin Scalia said, "the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy." You may not like what he said but it is hard to dispute his logic.

Many consumer advocates have been quick to scream at the court over such an "awful" decision. At ACCESS, we're no fans of mandatory binding arbitration. In fact, I personally will tell you that I think mandatory binding arbitration clauses should be illegal. At the very least, the way in which arbitrators are selected needs to be radically altered. At present, the deck is stacked completely in favor of big business.

Unfortunately, what is being written by both sides about this decision is a gross simplification of the issue. Both sides seem to be more intent on getting out their message than they are with correcting the current law. That's a mistake.

As previously stated, the Federal Arbitration Act (FAA) is outdated. It was enacted in 1925 and was initially used in state courts. Since 1980 the courts have allowed it to apply in both state and federal courts. The law was intended as a way to quickly settle disputes out of court. A few things have changed since 1925.

First, from 1908 to 1977, the American Bar Association prevented attorneys from advertising. The Supreme Court ended that practice in 1977 when it ruled that commercial speech was protected by the First Amendment. Since then, attorneys have been able to advertise as much as they want to. And if you watch any late night TV or cable news, you know that a lot of them advertise for class action lawsuits. You may have seen the ads asking for people to call about "bad drugs". These are run by attorneys who are trolling for plaintiffs in lawsuits against drug companies. This type of activity on the part of attorneys would have been unthinkable when the FAA was enacted and any attorney who tried it would likely have been disbarred.

Neither was the internet around in 1977. Now attorneys advertise there and use social media to bring in class action clients.

There is no doubt that some people are hurt by pharmaceuticals and other products and services. But there is also no doubt that many of the attorneys who are advertising for clients are simply trying to build clients for cases that they otherwise have no affiliation with. This type of activity hurts society at large - probably more so that this new ruling. It ties up the court system. It increases product costs. It causes products that have significant benefits to society as a whole to be pulled from the market by manufacturers who are afraid of being targeted in lawsuits simply because some attorney sees a big payday.

Secondly, it is up to congress and not the court to write laws. The Supreme Court issued its ruling based on the current law - the law that it had to work with. A lot of the critics of the decision are completely ignoring the fact that Congress could easily address this issue. And since the issue has been brewing for years, one can only assume that Congress has chosen to ignore it. That isn't the court's fault.

Third, in this particular case, the plaintiffs decided to forgo arbitration completely. They didn't even try. Even American Express agreed that there was nothing to prevent all of the plaintiffs in the case from pooling their resources in arbitration - effectively acting as a class - to attempt to resolve the issue. Had they done this, the Supreme Court might have been looking at different facts when they reviewed the case and come to a different decision. Now, we'll never know.

One thing is certain. The current law is not friendly to anyone who doesn't have significant financial resources. This new ruling makes the law even more unfriendly to the "little guy". And it is time for Congress to address the issue.

If Congress does take up the law, there are a couple of things that it should do. First, it should address the issue of attorneys who troll for class action clients. Simply put, this shouldn't be allowed. It is one thing for a group of people who

have been wronged to get organized and file a lawsuit. It is another thing entirely for attorneys to go out and organize people on their own simply so that they can file a case that otherwise would not have existed.

Ideally, we'd like to see Congress toss the issue of mandatory binding arbitration clauses back to the states. A number of states have already passed laws making them illegal but the federal courts have overturned these state laws. Since this is not an ideal world, we don't expect Congress to give up federal supremacy on this issue.

Given this, any new law needs to change the way that arbitrators are appointed. Currently, both parties must agree on the arbitrator. The reality is that arbitrators who side with consumers over businesses can't get a job. Once an arbitrator gets a reputation for siding with consumers, no company will agree to use him or her again. Our suggestion is that arbitrators should be assigned randomly. The only way that either side should be able to exclude someone is if they can show evidence of either a conflict of interest or bias. Neither side should hold the power of the purse string over the person hearing their case.

And finally, Congress should give the courts more power over binding arbitration clauses. If it can be shown that plaintiffs in a case have attempted to arbitrate and the court finds that the arbitrator didn't issue a ruling that was fair or unbiased, then the courts should have power to review and reverse the case. And if the plaintiffs in the case went to arbitration by pooling their resources and a court reverses the arbitration decision, those plaintiffs should be allowed to file a class action regardless of what the binding arbitration clause involved states. This would help ensure that all parties involved had a vested interest in a fair and expedient resolution to every case.

We believe these changes would make the process much more fair to all parties involved in arbitration cases. Additionally, it would reduce product expenses for manufacturers, free up the court system and give consumers' confidence that the process wasn't stacked against them.
byJim Malmberg
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