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Agreements to arbitrate class claims must be express

By W. Scott O'Connell, Christopher M. Mason, Carolyn G. Nussbaum

Continuing its long string of opinions friendly to traditional bilateral arbitration, the Supreme Court, in a 5 to 4 decision, has rejected the Ninth Circuit's view that an arbitration provision subject to multiple interpretations is nonetheless an adequate basis for an agreement to arbitrate on a class-wide basis. Nine years ago, in *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, the Court had held that parties could not be compelled to arbitrate on a class-wide basis unless there is an affirmative "contractual basis for concluding that the party *agreed* to do so."[1] This week, in *Lamps Plus, Inc. v. Varela*, No. 17-988, 2019 U.S. LEXIS 2943 (Apr. 24, 2019), a majority of the Court, over sharp dissents, held that an ambiguous agreement cannot provide the requisite "contractual basis" to compel class arbitration.

As the Court has emphasized in a number of cases over the last several years, arbitration is fundamentally a matter of consent. Because class arbitration is both "markedly different" from traditional individual arbitration, and also "undermines the most important benefits" of arbitration of individual claims, neither contractual silence—as in *Stolt-Neilsen*—nor contractual ambiguity—as in *Lamps Plus*—will support a conclusion under federal law that parties intended to consent to class arbitration.[2] In the Court's own words: "Neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself."[3] Left undecided, presumably for another day, is what level of specificity is necessary to demonstrate consent to class arbitration.

This new decision protects contract parties, who may not have thought about anything more than traditional, bilateral arbitration when including an arbitration clause in their document, from poor draftsmanship that could otherwise be construed as consent to class arbitration. The decision also means it is time once again for those who use arbitration provisions to review them for clarity.

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[1] *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (emphasis in original).

[2] 2019 U.S. LEXIS 2943, at *10-11.

[3] *Id.* at *14.

Background

In 2016, a hacker obtained tax information from Lamps Plus concerning 1,300 of its employees. A fraudulent tax return was filed shortly thereafter in the name of Frank Varela, one of those employees. Varela sued Lamps Plus in federal court in California on behalf of a putative class of employees whose information had been obtained.[4]

Varela had signed a standard Lamps Plus employment agreement that included an arbitration provision. Accordingly, Lamps Plus moved to compel arbitration of Varela's individual claims and to dismiss the lawsuit. The District Court granted the motion to compel arbitration, but (despite arguments from Lamps Plus) on a class-wide basis.[5]

In a split decision, the Ninth Circuit affirmed the District Court's order compelling class-wide arbitration.[6] While the employment agreement did not expressly reference class arbitration, it did state that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings related to my employment" and included a waiver of all rights "to file a lawsuit or other civil proceeding."[7] In the view of the Ninth Circuit, this did not make the failure to mention class arbitration into the "'silence' contemplated in *Stolt-Nielsen*."[8] Instead, according to that court, "[a] reasonable—and perhaps *the most reasonable*—interpretation of [the parties'] expansive language is that it authorizes class arbitration."[9] The Ninth Circuit then concluded that, because there were two reasonable interpretations of the arbitration clause (permitting class arbitration or not permitting it), the clause was ambiguous and therefore should be construed against the defendant drafter, based on California principles of contract construction.[10]

The Supreme Court granted certiorari to address whether the Federal Arbitration Act ("FAA"), 9 U.S.C., *et seq*., forecloses a state-law interpretation that would authorize class arbitration based solely on general language commonly used in arbitration agreements that does not necessarily demonstrate that the parties intended class-wide arbitration.

The Supreme Court's decision

In *Stolt-Neilsen*, the Court had held that an agreement to arbitrate classwide disputes should not be presumed in the face of "mere silence on the issue of class-action arbitration" or "from the fact of the parties' agreement to arbitrate."[11] However, the parties in *Stolt-Neilsen* had stipulated that "silence" meant "there's been no agreement that has been reached."[12] As a result, the Supreme Court did not have occasion to consider what contractual language or other evidence would be sufficient to demonstrate an agreement for class arbitration.

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[4] *See id*. at *6.

[5] See *id*.

[6] *Varela v. Lamps Plus, Inc*., 701 F. App'x 670, 672 (9th Cir. 2017).

[7] *Id*.

[8] *Id*.

[9] *Id*. (emphasis in original).

[10] *Id*. at 673.

[11] *Stolt-Neilsen S.A*, 559 U.S. at 665-687.

[12] *Id*. at 668-69.

