American Law Institute
Current Developments in Employment Law
Santa Fe, New Mexico
July 26, 2013

Arbitration

by

Richard T. Seymour*

* Law Office of Richard T. Seymour, P.L.L.C., 900 Brawner Bldg., 888 17th Street N.W., Washington, D.C. 20006-3307. Telephone: 202-785-2145. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net.

Some of the information in this paper is used with permission from past editions of Richard T. Seymour and John F. Aslin, Equal Employment Law Update (Bureau of National Affairs, Washington, D.C., 1996-2007), copyright © American Bar Association, 1996-2007. All other material is copyright © Richard T. Seymour, 2013.

Many of my papers can be downloaded from www.rickseymourlaw.com. Many of my other CLE papers are also downloadable from this site.

Table of Contents

I. Overview 1
A. AT&T Mobility LLC v. Concepcion 1
1. The Decision 1
2. RTS Comment on AT&T Concepcion v. Mobility 5
3. The Effect, So Far, of AT&T Mobility v. Concepcion 6
B. Rent-a-Center West v. Jackson 8
C. Stolt-Nielsen S.A. v. AnimalFeeds International Corp. 9
1. The Decision 9
D. *Oxford Health Plans* 10
E. *Stolt-Nielson* in the Lower Courts 14
F. Noncompetition Agreements 14
G. The FAA Does Not Confer Federal-Question Jurisdiction 14
H. The FAA's Limited Scope of Review Cannot be Expanded by Agreement 15
I. State-Required Administrative Determinations Do Not Trump the FAA 17
II. Practice Questions 17
A. Administrative Closings of Federal Court Cases 17
B. Waiver of Jury Trial 18
C. The "Evident Partiality" Standard of Review 18
D. Non-Signayories Not Bound 20
E. Union Member Not Collaterally Estopped by Adverse Finding in CBA Arbitration of CBA Claims 20

I. Overview

A. AT&T Mobility LLC v. Concepcion

1. The Decision

AT&T Mobility LLC v. Concepcion, __ **U.S.** __, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), upheld a consumer arbitration "agreement" that included a ban on class arbitrations. The Ninth Circuit, applying California law, had held the provision unconscionable. The Supreme Court reversed in a 5-4 decision written by Justice Scalia. The details of the question before the Court are important in determining its effect. The Court began by stating: "We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." It ended by holding that the process of arbitration was unsuited for the resolution of class claims. The arbitration agreement, as unilaterally revised by AT&T, "required that claims be brought in the parties' 'individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.'" *Id.* at 1744. It also barred the arbitrator from consolidating more than one person's claims, and barred the arbitrator from presiding "over any form of a representative or class proceeding." *Id.* at 1744 n.2. The process of arbitration, and the rights accorded to claimants against AT&T in arbitration, were unusual:

> The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT & T's Web site. AT & T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT & T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.FN3/
>
> FN3/ The guaranteed minimum recovery was increased in 2009 to $10,000. . . .

Id. at 1744. The Court's description of the district court's approach is also important:

> In March 2008, AT & T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The District Court denied AT & T's motion. It described AT & T's arbitration agreement favorably, noting, for

example, that the informal dispute-resolution process was "quick, easy to use" and likely to "promp[t] full or ... even excess payment to the customer *without* the need to arbitrate or litigate"; that the $7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. . . . Nevertheless, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT & T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. . . .

Id. at 1744-45. The Court rejected respondents' argument that the California law barring exculpatory provisions and holding class action waivers unconscionable applied to litigation as well as arbitration, and could thus be reconciled with the FAA. It stated at 1747:

> When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. *Preston v. Ferrer*, 552 U.S. 346, 353, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. In *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987), for example, we noted that the FAA's preemptive effect might extend even to grounds traditionally thought to exist "'at law or in equity for the revocation of any contract.'" *Id.*, at 492, n. 9, 107 S.Ct. 2520 (emphasis deleted). We said that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." *Id.*, at 493, n. 9, 107 S.Ct. 2520.
>
> An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. *See Discover Bank*, *supra*, at 161, 30 Cal.Rptr.3d 76, 113 P.3d, at 1109 (arguing that class waivers are similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.
>
> Other examples are easy to imagine. The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid preemption). Such examples are not

> fanciful, since the judicial hostility towards arbitration that prompted the FAA had manifested itself in "a great variety" of "devices and formulas" declaring arbitration against public policy. *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (C.A.2 1959). And although these statistics are not definitive, it is worth noting that California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts. Broome, *An Unconscionable Applicable of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39, 54, 66 (2006); Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L.Rev. 185, 186–187 (2004).

The Court described at 1747-48 a concession by respondents:

> "Rules aimed at destroying arbitration" or "demanding procedures incompatible with arbitration," they concede, "would be preempted by the FAA because they cannot sensibly be reconciled with Section 2." Brief for Respondents 32. The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.'" . . .

The majority stated:

> We largely agree. Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. . . . As we have said, a federal statute's saving clause "'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" . . .

