

Who Resolves Class Arbitrability?

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The United States Supreme Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*, 559 U.S. 662 (2010), reaffirmed the principle that the parties' intention governs the determination of whether an arbitration should proceed on a classwide basis. Left open in *Stolt-Nielsen*, however, was the issue of whether the court or the arbitrator would determine that intent. Arbitration practitioners and litigators were looking forward to the Court resolving that issue by way of its decision in *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013).

The *Sutter* decision left those expectations unsatisfied. Based on the record before the Court, Justice Kagan, writing for a majority bench,¹ held that, as the parties had stipulated that the arbitrator would determine whether there was an intention to allow class arbitration, the court would review his determination that the case should proceed as a class under the limited scope of review permitted by Section 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. §10. Applying that limited review, the Court affirmed the lower court's denial of an application to vacate the decision, finding that there was no fraud or other defense which would have required the court to set aside

¹ Justices Alito and Thomas concurred in a separate opinion authored by Justice Alito. Their decision raised the specter that an opt-in class arbitration would be subject to collateral attack by absent class members, since they "have not submitted themselves to this arbitrator's authority in any way." 133 S.Ct. at 2071. While the concurring opinion does not discuss at length Justice Alito's and Thomas's route to this conclusion, the opinion, in its discussion of the contract basis of arbitration, seems to imply that the determination of the absent members' intention on class arbitration, at least absent a definitive statement one way or the other in the contract, requires an individualized decision as to the intent of every purported class member.

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the award. Interestingly, the majority opinion states that, faced with the question of class arbitrability *ab initio*, the court might very well have differed from the conclusion of the arbitrator. “Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator’s contract interpretation, or any quarrel with Oxford’s contrary reading. . . . The potential for those mistakes is the price of agreeing to arbitration. . . . [The arbitrator’s] interpretation went against Oxford, maybe mistakenly so.” 133 S. Ct. at 2069.

The issue which many had hoped the Supreme Court would resolve – who decides class status – was relegated to a footnote and left for another day. In footnote 2, the Court raised the issue of who makes the decision, but moved no further toward its resolution. While Justice Kagan describes “questions of arbitrability” as being “presumptively for courts to decide,” she does not address whether class arbitrability is such a “question.” “*Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. See 559 U.S. at 680. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures.” 133 S. Ct at 2068 n 2.

Given the outcome in *Sutter*, this paper and program will take a look at how some of the lower courts have resolved the issue in the absence of direct guidance from above.

As the lower court cases consistently rely upon or, at least, discuss the Supreme Court’s decisions in *Green Tree Fin. Corp. v. Bazzle*, 539 U. S. 444 (2003) and *Stolt-Nielsen* some preliminary understanding of those cases is necessary. *Bazzle* was an appeal from the South Carolina Supreme Court, which had held that an arbitration clause which was silent as to the availability of a class-wide proceeding could be interpreted under South Carolina substantive law as permitting class certification. The lineup of the opinions in *Bazzle* made for a very confusing array of potential holdings. The plurality of the Court, in an opinion by Justice Breyer, joined by Justices Scalia, Souter and Ginsburg, very specifically held that the question of whether the arbitration

agreement forbids class certification is for the arbitrator to decide, 539 U.S. at 451, and that the courts below erred in making that determination. They considered the appropriate remedy to be the vacating of the judgment below and a remand for further proceedings. Chief Justice Rehnquist and Justices O'Connor and Kennedy dissented and would have held that the decision of whether a matter may proceed as a class arbitration is "one for the courts, not for the arbitrator. . . ." 539 U.S. at 455. They also would have held that the Federal Arbitration Act, not South Carolina substantive law, governed the dispute and that, under that federal law, the South Carolina Supreme Court wrongly interpreted the agreement. As a remedy, they would have reversed the decision below. 539 U.S. at 460. Justice Thomas, in a separate dissent, held that he would have affirmed, as, contrary to the Chief Justice's opinion, he did not believe that the FAA governed proceedings in state court. Justice Thomas did not address at all the question of whether class arbitrability was a determination to be made by the arbitrator or the court. 539 U.S. at 461. Therefore, absent the opinion from Justice Stevens, the Court lined up as follows: four Justices to vacate and remand; three Justices to reverse; and one Justice to affirm.

