Yes to Arbitration, but Did I Also Agree to Class Action and Consolidated Arbitration?

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In a recent franchise matter brought in state court involving multiple franchisee plaintiffs with nine separate franchise agreements, the authors sought to enforce the arbitration provisions within those agreements on behalf of the franchisor.[1] After arbitration was compelled, franchisee–plaintiffs filed a single arbitration demand, in essence consolidating all nine cases into a single arbitration. The authors objected to the ad hoc consolidation of the claims and requested that the American Arbitration Association (AAA) sever the claims administratively. However, the AAA required the appointment of a provisional arbitrator and briefing to determine the viability of the consolidation.

Flash back to *Green Tree Financial Corp. v. Bazzle*.[2] Until that 2003 U.S. Supreme Court decision, many standard arbitration provisions utilized in franchise agreements did not include any reference to consolidated arbitration or class action arbitration. It was presumed, at least by the franchisor, that the absence of any reference meant that consolidated or class action arbitrations were not permitted. However, due to six years of misguided court and arbitration decisions following *Bazzle*, many franchisors and other commercial entities have incorporated language into their arbitration provisions that seek to exclude the possibility of class action or consolidated arbitration.

Now flash forward to *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*.,[3] in which the Supreme Court confirmed the presumption that consolidated or class action arbitrations were not permitted if not specifically referenced in a franchise agreement. The *Stolt-Nielsen* decision was limited, however, to a fact pattern in which the arbitration provision was silent as to class action arbitration, and the Court did not reach the issue of consolidation.

In the aftermath of the *Stolt-Nielsen* decision, this article examines the history of this area of the law and considers what language, if any, should be included or removed in an arbitration provision to prevent class action and/or consolidated arbitration.

CONSOLIDATED/CLASS ACTION ARBITRATIONS

In deciding whether to agree to an arbitration provision in commercial contracts, including franchise agreements, the parties to the contract weigh the benefits and disadvantages of arbitration. For the franchisor, the benefits of arbitration are (1) decreased attorney fees and other costs of litigation; (2) less intrusive discovery of franchisor records and limited depositions of franchisor representatives; (3) the streamlined procedure of arbitration, which results in quick resolution of claims; (4) the availability of knowledgeable arbitrators in the specific fields at issue; (5) no precedential value; and (6) the confidentiality of the proceeding and the filings versus the public nature of a court litigation. The disadvantages of arbitration are (1) the limited rights to appeal an adverse ruling or decision by the arbitrator and (2) the lack of any right to a jury trial. Most franchisors (and franchisees) find that the benefits of arbitration outweigh the disadvantages, thus explaining the wide incorporation of arbitration provisions in franchise agreements. Importantly, in incorporating an arbitration provision, the parties to the franchise agreement are, as a rule, only considering individual arbitration, i.e., arbitrating claims against each other.

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Consolidated arbitration and class action arbitration significantly alter the benefits and disadvantages of arbitration. A consolidated arbitration permits multiple plaintiffs (typically fewer than twenty) to bring all of their claims in a single arbitration against a defendant. In the franchise context, a consolidated arbitration permits multiple franchisees to bring all of their claims against the franchisor in a single arbitration. For example, if a group of franchisees in the same region believes that its contributions to a national advertising fund are not being spent properly, a consolidated arbitration would permit that group of franchisees to file a single arbitration against the franchisor.

A class action arbitration permits a single plaintiff to bring its claims and all of the claims of similarly situated parties in a single arbitration against a defendant. In the franchise context, a class action arbitration permits a single franchisee to bring its claims and the claims of all other franchisees against the franchisor in a single arbitration. For example, if one franchisee believes its contributions to a national advertising fund are not being spent properly, the franchisee could bring a class action arbitration on behalf of all franchisees in the system.

Obviously, the benefits of individual arbitration are greatly

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compromised in class action arbitrations and, to some extent, in consolidated arbitrations. A franchisor might opt for the streamlined procedures and limited review of arbitration for a single dispute with a franchisee that involves limited monetary exposure; however, the franchisor might not opt for the streamlined procedures and limited review of the arbitration of dozens, if not hundreds or thousands, of claims brought in a consolidated or class action arbitration with millions of dollars at stake. When drafting its franchise agreement, a franchisor probably is unaware and, as a result, does not consider that silence on this issue could create significant monetary exposure in damages and counsel fees.

Given the ever-changing developments in the law and its application, franchisors should consider including specific language prohibiting consolidated and class action arbitrations in a franchise agreement's arbitration provision.

