News Release

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U.S. Supreme Court Reverses Second Circuit on Arbitration in *American Express Co. v. Italian Colors Restaurant*

Ruling Aligns with Amicus Brief of DRI-The Voice of the Defense Bar

CHICAGO – (June 20, 2013)—Declaring that courts must "'rigorously enforce' arbitration agreements according to their terms," the Supreme Court today reversed a decision of the Second Circuit that had invalidated a class arbitration waiver. The now-reversed Second Circuit rule created a sweeping, unwritten loophole in the Federal Arbitration Act (FAA) because it permitted courts to invalidate a class arbitration waiver whenever a class action is deemed the "only economically feasible means" to pursue a federal-law claim.

The Supreme Court ruling aligns with the position urged in an amicus brief that DRI's Center for Law and Public Policy submitted to the Court in December 2012.

As the Supreme Court phrased it, the central issue decided today was "whether a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act when the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." The Supreme Court majority held that the class arbitration waiver is indeed enforceable.

In reaching that conclusion, the Supreme Court reversed a Second Circuit decision that would have abrogated the FAA's core purposes for a broad swath of arbitration agreements. As Chief Judge Jacobs stated in his dissent from denial of rehearing en banc, class-arbitration waivers are "commonly used" in commercial arbitration agreements, and the Second Circuit's "broad ruling," "in the hands of class action lawyers, can be used to challenge virtually every ... agreement[] with such a clause." Under the now-reversed ruling of the Second Circuit, "every class counsel and every class representative who suffers small damages can avoid arbitration by hiring a consultant (of which there is no shortage) to opine that expert [or other] costs would outweigh a plaintiff's individual loss."

The Supreme Court's majority opinion, written by Justice Scalia, stated

> The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a

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federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success. Such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure. The FAA does not sanction such a judicially created superstructure.

DRI amicus co-author Jerrold J. Ganzfried stated, "Today's opinion reinforces the core principles that arbitration is a matter of contractual agreement, and that courts must be faithful to the terms of the contract. In addition, the Court reiterates its understanding of the important, practical ways in which class arbitration differs from the bilateral arbitration to which the parties agreed."

DRI brief authors Jerrold J. Ganzfried and John F. Stanton of Holland & Knight, Washington, D.C., are available for interview or for expert comment through DRI's Communications Office.

For the full text of the amicus brief, click here. For the text of the Court's decision, click here.

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