ROBINSON & COLE
ATTORNEYS AT LAW

Attorney Advertising

APRIL 2010

Class Actions/Appellate Legal Update

Supreme Court Holds That the Federal Arbitration Act Requires That Parties Must Agree to Submit to Class Action Arbitrations

On April 27, 2010, the Supreme Court issued a 5-3 decision holding that a party cannot be required to engage in class action arbitration absent a contractual agreement to do so. Because agreements providing for class arbitration are rare, this decision appears likely to preclude the vast majority of class arbitrations, although the Court, in a footnote, left open the possibility that an implicit agreement to arbitrate on a classwide basis will suffice. One can certainly infer that the burden of proving an agreement to submit to class arbitration without express language will be very difficult.

The parties' agreement in *Stolt-Nielsen, S.A. v. Animalfeeds International Corp*., No. 08-1998, slip op. (U.S. Apr. 27, 2010), was silent on the issue of class arbitration. Believing it was required under the Supreme Court's 2003 plurality decision in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), the parties submitted the class issue to a panel of arbitrators. The panel concluded that class arbitration was permitted, relying on other arbitral decisions allowing class arbitration and finding that t was no evidence that the parties intended to preclude it. *Stolt-Nielsen, slip op.* at 3-4. On Stolt-Nielsen's application, the federal district court vacated the panel's partial award, but the Second Circuit reversed, holding that the scope of judicial review of arbitral decisions was very narrow and the panel had not exceeded its powers under that narrow standard. *Id*. at 5-6.

The Supreme Court's majority opinion (Alito, J., joined by Roberts, C.J., and Scalia, Kennedy, and Thomas, Js.) overcame the reviewability hurdles and concluded that the arbitration panel exceeded its powers by "impos[ing] its own view of sound policy regarding class arbitration" rather than analyzing the FAA or state law. *Id*. at 7-9. The Court held that "a party may not be compelled under the FAA to submit to class arbitration unless t is a contractual basis for concluding that the party *agreed* to do so," stressing "the foundational FAA principle that arbitration is a matter of consent." *Id*. at 20. Central to the Court's analysis was a concession made by Animalfeeds International's attorney at the start of the arbitration that everyone agreed "that when a contract is silent on an issue t s been *no agreement* that has been reached on that issue." *Id* . at 4 (emphasis added). The Court further explained that, in light of the high stakes of class arbitration and limited judicial review, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id*. at 21-23.

The Court further concluded that a remand for rehearing by the arbitrators was unnecessary because, under the undisputed facts of the case, only one outcome was possible, *i.e*., that the parties had not agreed to arbitrate. *Id*. at 12. In a footnote, however, the Court left open the argument for future cases that a party might be found to have implicitly agreed to class arbitration, noting that "[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id*. at 23 n.10.

Justice Ginsburg dissented (joined by Stevens and Breyer, Js.), principally arguing that the majority should have declined to review the question on the merits because the issue was not

ripe for review (as it was only a partial award), and the traditional rules encouraging limited review of arbitral decisions precluded *de novo* review in this case. *Id.*, opinion of Ginsburg, J., dissenting, at 3-7. Justice Ginsburg noted what she saw as two positives to the majority decision: that it "does not insist on express consent to class arbitration," *id.* at 12-13 (meaning that something lesser may be sufficient), and that it "apparently spares from its affirmative-authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis." *Id.* at 13. While the first of those points is consistent with the majority's footnote, the second point&#151which might allow a wide range of class arbitrations under consumer contracts&#151has no direct support in the majority opinion (although the majority mentions that both parties were sophisticated).

Stolt-Nielsen is an important decision reflecting the Court's investment in a central precept of arbitration: that it is "a matter of consent, not coercion." *Volt v. Board of Trustees*, 489 U.S. 468, 479 (1989), *slip op*. at 17. From this point forward, a party seeking to compel class arbitration bears a heavy burden to show consent, either explicit or implicit. The Court did not address two of the issues that many hoped would be resolved in this appeal&#151whether the "manifest disregard of the law" standard survived the Court's decision in *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008), *slip op*. at n.3, and whether *Bazzle's* plurality holding that the question of consent is for the arbitrator, not the court, is good law, *slip op*. at 15-16.

For further information, please contact Wystan M. Ackerman, Linda Morkan, or other members of Robinson & Cole's Class Action Team or Appellate Team.

The information in this legal update should not be considered legal advice. Consult your attorney before acting on anything contained n.