Justice Stevens, in a three paragraph concurring opinion, stated that, while he would have affirmed, that would have left the court with no controlling judgment. Therefore, "because Justice Breyer's opinion expresses a view of the case *close to my own*. . .," he concurred in the judgment. 539 U. S. at 455 (emphasis added). Accordingly, with four Justices in the plurality and Justice Stevens joining in the judgment, the case was simply remanded to the court below.²

On the issue addressed in this paper - whether the court decides if an arbitration goes forward on behalf of a class - Justice Stevens stated, rather nondefinitively: "*Arguably* interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court." *Id* (emphasis added). As set forth below, that statement has been read both as favoring arbitrator resolution and as, at most, irrelevant. Therefore, at the end of the day, on the issue of "who decides," the

² There is no subsequent reported case from South Carolina as to the fate of the matter.

Supreme Court lined up four in favor of arbitrator decision (Justice Breyer's decision), three for resolution by the court (Chief Justice Rehnquist's decision), one completely silent (Justice Thomas) and one really just restating the issue (Justice Stevens). Thus, of the current nine Justices, on the basis of *Bazzle*, it appears that only three (Justices Breyer, Scalia, and Ginsburg) would definitely refer the question to the arbitrator; one (Justice Kennedy) would keep it with the court and the views of the others are, as yet, unexpressed.

In *Stolt-Nielsen*, the Supreme Court further muddled the question of to whom the parties look for a decision on whether to class the arbitration. AnimalFeeds was one of a number of shippers who utilized parcel tankers, like Stolt-Nielsen, to ship small quantities of liquids. The standard maritime charter contract which the parties signed contained an arbitration clause. AnimalFeeds sought classwide arbitration. The parties stipulated that the contract was silent as to whether claims could be arbitrated on behalf of a class, rather than an individual petitioner. The arbitration panel determined that the matter could proceed on behalf of the class; the District Court vacated the award, holding that the panel should have applied the custom and usage of the maritime industry, which would have mandated individual arbitration. The Second Circuit reversed, holding that, because Stolt-Nielsen had cited no authority *against* class arbitration under maritime law, the panel's decision was not in manifest disregard of the law and, therefore, was permissible. The Supreme Court reversed the Second Circuit, holding (1) that the applicable test is whether the parties' arbitration clause permits a classwide determination, not whether there is some relevant, generalized body of "common law" upon which the arbitrators can rely, 559 U.S. at 684, and (2) that agreement to classwide resolution may not be imposed simply because the arbitration agreement is silent on the issue, 559 U.S. at 685.

For purposes of this paper, however, the interesting issue is the majority's treatment of *Bazzle*. The majority, in an opinion written by Justice Alito – who, significantly was not on the Supreme Court bench at the time of the decision in *Bazzle* – seems particularly careful to avoid any implication in *Bazzle* that the arbitrator and not the court is to decide whether the arbitration is to proceed on behalf of a class.

Characterizing the opinion in *Bazzle* as simply that of a plurality, and not a majority of the court, Justice Alito specifically calls out the parties for being “baffle[d]” by the opinion in *Bazzle* and, consequently, believing that the judgment therein “requires an arbitrator, not a court, to decide whether a contract permits class arbitration,” 559 U.S. at 680. Justice Alito points out that “only the plurality [in *Bazzle*] decided that question,” *Ibid*. Since, in the very next sentence, the opinion states that the Supreme Court “need not revisit that question” because the parties “expressly assigned” that question to the arbitration panel, one must wonder whether this one paragraph discussion of the issue is intended to invite an opportunity for the Court to readdress the issue.³

The cases preceding *Sutter* had split on the issue, although most, in some way, relied upon *Stolt-Nielsen* and/or *Bazzle*.

In *Vilches v. The Traveler’s Companies, Inc.*, 413 Fed. App’x. 487 (3rd Cir. 2011) and *Hesse v. Sprint Spectrum, L. P.*, 2012 WL 37399 (W.D. Wash, Jan. 9, 2012), the courts were faced with the question of whether the parties were bound by an initial employment contract, which did not contain a class arbitration waiver, or by a revision which had such a provision. Both courts held that determination of the applicable agreement was one for the arbitrator. Because of the narrow issue considered, those cases are distinguishable from the straight up question of class arbitrability where there is but a single contract; the decision being made by the arbitrators in *Vichez* and *Lee* was simply which agreement the parties wanted to apply, with the arbitrability waiver merely being one of the consequences of that determination. Such factual determinations are the bread and butter of an arbitration.

