I. Alternative Dispute Resolution

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A. Introduction

Developments in alternative dispute resolution continue to be dominated by the U.S. Supreme Court's decisions in *AT&T Mobility*[1] and *Stolt-Nielsen*[2] respecting class adjudication. In an important new decision expanding the reach of *AT&T Mobility*, the Supreme Court held in *American Express Co. v. Italian*

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1. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
2. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp, 130 S. Ct. 1758 (2010).

Colors Restaurant[3] that the Federal Arbitration Act (FAA)[4] does not permit courts to invalidate contractual waivers of class arbitration even if the claimant's cost of individually arbitrating a federal statutory claim exceeds the potential recovery. Other new cases arising from *AT&T Mobility* include decisions grappling with issues related to FAA preemption of state laws that arguably place constraints on arbitration. The Eleventh Circuit held that the FAA did not preempt a South Carolina law of general application that rendered unconscionable an attorney fee provision, thereby voiding in part the contract's arbitration clause. The Fourth Circuit held that the FAA did not preempt a Maryland law requiring arbitration clauses to be supported by adequate consideration that is independent of the consideration supporting the underlying contract. In a decision that in part presaged *American Express*, the Eighth Circuit declined to follow a ruling of the National Labor Relations Board (NLRB) invalidating waivers of class arbitration in actions brought under the Fair Labor Standards Act (FLSA),[5] directing instead that the district court enter an order compelling a bilateral arbitration of the parties' labor dispute.

A circuit split emerged between the Second and Third Circuits and the Fifth Circuit respecting the proper construction of *Stolt-Nielsen*, including the degree of deference courts should extend under the FAA to an arbitrator's award holding parties had consented to class arbitration. The Supreme Court granted a writ of certiorari to resolve that circuit split, holding in *Oxford Health Plans LLC v. Sutter*[6] that the arbitrator's decision to compel class arbitration survived the deferential standard of review mandated by § 10(a)(4) of the FAA.

Recent circuit court decisions interpreting provisions of the FAA are also reviewed. In one case, the Fifth Circuit addresses the district court's authority under § 5 of the FAA to appoint arbitrators in a multiparty dispute. In two other cases, the Second and Sixth Circuits address the current circuit split between the First and Tenth Circuits and the Fifth and Ninth Circuits respecting whether the definition of "arbitration" in the FAA should be determined by reference to state law or the federal common law, joining the circuits that apply the federal common law.

B. Supreme Court's Decision in *American Express*

Analysis of the Supreme Court's decision in *American Express* needs to begin with a brief summary of the Court's holding in *AT&T Mobility*, as these two cases serve as bookends respecting the issue of public policy objections to the enforcement of class arbitration waivers.

In *AT&T Mobility*, the Supreme Court held that the FAA preempted California's judicial rule (known as the *Discover Bank*[7] rule) governing unconsciona-

3. No. 12-133, 2013 WL 3064410 (U.S. June 20, 2013).
4. 9 U.S.C. §§ 201 et seq.
5. 29 U.S.C. § 201 et seq.
6. No. 12-135, 2013 WL 2459522 (U.S. June 10, 2013).
7. Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

bility of class arbitration waivers in consumer contracts. Under the *Discover Bank* rule, class waivers in consumer arbitration agreements were deemed unconscionable if (1) the waiver was in an adhesion contract, (2) disputes between the parties would likely involve small amounts of damages, and (3) the party with inferior bargaining power alleged a deliberate scheme to defraud.[8] The Court held that the FAA preempted the *Discover Bank* rule because it placed an impermissible burden on arbitration. The Court focused its analysis on the ways in which class arbitration procedures differ from bilateral arbitration. Class arbitration would likely alter the duration, cost, and informality of bilateral arbitration. It would simultaneously increase risks due to potentially greater financial exposure with no right of appeal, save for the limited grounds set out in the FAA for annulling awards. The Court was concerned that companies that might otherwise be inclined to utilize arbitration for dispute resolution would be concerned about the lack of procedural and substantive protections available to defendants in class arbitration. Based on these considerations, the Court concluded California's *Discover Bank* rule voiding waivers of class arbitration was inconsistent with the FAA's policy of encouraging arbitration and was therefore preempted by the federal law.

In *American Express*, the Supreme Court extended protection for waivers of class arbitration by precluding reliance on the public policy ground embodied in the "effective vindication" doctrine to preclude such waivers. While the holding in *American Express* bars use of the FAA to invalidate contractual waivers of class arbitration on the ground that a plaintiff's cost of proving a federal statutory claim exceeds the potential recovery, the impact of the decision is likely to be far broader, limiting the scope of the "effective vindication" doctrine to situations where the arbitration clause and related contractual provisions directly preclude actual prosecution of the claim.

American Express arose from a class action antitrust suit filed by the Italian Colors Restaurant, the National Supermarkets Association, Inc., and a number of other merchants claiming that American Express used its monopoly power to create a tying arrangement that violated § 1 of the Sherman Act[9] by forcing merchants that accepted American Express charge cards to also American Express credit and debit cards at rates approximately 30 percent higher than the fees for competing credit cards.[10] American Express moved to dismiss the suit and compel individual arbitration under the FAA, arguing each of the

8. *AT&T Mobility*, 131 S. Ct. at 1746.

