III. MANDATORY ARBITRATION OF EMPLOYMENT CLASS ACTION DISPUTES: FROM THE PERSPECTIVE OF PLAINTIFFS' COUNSEL

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Class Arbitrations: Be Careful What You Ask For . . .

A growing number of employers are turning to pre-dispute and pre-packaged mandatory arbitration agreements to limit the ability of their employees to prosecute statutory claims.[1] While employers argue that arbitration agreements (like any other bilateral contract) are enforceable,[2] employee advocates contend that they are contracts of adhesion, provide for a forfeiture of statutory rights, and are therefore unenforceable.

Typically, employees have no meaningful opportunity to negotiate the terms of these take-it-or-leave-it arbitration agreements. Instead, the terms of the arbitration agreement are presented to the prospective employee as a *fait accompli*—usually in the context of the employment application or employee handbook. Sometimes the terms of the arbitration agreement are incorporated by reference in an employment contract and require the applicant first to obtain and then search out the terms in materials that are not provided by the employer.[3] Even more alarming, companies are beginning to roll out mandatory arbitration-waiver clauses that work to prevent employees from joining together in class and collective actions.[4] Because for the vast majority of employees this choice is really no choice at all, the societal impact of class arbitration preclusion is far reaching and substantial.[5] This trend is

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[1]Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007); Ware, *Paying the Price of Process: Judicial Recognition of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89 (2001).

[2]"[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

[3]This is true for registered representatives in the financial services industry licensed by the Financial Industry Regulatory Authority (FINRA). *See* http://www.finra.org/RegistrationQualifications/MemberFirms/HowtoBecomeaMember/FormsAdditionalDocuments/p011761.

[4]Sternlight, *Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise*, 8 No. 3. DISP. RESOL. MAG. 13 (2002).

[5]"As a greater percentage of the work force becomes subject to arbitration agreements as a condition of employment, . . . the pool of charges from which the EEOC can choose cases that best vindicate the public interest would likely get smaller and become distorted. We have generally been reluctant to approve rules that may jeopardize the [Equal

particularly reprehensible in civil rights and wage and hour cases, where the employer's disputed conduct exploits low-wage manual laborers or similar at-risk populations.[6]

Employers have not only incorporated class arbitration preclusions in their agreements but also have challenged class arbitrations where the underlying agreements are silent regarding class treatment. The results have been mixed. Only one U.S. Supreme Court precedent exists—a plurality decision that left more questions than answers. In that 2003 decision, *Green Tree Financial Corp. v. Bazzle*,[7] the Supreme Court held that when an arbitration agreement is ambiguous concerning the maintenance of a class action, the arbitrator must decide whether the agreement was intended to prohibit class-wide arbitration. The plurality decision implicitly reversed the then commonly held assumption that the Federal Arbitration Act (FAA) disfavors class arbitration.[8] But it left open the issues of whether express class action waivers are enforceable, and how class arbitrations should proceed.[9]

Class Arbitrations: Their Societal Importance

Class actions serve an important and long-standing interest in our nation's legal system. All 50 states have adopted court rules that provide for class actions—a clear indication of unanimous approval for joint resolution of common claims. Class actions promote efficient and uniform resolution of claims, improved access to the litigation process (especially for those with limited means), and advancement of the public interest through private enforcement of the law.[10]

Employment Opportunity Commission's] EEOC's ability to investigate and select cases from a broad sample of claims." EEOC v. Waffle House, Inc., 534 U.S. 279, 296 (2002) (citing *Voluntary Arbitration in Worker Disputes Endorsed by 2 Groups,* Wall St. J., June 20, 1997, at B2 (reporting that the American Arbitration Association estimates "more than 3.5 million employees are covered" by arbitration agreements designating it to administer arbitration proceedings)).

[6] *See* Ansoumana v. Gristede's Operating Corp., 201 F.R.D. 81 (S.D.N.Y. 2001) (certifying a class of undocumented African delivery workers who were paid $1 per hour in New York City).

[7] 539 U.S. 444 (2003).

