THE SUPREME COURT TO CLASS ACTION ARBITRATION:

DROP DEAD

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In a series of decisions beginning in 1991, the United States Supreme Court has continually enforced individual binding arbitration agreements for employment disputes. Since 2010, the Court has issued two decisions that have gone in the opposite direction, when it restricted the use of class action arbitrations. The juxtaposition of these two lines of cases could not present a starker contrast, with the Court's strained, result-oriented reasoning becoming evident. The upshot is that corporations can force plaintiffs to submit to binding arbitration, avoiding a jury trial, without the corresponding fear that they can be saddled with a class action arbitration. As a result, an individual plaintiff will easily forfeit access to both a jury trial and a class action arbitration claim.

In *14 Penn Plaza LLC vs. Pyett*, the Supreme Court considered a clause in a union collective bargaining agreement that "[a]ll such [statutory] claims shall be subject to the grievance and arbitration procedures . . . as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination."[1] The Court held that this clause met the test in *Wright v. Universal Maritime Services Corp.*,[2] that the waiver of a court action for arbitration was "clear and unmistakable."[3] It sent the plaintiff's statutory claim to arbitration under the Age Discrimination in Employment Act

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1. 129 S. Ct. 1456, 1461 (2009) (quoting the bargaining agreement between the labor union and management).

2. 525 U.S. 70, 79-81 (1998).

3. *14 Penn Plaza*, 129 S. Ct. at 1462.

("ADEA").[4] Arbitration through a labor agreement was found to be an adequate forum for litigating statutory discrimination claims, although the plaintiff did not personally waive his right to a jury trial. The majority opinion rejected the central rationale of *Alexander v. Gardner-Denver, Co.*, that a union would likely subordinate an individual's statutory rights to vindicate his or her individual civil rights claims in favor of the demands of the bargaining unit as a whole.[5] The Court in *Alexander* found that when an individual union grievant went to arbitration on a discipline grievance under his labor agreement, he did not waive the right to pursue a statutory discrimination claim.[6] The *14 Penn Plaza* decision disagreed, continuing the recent trend that arbitration of statutory claims can be contractually mandated, no matter how far ranging its scope. A trend in the opposite direction, however, is emerging for class action arbitrations, which are becoming extinct. The Supreme Court used conflicting arguments to support these two lines of decisions.

In *14 Penn Plaza* the Supreme Court found that the *Alexander* Court's concerns about the arbitration process were too ill-founded to be speculative and labeled *Alexander's* thirty-five-year old reasoning to the contrary as dicta.[7] For a number of reasons, the Supreme Court in *14 Penn Plaza* criticized the "misconceived view of arbitration" upon which it concluded the *Alexander* decision rested. It found the following to be non-persuasive: first, that an agreement to submit statutory discrimination claims to arbitration was tantamount to a waiver of those rights; second, that certain features of arbitration made it a comparatively inappropriate forum for the equal resolution of rights created by Title VII; third, that the collective bargaining process may subordinate the interests of the individual employee to the collective rights of the bargaining unit; and fourth, that the labor agreement does not clearly and unmistakably require arbitration of the ADEA claims.[8]

This supplemented the Court's reasoning in *Gilmer v. Interstate/Johnson Lane Corp.*,[9] (the first decision by the Supreme Court in this area), where an individual, non-union plaintiff was forced to arbitrate an employment discrimination claim. It rejected other reasons found in *Alexander*: first, that arbitration

4. 29 U.S.C. § 621 *et seq.* (2006).

5. 415 U.S. 36, 58 n. 19, 59 (1974).

6. *Id.* at 51-52.

7. *14 Penn Plaza*, 129 S. Ct. at 1469 n.9, 1469-71; *see id.* at 1479-80 n.3 (Stevens, J., dissenting). Justice Stevens criticizes the majority opinion for its narrow reading of *Alexander*, 415 U.S. at 47-59.

8. *Id.* at 1471-74.