9. 15 U.S.C. § 1 et seq.

10. A charge card requires its holders to pay the full outstanding balance at the end of a billing cycle. A credit card can be used to finance a purchase such that only a portion of the balance due plus interest must be paid each billing cycle. American Express had long focused its business on charge cards issued to businesses and wealthy individuals for travel and other business-related purposes. American Express claimed that its charge card holders were more affluent than credit cardholders and thus were "a higher class of customer" and as such more attractive to merchants. American Express thus charged higher "merchant discount fees" than mass-market credit cards such as Visa, MasterCard, and Discover. *See* In re Am. Express Merchants' Litig., 667 F.3d 204, 207 (2d Cir. 2012) [*Amex III*].

merchants had entered into a card acceptance agreement requiring disputes to be resolved through arbitration where "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis."[11] The district court granted the motion to compel arbitration, and the Second Circuit on appeal reversed, holding the class action waiver unenforceable, "because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs."[12] Central to the Second Circuit's holding was the testimony of an economics expert who opined, without serious challenge by American Express, that the cost of providing economic testimony to support the arbitration claim would be in the range of several hundred thousand to as much as one million dollars, whereas the claimant Italian Colors' maximum recovery after trebling damages would be only $38,549.[13] The cost of the economic testimony necessary to prove the case, therefore, was so great that the claimant would have no reasonable path in an individual arbitration to vindicate its statutory antitrust rights.

The Supreme Court granted American Express's petition for a writ of certiorari, then vacated and remanded the case for reconsideration in light of its decision in *Stolt-Nielsen*. On remand, the Second Circuit found its original analysis unaffected by *Stolt-Nielsen* and again reversed the district court's decision and remanded for further proceedings.[14] The Supreme Court then issued its decision in *AT&T Mobility*, and the Second Circuit *sua sponte* reconsidered its opinion in *Amex II* in light of that decision. Finding the decision did not alter its analysis because *AT&T Mobility* involved preemption of state law rather than the doctrine of "effective vindication" of federal statutory rights, the Second Circuit again reversed the district court's decision and remanded for further proceedings.[15] The Supreme Court again granted certiorari to review the Second Circuit's decision.

Reversing the Second Circuit's judgment, the Court left in place the requirement that the antitrust dispute be arbitrated rather than litigated in court, but rejected the conclusion that the FAA permits courts to invalidate a contractual waiver of class arbitration on the grounds that the cost of arbitrating an antitrust claim in an individual arbitration, as opposed to a class arbitration, exceeds the potential recovery. The Court started its analysis by stating that "Congress enacted the FAA in response to widespread judicial hostility to arbitration."[16] The Court held that, consistent with the text of the FAA, "courts must 'rigorously enforce' arbitration agreements according to their terms."[17] The FAA's mandate in favor of arbitration "holds true for claims that allege

11. *Id.* at 209.

12. *In re* Am. Express Merchants' Litig., 554 F.3d 300, 304 (2d Cir. 2009) [*Amex I*].

13. Am. Express Co. v. Italian Colors Rest., No. 12-133, 2013 WL 3064410, at *3 (U.S. June 20, 2013).

14. *In re* Am. Express Merchants' Litig., 634 F.3d 187, 199–200 (2d Cir. 2011) [*Amex II*]. The Second Circuit placed on hold the mandate in *Amex II* to allow Amex to file a petition seeking a writ of certiorari.

15. *Amex III*, 634 F.3d at 206. The Supreme Court's decision in *AT&T Mobility* held that the FAA preempted a state law barring enforcement of a class arbitration waiver.

16. *Am. Express,* 2013 WL 3064410, at *4.

17. *Id.*, citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985).

a violation of a federal statute" unless " 'overridden by a contrary congressional command.' "[18] The Court found that no such contrary congressional command required rejection of the waiver of class arbitration in the card acceptance agreement.

Responding to the Second Circuit's concern that the cost of providing the required expert economic testimony rendered individual arbitration cost prohibitive, the Supreme Court stated: "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim"[19] and further do not "evinc[e] an intention to preclude a waiver" of class action procedures.[20] In fact, the Court noted that neither the Sherman nor Clayton Acts make any reference to class actions, and it was decades after these statutes were enacted that Federal Rule of Civil Procedure 23 was adopted to allow claims to be prosecuted in a fashion other than "on behalf of the individual named parties only."[21] The Court held that "congressional approval of Rule 23" does not "establish an entitlement to class proceedings for the vindication of statutory rights."[22] Further, the Court stated *AT&T Mobility* had rejected the proposition that "federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration."[23]