[8] The substantive provisions of the FAA, which require arbitration agreements to be enforced according to their terms, are binding on both federal and state courts and preempt inconsistent state law. *See* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984).

[9] *See* 9 U.S.C. §2 (2000) (a written arbitration provision contained in a "contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

[10] Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1, 29–30 nn. 100, 101, 102 (2000). *See* Shroyer v. New Cingular Wireless Servs., 498 F.3d 976, 993 (9th Cir. 2007) (noting that companies

Precluding class actions would undermine the private enforcement of important public policies, including nondiscrimination and consumer protection. Class actions brought by harmed individuals target irresponsible and socially unacceptable corporate behavior and, if successful, levy significant financial consequences in order to deter future misconduct, as well as compensate those harmed. Employers hope to prevent class treatment in arbitration in order to limit corporate exposure to the higher costs of class-wide monetary damage awards—including punitive damages—and of broad injunctive relief provisions. Obvious financial constraints can deter harmed individuals from pursuing legal claims on an individual basis. In the arbitration context this is especially true, given the high costs of filing arbitration demands and the fees arbitrators require both parties to pay early on. For individuals, arbitration costs make the pursuit of small claims unaffordable and impractical.[11]

If class actions are eliminated, then economically unfeasible but socially necessary claims will no longer be brought by plaintiffs. Wage and hour claims, such as failure to pay overtime wages or minimum wage, are particularly vulnerable given that they are often negative-value[12] claims or claims that would not otherwise be prosecuted by the private bar.[13] Employment discrimination suits are another potential area of concern. Barred from bringing a class action, individual discrimination plaintiffs are not likely to

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across the nation are currently engaging in and receiving the benefits of class arbitration). *See also* AAA Class Arbitration Docket, available online at http://www.adr.org/sp.asp?id=25562 (listing more than 175 class arbitration proceedings that are currently being administered under the AAA's "Supplementary Rules for Class Arbitrations").

[11]Smith, *The Use of Mandatory Arbitration Clauses to Prevent Class Actions: A Problem for Plaintiffs and a Problem for Society*, 2 J. AM. ARB. 129, 138 (2003).

[12]A negative-value claim is a legal claim that has a potential economic benefit to the plaintiff/claimant that is less than the anticipated transaction costs.

[13]Class actions ensure representation for those who cannot be expected to protect themselves. *See* Horn v. Associated Wholesale Grocers Inc., 555 F.2d 270, 275 (10th Cir. 1977). Congress recognized this when it passed the Class Action Fairness Act:

> Class actions were designed to provide a mechanism by which persons, whose injuries are not large enough to make pursuing their individual claims in the court system cost efficient, are able to bind together with persons suffering the same harm and seek redress for their injuries.
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> S. Rep. 109-14, at *4.

President George W. Bush agreed:

> Class actions can serve a valuable purpose in our legal system. They allow numerous victims of the same wrongdoing to merge their claims into a single lawsuit. When used properly, class actions make the legal system more efficient and help guarantee that injured people receive proper compensation. That is an important principle of justice.
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> Office of the Press Secretary, President Signs Class-Action Fairness Act of 2005 (Feb. 21, 2005), available online at http://www.whitehouse.gov/news/releases/2005/02/20050218-11.html (last visited Mar. 11, 2008).

have access to the type and breadth of statistical evidence available to a class, making pattern and practice cases difficult, if not impossible, to prove. Finally, a class-based resolution (either through verdict or settlement) typically results in sweeping injunctive relief that is designed to remedy past discriminatory employment practices.

Although many corporate defendants try to characterize the class action waiver as merely a forum or procedural choice, this argument ignores the unique benefits of the class action device. For example, a significant number of major corporations have enhanced equal employment opportunities for their employees as a result of class-based consent decrees and settlements.[14] These company-wide reforms are generally not available in the single-plaintiff context—even *after* a liability finding against the employer.[15]

The Mechanics of Class Arbitrations

Gateway Issues: Who Decides If Class Arbitration Is Appropriate Under a Particular Agreement?

