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A Court or an Arbitrator—Who Decides Whether Arbitration Agreements Provide for Class Arbitration?

The California Supreme Court is poised to soon weigh in on a major issue of arbitration that has divided California appellate courts and federal courts across the country: Does a court or an arbitrator decide whether an arbitration agreement allows for class arbitration? Because of the "high stakes" nature of class litigation and the fact that judicial review of arbitration decisions is "much more limited" than review of court judgments, the answer to that question can dramatically impact litigation.[1] As one California Court of Appeal has warned, the deferential standard of review applied to arbitrators' decisions renders them essentially "unreviewable."[2] Resolution of this "who decides" issue depends on whether the availability of class arbitration is deemed a question of "procedure" or "arbitrability." Arbitrators decide questions of procedure, that is, questions that "grow out of the dispute and bear on its final disposition."[3] In contrast, questions of "arbitrability" address what type of disputes and which parties' claims are governed by an arbitration agreement.[4] Unless the parties to an arbitration agreement clearly and unmistakably agree to the contrary, questions of arbitrability are decided by a court.[5]

Courts holding that an arbitrator must determine the availability of class arbitration reason that this issue is one of "procedure" because a class action is a procedural device, and generally rely on language in the U.S. Supreme Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle*.[6] On the other hand, courts holding that the availability of class arbitration is a question of "arbitrability" reason that this issue determines whose claims (i.e., absent class members' claims) are governed by an arbitration agreement, and, therefore, has too significant an impact on the scope of an arbitration to be left to the discretion of an arbitrator. These courts disregard the *Bazzle* plurality decision, concluding that its persuasiveness has been called into question by two later U.S. Supreme Court decisions, *Stolt–Nielsen S.A. v. Animalfeeds International Corp.*[7] and *Oxford Health Plans LLC v. Sutter*.[8]

This article explores the background and competing arguments on the "who decides" issue that has split the California appellate and federal courts. In the past six months, for example, the Second District in *Sandquist v. Lebo Automotive, Inc.*[9] held that arbitrators must decide whether an arbitration agreement allows for class arbitration, while the Fourth District reached the opposite conclusion in both *Network Capital Funding Corp. v. Papke*[10] and *Garden Fresh Restaurant Corp. v. Superior Court*.[11] The California Supreme Court's decision to consider this key issue could not be more timely.[12]

■ Background: Determining What Issues Constitute Questions of Arbitrability

The U.S. Supreme Court has long recognized that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."[13] To that end, the Court has instructed that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[14]

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1. *Garden Fresh Restaurant Corp. v. Super. Ct.* (2014) 231 Cal.App.4th 678, 686-687.
2. *Ibid.*
3. *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 84-85 (*Howsam*).
4. *Id.* at p. 84.
5. *Ibid.*
6. (2003) 539 U.S. 444.
7. (2010) 559 U.S. 662 (*Stolt-Nielsen*).
8. (2013) ___U.S.___ [133 S.Ct. 2064].
9. (2014) 228 Cal.App.4th 65, review granted Nov. 12, 2014, S220812; see also *Lee v. JPMorgan Chase & Co.* (C.D. Cal. 2013) 982 F.Supp.2d 1109.
10. (2014) 178 Cal.Rptr.3d 658, review granted Jan. 14, 2015, S222638.
11. (2014) 231 Cal.App.4th 678.
12. See *Sandquist v. Lebo Automotive, Inc.* (Cal. 2014) 180 Cal.Rptr.3d [granting review].
13. *Housam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83.
14. *AT&T Technologies, Inc. v. Communications Workers of Am.* (1986) 475 U.S. 643, 649.