The Court characterized the "effective vindication" doctrine as a "judge-made exception to the FAA" that "originated as dictum in *Mitsubishi Motors*, where we expressed a willingness to invalidate, on "public policy" grounds, arbitration agreements that "operat[e] . . . as a prospective waiver of a party's *right to pursue* statutory remedies."[24] Because the effective vindication doctrine had its origin in the *right to pursue* statutory remedies, the doctrine was applicable to (1) "a provision in an arbitration agreement forbidding the assertion of certain statutory rights," or "perhaps" (2) "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."[25] The Court concluded, however, that "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy."[26] The majority did not believe the waiver of class action arbitration in the card acceptance agreement prevented the *right to pursue* a statutory remedy.[27]

18. *Id.*, citing CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 668–69 (2012) (quoting Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987)).
19. *Id.*
20. *Id.*, citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).
21. *Id.*, quoting Califano v. Yamasaki, 442 U.S. 682, 700–01 (1979).
22. *Id.*
23. *Id.*
24. *Id.* at *5 (emphasis in original), citing *Mitsubishi Motors*, 473 U.S., at 637, n.19.
25. *Id.*
26. *Id.*
27. The majority cited two cases to support its conclusion. First, in *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28 (1991), the Court enforced a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions. Second, in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S.

Finally, the Court rejected as contrary to the FAA the "judicially created superstructure" the Second Circuit's decision would impose on parties before their claims could proceed to arbitration.[28] The Court stated: "The regime established by the Court of Appeals' decision would require—before a plaintiff can be held to contractually agreed bilateral arbitration—that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the cost of developing that evidence, and the damages that would be recovered in the event of success."[29] The Court held that "such a preliminary litigating hurdle would undoubtedly destroy the prospect of speedy resolution that arbitration in general and bilateral arbitration in particular was meant to secure."[30]

The dissenting opinion by Justice Kagan sharply criticizes the majority's reasoning. The dissent begins by providing a "nutshell version" of the case:

> The owner of a small restaurant (Italian Colors) thinks that American Express (Amex) has used its monopoly power to force merchants to accept a form contract violating the antitrust laws. The restaurateur wants to challenge the allegedly unlawful provision (imposing a tying arrangement), but the same contract's arbitration clause prevents him from doing so. That term imposes a variety of procedural bars that would make pursuit of the antitrust claim a fool's errand. So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.[31]

The dissent characterizes the majority's response to Italian Colors' dilemma as: "too darn bad."[32] This answer, Justice Kagan asserts, "is a betrayal of our precedents, and of federal statutes like the antitrust laws."[33] In the minority's view, "this is just the kind of case the [effective vindication] rule was meant to address."[34] But the majority is so "bent on diminishing the usefulness of

528 (1995), the Court enforced arbitration even though the federal statute prohibited any agreement " 'relieving' " or " 'lessening' " the liability of a carrier for damaged goods, finding the costs and expenses of arbitration abroad did not bar vindication of the statutory right. *Am. Express*, 2013 WL 30664410, at *6.

28. Even outside the context of class action arbitration, the FAA has been routinely held to authorize only the narrowest intrusion into pre-arbitral proceedings to avoid compromising the independence of the arbitrators. Except with respect to gateway issues, judicial review of arbitral authority under the FAA occurs post- rather than pre-arbitration. *See, e.g.,* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–04 (1967). *See also* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 22–23, 38 (2012).

29. Am. Express Co. v. Italian Colors Rest., No. 12-133, 2013 WL 3064410, at *7 (U.S. June 20, 2013).

30. *Id.*

31. *Id.* at *8.

32. *Id.*

33. *Id.*

34. *Id.* at *10.

Rule 23," that it is ready to dismantle everything that "looks like a class action."[35] Insisting that "the FAA was never meant to produce this outcome,"[36] the dissent concludes:

> The FAA conceived of arbitration as a "method of *resolving* disputes"—a way of using tailored and streamlined procedures to facilitate redress of injuries. . . . In the hands of today's majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.[37]

The majority and minority opinions in *American Express* demonstrate the extent to which the issue of class arbitration has transformed the Supreme Court's jurisprudence on alternative dispute resolution—once the sleepy backwater of the Court's docket—into a battleground of the ongoing left versus right, liberal versus conservative debate.

From a strictly commercial point of view, the tension between the majority's emphasis on protecting freedom of contract and the dissent's objection that a party with superior economic power can craft a contract that indirectly insulates itself from liability is one that is inherent in private dispute resolution. The Supreme Court's recent decisions have expanded and protected party autonomy in fashioning arbitration terms, in part by use of the FAA to restrict the authority of courts and legislatures to impose limits on privately agreed arbitration provisions. Parties can now contract to arbitrate a broader range of disputes than ever before, utilizing procedures that are highly customized to their commercial requirements.