FEDERAL ARBITRATION ACT

The Federal Arbitration Act (FAA) ensures the enforcement of arbitration provisions in contracts involving interstate commerce.[4] The U.S. Congress passed the FAA in response to some state courts' refusal to enforce arbitration provisions contained in contracts from other states. Arbitration is a matter of consent, and the FAA leaves it to the parties to establish the nature and scope of their arbitration.[5] It is in the discretion of the parties to craft arbitration provisions to specifically determine and state explicitly (1) where the arbitration will take place, (2) how many arbitrators there will be, (3) what rules and procedures will apply to the arbitration, and (4) what issues may be resolved in the arbitration.

The FAA provides that "a contract evidencing a transaction involving commerce" that contains a written provision to settle a controversy "arising out of such contract or transaction" by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[6] *Commerce* in the FAA means "commerce among the several States or with foreign nations, or in any Territory of the United States."[7] "The term 'involving commerce' is not to be narrowly construed, and courts have found the requisite involvement where contractual activity facilitates interstate commercial transactions or where it affects commerce."[8] The Supreme Court later concluded that the FAA's reach extended to the full limits of Congress's Commerce Clause power.[9]

There can be no argument that a franchise system that is in multiple states and/or requires the delivery of materials from vendors in another state involves interstate commerce. For instance, the creation of a franchise relationship between a Pennsylvania franchisor and franchisees in New Jersey would clearly implicate interstate commerce "and creates significantly more than the 'slightest nexus' with interstate commerce that the [FAA] requires."[10]

The FAA applies even if the franchisee is in the same state as the franchisor, and the parties did not contemplate an interstate commerce connection.[11] In *Allied-Bruce Terminix Cos. v. Dobson*, a resident of Alabama purchased a lifetime termite maintenance agreement from an Alabama franchisee of Terminix.[12] Although the maintenance agreement was entered into between two Alabama parties, the *Allied-Bruce* Court held that interstate commerce was involved, in large part because the material used by the local franchisee was from out of state.[13]

If the arbitration provision is not governed by the FAA, a different analysis comes into play. In those instances, state law regarding contract interpretation and procedural rules regarding class actions and consolidation would apply. In such cases, whether an arbitration provision permits class action or consolidated arbitration would be determined on a state-by-state, contract-by-contract basis.

PRE-*BAZZLE*

Prior to 2003, consolidated or class action arbitration was generally not permitted by the FAA unless the arbitration provision explicitly provided for such arbitration. Although the FAA does not directly address the issue of consolidated or class action arbitration, the U.S. Supreme Court characterized the goal of federal arbitration legislation as the enforcement of arbitration agreements as intended by the parties, not the most expeditious dispute resolution. The Court held that

> [t]he legislative history of the [FAA] establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims. . . . The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation.[14]

Thereafter, the majority of the federal circuit courts determined that when an arbitration provision is silent as to whether claims are subject to class action or consolidation, the courts are without power to compel consolidation or class action arbitration. To compel consolidated or class action arbitration, express language in the arbitration provision is required.[15]

THE *BAZZLE* DECISION

In 2003, the Supreme Court opined on the limited question of "whether the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*., prohibits class-action procedures from being superimposed onto an arbitration agreement that does not provide for class-action arbitration."[16] The *Bazzle* Court limited its review to class action arbitration and did not consider consolidated arbitration. After deciding to hear the case, however, the Court determined that it could not reach the question of whether the FAA prohibited class action arbitration because the arbitrator, not a court, had to make the initial decision about whether the arbitration provision explicitly provided for class action arbitration.[17] After

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hearing the case, the Court simply remanded for further proceedings consistent with the opinion.

POST-*BAZZLE*

Although the *Bazzle* decision never addressed whether the FAA prevented class action arbitration, a few federal appellate courts have subsequently misinterpreted the *Bazzle* decision and concluded that it overruled the previous decisions interpreting the FAA. However, a close look at the *Bazzle* decision does not suggest any departure from the Supreme Court's consistent holdings that the scope of the arbitrator's authority under the FAA is determined solely by the parties' agreement.[18] The *Bazzle* Court at most concluded only that it is for the arbitrator to determine, in the first instance, whether the arbitration provision at issue is or is not silent on the issue of class arbitration. The *Bazzle* Court engaged in no discussion regarding the permissibility of class or consolidated proceedings if the arbitration provision is silent, and did not reference any of the cases that previously addressed consolidated and class action arbitration in a absence of a specific arbitration provision.

