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What the Lamps Plus court did not say about class arbitration

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In the aftermath of the Supreme Court's decision in *Lamps Plus, Inc. v. Varella*, No. 17-988, 2019 WL 1780275 (U.S. Apr. 24, 2019), a lot of ink has been spilled on the issue of class arbitration. The *Lamps Plus* majority, relying on the Court's prior decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp* ., 559 U.S. 662 (2010), ruled that a party cannot be required to participate in a class arbitration unless the parties' arbitration agreement explicitly authorizes class arbitration. Because agreements expressly authorizing class arbitration generally do not exist, the Lamps Plus ruling – for the most part – signals the end of class arbitration.

We say "for the most part" because the class arbitration device is not yet extinct. That is because there are many arbitration agreements that assign the issue of "arbitrability" – which most courts agree includes the availability of class arbitration – to the arbitrator, usually by incorporating the rules of the American Arbitration Association (AAA). Accordingly, it is possible that an arbitrator could still decide to conduct a class arbitration proceeding, and any such decision would be virtually unreviewable by a court (because an arbitration award cannot be vacated simply on the ground that an arbitrator committed a mistake of law).

In other words, if an arbitration agreement (a) assigned to the arbitrator the decision to determine arbitrability issues, either expressly or by incorporation of the rules of the AAA (or another arbitral organization that authorizes an arbitrator to rule on his or her own jurisdiction); and (b) lacked an express class-action waiver (such a waiver should tie the hands of the arbitrator just as it would a court), then an arbitrator potentially could interpret the arbitration agreement as allowing class arbitration – a ruling that courts must respect "however good, bad, or ugly." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013).

But there is a more fundamental issue that *Lamps Plus* could have – but did not – address, and that is whether the class arbitration device is workable, even if parties to an arbitration agreement expressly agree to use it. A ruling on this issue potentially would close the door on all class arbitrations, period, subject only to an amendment of the Federal Arbitration Act by Congress.

The *Lamps Plus* majority viewed class arbitration as an aberration from the traditional bi-lateral arbitration contemplated by the FAA. For that reason, the majority ruled that a court may not assume parties have agreed to class arbitration unless their arbitration agreement expressly says so. Construing an ambiguity against the drafter is not enough.

But the disconnect between traditional arbitration and class arbitration warrants more than merely placing the thumb on the scale of an interpretative dispute. Think about your typical consumer fraud class action. The class representative files the class action in a trial court (such as an Article III federal district court), where it is governed by rules of procedure constituting, essentially, legislative enactments

(such as Federal Rule of Civil Procedure 23). Most of these cases seek damages (such as under Federal Rule 23(b)(3)), with the result that all class members receive notice and an opportunity to opt out if the court grants certification or approves a class settlement.

In other words, your typical class action (as opposed to a collective action under the federal Fair Labor Standards Act) will not be structured as an opt-in class. If the class member receives notice and fails to opt out, the class member ultimately will be bound by the judgment entered by the trial court (whether favorable or unfavorable to the class). Indeed, any class notice in a federal class action "must clearly and concisely state in plain, easily understood language . . . the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B)(vii).

If a class member later raises the same claims in a subsequent lawsuit, the only defense to that suit (other than a merits defense) is *res judicata*, based on the class judgment. Even where a class judgment is entered after a class settlement agreement is approved, *res judicata* is still the only bar. In the class settlement context, the putative class members are not subject to a release defense, because they are not contracting parties. Instead, the class settlement agreement is incorporated into the class judgment, rendering the class settlement the judgment of the court, enforceable via *res judicata*.

A class arbitration proceeding cannot produce a class judgment. While an arbitrator can purport to certify a class and issue an award, the award binds only the parties to the arbitration proceeding. That award can subsequently be confirmed and converted into a judgment, but the resulting judgment is again only binding on the parties to the confirmation proceeding before the trial court. The only possible exceptions would be (a) where every single class member is a party to an arbitration agreement that contractually authorizes binding class procedures (which almost certainly will never happen); or (b) where every class member "opts in" to the class arbitration.

Justice Alito raised the issue of whether a class arbitration can effectively bind absent class members in his concurring opinion in *Oxford Health*, 569 U.S. at 573 (Alito, J., concurring). In his concurrence, Justice Alito reasoned that, where an arbitration agreement does not explicitly authorize class arbitration, the distribution of opt-out notices to the putative members of an arbitration class would not be sufficient to bind them to a class arbitration award. *Id*. at 574. "'[A]rbitration is simply a matter of contract between the parties,' and an offeree's silence does not normally modify the terms of a contract." *Id*. (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995), and citing 1 *Restatement (Second) of Contracts* § 69(1) (1979)). According to Justice Alito, "at least where absent class members have not been required to opt in, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Id*. (emphasis in original).

During the *Lamps Plus* argument, several Justices expressed interest in the viability of opt-out class arbitration, based on the concerns articulated by Justice Alito. 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.

These "structural" concerns with class arbitration could have formed the basis for a very different opinion in *Lamps Plus*, one that rejected all class arbitrations as fundamentally inconsistent with the FAA. But the majority apparently did not see the need to address the issue, given that the arbitration agreement in *Lamps Plus* did not expressly authorize class arbitration, and the majority did not see the need to venture beyond the reasoning of *Stolt-Nielsen*. It remains to be seen whether the Supreme Court or another court will have occasion to address the more fundamental issue of whether opt-out class arbitration can ever work, given that the class arbitration device is now on its deathbed.