Id. at 1748. However, the Court held that the requirement of class proceedings was just such an element incompatible with arbitration: "The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* The Court made clear that classwide arbitration was available by consent, but that requiring it under *Discover Bank* was incompatible with arbitration and the FAA:

> Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

Id. at 1750-51. The Court held that a main advantage of arbitration is informality, and that class arbitration requires formality. "For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and

absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class." *Id.* at 1751. It then accepted the common argument of defendants that the stakes in class litigation are so high that defendants are compelled to settle. The Court then turned a logical cartwheel, turned its back on the use of arbitration to resolve large commercial disputes and its past reliance on that practice to impose arbitration in the employment context, and stated that class arbitration is unsuitable because arbitration is generally for small amounts:

> Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail . . . and class arbitration would be no different.
>
> Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing ... or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award ... was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review . . . . We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision. FN8/
>
> FN8/ The dissent cites three large arbitration awards (none of which stems from classwide arbitration) as evidence that parties are willing to submit large claims before an arbitrator. *Post,* at 7–8. Those examples might be in point if it could be established that the size of the arbitral dispute was predictable when the arbitration agreement was entered. Otherwise, all the cases prove is that arbitrators can give huge awards—which we have never doubted. The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.

Id. at 1752. Finally, the Court addressed the argument that only class treatment would result in

relief to persons with small claims:

> The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. See *post,* at 9. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT & T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT & T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole, 584 F.3d, at 856, n. 9. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT & T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." . . . .

Id. at 1753 (emphasis in original). Justice Thomas joined the majority opinion and also wrote a concurring opinion. Justice Breyer filed a dissenting opinion, joined by Justices Ginsberg, Sotomayor, and Kagan.

2. RTS Comment on AT&T Concepcion v. Mobility

RTS Comment on AT&T Concepcion v. Mobility: This is not a workmanlike product. The Court's reasoning ignores the history, purpose, and application of the Federal Arbitration Act, and pulls out of thin air—and contrary to reality—the proposition on which it actually decided the case: that arbitration is only for small claims. The Court was concerned with the stakes to corporate defendants demanding the arbitration clauses to be too high for class arbitration to be visited on them, but it has blinded itself to the plight of individuals who have been forced into arbitration agreements and have their whole careers at stake. However, it seems to me that the Court's approach will turn out to be self-limiting.

I do not think that this result will affect EEO class litigation seeking systemic injunctive relief where there are arbitration "agreements" with class action bans. The Court has permitted arbitration agreements to be enforced only where they do not interfere with the substantive rights of litigants, and one of the most important substantive rights in systemic EEO class litigation is an injunctive decree changing the employer's personnel practices for the future. Such decrees can be obtained only in class actions, because individuals suing as individuals do not have the standing necessary to obtain broad injunctive decrees that will not benefit them personally. Thus, enforcement of a class action waiver would effectively immunize the employer from one of the most important aspects of relief and repeal the injunctive provisions of the EEO laws. Since this cannot be done, the arbitration agreement must either fall so that the class claims can be heard in court, or the class claims must be heard in arbitration. There is no room for *AT&T Mobility* in EEO class litigation seeking systemic injunctive relief.

Nor do I think that *AT&T Mobility* will have any effect in the normal consumer case. AT&T's plan made its customers individually better off in ADR and arbitration than they would

have been if they litigated the case in court and obtained all the relief allowable. That is extraordinarily rare. The Court' emphasized this "better off" feature both at the beginning and at the end of its decision. In the 99.99% of all consumer cases where there are no such elements, and where application of AT&T Mobility would in effect preclude the ability to obtain even individual relief because the damages are small, the Fifth Amendment stands as a bar to class action waivers. The Court had no occasion to consider the practical denial of due process, or the status of AT&T as using state action under the FAA to deprive customers of property interests without due process of law, because such a question cannot arise where the agreement leaves individuals with an incentive to proceed and a means of paying counsel. The question does arise in the more typical consumer situation.

3. The Effect, So Far, of AT&T Mobility v. Concepcion

In re American Exp. Merchants' Litigation, 667 F.3d 204 (**2d Cir.** 2012), held that the class action waiver in American Express's arbitration agreements would deprive merchants of any practical means of enforcing their rights, and that the waivers were therefore unenforceable. Plaintiffs relied on expert economic opinion that it would make no economic sense for merchants or individual companies to pursue their claims in arbitration. The court relied heavily on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000), in which "the Supreme Court acknowledged in dicta 'that the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum.'" 667 F.3d at 215-16.

Quilloin v. Tenet HealthSystem Philadelphia, Inc., 673 F.3d 221, 18 Wage & Hour Cas.2d (BNA) 1563 (**3d Cir.** 2012), reversed the denial of defendant's motion to compel arbitration of plaintiff's FLSA and State-law claims, with a class-action waiver. The court held that the ambiguous terms of the contract—whether it allowed fee-shifting in accordance with statutory law and whether the contract's failure to mention class arbitration amounted to a waiver, were to be decided by the arbitrator, and that the lower court erred by assuming a worst-case scenario and finding the agreement unconscionable on those grounds. The court held that Pennsylvania's ban on class-action waivers, where those would effectively preclude the enforcement of rights, was barred by the FAA. The court did not avert to any of the reasoning that the Second Circuit had found persuasive.