Assigning gateway questions of arbitrability to a court rather than an arbitrator "avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate."[15]

The Court has emphasized that questions of arbitrability do not encompass all "dispositive" questions whose "answer will determine whether the underlying controversy will proceed to arbitration on the merits."[16] Rather, questions of arbitrability are confined to the "narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter."[17] Specifically, questions of arbitrability include "whether the parties are bound by a given arbitration clause" and whether an arbitration clause "applies to a particular type of controversy."[18] On the other hand, "procedural" questions which "grow out of the dispute and bear on its final disposition," and "prerequisites" to arbitration, such as "time limits, notice, laches, [and] estoppel," are for arbitrators to decide.[19]

As the Court recently reiterated in *Oxford Health Plans LLC v. Sutter*, it "has not yet decided whether the availability of class arbitration" is a question for a court or an arbitrator.[20] Nonetheless, two competing viewpoints can be discerned from its recent precedent.

In *Green Tree Financial Corp. v. Bazzle*, a plurality of the U.S. Supreme Court concluded that the question of "whether the [arbitration] agreement forbids class arbitration . . . is for the arbitrator to decide."[21] This question was not one of arbitrability, the plurality explained, because it did not fall into the "narrow exception" of issues pertaining to "the validity of the arbitration clause [or] its applicability to the underlying dispute between the parties."[22] Instead, the question pertained to "what kind of arbitration proceeding the parties agreed to"; in other words, it concerned "contract interpretation and arbitration procedures."[23] This sort of question, the plurality opined, was one for which arbitrators are "well situated."[24]

More recently, however, in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, a majority of the Court emphasized that *Bazzle* was not binding authority because "only the plurality" in *Bazzle* concluded that an arbitrator should determine the availability of class arbitration.[25] While *Stolt-Nielsen* did not reach the question of who decides the availability of class arbitration,[26] *Stolt-Nielsen* held that the arbitrators in that case exceeded their authority when they found that an arbitration agreement provided for class arbitration where the parties stipulated that there was no agreement as to class arbitration.[27] In reaching this conclusion, the Court explained that whether an agreement provides for class arbitration is not simply a matter of "what 'procedural mode' [i]s available" to adjudicate a party's claims, distinguishing the issue from "'procedural questions' presumptively to the arbitrator's discretion."[28]

Underlying the Court's decision in *Stolt-Nielsen* were pragmatic concerns. The Court emphasized that the inclusion of class claims in arbitration fundamentally changes the nature of that arbitration and significantly expands its scope.[29] In other cases, the Court has also acknowledged that the differences between bilateral and class arbitration – namely, the effect on "absent parties" – means that class arbitration requires "additional and different procedures and involv[es] higher stakes."[30] These different procedures result in three potential complications, all of which raise the stakes on the question of whether an arbitrator or a court decides the availability of class arbitration.

First, the standard of review for an arbitrator's decision is limited to "misconduct rather than mistake."[31] As a result, one California Court of Appeal has warned that if the question of the availability of class arbitration is "sent to an arbitrator to decide, the arbitrator's decision would be unreviewable, and if the matter were to proceed to arbitration on

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15. *Howsam, supra*, 537 U.S. at pp. 83-84.
16. *Id.* at p. 83.
17. *Id.* at pp. 83-84.
18. *Ibid.*
19. *Id.* at pp. 84-85.
20. (2013) 133 S.Ct. 2064, 2068, fn. 2.
21. (2003) 539 U.S. 444, 451.
22. *Id.* at p. 452.
23. *Id.* at pp. 452-453, italics original.
24. *Id.* at p. 453.
25. (2010) 559 U.S. 662, 680.
26. The Court did not reach this question because the parties did not dispute that it was a question for the arbitrator. *Id.* at p. 680.
27. *Id.* at pp. 673, 676.
28. *Id.* at pp. 686-687.
29. *Ibid.*
30. *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 1750] (*Concepcion*).
31. *Id.* at p. 1752 (listing bases under the Federal Arbitration Act, 9 U.S.C. § 10, for overturning an arbitral award); *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11 ("[I]t is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law.").

a class and/or representative basis, the result of this potentially high stakes proceeding would also be unreviewable."[32] Given this deferential standard of review and "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."[33]