When a sophisticated company prepares a customized procedure to address dispute resolution more efficiently and effectively, that procedure *by design* may indirectly limit the number of disputes filed against the company. This might be accomplished, for example, by greater reliance on mediation. But it

35. *Id.* at *15. Justice Kagan's dissent acknowledged that an agreement could prohibit class arbitration without offending the effective vindication rule "if it provided an alternative mechanism to share, shift, or reduce the necessary costs," stating "[t]he effective-vindication rule asks whether an arbitration agreement *as a whole* precludes a claimant from enforcing federal statutory rights." *Id.* at *13. The card acceptance agreement in *American Express* did more than simply prohibit class arbitration. According to the dissent, it also prohibited other conduct that would allow the claimant to economically pursue an antitrust claim through arbitration:

> The agreement also disallows any kind of joinder or consolidation of claims or parties. And more: Its confidentiality provision prevents Italian Colors from informally arranging with other merchants to produce a common expert report. And still more: The agreement precludes any shifting of costs to Amex, even if Italian Colors prevails. And beyond all that: Amex refused to enter into any stipulations that would obviate or mitigate the need for the economic analysis. In short, the agreement as applied in this case cuts off not just class arbitration, but any avenue for sharing, shifting, or shrinking necessary costs. Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.

Id. at *11. The majority opinion does not specifically address the dissent's arguments on these points.

36. *Id.*

37. *Id.* (citations omitted).

might also be achieved through a variety of provisions that together make it more difficult or less financially attractive to file and prosecute a claim, including by restrictions intended to limit the aggregation of claims by multiple claimants. From the company's point of view, a well-drafted, custom dispute resolution process will not only more efficiently and economically resolve disputes that are filed, the process itself will reduce the total number of claims (or at least the aggregate value of the claims) that are filed. Fewer and/or lower value claims means less is spent to satisfy damage claims and defense costs are lower.

Companies can to a significant extent insulate themselves from class action litigation by including arbitration clauses in their contracts. The combined effect of the *AT&T Mobility* and *American Express* cases is that companies can also insulate themselves from class arbitration by including waivers of such arbitration in their contracts. These waivers cannot in most instances be directly prohibited or restricted by state legislatures as a result of FAA preemption of state law under *AT&T Mobility*. In addition, as a result of *American Express*, the authority of the federal courts to invalidate the clauses under the FAA through judicially created rules such as the "effective vindication" doctrine has been curtailed.

As discussed below, arbitration provisions in contracts, including class waivers, can still be attacked on traditional public policy grounds applicable to contracts generally. Additionally, as discussed below in conjunction with the Supreme Court's decision in *Oxford Health Plans*, an avenue is still open to class arbitration if the arbitration clause fails to include an express waiver of that procedure.

C. Additional Cases Addressing Arbitrability of Class Actions

Since *AT&T Mobility*, lower courts have been faced with numerous scenarios in which the FAA is alleged to have preempted various types of federal and state statutes and the common law. Some of the cases discussed below arise in the context of class actions, but others involve totally unrelated contexts, including whether the FAA as interpreted in *AT&T Mobility* preempts state law restrictions on noncompetition agreements, state unconscionability laws, state laws requiring mutual consideration to enforce arbitration agreements, and the Fair Labor Standards Act (FLSA).

1. Supreme Court's Per Curiam Opinion in *Nitro-Lift Technologies*

The Supreme Court's per curiam opinion in *Nitro-Lift Technologies, LLC v. Howard*[38] rebuked the Oklahoma Supreme Court for invalidating noncompetition agreements in two employment contracts containing arbitration provisions.

38. 133 S. Ct. 500 (2012).

The Court held that the state court had ignored a basic tenet of the FAA's substantive arbitration law in failing to allow the arbitrator to decide in the first instance the validity under state law of the covenants not to compete.

The dispute in *Nitro-Lift* involved two employees who began working for a competitor of their former employer, allegedly in violation of their covenants not to compete. Their employment contracts contained arbitration clauses providing: "Any dispute, difference or unresolved question between Nitro-Lift and the Employee (collectively the "Disputing Parties") shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in Houston, Texas in accordance with the rules existing at the date hereof of the American Arbitration Association."[39]

The employees filed suit in state court seeking to declare the noncompetition agreements null and void and to enjoin their enforcement. The state court dismissed the complaint, finding an arbitrator, not the court, should resolve the dispute. On appeal, the Oklahoma Supreme Court determined that an Oklahoma statute limiting the enforceability of covenants not to compete permitted the state court, as opposed to the arbitrator, to review whether the noncompetition agreements were void as against Oklahoma's public policy.

The Supreme Court granted certiorari and vacated the decision of the Oklahoma Supreme Court. The Court noted that the state trial court found the contracts contained valid arbitration clauses and it was therefore the arbitrator's role to decide whether the noncompetition agreements were null and void. The Court specifically rejected the Oklahoma Supreme Court's analysis that its own "jurisprudence controls this issue" such that the state court could review a "contract submitted to arbitration where one party assert[s] that the underlying agreement [is] void and unenforceable."[40] Instead, the Supreme Court held "the Oklahoma Supreme Court must abide by the FAA, which is 'the supreme Law of the Land,' U.S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law."[41] Citing *AT&T Mobility*, the Court stated: "Our cases hold that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.' "[42]

Nitro-Lift is important mostly because the Supreme Court took the somewhat unusual step of granting certiorari specifically for the purpose of issuing a per curiam opinion to vacate the decision of the Oklahoma Supreme Court, thereby reinforcing the message in *AT&T Mobility* and other recent Supreme Court precedents that parties are free to consent to arbitrate most disputes and that courts and state legislatures cannot consistent with the FAA interfere with either the parties' contractual freedom to craft their arbitration agreements, or with the arbitral process before it has run its course and an award has been rendered.

