

‘Lamps Plus’: The Supreme Court’s Latest Limitation on Class Arbitration

By John Fellas

In its April 24, 2019 decision in *Lamps Plus v. Varela*, 2019 WL 1780275, the U.S. Supreme Court held that the contra proferentem rule could not properly be applied to construe an ambiguous arbitration agreement to permit class arbitration. In doing so, it added to a series of (in most cases) 5-4 decisions making it harder for a party to bring an arbitration proceeding on behalf of a class.

The Rise and Fall of Class Arbitration

Before getting to the specifics of *Lamps Plus*, it is worth putting it in context. The starting point is the court’s plurality decision in *Green Tree Financial v. Bazzle*, 539 U.S. 444 (2003). While there were rare sightings of class arbitration in the United States prior to *Bazzle*, for a few years after that decision, it was all the rage. One striking aspect of *Bazzle*, in retrospect, is that the court took it as a given that class arbitration is consistent with the Federal Arbitration Act (FAA). *Bazzle*, in fact, addressed a narrow question: Given that class arbitration is permissible, who, as between a court and an arbitrator, has the authority to determine whether an arbitration clause permits class arbitration. Justice Stephen Breyer (whose opinion was joined by three other Justices) concluded that it is for an arbitrator to decide.

In reaching this conclusion, Breyer noted that there was a narrow

category of arbitration-related issues that courts, rather than arbitrators, are expected to resolve: “They include certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.” Breyer was careful to stress that “[t]he question here—whether the contracts forbid class arbitration—does not fall into this narrow exception.” Rather, it is for an arbitrator rather than a court to decide the class arbitration question because “[i]t concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.” About four months after *Bazzle*, the American Arbitration Association (AAA) issued a set of rules designed for class arbitration—the Supplementary Rules for Class Arbitration. Within a few years, the AAA was administering hundreds of class arbitrations.

Having begotten class arbitration in 2003, a few years later, the court began a two-pronged attack on it. The two prongs were driven by a common theme: despite *Bazzle*, class arbitration is inconsistent with the FAA.

One prong of the court’s attack was to uphold the validity of provisions in arbitration agreements under which a party waived the right to pursue a claim on behalf of a class. Thus, in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), the court (5-4) rejected a challenge to the enforceability of a class action



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waiver on grounds of unconscionability under California state law. In *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), the California Supreme Court held class action waivers to be unconscionable under two conditions: (1) when found in consumer contracts of adhesion that were likely to involve small damages claims; and (2) when the party with the superior bargaining power was alleged to have carried out a scheme deliberately to cheat many consumers out of small sums of money.

In *Concepcion*, Justice Antonin Scalia, writing for the majority, stated “that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA” primarily on the ground that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”

The second prong of the court's attack targeted the construction of arbitration clauses. Seven years after *Bazzle*, the court held in *Stolt-Nielsen SA v. Animal Feeds*, 130 S.Ct. 1758 (2010)—a 5-3 decision, Justice Sonia Sotomayor taking no part—that an arbitration tribunal's decision that class arbitration was authorized by an agreement that was "silent" on the issue was inconsistent with the FAA. The reason offered by Justice Samuel Alito, who authored the majority opinion, aligned with the one later given in *Concepcion*: "the differences between bilateral arbitration and class arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Lamps Plus* took *Stolt-Nielsen* a step further: where *Stolt-Nielsen* held that a silent contract could not, consistent with the FAA, authorize class arbitration, *Lamps Plus* held that an ambiguous contract could not either.

'Lamps Plus'

In *Lamps Plus*, Frank Varela sought to bring a class action lawsuit against his employer on behalf of 1,300 employees affected by an allegedly negligent data breach. *Lamps Plus* moved to compel individual (rather than class) arbitration based upon the arbitration clause in Varela's employment agreement. The Ninth Circuit affirmed the district court's decision to compel class arbitration. Central to the Ninth Circuit's decision was a finding that the arbitration clause was ambiguous. Applying the contra proferentem rule—that ambiguities are construed against the drafter of a contract—the Ninth Circuit resolved the ambiguity against *Lamps Plus*.

