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REPORT

ARBITRATION

CONSUMER

The U.S. Supreme Court's recent decisions in *Stolt-Nielsen*, *Italian Colors*, and *Rent-A-Center* have begun ''a new era of individual arbitration,'' say attorneys Amy L. Brown, Pierre H. Bergeron, and Colter L. Paulson in this BNA Insight. The authors analyze the decisions, and predict the top court's ruling in *Stolt-Nielsen* will effectively end class arbitration, adding that ''few will regret its demise.''

Individual arbitration will allow consumers with legitimate grievances to more effectively vindicate their claims quickly and at less expense, the authors contend. Consumers are more likely to succeed on the merits than in litigation, and almost certainly will recover more in individual arbitrations than as part of a class action settlement, the authors say.

The Supreme Court Signals the End of Class Arbitration And, Perhaps, Breathes New Life Into Class Action Waivers

BY AMY L. BROWN, PIERRE H. BERGERON, AND COLTER L. PAULSON

Recent Supreme Court cases appear to mark the beginning of a new era for both business and consumer arbitrations under the Federal Arbitration Act (FAA). First, *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*[1] signals the demise of class arbitration for both businesses and consumers. Class arbitration began to gain currency in the wake of the holding in *Bazzle v.*

[1] *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S. Ct. 1758 (Apr. 27, 2010).

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Green Tree Fin. Corp.[2] that arbitrators, not courts, should decide whether silent arbitration agreements allow for class actions. Purportedly following *Bazzle*, numerous arbitrators found that silence was evidence of an intent to allow class arbitration. The Supreme Court put an end to that reasoning in *Stolt-Nielsen*, holding that arbitration agreements must reflect the actual agreement between the parties to arbitrate on a class basis – and that a party does not consent to class arbitration through silence. Given that few, if any, contracts call for class arbitration, this ruling will effectively end class arbitration. In a footnote, *Stolt-Nielsen* also rejected the argument that class proceedings must be allowed when the plaintiffs' claims are too small to justify the cost of individual arbitration.

Less than a week later, the Supreme Court gave teeth to that footnote by vacating the Second Circuit's decision in *Am. Express Co. v. Italian Colors Restaurant*.[3] The Second Circuit had found the class action waiver in the parties' arbitration agreement to be unenforceable based on allegations that individual arbitration of the claims would cost far more than they were worth.[4] However, the Supreme Court granted certiorari, vacated the Second Circuit's decision on the strength of *Stolt-Nielsen*, and remanded back to the Second Circuit – a ruling that was tantamount to affirming both that class arbitration cannot be imposed on unwilling parties and that arbitration will be enforced despite purported difficulties in bringing small claims.[5]

Closely on the heels of those decisions was the Supreme Court's recent opinion in *Rent-A-Center v. Jackson*,[6] holding that an agreement to arbitrate the enforceability of an arbitration agreement must be honored unless the party resisting arbitration can specifically challenge that delegation clause. In other words, the challenger must show that the delegation of the enforceability dispute to the arbitrator is itself unenforceable or unconscionable. The Court noted that traditional unconscionability doctrines (which were argued by the plaintiff) such as discovery limitations and fee-shifting would likely not suffice to challenge to such a limited delegation to the arbitrator. Indeed, it is difficult to imagine an argument that would be sufficiently targeted to a delegation clause to warrant judicial review. As a practical matter, therefore, *Rent-A-Center* means that virtually all agreements with delegation clauses will go to an arbitrator to decide gateway challenges to the enforceability of an arbitration agreement.

[2] *Bazzle v. Green Tree Fin. Corp*, 593 U.S. 444 (2003).

[3] *Am. Express Co. v. Italian Colors Rest.,* 559 U.S. __, 2010 U.S. LEXIS 3744 (May 3, 2010).

[4] *In re Am. Express Merchants' Litig.,* 554 F.3d 300 (2d Cir. 2009).