Wachovia Securities, LLC v. Brand, 671 F.3d 472, 474, 33 IER Cases 679 (**4th Cir.** 2012), stated the case in its opening paragraph:

> Wachovia Securities, LLC ("Wachovia") appeals from the district court's refusal to vacate an arbitration award entered against it after it sued several former employees on what the arbitrators determined were frivolous claims. Wachovia argues that the arbitrators (the "Panel") violated § 10(a)(3) of the Federal Arbitration Act (the "FAA") and "manifestly disregarded" the law when they awarded $1.1 million in attorneys' fees and costs under the South Carolina Frivolous Civil Proceedings Act (the "FCPA"), codified at S.C.Code Ann. § 15–36–10. For the reasons that follow, we affirm.

(Footnote omitted.) Wachovia sued the employees after they went to work for a competitor and alleged that the employees had taken client lists and other confidential information. It sought an

injunction against soliciting Wachovia clients and employees. The Answer filed by the employees claimed that Wachovia's claim was baseless and an attempt to intimidate other Wachovia employees, and claimed attorneys' fees under the South Carolina Wage Payment Act. They did not mention the FCPA. The employees first raised their claims for fees under the FCPA in their simultaneous briefing on fees, submitted on the last day of the FINRA hearings in the case after Wachovia requested and obtained a one-day delay for the briefing. Wachovia complained that the panel did not allow 30 days to respond, as provided in the FCPA. However, it did not follow up on the suggestion of additional briefing and did not request additional briefing. *Id.* at 476-77. The court of appeals found it significant that Wachovia had followed a practice of sandbagging the employees in the litigation, and cited an instance in which Wachovia submitted a late DVD that it contended showed the employees carrying off Wachovia materials to a competitor, and got an injunction on the strength of that without allowing the employees enough time to check and respond to the DVD. Wachovia later admitted that the DVD only showed employees removing boxes, and that the Wachovia attorney describing the contents of the DVD had not reviewed it before describing it. *Id.* at 476 n.4. The district court had rejected Wachovia's argument that the FCPA could not be enforced in arbitration because the statute did not mention arbitration. *Id.* at 477. The court of appeals relied on *Concepción*, and its references to the speed and informality of arbitration, in holding that the procedures of the FCPA do not bind an arbitral panel. "Parties may, of course, consent to particular procedures in arbitration, but it is inconsistent with the FAA for one party to demand ex post particular procedural requirements from state law." *Id.* at 479 (citation omitted). The court rejected Wachovia's argument that it was deprived of an opportunity to respond to the FCPA request for attorneys' fees:

> To the contrary, we find that Wachovia is the architect of its own misfortune. Wachovia, not the arbitrators, cut short the hearing on the issue of attorneys' fees. The arbitrators set the deadline for submitting briefs on the issue of attorneys' fees for the penultimate day of hearings. Wachovia inexplicably missed this deadline and submitted its brief on the final day of arbitration, thereby leaving no time for the parties to debate the issue. Moreover, after Wachovia complained that it had not received a fair hearing on the issue of fees, the arbitrators asked Wachovia if it wanted to submit additional briefs. Wachovia turned down this opportunity. Even if Wachovia is correct in its contention that the FCPA requires a hearing in the context of arbitration, it could have used the additional briefing to explain why a hearing was necessary.

Id. at 480.

Coneff v. AT & T Corp., 673 F.3d 1155 (**9th Cir.** 2012), involved the same arbitration agreement as in *Concepción*. The court reversed the district court's order denying arbitration, and remanded for a determination of State law on unconscionability. The court disagreed with *In re American Exp. Merchants' Litigation*. *Id.* at 1157 n.3. It also distinguished between the extinguishing of substantive State statutory or common law rights and the overriding of Federal statutory or common-law rights. *Id.* at 1158-59. It stated that *Concepción* did not overturn State-law challenges to the validity of a contract, and remanded that question:

> Thus, we remand to the district court to apply Washington choice-of-law rules to Plaintiffs' procedural unconscionability arguments. The first step of that analysis will be

> to determine whether an actual conflict exists among the laws of the various states involved in this case. That analysis requires the court first to determine whether any of the relevant states allow voiding a contract on grounds of freestanding procedural unconscionability. If the laws all require at least some showing of substantive unconscionability, then Plaintiffs' claim necessarily fails because of our holding that the arbitration clause at issue is not substantively unconscionable. But if a showing of procedural unconscionability would result in success for Plaintiffs under some of the relevant state precedents, the district court must complete the conflict-of-law analysis and decide which Plaintiffs, if any, may benefit.

Id. at 1161-62 (footnote omitted).

Kilgore v. KeyBank, Nat. Ass'n, 673 F.3d 947 (**9th Cir.** 2012), reversed an order refusing to compel arbitration, and held that *Concepción* barred the California statute prohibiting the use of arbitration to resolve claims for broad, public injunctive relief.