On appeal, the Supreme Court majority framed the issue before it as "whether, consistent with the FAA, an ambiguous agreement can provide the necessary 'contractual basis' for compelling class arbitration." Relying on *Stolt Nielsen*, the court

held that the FAA requires "more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis."

Underlying the Supreme Court's post-*Bazzle* decisions, are differing views on the merits of class actions. In *Lamps Plus*, Chief Justice John Roberts, writing for the majority, expressed solicitude for their targets—noting that a class actions "greatly increase[] risks to defendants." By contrast, Justice Ruth Bader Ginsburg, in dissent, expressed concern for those who might bring them, noting that, through its post-*Bazzle* decisions, "the Court has hobbled the capacity of employees and consumers to band together in a judicial or arbitral forum."

Regardless of one's view of the merits of class arbitration, in the opinion of this author, the majority's reasoning in *Lamps Plus* is flawed.

The Majority's Reasoning

There were two main bases for the majority's decision. The first is a theme common to many of the court's post-*Bazzle* decisions: class arbitration is inconsistent with the FAA because it makes the "process slower, more costly, and more likely to generate procedural morass than final judgment" and, thus, "undermine[s] the central benefits of arbitration itself." But this confuses the practices typical of arbitration for those essential to it. While arbitration typically is quicker, cheaper and procedurally simpler than litigation in the U.S. courts, nothing mandates that it must be. Nothing in the FAA states that it applies solely to efficient and procedurally straightforward arbitration. Rather, as the court affirmed in *Lamps Plus*, the core principle of the FAA "requires courts to enforce covered arbitration agreements according to their terms." Parties could theoretically enter into a bilateral arbitration agreement that contemplated a lengthy, complex and costly process, including

appellate review by a new arbitration panel. Such a process might be criticized by some as "undermining the benefits of arbitration." But this does not change the fact that such a process is covered by the FAA.

The majority misses the point by focusing on whether the inevitable procedurally complexity of class arbitration undermines the "benefits of arbitration." What matters is not whether parties agree to a process that secures the typical benefits of arbitration, but whether they agree to a process that entitles them to *the benefits of the FAA*. This is because, when an arbitration agreement falls under the FAA, the parties to it are entitled to certain benefits, most notably, the right to go to court to enforce their arbitration agreement and any ensuing award. Since the FAA's cardinal principle is that "arbitration agreements should be enforced according to their terms," it follows that an arbitration agreement must be enforced even if the process it contemplates does not secure the benefits of speed and cost-effectiveness typical of many arbitration proceedings. This is not to say that just any process agreed to by the parties is covered by the FAA. Imagine two parties agree to resolve their disputes by appointing an arbitrator to flip a coin. Even though that process would be quick, cheap and simple, it would surely be inconsistent with, and denied the benefits of, the FAA because it is arbitrary and unreasoned.

But if parties to a bilateral arbitration agreement who agree to costly and slow, reasoned procedures must be accorded the benefits of the FAA, there is no logical reason why parties who agree to class arbitration should be denied them. It is important to note in this context that the *Lamps Plus* majority accepts that an *explicit* agreement to class arbitration is inconsistent with the FAA. As Roberts noted (quoting *Concepcion*): "[C]lass arbitration, to the extent it is manufactured by [state law] *rather than consen[t]*, is inconsistent with the

FAA” (emphasis added). If that is true of an explicit agreement to class arbitration, then surely the same result follows when an ambiguous agreement, properly construed in accordance its governing state law that applies equally to all contracts, is read to require class arbitration.