[5] Though not a reversal on the merits, a grant, vacate, and remand (GVR) by the Supreme Court shows there is ''a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.'' *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). A GVR is appropriate where the Court believes that ''such a redetermination may determine the ultimate outcome of the litigation.'' *Id*. A GVR in *Italian Colors* following *Stolt Nielsen* makes sense given the Second Circuit's reliance on the difficulty of bringing small claims as a basis to find the class action waiver in the arbitration agreement to be unenforceable.

[6] *Rent-A-Center v. Jackson*, 561 U.S. __, 2010 U.S. LEXIS 4981 (2010).

The Supreme Court has cleared a path to hold that state-law doctrines forbidding class action waivers cannot overturn contracts that require individual arbitration.

Having put the doctrinal pieces into place with *Stolt-Nielsen*, *Italian Colors*, and *Rent-A-Center*, the Supreme Court is poised to address the interplay of many of the same issues with class action waivers in the consumer context this fall in *AT&T Mobility LLC v. Concepcion*.[7] The grant of certiorari in *Concepcion* – a case centering on the enforceability of consumer class action waivers – in the wake of the trio of cases described above may signal a new era for consumer arbitrations, and specifically the enforceability of class action waivers in consumer arbitration agreements. Previously, some courts – particularly in the consumer context – had invalidated class action waivers based largely on state-law doctrines of unconscionability. With their focus on enforcing arbitration agreements as written, *Stolt-Nielsen* and *Rent-A-Center* suggest such an approach is no longer tenable.

Building on the recent decisions, the Supreme Court has cleared a path to hold that state-law doctrines forbidding class action waivers cannot overturn contracts that require individual arbitration. But whatever the result in *Concepcion*, class arbitration is probably dead. Because of its many drawbacks – chronicled by the Court in *Stolt-Nielsen*[8] – almost no company will voluntarily include a provision permitting class arbitration in their contracts.

A. *Stolt-Nielsen* and *Rent-A-Center* Put an End to Misreading of *Bazzle*

Misreading Led to Hundreds of Class Arbitrations Where Agreements Were Silent on Class Proceedings

Before *Bazzle*, class arbitration was a rare and unfamiliar procedure – largely because most federal circuits held that arbitrators did not have the power to consolidate individual arbitrations.[9] Federal courts also generally rejected the proposition that arbitrations could be brought as class actions at all.[10] However, beginning with California, some state courts began to hold that class arbitration was permissible even in the absence of an explicit agreement to proceed as a class. *Bazzle* redirected this trend, both legitimizing the process of class arbitration and holding that arbitrators, not courts, should decide whether a silent clause permits class arbitration.

Yet the Supreme Court's inability in *Bazzle* to produce a majority decision left much uncertainty in its wake. *Bazzle*'s plurality decision was widely interpreted as holding that an arbitrator should decide

[7] *AT&T Mobility LLC v. Concepcion*, 560 U.S. __ (2010).

[8] 130 S. Ct. at 1176.

[9] *See* William H. Maker, *Class Action Arbitration*, 10 Cardozo J. of Conflict Resolution 335, 346 (2009).

[10] *Id*. at 346-47.

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whether class arbitrations were warranted if the arbitration clause were silent. The Court seemingly rejected the argument that class arbitration could not be allowed unless expressly authorized in the agreement. Even so, federal circuits split afterward on the substantive question of whether class arbitration was appropriate if the arbitration agreement was silent on the issue. The Seventh Circuit continued to follow its former precedent that class action arbitration was inappropriate if the clause was silent.[11] The Second Circuit, among others, disagreed.[12]

The end result of *Bazzle* was a blossoming of class arbitrations. Following *Bazzle*, the AAA and JAMS adopted class arbitration rules allowing arbitrators to decide whether to allow class arbitration when the arbitration agreement was silent on the issue.[13] The AAA refused to administer class arbitrations if the arbitration agreement specifically forbade class treatment unless a court orders class arbitration.[14] Since it adopted those rules in 2004, the AAA has administered more than 280 class arbitrations, with over 120 currently active in 2010.[15] Though the JAMS policies on class arbitration have changed over time, its current position is the same as that of the AAA.[16]

