Case Notes

No Class Arbitration on Parties Who Are Silent on the Issue

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., U.S. Supreme Court No. 08-1198 (April 27, 2010).

In a 5–3 decision in *Stolt-Nielsen v. AnimalFeeds*, the United States Supreme Court held that imposing class arbitration on parties who have not agreed specifically to class arbitration is inconsistent with the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. Because the parties' arbitration agreement was silent on class arbitration, the Supreme Court held that the arbitration panel's inference that the parties intended to authorize class-wide arbitration exceeded its powers. The holding answers the question left open by *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2002), on the proper standard to be applied in deciding whether class arbitration is permitted.

AnimalFeeds brought an antitrust class action against Stolt–Nielsen for price fixing in federal court. The parties had entered into an arbitration agreement, but it was silent on the issue of class arbitration. The action was ordered to arbitration and the parties agreed to submit the question of whether their arbitration agreement allowed for class arbitration to a panel of arbitrators. The panel determined that the arbitration clause allowed for class-wide arbitration. At the Supreme Court, the petitioner, Stolt-Nielson, argued that the panel had exceeded its authority by deciding that consent to class arbitration could be inferred from silence in the arbitration agreement. Respondent, AnimalFeeds, argued that the issue of whether the agreement provided for class arbitration was properly submitted to the arbitration panel for decision.

In the majority opinion by Justice Alito, 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." Slip. Op. at 20 (emphasis in original). The Court noted that while there may be certain contexts in which it is appropriate to presume that parties entering into arbitration agreements implicitly authorize the arbitrator to adopt necessary procedures to give effect to the parties' agreement, class arbitration does not fall in this category. This is because "class arbitration changes the nature of the 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. The Court noted that the presumed benefits of arbitration, including lower costs and higher efficiency in reaching a decision, are much less assured in class arbitration, which includes

hundreds or thousands of parties, does not include the same presumption of privacy and confidentiality, and adjudicates the rights of absent parties. The Court therefore concluded that, in the absence of explicit language, there is good reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration.

This decision will limit a growing practice among arbitrators of permitting class-wide arbitration based on the presumed intent of the parties where the agreement is silent. Moreover, the post-*Bazzle* concern with severability of class action waivers may now be superseded, since *Stolt-Nielsen* seems to hold that unless an agreement can be read to permit class arbitration, it is not permissible under the FAA. *Stolt-Nielsen* did not specifically address unconscionability arguments that are frequently raised in opposition to enforcement of class action waivers in arbitration agreements. Nonetheless, *Stolt-Nielsen* is likely to be argued to preempt state law decisions refusing to enforce arbitration agreements with class action waivers according to their terms pursuant to the FAA. Parties wishing to avoid class arbitration should continue to include provisions explicitly stating that class arbitration is not part of the agreement to arbitrate.

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