B. Rent-a-Center West v. Jackson

Rent-a-Center West v. Jackson, __ **U.S.** __, 130 S. Ct. 2772, 109 Fair Empl.Prac.Cas. (BNA) 897 (2010), a § 1981 case, involved an arbitration agreement that delegated to the arbitrator any question of the validity of the arbitration agreement. The Court stated: "The Agreement provided for arbitration of all 'past, present or future' disputes arising out of Jackson's employment with Rent-A-Center, including 'claims for discrimination' and 'claims for violation of any federal ... law.' . . . It also provided that '[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.'" *Id.* at 2775. Plaintiff challenged the agreement as unconscionable under Nevada law because of the requirement that he pay half the fees. The Court held that the agreement met the heightened standard of clear and unmistakable evidence that the parties intended to delegate to the arbitrator the issue of arbitrability, but that the heightened showing did not mean that the party seeking to enforce arbitration had to show by clear and unmistakable evidence that the agreement was not unconscionable. *Id.* at 2778 n.1. The Court held that the agreement to arbitrate is enforceable under 2 of the FAA without regard to the enforceability of the underlying contract, and that a court must therefore determine the enforceability of the agreement to arbitrate even if all other questions under the agreement are to be resolved by the arbitrator. The Court held that it made no difference that the agreement to arbitrate here involved the delegation provision as to arbitrability, and that the remainder of the agreement was the broad arbitration agreement. "Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 2779. Justice Scalia wrote the opinion of the Court, joined by the Chief Justice and Justices Kennedy, Thomas, and Alito. Justice Stevens dissented, joined by Justices Ginsburg, Breyer, and Sotomayor.

C. Stolt-Nielsen S.A. v. AnimalFeeds International Corp.

1. The Decision

Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 **U.S.** 662, 130 S.Ct. 1758 (2010),[1] held that an interim arbitration award ordering classwide arbitration must be vacated under the F.A.A. where the arbitral panel exceeded its powers by failing to base its decision on New York law or maritime law as to the proper construction of an arbitration agreement that is silent as to class arbitration, and instead donning the mantle of a common-law court in deciding what is the best public policy in such situations. The Court stated at 1768-69:

> Rather than inquiring whether the FAA, maritime law, or New York law contains a "default rule" under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation. Perceiving a post-*Bazzle* consensus among arbitrators that class arbitration is beneficial in "a wide variety of settings," the panel considered only whether there was any good reason not to follow that consensus in this case. . . . The panel was not persuaded by "court cases denying consolidation of arbitrations,"FN5 by undisputed evidence that the Vegoilvoy charter party had "never been the basis of a class action," or by expert opinion that "sophisticated, multinational commercial parties of the type that are sought to be included in the class would never intend that the arbitration clauses would permit a class arbitration."FN6 . . . Accordingly, finding no convincing ground for departing from the post-*Bazzle* arbitral consensus, the panel held that class arbitration was permitted in this case. . . . The conclusion is inescapable that the panel simply imposed its own conception of sound policy.FN7

(Footnotes omitted.) The Court held at 1775-76:

> From these principles, 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. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached "no agreement" on that issue . . . . The critical point, in the view of the arbitration panel, was that petitioners did not "establish that the parties to the charter agreements intended to preclude class arbitration." . . . Even though the parties are sophisticated business entities, even though there is no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment, the panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.
>
> In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties' agreement. Thus, we have said that "'procedural"

[1] U.S. Reports pagination not yet available.

> questions which grow out of the dispute and bear on its final disposition' are presumptively not for the judge, but for an arbitrator, to decide." . . . This recognition is grounded in the background principle that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." *Restatement (Second) of Contracts* § 204 (1979).
>
> An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. . . . But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration. . . . *Cf. First Options, supra*, at 945 (noting that "one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate" contrary to their expectations).

Justice Alito wrote the majority opinion, joined by the Chief Justice and Justices Scalia, Kennedy, and Thomas. Justice Ginsburg dissented, joined by Stevens and Breyer. Justice Sotomayor did not participate.

D. ***Oxford Health Plans***

Oxford Health Plans LLC v. Sutter, __ **U.S.** __, __ S.Ct. __, 2013 WL 2459522, (June 10, 2013), unanimously held that the arbitrator did not exceed his authority in deciding that the parties' arbitration agreement allowed for class arbitration. The first paragraph of the Court's decision summarized the case:

> Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. See *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). In this case, an arbitrator found that the parties' contract provided for class arbitration. The question presented is whether in doing so he "exceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act (FAA or Act), 9 U.S.C. § 1 et seq. We conclude that the arbitrator's decision survives the limited judicial review § 10(a)(4) allows.

Id. at p. *2. The Court explained the limited review of arbitral decisions for the sake of promptness and finality, noted that Oxford Health Plans had not challenged the arbitrability of class treatment in court, and held that it chose arbitration and must now live with that choice:

> Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct.

1920, 131 L.Ed.2d 985 (1995). That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process." *Ibid.*

> Here, Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator[ ] exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. "It is not enough ... to show that the [arbitrator] committed an error—or even a serious error." *Stolt–Nielsen*, 559 U.S., at 671, 130 S.Ct. 1758. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp. v. Mine Workers*, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); internal quotation marks omitted). Only if "the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination. *Eastern Associated Coal*, 531 U.S., at 62, 121 S.Ct. 462 (quoting *Misco*, 484 U.S., at 38, 108 S.Ct. 364). So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.FN2

FN2. We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions—which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"—are presumptively for courts to decide. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion). A court may therefore review an arbitrator's determination of such a matter *de novo* absent "clear[ ] and unmistakabl[e]" evidence that the parties wanted an arbitrator to resolve the dispute. *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). *Stolt–Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. See 559 U.S., at 680, 130 S.Ct. 1758. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures. See Brief for Petitioner 38, n. 9 (conceding this point). Indeed, Oxford submitted that issue to the arbitrator not once, but twice—and the second time after Stolt–Nielsen flagged that it might be a question of arbitrability.