What many arbitrators failed to do was to take a close look at the *Bazzle* decision to note its inherent limitations.

AAA RESPONDS TO *BAZZLE*

After the *Bazzle* decision, the AAA, "in response to the ruling of the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*," issued Supplementary Rules of Class Arbitrations "to govern proceedings brought as class arbitration."[19] These rules provide, inter alia, that the arbitrator, as a threshold matter, must determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."[20] In addition, the rules eliminate the presumption of confidentiality, making the arbitration hearings and the decisions (and certain filings, including the demand and the award) public.[21] The rules also provide that the AAA will administer demands for class arbitration if the underlying agreement provides for arbitration via the AAA and if the agreement is silent with respect to class claims, consolidation, or joinder of claims.[22]

In *Bazzle*'s aftermath, a number of arbitrators have determined that class action arbitration is permitted under arbitration provisions when the arbitration provision is silent as to the permissibility of class action arbitration. In making these determinations, the arbitrators relied upon a number of rationales. Because the AAA rules specifically provide for class arbitration, arbitrators determined, in some instances, that class arbitration should be permitted if the arbitration provision was silent.[23] Other arbitrators looked to the law of the state where the arbitration was brought to determine whether class action arbitration was permissible.[24] Still others held that if the arbitration clause encompassed any and all claims and disputes, the clause in and of itself was sufficiently broad to allow for class arbitration.[25] Many arbitrators concluded that the *Bazzle* decision indirectly permitted class action arbitration under the FAA when the arbitration provision was silent as to that issue because otherwise the *Bazzle* Court would have issued a bright-line rule prohibiting class action arbitration instead of leaving it up to arbitrators to decide.[26]

What many arbitrators failed to do was to take a close look at the *Bazzle* decision to note its inherent limitations. Namely, the *Bazzle* Court never reached a determination whether class action arbitration was permitted under the FAA. The Supreme Court cleared up this misinterpretation in the *Stolt-Nielsen* decision.

STOLT-NIELSEN

The Supreme Court granted certiorari in the *Stolt-Nielsen* case to decide "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA)."[27] The *Stolt-Nielsen* case involved a dispute between maritime shipping companies and their customers. Specifically, the customers alleged that the shipping companies were engaging in anticompetitive behavior that led to overcharging.[28] The agreements between the parties contained an arbitration provision that was silent as to whether class action arbitration was permitted.[29] Although a number of separate cases were brought by customers in different federal district courts, the Judicial Panel on Multidistrict Litigation consolidated the pending actions, and arbitration was ordered.[30] Thereafter, a customer, AnimalFeeds, served Stolt-Nielsen with a demand for class arbitration. The parties agreed to submit the issue of class arbitration to a provisional panel.[31]

The provisional panel determined that although the arbitration provision was silent as to class action arbitration, class action arbitration was permitted.[32] The *Stolt-Nielsen* Court noted that "the provisional panel thought that *Bazzle* controlled the resolution of the question whether the arbitration provision permitted the arbitration to proceed on behalf of a class."[33] The provisional panel's decision was appealed to the U.S. District Court for the Southern District of New York, which reversed, holding that the decision was in manifest disregard of maritime law because the provisional panel failed to engage in a choice of law analysis.[34] AnimalFeeds appealed to the Second Circuit, which reversed the decision of the Southern District and reinstated the provisional panel's decision, finding no manifest disregard of any maritime law.[35]

The Supreme Court concluded that imposing class action arbitration on parties that have not agreed to authorize class arbitration is inconsistent with the FAA, and that a party may not be compelled under the FAA to submit to class

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arbitration unless there is a contractual basis for concluding that the party agreed to do so. The *Stolt-Nielsen* Court further held that the mere existence of an agreement to arbitrate cannot be inferred to permit class action arbitration.

Initially, the Court noted that the provisional panel's reliance on the *Bazzle* decision was misplaced. Justice Alito noted that "when *Bazzle* reached this Court, no single rationale commanded a majority. . . . [T]he plurality opinion decided only the first question, concluded that the arbitrator and not a court should decide whether the contracts were indeed 'silent' on the issue of class arbitration."[36] The *Bazzle* plurality did not decide what standard was appropriate in determining whether an arbitration provision allows class arbitration. Although the concurrence addressed this issue, *Bazzle* did not yield a majority decision on this issue.[37]