39. *Id.* at 502.
40. *Id.* at 503.
41. *Id.*
42. *Id.*, quoting AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011).

2. Eighth Circuit's Decision in *Owen v. Bristol Care*

In *Owen v. Bristol Care, Inc.*,[43] the Eighth Circuit considered the enforceability of a waiver of class arbitration contained in an employment agreement. The agreement required the parties to resolve "all claims or controversies" by binding arbitration but prohibited them "from arbitrating claims subject to [the] Agreement as, or on behalf of, a class."[44]

The former employee filed suit in the district court, which the employer sought to stay in order to compel arbitration. The district court denied the employer's motion, concluding that the Supreme Court's decision in *AT&T Mobility* upholding the enforceability of a class waiver in a consumer contract was not controlling in the employment context, relying on the NLRB decision in *In re D.R. Horton, Inc.*[45] The NLRB concluded in *D.R. Horton* that class waivers are invalid in FLSA[46] cases because the FLSA provides for the right to bring a class action.

The Eighth Circuit reversed, holding that "there must be a 'contrary congressional command' for another statute, such as the FLSA, to override the FAA's mandate."[47] Finding that neither the text nor legislative history of the FLSA indicates a congressional intent to bar employees from agreeing to arbitrate FLSA claims individually, nor any "inherent conflict" between the FLSA and the FAA, the Eighth Circuit reversed the district court's decision and directed the district court to enter an order compelling arbitration.[48]

3. Eleventh Circuit's Decision in *In re Checking Account Overdraft Litigation*

The Eleventh Circuit in *In re Checking Account Overdraft Litigation*[49] rejected a challenge that *AT&T Mobility* required preemption of South Carolina law invalidating an arbitration provision as unconscionable. A customer brought a putative class action challenging certain bank fees and charges mandated in her bank services agreement (BSA). The bank responded by filing a motion in the district court to compel arbitration under FAA §§ 3 and 4. The district court denied the bank's motion, ruling that the arbitration agreement was unconscionable under South Carolina law and could not be enforced. An appeal was taken,

43. 702 F.3d 1050 (8th Cir. 2013).
44. *Id.* at 1051.
45. 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012).
46. 29 U.S.C. § 201 et seq.
47. *Owen*, 702 F.3d at 1052, citing CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 669 (2012).
48. *Id.* The Eighth Circuit's decision declining to follow the NLRB's decision in *D.R. Horton* is consistent with nearly all of the district courts to consider that decision. *See, e.g.,* Carey v. 24 Hour Fitness USA, Inc., 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012); Tenet Healthsystem Phila., Inc. v. Rooney, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012); Reyes v. Liberman Broadcasting, Inc., 146 Cal. Rptr. 3d 616 (Cal. Ct. App. 2012). *But see* Raniere v. Citigroup, Inc., 827 F. Supp. 2d 294 (S.D.N.Y. 2011).
49. 685 F.3d 1269 (11th Cir. 2012), *reh'g en banc denied* (Aug. 16, 2012).

but in the interim, the Supreme Court decided *AT&T Mobility*, so the Eleventh Circuit remanded the case to the district court for further consideration.

On remand, the district court again denied the bank's motion to compel arbitration. It held that the bank had waived its right to submit the question of arbitrability to the arbitrator because the bank had already submitted the issue to the district court, which had ruled against the bank. The district court also found (again) that the arbitration clause was unconscionable because, under a separate provision in the BSA, the bank could recover all costs and attorney fees it incurred defending the arbitration by withdrawing funds from the customer's account without prior notice, even if the bank did not prevail in the arbitration.

On appeal, the bank raised five arguments: "(1) that the question of whether the arbitration provision is enforceable must be resolved by the arbitrator; (2) that the cost-and-fee-shifting provision in the agreement that the district court held unconscionable does not apply to the arbitration provision; (3) that *Concepcion* prohibits application of South Carolina's unconscionability doctrine to the arbitration provision; (4) that the cost-and-fee-shifting provision, in any event, is not unconscionable; and (5) that the cost-and-fee-shifting provision is severable from the arbitration provision."[50] The bank prevailed only on its fifth claim.

The Eleventh Circuit affirmed the district court's determination that the bank had waived its right to arbitrate the threshold issue of unconscionability because the bank had asked the district court to determine that question in its original motion to compel arbitration.[51]

The court then turned its attention to whether the cost-and-fee provision applies to the arbitration provision and, if so, whether the FAA preempts South Carolina's doctrine of unconscionability. The bank argued the cost-and-fee-shifting provision did not apply to the arbitration because the arbitration was governed in terms of a fee shifting provision by the AAA arbitration rules, not the separate "Costs, Damages and Attorneys' Fees" provision of the BSA.[52] The Eleventh Circuit disagreed, holding that the cost-and-fee-shifting provision of the BSA applied to the entire account relationship, including *any dispute*, and hence made the customer liable for all costs of any arbitration or litigation regardless of whether the customer substantially prevailed.