> And we have already all but answered that question just by summarizing the arbitrator's decisions, see supra, at ——— – ———; they are, through and through, interpretations of the parties' agreement. The arbitrator's first ruling recited the "question of construction" the parties had submitted to him: "whether [their] Agreement allows for

class action arbitration." App. 29–30. To resolve that matter, the arbitrator focused on the arbitration clause's text, analyzing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to arbitration. The arbitrator concluded, based on that textual exegesis, that the clause "on its face ... expresses the parties' intent that class action arbitration can be maintained." *Id.*, at 32. When Oxford requested reconsideration in light of *Stolt–Nielsen*, the arbitrator explained that his prior decision was "concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself." App. 69. He then ran through his textual analysis again, and reiterated his conclusion: "[T]he text of the clause itself authorizes" class arbitration. *Id.*, at 73. Twice, then, the arbitrator did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not "exceed[ ] [his] powers." § 10(a)(4).

Oxford's contrary view relies principally on *Stolt–Nielsen*. As noted earlier, we found there that an arbitration panel exceeded its powers under § 10(a)(4) when it ordered a party to submit to class arbitration. See *supra, at* ——. Oxford takes that decision to mean that "even the 'high hurdle' of Section 10(a)(4) review is overcome when an arbitrator imposes class arbitration without a sufficient contractual basis." Reply Brief 5 (quoting *Stolt–Nielsen*, 559 U.S., at 671, 130 S.Ct. 1758). Under *Stolt–Nielsen*, Oxford asserts, a court may thus vacate "as ultra vires " an arbitral decision like this one for misconstruing a contract to approve class proceedings. Reply Brief 7.

But Oxford misreads *Stolt–Nielsen*: We overturned the arbitral decision there because it lacked any contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a "sufficient" one. The parties in *Stolt–Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. See 559 U.S., at 668–669, 673, 130 S.Ct. 1758. In that circumstance, we noted, the panel's decision was not—indeed, could not have been—"based on a determination regarding the parties' intent." *Id.*, at 673, n. 4, 130 S.Ct. 1758; see *id.*, at 676, 130 S.Ct. 1758 ("Th[e] stipulation left no room for an inquiry regarding the parties' intent"). Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement. *Id.*, at 673, 130 S.Ct. 1758. Instead, "the panel simply imposed its own conception of sound policy" when it ordered class proceedings. *Id.*, at 675, 130 S.Ct. 1758. But "the task of an arbitrator," we stated, "is to interpret and enforce a contract, not to make public policy." *Id.*, at 672, 130 S.Ct. 1758. In "impos[ing] its own policy choice," the panel "thus exceeded its powers." *Id.*, at 677, 130 S.Ct. 1758.

The contrast with this case is stark. In *Stolt–Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But § 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of

interpreting a contract, not when he performed that task poorly. *Stolt–Nielsen* and this case thus fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.

The remainder of Oxford's argument addresses merely the merits: The arbitrator, Oxford contends at length, badly misunderstood the contract's arbitration clause. See Brief for Petitioner 21–28. The key text, again, goes as follows: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." App. 15–16. The arbitrator thought that clause sent to arbitration all "civil action[s]" barred from court, and viewed class actions as falling within that category. See *supra, at* ——. But Oxford points out that the provision submits to arbitration not any "civil action[s]," but instead any "dispute arising under" the agreement. And in any event, Oxford claims, a class action is not a form of "civil action," as the arbitrator thought, but merely a procedural device that may be available in a court. At bottom, Oxford maintains, this is a garden-variety arbitration clause, lacking any of the terms or features that would indicate an agreement to use class procedures.

We reject this argument because, and only because, it is not properly addressed to a court. Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under § 10(a)(4). *Eastern Associated Coal*, 531 U.S., at 62, 121 S.Ct. 462 (internal quotation marks omitted). The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel*, 363 U.S. at 599, 80 S.Ct. 1358. The arbitrator's construction holds, however good, bad, or ugly.

In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.

Id. at pp. *4 - *6.

E. ***Stolt-Nielson*** **in the Lower Courts**

Jock v. Sterling Jewelers Inc., 646 F.3d 113, 115, 112 Fair Empl.Prac.Cas. (BNA) 1137 (**2d Cir.** 2011), reversed the decision of the district court and upheld the arbitrator's decision to treat the dispute as a class arbitration although the agreement was silent on whether class arbitration was allowed. The court held that an absence of an explicit agreement did not mean that the parties did not have an implicit agreement for class arbitration, and that the arbitration agreement was broader than that in *Stolt-Nielson*. The arbitrator approached the question under the then-current law as whether anything in the agreement expressly prohibited class arbitration, held that there was no such prohibition, and ordered class arbitration. The court held that that was the question the parties had submitted to the arbitrator, that the arbitrator thus had jurisdiction to decide the question, and that the district court erred in deciding whether the question had been decided correctly. Judge Winter dissented. *Id.* at 127-33.

In re American Express Merchants' Litigation, 634 F.3d 187 (**2d Cir.** 2011), held that the enforceability of the class-action waiver in the merchant contracts with American Express was for the court to determine, not the arbitrator, and that the waiver was unenforceable because it would be too expensive to litigate claims individually.