The majority tries to avoid this conclusion by claiming that it is improper to use the *contra proferentem* rule to construe an ambiguous arbitration clause because it is a rule of public policy rather than one for ascertaining contractual intent. But as Justice Elena Kagan points out in dissent, the rule *is* relevant to ascertaining contractual intent since it “encourages the drafter to set out its intent in clear contractual language, for the other party then to see and agree to.” Moreover, the rule is so well-established in each of the 50 states that it gives rise to reasonable expectations as to how a contract will be interpreted and, as Kagan notes, “enables an interpreter to resolve any remaining uncertainty in line with the parties’ likely expectations.” And if parties to a contract do not wish that rule to apply, they are free to exclude it.

The second basis for the majority’s decision is that it “aligns with our refusal to infer consent when it comes to other fundamental arbitration questions.” Roberts quotes Breyer’s opinion in *Bazzle* to identify “fundamental arbitration questions”: “we presume that parties have not authorized arbitrators to resolve certain ‘gateway’ questions such as ‘whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration agreement applies to a certain type of controversy.’” But if, as Roberts’s suggests, class arbitration raises a “fundamental arbitration question[,]” it is important to be clear precisely what that question is.

In *Lamps Plus*, it was undisputed that the parties had agreed to

arbitrate—that, after all, was the basis of *Lamps Plus*’s motion to compel. Thus, the question raised there was not “whether the parties have a valid arbitration agreement at all.” Rather, the question raised in *Lamps Plus* arose out of the ambiguity that the majority accepted characterized the arbitration agreement, i.e., “whether a concededly binding arbitration agreement applies to a certain type of controversy.” But, as Roberts acknowledged, there is a well-established rule to address an ambiguity about whether a clause applies to a particular controversy (e.g., does an arbitration clause apply only to an individual claim or extend to claims on behalf of a class?): “we have repeatedly held that ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration.” Yet the court never addressed the application of that rule to the question before it.

In her dissent, Kagan criticized the majority’s decision because “the FAA does not empower a court to halt the operation of such a garden-variety principle of state law” as California’s *contra proferentem* rule. Kagan pointedly asked “[h]ow, then, could the majority go so wrong?” She went on to answer her own question by suggesting that the majority was driven more by the desire for a particular outcome than the requirements of the FAA: the majority’s decision “would never have graced the pages of the U.S. Reports save that this case involves ... class proceedings” (ellipsis in original).

The Future of Class Arbitration

On a broad reading of *Lamps Plus*, its net effect is that class arbitration is permitted only under two conditions: (1) the arbitration clause explicitly authorizes it; and (2) there is no class action waiver in the arbitration agreement. However, there is a narrower reading. At least when

it comes to clause construction, *Lamps Plus* still leaves open two important questions. The first is whether parties may delegate to an arbitrator the authority to decide whether an arbitration clause permits class arbitration. The second is whether rules of contract interpretation other than the *contra proferentem* rule can be relied upon to construe a clause to permit class arbitration.

Regardless of whether *Lamps Plus* is read broadly or narrowly, it is clear that the court’s post-*Bazzle* decisions have limited the ability of consumers and employees to seek relief in small value cases. As Justice Breyer put it in his dissent in *Concepcion*, “[t]he *realisticalternative* to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30” (emphasis in original).

It is, likely, therefore, that there will be continued attempts to address this issue through legislation, such as the proposed Arbitration Fairness Act of 2017, which would have invalidated pre-dispute arbitration agreements for certain types of disputes, including those involving employment and consumers. In fact, Ginsburg ends her dissent in *Lamps Plus* by stating: “Congressional correction of the Court’s elevation of the FAA over the rights of employees and consumers to act in concert remains urgently in order.” Regardless of one’s views on the merits of such legislation, there is a concern that, if it comes, it might be so vaguely drafted (like the prior proposed legislation) that it can be read to apply not just to agreements involving employees or consumers, but also to domestic business-to-business agreements and international agreements, as to which there are compelling reasons in favor of arbitration.

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