Next, the court concluded that the FAA did not preempt South Carolina's unconscionability doctrine. The Eleventh Circuit held that § 2 of the FAA saved

50. *Id*. at 1274.

51. The bank argued that the Supreme Court's decision in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), required the district court to submit the issue of enforceability to the arbitrator, but the Eleventh Circuit disagreed, distinguishing *Rent-A-Center* on the grounds that the issue of unconscionability was not before the Supreme Court. *In re Checking Acct. Litig.*, 685 F.3d at 1274–75.

52. This provision provided: "You agree to be liable to the Bank for any loss, costs, or expenses, including, without limitation, reasonable attorneys' fees, the costs of litigation, and the costs to prepare or respond to subpoenas, depositions, child support enforcement matters, or other discovery that the Bank incurs as a result of any dispute involving your account. You authorize the Bank to deduct any such loss, costs, or expenses from your account without prior notice to you." *Id*. at 1275.

from preemption " 'generally applicable contract defenses' provided by state law 'such as fraud, duress, or unconscionability.' "[53] Generally applicable contract defenses included "defects in the making of the arbitration agreement," as long as the defense does not "apply only to arbitration."[54] Finding that South Carolina's unconscionability doctrine had been applied to numerous contractual provisions unrelated to arbitration, the court concluded that it was not preempted by the FAA.

The court then directed its attention to whether the arbitration agreement in the BSA was unconscionable under South Carolina law. This was a two-part analysis, requiring a determination whether (1) there was an "absence of meaningful choice on the part of one party due to one-sided contract provisions," and (2) the terms are "so oppressive that no reasonable person would make them and no fair and honest person would accept them."[55] The court concluded the cost-and-fee-shifting provision was unconscionable.

The final issue was whether the cost-and-fee-shifting provision could be severed from the arbitration clause and, if so, whether the court should exercise its discretion to "refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result."[56] The court concluded that it could sever the clause and that it should do so because the two provisions were not necessarily dependent on each other. It therefore ordered that the case be remanded to the district court with instructions to compel arbitration.

The Eleventh Circuit's analysis of the preemption issue closely tracks established precedent. State laws of general applicability to all contracts are generally not preempted. By contrast, state laws that single out arbitration, or that impose particular requirements or burdens on the arbitral process are preempted, as explained in *AT&T Mobility*.

4. Fourth Circuit's Decision in *Noohi v. Toll Bros.*

The Fourth Circuit was presented with a somewhat more difficult application of *AT&T Mobility* in *Noohi v. Toll Bros., Inc.*[57] because Maryland law imposed a requirement on arbitration clauses that it does not apply to other contract clauses. Maryland substantive law provides that an arbitration provision is treated as a severable contract from the underlying agreement in which it is incorporated. As such, the arbitration provision must be supported by adequate consideration, and it is not sufficient to rely on the consideration for the underlying contract.[58]

The facts in *Noohi* were that the plaintiffs placed a deposit on a new home to be constructed by Toll Brothers; the contract was contingent on receiving a loan

53. *Id.,* citing AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).
54. *Id.* at 1277.
55. *Id.* at 1279, citing Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007).
56. *Id.* at 1283.
57. 708 F.3d 599 (4th Cir. 2013).
58. *See* Cheek v. United Healthcare of Mid-Atl., Inc., 835 A.2d 656 (Md. 2003).

commitment. The plaintiffs applied for a loan and received a commitment, but that commitment was withdrawn and they were subsequently unable to obtain financing for a mortgage. The plaintiffs requested a return of their deposit, but Toll Brothers refused, arguing the contingency was removed when the commitment was received regardless of whether financing was actually made available. The plaintiffs filed suit in federal court under the Class Action Fairness Act,[59] and Toll Brothers filed a motion to dismiss or to stay pending arbitration based on the arbitration provision in the home purchase agreement. The district court dismissed Toll Brothers' motion because it found the arbitration agreement was unenforceable for lack of consideration, but in reaching this decision, the court failed to address whether Maryland law was preempted based on the Supreme Court's decision in *AT&T Mobility.*

On appeal, the Fourth Circuit held that because the arbitration provision required plaintiffs but not Toll Brothers to arbitrate disputes, there was no mutuality of consideration to support the arbitration clause itself. Because under Maryland law, the consideration for the underlying contract could not support the arbitration provision, that provision was void for lack of consideration. Toll Brothers argued, however, that Maryland law "imposes a requirement on arbitration clauses (mutuality within the clause itself) that does not apply to other contract clauses."[60] As the Fourth Circuit acknowledged, "[t]his contention properly gives us pause"[61] because the Maryland law requiring mutuality of consideration within the arbitration clause arguably singles out arbitration provisions for suspect status in violation of *AT&T Mobility* and other Supreme Court precedent. The Fourth Circuit concluded that