The first two issues for determination are (1) whether the arbitration can be maintained as a class action, and (2) who actually decides that issue. Both answers depend on the arbitration agreement itself: Is it silent on the issue of class arbitrability, does it have an express class action preclusion, or is the agreement ambiguous?

The Agreement is Ambiguous: The Arbitrator Decides the Clause Construction. As noted above, the Supreme Court in *Bazzle* determined that an arbitrator, rather than a court, must decide whether class action arbitration is available under a particular agreement.[16] The plurality of the Court determined that because the arbitration agreement at issue was ambiguous with regard to whether class arbitration was permitted, the arbitrator must

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[14]To name a few: Morgan Stanley, Smith Barney, Home Depot, American Express, State Farm, Texaco, Ford Motor Company, Coca-Cola, MetLife, Boeing, Publix, UPS, FedEx, and United Airlines have all settled class-based statutory-discrimination lawsuits requiring broad Equal Employment Opportunity (EEO)-based reforms.

[15]*See* Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955 (11th Cir. 2008) (where the District Court dismissed the employees' pattern-and-practice claims, holding that such a claim could proceed only as a class action and the employees had not sought class certification).

[16]In *Bazzle*, the Court noted that "[u]nder the terms of the parties' contracts, the question—whether the agreement forbids class arbitration—is for the arbitrator to decide." Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451 (2003).

make a contract interpretation determination about whether the agreement was actually silent on the issue.[17] Because the South Carolina Supreme Court had made that determination instead, the proceeding was vacated and remanded to the arbitrator for a decision on this "procedural gateway" arbitrability issue. Accordingly, based on *Bazzle*, the arbitrator must first make a contract interpretation decision if the agreement is ambiguous on whether or not the matter may be maintained on a class basis. For example, the American Arbitration Association (AAA) has issued *Supplemental Rules for Class Arbitrations* (AAA Class Rules) to govern proceedings brought as class arbitrations. The AAA requires that the arbitrator "determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class" (the Clause Construction Award).[18]

This decision may be "appealed" to a court of "competent jurisdiction," but if the arbitration is brought at the AAA in the first instance, what court has jurisdiction and how does the issue get decided? This issue recently played out in the Fourth Circuit. In *In re Long John Silver's Restaurants, Inc.*, the employer restaurant initiated a mandatory arbitration procedure, pursuant to a standard arbitration agreement, in response to employee claims of Fair Labor Standards Act (FLSA) violations including failure to pay overtime, unlawful payroll deductions, and salary givebacks.[19] The arbitrator ruled that the "opt-in" collective action provision of the FLSA[20] did not apply in the arbitration proceeding; instead, the arbitration proceedings were governed by the "opt-out" class certification provision of the AAA Class Rules. The employer filed an action in federal district court, pursuant to the FAA and diversity jurisdiction, seeking to vacate the arbitrator's decision to permit a class action in the arbitral forum. The district court determined that it did not have federal jurisdiction and dismissed the action on that basis. Presumably in dicta, the court went on to comment that the arbitrator was correct to permit a class-based arbitration and noted that the resolution of this issue relies principally—if

[17]"We are faced at the outset with a problem concerning the contracts' silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner [] contends? . . . [This] is a matter for the arbitrator to decide." *Id.* at 451–53.

[18]American Arbitration Association, *Supplemental Rules for Class Action*, Rule 3.

[19]Long John Silver's Rests., Inc. v. Cole, 514 F.3d 345 (4th Cir. 2008).

