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Two Class Action Arbitration Cases Could Alter Legal Landscape

In its previous three terms, the U.S. Supreme Court has built a wall of major rulings enforcing bilateral contracts that would ban class actions in arbitrations: Stolt-Nielsen v. AnimalFeeds Int'l, 130 S. Ct. 1758 (2010); AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011); and CompuCredit. v. Greenwood, 132 S. Ct. 665 (2012). Those decisions recognize that, under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., class arbitration is a matter of contract, and therefore arbitration agreements must be enforced "in accordance with the terms of the agreement." Stolt-Nielsen and Concepcion also have emphasized "the fundamental changes brought about by the shift from bilateral arbitration to classaction arbitration," Stolt-Nielsen, which "make[] the [arbitration] process slower, more costly, and more likely to generate procedural morass than final judgment," Concepcion.

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These distinctions cast doubt on the notion that a party can be deemed to have agreed to class arbitration merely by agreeing to bilateral arbitration.

Nevertheless, lower court decisions have blunted their impact, reading Stolt-Nielsen and Concepcion narrowly to find class arbitration permissible despite ambiguity or their outright prohibition in the bilateral arbitration agreement.

In its October 2012 term, the Supreme Court has granted certiorari to review two of these rulings: Sutter v. Oxford Health Plans, 675 F.3d 215 (3d Cir. 2012), cert. granted sub nom., Oxford Health Plans v. Sutter, 81 U.S.L.W. 3070 (U.S. Dec. 7, 2012) (No. 12-135); and American Express Merchants' Litigation, 667 F.3d 204, cert granted sub nom., American Express v. Italian Colors Restaurant, 81 U.S.L.W. 3070 (U.S. Nov. 9, 2012) (No. 12-133). The Supreme Court's decisions in these cases will go a long way towards determining whether class arbitration may become a contractual rarity, permitted only where the parties have expressly agreed to it, or a procedure potentially available in a wide array of consumer, commercial and employment settings, with the attendant risks of protracted proceedings, large settlements and even larger judgments that such actions present for businesses.

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The first of these cases, Oxford Health Plans, presents the court the opportunity to resolve two interrelated questions that have divided the lower courts: who determines whether an arbitration agreement allows for class proceedings, the court or the arbitrator? And, can standard-form terms in arbitration agreements alone provide a basis for finding that the parties had agreed to class proceedings consistent with the FAA?

> ***"These distinctions cast doubt on the notion that a party can be deemed to have agreed to class arbitration merely by agreeing to bilateral arbitration."***

The court's first attempt at resolving these issues was Green Tree Fin. v. Bazzle, 539 U.S. 444 (2003), a class action against a commercial lender. In that case, the South Carolina Supreme Court held that the agreement to arbitrate "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract" was "silent" regarding class arbitration, and therefore class arbitration was permitted under state law.

Justice Stephen Breyer , writing for a four-justice plurality, concluded that the issue of whether class arbitration was permitted was a question of "contract interpretation and arbitration procedures" for the arbitrator to decide, not a question of whether the parties agreed to arbitrate a given dispute in the first place.

Consequently, the court remanded so that the arbitrator could decide the issue in the first instance. (While Justice John Paul Stevens concurred in the judgment, he would have affirmed the South Carolina Supreme Court's decision permitting class arbitration on the merits.)

In the wake of Bazzle, class arbitration has become more common, as Bazzle seemed to give arbitrators considerable leeway in ordering class arbitration despite the absence of specific contractual language authorizing it. The Supreme Court, however, sounded a very different note, considerably more skeptical of class arbitration, in Stolt-Nielsen, a 5-3 decision by Justice Samuel Alito (Justice Sonia Sotomayor , who had been on the Second Circuit when it considered Stolt-Nielsen, did not participate).

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In Stolt-Nielsen, the court considered whether an arbitral panel could order class arbitration in the face of contractual "silence." First, Stolt-Nielsen emphasized that the question of whether the parties'

contract permits class arbitration is for the court or the arbitrator had remained open, because Breyer's Bazzle opinion favoring it being a question for the arbitrator commanded only a plurality of the court.