> [i]n a basic sense, the *Cheek* rule does single out an arbitration provision in a larger contract, and assess whether that provision binds both parties to arbitrate at least some claims. But on closer inspection, we are persuaded that all *Cheek* does is treat an arbitration provision like any stand-alone contract, requiring consideration. Lack of consideration is clearly a generally applicable contract defense. The *Cheek* rule does not bar the arbitration of entire categories of claims. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (holding that West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes was preempted by the FAA). Nor does it ignore an arbitration provision to gauge the enforceability of a different provision within the same contract. *See Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam) (reversing, as inconsistent with the FAA, the Oklahoma Supreme Court's invalidation of a noncompetition agreement on public policy grounds, where that agreement contained a valid arbitration clause).[62]

59. Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).
60. *Noohi*, 708 F.3d at 612.
61. *Id.*
62. *Id*. The *Cheek* rule is contrary to the law in many states, where "consideration for the underlying contract can also serve as consideration for an arbitration agreement within the contract, even though the arbitration agreement is drafted so that one party is absolutely bound to arbitrate all disputes, but the other party has the sole discretion to amend, modify, or completely revok[e] the arbitration

After conducting its analysis, and while recognizing "the gravity of the issue presented," the Fourth Circuit concluded that it was not prepared "to overturn a decision of the high court of one of the 50 states—relying on our Constitution's Supremacy Clause—despite the fact that the United States Supreme Court has never held that Congress, in enacting the FAA, intended to preempt states from requiring mutual consideration in an arbitration provision."[63] The court affirmed the judgment of the district court that the arbitration clause was void under Maryland law for lack of mutuality of consideration and that the Maryland law relied upon to void the arbitration provision was a rule of general contract law not preempted by the FAA and the Supreme Court's decision in *AT&T Mobility*.

D. Supreme Court's *Oxford Health Plans* Decision Addresses Circuit Split

In *Stolt-Nielsen*, the Supreme Court decided that parties whose arbitration clauses are silent on the issue of consent to class arbitration may not be compelled to participate in class arbitration. *Stolt-Nielsen* arose in the context of a broad form arbitration agreement to arbitrate "[a]ny dispute arising from the making, performance or termination" of a contract.[64] When a dispute arose, one party served a demand for class arbitration. To resolve whether class arbitration was permissible, the parties entered into a supplemental agreement providing that the arbitrators should decide whether to conduct the arbitration under class rules and, if so, directing them to use the American Arbitration Association's Supplementary Rules for Class Arbitrations.[65] Significantly, the parties also entered into a stipulation that their arbitration clause was "silent" with respect to class arbitration, meaning that there had "been no agreement" on the issue.[66] The arbitrators concluded that the arbitration clause allowed for class arbitration. The Supreme Court vacated the award, holding that parties could only be compelled to participate in class arbitration if there was a contractual basis for concluding they had consented to class arbitration; that consent could not be inferred simply from the fact that parties agreed to arbitrate their disputes; and

agreement at any time and for any reason." *Cheek*, 835 A.2d at 667. At the same time, however, Maryland law is arguably analytically consistent with the Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403–04 (1967), which holds that courts may adjudicate claims of "fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate"—but may not 'consider claims of fraud in the inducement of the contract generally' " when deciding whether to void the arbitration clause.

63. *Noohi*, 708 F.3d at 613. Neither the parties nor the Fourth Circuit addressed whether the one-sided and unreasonable nature of the arbitration clause rendered the clause unconscionable under state law.

64. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp, 130 S. Ct. 1758, 1765 (2010).

65. *Id.*

66. *Id.* at 1766.

that by virtue of the stipulation that there had "been no agreement" on class arbitration, the tribunal "simply imposed its own conception of sound policy" and not the terms of the contract.[67] In reaching this conclusion, the Court focused on the differences between bilateral arbitration and class arbitration, stating: "We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."[68]

Although the Supreme Court's decision in *Stolt-Nielsen* appeared to create a broad rule of decision, lower courts have grappled with the proper application of the case for a number of reasons. A circuit split arose when the Fifth Circuit expressly parted ways with the Second Circuit over the degree of deference to which an arbitrator's determination of class arbitrability was entitled under § 10(a)(4) of the FAA. Specifically, the Fifth Circuit asserted courts could examine the arbitrator's rationale for deciding whether the arbitration clause demonstrated an intent to authorize class arbitration.[69] Prior to discussing the Supreme Court's decision in *Oxford Health Plans*, it is helpful to review each of the three cases that precipitated the circuit split. A review of these cases is also helpful to understand how little new ground was broken in the Supreme Court's decision in *Oxford Health Plans* and why the issue raised in *Stolt-Nielsen* of whether the courts or arbitrators should decide class arbitrability questions may need to be addressed again by the Court.