Guida v. Homes Savings, Inc., 793 F. Supp. 2d 611 (E.D.N.Y. 2011)(collecting cases), discusses at length the interaction between *Bazzle* and *Stolt-Nielsen*, noting that the Supreme Court did not use the opportunity in the latter case to overrule the plurality decision in the first, from which the *Guida* court seems to infer that *Bazzle* would be adopted by the current panel of Justices. As discussed above, Justice Alito’s

³ The Supreme Court seems to have considered it so important to raise this flag that it went all the way back to a single statement by one of the counsel arguing to the arbitration panel to support the discussion, 559 U.S. at 680.

very specific (and, arguably, gratuitous) characterization in *Stolt-Nielsen*, of the *Bazzle* opinion as being merely one by a plurality could equally lead to the opposite conclusion.

In *Pedcor Mgmt. Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003), the court simply followed the then-recent decision in *Bazzle*; held that the arbitrator, not the court, determines whether to move forward on a class basis; vacated the District Court's opinion that the case go forward as a class and remanded for referral of the issue to the arbitration panel. The real significance of *Pedcor* to those outside the Fifth Circuit, however, is Circuit Judge Wiener's discussion of the significance of Justice Stevens's concurrence in *Bazzle*. Reading Justice Stevens' statements that "*arguably* the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court" (emphasis added) and that "Justice Breyer's opinion expresses a view of the case *close to [his]own*" (emphasis added) as an agreement with the majority, Circuit Judge Wiener essentially treats *Bazzle*'s statement that class arbitration is in the arbitrator's realm as a holding by the majority, not a plurality, of the nine Justices, 343 F.3d at 358. In *International Bancshares Corp. v. Lopez*, 2014 WL 5734121 (S.D. Tex., October 28, 2014), while recognizing that the Supreme Court in *Stolt-Nielsen* stated that *Bazzle* was merely a plurality decision, the District Court applied it to a post-*Sutter* action. *Ibid* at fn. 3.

On the other hand, the Courts of Appeals for the Second, Third and, by implication, the Seventh Circuits, as well as several District Courts, held that arbitrability is to be resolved by the court. In *Puleo v. Chase Bank*, 605 F.3d 172 (3rd Cir. 2010) and *In re: American Express Merchants Litigation*, 554 F. 3d 300 (2nd Cir. 2009), *vacated and remanded for further consideration on other grounds sub nom. American Express Co. v. Italian Colors Restaurant*, 130 S. Ct. 2401 (2010), the Second and Third Circuits considered who should determine the enforceability of class arbitration agreements contained in credit card contracts. Both courts held that the contract needed to be viewed as a whole, with the arbitration provision being viewed as granting only individual arbitration, rejecting the consumers' argument that the duty to arbitrate and the format of that arbitration (class versus individual) are two separate questions.

Therefore, the courts considered a challenge to class arbitration as being a direct challenge to the arbitrability of the dispute itself. Since a challenge to arbitrability is clearly reserved to the court, both Circuits held that the court, not the arbitrator, determines whether to move forward as a class or individually.

While not addressing specifically a class arbitration case, the Seventh Circuit, in *Employers Ins. Co. of Wausau v. Century Indemnity Co.*, 443 F.3d 573 (7th Cir. 2006), signaled that it would probably leave resolution of the classing issue to an arbitrator. There, the parties disagreed on whether the arbitrator could consolidate arbitrations under different reinsurance contracts into a single proceeding and whether the arbitration could be joined with those involving other reinsurers. The court held that the issue was procedural and should be left to the arbitrator. One of the most interesting aspects of the case is Chief Judge Flaum's discussion of the implications to be drawn from Justice Stevens's concurrence. Recognizing the Fifth Circuit's decision in *Pedcor*, the *Employer's Insurance* decision specifically declines to find that Justice Stevens' concurrence agrees with the plurality in *Bazzle* that the arbitrator is the forum in which the availability of a class is to be determined, 443 F. 3d at 579-80. See also, *Price v. NCR Corp.*, 908 F. Supp. 2d 935 (N.D. Ill. 2012)(finding that class certification is to be made by the court, in reliance upon *Employer's Ins. Co.*, discussed above); *Mork v. Loram Maintenance of Way, Inc.*, 844 F. Supp. 2d 950 (D. Minn. 2012)(holding that determination of whether an FLSA claim could proceed as a collective arbitration lay with the court) and *Corrigan v. Domestic Linen Supply Co., Inc.*, 2012 WL 2977262 (N.D. Ill. July 20, 2012)(simply stating the rule).

