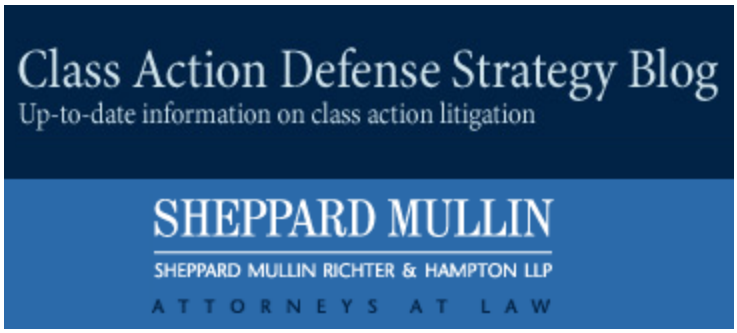

Class Action Defense Strategy Blog

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The United States Supreme Court Rules That Class Arbitration Is Improper When Parties To An Arbitration Agreement Have Not Explicitly Authorized Class Arbitration

By Dan Brown

On April 27, 2010, in a closely watched antitrust case with the potential for broad impacts on class action arbitrations, the United States Supreme Court considered the issue "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq." Slip op. at 1. *See Stolt-Nielsen S.A. et al. v. AnimalFeeds International Corp.*, 559 U.S. ---, No. 08-1198 (April 27, 2010) ("*Stolt-Nielson*").

As explained below, the Supreme Court held by a 5–3 vote (Justice Sotomayor recused herself) 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." *Id*. at 20 (emphasis in original). The Supreme Court reasoned that imposing class arbitration on parties that haven't voluntarily consented to class arbitration conflicted with the FAA.

Relevant Background

In *Stolt-Nielsen*, the defendant entered into a maritime charter party agreement (the "Charter Party Agreement") with plaintiff to transport certain animal food ingredients on Stolt-Nielsen's vessel. Slip op. at 1-2. The Charter Party Agreement contained an arbitration provision, that was silent with respect to class arbitration.

After a dispute arose, defendant filed an arbitration on behalf of a putative class against Stolt-Nielsen, asserting antitrust violations premised on allegations of price fixing. The arbitration panel initially considered the issue of the availability of class arbitration, and ruled that because the arbitration provision did not preclude class arbitration, a class action could proceed. *Id*. at

4. The United States District Court for the Southern District of New York vacated the arbitrators' ruling but, on appeal, the United States Court of Appeals for the Second Circuit reversed, and held that a class arbitration was permissible because nothing in the FAA, maritime law, or New York law precluded class arbitration absent an express class action waiver. *Id.* at 4-5. A "class action waiver" expressly prohibits arbitration on a class-wide basis. Here, however, because the Charter Party Agreement was silent as to class-wide arbitration, The Court of Appeals held that the provision authorized arbitration on behalf of a putative class.

Stolt-Nielsen Transportation Group Ltd. and other interested parties petitioned the United States Supreme Court for certiorari, challenging the ruling from the Second Circuit.

The United States Supreme Court Weighs In

As an initial matter, the Supreme Court held that the arbitration panel had exceeded its authority under the FAA, 9 U.S.C. § 10(a)(4). Slip op. at 7. Specifically, the Supreme Court held that the arbitration panel had made its own "policy decision" rather than applying a settled body of applicable law, such as the FAA, maritime law, or New York law, to construe the arbitration provision. *Id*. at 8-12, n. 4. Writing for the majority, Justice Alito wrote "In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers."

The Supreme Court then addressed whether the FAA permits class arbitrations where the operative arbitration provision is silent on the issue. *Id.* at 13. The Supreme Court held that a party cannot be "compelled" to participate in a class arbitration unless it had agreed to do so. *Id.* at 19-20, and criticized the arbitrators' focus on whether the agreement reflected intent to "preclude" class arbitration, as "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.* at 12, 20. Thus, an arbitration provision that is silent on the issue of class arbitration is not sufficient evidence that a party intended to submit to class arbitration. *Id.* at 21 (noting that class arbitration "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it simply by agreeing to submit their disputes to an arbitrator").

The Supreme Court stated it had "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. However, while the Supreme Court did not explicitly identify the factors necessary to determine whether an arbitration provision authorizes class-action arbitration, it noted that "[u]nder both New York law and general maritime law, evidence of 'custom and usage'" "is relevant to determining the parties' intent when an express agreement is ambiguous." *Id.* at 9–10 ,n. 6. Thus, evidence of custom and usage may support the conclusion that the parties did (or did not) intend to permit class arbitration. Nonetheless, the opinion suggests that silent clauses cannot be interpreted to permit class action arbitration.

It is also noteworthy that the dissent described the parties to the subject arbitration provision as both "sophisticated business entities" and that the agreement was not a contract of adhesion, suggesting that a different outcome might pertain where bargaining power is not equal, such as in consumer litigations where courts have found class-action waivers unenforceable. *Id.* at 11, n.

10, 13 (Ginsburg, J., dissenting).

The *Supreme Court*also avoided the question of whether a court or an arbitrator decides whether a contract permits class arbitration, and noted that only a plurality of the Supreme Court in *Green Tree Financial Corp v. Bazzle*,539 U.S. 456 (2003) had determined that the arbitrators can decide "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class." *Id.* at 4, 16. Thus, whether the arbitrator or the court decides whether an agreement permits class arbitration remains unsettled.