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Class-Action Arbitration Cannot Be Compelled Absent Evidence of Consent

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On April 27, 2010, a divided U.S. Supreme Court (5-3, with Sotomayor, J., recused) held that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"), does not permit forcing unwilling parties to participate in a class arbitration to which they have not consented. This is a case of potentially great significance to entities whose contractual relationships include arbitration provisions and that generally oppose class-action treatment of cases against them—particularly employers of all kinds, but also health care providers and financial services companies, among others. *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.,* No. 08-1198, 559 U.S. ____ (2010).

Stolt-Nielsen involved a dispute in a maritime setting, alleging unlawful price fixing and governed by a charter that included a provision mandating arbitration pursuant to the FAA, but which was silent as to whether such an arbitration could be conducted on a class-action basis, *i.e.*, whether absent parties could be included in the case. While insisting that the bi-party matter must be arbitrated, the defendant opposed class-action treatment.

The parties stipulated to submit to the arbitration panel the question of whether their arbitration agreement allowed for class arbitration under the class rules of the American Arbitration Association ("AAA"), ostensibly following the Supreme Court's elusive majority holding in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

The arbitration panel determined that the arbitration clause at issue did not expressly preclude—and, thus, permitted—class arbitration. A federal district court vacated, holding that the arbitration ruling was made "in manifest disregard" of the law. The U.S. Court of Appeals for the Second Circuit reversed.

In vacating the Second Circuit's decision, the Supreme 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. Here, the Supreme Court noted, the parties concurred that they had reached "no agreement" on that issue.

Further, the Supreme Court said that an implicit agreement to authorize class-action arbitration is not a term that an arbitrator may infer solely from the fact that the parties have agreed to arbitrate. This is so, the Supreme Court said, because class-action arbitration so fundamentally changes the nature of arbitration involving only two parties that it cannot be presumed that the parties consented to it simply by agreeing to submit their disputes to arbitration.

On May 3, 2010, the U.S. Supreme Court summarily vacated and remanded for reconsideration, in light of *Stolt-Nielsen*, the decision of the Second Circuit in *American Express Co., et al. v. Italian Colors Restaurant, et al.*, a case concerning an anti-trust dispute between American Express and a putative class of businesses that accepted payment with the American Express card. The parties' agreement included an arbitration clause with a waiver of class claims. The Second Circuit had ruled that the question of whether such a waiver was "unconscionable" was for the courts, not an arbitrator, and that the waiver was, indeed, unconscionable. The Supreme Court has now ordered the Second Circuit to take another look at its position (559 U.S. ___ (2010)).

The significance of *Stolt-Nielsen* to employers, service providers and others is both obvious and far reaching, but we note several caveats—issues left open by the Supreme Court than might be obviated by clear arbitration agreements. On the face of the Supreme Court's decision, defendants in arbitration cases who have not consented to class treatment may move to dismiss such demands with a great likelihood of success. Where an arbiter has compelled class-wide determination, an employer or other defendant may move to have the decision enjoined or vacated as manifestly in disregard of the law. Given at least two issues reserved by the Supreme Court, however, we suggest that parties not currently involved in arbitrations consider strengthening their agreements in two specific ways.

First, because the parties in *Stolt-Nielsen* stipulated that the class determination question could be decided by the arbitral panel, the Supreme Court did not reach the question, left open in the earlier *Bazzle* case, of whether, absent such an agreement, this should be a question for a court or for an arbitrator. Second, given the *Stolt-Nielsen* parties' additional stipulation that their maritime charter agreement contained "no agreement" as to class-action arbitration, the Supreme Court went no further. However, the Supreme Court suggested that, where a contract is ambiguous on the subject, evidence of custom and usage, particularly relevant under maritime law and the law of New York State (and perhaps other jurisdictions) may be admissible to establish intent to permit class-action arbitration. Accordingly, companies reviewing their contracts that contain arbitration provisions might wish to be very specific in seeking agreement as to who decides questions of jurisdictional law and, most significantly and most likely, that nothing in the agreement or otherwise should be read as consenting to class actions.

As employers and service providers have come to learn, the defense of single-claimant cases in arbitration proceedings is far less time-consuming and costly than a determination in class proceedings. Especially in our current litigious climate, these entities should take particular care in the crafting and revision of their agreements that call for arbitration.

EBG represents a variety of commercial entities involved in arbitration of disputes, including employers, health care providers, hospitality companies and financial services providers. For advice concerning the effects of the *Stolt-Nielsen* decision or about arbitration agreements more generally, please contact:

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