Stolt-Nielsen, however, offered no further guidance, and the lower courts have been divided on the issue.[1]

Next, Stolt-Nielsen held that the arbitral panel's decision to permit class arbitration "exceeded [the panel's] powers" under the FAA and should be vacated because the agreement was silent on the issue of class arbitration and the parties themselves had stipulated that they had not agreed to class arbitration in their contract.

In so holding, Stolt-Nielsen affirmed 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."

But the court left unclear what that contractual basis may be. It noted only that express language referring to class arbitration was not always required but that "[a]n implicit agreement to authorize class-action arbitration...is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."

Where the contract is silent on the matter of class arbitration and the parties have not stipulated to their intent, some cases have held that Stolt-Nielsen still allows the arbitrator to permit class arbitration, so long as the arbitrator purports to rely on the parties' intent and not considerations of public policy. These cases have found that Stolt-Nielsen has left in place existing case law referring the interpretive question of contractual silence to arbitrators and applying a highly deferential standard of review in determining whether to vacate an arbitrator's interpretation.

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In Oxford Health Plans, for example, the Third Circuit affirmed the district court's refusal to vacate an arbitrator's decision to permit a class arbitration for unpaid insurance claims brought by doctors against the health care insurer, despite the silence of the parties' arbitration agreement on class arbitration. The Third Circuit held that Stolt-Nielsen "did not establish a bright line rule that class arbitration is allowed

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[1] Compare, e.g., Vilches v. The Travelers Companies, 413 Fed.App'x 487, 492 (3d Cir. Feb. 9, 2011) and Guida v. Home Sav. of Am., 793 F. Supp. 2d 611, 616 (E.D.N.Y. 2011) (issue is for the arbitrator) with Corrigan v. Domestic Linen Supply, 2012 WL 2977262, at *4 (N.D. Ill. July 20, 2012) and Reed Elsevier v. Crockett, 2012 WL 604305, at *8 (S.D. Ohio Feb. 24, 2012), appeal pending, No. 12-3574 (6th Cir.) (issue is for the court).

only under an arbitration agreement that incants class arbitration' or otherwise expressly provides for aggregate procedures," and distinguished Stolt-Nielsen on the ground that the parties in Oxford Health Plans had not stipulated to their lack of an agreement on class arbitration.

Because the arbitrator "articulate[d] a contractual basis for his decision to order class arbitration" in finding that the contract's proviso that "all" disputes "arising under this Agreement" must be arbitrated allowed for class arbitration, the Third Circuit concluded that the arbitrator did not exceed his powers, and the award was upheld.

The Second Circuit adopted a similar approach in Jock v. Sterling Jewelers, 646 F.3d 113 (2d Cir. 2011), cert. denied, 132 S. Ct. 1742 (2012), in finding that an arbitrator properly exercised her authority in reading the parties' agreement to permit class arbitration despite the agreement's silence on class arbitration.

Expressly disagreeing with Oxford Health Plans and Jock, however, the Fifth Circuit has rejected the principle that the traditional deference afforded arbitration awards precludes an inquiry into whether the arbitrator correctly determined the parties' intent regarding class arbitration.

In Reed v. Florida Metropolitan University, 681 F.3d 630, 641 (5th Cir. 2012), the Fifth Circuit found that an arbitrator exceeded his powers in determining that parties "implicitly agreed to class arbitration" based upon the agreement's reference to "any dispute" and "any remedy." The court held that the arbitrator's reliance on the "any dispute" clause was inappropriate in that such language is standard in arbitration agreements and, indeed, was present in the Stolt-Nielsen agreement that the Supreme Court had found would not evince an intention to permit class arbitration.

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Reliance on the "any remedy" clause also was improper because a class action is not a "remedy" just a procedural device. Although the Fifth Circuit acknowledged that Stolt-Nielsen does not preclude a finding that the parties implicitly agreed to class arbitration, such agreements should not be "lightly inferred." Instead, Stolt-Nielsen directs that courts must "undertake an inquiry into the arbitrator's reasoning."

