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The Lamps Plus oral argument suggests the U.S. Supreme Court may address the threshold issue of an arbitrator's power to adjudicate the claims of absent class members

by Jay Bogan

Takeaway: As we explored in a prior post ("*Class arbitration – can it even work?*"), conducting a class arbitration like most class actions – that is, giving absent class members notice and an opportunity to opt-out – may not be sufficient to bind absent class members to a class arbitration award. This problem arises from the purely contractual nature of arbitration and the fact the arbitrator does not have the authority of a court to enforce procedural rules that have the force of law.

The U.S. Supreme Court recently explored this threshold question of viability during oral argument in *Lamps Plus, Inc. v. Varela*, No. 17-988 (U.S. argued Oct. 29, 2018). In *Lamps Plus*, a 2-1 Ninth Circuit panel affirmed the district court's ruling allowing class arbitration claims to proceed, agreeing with the lower court that ambiguous language in the contract regarding class arbitration had to be construed against the drafter of the contract under the state law contractual interpretation doctrine of *contra proferentem*. *See Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672-73 (9th Cir. 2017), *cert. granted*, No. 17-988 (U.S. Apr. 30, 2018). In a two-sentence dissenting opinion, Judge Fernandez concluded that the arbitration agreement – which did not expressly refer to class arbitration – was "not ambiguous" and "[w]e should not allow Varela to enlist us in this palpable evasion of *Stolt-Nielsen*." *Id*. at 673 (Fernandez, J., dissenting).

Judge Fernandez's dissent focused on *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* , 559 U.S. 662 (2010). In *Stolt-Nielsen*, the Supreme Court held that, because of the vast differences between bilateral and class arbitration, a party's consent to class arbitration cannot be inferred solely from the fact that the party agreed to arbitrate in the first place. In Judge Fernandez's view, inferring consent to class arbitration based on *contra proferentem* could not be reconciled with *Stolt-Nielsen*.

During oral argument before the Supreme Court, questions from several Justices indicated interest in the deeper question of viability of any opt-out class arbitration, as opposed to addressing only the *Stolt-Nielsen* issue. Several of these questions reflected the concerns articulated by Justice Alito in 2013, when he raised the issue of whether a class arbitration can effectively bind absent class members in his concurring opinion in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013) (Alito, J., concurring). During the *Lamps Plus* argument, Justice Gorsuch asked: "[W]hat do we do with the due process problem

that Justice Alito pointed out in Oxford Health?" and "What do we do about those absent class members in opt-out class classes permitted by whatever arbitrable forum's rules prevail?" Transcript of Oral Argument, at 37-38. Justice Gorsuch then tied this "due process" issue to the issue of contractual interpretation: "[S]hould we ignore [the due process issues] in considering the impact here of the Arbitration Act and normal contract principles and whether normal contract principles would abide due process, for example?" *Id*. at 38.

Picking up on his own concurrence in *Oxford Health*, Justice Alito asked: "But do you think that … absent class members who didn't agree to arbitration could be bound by the decision of the arbitrator? … if [absent class members] have a legal claim, how can they be deprived of their legal claim pursuant to an arbitration award if they never agreed to arbitration? I thought arbitration was a matter of contract." *Id*. at 39-40.

Earlier comments by Justice Kavanaugh and Chief Justice Roberts indicate the Supreme Court might find a way to tie the due process issue to the contractual interpretation issue. According to Justice Kavanaugh, if "Stolt-Nielsen said that you needed something on the order of express language" to authorize class arbitration, then "the ship has sailed" on the contractual interpretation issue before the Court *Id*. at 20. Chief Justice Roberts, discussing the supposedly "neutral" contractual interpretation rule of *contra proferentem*, remarked: "[T]he question really is whether they're neutral principles. … the argument is that applying these principles has a peculiar impact on arbitration agreements since it authorizes a type of arbitration that is – is like a poison pill that basically [we] said in prior cases is fundamentally inconsistent with arbitration." *Id*. at 32-33. He later remarked: "So, if the [Federal Arbitration Act] says enforce the contract[] according to its terms, but one of the terms, as our prior precedents say, is fundamentally inconsistent with arbitration itself, then, presumably, the FAA would preclude that term." *Id*. at 35.

Based on these comments, it is possible the U.S. Supreme Court will require that an arbitration agreement contain (borrowing the words of Justice Kavanaugh) "express language" authorizing class arbitration, before a district court or arbitrator may rule that class arbitration may proceed. Otherwise, it cannot be presumed from an arbitration agreement that the parties agreed to a process with inherent due process problems and therefore dubious finality.

But the Court also could address the deeper issue, addressing an arbitrator's power to bind absent parties to any type of representative ruling. The Court could rule that the interpretation issue relates to the underlying contractual basis for arbitration and thus requires, as a matter of due process, a basis for finding express consent by the absent parties to having a single arbitrator or panel of arbitrators decide all of the class members' claims. In other words, unless every class member's arbitration agreement unambiguously authorized an arbitrator selected by a different class member to adjudicate the claims of absent class members, then the absent class members could not be said to have agreed to class arbitration (unless they separately "opted in" to the class arbitration). Such an arbitration agreement almost certainly does not exist.

Ultimately, the *Stolt-Nielsen* issue may become purely academic, as more and more arbitration agreements will include an unambiguous class action waiver. In the meantime, it will be interesting to see if *Lamps Plus* merely extends the *Stolt-Nielsen* rule or takes on Justice Alito's threshold question of an arbitrator's power to bind absent class members.