9. 500 U.S. 20 (1991).

will not undermine the role of the Equal Employment Opportunities Commission ("EEOC") in the ADEA; second, that Congress did not preclude arbitration in the ADEA; third, that arbitration will not permit adequate discovery; fourth, that the privacy of an arbitration proceeding will impede the ADEA; fifth, that the arbitrator can give the same relief as a court or jury; sixth, that class relief is not possible; seventh, that there is unequal bargaining power between the employee and the employer; eighth, that unlike *Alexander* this is not an arbitration growing out of a collective bargaining agreement;[10] and ninth, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court said, "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts."[11]

The Supreme Court has taken a completely different and contradictory approach in class action arbitrations, where it limits, if not eliminates, arbitrations. In *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, Animalfeeds brought a class action anti-trust suit for price fixing, and that suit was consolidated with similar suits.[12] Animalfeeds then sought arbitration on behalf of a class of purchasers of Parcel Tanker Transportation Services. The parties agreed to submit the question of whether their arbitration agreement allowed for class arbitration to a panel of arbitrators, who would be bound by the class rules developed by the American Arbitration Association ("AAA"), following the reasoning of *Green Tree Financial Corp. v. Bazzle*.[13] The AAA Class Rule 3 requires an arbitrator to determine "whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against the class."[14] The parties stipulated at arbitration that the arbitration clause was silent with respect to class arbitration. After hearing arguments and evidence, the arbitrators concluded that the arbitration clause allowed for class arbitration. They found persuasive the fact that other arbitrators' rulings after *Bazzle* had construed "a wide variety of clauses in a wide variety of settings as allowing for class arbitration."[15]

The parties' Supplemental Agreement referred the class action issue to the arbitration panel for determination. Significantly,

10. *Id.* at 27-35.
11. 532 U.S. 105, 123 (2001).
12. 130 S. Ct. 1758, 1765 (2010).
13. 539 U.S. 444 (2003).
14. *Stolt-Nielsen*, 130 S. Ct. at 1765.
15. *Id.* at 1766.

contrary to the finding of the majority opinion that the arbitration panel relied on "policy," the panel never used the word "policy" in its award. Instead, it relied upon New York law, maritime law, and other AAA panel decisions.[16]

The established standard for reversing an arbitration award is that it is not enough for a petitioner to show that the arbitrator committed error or even a serious error.[17] "It is only when the arbitrator strays from interpretation and application of the agreement and effectively 'dispenses his own brand of industrial justice' that his decision may be unenforceable."[18] Under Sections 10(a)(1-4) of the Federal Arbitration Act,[19] an arbitration decision may be vacated on the grounds that the arbitrator "exceeded [his] powers," or for corruption or bias.

Still, the Supreme Court in *Stolt-Nielsen* vacated the class action award and held that the arbitrators improperly permitted class arbitration. It reasoned that "the task of an arbitrator is to interpret and enforce a contract, not to make public policy. In this case, we conclude that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration."[20] The Supreme Court stated that the arbitration panel acted as if it had common law authority, rather than looking for its authority within the arbitration agreement.[21] It found "it follows that 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."[22]

The Supreme Court held that the arbitration panel regarded the agreement's silence on the question of class arbitration as dispositive.[23] It added, "[t]he panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."[24] It refused to enforce the arbitration award directing class arbitration. In *14 Penn Plaza*, however, where the individual union members did not consent to permitting their statutory claims to go to arbitration, but it was the union that

16. *Id.* at 1780 (Ginsberg, J., dissenting).

17. E. Associated Coal Corp. v. United Mine Workers of Am., 531 U.S. 57, 62 (2000); United Int'l Paper Workers Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

18. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

19. 9 U.S.C. §§ 10(a)(1-4) (2006).

20. *Stolt-Nielsen*, 130 S. Ct. at 1762.

21. *Id.* at 1769-72.

22. *Id.* at 1775.

23. *Id.*

24. *Id.*

consented, the arbitration award was still enforced.[25]

The dissent in *Stolt-Nielsen* uncovered the fallacy of this reasoning. It stated "the Court's characterization of the arbitration panel's decision as resting on 'policy,' not law, is hardly fair comment, for 'policy' is not so much as mentioned in the arbitrator's award."[26] The dissent went on to state that "[i]nstead, the panel tied its conclusion that the arbitration clause permitted class arbitration . . . to New York law, federal maritime law, and decisions made by other panels pursuant to Rule 3 of the American Arbitration Association's Supplemental Rules for Class Arbitrations."[27] Moreover, the Supplemental Arbitration Agreement provides that the panel must look to AAA class action rules to decide if it is a class arbitration.