Given the recent skepticism of the Supreme Court towards class arbitration, the Third Circuit's Oxford Health Plans decision stands a strong chance of reversal. Only Justice Antonin Scalia joined both Stolt-Nielsen and the Bazzle plurality, and the court may attempt to reconcile the two opinions by holding that, under Stolt-Nielsen, the FAA requires a more stringent standard of review of an arbitrator's decision to permit class arbitration where the agreement is silent, as opposed to the deferential standard of review that normally applies to arbitration awards. But the court was closely divided in Stolt-Nielsen and Bazzle, and will almost certainly be divided in Oxford Health Plans. If the court affirms the

Third Circuit, it will send a signal that arbitrators have broad discretion to find class arbitration permitted simply on the basis of standard-form terms in arbitration agreements, such as those covering "any dispute" or "any remedy," potentially permitting class arbitration in a wide array of cases where the parties to bilateral arbitration have not specifically waived class actions.

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Even where the arbitration agreement expressly waives class actions, some courts have invoked the "federal substantive law of arbitrability" in ordering a class action to proceed where the costs of proving individual claims under federal statutes would be so high as effectively to deter the pursuit of individual arbitration. American Express presents the question of whether the "federal substantive law of arbitrability" survives Concepcion's holding that the FAA preempts state-law unconscionability attacks based on the adhesive nature of the class action waiver and the predictably small amount of damages at issue.

By way of background, in Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 637 (1985), the court held that federal antitrust claims could be arbitrated under the FAA "so long as the prospective litigant may effectively vindicate its statutory cause of action in the arbitral forum." Building on this language, in Green Tree Fin.-Alabama v. Randolph, 531 U.S. 79, 90 (2000), the court acknowledged in dicta that "the existence of large arbitration costs could preclude a litigant...from effectively vindicating her federal statutory rights in the arbitral forum."

In the face of an otherwise enforceable class action waiver, the issue of prohibitive costs can arise where the plaintiff argues that, due to the small potential recovery compared to the high costs of presenting a case in arbitration, it would not be economically feasible to pursue the claim as an individual action. Of note, Breyer's dissent in Concepcion argued that class proceedings were necessary to prosecute smalldollar claims that might otherwise slip through the legal system. Scalia's majority opinion, joined by four other justices, rejected this view, saying that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

But Concepcion arguably left open what would happen if the class action waiver made it too expensive to vindicate federal rights. Indeed, as the Supreme Court majority noted, the district court had found that the arbitration procedures were "sufficient to provide incentive for the individual prosecution of meritorious claims."

The Second Circuit, however, squarely faced this contentious issue in its series of decisions in American Express Merchants' Litigation, an antitrust lawsuit that was initially decided by the Second Circuit in 2009, 554 F.3d 300 (Amex I). The Amex I court held that, under Randolph, plaintiffs had to demonstrate

that the cost of individually arbitrating their disputes would be prohibitively expensive, effectively depriving them of the statutory protections of the antitrust laws.

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The plaintiffs carried their burden, the court found, by submitting an expert's affidavit opining that an expert economic study, an important component of proving an antitrust violation, likely would cost somewhere between $300,000 and $2 million. Each individual plaintiff would need such a study, yet the average individual recovery would be less than $5,300.

The court reiterated this finding after the Supreme Court vacated Amex I and ordered reconsideration in light of Stolt-Nielsen, 634 F.3d 187 (2011) (Amex II), and said it again in Amex III after the court sua sponte ordered reconsideration in light of Concepcion. The Amex III court asserted that Concepcion did not overrule Mitsubishi and Randolph, and thus did not affect the "vindication of statutory rights" principle it found to be part of the "federal substantive law of arbitrability."

The Second Circuit subsequently declined to rehear Amex III en banc, over the dissents of five judges. American Express Merchants' Litig., 681 F.3d 139 (2d Cir. 2012). Writing in dissent, Chief Circuit Judge Dennis Jacobs criticized Amex III for undermining the policy of the FAA; distinguishing Concepcion on dubious grounds; and improperly relying on the dicta from Randolph.

