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Consent, Not Coercion: Supreme Court Rejects Contractual Ambiguity as a Basis for Class Arbitration

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The Lede

Arbitration is a matter of consent, not coercion. That straightforward legal principle has been the polestar of much of the Supreme Court's arbitration jurisprudence for the past 20 years. Consistent with that general trend, the Supreme Court today held that an arbitration agreement cannot be read as permitting class arbitration unless the agreement clearly and explicitly so provides; it is not enough that the agreement is susceptible to the interpretation that it permits class arbitration.

The Facts

In 2016, an employee of lighting retailer Lamps Plus allegedly fell victim to a phishing scheme and unwittingly disclosed the tax information of over 1,000 of the company's employees to the perpetrator of the scheme. The plaintiff in the underlying lawsuit (and respondent in the Supreme Court), Frank Varela ("Varela"), was one of numerous employees who had a fraudulent tax return filed in his name in the wake of the incident.

Although Varela had signed an arbitration agreement as part of his employment, he nevertheless filed suit against his employer in federal court in California, seeking to represent a putative class of other Lamps Plus employees. Lamps Plus moved to compel individual arbitration and to dismiss the lawsuit; the district court agreed to compel arbitration, but did so on a classwide basis.

Lamps Plus appealed, and the Ninth Circuit affirmed. In so doing, the Ninth Circuit distinguished the Supreme Court's prior decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), which held that a court cannot compel class arbitration when the arbitration agreement in question is "silent" on the question whether classwide proceedings are permissible. Lamps Plus's arbitration agreement was distinguishable, the Ninth Circuit reasoned, because it was "ambiguous"—rather than "silent"—on the question of class arbitration. The Ninth Circuit then applied the California contract law principle of *contra proferentem* to construe that ambiguity against the agreement's drafter (Lamps

Plus). As a result, the Ninth Circuit held that the agreement authorized class-based arbitration proceedings.

The Decision

In a 5-4 decision authored by Chief Justice Roberts, the Supreme Court reversed. Accepting for purposes of its decision the Ninth Circuit's conclusion that the arbitration agreement was ambiguous on the issue of class arbitration, the Supreme Court went on to hold that California's *contra proferentem* doctrine was implicitly preempted by the Federal Arbitration Act ("FAA"). The reason, as indicated at the outset of this alert, is that arbitration under the FAA is a matter of ***consent***.

As the Chief Justice explained in his opinion, "[p]arties may generally shape [arbitration] agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes." Slip op. at 7. The FAA requires that those choices be honored by arbitrators and courts alike—not supplanted or modified by a particular state's contrary policy preferences. More fundamentally, "arbitrators wield only the authority they are given [by the parties]." *Id*. Consequently, any arbitral award on a type of claim or to a party not contemplated by the parties' agreement would be unauthorized and *ultra vires*.

California's *contra proferentem* doctrine, however, is not calibrated to help courts determine the existence or scope of the parties' consent. Indeed, it "is by definition triggered only after a court determines that it *cannot* discern the intent of the parties." *Id*. at [10]. Because the doctrine counsels courts to read arbitration agreements as authorizing procedures as to which there is no clear indication of the parties' consent, the Court held it preempted. In so holding, the Court echoed the reasoning of several other courts that had previously held that *contra proferentem* is overridden by the FAA's strong public policy favoring arbitration.

Justice Thomas concurred, expressing his view that the Lamps Plus agreement, like the one in *Stolt-Nielsen*, was silent on the availability of class arbitration, and that the result here was thus compelled by that decision.

Justice Kagan wrote the principal dissent, in which she strongly disagreed with the majority's holding that the FAA preempts the *contra proferentem* doctrine. In her view, such preemption should be reserved only for cases where the state contract law at issue discriminates against arbitration agreements. By finding preemption here, Justice Kagan opined, the Court was going even beyond its holding in *Concepcion*, which invalidated California's ban on class waivers in arbitration clauses. There, the rule in question discriminated against arbitration, whereas here the *contra proferentem* doctrine "is as even-handed as contract rules come." Slip op. at 7. In her view, the only basis for the Court's preemption decision was its view that ***class*** arbitration was fundamentally at odds with what the majority viewed as the FAA's default rule—bilateral arbitration of the claims of the two named parties only.

The Upshot

There are two clear takeaways from the Supreme Court's decision. The first, more doctrinal, takeaway is that the Supreme Court has now imposed a clear statement rule where class arbitration is concerned: Only if it is clear from the arbitration agreement itself—without resort to policy-based interpretive tiebreakers like *contra proferentem*—may a court find that classwide procedures can be used in lieu of individual arbitration.

The second takeaway is more abstract but also more sobering for those seeking to shoehorn classwide, public-injunction, private attorney general, and other aggregative procedures into the arbitral forum: The Supreme Court is having none of it. This decision, even more clearly than *Stolt-Nielsen*, *Concepcion*, and the Court's other recent arbitration precedents, makes clear that the Court views class arbitration as presumptively incompatible with, if not downright antithetical to, the bilateral form of arbitration envisioned by the FAA. Although disagreeing with the majority opinion, even Justice Kagan's dissent recognized both the Court's general trend in recent years and also the marginal step beyond those past decisions that this case represents. Litigants facing efforts to inject aggregate dispute resolution into arbitration have now been given another important tool in attempting to fend off that incursion.

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