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The Supreme Court's Class Action Arbitration "Do Over" in *Stolt-Nielsen*

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Seven years ago, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), a plurality of the U.S. Supreme Court held that an arbitrator, not a court, must decide whether a contract between two arbitrating parties allows or forbids class arbitration. *Bazzle* concerned contracts between Green Tree, a commercial lender, and its customers. The contracts contained an arbitration clause but did not mention class arbitration. The arbitrator certified a class in arbitration and ultimately ruled in favor of the class. On appeal, the South Carolina Supreme Court affirmed the arbitrator's decision, holding that the contracts were silent with respect to class arbitration but that a class action arbitration would serve efficiency and equity. A plurality of the U.S. Supreme Court ruled that whether the contracts forbid class arbitration was for the arbitrator to decide. The parties had agreed to submit to the arbitrator "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." The Court reasoned that the dispute about what the arbitration contract means was a dispute relating to the contract. With Justice John Paul Stevens concurring in the judgment, the Court remanded the case so that the arbitrator could decide the question of contract interpretation.

Bazzle created a firestorm among commercial business interests. The legal community widely interpreted *Bazzle* as recognizing, for the first time, that arbitration clauses encompassed class action proceedings unless the parties expressly precluded class arbitrations in their agreement. Prior to *Bazzle*, few arbitrations involved class actions.[1] After *Bazzle*, the American Arbitration Association (AAA) went so far as to adopt specific, supplementary rules setting forth requirements for maintaining a class arbitration and for the issuance of a class determination award.[2]

The supplementary rules developed by the AAA require the arbitrator to proceed in distinct phases. As a threshold matter, the rules require the arbitrator to determine whether the applicable arbitration clause permits the arbitration to proceed on behalf of a class. Following issuance of a decision respecting the construction of the arbitration clause, the arbitrator must stay all proceedings for 30 days to permit any party to move before a court of competent jurisdiction to vacate the decision regarding construction of the clause. After this period of time expires, the arbitrator must determine whether the arbitration should proceed as a class arbitration. In making this determination, the arbitrator should consider several criteria, including

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whether: (1) the class is so numerous that joinder of separate arbitrations is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the class; (4) the representative party will fairly and adequately protect the interests of the class; (5) counsel will fairly and adequately protect the interests of the class; and (6) each class member has entered into an agreement which is substantially similar to that signed by the class representatives. Finally, the arbitrator must find that the questions of law and fact common to the members of the class predominate over any questions affecting individual members. These criteria mirror the requirements for certifying a class under Federal Rule of Civil Procedure 23. According to the AAA rules, the presumption of privacy and confidentiality does not apply to class arbitrations. All class arbitration proceedings may be made public.

Many companies after *Bazzle* attempted to evade its perceived impact by including in contractual arbitration clauses provisions affirmatively prohibiting class action arbitrations.[3] A number of courts, in increasing frequency, however, have stricken such provisions as void against public policy on a variety of grounds.[4] Those companies, however, were left with the unsatisfactory result of resolving their disputes on class action basis in a judicial setting, bereft of their right to arbitrate disputes. Other companies have found themselves in a class arbitration setting, without the boundaries of precedent or the safeguards of appeal provided by a court system.

On April 27, 2010, the Supreme Court dramatically altered the landscape of class action arbitrations in its decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* No. 08-1198, 559 U.S. ___, 2010 BL 92476 (Apr. 27, 2010). In *Stolt-Nielsen*, the Court ruled that one party to a contract may not, under the Federal Arbitration Act (FAA, 9 U.S.C. §§ 1-16), compel another party to submit to class arbitration where the agreement is silent as to whether the parties agreed to class arbitration. Because the relative benefits of class arbitration are much less assured, the Court found that there is reason to doubt mutual assent to class arbitration where the agreement is silent. Put differently, an agreement to submit to class arbitration must be explicit and cannot be implied.

In *Stolt-Nielsen*, chartered shipping vessels had arbitration clauses in their contracts with customers. After a Justice Department investigation, AnimalFeeds accused the shippers of price fixing. The parties agreed that their dispute would be arbitrated. They also stipulated that the arbitration clause was silent with respect to class arbitration. Although the parties agreed as to the silence of the arbitration clause with respect to class arbitration, the arbitrators concluded that the arbitration clause nonetheless allowed for class arbitration. The arbitrators found persuasive the fact that other arbitrators ruling after *Bazzle* had construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration." The arbitrators stayed the proceeding in order to give the parties the opportunity to seek judicial review regarding the construction of the arbitration clause.

The Court held that when construing an arbitration clause, arbitrators must give effect to the contractual rights and expectations of the parties. As with any other contract, the parties' intentions control and parties may specify with whom they choose to arbitrate their dispute. From these principles, the Court held that "a party

may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." The Court explained that while it may be appropriate in some situations to assume that the parties have authorized the arbitrator to adopt certain procedures, an agreement to authorize class arbitration is not a term that the arbitrator may infer solely from the agreement to arbitrate.

The practical effect of *Stolt-Nielsen* is to return business interests to essentially where they were before *Bazzle*—they may avoid class arbitrations where the parties do not explicitly agree on class arbitrations in their agreement. In other words, an agreement to arbitrate claims is not an agreement to class arbitration. If a party wants to have its claims subject to class arbitration, the party must include such a term in the agreement to arbitrate. Moreover, if a rogue arbitrator orders class arbitration when a contract is silent on the issue, the Supreme Court has provided a roadmap for appeal of that decision even though appeal of arbitration decisions generally are precluded. While *Stolt-Nielsen* appears to have a dramatic effect on class arbitrations, the ultimate scope of the decision is yet to be determined. For example, does the decision apply to consumer adhesion contracts? *Stolt-Nielsen* involved negotiated contracts by sophisticated businesses. In her dissent, Justice Ruth Bader Ginsburg seems to imply that a different rule could apply to claims brought by consumers, especially if they have no other way to vindicate their rights than a class arbitration. Questions of scope aside, there is little doubt that, by requiring class arbitration clauses to be explicit, *Stolt-Nielsen* will have the effect of at least reducing the number of class arbitrations. Call it a "do-over" for the Supreme Court.

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[1] *See* Ann C. Hodges, *Can Compulsory Arbitration Be Reconciled with Section 7 Rights?*, 38 Wake Forest L. Rev. 173, 209-10 (2003).

[2] *See* American Arbitration Association, *Supplementary Rules for Class Arbitration*, Rules 3 – 5, *available at* http://www.adr.org/sp.asp?id=21936.

[3] *See* Nora Lockwood Toohor, *Plaintiffs Wrestle with Class Arbitration Bans*, Lawyers USA, Nov. 19, 2007, http://www.allbusiness.com/legal/legal-services-litigation/8921629-1.html.

[4] *See, e.g.*, *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 984 (9th Cir. 2007) *Carlsen v. Freedom Debt Relief*, No. 09-cv-00055, 2010 BL 66856, at *6 (E.D. Wash. Mar. 26, 2010); *Cohen v. DirecTV, Inc.*, 48 Cal. Rptr. 3d 813 (Dist. Ct. App. 2006).