Under the "searching" inquiry into "economic feasibility" mandated by Amex III, Jacobs argued, "arbitration must now begin in federal court, and be litigated there in many critical respects." Moreover, in response to the Amex III panel's concern with the high cost of an expert economic study, Jacobs noted that the same level of expert opinion might not be necessary in an arbitration, because "the rules of evidence do not govern arbitration, and...an arbitrator can consult treatises and articles for relevant antitrust and economic principles, and should do so in some cases."

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Further, Jacobs argued that Amex III misread Randolph's dicta regarding "large arbitration costs." Randolph's reference was to "the cost of access to an arbitral forum," i.e., "payment of filing fees, arbitrators' costs, and other arbitration expenses."

The weight of authority outside the Second Circuit appears to reject Amex III's reading of Concepcion. In Coneff v. AT&T, 673 F.3d 1155 (9th Cir. 2012), the Ninth Circuit rejected a "prohibitive costs" challenge to a class-action waiver in an arbitration clause of a consumer service contract, reading Concepcion as foreclosing reliance on the concern that "customers have insufficient incentive" to litigate their claims due to their small-dollar value, as opposed to the concern that customers would have "no effective

means to vindicate their rights" due to the potential that, for example, they would have to bear the costs of arbitration because of the lack of fee-shifting provisions.

Especially in the wake of Coneff, several lower courts outside the Second Circuit have forcefully dismissed the Amex analysis and paid no attention to any effort to distinguish Amex III.[2] In addition, some courts have held expressly that "the Concepcion Court did not depend on the consumer-friendly aspects of the provision there in order to uphold it." Hodson v. DirecTV, 2012 WL 5464615, at *7 (N.D. Cal. Nov. 8, 2012).

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The Supreme Court's 2012 decision in CompuCredit also suggests that Amex III is vulnerable to reversal. In CompuCredit, the court held that, despite references in a federal statute to a right to commence class actions in court, individual class action waivers and arbitration agreements were enforceable in suits under that statute, the Credit Repair Organizations Act. The court reasoned that the FAA "requires courts to enforce agreements to arbitrate according to their terms...even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." This statement, coupled with the CompuCredit court's holding that Congress must provide a clear statement of its intent to foreclose arbitration, suggests that the unwritten "federal substantive law of arbitrability" may not provide a proper basis for striking down arbitration agreements that otherwise would be enforceable under Concepcion.

But given the vintage of the "federal substantive law of arbitrability," and the fact that four justices dissented in Concepcion, the result may well be closer than the 8-1 outcome in CompuCredit. In this vein, it is worth noting that Sotomayor, a member of the Second Circuit panel that decided Amex I (she joined in its unanimous decision), has recused herself from participation in American Express.

Oxford Health Plans and American Express make it imperative that care be taken in drafting arbitration agreements. Regardless of the outcome in Oxford Health Plans, businesses should include an express class arbitration waiver if only bilateral arbitration is intended. Supreme Court affirmance in American Express may compel restructuring the class action waiver so that plaintiffs have sufficient incentive to bring individual arbitrations, such as by providing an "incentive payment" and recovery of attorney's

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[2] See King v. Capital One Bank (USA), 2012 WL 6052053, at *1 (W.D. Va. Dec. 5, 2012); Knutson v. Sirius XM Radio, 2012 WL 1965337, at *5 (S.D. Cal. May 31, 2012); Jasso v. Money Mart Exp., 2012 WL 1309171, at *7 (N.D. Cal. April 13, 2012); Brokers' Services Mktg. Group v. Cellco P'ship, 2012 WL 1048423, at *3-*5 (D.N.J. March 28, 20

fees should the plaintiff obtain an arbitrator's award greater than business' last settlement offer, similar to the arbitration clause in Concepcion.

If, on the other hand, the Supreme Court issues broad rulings reversing both Oxford Health Plans and American Express, calls from the plaintiffs' bar for Congress to codify the "federal substantive law of arbitrability" or otherwise make class arbitration more freely available will be heard.