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COMMENT

CRUISES, CLASS ACTIONS, AND THE COURT

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As the Carnival Triumph debacle splashed across the national consciousness,¹ lawyers shook their heads. Sensationalist news coverage exposed common knowledge in the legal community: cruise passengers have little recourse against carriers, and, as a result, they often bear the brunt of serious physical and financial injuries. Cruise lines, escaping legal accountability for their negligence, sail off undeterred from neglecting passenger safety on future voyages.² While its previous decisions helped entrench this problem, a recently argued case presents the Supreme Court with another opportunity to address it.³

The fine print on cruise ship tickets requires that passengers submit most claims to arbitration and prohibits passengers from uniting similar claims in a class action or class arbitration.⁴ It might not be apparent why a passenger with a claim worth thousands of dollars would lack recourse without class action, but the process of resolving claims individually is biased in favor of the cruise line, and only class action allows evenhanded

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1. See, e.g., Curt Anderson, *Cruise Lawsuits Are in, but Carnival Has Advantage*, ASSOCIATED PRESS: THE BIG STORY (Feb. 21, 2013, 4:59 PM), <http://bigstory.ap.org/article/cruise-lawsuits-are-carnival-has-advantage>.

2. See generally Thomas A. Dickerson, *The Cruise Passenger's Dilemma: Twenty-First Century Ships, Nineteenth-Century Rights*, 28 TUL. MAR. L.J. 447 (2004).

3. *Am. Express Co. v. Italian Colors Rest.*, No. 12-133 (argued Feb. 27, 2013).

4. See *Ticket Contract*, CARNIVAL CRUISE LINES, http://www.carnival.com/CMS/Static_Templates/ticket_contract.aspx (last visited Mar. 30, 2013).

justice.⁵ The bias arises because, in any individual case involving questions common to a group of plaintiffs, the cruise line will greatly outspend any individual claimant, not just because of its greater wealth, but because it has a greater stake in the litigation classwide.⁶

Suppose the 4000 Triumph passengers each suffered \$1000 in damages, which they believe was caused by the cruise line's negligence. Proceeding separately, each passenger would spend no more than \$1000 to prove the defendant's negligence, but the defendant, concerned about its total liability, would spend up to \$400,000. The parties will get what they pay for, and the defendant's first-class defense likely will prevail over each passenger's cut-rate case. Realizing their disadvantage, rational plaintiffs may decide not to file otherwise worthy individual claims.

Class action eliminates this disparity in economic power. By aggregating all claims, plaintiffs gain the same incentive to make a first-class case that the defendant naturally possesses. This does not apply just for cruises, because class action evens the playing field for a broad spectrum of claims that affect our lives: employment discrimination, environmental harm, securities and consumer fraud, anti-competitive conduct, constitutional violations, and mass torts.⁷

The fate of the Carnival Triumph passengers may have been sealed by a Supreme Court ruling from 2011. In *AT&T Mobility v. Concepcion*,⁸ the Court upheld clauses in arbitration agreements that banned class procedures despite state law findings that such contracts were unconscionable.⁹ While Justice Scalia's majority opinion questioned the cost and formality of class arbitration,¹⁰ none of the justices addressed the pro-defendant bias that exists without a class solution.

5. See David Korn & David Rosenberg, *Concepcion's Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM (forthcoming June 2013).

6. See *id.*

7. See Brian T. Fitzpatrick, *The End of Class Actions*, 46 U. MICH. J.L. REFORM (forthcoming June 2013).

8. 131 S. Ct. 1740 (2011).

9. See *id.* at 1744, 1748.

10. See *id.* at 1751-52.

The Court has a chance to change course when it decides *American Express Co. v. Italian Colors Restaurant*,¹¹ a case that concerns millions of claims brought by small retailers who allege that the credit card company violated the Sherman Antitrust Act by abusing monopoly power.¹² Below, the Second Circuit Court of Appeals refused to enforce an arbitration agreement that barred class actions because high costs would render any individual plaintiff's claim economically impractical.¹³ An essential expert analysis would cost at least \$300,000, but even the highest-volume retailer would only expect to recover damages of \$12,850.¹⁴ To avoid this hopeless situation, the plaintiffs ask the Supreme Court to refuse to require individual arbitration that does not allow the effective vindication of legal rights.¹⁵

The danger is that the Court may go only halfway, striking down some aspects of the American Express agreement without requiring a form of class action. Half-measures, such as allowing plaintiffs to voluntarily join their claims or requiring that a defendant pay the fees and costs of a prevailing plaintiff, leave in place pro-defendant bias. Voluntary joinder of millions of claims is an impractical substitute for class action aggregation, and shifting a plaintiff's fees and costs does not change the parties' disproportionate stakes. Even if American Express footed the \$300,000 bill for the plaintiffs' expert analysis, it could still overwhelm a minimally competent case by spending many millions more on its own analysis.

Instead, the Court should embrace a more robust "effective vindication" rule, allowing states to limit the enforcement of arbitration agreements that compromise claimants' substantive rights. *American Express* allows the Supreme Court to finally acknowledge a bias that endangers the enforcement of laws upon which we depend.

11. *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 207–08 (2d Cir. 2012), *cert. granted* by *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 594 (2012) (argued Feb. 27, 2013).

12. *See id.* at 207–08.

13. *See id.* at 218.

14. *Id.* at 217–18.

15. Brief for Respondents at 46–47, *Am. Express Co. v. Italian Colors Rest.*, No. 12–133 (U.S. Jan. 22, 2013), 2013 WL 267025.

If the Court does not address this bias, it may be up to Congress to legislate class methods that allow the effective enforcement of its laws. Ideally, Congress would amend the Federal Arbitration Act¹⁶ to limit the effects of the Supreme Court's class arbitration rulings. But Congress could start with smaller steps, requiring the availability of class procedures for rights protected in new legislation. Amid continuing Carnival incidents, New York Senator Chuck Schumer proposed a "passenger's bill of rights" that would expand substantive protections for cruise consumers that would strengthen medical care and refund requirements.¹⁷ Though perhaps a less telegenic proposal, Congress should supplement any cruise reforms by specifically permitting either class action or class arbitration options for those bringing passenger claims. Until the Court or Congress addresses this overlooked pro-defendant bias, cruise carriers, credit card companies, and many others who inflict classwide injuries will avoid full responsibility for their actions.

16. 9 U.S.C. §§ 1-16 (2006).

17. Press Release, U.S. Senator Charles E. Schumer, Schumer Calls for Cruise Ship "Bill of Rights" (Mar. 18, 2013), <http://www.schumer.senate.gov/Newsroom/record.cfm?id=341068>.