F. Noncompetition Agreements

Nitro-Lift Technologies, L.L.C. v. Howard, __ **U.S.** __, 133 S.Ct. 500, 503, 184 L.Ed.2d 328, 34 IER Cases 961 (2012), reversed the Oklahoma Supreme Court and held that courts may not review the validity of noncompetition agreements subject to a valid arbitration clause. The Court held that the determination of validity is for the arbitrator to determine. The Court discussed the Federal Arbitration Act, and continued:

> And when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved "by the arbitrator in the first instance, not by a federal or state court." . . . For these purposes, an "arbitration provision is severable from the remainder of the contract" . . . and its validity is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide.

(Citations omitted.)

G. The FAA Does Not Confer Federal-Question Jurisdiction

Vaden v. Discover Bank, 556 **U.S.** 49, 53-54 (2009), reversed the Fourth Circuit's affirmances of an order compelling arbitration, which was entered in a Federal-court action to enforce the FAA by compelling cardholders—who were State-law defendants and counter-claim State-law class plaintiffs in state-court proceedings—to arbitrate their claims. The Court described the procedural posture of the case, and its resolution of the matter:

> The litigation giving rise to these questions began when Discover Bank's servicing affiliate filed a complaint in Maryland state court. Presenting a claim arising solely under state law, Discover sought to recover past-due charges from one of its credit

cardholders, Betty Vaden. Vaden answered and counterclaimed, alleging that Discover's finance charges, interest, and late fees violated state law. Invoking an arbitration clause in its cardholder agreement with Vaden, Discover then filed a § 4 petition in the United States District Court for the District of Maryland to compel arbitration of Vaden's counterclaims. The District Court had subject-matter jurisdiction over its petition, Discover maintained, because Vaden's state-law counterclaims were completely preempted by federal banking law. The District Court agreed and ordered arbitration. Reasoning that a federal court has jurisdiction over a § 4 petition if the parties' underlying dispute presents a federal question, the Fourth Circuit eventually affirmed.

We agree with the Fourth Circuit in part. A federal court may "look through" a § 4 petition and order arbitration if, "save for [the arbitration] agreement," the court would have jurisdiction over "the [substantive] controversy between the parties." We hold, however, that the Court of Appeals misidentified the dimensions of "the controversy between the parties." Focusing on only a slice of the parties' entire controversy, the court seized on Vaden's counterclaims, held them completely preempted, and on that basis affirmed the District Court's order compelling arbitration. Lost from sight was the triggering plea-Discover's claim for the balance due on Vaden's account. Given that entirely state-based plea and the established rule that federal-court jurisdiction cannot be invoked on the basis of a defense or counterclaim, the whole "controversy between the parties" does not qualify for federal-court adjudication. Accordingly, we reverse the Court of Appeals' judgment.

H. The FAA's Limited Scope of Review Cannot be Expanded by Agreement

Hall Street Associates, L.L.C. v. Mattel, Inc., 552 **U.S.** 576 (2008), involved an arbitration agreement crafted while the dispute was in litigation in the U.S. District Court for the District of Oregon, and entered as an order by the court. Hall Street claimed a right to indemnification for environmental clean-up costs resulting from Mattel's tenancy in the property leased to it by Hall Street. The agreement approved by the court contained a paragraph providing for judicial review of the arbitrator's award, including authority to "vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." *Id.* at 1400–01. In the event, the district court rejected the arbitrator's interpretation of the lease as implausible. The Court held that the provisions for judicial review in §§ 10 and 11 of the FAA, 9. U.S.C. §§ 10, 11, are exclusive and may not be expanded by contract. The Court explained:

> To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] ... powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted;" the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." Given this emphasis on extreme arbitral conduct, the old rule of ejusdem generis has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a

> general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. "Fraud" and a mistake of law are not cut from the same cloth.

Id. at 586. The Court held open the possibility that the parties might contract for review under State law:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

Id. at 590. The Court also held that it was unclear whether this particular agreement was entered into pursuant to the FAA alone, or pursuant to the lower court's authority over alternative dispute resolution procedures. The Court raised but did not resolve these questions, stating:

> We are, however, in no position to address the question now, beyond noting the claim of relevant case management authority independent of the FAA. The parties' supplemental arguments on the subject in this Court implicate issues of waiver and the relation of the FAA both to Rule 16 and the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 651 et seq., none of which has been considered previously in this litigation, or could be well addressed for the first time here. We express no opinion on these matters beyond leaving them open for Hall Street to press on remand. If the Court of Appeals finds they are open, the court may consider whether the District Court's authority to manage litigation independently warranted that court's order on the mode of resolving the indemnification issues remaining in this case.

Id. at 592. Justice Stevens, joined by Justice Kennedy, dissented. Justice Breyer dissented.