The *Stolt-Nielsen* decision casts doubt as to whether the *Bazzle* decision even requires an arbitrator, rather than a court, to decide whether an arbitration provision permits class arbitration.[38] More importantly, however, the Court ruled clearly that "*Bazzle* did not establish the rule to be applied in deciding whether class arbitration is permitted. The decision in *Bazzle* left that question open."[39] The Court reasoned that the FAA's purpose in enforcing agreements to arbitrate, while keeping in mind the tenet "that arbitration 'is a matter of consent, not coercion,'"[40] is the preeminent concern in making this determination. And, therefore, the Court determined that if the arbitration provision is silent as to class action arbitration, class action arbitration is not permitted under the FAA.[41] In reaching this decision, the Court observed that there can be no implicit agreement to permit class action arbitration because "class action arbitration changes that nature of 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."[42]

Stolt-Nielsen has brought some clarity as to when class action arbitration is permitted under the FAA.

This is the extent of the *Stolt-Nielsen* decision. The Court did not decide "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."[43] Thus, at least two questions are left open by *Stolt-Nielsen*: (1) what language in an arbitration provision would permit class action arbitration and (2) whether the analysis is the same for consolidated arbitration.

As to both questions, one should anticipate that the Supreme Court will require an express agreement within an arbitration provision to engage in class action arbitration. Whether the Court would require an express agreement to permit consolidated arbitration is an open question, one that is beginning to be debated by the lower federal courts. Notably, the *Stolt-Nielsen* Court emphasized the prior decisions of the Supreme Court, which held that the FAA's central purpose is to ensure that private agreements to arbitrate are enforced according to their terms. Moreover, the *Stolt-Nielsen* Court emphasized that the parties are generally free to structure their arbitration agreements as they see fit and that the parties may "specify with whom they choose to arbitrate."[44]

POST–*STOLT-NIELSEN*

In the last several months, a number of federal courts have considered the *Stolt-Nielsen* decision. Three cases are of particular note.

In *Anwar v. Fairfield Greenwich Ltd.*, the Southern District of New York considered whether the *Stolt-Nielsen* decision prevents consolidated arbitration when the arbitration agreement is silent.[45] In *Anwar*, a number of overseas investors who were caught up in the Bernie Madoff Ponzi scheme brought suit to recover their investment in one of the scheme's feeder funds, Fairfield Sentry. The overseas investors had twenty-four separate investment accounts with a company named Standard Chartered and used these accounts to purchase shares of Fairfield Sentry. The Standard Chartered accounts were governed by brokerage client agreements requiring arbitration. The arbitration provision provided that "no person shall bring a putative or certified class action to arbitration."[46]

In the aftermath of Madoff's admission, the overseas investors brought a consolidated arbitration alleging that no due diligence was performed prior to recommending investment in Fairfield Sentry.[47] Then, shortly after the *Stolt-Nielsen* decision, the AAA entered a partial award permitting the consolidated arbitration to continue, reasoning that the arbitration agreement was ambiguous because the arbitration explicitly prohibited class arbitration but did not mention consolidated arbitration. After analysis of state law and industry practice, the partial award permitted the consolidated arbitration to move forward. The Southern District of New York agreed with the partial award. The *Anwar* court determined that the *Stolt-Nielsen* decision was limited to class action arbitrations, in large part because the changes in the arbitral bargain caused by class action arbitration are not similarly wrought in a consolidated proceeding.[48] Specifically, confidentiality is maintained in a consolidated arbitration, and there are not an overwhelming number of plaintiffs that would cause issues relating to discovery and the arbitration proceeding itself. Therefore, the *Anwar* court permitted consolidated arbitration to proceed even though the arbitration provision did not address consolidated arbitration.

In two other cases, the federal court for the Western District of Washington and the Second Circuit (applying California law) expressed concern over whether the *Stolt-Nielsen* decision runs afoul of state law prohibiting class action waivers. The Western District of Washington in *Mansker v. Farmers Insurance Co. of Washington* discussed this issue, although ultimately it did not rule upon the apparent conflict between *Stolt-Nielsen* and the state's common law.[49] In *Mansker*, class

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action plaintiff argued that the *Stolt-Nielsen* decision prohibiting class action arbitration when the arbitration agreement is silent acts as a de facto class action waiver.[50] The *Mansker* court never reached a determination on this issue but did note that it raised troubling issues under Washington law.[51]