[20]Codified at 29 U.S.C. §216(b).

not exclusively—on state law governing the interpretation of contracts.[21]

On appeal, the Fourth Circuit seemingly ignored the federal-jurisdiction issue and affirmed the arbitrator's decision to permit a class action on the merits. First, the court held that there is no support for the proposition that Congress intended to preclude a waiver of the "opt-in" procedure for class arbitration of FLSA claims. The court then analyzed the arbitrator's findings and found that he did not exceed the scope of his authority by certifying an opt-out class of FLSA claimants.[22]

The Agreement is Silent: Courts and Arbitrators are Split. Both state and federal courts are split on what to do where the agreement is silent on class arbitrability. Some courts have held that the FAA requires strict interpretation and enforcement of arbitration agreements, and if the agreement is silent, the agreement must be construed as prohibiting class treatment. Alabama is one jurisdiction that prohibits class arbitrations when the agreement is silent.[23]

Other courts, such as the Pennsylvania Superior Court,[24] have taken the opposite route by holding that the FAA does not preempt state courts from allowing arbitrations to go forward on a class basis. In contrast, California has created a hybrid procedure for class arbitration that allows for both arbitrators and judges to retain responsibility for the proceedings.[25]

For several reasons, the better course of action is to permit class-based arbitrations where the arbitration agreement is silent. First, arbitration agreements must be treated by courts like other contracts. As one commentator pointed out:

> With respect to contracts that do not include arbitration agreements, however, courts have not required the contract itself to specify a class

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[21] "Respondents' attempts to invoke the FAA as a basis for jurisdiction fail because the sole issue presented to this Court is whether the arbitration agreement permits Claimants to proceed as a class against Respondents. . . . Thus, the Court must once again conclude that Respondents' invocation of federal jurisdiction—here under the FLSA—is far too attenuated to present a substantial federal question for the Court to decide." Cole v. Long John Silver's Rests., Inc., 388 F. Supp. 2d 644, 650 (D.S.C. 2005).

[22] "Any judicial review of an arbitration award must be an extremely narrow exercise. . . . In order to overturn an arbitration award on the basis of the arbitrator's manifest disregard of the law, the party pursuing that effort must sustain a heavy burden, and is obliged to show that the arbitrator knowingly ignored applicable law when rendering his decision." *Long John Silver's Rests., Inc. v. Cole,* 514 F.3d at 348.

[23] *See* Medical Ctr. Car, Inc. v. Smith, 727 So. 2d 9 (Ala. 1998).

[24] *See* Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860 (Pa. Super. Ct. 1991).

[25] *See* Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982), *rev'd on other ground sub nom.* Southland Corp. v. Keating, 465 U.S. 1 (1983).

> action suit is permitted before granting certification of a class. . . . [R]equiring arbitration agreements to specifically authorize class-based relief before allowing class arbitration to proceed would therefore be a departure from the normal interpretation of nonarbitration contracts, in violation of the FAA.[26]

Moreover, all ambiguities in arbitration agreements must be construed against the employer-drafter and in favor of the employee. Well-established state contract interpretation laws require that any ambiguity be construed against the drafter. Lastly, because arbitration service providers, such as AAA and the Judicial Arbitration and Mediation Services (JAMS), have adopted class arbitration procedures, their rules govern. This is because many agreements specify the arbitration service provider in the agreement. By doing so, they invoke the arbitration service providers' rules, which include the availability of class arbitration. For these reasons, class arbitration availability is the most supportable outcome where the agreement is silent.

A recent poll of the decisions on the AAA Web site confirmed that six recent AAA clause-construction awards have all held that arbitration agreements that are silent on class and collective claims must be allow class claims to proceed.[27] It is difficult to track this issue at other arbitration service providers—JAMS, for example, does not publish any of its arbitration decisions.[28]

The Agreement has an Express Class Preclusion Clause: Courts are Split. Under the FAA, courts must enforce agreements to arbitrate according to their terms.[29] At first glance, the statute seems to support a determination that explicit class preclusions are enforceable on their face. Indeed, some state courts have

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[26] Lipshutz, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1707–08 (2005).

