



Silence Does Not Give Consent: The Supreme Court Disallows Class Arbitration in the Absence of Express Contractual Language in *Stolt-Nielsen v. AnimalFeeds International*

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On April 27, 2010, the United States Supreme Court ruled 5-3 that arbitrators could not impose class arbitration where the parties' agreement didn't explicitly provide for it.¹ The case represents a rebuke of class arbitration where parties never intended it, but leaves some openings for collective action by plaintiffs, even when not explicitly agreed to, depending on the jurisdiction governing the contract and standard practice within the industry.

Trends Toward Class Arbitration

Antitrust plaintiffs often bring their claims as class actions, whereby a single party asserts a claim on behalf of an entire class negatively affected by another party's illegal conduct. But over recent decades, as arbitration became a popular way to settle disputes, *class arbitration* emerged as a method for allowing arbitration-bound plaintiffs to pursue collective action.² As of September 2010, the AAA was administering 278 class arbitrations, up from 190 in 2007.³ These trends were due in part to court decisions compelling arbitration but mandating that litigants be able to proceed on behalf of the class in that forum.⁴

In 2003, the Supreme Court addressed this trend in *Green Tree Financial Corp. v. Bazzle*.⁵ In that case, a plurality of the Court decided that arbitrators, not courts, were charged with the task of determining whether class arbitration was permitted under an arbitration clause.⁶ Many viewed the opinion as an endorsement for the availability of class arbitration.⁷ And in response, companies began inserting class-action waivers within arbitration agreements to avoid the prospect of class actions in arbitral forums.⁸ Yet, many contracts remained silent on the issue of class arbitration, which led to the issue faced in *Stolt-Nielsen*.

Behind *Stolt-Nielsen*

The case arose from a 2003 investigation by the Department of Justice that revealed that Stolt-Nielsen and other operators of "parcel tankers"—large vessels that lease compartments to customers wishing to move goods overseas—engaged in an illegal price-fixing conspiracy.⁹ The Justice Department obtained guilty pleas against two of the companies involved in the cartel.¹⁰ AnimalFeeds, a customer, brought a class action against Stolt-Nielsen on behalf of all affected customers in federal court.¹¹ The court compelled arbitration of the antitrust dispute pursuant to an arbitration clause within the parties' standard contract.¹² AnimalFeeds then demanded that it be allowed to represent the class in arbitration. The agreement was silent on whether class arbitration was allowed, so the parties submitted the issue to a New York arbitration panel.¹³ The panel concluded, based on post-*Bazzle* arbitration decisions, that the contract allowed AnimalFeeds to pursue their action on behalf of the aggrieved class.¹⁴

Stolt-Nielsen petitioned the Southern District of New York, which vacated the arbitration decision based on the arbitrators' failure to consider New York or maritime law.¹⁵ The Second Circuit, however, reversed.¹⁶ The court of appeals found that, applying high deference to the arbitrators' interpretation of the contract, the finding that class arbitration was an option intended by the parties was valid absent a judicial ruling holding otherwise.¹⁷

The Supreme Court's Decision

The Supreme Court reversed the Second Circuit and the decision of the arbitration panel, remanding the case to proceed in arbitration without class representation.¹⁸ The Court noted that it will reverse an arbitrator only when he or she "strays from

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interpretation and application of the agreement and effectively dispenses his own brand of industrial justice.”¹⁹

The Court found that high standard met because the arbitrators’ decision to allow class arbitration without an explicit agreement contravened the parties’ intent.²⁰ Under the Federal Arbitration Act (FAA),²¹ an arbitrator has the power to resolve disputes only insofar as the parties have contracted.²² So, according to the Court, a party “may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”²³ No agreement could be implied *solely* from the existence of an arbitration clause because class-action arbitration fundamentally “changes the nature of arbitration.”²⁴ In the face of no agreement, the arbitrators were supposed to ascertain custom and usage according to New York or maritime law.²⁵ Because the Court found evidence that commercial parties in this situation never intend to permit class arbitration, it concluded that class arbitration could not be permitted under the circumstances.²⁶