The majority opinion in *Lamps Plus*, addressing this issue, framed it as one involving the "interaction" between a state principle of contract interpretation and the FAA's federal principle that arbitration is a matter of consent.[13] The fundamental question was therefore whether state law principles used to interpret an ambiguous contract could also be used to supply the requisite consent. The Court concluded that it could not, because the FAA requires "more than ambiguity" to establish an agreement to arbitrate on a class-wide basis.[14]

First, the Court viewed the difference between individual and class arbitration as a "fundamental change", quoting *Stolt-Nielsen*.[15] Second, the Court cited its precedent that class arbitration "'sacrifices the principle advantage of arbitration' and 'greatly increases the risks to defendants,'" quoting *AT&T Mobility LLC v. Concepcion*.[16] In addition, quoting *Concepcion*, it noted that class arbitration "makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[17] Against this listing of the perceived disadvantages of class arbitration, the Court then hearkened back to *Stolt-Nielsen*, and concluded that "there is reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration."[18]

In this context, it is not surprising that the Court required something more than an ambiguous provision to demonstrate consent to class arbitration. And although the majority noted that the doctrine of *contra preferentem*—construing ambiguous language against the drafter—"enjoys a place in every hornbook and treatise on contracts," that doctrine applies only after a court has been unable to divine the parties' intent.[19] In its view, necessarily following from *Stolt-Neilsen*, a contractual interpretation under state law based on an absence of evidence of intent to consent to class arbitration would not be a sufficient basis on which to base a finding of the consent to such non-traditional arbitration required by the FAA.

Justice Thomas filed a separate concurrence, noting his skepticism of the Court's "implied pre-emption" of state contract law, but otherwise agreeing with the majority.[20] Justices Ginsburg, Breyer, Sotomayor, and Kagan all wrote separate dissents (some of them joining in each other's individual opinions). All of the dissenters disagreed with the majority's implied state law pre-emption, but each had their own views.

Justice Ginsburg, joined by Justices Breyer and Sotomayor, criticized the lengths to which the majority was willing to go to "hobble the capacity of employees and consumers to band together in a judicial or arbitral forum," likening the effort to the mythological giants who sought to pile Mounts Olympus and Ossa on the summit of mountain Pelion to try to reach the heavens and destroy the gods.[21] While Justice Breyer joined Justice Ginsburg's dissent, as well as Justice Kagan's, he also dissented based on his conclusion that the Court lacked jurisdiction over Lamps Plus'

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[13] 2019 U.S. LEXIS at *11.

[14] *Id*. at *10-11.

[15] *Id*. at *2 (quoting 559 U.S. at 686).

[16] *Id*. (quoting 563 U.S. 333, 348, 350 (2011)).

[17] *Id*. at *3 (quoting 563 U.S. at 348).

[18] *Id*. at *13 (quoting 559 U.S. at 685-86).

[19] *Id*. at *16.

[20] *Id*. at *20-21.

[21] *Id*. at *23, 26.

petition.[22] Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor (in part), would have affirmed, finding no reason to displace state contract law where it does not discriminate against arbitration and suggesting that the majority was influenced by a dislike for class arbitration itself.[23] And Justice Sotomayor, joining with Justice Ginsburg and in part with Justice Kagan, added that the majority's "haste" to pre-empt state contract interpretation without even expressly finding the contract ambiguous was "ill-advised."[24]

Conclusion

In many ways, the *Lamps Plus* decision is no surprise. From *Stolt-Neilsen*, through *Concepcion*, and more recently in *Epic Systems Corp. v. Lewis*,[25] the Court has been openly and pointedly critical of class arbitration. Indeed, according to the majority, the Court's decision in *Lamps Plus* "follows directly" from *Stolt-Neilsen*.

As we have previously advised, arbitration agreements must be carefully drafted to comply with evolving case law to ensure that parties' objectives will actually be met. While the Supreme Court's recent decisions generally favor businesses' and employers' views on arbitration, some states are attempting to expand employees' and consumers' access to the courts. There remain many factors for any employer or business to carefully consider when considering whether to adopt or maintain an arbitration agreement.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

- W. Scott O'Connell at **soconnell@nixonpeabody.com** or 617-345-1150
- Christopher M. Mason at **cmason@nixonpeabody.com** or 212-940-3017
- Carolyn G. Nussbaum at **cnussbaum@nixonpeabody.com** or 585-263-1558

[22] *See id.* at *27.

[23] *See id.* at *50-52, 57-58.

[24] *Id.* at *41-42.

[25] 138 S. Ct. 1612 (2018).