Second, "class arbitration greatly increases risks to defendants" because it substantially aggregates, by "tens of thousands of potential claimants," the costs of an error in an environment lacking in "multilayered review," thus "mak[ing] it more likely that errors will go uncorrected."[34] As the Court has pointed out, "class arbitration *requires* procedural formality," in that American Arbitration Association's rules for class arbitration "mimic" the corresponding class-action rules in the Federal Rules of Civil Procedure.[35] By eliminating the "principal advantage of arbitration – its informality" – class procedures make "the process slower, more costly, and more likely to generate procedural morass than final judgment."[36]

Finally, the Court has expressed a concern that class arbitration can jeopardize absent claimants' due process rights to be afforded notice, an opportunity to be heard, and the right to opt out. Such safeguards did not appear to have been contemplated when Congress passed the Federal Arbitration Act in 1925, leading the Court to muse that it is "at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied."[37]

Given all of these concerns and the substantial differences between litigating class claims before a court or an arbitrator, the question of who decides the availability of class arbitration can fundamentally alter the nature and scope of class litigation. Courts are split on this "who decides" question, with the California Courts of Appeal having reached opposite conclusions in the past year. The California Supreme Court has now entered the fray.

■ The Availability of Class Arbitration as a Question for an Arbitrator: *Sandquist*, *Lee*, and Other Authorities

In a case now pending before the California Supreme Court, *Sandquist v. Lebo Automotive, Inc.*, the Second Appellate District sided with arbitrators, concluding that "the question whether the parties agreed to class arbitration was for the arbitrator rather than the court to decide."[38] Its holding and reasoning align it with several federal courts to have considered the issue.

The Second District in *Sandquist* relied chiefly on the plurality opinion in *Bazzle*, finding it "persuasive" despite the U.S. Supreme Court's statement in *Stolt–Nielsen* that *Bazzle* was not binding.[39] The rule in *Bazzle*, the Second District explained, "is particularly appropriate in light of the fact that a class action is a procedural device," and "procedural questions" are "presumptively not for the judge, but for an arbitrator, to decide."[40] The Second District dismissed *Stolt–Nielsen*'s concerns regarding the "fundamental" differences between class actions and class arbitrations, reasoning that these concerns were "more relevant" to the issue of whether the arbitration agreement allows for class arbitration, rather than the question of who decides that issue.[41] Consequently, the Second District remanded the case with instructions that the trial court vacate its order and allow an arbitrator to determine whether class arbitration was permitted under the arbitration agreement.[42]

More recently, in *Rivers v. Cedars-Sinai Medical Care Foundation*, an unpublished decision, the Second District reiterated its position that the "who decides" question was for the arbitrator because it "does not involve whether the arbitration proceeds or against whom it proceeds . . . , but only in what manner it proceeds."[43] The Second District more fully addressed the U.S. Supreme Court's concerns about class arbitration's impact on the nature and scope of litigation. As to the concern about the lenient standard of review applied to an arbitra-

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32. *Garden Fresh Restaurant Corp. v. Super. Ct.* (2014) 231 Cal.App.4th 678, 686-687.
33. *Concepcion, supra*, 131 S.Ct. at p. 1752.
34. *Ibid.*
35. *Id.* at p. 1751, italics original.
36. *Id.* at pp. 1750-1752.
37. *Id.* at pp. 1751-1752.
38. (2014) 228 Cal.App.4th 65, 79, review granted Nov. 12, 2014, S220812.
39. *Id.* at p. 78.
40. *Ibid.* (quoting *Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83-84).
41. *Id.* at pp. 78-79.
42. *Id.* at p. 79.
43. (Cal. Ct. App., Jan. 13, 2015, No. B249979) 2015 WL 166867, at p. *5.