Comment by Richard Seymour on *Hall Street Associates, L.L.C. v. Mattel, Inc.*: Employers may be less willing to force arbitration agreements on employees if they are limited to the FAA provisions for judicial review. There is real concern among employers about what a single arbitrator could do to their personnel systems in awarding injunctive relief, or about the possibility of a rogue arbitrator who simply gets everything wrong. Plaintiffs' attorneys are also concerned about rogue arbitrators. One solution may be to use a panel of three arbitrators. Although this increases the cost of arbitration, the employer may be willing to pay the higher fees in order to have this protection in high-stakes cases. In AAA arbitrations, Canon X arbitrators can be used; there is an impartial chair of the panel, and one Canon X arbitrator chosen by each side that can meet with each side and discuss the arbitration—and even strategy—while the arbitration is pending, as long as there is full disclosure of each contact. While the Canon X arbitrators must vote according to their view of the merits, their use assures each side that its views are heard in the caucus. In addition, JAMS rules allow the parties to

specify in advance that they want an arbitral appeal of the arbitrator's decision. The JAMS Optional Appeal Procedure is described at http://www.jamsadr.com/rules/optional.asp.

I. State-Required Administrative Determinations Do Not Trump the FAA

Preston v. Ferrer, 552 **U.S.** 346, 27 IER Cases 257 (2008), held that the Federal Arbitration Act preempts State laws providing for the resolution of specific types of disputes by administrative machinery. Preston, a California attorney, demanded arbitration in a dispute with his client, "Alex E. Ferrer, a former Florida trial court judge who currently appears as 'Judge Alex' on a Fox television network program," as provided in their contract. Ferrer objected, asserting that Preston was an unlicensed talent agent and that the dispute had to be resolved by the California Labor Commissioner under the California Talent Agencies Act. "Ferrer asserted that Preston acted as a talent agent without the license required by the TAA, and that Preston's unlicensed status rendered the entire contract void." *Id.* at 350 (footnote omitted). Preston urged that he was a "personal manager" not covered by the TAA. The California Court of Appeal held that the TAA vests excusive original jurisdiction in the Labor Commissioner, the Supreme Court of California denied review, and the Supreme Court of the United States granted review. The Court noted that Ferrer had argues below that the entire controversy should be finally resolved by the Labor Commissioner, but argued before the Supreme Court that arbitration could follow an initial but non-final resolution by the Labor Commissioner. It also noted that the Labor Commissioner acts as an impartial arbiter under the TAA, and does not act the EEOC. The Court stated its holding simply: "In sum, we disapprove the distinction between judicial and administrative proceedings drawn by Ferrer and adopted by the appeals court. When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." *Id.* at 359. Justice Thomas dissented.

II. Practice Questions

A. Administrative Closings of Federal Court Cases

Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 117 Fair Empl.Prac.Cas. (BNA) 956 (**3d Cir.** 2013), affirmed the lower court's decision not to vacate the ADEA arbitration award in favor of the employer. Plaintiff and defendant entered into the arbitration agreement at a settlement conference with the district court. The lower court then marked the case closed. The court of appeals held that this administrative closure was subject to re-opening, did not create an appealable order, and had no effect on jurisdiction. "District courts often use administrative closings to prune their overgrown dockets. . . . The practical effect is "to remove a case from the court's active docket and permit the transfer of records associated with the case to an appropriate storage repository." . . . Administrative closings are particularly useful "in circumstances in which a case, though not dead, is likely to remain moribund for an appreciable period of time. . . ." *Id.* at 247. The court stated:

> Words matter. "The judicial process works best when orders mean what they say. Surprising interpretations of simple language—perhaps on the basis of a judicial intent not revealed in the words—unnecessarily create complex questions and can cause persons to forfeit their rights unintentionally." . . . Consistent with this principle, we have

> rejected previous attempts to characterize an administrative closing as a final order in disguise . . . as have other circuits . . . .

Id. at 248 (footnote and citations omitted). Plaintiff was therefore entitled to move to vacate the decision in the same case. *Id.* at 248-49. In a striking application of waiver and counter-waiver, the court of appeals held that, by failing to mention it in the district court, defendant waived its defense that Freeman waived his contention of "evident partiality" by failing to raise it in the arbitral proceeding. The court discussed the interplay of the absence of knowledge and waiver, *id.* at 249-50, and concluded:

> But we need not adopt any approach today. The doctrine of appellate waiver is not somehow exempt from itself. . . . This means that a party can waive a waiver argument by not making the argument below or in its briefs.

Id. at 250 (citation omitted).

B. Waiver of Jury Trial

Klein v. Nabors Drilling USA L.P., 710 F.3d 234, 239 (**5th Cir.** 2013), reversed an order declining to compel arbitration. The court held that the language of the arbitration agreement saying that no rights were waived could not be read to invalidate the agreement. It explained:

> Klein's reliance on the Acknowledgment's provision indicating that the Program is not intended "to violate or restrict any rights of employees guaranteed by state or federal law" is also misplaced. Despite the provision's breadth, interpreting it to include "the procedural right to a jury trial" would create an unnecessary conflict with the Program's unambiguous language regarding arbitration as the exclusive procedural mechanism for resolving disputes. Our task is to interpret each provision in a manner consistent with the contract as a whole—not to tailor our interpretation of the entire contract to fit one provision. When interpreting the provisions together, it becomes clear that the Acknowledgment disclaims a restriction only on *substantive* rights that would have been available to Klein in a judicial forum. . . .

(Emphasis in original.)