[27] *See* In the Matter of the Arbitration Between Diallo Crawford, Individually and on Behalf of Others Similarly Situated, and Labor Ready Northwest, Inc. (AAA File No. 11 160 02264 06); In the Matter of the Arbitration Between Sherie Goldstein, Individually and on Behalf of Others Similarly Situated, and Ibase Consulting of Fairfield County (AAA File No. 11 160 02760 03); In the Matter of the Arbitration Between Erin Cole and Nick Kauffman, on Behalf of Themselves and All Others Similarly Situated, and Long John Silver's Restaurants, Inc. (AAA File No. 11 160 00194 04); In the Matter of the Arbitration Between Joseph Milstein and Protection One Alarm Servs., Inc. (AAA File No. 11 110 00270 04); In the Matter of the Arbitration Between Hearthside Rest., Inc. et al. and Qwest Dex, Inc. et al. (AAA File No. 11 147 00357 04); In the Matter of the Arbitration Between Debra Budner and Gerald Budner and Ralph Oats, et al. (AAA File No. 11 181 00828 04).

[28] *See* http://www.jamsadr.com/rules/class_action.asp.

[29] *See supra* footnote 132.

taken this position, including courts in New York,[30] Illinois,[31] and Texas.[32] Other state courts have held that arbitration agreements are to be enforced like any other contract and, therefore, state contract defenses (such as unconscionability and unenforceability, based on public policy concerns) are available to invalidate certain provisions, including class preclusion clauses. State courts that have adopted this reasoning include California,[33] Florida, [34] North Carolina,[35] and Ohio.[36] As recently as January 25, 2008, the North Carolina Supreme Court found that arbitration clauses in loan agreements (which precluded class arbitration) were standard-form contracts of adhesion, unconscionable, and, therefore, unenforceable.[37]

The federal circuit courts are likewise split. Three circuits have enforced arbitration agreements that preclude class actions: the Third Circuit,[38] the Seventh Circuit,[39] and the Eleventh Circuit.[40] Interestingly, the First Circuit has enforced an arbitration clause while invalidating the class action waiver, relying on a savings clause providing for severance of invalid provisions.[41]

Recently, the Ninth Circuit has held in two separate decisions that a class action ban and the arbitration agreement containing it were both unconscionable and unenforceable under both California state law[42] and Washington state law.[43] In both instances, the court found that the FAA did not preempt the result. Additionally, some state legislators have taken action by drafting state laws prohibiting the use of class action preclusions. Connecticut adopted a statute that prohibits the inclusion of a waiver of collective action

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[30] *See* Tsadilas v. Providian Nat'l Bank, 13 A.D.3d 190 (N.Y. 2004).
[31] *See* Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886 (Ill. App. 2003).
[32] *See* AutoNation USA Corp. v. Leroy, 105 S.W.3d 190 (Tex. 2003).
[33] *See* Discover Bank v. Superior Ct. of Los Angeles, 113 P.3d 1000 (Cal. 2005).
[34] *See* Powertel, Inc. v. Bexley, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999).
[35] *See* Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C. 2008).
[36] *See* Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161 (Ohio Ct. App. 2004).
[37] *Tillman*, 655 S.E.2d at 372–73.
[38] *See* Johnson v. West Suburban Bank, 225 F.3d 366, 374 (3d Cir. 2000).
[39] *See* Livingston v. Associates Fin., Inc., 339 F.3d 553 (7th Cir. 2001).
[40] *See* Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814, 819 (11th Cir. 2001).
[41] *See* Kristian v. Comcast, 446 F.3d 25 (1st Cir. 2006)
[42] *See* Shroyer v. Cingular Wireless, 498 F.3d 976, 990 (9th Cir. 2007) ("The Federal Arbitration Act's purpose of reversing hostility to arbitration and placing arbitration agreements on the same footing as ordinary contracts does not appear to be frustrated or undermined in any way by a holding that class arbitration waivers in contracts of adhesion, like class action waivers in such contracts, are unconscionable. . . . To hold that California unconscionability law may be applied only to invalidate a class action waiver, but not a class arbitration waiver, would place arbitration agreements on a different footing than other contracts, in direct contravention of this principal purpose of the Federal Arbitration Act.").
[43] *See* Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008).

rights in home loan agreements.[44] Georgia prohibits enforcement of arbitration agreements within specific types of loans if they are unconscionable and directs courts to consider "the circumstances of the transaction as a whole, including but not limited to . . . [w]hether the contract restricts or excludes damages or remedies that would be available to the borrower in court, including the right to participate in a class action."[45] Clearly, a trend is in the making.