For many of the parties before the AAA and JAMS, class arbitration was unavoidable. Parties that did not immediately amend their arbitration clauses in the aftermath of *Bazzle* (and for many it was already too late) were stuck with class arbitration for which they neither contracted nor desired. And, in some cases, parties that had included class action waivers in their arbitration agreements still found themselves subject to class arbitration proceedings.[17] Amazingly, almost every arbitrator acting under the AAA rules held that a silent clause demonstrated that the parties intended to permit class arbitration. Indeed, of the 135 Clause Construction Awards issued in AAA arbitration, only seven found that the arbitration clause did not allow for class arbitration.[18]

Typical of these decisions was a holding by a three-arbitrator panel that because the respondent ''knew or should have known of the *Bazzle* decision'' it would have explicitly excluded class arbitration if it had wanted to.[19] The arbitrators reasoned that *Bazzle* would not have sent that case to arbitrators if there was not a belief that silence did not allow for class treatment. Therefore, the panel held that clauses that *implicitly* rejected class treatment must be ignored because ''[a] sentence should not be used to exclude class arbitration when it does not use the words 'class arbitration.' ''[20] This logic led the panel to disregard contractual language requiring individual arbitration. The panel was able to hold that the phrase ''any and all dispute resolution procedures shall be conducted only between the parties'' actually did allow for class arbitration.[21]

In the meantime, many parties – concerned about the implications of a silent clause – added provisions expressly forbidding class proceedings or consolidation to their arbitration agreements. But these clauses prompted a backlash in some courts, which held such class action waivers to be unenforceable. Other courts disagreed, producing a split of authority that was as irreconcilable as it was frustrating to litigants. That is what the Supreme Court began to clear up in *Stolt-Nielsen* and should definitively resolve through *Concepcion*. When combined with *Rent-A-Center*, this trilogy of cases will eliminate much of the guesswork on class arbitration.

B. Necessary Groundwork Laid to Enforce Reasonable Agreements for Individual Arbitration

The past decade has seen dozens of certiorari petitions requesting guidance on the enforceability of arbitration clauses with class action waivers contained within standard business and consumer agreements. After years of silence, the Supreme Court in *Stolt-Nielsen* finally spoke out against the practice of arbitrators ignoring the written contracts to allow class arbitration. Without such action (and without the anticipated action in *Concepcion*), standard arbitration clauses were in danger of becoming irrelevant – if a clause did not explicitly ban class arbitration, it allowed class arbitration; but if it banned class arbitration, then it was unconscionable. Parties had little motivation to include arbitration clauses that essentially guaranteed a class proceeding.

Stolt-Nielsen explicitly resolved one problem by holding that arbitrators cannot turn an individual arbitration into a class arbitration without a specific agreement by the parties to proceed as a class. In other words, when

[11] *Employers Ins. Co. of Wausau v. Century Indem. Co*., 443 F.3d 573, 580 (7th Cir. 2006) (finding that *Bazzle* did not create binding precedent); *Champ v. Siegel Trading Co*., 55 F.3d 269, 275 (7th Cir. 1995) (''the FAA forbids federal judges from ordering class arbitration where the parties' arbitration agreement is silent on the matter'').

[12] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 548 F.3d 85 (2d Cir. 2008); *Rollins, Inc. v. Garrett*, 176 Fed. Appx. 968, 969 (11th Cir. 2006); *JSC Surgutneftegaz v. President & Fellows of Harvard College*, 2007 U.S. Dist. LEXIS 79161 (S.D.N.Y. Oct. 11, 2007).

[13] *See* JAMS Class Action Procedures, www.jamsadr.com/images/PDF/JAMS_Class_Action _Procedures.pdf; *see also* AAA Supplementary Rules For Class Arbitrations § 4(a) (2003), www.adr.org/sp.asp?id=21936.

[14] AAA Policy on Class Arbitration (July 14, 2005), www.adr.org/sp.asp?id=28779.

[15] *See* Amicus Brief of the AAA, filed in *Stolt-Nielsen*, p. 22.

[16] *See* JAMS Class Action Rule 1(a).

[17] *See Cooper v. QC Fin. Servs., Inc.,* 503 F. Supp. 2d 1266, 1292 (D. Ariz. 2007) (''Once [the class action waiver is] severed, the case can proceed to arbitration and this Court can direct the arbitrator to determine whether Plaintiff satisfies the requisite criteria for this matter to proceed as a class arbitration.'').