In *Fensterstock v. Education Finance Partners*, the Second Circuit considered whether a class action waiver within an arbitration provision in a student loan agreement was unconscionable and whether *Stolt-Nielsen* figured into the decision.[52] There, plaintiff brought an action on behalf of himself and others similarly situated, alleging that certain student loan providers and servicers engaged in fraudulent and deceptive practices. Defendants filed a motion to compel individual arbitration in accordance with the terms of plaintiff's loan agreement. The district court denied defendants' motion, holding that the arbitration clause was unconscionable under California law.[53] On appeal, the Second Circuit agreed with the district court. The court concluded that under California law, the class action arbitration waiver clause found within the student loan agreement was unconscionable and therefore unenforceable.[54] In doing so, the court emphasized that the student loan agreement was a consumer contract of adhesion and not a contract bargained for by equal parties.[55]

THE CONSEQUENCES

"Unexpected and involuntary [consolidated or] class action arbitration fundamentally alters the risks and benefits of the original arbitration" provision. Such a change can transform an individual arbitration of a limited franchise dispute into a "sprawling, high-stakes" arbitration without the safeguards of actual litigation (such as full appellate review).[56]

Although there is now some certainty regarding arbitration provisions that are silent as to class action arbitration, franchisors would be prudent to take steps to remove this determination from the hands of the arbitrators/courts by reviewing and, if necessary, redrafting arbitration provisions in their franchise agreements. Otherwise, franchisees may be successful in exploiting the void in Supreme Court jurisprudence regarding consolidated arbitration. Until that void is filled, franchisors should include language specifically forbidding consolidated arbitration in the franchise agreement, as well as language prohibiting class action arbitration. In drafting and entering into such a waiver, however, the franchisor must consider applicable state common law (and perhaps statutory law) regarding class action/consolidation waivers and whether such provisions are considered an unconscionable contract provision, thus invalidating the waiver.

As an example, the arbitration provision that led to the attempted consolidation of nine franchisees' arbitrations in which the authors are involved made no mention of consolidated or class action arbitration:

> Except as specifically otherwise provided in this Agreement, and in the event that Franchisee or Franchisor seeks injunctive relief under this Agreement, each of us agree that any and all disputes between us, and any claims by either of us that cannot be amicably settled, will be determined solely and exclusively by arbitration in accordance with the then existing rules of the American Arbitration Association at its nearest Pennsylvania office, subject to the following:
>
> Franchisee and Franchisor will select one arbitrator, and the two so designated will select a third arbitrator. If either of us fails to designate an arbitrator within 7 days after arbitration is requested, then a single arbitrator will be selected by the American Arbitration Association upon application of either you or Franchisor. Arbitration proceedings will be conducted in accordance with the rules then prevailing of the American Arbitration Association at its Yardley, Pennsylvania, office. Judgment upon an award of the majority of the arbitrators will be binding, and will be entered in a court of competent jurisdiction.
>
> Nothing herein contained will bar the right of Franchisee or Franchisor to obtain injunctive relief against threatened conduct that would violate this Agreement or cause loss of damages.[57]

Although under *Stolt-Nielsen* the absence of any mention of class action arbitration is sufficient to prevent class action arbitration, there are still issues such as consolidated arbitration and state laws regarding, inter alia, class action waivers. Therefore, the prudent practice is to include a provision that explicitly prohibits class action and consolidated arbitration, such as "Franchisee agrees that it will not file any arbitration claim as a class action, seek class action status, or permit its claim to be joined or made part of any class action filed by another. Franchisee further agrees that it will not file or join in any consolidated arbitration." If a given state has a statute relating to class action waivers, additional language may be mandated by statute.

CONCLUSION

For franchisors, class action arbitration and consolidated arbitration create uncertainty in their relations with franchisees. The *Stolt-Nielsen* decision has brought some clarity as to when class action arbitration is permitted under the FAA. This clarity will assist franchisors in drafting and enforcing arbitration provisions related to both class action and consolidated arbitration. The careful draftsman will be certain to clearly exclude class actions and consolidation of claims from the franchise agreement's arbitration provision. However, franchisors and their counsel must keep an eye on future developments in this area, especially related to consolidated arbitration, as it is likely that this area of the law will continue to evolve.

ENDNOTES

1. Biffle v. Slim & Tone, LLC, C.A. No. 2008-07157-19 (Pa. C.C.P. 2010).

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2. 539 U.S. 444 (2003).

3. 130 S. Ct. 1758 (U.S. 2010).

4. Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 54 (1995).

5. 9 U.S.C. § 2.

6. 9 U.S.C. § 2.

7. 9 U.S.C. § 1.

8. Seltzer v. Klein, 1989 WL 41288, at *3 (E.D. Pa. Apr. 20, 1989) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401–02, n.7 (1967)).

9. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274–75 (1995).

10. B.G. Balmer & Co., Inc. v. U.S. Fid. & Guar. Co., 1998 WL 764669, at *3 (E.D. Pa. Oct. 30, 1998) (interstate commerce involved regarding an agreement creating an agency relationship between Maryland corporation and a Pennsylvania corporation); *see also* Allison v. Medicab Int'l, Inc., 597 P.2d 380 (Wash. 1979) (franchise agreement between New York corporation and Washington resident was in interstate commerce).

11. *Allied-Bruce*, 513 U.S. at 281.

12. *Id.* at 268.

13. *Id.* at 282; *see also* Troshak v. Terminix Int'l Co., 1998 WL 401693, at *1 (E.D. Pa. July 2, 1998); Feinberg v. Ass'n of Trial Lawyers Assurance, 2002 WL 31478866, at *1 (E.D. Pa. Nov. 4, 2002).

14. Dean Witter Reynolds, Inc. v. Boyd, 470 U.S. 213, 219–21 (1985).

15. *See* Am. Centennial Ins. Co. v. Nat'l Cas. Co., 951 F.2d 107 (6th Cir. 1991); Baesler v. Cont'l Grain Co., 900 F.2d 1193 (8th Cir. 1990); Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281 (11th Cir. 1989); Weyerhaeuser Co v. W. Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984); Phila. Reins. Corp. v. Emp'rs Ins. of Wausau, 61 F. App'x 816, 820 (3d Cir. 2003) (citing Champ v. Siegel Trading Co., 55 F.3d 269, 274–75 (7th Cir. 1995)); *see also* Certain Underwriters at Lloyd's v. Century Indem. Co., 2005 WL 1941652, at *2 (E.D. Pa. Aug. 1, 2005).

16. Green Tree Fin. Corp. v. Bazzle, 2002 WL 32101094 (U.S. 2002); *see also* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447 (2003).

17. *Bazzle*, 539 U.S. at 447.

18. *See, e.g.*, UPS v. Int'l Bhd. of Teamsters, 55 F.3d 138, 141 (3d Cir. 1995); *see also* ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 85 (2d Cir. 2009).

19. *See* AAA Policy on Class Arbitrations (July 14, 2005).

20. *See id.* Rule No. 3.

21. *See id.* Rule Nos. 9, 10.

22. *See id.* Rule No. 18.

23. *See* Bess v. DIRECTV, Inc., AAA No. 11-140-02228-08 (Sept. 17, 2009).

24. *See* Cable Connection, Inc. v. DIRECTV, Inc., AAA No. 11-145-00752-04 (Feb. 8, 2005). In his thoughtful dissent, arbitrator Richard Chernick noted that the procedural law that applied to the arbitrator was the Federal Arbitration Act, not California procedural law; and, as a result, California procedural law is not pertinent to determining whether class action arbitration is permissible. Instead, Mr. Chernick looked to the plain meaning of the arbitration provision, which did not contemplate or permit class action arbitration.

25. *See* Herbert Kirsh v. Finova Group, AAA No. 11-148-Y-01381-07 (Sept. 26, 2008); Champion Ford Lincoln Mercury, Inc. v. Dealer Computer Servs., Inc., AAA No. 11-117-01935-06 (June 5, 2007).

26. *See e.g.*, *Champion Ford*, AAA No. 11-117-01935-06, at 7.

27. Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1764 (2010).

28. *Id.* at 1765.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1766.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1771.

37. *Id.*

38. *Id.* at 1772 ("Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding. For one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration.").

39. *Id.*

40. *Id.* (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

41. *Id.* at 1775.

42. *Id.* at 1776.

43. *Id*.

44. *Id.*

45. *See* Anwar v. Fairfield Greenwich Ltd., 2010 WL 3431126, at *12–13 (S.D.N.Y. Aug. 20, 2010).

46. *Id.* at *1.

47. *Id.* at *4.

48. *Id.* at *12.

49. Mansker v. Farmers Ins. Co. of Wash., 2010 WL 3699847 (W.D. Wash. Sept. 14, 2010).

50. *Id.* at *2.

51. *Id.*

52. Fensterstock v. Educ. Fin. Partners, 611 F.3d 124 (2d Cir. 2010).

53. *Id.* at 127.

54. *Id.* at 140.

55. *Id.* at 139–40.

56. Stolt-Nielsen v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1764 (2010).

57. Biffle v. Slim & Tone, LLC, C.A. No. 2008-07157-19 (Pa. C.C.P. 2010).

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