Cases since *Sutter* remain split.

A case decided last July, *Opalinski v. Robert Half International, Inc.*, 761 F. 3d 326 (3rd Cir. 2014). could have given the Supreme Court a chance to decide the question which it avoided in *Oxford Health*, but on March 9, 2015, the Justices denied the petition for a writ of certiorari, *Opalinski v. Robert Half International, Inc.* 135 S. Ct. 1530 (2015). The Court of Appeals in appropriately hinges its analysis on whether the determination of the right to classwide arbitration is a "question of arbitrability." If "yes,"

then the court decides the issue; if “no,” resolution of the issue is presumptively up to the arbitrator. The court frames the consideration around two questions – whose claims are being resolved and what type of controversy is being considered. In response to the first query, the court looked to those cases which hold that *whether* a party has agreed to arbitration is an issue for judicial resolution. Since the resolution of deciding whether an arbitration proceeds as a class effectively decides *whether* the absent parties have, in essence, agreed to arbitrate, the Third Circuit held that the court retained that decision.

The court then considered “what” was being decided, i.e. the “type of controversy.” The analysis here is less clear than the resolution of the “whose claim” issue. The court cites to its prior *en banc* decision in *Puleo v. Chase Bank USA, N.A.*, *supra*, in which it held that it would not order the arbitration of a claim which the parties did not agree to arbitrate. Its analysis of the class arbitration question, however, does not return to the question of whether parties agreed to turn to the arbitrator to resolve the threshold question of whether the proceeding will move forward as a class or only as to the single claimant. Rather, it discusses the difficulties encountered in class arbitration, citing, for example, the Supreme Court’s statement that “[a]rbitration is poorly suited to the higher stakes of class litigation,” 761 F. 3rd at 334, quoting *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011). However, utilizing the Third Circuit’s analysis that the parties must agree that the arbitrator determines classwide status, it would seem that the far easier answer is that virtually no purchaser signing the typical consumer contract with an arbitration clause (think a cell phone service contract or the purchase of a computer) ever had in mind that there even *were* such things as class arbitrations, let alone that he or she is agreeing that the determination of the applicability thereof would go to an arbitrator. Since arbitration is a matter of contract, that failure to have a meeting of the minds would seem to preclude consideration of the issue by the arbitrator, leaving it to the court.⁴

⁴ In an interesting side note, the court in *Opalinski* had to distinguish its own prior holding in *Quilloin v. Tenet HealthSys. Philadelphia, Inc.*, 673 F.3d 221 (3rd Cir. 2012), in which it “concluded that classwide arbitration was *not* a question of arbitrability,” 761 F.3d at 331 (Emphasis in original). The panel took two approaches. First, it

The Sixth Circuit has also directly taken up the Supreme Court's challenge to determine the appropriate forum for resolution of the class arbitration issue, *Reed Elsevier v. Crockett*, 734 F.3d 594 (6th Cir. 2013). There, Defendant Crockett, a lawyer, filed an arbitration to resolve a billing dispute with Lexis Nexis, claiming that his law firm incurred additional fees for databases outside its plan, without adequate warning. In that demand, Crockett sought to arbitrate the matter on behalf of two classes – law firms and clients to whom the charges were passed on. Lexis Nexis filed suit in the U.S. District Court, seeking a declaratory judgment that the contract's arbitration clause did not authorize class arbitration. The District Court granted summary judgment for Lexis Nexis. On appeal, the Sixth Circuit considered two issues. The first – and, in light of the *Sutter* and *Stolt-Nielsen* cases, the more difficult – was whether the issue should have been reserved to the arbitrator as one which was procedural, rather than decided by the court as a “gateway” question.