[18] *See* Amicus Brief of the AAA, filed in *Stolt-Nielsen*, p. 22. Another 22 cases involved stipulations that the agreement permitted class arbitration — it is unknown how many of these are the result of the defendant acknowledging the then-general standard among AAA arbitrators that class arbitration is permitted unless explicitly denied.

[19] *Louisiana Health Serv. Indemn. Co. v. DVA Renal Healthcare, Inc*., Clause Contruction Award at 5-6 (Oct. 5, 2007), www.adr.org/si.asp?id=5038; *Awe v. I&M Rail Link LLC*, Clause Construction Award at 14-17 (May 4, 2005), www.adr.org/si.asp?id=3714 (noting, and following, the ''national pattern'' of clause construction awards).

[20] *Id*.; *see also Dub Herring Ford, Inc. v. Dealer Computer Serv., Inc*., Clause Construction Award at 8-11 (Nov. 27, 2006), www.adr.org/si.asp?=id=4542 (anything but an explicit exemption allows class arbitration);

[21] *Louisiana Health Serv. Indemn. Co. v. DVA Renal Healthcare, Inc*., Clause Contruction Award at 7.

an arbitration clause is silent, arbitrators may not conduct class arbitration. The Supreme Court found this to be so clear that it vacated the arbitrators' decision to the contrary under the high standard for vacating an arbitral award under the FAA.[22] *Stolt-Nielsen* reaffirmed that the '' 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.' ''[23] The Court faulted the arbitrators for their decision because it was premised on public policy rather than the language of the contract or the FAA.[24] No longer can arbitrators search for textual clues about whether class proceedings were intended – there must be an explicit agreement. The Supreme Court thus ended much of the mischief caused by the splintered *Bazzle* decision.

In *Stolt-Nielsen*, the Supreme Court hinted at a broader doctrine on the enforceability of clauses requiring individual arbitration. The plaintiffs in *Stolt-Nielsen* argued that a class action mechanism was necessary because the '' 'vast majority' of the potential class members 'have negative value claims . . . meaning it costs more to litigate than you would get if you won.' ''[25] *Stolt-Nielsen* involved allegations of antitrust violations by an international cartel – an expensive and complex allegation to prove. Nevertheless, the Court was unsympathetic to these public policy-based arguments and did not hesitate to order individual arbitration (implicitly rejecting the decisions of some federal courts that antitrust claims were too complex for individual arbitration given the hundreds of thousands of dollars in expert fees required to prove such a case[26]).

The rule announced in *Stolt-Nielsen* applies with no less force when the parties agree to a class action waiver. As noted above, it would be anomalous if the federally-mandated default rule were no class arbitration but parties were penalized for rendering the implicit explicit through a class action waiver. The Supreme Court reinforced this notion in the *American Express* case, which involved a challenge to the enforceability of an arbitration agreement that contained an express class action waiver. The plaintiffs in that case allege ''that enforcement of the class action waiver would effectively strip them of the ability to assert their claims because 'each individual plaintiff would have to incur discovery costs amounting to hundreds of thousands of dollars, despite seeking average damages of only $5,000.' ''[27]

The merchant plaintiffs in *American Express* claimed that American Express had violated antitrust law with an illegal tying arrangement. They introduced expert evidence that ''due to the complexity and analytical intensity of an antitrust study, total expert fees are substantial — at least several hundred thousand dollars, and possibly over $1 million.''[28] Because the costs of pursuing an individual case would exceed the potential recovery, the Second Circuit concluded that ''the class action waiver provision at issue should not be enforced because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by plaintiffs.''[29] The Supreme Court's vacatur and remand of this decision in light of *Stolt-Nielsen* will likely prompt the Second Circuit to reverse course.

