

HOW SMALL BUSINESSES BENEFIT FROM CLASS ACTIONS: ANTITRUST CONSPIRACIES

The 2013 U.S. Supreme Court case, *American Express v. Italian Colors Restaurant*¹ involved a class action brought by Alan Carlson, longtime owner of Italian Colors restaurant in Oakland, California. Italian Colors is a successful restaurant, but like most local restaurants, its profit margins are “razor thin.”² Like many businesses, it must accept AmEx cards from customers to survive.

However, American Express demanded that, if Italian Colors accepted *any* American Express cards it had to accept *all* types of American Express cards, even ones that carry extremely high fees. In addition, Mr. Carlson was not permitted to offer discounts to customers to encourage them to use other forms of payment beside American Express cards. Mr. Carlson believed this violated antitrust laws and he began a class action lawsuit against AmEx on behalf of other small businesses like his.

But, American Express merchant contracts contained forced arbitration clauses and class action bans. According to those terms, Mr. Carlson was not allowed to join with others in a class action lawsuit but rather had to bring his antitrust case in a private arbitration system all by himself – an impossibility because the cost to one person of bringing an antitrust action against a huge company like American Express is prohibitive.³ The U.S. Supreme Court did not care. It upheld AmEx’s forced arbitration clause and class action waiver. It found such clauses valid even where they prevented an injured party from vindicating important rights guaranteed to them by antitrust and other federal laws.

This ruling is having devastating consequences for small businesses like Italian Colors Restaurant. Antitrust conspiracies steal billions of dollars from American consumers and businesses every year.⁴ These conspiracies often come in the form of international price-fixing cartels, in which business competitors illegally agree to set an artificially high price for the goods they produce. Small businesses, which often operate with slim profit margins, are particularly hard hit when they are forced to pay price-fixed overcharges. The U.S. Department of Justice aggressively prosecutes these illegal cartels.⁵

However, class actions provide virtually the only way to compensate small businesses that are victims of antitrust violations.⁶ Simply put, without class actions, businesses cannot recover their stolen money.

The following are examples of recent class action settlements won by small businesses and others against companies engaged in illegal antitrust conspiracies. The cost of hiring experts and paying expenses to litigate each of these cases ranged from hundreds of thousands to millions of dollars. They are all contained in CJ&D’s extensive class action compilation, *First Class Relief*.⁷ Without these class actions, criminals would have been able to keep their ill-gotten gains and their small business victims would have been left with nothing.

- Two dozen major airfreight carriers in the world reached at least 21 settlements for over \$320 million with class members for unlawfully fixing prices of airfreight shipping services.⁸

- Companies and individuals who sold bulk extruded graphite products settled with a class of companies that purchased extruded graphite products to use in casting molds and furnace linings, among other things, for over \$5 million.⁹
- Manufacturers of Dynamic Random Access Memory (DRAM) chips, which are used in personal computers and video game consoles, settled for \$242,000,000 to over 19,000 claimants who alleged price-fixing.¹⁰
- Manufacturers of graphite electrodes, which are used to conduct electricity in steel mill furnaces, settled with a class of steel manufacturers who alleged anti-competitive activity. The settlement totaled over \$111 million, which was distributed to 166 claimants.¹¹
- Manufacturers of Thin Film Transistor Liquid Crystal Display (TFT-LCD) flat panels used in computers and televisions settled with flat panel purchasers over allegations of price-fixing. Defendants distributed close to \$320,000,000 to almost 3,000 claimants.¹²
- Insurance brokers and insurance companies settled with commercial insurance policyholders over allegations of anti-competitive activity. The defendants paid about \$121,800,000 to over 2,000,000 claimants.¹³
- Several U.S. manufacturers of linerboard settled with a class of businesses that purchased corrugated boxes and sheets over price-fixing allegations. The settlement distributed over \$140,000,000 to more than 7,000 claimants.¹⁴
- DeBeers, which mines and trades diamonds, settled with a class of purchasers of diamonds who alleged anti-competitive activity. The settlement from DeBeers distributed over \$110,000,000 to thousands of claimants.¹⁵
- Shipping companies that provide cabotage services settled with direct purchasers of ocean shipping services between Puerto Rico and the continental U.S. over allegations of price-fixing. Settlements totaled over \$30 million.¹⁶

NOTES

¹ 133 S. Ct. 2304 (June 20, 2013).

² Testimony of Alan Carlson before the U.S. Senate Committee on the Judiciary regarding, "The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers and Small Businesses?" at 1, December 17, 2013, <http://www.judiciary.senate.gov/imo/media/doc/12-17-13CarlsonTestimony.pdf>.

³ Respondent's Brief, *American Express Co. v. Italian Restaurant*, No. 12-133, January 22, 2013, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-133_resp.authcheckdam.pdf (argued February 27, 2013).

⁴ Statement of William J. Baer, Assistant Attorney General, Antitrust Division, and Ronald T. Hosko, Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation, before the Antitrust, Competition Policy and Consumer Rights Subcommittee of the Committee on the Judiciary, United States Senate, November 14, 2013.

⁵ *Ibid.*

⁶ U.S. Dep't of Justice, Antitrust Division Workload Statistics FY 2003-2012, 11 n.15, <http://www.justice.gov/atr/public/workload-statistics.html>.

⁷ <http://centerjd.org/content/first-class-relief-how-class-actions-benefit-those-who-are-injured-defrauded-and-violated>

Many thanks to the Committee to Support the Antitrust Laws for their research assistance.

⁸ *In re Air Cargo Shipping Services Antitrust Litigation*, Case No. 06-md-1775 (EDNY).

⁹ *In re Bulk [Extruded] Graphite Products Antitrust Litigation*, Case No. 02-CV-06030 (D. N.J.)

¹⁰ *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, MDL No. 1486 (N.D. Cal.)

¹¹ *In re Graphite Electrodes Antitrust Litigation*, MDL No. 1244 (E.D. Pa.)

¹² *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL No. 1827 (N.D. Cal.)

¹³ *In re: Insurance Brokerage Antitrust Litigation [Zurich Settlement]*, Case No. 04-5184 (D. N.J.)

¹⁴ *In re Linerboard Antitrust Litigation*, MDL No. 1261 (E.D. Pa.)

¹⁵ *Sullivan v. DB Investments, Inc.*, Case No. 04-cv-2819 (SRC) (D. N.J.)

¹⁶ *In re: Puerto Rican Cabotage Antitrust Litigation*, Case No. 08-md-1960 (D. P.R.)