tor's decision, the Second District noted that "the absence of complete judicial review is part of the arbitration bargain" – indeed, it is one mechanism to reduce costs.[44] The Second District also explained that "[a]ny due process concerns as to the effect of those differences between bilateral and class arbitration are resolved by requiring the parties' consent to class arbitration" and adhering to the rule that a "plaintiff bound by a valid arbitration agreement may only be a proper representative in arbitration for those similarly bound by the arbitration agreement."[45]

Similarly, in *Lee v. JPMorgan Chase & Co.* the Central District of California held that it is for the arbitrator to decide whether a plaintiff "may arbitrate on a class, collective, or representative basis."[46] As with the Second District in *Sandquist*, the court in *Lee* relied principally on *Bazzle* in finding that the availability of class arbitration is an "issue . . . of procedure, which is left to the arbitrator."[47] The *Lee* court disagreed with courts that have concluded that *Stolt-Nielsen* undermined *Bazzle*, explaining that *Stolt-Nielsen* "had no occasion . . . to rule on whether the availability of class arbitration is a question for the court or an arbitrator," and, instead, had simply ruled on "*how to decide* whether an arbitration agreement authorizes class arbitration, not *who decides*."[48] Relying on the plurality opinion in *Bazzle*, the *Lee* court therefore concluded that the question of the availability of class arbitration "concerns the procedural arbitration mechanisms available to Plaintiffs, and does not fall into the limited scope of this Court's responsibilities in deciding a motion to compel arbitration."[49]

Outside of California, several federal district courts in other circuits have found *Bazzle* persuasive and concluded that arbitrators should decide the question of whether an arbitration agreement permits class arbitration, reasoning that this question goes to the procedures that the parties will use to arbitrate their dispute.[50] For instance, the Southern District of New York held in *In re A2P* that the availability of class arbitration is a question for the arbitrator because it "does not go to the power of the arbitrators to hear the dispute, but rather to an issue that simply pertains to the conduct of proceedings that are properly before the arbitrator."[51] In support of its holding, the court pointed to the circumstances at hand, in which it had already ruled that the arbitration agreement was clear, enforceable, and covered the parties' claims.[52] With the court already having decided these threshold questions – undisputed questions of arbitrability – it was "within the arbitrator's competence" to decide if the agreement "allow[ed] for class arbitration" as a means of litigating the parties' claims.[53]

The Southern District of New York acknowledged the argument – expressed by some courts that have held that class-arbitration availability is a question of arbitrability – that "the availability of class arbitration is plausibly an issue that contracting parties might expect a court to resolve, subject to standard appellate review, rather than risk undergoing the entirety of a high-stakes, high-cost arbitration that may differ from the proceeding contemplated by the parties."[54] Nonetheless, the court stated, the costliness of class arbitration did not rebut *Bazzle*'s "core point[s]" that "the class of questions of arbitrability is a limited one" and that the availability of class arbitration pertains to "procedures" instead of "whether an arbitration is permissible in the first instance."[55]

■ The Availability of Class Arbitration as a Question for a Court: *Network Capital*, *Garden Fresh*, and Similar Authorities

A few months after the Second Appellate District's *Sandquist* decision, its reasoning was rejected by

44. *Id*. at p. *6.
45. *Id*. at pp. *5-6.
46. (C.D. Cal. 2013) 982 F.Supp.2d 1109,1112.
47. *Ibid*.
48. *Id*. at p. 1113, italics original.
49. *Id*. at p. 1114.
50. See, e.g., *In re A2P SMS Antitrust Litigation* (S.D.N.Y. May 29, 2014, 12 CV 2656 (AJN)) 2014 WL 2445756, at p.*10 ("[T]he Court is persuaded by the Supreme Court's decision in *Bazzle* that the arbitrator, rather than the Court, should decide whether class arbitration is available."); *Hesse v. Sprint Spectrum L.P.* (W.D. Wa. Feb. 17, 2012, No. C06–592JLR) 2012 WL 529419, at p *4 (stating that class-arbitration availability "is a procedural issue that should be left for the arbitrator to decide"); *Guida v. Home Savings of Am., Inc.* (E.D.N.Y. 2011) 793 F.Supp.2d 611, 616 ("This Court concludes, in light of *Stolt–Nielsen* and *Bazzle*, that the ability of a class to arbitrate a dispute where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue is a procedural question that is for the arbitrator to decide.").
51. *In re A2P SMS Antitrust Litigation, supra*, 2014 WL 2445756, at p.*10.
52. *Ibid*.
53. *Ibid*.
54. *Id*. at p. *11.
55. *Id*. at p. *12.