What happens if a class action is first commenced in the arbitral forum and the arbitration agreement explicitly precludes the maintenance of a class? Currently, the AAA and other organizations take the position that the Supreme Court has endorsed the arbitrator as the proper decisionmaker for "gateway" issues and has allowed the arbitrability issue to be decided by the arbitrator, *unless* there is an explicit class action waiver.[46] In that event, the AAA (at least) requires that the parties obtain a court order determining whether or not the class preclusion clause is enforceable.[47]

Interestingly, one prominent arbitration provider, JAMS, made a short-lived but highly commendable attempt to refuse to honor class preclusions because they are inherently unfair and it is "inappropriate" for companies to draft contracts that bar employees/consumers from bringing class arbitrations.[48] Five months after taking this stand, JAMS succumbed to enormous corporate pressure and reversed its policy.

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[44]Conn. Gen. Stat. Ann. §36a-746c (West Supp. 2004) provides: "A high cost home loan shall not provide for or include . . . a waiver of participation in a class action. . . ." A similar bill is being brought in the Texas legislature for tax refund anticipation loans. H.B. 398, 79th Leg., Reg. Sess. (Tex. 2005).

[45]Ga. Code Ann. §16-17-2(c)(2) (Supp. 2004).

[46]Commentators have argued that the position of the AAA and others is incorrect and that the Supreme Court in *Bazzle* did not in fact endorse arbitrators to decide all gateway issues. *See* Lipshutz, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 STAN. L. REV. 1677, 1707–08 (2005).

[47]The AAA will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation, or joinder of claims. The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation, or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder, or the enforceability of such provisions, to an arbitrator or to the Association.

[48]Resinger, *JAMS' Position on Class Action Draws Ire*, N.Y.L.J., Feb. 17, 2005.

Once in Arbitration, How Are Class Claims Handled?

In cases where courts have allowed class arbitrations to go forward, and in cases where the arbitrator him- or herself has allowed the class to proceed, how are class arbitrations handled? As noted above, organizations like the AAA and JAMS have promulgated special class arbitration rules that work to protect fairness and due process. The class arbitration rules are modeled after the procedural safeguards of Federal Rule of Civil Procedure 23 and have defined stages in the process that permit a party to go to court if the party feels that its interests are not being protected.

For example, Rule 3 of the AAA's *Supplemental Rules for Class Actions* requires an automatic 30-day stay, after a clause construction award, to allow the parties an opportunity to seek court review of this threshold decision. Likewise, the rules provide for a second automatic 30-day stay after a decision is rendered on the motion for class certification for court review.

However, these procedural safeguards raise many interesting questions:

- What court has jurisdiction over these issues if a court has not already retained jurisdiction over the matter?
- Will a federal court accept review? And if so, what standard of review will it apply?
- What if the arbitrator grants in part and denies in part the motion for class certification? Can each side seek to vacate in different federal district or state courts under different circuit/state law governing class actions?[49]
- Will the judge reviewing the grant or denial of class certification hand off to the arbitrator the "policing" obligations owed to the absent class—or, instead, retain concurrent jurisdiction?[50]

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[49] *Compare* Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999), *overruled on other grounds by* In re Initial Public Offering Sec. Litig. ("IPO"), 471 F.3d 24 (2d Cir. 2006) *and* Dukes v. Wal-Mart, Inc., 509 F.3d 1168 (9th Cir. 2007) (permitting the broad use of a Rule 23(b)(2) Title VII class action) *with* Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) (limiting the use of a Rule 23(b)(2) class to very limited circumstances in a Title VII class action).