Though *Rent-A-Center v. Jackson*[30] does not deal expressly with the class action issue, it certainly showed the Court's willingness to hold that the FAA's policies must be strictly enforced even when opposed by a state-law unconscionability doctrine (which is the usual tool for trying to avoid a class action waiver). By placing the unconscionability decision in the hands of the arbitrator, rather than the court, one very important practical effect of this decision is to avoid the remnants of judicial antipathy to arbitration. Arbitrators are not likely to find that the plaintiff before them will not get a fair chance to vindicate her rights in arbitration. Moreover, arbitrators do not need to speculate (as courts must do) how the arbitral rules, costs, and timing will affect the plaintiff's ability to vindicate her rights. And if they have concerns on that score, they can ensure that the plaintiff will be protected. Indeed, arbitrators that have rejected unconscionability challenges have ensured that individual claims can be pursued with minimal cost and delay.[31]

Stolt-Nielsen, *American Express*, and *Rent-A-Center* have laid the groundwork to revitalize individual arbitration. Together, the cases establish that (1) class arbitration must be actively chosen by the parties – it cannot be inferred from silence; (2) class action waivers are likely enforceable notwithstanding a plaintiff's claim that a case is too complex or expensive to prove individually; and (3) parties can delegate virtually all arbitrability decisions (including unconscionability) to an arbitrator.

With these doctrines in place, the Supreme Court granted certiorari in *AT&T Mobility LLC v. Concepcion*, a case involving an arbitration agreement in a customer's cellphone contract. The arbitration agreement contains several salutary features such as paying for all arbitration fees, preserving all substantive rights, and offering premiums if the plaintiff recovered more than the defendant's settlement offer. Indeed, the Ninth Circuit acknowledged that ''[t]he provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim.''[32] But, the court was concerned that most aggrieved customers would not pursue claims, particularly when their damages were less than one or two hundred dollars.

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[22] *Stolt-Nielsen*, 130 S. Ct. at 1770 (noting there was ''only one possible outcome'').

[23] *Id*. at 1773 (citations removed).

[24] *Id*. at 1773-74.

[25] *Id*. at 1769 n.7.

[26] *See, e.g., Kristian v. Comcast Corp*., 446 F.3d 25 (1st Cir. 2006).

[27] *American Express Co. v. Italian Colors Rest*., 554 F.3d 300, 308 (2d Cir. 2009).

[28] *Id*. at 316.

[29] *Id*. at 304.

[30] *Rent-A-Center v. Jackson*, __ U.S. __, 2010 U.S. LEXIS 4981 (2010).

[31] *Awe v. I&M Rail Link LLC*, Order on Unconscionability at 3-4, www.adr.org/si.asp?id=4476 (guiding counsel on procedures to limit costs for individual claims, after finding that the fee-splitting and attorneys' fee provisions were not unconscionable).

[32] *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 855-56 (9th Cir. 2009).

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Class arbitration has been much maligned as foregoing many of the benefits of individualized arbitration while creating additional burdens not present in litigation.

Applying California law on unconscionability, the Ninth Circuit held that all consumer arbitration agreements are unconscionable if they involve small damages and prevent plaintiffs from bringing a class proceeding.[33] The class action waiver was ''exculpatory'' because the available damages might not provide an adequate incentive for a customer to pursue individual arbitration.[34] In the end, the problem with the arbitration agreement under California law ''is that not every aggrieved customer will file a claim,''[35] which elevates the class action mechanism to almost an inalienable right. The Ninth Circuit also rejected AT&T's argument – that it subsequently pressed in its cert petition – that the FAA preempts California law on unconscionability.

The Supreme Court's recent decisions place it in an ideal position to finally clarify the extent and effect of the FAA's preemption of state unconscionability doctrines that prevent individual arbitration. The recent decisions provide a basis for the Court to address the chief objection to class action waivers in arbitration agreements. It can now reject the argument that some claims are just too small (or too expensive and complex), for individual arbitration. The Court can point to *Stolt-Nielsen's* emphasis on enforcing agreements as they are written under the FAA – the heart of the FAA is to enforce arbitration agreements according to their terms. The *Concepcion* case thus crystallizes the question of which view should prevail: the FAA's policy of enforcing all arbitration agreement that allow individuals to be made whole or state public policy arguments that class proceedings must be allowed regardless of protections given to individuals.