C. The "Evident Partiality" Standard of Review

Freeman v. Pittsburgh Glass Works, LLC, 709 F.3d 240, 117 Fair Empl.Prac.Cas. (BNA) 956 (**3d Cir.** 2013), explored the law regarding bias of an arbitrator, held it was not present, and affirmed the lower court's decision not to vacate the ADEA award in favor of the employer. The court explained the "evident partiality" standard for disqualification of an arbitrator:

> In response to the parties' confusion, we take this opportunity to reaffirm what we said in *Kaplan.* An arbitrator is evidently partial only if a reasonable person would have to conclude that she was partial to one side. *Id.* The conclusion of bias must be ineluctable, the favorable treatment unilateral. *See Andersons*, 166 F.3d at 329 ("The alleged partiality must be direct, definite, and capable of demonstration.").

> This standard requires a stronger showing—namely, partiality that is evident—than does the appearance standard, and for good reason. Most importantly, the relevant statutory language indicates that the two standards should be different. . . . The Federal Arbitration Act requires a party to show "evident partiality." 9 U.S.C. § 10(a)(2). The word "evident" suggests that the statute requires more than a vague appearance of bias. Rather, the arbitrator's bias must be sufficiently obvious that a reasonable person would easily recognize it. By contrast, the judicial standard requires recusal if a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This language suggests that the judicial inquiry focuses on appearances—"not on whether the judge actually harbored subjective bias." *In re Antar*, 71 F.3d 97, 101 (3d Cir.1995).
>
> In addition, parties often select arbitrators precisely because they are industry insiders. Parties want someone who understands their business—even if that person already has some familiarity with the parties and issues. *See Commonwealth Coatings*, 393 U.S. at 150, 89 S.Ct. 337 (White, J., concurring) ("It is often because they are [people] of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."); *see also* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L.Rev. 1724, 1728 (2001) ("Arbitrators are selected for their experience in their respective industry and their reputation for integrity and fairness." (quotation marks and citation omitted)). An overly strict appearance standard would exclude some of the most qualified arbitrators.

Id. at 253 (citation omitted). The court rejected plaintiff's argument that *Kaplan* applies only to actual-bias cases, and not to nondisclosure cases. *Id.* at 254. The court also rejected plaintiff's claim that the rules of the American Arbitration Association require the absence of even an appearance of bias, stating: "That rule, however, does not govern our review. We are not at liberty to jettison the words of Congress in favor of a third-party standard." *Id.* (citation omitted). The court rejected plaintiff's argument that the arbitrator's receipt of a small amount of campaign funds—less than 1% of what she raised—for an unsuccessful run for a Supreme Court judgeship showed evident partiality, where the funds were actually raised by a committee rather than by the arbitrator personally, where the records were publicly available, and where plaintiff's counsel's firm contributed five times as much. *Id.* at 254-55. The court also held that the arbitrator's having co-taught a course with an attorney from a minority owner of defendant was too insubstantial to satisfy the evident partiality standard: "As for Lally–Green's teaching relationship, we conclude that it too fails to show 'evident partiality'—even if we accept Freeman's claim that she did not disclose the relationship beforehand. By itself, a professional relationship with a party's minority owner is not 'powerfully suggestive of bias.' . . . . Nor is it a specific fact 'that indicate[s] improper motives on the part of an arbitrator.' . . . The Federal Arbitration Act requires more than suppositions based on mutual familiarity " *Id.* at 255-56. Finally, the court rejected plaintiff's claim that the arbitrator fraudulently induced him to select her as arbitrator because she failed to disclose the depth of her association with defendant. It stated at 257: "Freeman fails miserably in his effort to satisfy these elements."

D. Non-Signayories Not Bound

Mendez v. Puerto Rican Int'l Companies, Inc., 553 F.3d 709, 105 FEP Cases 609 (**3d Cir.** 2009), affirmed the district court's refusal to stay proceedings as to thirty-three employees who had not been shown to have signed arbitration agreements. The court stated at 711: "Turning to the merits, the issue for resolution is whether a defendant who is entitled to arbitrate an issue which it has with one plaintiff in a suit can insist on a mandatory stay of litigation of issues it has with other plaintiffs who are not committed to arbitrate those issues. We conclude that Section 3 was not intended to mandate curtailment of the litigation rights of anyone who has not agreed to arbitrate any of the issues before the court."

E. Union Member Not Collaterally Estopped by Adverse Finding in CBA Arbitration of CBA Claims

Nance v. Goodyear Tire & Rubber Co., 527 F.3d 539, 547, 20 AD Cases 1110, 184 LRRM 2198 (**6th Cir.** 2008), affirmed the grant of summary judgment to the ADA, FMLA, and State-law defendant. The court held that plaintiff was not collaterally estopped by an arbitrator's finding under the collective bargaining agreement that plaintiff had resigned without notice.

> Generally, "once an issue has been fully litigated and necessarily determined by an adjudicatory body, a party and its privies are precluded from raising that issue in a subsequent proceeding." . . . However, when an employee like Nance submits her grievance to arbitration, she is seeking only to vindicate her contractual rights under a collective bargaining agreement. Such an employee is not barred from bringing a subsequent statutory claim against her employer based on the same conduct, because arbitration over contractual disputes under a collective bargaining agreement is of a "distinctly separate nature" than "independent statutory rights accorded by Congress." . . . Not only are the two forums independent, but they are in fact, according to the Court, "complementary since consideration of the claim by both forums may promote the policies underlying each."

(Citations omitted.)