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High Court May Dim Lights On Class Arbitration In Lamps Plus

By **Adam Primm and Peter Kirsanow** (November 15, 2018, 2:27 PM EST)

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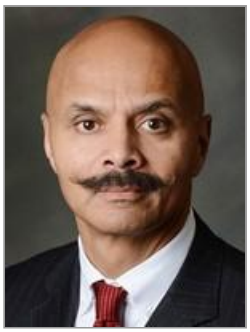

Peter Kirsanow

On Oct. 29, 2018, the U.S. Supreme Court heard oral arguments in Lamps Plus Inc. v. Frank Varela, a case on appeal from the Ninth Circuit examining whether an arbitration agreement permitted class arbitration. The language of the agreement is silent regarding class arbitration, only stating that the company and employee "mutually consent to the resolution of all claims or controversies, past, present, or future, that I may have against the company … or that the company may have against me. Specifically, the company and I mutually consent to the resolution by arbitration of all claims that may hereafter arise in connection with my employment or any of the parties' rights or obligations arising under this agreement." The agreement did not contain a class action waiver. The company argues that because the agreement is silent regarding class arbitration, the parties could not have agreed to authorize class arbitration. The employee argues that the language is ambiguous and should be construed against the drafter — the company — thus, authorizing class arbitration.

Counsel for Lamps Plus, Andrew Pincus, opened his argument by describing the standard contained in the Federal Arbitration Act, or FAA, that must be satisfied to permit class arbitration. Pincus continued that the Supreme Court previously elaborated on the issue in Stolt-Nielsen SA v. AnimalFeeds International Corp., in which the court found that a party may not be compelled to submit to class arbitration under the FAA absent a contractual basis for finding the party agreed to do so.

Justice Sonia Sotomayor, the most active justice during oral arguments, asked about the intersection of the FAA/Stolt-Nielsen position and state law regarding contract interpretation, a main theme throughout the oral arguments. Pincus responded that the FAA imposes a clear and unmistakable requirement regarding whether class arbitration is permitted before delegating gateway issues to the arbitrator for interpretation. Pincus elaborated that the decision in Stolt-Nielsen found that silence in the arbitration agreement is not enough to impose an obligation to engage in class arbitration, which is precisely what the Ninth Circuit imposed when faced with silence in this case. Justice Brett Kavanaugh, while later questioning counsel for Varela, Michele Vercoski, highlighted the Ninth Circuit's decision and the dissent's statement that the appellate decision is a "palpable evasion of Stolt-Nielsen."

Justice Elena Kagan followed Justice Sotomayor in questioning why authorization of class arbitration could not be found in the present agreement where the agreement was silent on the issue. She stated that some language regarding the claims subject to arbitration ("all disputes, claims, or controversies" and "all suits or other legal proceedings") cuts in favor of authorizing class arbitration, while other language (repeated references to "I, me, and my" when discussing the claims) supports the argument that only individual arbitration is authorized. Justice Kagan suggested that the "all disputes, claims, or controversies" language is a general clause that would include subcategories like class proceedings. Pincus responded that there is such a fundamental difference regarding class arbitration that Stolt-Nielsen outlined a special contractual rule, separate from general contract interpretation. Instead of construing ambiguity against the drafter to read authorization for class

arbitration into the agreement, Stolt-Nielsen instead required clear and unmistakable proof that the parties intended to authorize class arbitration instead of just bilateral arbitration. Thus, the subcategory of class proceedings is not necessarily included under the general "all disputes, claims, or controversies" language.

Justice Sotomayor chimed in that interpreting the arbitration agreement is a matter of contract controlled by state law, but Pincus again pushed back that Supreme Court precedent conversely states that the FAA created a special interpretive rule deferring to the FAA, which — in favoring arbitrability — would delegate such questions of arbitration procedure to an arbitrator as opposed to judicial interpretation. Essentially, instead of state contract law interpreting whether an arbitration agreement authorizes class arbitration, the FAA and Supreme Court precedent instead find that a federal rule requires clear and unmistakable language that the agreement authorizes class arbitration and any question as to whether the agreement actually contains such authorization should be interpreted by the arbitrator, in light of the FAA , Stolt-Nielsen and other Supreme Court precedent instead of state contract law. Justice Neil Gorsuch appeared to latch onto this argument by noting that Section 4 of the FAA appeared limited to the question of whether there was an agreement to arbitrate, and procedural questions regarding whether arbitration would be on a class or individual basis was left to the arbitrator and beyond the scope of judicial determinations.