The Supreme Court again rejected class-based arbitration of consumer complaints in a matter arising in California, in *AT&T Mobility LLC v. Concepcion*.[28] The Concepcions had purchased a telephone for which the company said part of the service was to be "free." Still, they were assessed a nominal charge of $30.22, which they protested.[29] The Court used this case as a vehicle to reject the notion of arbitration of consumer claims as class actions.

The Court held that most of the protections that would be found in federal court proceedings in class claims were missing in the arbitration setting and that the absence of those protections made this forum untenable. The majority held that individuals still had a right to individual arbitration.[30] However, Justice Stephen Breyer, leading the dissent, declared such a remedy was really none at all since it would be unlikely individuals could find counsel for claims of $30.22.[31]

In *AT&T Mobility*, the Supreme Court discounted arguments that it used to support the order of arbitration in *14 Penn Plaza*: first, that class action arbitration sacrifices the principle advantage of arbitration, its informality, and makes the process slower, more costly and more likely to generate a procedural morass; second, that class action arbitration requires procedural formality under the AAA's rules; third, that arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties; and fourth, that class arbitration

25. 129 S. Ct. 1456, 1475 (2009).
26. 130 S. Ct. at 1780 (Ginsberg, J., dissenting).
27. *Id.*
28. 131 S. Ct. 1740 (2011).
29. *Id.* at 1744.
30. *Id.* at 1752.
31. *Id.* at 1761 (Breyer, J., dissenting).

increases the risks to defendants, as there are more limited mechanism for review.[32] Under 9 U.S.C. § 10 of the FAA, a court can only vacate an arbitral award when it was procured by corruption, fraud, or undue means. In *Stolt-Nielsen* and *AT&T Mobility*, the Supreme Court added other reasons: first, the arbitrator no longer resolves a single dispute, but hundreds or thousands; second, there is no presumption of privacy and confidentiality; and third, the rights of absent parties are adjudicated.[33]

Labor and employment arbitration for individuals continues to expand. A logical extension of *14 Penn Plaza* would be for an expansion of class arbitration. This is not occurring. Although the Supreme Court encourages individual arbitration, it disfavors class arbitration. Private informal arbitration hearings without a jury are now universally appropriate for individuals. However, when arbitration may be contrary to the interests of a corporation, such as class arbitration, the Supreme Court suddenly jettisons arbitration. In this way, individuals are saddled with arbitration, a venue which corporations normally consider to be in their favor. Class arbitrations, being contrary to the interests of corporations, have become nearly impossible to pursue. Thus, individual claimants must submit to separate arbitrations, insulating a company from both a jury and a potentially damaging class arbitration award.

The Supreme Court does not seem to be bothered by the use of contradictory reasoning to support its conclusions. Being informal, private, not being precluded by the anti-discrimination statutes, barring a jury trial, being less costly, affording the same relief in arbitration as in court, having arbitrators who are not generally knowledgeable with litigation procedural formalities, having a limited scope of review, and being forced into arbitration, are viewed favorably when an individual plaintiff's rights are involved. These same "virtues" nevertheless become impediments when a corporation's rights are affected.

Even though the class action waivers in *AT&T Mobility* and *Stolt-Nielsen* related to consumer agreements, the holdings in these cases are of equal applicability to the full range of employment class actions. Companies that want to avoid the possibility of class action claims being pursued through arbitration will insert language in employment agreements similar to that found in these cases, which requires claims to be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or

32. *Id.* at 1750-54 (majority opinion).

33. *See id.* at 1750; Scott-Nielsen S.A. v. Animalfeeds Int'l Corp. 130 S. Ct. 1758, 1776 (2010).

representative proceeding."[34] The takeaway is that arbitration is an appropriate venue for a plaintiff in a discrimination action, unless he or she wants to expand the claim to a class action, when it mysteriously becomes objectionable.

34. *AT&T Mobility*, 131 S. Ct. 1744. This is consistent with the Supreme Court's class decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), which restricted class actions in employment litigation.