the Fourth Appellate District in two published decisions holding that the availability of class arbitration was a question for the court, not an arbitrator: *Network Capital Funding Corp. v. Papke* [56] and *Garden Fresh Restaurant Corp. v. Superior Court*.[57] In rejecting the Second District's reasoning, the Fourth District applied the following analysis, drawn primarily from the only two federal appellate courts to address this "who decides" issue.

The Fourth District first dispensed with *Bazzle*, reasoning that it had "limited" persuasive value because two subsequent U.S. Supreme Court decisions – *Stolt-Nielsen*[58] and *Oxford Health Plans LLC v. Sutter*[59] – have cautioned that, as a plurality opinion, *Bazzle* is not the final word on whether a court or arbitrator determines the availability of class arbitration.[60] The Fourth District concluded that this later qualifying language from the U.S. Supreme Court has "cast doubt" on the *Bazzle* plurality's decision.[61]

Next, the Fourth District read *Stolt-Nielsen* as having "rejected the conclusion" in *Bazzle*'s plurality opinion that "a question is procedural simply because the answer determines the procedures the parties will use to arbitrate their claims."[62] The Fourth District relied especially on the statement in *Stolt-Nielsen* that whether an agreement provides for class arbitration is not simply a matter of "what 'procedural mode' [i]s available" to adjudicate a party's claims.[63] Several courts have read this language in *Stolt-Nielsen* as "giv[ing] every indication, short of an outright holding, that classwide arbitrability is a gateway question" for the courts.[64]

Reading the tea leaves from recent U.S. Supreme Court decisions, some courts also conclude that the availability of class arbitration is a question "to be decided by the court" because it "affects whose claims may be arbitrated."[65] In *Opalinski, v. Robert Half International Inc*., the Third Circuit derived the principle that a "court must determine whose claims an arbitrator is authorized to decide" from its own[66] and U.S. Supreme Court[67] precedent.[68] The court then reasoned that the question of whether class arbitration is available, that is, whether arbitration "must include absent individuals[,] . . . affects whose claims may be arbitrated and is thus a question of arbitrability to be decided by the court."[69] The court also noted Justice Alito's warning in his concurrence in *Oxford Health* that "courts should be wary of concluding that the availability of classwide arbitration is for the arbitrator to decide, as that decision implicates the rights of absent class members without their consent."[70]

In addition to precedential analogies, the Sixth Circuit in *Reed Elsevier, Inc. ex rel. LexisNexis Division v. Crockett*, has also advanced a pragmatic argument for holding that the availability of class arbitration is a question of arbitrability for the court.[71] In *Reed*, the Sixth Circuit characterized questions of arbitrability as "fundamental to the manner in which the parties will resolve their dispute," whereas questions of procedure "concern details."[72] The court then examined the real-world impact of allowing an arbitrator to decide the availability of class arbitration, concluding that "whether