While acknowledging the existence of *Bazzle*, the court treated it purely as a non-binding plurality decision, holding that the issue is an “open one.” 734 F.3d 597-98. Based upon the Supreme Court's decision in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), the *Reed Elsevier* court broke disputes in an arbitration into two classes – “gateway” issues, such as whether there is a valid arbitration agreement or whether the clause applies to a certain type or controversy, and what the court called “subsidiary” issues. The former are for judicial resolution; the latter are left to the arbitrator. The issue to the *Reed Elsevier* court was, therefore, into which bucket class arbitrability fell. The court defined the two types of questions as follows: Gateway questions are those which are “*fundamental* to the manner in which the parties will resolve their dispute”; subsidiary questions “by comparison, *concern details*.” 734 F. 3d at 598 (Emphasis added). . The court held that “whether the parties arbitrate one claim or 1,000 in a single proceeding *is no mere detail*” and found that the issue was a

characterized the holding as mere dictum because the parties had agreed that the arbitrator should resolve the issue. Secondly, it criticized *Quilloin*'s “reliance” on *Stolt-Nielsen*, correctly stating that the Supreme Court there left the arbitrator v. court issue open. However, in that criticism, the *Opalinski* court also seems to mold *Stolt-Nielsen* to its own ends, in stating that the Supreme Court there holds that that “availability of classwide arbitration is a question of substance rather than procedure,” 761 F.3d at 331-32.

gateway one for court resolution (Emphasis added). In so holding, it considered the effect of a classwide arbitration on the “lower costs, greater efficiency and speed” which arbitration supposedly affords; the difficulty of maintaining the confidentiality inherent in arbitration when a larger group of claimants is involved; the risks inherent in class damages exposure, where judicial review is quite limited, and the binding effect of the decision on absent parties. Accordingly, it found that the District Court acted properly in not deferring the decision to the arbitrator.⁵

At the District Court level, the decisions are mixed. In *Chassen v. Fidelity National Financial, Inc.*, No. 09–291 (PGS)(DEA), 2014 WL 202763 (D.N.J. Jan. 17, 2014), the District Court called the question of whether the subject clause required class or individual arbitration a “gateway issue.” *Id* at *6. Relying heavily upon factors laid out by the Supreme Court in *Sutter, Stolt-Nielsen*, and *AT & T Mobility, LLC. v. Concepcion*, 131 S. Ct. 1730 (2011), describing the difficulty of class arbitration, the court held that it, not the arbitrator, would decide whether the parties agreed to a collective proceeding. However, it held that an evidentiary hearing was necessary to resolve that issue. As of this writing, there is no published decision as a result of that hearing.

The same result was reached by the court in *Chico v. Hilton Worldwide, Inc.*, 2014 WL 5088240 (N.D. Cal. October 7, 2014). In *Chico*, the court adopted the reasoning of *Opalinski* and *Reed Elsevier* without any elaboration; it, then, found that the subject arbitration agreements did not contemplate classwide or collective resolution. The driver of the court’s decision – as it should be – is the language of the arbitration agreement itself. Based upon the agreement’s reference to the plaintiff “in the singular” and the absence of any reference to “employee groups, putative class members, other employees, or other employees’ claims or disputes,” the court held that there was “no contractual or other basis for concluding that the parties agreed to class-

⁵ The court also held that the contract did not allow class arbitration, affirming the District Court’s judgment in favor of Lexis Nexis.

wide arbitration.” *Ibid* at *12.⁶ See also *Morgan v. Robinson*, 2014 WL 6612582, *2 (D. Neb. Nov. 20, 2014)(merely citing to the plurality opinion in *Bazzle*).

Several District Courts have taken the contrary view, holding that the availability of collective arbitration is merely a procedural issue to be resolved by the arbitrator. The most complete discussion of the authorities on both sides of the issue is contained in *In re: A2P SMS Antitrust Litigation*, 2014 WL 2445756 (S.D.N.Y. May 29, 2014)⁷. Recognizing that the issue is a “close one,” *id* at *12, Judge Nathan relied primarily upon the reasoning in *Bazzle*, interpreting that decision as holding that “the class of questions of arbitrability is a limited one.” *Id*. She would apparently limit the area in which a court enters the fray to the sole question of whether “an arbitration is permissible in the first instance.” *Id*. (emphasis added). Once the court determines that there is to be an arbitration of some type, everything else, including collective action, is merely a question of procedure. In its analysis, the court discusses, at some length, the difficulties recognized in *Reed Elsevier* and *Chassen* – cost, confidentiality, etc. – which make a class arbitration a very different animal from an individual proceeding and acknowledges that, if an arbitrator incorrectly makes the high stakes decision to allow class arbitration, the respondent is left with very limited judicial review of that determination. However, Judge Nathan viewed those issues as going to the merits of whether the parties could be deemed to have intended class arbitration under such difficult circumstances, not to the threshold question of who makes that decision.