Vercoski then began her argument in favor of imposing class arbitration. After remaining silent during Pincus' argument, Chief Justice John Roberts immediately questioned Vercoski regarding whether California's contract principles are "neutral" or actually operate as a "poison pill" imposing class arbitration that is "fundamentally inconsistent with arbitration." Vercoski responded that interpreting the contract and giving intent to the parties is consistent with the policy of the FAA, even if the default may be a bilateral agreement and not class arbitration. Justice Stephen Breyer later pointed out that arbitration associations have rules governing class arbitration, so they must not see class arbitration as a poison pill.

Later, Justice Gorsuch and Justice Samuel Alito both asked Vercoski about the risk that imposing class arbitration on putative class members who may not have even signed arbitration agreements could violate procedural due process protections under the 14th Amendment. Vercoski agreed that absent class members without arbitration agreements could be bound by an arbitrator's decision to impose class arbitration because protections within subsequent class certification procedures would protect those individuals' due process rights. Vercoski stated that such an issue would be antecedent to the issues raised in the present case. Vercoski further stated that if a court provides a basis to permit class arbitration, the arbitrator retains discretion to ultimately find that there is no class. However, Pincus responded in his rebuttal that the arbitrator would not be able to contradict the court's ruling that class arbitration was authorized.

Justice Alito engaged Vercoski in a hypothetical regarding a contract silent on arbitration generally. If the drafter opposed arbitration, but the signer sought arbitration, Vercoski stated that state contract law would construe the contract in favor of finding arbitration — although she also claimed that this outcome was consistent with the FAA — effectively inserting arbitration into an agreement that otherwise never contemplated it.

Justice Breyer followed up on this exchange to restate that Stolt-Nielsen held that the authorization of class arbitration could not be inferred solely from the fact that the parties generally agreed to arbitration. Justice Breyer then stated that California has a special rule not present in other jurisdictions, stating that a general agreement to arbitrate that is silent on class arbitration is sufficient to create ambiguity and create authorization for class arbitration, which is precisely what Stolt-Nielsen found against.

Justice Sotomayor then continued the inquiry by asking whether the language of the agreement is even sufficient to create the foothold under California contract law to find ambiguity to impose authorization for class arbitrations. Justice Sotomayor pointed out that other decisions in the California courts found similar language regarding "the waiver of all lawsuits or other civil legal proceedings" insufficient to create ambiguity to support class arbitration and instead found the presence of "I" and "my" supported an intent to engage in just bilateral arbitration. Justice Sotomayor did not agree with Vercoski's response that language stating that "arbitration shall be in lieu of any and all lawsuits or civil, legal proceedings" evidenced an intent to allow class arbitration because Justice Sotomayor determined that arbitrations are not "law proceedings." Instead, she

described how the procedures are drastically different. Vercoski disagreed and stated that the term "proceeding" is broad and includes legal actions or procedures, such as civil arbitration or class arbitration.

Possibly showing where she stands on this case, Justice Ruth Bader Ginsburg repeatedly described arbitration agreements as "adhesion contracts," but otherwise did not substantially probe the main issues. Justice Clarence Thomas was silent throughout the proceeding.

As a secondary matter, the justices also questioned the two advocates regarding the procedural posture in the case and whether the lower court's order to compel arbitration should have been appealable at this juncture, but such questioning took a backseat to the imposition of class arbitration.

It is noteworthy, that the Supreme Court's decision in Epic Systems stated that "courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent" and "Congress has instructed that arbitration agreements like those before us must be enforced as written." Although not dispositive on the issue, these quotes appear to show that the court, as recently as this summer, was disinclined to expand the language of an arbitration agreement beyond the parties' apparent intent. Coupled with the language of Stolt-Nielsen (a 5-3 decision authored by Justice Alito) that "class action arbitration changes the 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," the Ninth Circuit's decision in Lamps Plus appears to be facing an uphill battle to uphold the authorization of class arbitration.

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