Department of Justice

STATEMENT

OF

LESLIE C. OVERTON
DEPUTY ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON

"MANDATORY ARBITRATION REQUIREMENTS"

PRESENTED ON

DECEMBER 17, 2013

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Mr. Chairman, and distinguished members of the Committee, I appreciate this opportunity to appear before you today to share with the Committee the position that the United States put forward in its brief in the Supreme Court as *Amicus Curiæ* supporting Respondents, in *American Express Company, et al. v. Italian Colors Restaurant, et al.*, No. 12-133 (January 2013). The United States filed its brief because of its concern that the effect of the mandatory arbitration agreement in the facts of that case would prevent respondents from being able to effectively vindicate their rights under the antitrust laws.

Background

The respondents in *Italian Colors*, the named plaintiffs in a consolidated set of putative class actions, were merchants who accept American Express cards. The merchants alleged that petitioners—American Express Company and a wholly owned subsidiary (American Express)—violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by engaging in an unlawful tying arrangement. Specifically, the merchants alleged that American Express used its market power in corporate and personal charge cards to compel the merchants to accept American Express' mass-market credit and debit cards at elevated merchant-fee rates.

The contractual relationship between American Express and the merchants was governed by the Card Acceptance Agreement (Card Agreement), American Express' standard form contract for merchants. The Card Agreement required all disputes between the parties to be resolved by arbitration. The Card Agreement further provided that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis," and that "[c]laims … may not be joined or consolidated" with claims brought by other merchants. The Card Agreement did not permit the prevailing party to shift its costs to the other party, and it contained a confidentiality provision that prohibited the disclosure of information obtained in an arbitration proceeding.

The class action complaints were consolidated in federal district court, and American Express moved to compel arbitration under the Card Agreement's mandatory arbitration clause. The district court held that the parties' dispute fell within the scope of the Card Agreement's arbitration clause, granted American Express' motion to compel arbitration, and dismissed the suits. The district court rejected the merchants' argument that the clause should not be enforced because the costs of individual arbitration would eclipse the value of any potential recovery.

The court of appeals reversed and remanded, noting 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." *In re American Express Merchants' Litigation*, 554 F.3d 300 (2nd Cir., Jan. 30, 2009), at 315 (citing *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), at 92). The merchants, who bore the burden of demonstrating that they would face prohibitive costs in arbitration, presented expert evidence demonstrating that they would bear expert fees and expenses of at least several hundred thousand dollars, and possibly more than $1 million. The estimated damages for the merchant with the largest volume of American Express transactions, however, amounted to only $38,549 when trebled, as provided under the antitrust laws.

The court of appeals accordingly concluded that "the class action waiver in the Card Acceptance Agreement cannot be enforced in this case because to do so would grant [American Express] de facto immunity from antitrust liability by removing [the merchants'] only reasonably feasible means of recovery." 554 F.3d at 320. The Supreme Court subsequently granted certiorari.

The United States' Brief

The United States' brief observed that under the Supreme Court's precedents, agreements to arbitrate federal statutory claims are enforceable if, but only if, "the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). While the Federal Arbitration Act establishes a generally applicable federal policy favoring the creation and enforcement of agreements to arbitrate, the “effective-vindication” rule reconciles this policy with the policies of a wide range of federal statutes that confer substantive rights and authorize private suits by aggrieved persons. The rule allows contracting parties to agree that their disputes will be resolved by an alternative adjudicator, while denying enforcement of an arbitration agreement in circumstances where its function would be, in practical effect, a prospective waiver of substantive rights.

The brief explained that the arbitration agreement at issue in *Italian Colors* effectively precluded the merchants from asserting their antitrust claims by making it prohibitively expensive for them to do so. Because the costs of proving the merchants’ claims would have greatly exceeded the potential recovery for any individual merchant, some mechanism for sharing or shifting costs would have been necessary to permit the merchants to effectively vindicate their claims in arbitration. But the arbitration agreement foreclosed all such methods, leaving the merchants with no practical means of establishing American Express’ alleged Sherman Act violations.

The United States’ brief argued that, because of restrictions contained in the arbitration agreement, the merchants had established that each merchant, proceeding individually, could seek redress for American Express’ alleged antitrust violations only by incurring expenses far greater than the maximum recovery an individual business could hope to obtain. No rational actor would attempt to bring a claim when a negative recovery is a certainty. Under the circumstances of that case, an order compelling arbitration therefore would preclude the merchants from effectively vindicating their federal claims.

The United States argued that under American Express’ approach, companies could use a combination of class-action and joinder prohibitions, confidentiality requirements, and other procedural restrictions to increase the likelihood that a plaintiff’s cost of arbitration would exceed its projected recovery. Companies could then require acceptance of unwieldy procedures as a condition of doing business, getting hired, or purchasing products. That would deprive a range of federal statutes of their intended deterrent and compensatory effect, without promoting the actual use of arbitration as an alternative means of dispute resolution.

This concludes my discussion of the United States’ brief. I would be happy to answer any questions you may have.