Justice Ginsberg dissented, joined by Justices Breyer and Stevens.²⁷ She found the appeal lacking in finality and not properly before the Court.²⁸ She also noted that the arbitrators’ award should be affirmed on the merits because they did in fact rely on contract interpretation and New York and maritime law.²⁹

The Future of Class Arbitration

In many cases *Stolt-Nielsen* will preclude plaintiffs from bringing class arbitration unless a specific provision in the arbitration clause provides for it. But it is not certain that class arbitration can never proceed without explicit agreement. As Justice Ginsberg observed, class arbitration may be able to proceed without express agreement if some contractual basis implies an agreement.³⁰ Another “stopping point” she noted is that, where class arbitration is custom in the industry or where one party is a consumer presented with an adhesion contract, contractual silence may permit class arbitration.³¹ So, while businesses with arbitration clauses (but no class-arbitration waiver) have less exposure to class arbitration than before, they should still look to applicable state law and other contract-interpretation methods to learn if class actions are allowed under their contracts.

- 3 American Arbitration Association, Searchable Class Action Docket, <http://www.adr.org/sp.asp?id=25562>; Clancy & Stein, 63 Bus. Law 55 n.1.
- 4 See *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867-68 (Cal. Ct. App. 2002); *Blue Cross v. Superior Court*, 78 Cal. Rptr. 2d 779, 794 (Cal. Ct. App. 1998); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. Ct. 1991); *Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co.*, 210 F.3d 771, 774-76 (7th Cir. 2000); *New Eng. Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5, 8 (1st Cir. 1988).
- 5 539 U.S. 444 (2003).
- 6 *Id.* at 451-53.
- 7 Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA L. REV. 185, 187 (2006) (stating that *Bazze* “implicitly permitted class arbitration”); Matthew Eisler, *Difficult, Duplicative and Wasteful?: The NASD’s Prohibition of Class Action Arbitration in the Post-Bazze Era*, 28 CARDOZO L. REV. 1891, 1907 (2007) (stating that *Bazze* held that “class arbitration is permissible under the FAA, even where the agreements are silent”).
- 8 Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 410 (2005).
- 9 130 U.S. at 1765.
- 10 *Stolt-Nielsen S.A. Indicted on Customer Allocation, Price Fixing, and Bid Rigging Charges for its Role in an International Parcel Tanker Shipping Cartel*, U.S. DEP’T JUSTICE (Sep. 6, 2006), http://www.justice.gov/opa/pr/2006/September/06_at_596.html.
- 11 *Id.* at 1764-65.
- 12 *Id.* A standard contract in the maritime trade is known as a “charter party.” *Id.* at 1764.
- 13 *Id.* at 1765-66.
- 14 *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.2d 85, 90 (2d Cir. 2008).
- 15 *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 435 F. Supp. 2d 382, 384-85 (S.D.N.Y. 2006).
- 16 *Stolt-Nielsen*, 548 F.2d at 102.
- 17 *Stolt-Nielsen*, 548 F.2d at 101.
- 18 *Stolt-Nielsen*, 130 S. Ct. at 1777.
- 19 *Id.* at 1767 (quotations omitted).
- 20 *Id.* at 1776.
- 21 9 U.S.C. § 2 (2006).
- 22 *Stolt-Nielsen*, 548 F.2d at 1773.
- 23 *Id.* at 1775.
- 24 *Id.* at 1775. These changes include the sheer volume of additional parties to a class action, a loss of privacy and confidentiality normally applicable in arbitration, and the fact that a class award affects absent parties in addition to the litigating parties. *Id.* at 1776.
- 25 *Id.* at 1769.
- 26 *Id.*
- 27 *Id.* at 1777. Justice Sotomayor took no part in the case. *Id.* at 1763.
- 28 *Id.* at 1779.
- 29 *Id.* at 1779-82.
- 30 *Id.* at 1783.
- 31 *Id.*

1 *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1764 (2010).

2 David S. Clancy & Matthew M. K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act’s Legislative History*, 63 Bus. Law 55 (2007) (demonstrating that “[c]lass arbitration is a swiftly growing phenomenon”).



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