The District of Minnesota reached a similar result in *Harrison v. LegalHelpers Debt Resolution, Inc.* 2014 WL 4185814 (D. Minn. August 22, 2014). The court first acknowledged that, as in *Oxford Health*, the parties had stipulated that the decision of classwide arbitrability was set for resolution by the arbitrator, *ibid* at *3. District Judge

⁶ The case is also interesting for its discussion of the nature of the evidence presented as to whether the Plaintiff, who purportedly did not speak English, agreed to the arbitration agreement. It provides a very good road map as to the case that might be assembled and presented when there is a claim that the petitioner did not understand the meaning of the word “arbitration” or did not assent to the process, *Chico* at *5-6.

⁷ Appeals were filed to the Second Circuit on June 30, 2014. There is no published opinion from the Second Circuit to date.

Montgomery, however, in a lengthy dictum defers to the plurality opinion in *Bazzle* and opines that the issue is one to be resolved by the arbitrator.⁸

In several shorter opinions, other courts have held that class determination is procedural and, therefore, for arbitral resolution. In *Lee v. J.P. Morgan Chase & Co.*, 982 F. Supp. 2d 1109 (C.D. Cal. 2013), the issue came before the court on defendant's motion to compel arbitration on an individual basis. Without detailed analysis, the court held that *Bazzle* was persuasive, reading that decision to hold that only the validity of the arbitration clause or its applicability to the dispute between the parties is reserved for judicial resolution. The decision is most useful, however, for its evaluation of the effect of *Stolt-Nielsen* on the jurisdictional question of who will be the decision maker. Defendants argued that giving the arbitrator broad discretion to make the determination of class versus individual arbitration would contradict *Stolt-Nielsen's* policy of limiting class arbitrations to those circumstances in which the parties clearly chose that vehicle. The District Court rejected that argument, holding that *Stolt-Nielsen* deals only with "how to decide whether an arbitration agreement authorizes class arbitration, not who decides." 982 F. Supp. 2d at 1113 (emphasis in original). In *Kovachev v. Pizza Hut, Inc.*, 2013 WL 4401373 (N.D. Ill. Aug. 15, 2013), the District Court, like Judge Staton in *Lee*, held that *Stolt-Nielsen* did not address who was to make the decision of class proceedings. The *Kovachev* court, then, analogized the issue of class certification to the consolidation of multiple arbitrations, a question which *Employers Ins. Co. of Wausau, supra*, had previously resolved for the Seventh Circuit by holding that the issue was one for the arbitrator.⁹ In *Holden v. Raleigh Restaurant Concept, Inc.*, 2014 WL 6609774 (E.D.N.C. Nov. 20, 2014), the court relied upon *Bazzle*, but also found support for referring decision to the arbitration panel in the Fourth Circuit's holding that

⁸ In the published opinion referenced above, the court states that the Tenth Circuit has held that arbitrators should decide the issue, citing to *Quilloin v. Tenet Health System, Inc.*, *ibid.* Caution should be taken with this portion of the opinion, as *Quilloin* was decided by the *Third*, not the *Tenth*, Circuit and, as discussed above, has been essentially overruled by *Opalinski*. The author has not seen the original opinion; the misstatement may be a typographical error by Westlaw or may have been corrected by the court in a revised opinion.

⁹ The *Kovachev* opinion is also very useful for its assembly of a number of Northern District of Illinois decisions holding that class arbitration is for resolution by the arbitrator, *see* *2 fn. 3.

the unconscionability of a collective action waiver is reserved for the arbitrator, see *Davis v. ECPI Coll. Of Tech., L.C.*, 227 Fed. App'x 250, 251 (4th Cir. 2007); see also *Jackson v. Home Team Pest Defense, Inc.*, 2013 WL 6051391 (M.D. Fla. Nov. 15, 2013), *appeal dismissed*, Dkt. No. 15619 (11th Cir. April 2, 2014).