C. Whatever the Result in *Concepcion*, Class Arbitration Is on Its Way Out

The era of class arbitration is likely over regardless of the result in *Concepcion*. This is because very few companies will willingly insert a clause in their agreements agreeing to a class proceeding. Indeed, if the Supreme Court reverses *Concepcion*, many companies will begin to include class action waivers with greater assurance of their enforceability. But if class waivers can be invalidated as unconscionable under state law, it may prompt some companies to abandon arbitration altogether (as Comcast has recently done for its California customers[36]).

Class arbitration has been much maligned as foregoing many of the benefits of individualized arbitration while creating additional burdens not present in litigation. Indeed, the Supreme Court emphasized those points in *Stolt-Nielsen* to conclude that class arbitration was not comparable to private litigation.[37] With the seriatim appeal mechanism imposed by the AAA and JAMS rules for class arbitrations,[38] class proceedings can stretch out for years, even longer than class litigation. (Paradoxically, the appeals may be inconsequential because of the deferential standard of review for arbitration awards).

These considerations have led companies to prefer class litigation to class arbitrations. Companies are not the only ones fleeing class arbitration. Some consumer advocates have found that class arbitration, in its current form, threatens to eliminate many of the due process protections available in class litigation. The lack of real appellate review can have dire consequences for absent class members who were not accorded due process in becoming part of the class. An arbitrator error can ''negatively impact thousands of individuals and yet remain insulated from review.''[39] One commentator has noted that the adoption of class arbitration rules that mimic class litigation not only results in delay, increased expense, but also ''provide[s] arbitrators with false assurance through interim judicial approval of their decisions which may not, in fact, provide actual due process.''[40]

D. Conclusion

The Supreme Court's recent decisions in *Stolt-Nielsen*, *Italian Colors*, and *Rent-A-Center* have begun a new era of individual arbitration. The post-*Bazzle* experiment with class arbitration has probably concluded, and few will regret its demise. If the Supreme Court continues its trend in arbitration decisions, it may rule in *Concepcion* that the FAA overrides state policies against consumer class action waivers where the arbitration agreement allows individuals to effectively vindicate their rights. Empirical studies suggest that 40 to 60% of consumer arbitration contracts currently have class action waivers.[41] If *Concepcion* is reversed, those numbers will likely grow.

Though that result has been derided in some quarters, it might benefit all parties. Individual arbitration will mean that consumers with legitimate grievances can effectively vindicate their claims very quickly and at small expense. They may also be more likely to succeed on the merits than in litigation,[42] and they almost cer-

[33] *Id*. at 854.

[34] *Id*. at 855-56.

[35] *Id*. at 856 n.9.

[36] *See* Comcast Agreement For Residential Services, www.comcast.net/terms/subscriber/ at ¶ 13(k) (''If you are a Comcast customer in California, Comcast will not seek to enforce the arbitration provision above unless we have notified you otherwise.'') (emphasis removed).

[37] 130 S. Ct. at 1776.

[38] AAA Supplementary Rules for Class Arbitrations, ¶ 3 (allowing appeal from clause construction award) & ¶ 5 (allowing appeal from class certification award) at http://www.adr.org/sp.asp?id=21936; JAMS Class Action Procedures, ¶ 2, 3 (same as AAA), at http://www.jamsadr.com/rules-class-action-procedures/

[39] Imre S. Szalai, *The New ADR: Aggregate Dispute Resolution and Green Tree Financial Corp. v. Bazzle*, 41 CAL. W. L. REV. 1, 101 (2004).

[40] Carole J. Buckner, *Due Process In Class Arbitration*, 58 FLA. L. REV. 185, 194 (2006).

[41] Christopher R. Drahozal and Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 472-473 (2010).

[42] Joshua S. Lipshutz, Note, *The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Ar-*

tainly will recover more than they would as part of a class action settlement. And the clarity provided by the Supreme Court will mean that parties can quickly get to the heart of the dispute rather than spending sometimes years (and countless dollars in legal fees) trying to litigate arbitrability.

bitration Agreements and Class Action Lawsuits, 57 STAN. L. REV. 1677, 1712 (2005).

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