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THE NEW ARBITRATION CLASS ACTION: FILING THOUSANDS OF INDIVIDUAL ARBITRATION CLAIMS

Yanni Thanopoulos

Arbitration clauses that prohibit class action lawsuits guard companies from class action litigation.¹ The Supreme Court has disparaged the use of class arbitration² and has upheld class action waivers.³ As a result, if a contract contains an arbitration clause that bars class actions, the only recourse under the contract is to pursue individual arbitration. If a claim yields only a small amount of damages, the claimant would essentially be left with no recourse: the claimant would not be able to join a class action, and the cost of individual arbitration would outweigh the potential reward.⁴ Thus, arbitration clauses that forbid class action lawsuits can completely insulate companies from liability, so long as a single claim is not worth the cost of arbitrating.

This protection was solidified in *American Express v. Italian Colors*.⁵ The Supreme Court upheld an arbitration clause containing a class action waiver, despite evidence that the plaintiffs' only viable recourse was a class action.⁶ A group of merchants who contracted with American Express filed a class action under antitrust laws, alleging that American Express used their market power to increase fees.⁷ The contracts contained arbitration clauses and class action waivers.⁸ American Express asked the Court to enforce these provisions and compel the plaintiffs to file their complaints individually in arbitration.⁹ The plaintiffs argued that it would be economically unfeasible to pursue individual arbitration and, therefore, that the court should allow them to proceed with the class action.¹⁰ An expert witness found that arbitration would cost an individual merchant between \$300,000 and \$1,000,000, while the potential damages would be—at most—\$38,549.¹¹

Justice Scalia enforced the arbitration clause and class action waiver, holding that it is immaterial to the validity of an arbitration agreement whether a plaintiff can recoup their individual arbitration costs.¹² Justice Scalia pointed out that each individual plaintiff could still bring their case in arbitration; therefore, their rights under antitrust laws were technically still intact.¹³ But why would any plaintiff exchange \$1 million for a chance at \$38,549? As Justice Kagan pointed

¹ Jay Ramsey & Abby Meyer, *An Arbitration Clause Health Check*, NAT'L L. REV. (June 23, 2020), <https://www.natlawreview.com/article/arbitration-clause-health-check> [<https://perma.cc/LRT3-KRQE>].

² Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/> [<https://perma.cc/8QAT-6YDZ>]; see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

³ Stone & Colvin, *supra* note 2; see also *Concepcion*, 563 U.S. 333.

⁴ See J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2006).

⁵ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

⁶ *Id.*

⁷ *Id.* at 231.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Am. Express Co.*, 570 U.S. at 238.

¹² *Id.*

¹³ *Id.*

out in her dissent, arbitration should be upheld as a streamlined method of resolving disputes, not “a foolproof way of killing off valid claims.”¹⁴

After *American Express*, arbitration clauses insulated companies from any claims in which individual costs to arbitrate outweighed the potential damages, a serious victory for businesses.¹⁵ What happened next was what no company hiding behind an arbitration clause and class action waiver thought possible.¹⁶

Several clever, well-resourced law firms began helping thousands of plaintiffs file individual arbitration claims, forcing some companies to pay millions of dollars in arbitration filing fees.¹⁷ For a business, arbitration filing fees can be as high as \$1,900 per claim.¹⁸ In 2019, law firms helped 75,000 people file individual arbitration claims against Amazon, alleging that Alexa products violated recording laws.¹⁹ As a result, Amazon faced millions of dollars in fees. Fed up with these fees, Amazon removed both the arbitration clause and class action waiver from its Conditions of Use.²⁰

In another example, 5,879 DoorDash drivers filed individual arbitration claims against DoorDash.²¹ Ironically, DoorDash attempted to dodge the (over) \$12 million in arbitration fees by asking the court to ignore its own arbitration clause and to combine the cases into a class action lawsuit.²² Referring to the case as “an irony upon iron[ies],”²³ the district court held that DoorDash must honor its side of the bargain and arbitrate all of the claims individually.²⁴ After paying over \$10 million in arbitration fees, DoorDash eventually settled the case for \$85 million.²⁵

Flooding the arbitration system with thousands of individual claims was successful in penetrating the shield that had been guarding so many companies from class action scrutiny. Justice Kagan has stressed that arbitration laws should compel companies “to adopt arbitral procedures that facilitate efficient and accurate handling of complaints.”²⁶ Only time will tell whether companies follow Amazon’s lead and ditch arbitration clauses altogether or alter current clauses to handle complaints more efficiently. What we do know now, though, is that companies can no longer abuse arbitration clauses to “kill off” legitimate claims.²⁷

¹⁴ *Id.* at 244 (Kagan, J., dissenting).

¹⁵ Jason M. Halper & William Foley, *Seven Months After “American Express v. Italian Colors Restaurant”: The End of Class Actions?*, MONDAQ (Jan. 14, 2014), <https://www.mondaq.com/unitedstates/class-actions/285906/seven-months-after-american-express-v-italian-colors-restaurant-the-end-of-class-actions> [<https://perma.cc/LE6P-HLZQ>].

¹⁶ Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021), <https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000> [<https://perma.cc/HSL6-J5QC>].

¹⁷ *Id.*

¹⁸ *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1064 (N.D. Cal. 2020).

¹⁹ Randazzo, *supra* note 16.

²⁰ *Id.*

²¹ *DoorDash*, 438 F. Supp. 3d at 1064.

²² *Id.* at 1068.

²³ *Id.*

²⁴ *Id.*

²⁵ Randazzo, *supra* note 16.

²⁶ *Am. Express Co.*, 570 U.S. at 244 (Kagan, J., dissenting).

²⁷ *Am. Express Co.*, 570 U.S. at 238–39.