Other courts have addressed the question less directly. In *Southern Communications Services, Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013), the court affirmed the District Court's decision that the arbitrator did not exceed his powers in certifying a class. However, there, as in *Sutter*, the parties agreed to submit the question to the arbitrator and the court did not address specifically the "who decides" issue, 720 F. 3d at 1355-56, see p. 14, *infra*. Likewise, in *Debose v. Smith & Wollensky Restaurant Group, Inc.*, 2013 WL 5487939 (S.D. Tex. Sept. 30, 2013), the parties agreed that the arbitrator should make the class action determination. The arbitrator decided that only individual arbitration was permitted. In *International Bancshares Corp. v. Lopez*, *ibid* at *4, the District Court found that contract language stating that "[t]he arbitrator(s) shall have the exclusive authority to determine the arbitrability of any dispute which the employee or the employers assert is subject to [the policy under dispute]" was sufficient to delegate the issue of whether to arbitrate the whole class to the panel. In *Smith v. BT Conferencing, Inc.*, 2013 WL 5937313 (S.D. Ohio Nov. 5, 2013), the District Court decided the issue of class arbitrability, rejecting the claim. However, the opinion is silent as to whether either party argued that the arbitrator, not the court, should make that determination.

There is sometimes a sense among practitioners that arbitrators like to retain difficult issues for their own resolution because of the intellectual challenges raised and, cynics would argue, the remuneration that flows from additional hearing dates. Further, *Sutter* makes it clear that a decision compelling classwide arbitration, even if wrong, will not get any kind of judicial consideration. Therefore, as a practice issue, those opposing class arbitration should keep in the forefront of their strategic planning the challenge raised by the Supreme Court in *Sutter's* second footnote and refuse to concede that the issue of arbitrability of those issues is a mere "procedural" question to be left to the arbitrator.

How to raise that challenge will be driven by the circumstances of a given case. The only clean option, however, is to exercise the rights conferred under the Federal Arbitration Act. At the commencement of the case, the party opposing class certification may move to compel arbitration, requesting that the court's order specify that the proceeding is to be conducted on an individual basis only; alternatively, it may wait until the arbitrator resolves class certification and, then, seek to confirm or vacate the arbitrator's decision. The procedural steps in *Opalinski* frame the issue. There, Plaintiff brought a civil action under the Fair Labor Standards Act. Robert Half moved to compel arbitration on an individual basis. The District Court compelled arbitration, but left the class decision to the arbitrator. Perhaps believing that it could convince the arbitrator not to class and wishing to avoid the costs of an appeal or deciding that the order compelling arbitration was not ripe for appeal, Half did seek not review of that order by the Third Circuit, but proceeded with arbitration. The arbitrator issued a partial award determining that the matter should proceed on behalf of an employee class. Half sought to vacate that partial award; the District Court denied the motion and the Third Circuit decision ensued.

Great care needs to be taken to comply with the provisions of the Federal Arbitration Act related to such a review. In *W.C. Motor Company v. Talley*, 2014 WL 3882489 (N.D. Ill. August 7, 2014), the parties had arbitrated their claim and in December, 2009, the arbitrator determined that the matter could move forward as a class. However, he stayed his award for thirty days, to allow the parties to appeal that determination. Neither party appealed. In April, 2010, the U.S. Supreme Court decided *Stolt-Nielsen*. W.C. Motor filed a motion with the arbitrator, seeking reconsideration; the arbitrator refused to grant the request. W. C. Motor, then, filed suit seeking to vacate the arbitrator's decision and to compel Talley to arbitrate his claims on an individual basis. That action was dismissed for timeliness under the FAA. Numerous pleadings and amended pleadings followed, see *ibid* at *2, the upshot of which was that the request to vacate the arbitration award was withdrawn and W.C. Motor sought only a "declaration that whether the parties' contract permits class arbitration is a 'gateway

matter which is reserved for judicial determination.” *Ibid.*¹⁰ The case, thus, became simply a civil action for a declaratory judgment, not an application to vacate under the FAA. The court dismissed the action for lack of subject matter jurisdiction, since no single plaintiff, including Ms. Talley, had a claim of \$75,000 and aggregation of the claims was not permitted. See *Snyder v. Harris*, 394 U.S. 332 (1969). Since there was no appeal from the arbitrator’s decision, the court did not reach the issue of whether it, rather than the arbitrator, should have made the classing decision. In dictum, which the court itself deemed “unnecessary”, *ibid* at *6, the court indicated that, like the parties in *Sutter*, the parties before it had agreed to arbitrate the issue of classing. Therefore, it would have refused to vacate the award, even if the question were properly presented.