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56. (2014) 178 Cal.Rptr.3d 658 (*Network Capital Funding Corp.*), review granted Jan. 14, 2015, S222638.
57. (2014) 231 Cal.App.4th 678.
58. *Stolt-Nielsen S.A. v. Animalfeeds Internat. Corp.* (2010) 559 U.S. 662, 680 (*Stolt-Nielsen*) (emphasizing that *Bazzle* was not binding authority because "only the plurality" in *Bazzle* concluded that an arbitrator should determine the availability of class arbitration).
59. (2013) 133 S.Ct. 2064, 2068, fn. 2 (reiterating that the Court "has not yet decided whether the availability of class arbitration" is a question for a court or an arbitrator).
60. See, e.g., *Network Capital Funding Corp., supra*, 178 Cal.Rptr.3d at p. 664.
61. *Garden Fresh Restaurant Corp. v. Super. Ct., supra*, 231 Cal.App.4th at p. 685.
62. *Network Capital Funding Corp., supra*, 178 Cal. Rptr.3d at p. 666 & fn. 3.
63. *Id*. at p. 666; *Stolt-Nielsen, supra*, 559 U.S. at pp. 686-687.
64. *Garden Fresh Restaurant Corp. v. Super. Ct.* (2014) 231 Cal.App.4th 678, 687; *Opalinski, v. Robert Half Internat. Inc*. (3d Cir. 2014) 761 F.3d 326, 332 (*Opalinski*) (reasoning that *Stolt-Nielsen* "indicates that the availability of class-wide arbitration is a question of substance rather than procedure").
65. *Opalinski, supra*, 761 F.3d at pp. 332-333.
66. See *Allstate Settlement Corp. v. Rapid Settlements, Ltd.* (3d Cir. 2009) 559 F.3d 164, 169 ("[w]hether the arbitrator's award binds [a third-party] is a question that the court must decide"); *Sandvik AB v. Advent Internat. Corp*. (3d Cir. 2000) 220 F.3d 99, 107 (determining "whether Huep's signature bound Advent" was "a necessary prerequisite to the court's fulfilling its role of determining whether the dispute is one for an arbitrator to decide").
67. See *First Options of Chicago, Inc. v. Kaplan* (1994) 514 U.S. 938, 946 (holding that whether an arbitration agreement bound individual business owners who signed on behalf of their wholly owned company was a "question of arbitrability" to be presumptively determined by a court absent clear contractual language to the contrary); *John Wiley & Sons, Inc. v. Livingston* (1964) 376 U.S. 543, 546-547 (holding that whether defendant-company was bound by arbitration provisions of an agreement signed by a company with which it had merged was "no doubt" a "matter to be determined by the Court").
68. *Opalinski, supra*, 761 F.3d at pp. 332-333.
69. *Ibid.*
70. *Id*. at p. 333.
71. (6th Cir. 2013) 734 F.3d 594. pp. 598-599.
72. *Ibid.*

the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally."[73] The court reasoned that an "incorrect answer in favor of classwide arbitration would 'forc[e] parties to arbitrate' not merely a single 'matter that they may well not have agreed to arbitrate[,]'. . . but thousands of them."[74] Given that the question of whether class arbitration is available has a tremendous effect on arbitration's scope and expense, the court concluded that this was not a question of mere procedural "details" entrusted to an arbitrator's discretion, but rather was reserved for the court.[75]

As discussed above, given the concerns raised by the U.S. Supreme Court that arbitration may be "poorly suited to the higher stakes of class litigation,"[76] and the fact that class arbitration decisions have been deemed to be essentially "unreviewable,"[77] resolution of the question of whether a court or an arbitrator decides the availability of class arbitration will have a profound impact on the future of class action litigation. With California appellate and federal courts split on this issue, litigators eagerly await the California Supreme Court's ruling on this "who decides" issue.

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73. *Id*. at p. 599.

74. *Id*. at pp. 598-599; see also *Huffman v. Hilltop Cos., LLC* (6th Cir. 2014) 747 F.3d 391, 398 (reiterating and following *Reed*'s holding that "whether an arbitration agreement permits classwide arbitration is a gateway matter, which is reserved "for judicial determination unless the parties clearly and unmistakably provide otherwise").

75. *AT&T Mobility LLC v. Concepcion, supra*, (2011) 131 S.Ct. 1740, 1752.

76. *Garden Fresh Restaurant Corp. v. Super. Ct.* (2014) 231 Cal.App.4th 678, 686-687.