[50] *See, e.g.,* Partington v. American Int'l Specialty Lines Ins. Co., 443 F.3d 334, 340 (4th Cir. 2006) ("Certification is contingent upon the trial court's satisfaction 'after a rigorous analysis,' that the prerequisites of Rule 23(a) have been satisfied.... This analysis is designed to protect absent class members whose rights could be affected by the certification."); Baker v. Washington. Mut. Fin. Group, 2007 U.S. Dist. LEXIS 11973 (D. Miss. 2007) ("The Court is under a duty to protect absent class members and to police class action proceedings and must approve the terms of any settlement of a class action."). The protections of Rule 23 are vital in a limited-fund class settlement. *See* Williams v. National

- What if the arbitrator is asked to approve a settlement class—does due process require a court to oversee the settlement, or can the parties wave the magic wand and have *any*[51] arbitrator declare the settlement fair, reasonable, and adequate?
- Do the protections of the Class Action Fairness Act (CAFA) apply to arbitrations and is the CAFA settlement notice to federal and state agencies required in the arbitral forum?[52]

Outside of these important jurisdictional issues, other equally important due process considerations must be addressed. It has long been established that in order to protect absent class members, class actions must provide basic due process guarantees, such as adequacy of representation, notice and opportunity to opt out (for monetary relief), an opportunity to be heard, and an openness of proceedings (which flies in the face of the traditional confidential arbitrations).[53] Class arbitrators must also be cognizant of the important issues surrounding settlement and attorneys' fees.[54] The question remains whether arbitration service providers' rules governing the approval of class-based settlements will satisfy fed-

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Sec. Ins. Co., 237 F.R.D. 685, 693 (D. Ala. 2006) ("The court finds that the protection afforded by 23(b)(1)(B) is necessary to protect absent class members and accomplish the settlement proposed....").

[51]The arbitrator is an agent of the parties. Could the parties hire "Joe, the arbitrator," and ask him to approve, for example, a Rule 23(b)(1) limited-fund settlement class?

[52]Under CAFA, a court may approve a proposed coupon settlement only after it holds a hearing and issues a written opinion finding that the settlement is reasonable, adequate, and fair to class members. Also, CAFA mandates that a proposed settlement requiring any class member to pay sums to class counsel resulting in a net loss to the class member will not be approved unless the court finds that the nonmonetary benefits to the class member substantially outweigh any such loss. Other substantive provisions of CAFA also require court oversight.

[53]*See generally* Amchem Prods. v. Windsor, 521 U.S. 591 (U.S. 1997).

[54]Rule 23(e) of the Federal Rules of Civil Procedure sets forth additional requirements to protect absent class members from unfair or "sellout" class-based settlements. A court must determine that the "proposed settlement is 'fundamentally fair, adequate, and reasonable,' recognizing that '[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness....'" Staton v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003). "[C]oncerns about the fairness of settlement agreements 'warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate distribution of the settlement....'" *Id.* at 1021. *See generally* Jaffe v. Morgan Stanley & Co., 2008 U.S. Dist. LEXIS 12208 (N.D. Cal. 2008); Acosta v. Trans Union, LLC, 243 F.R.D. 377, 396 (C.D. Cal. 2007) (where the court denied approval under Rule 23(e) because plaintiffs' counsel had acquired virtually no information from the defendants (other than a procedures manual so heavily redacted as to be "worthless"), failed to engage an expert until after the settlement had been reached, and had only a thin understanding of the factual basis for plaintiffs' claims, how the proposed settlement remedy would work, or cost to the defendants of the settlement).

eral court authority requiring a careful review of the proposed settlement to determine its overall fairness.[55]

Conclusion

There are a host of unresolved issues surrounding the viability, consequence, and societal impact of the intersection of class actions and the private arbitral forum. While some employers are trying to build a better mousetrap to avoid class-based liability, others consider the arbitral forum as a more efficient venue to adjudicate all claims—including class actions. However, whether either approach will actually deliver the actor's stated goal is difficult to predict. What is clear, from the authors' prospective, is that those arbitrators who confront these difficult issues must be careful to protect, as much as possible, the statutory and constitutional rights of employees from employer overreaching.

[55]**AAA Supplementary Rule 8(a)(3):** The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

JAMS Rule (6)(3): The arbitrator may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and a finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.