Two areas of caution for practitioners on either side. First, be very wary of an implicit waiver of judicial determination of the classing question. Those opposing class action need to be careful not to take even the slightest action, such as a conference with the arbitrator to discuss briefing and scheduling of motions, without making it explicit that such participation is without any concession that the arbitrator is to make the class determination; conversely, those seeking certification should jump on any such concessions. Second, as noted by the diversity of results above, the forum in which the issue is resolved can be outcome determinative. The first party to the courthouse has a clear advantage. Therefore, both purported class claimants and respondents need to move quickly and fully utilize the venue, jurisdictional and procedural provisions of the Federal Arbitration Act, of Title 28 of the U.S. Code and of applicable state long arm jurisdiction to get themselves positioned in a favorable court for motions to frame the scope of the arbitration.

Of great importance to those drafting arbitration clauses, meanwhile, are the decisions which hold that the mere act of referring the matter for arbitration under the American Arbitration Association’s Commercial Rules is sufficient to demonstrate an intent to have the arbitrator resolve the classing issue. In *Reed v. Florida Metropolitan*

¹⁰ Ultimately the arbitrator certified a class of 1,950 class members who had each paid a fee of \$130 to W.C. Motor,

University, Inc., 681 F.3d 630 (5th Cir. 2012), the parties provided for arbitration to be administered by the Triple A. AAA Supplementary Rule 3 states that “the arbitrator shall determine as a threshold matter. . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class,” quoted *ibid* at 635. The court held that, by adopting the AAA’s Commercial Rules, the parties implicitly adopted the Supplemental Rules, including Rule 3. Thus, it reasoned, the arbitrator was empowered to determine classing of the arbitration.¹¹ The risks are made clear in *W. C. Motor, supra*. The parties’ contract contained the following standard, vanilla arbitration provision: “Any controversy or claim arising out of or relating to this contract. . . shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules. . .”, *quoted at* *3. The court interpreted this inclusion as demonstrating that “W.C. Motor contractually agreed to the let he arbitrator decide class arbitrability. . . .”, *ibid*. See also *Bergman v. Spruce Peak Realty, LLC*, 2011 WL 5523329 (D. Vt. Nov. 14, 2011); *Southern Communications Services, Inc. v. Thomas*, 829 F. Supp.2d 1324 (N.D. Ga 2011)(applying the AAA Wireless Industry Arbitration Rules, which also invoke the Supplementary Rules), *aff’d* 720 F. 3d 1352 (5th Cir. 2013)(the affirming opinion does not address the issue of whether Supplementary Rule 3 constitutes a delegation of the classing decision to the arbitrator); *Yahoo! Inc. v. Iversen*, 836 F. Supp 2d 1007 (N.D. Cal. 2011)(applying the Resolution of Employment Dispute Rules).

At a minimum, those drafting or revising contracts and wanting to avoid classwide exposure should take great care, if they choose for some reason not to specifically exclude class arbitration from their agreements, to redline out Supplementary Rule 3 from their invocation of the AAA’s Commercial Rules. Alternatively, the parties can simply not invoke AAA administration, thus avoiding the impact of Supplementary Rule 3 completely.

¹¹ The court ultimately held that the arbitrator exceeded his power in ordering class arbitration, opining that the arbitrator erred in finding that the “any dispute” and “any remedies” clauses of the submission clause and the agreement’s silence regarding class arbitration demonstrated an agreement to classwide arbitration, the viability of the court’s in depth review of the arbitrator’s rationale is questionable post-*Sutter*.

Vesting broad discretion in an arbitrator – who may not invoke the protections inherent in the Federal Rules of Civil Procedure related to class actions and whose decision is essentially irreversible – should strike terror into the heart of any defense counsel who is faced with potentially thousands of similarly situated claimants.