1. Second Circuit's Decision in *Jock v. Sterling Jewelers Inc.*

The Second Circuit in *Jock v. Sterling Jewelers Inc.*[70] reversed a district court judgment that vacated an arbitral decision compelling class arbitration as inconsistent with *Stolt-Nielsen*. The district court vacated the arbitrator's award on two grounds. First, the arbitrator determined that no provision of the contract indicated an intent to *preclude* class arbitration, which the court viewed as an incorrect interpretation of the holding in *Stolt-Nielsen*.[71] Second, while the district court acknowledged that *Stolt-Nielsen* "does not foreclose the possibility that parties may reach an 'implicit'—rather than express—'agreement to authorize class-action arbitration,' " the district court

67. *Id.* at 1769.

68. *Id.* at 1776.

69. *See* Reed v. Florida Metro. Univ., Inc., 681 F.3d 630, 645–46 (5th Cir. 2012) ("To the extent that the Second Circuit decided not to undertake an inquiry into the arbitrator's reasoning, we must part ways.").

70. 646 F.3d 113 (2d Cir. 2011), *cert. denied,* 132 S. Ct. 1742 (2012).

71. The Fifth Circuit in *Reed* also commented that the arbitrator's approach in *Jock* was inconsistent with *Stolt-Nielsen. Reed,* 681 F.3d at 645 ("Instead of examining the arbitrator's award, the *Jock* majority confirmed the award even though the award based its conclusion in part upon the agreement's failure to expressly prohibit class arbitration, a rationale that is incompatible with *Stolt-Nielsen*.").

found from its review that "the record here provides no support for such an implied agreement" to arbitrate.[72]

The Second Circuit reversed "[b]ecause the district court did not undertake the appropriate inquiry—whether, based on the parties' submissions or the arbitration agreement, the arbitrator had the authority to reach an issue, not whether the arbitrator decided the issue correctly—and instead substituted its own legal analysis for that of the arbitrator's. . . ."[73] The Second Circuit stated that when the arbitration agreement gives the arbitrator the authority to reach an issue, i.e., whether the parties' contract permits class arbitration, FAA § 10(a) sets forth specific and limited grounds for vacating the award, namely: "corruption, fraud, or undue means in procurement of the award, evident partiality or corruption in the arbitrators, specified misconduct on the arbitrators' part, or 'where the arbitrators exceeded their powers.' "[74] The court therefore held: "under our precedent it is not for the district court to decide whether the arbitrator 'got it right' when the question has been properly submitted to the arbitrator and neither the law nor the agreement categorically bar her from deciding that issue."[75]

2. Third Circuit's Decision in *Sutter v. Oxford Health Plans LLC*

The Third Circuit in *Sutter v. Oxford Health Plans LLC*[76] adopted a similar approach to the Second Circuit. Sutter, a physician, filed a putative class action lawsuit against Oxford Health Plans alleging that it improperly denied, underpaid, and delayed payment to physicians with whom it had contracted. Oxford successfully moved to compel arbitration, and the parties submitted to the arbitrator the question of whether the arbitration clause in their agreement allowed for class arbitration.

The arbitration agreement made no express reference to class arbitration. Nor did the parties have any extrinsic evidence respecting whether they consented to

72. *Jock*, 646 F.3d at 118.

73. *Id.* at 122.

74. *Id.* at 121. *See also* Wall St. Assocs. L.P. v. Becker Parisbas Inc., 27 F.3d 845, 848 (2d Cir. 1994).

75. *Id*. at 124. *See also* ReliaStar Life Ins. Co. of New York v. EMC Nat'l Life Co., 564 F.3d 81, 85–86 (2d Cir. 2009). The Second Circuit's analysis in *Jock* was adopted by the First Circuit in its recent decision, *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd.*, 683 F.3d 18 (1st Cir. 2012). Fantastic Sams Franchise Corp. (franchisor) licenses a nationwide chain of hair salons. The franchisees' regional owners association filed a demand for class arbitration with the AAA, alleging the franchisor had breached its agreements with franchisees represented by the regional owners' association. The franchisor filed a petition in the district court under FAA § 4 to stay the arbitration and to compel the regional owners to arbitrate their claims on an individual basis. The district court granted franchisor's petition as to twenty-five post-1988 licensee agreements, which expressly prohibited class arbitration. It denied relief as to ten (later reduced to six) pre-1988 licensee agreements that had broad form arbitration provisions not expressly prohibiting class arbitration. Those were allowed to proceed to arbitration. The franchisor appealed to the First Circuit, which affirmed, holding that the arbitrator, not the court, should review the arbitration agreement to ascertain whether, consistent with *Stolt-Nielsen*, it provided a contractual basis for permitting class arbitration.

76. 675 F.3d 215 (3d Cir. 2012), *aff'd*, 2013 WL 2459522 (U.S. June 10, 2013).

class arbitration at the time of contracting.[77] The arbitrator determined, therefore, that he was free to analyze the arbitration clause and concluded, based on the breadth of that provision, that the parties intended to authorize class arbitration.[78] The relevant portion of the arbitration agreement provided: "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 in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator."[79]

The arbitrator determined that the first phrase of the arbitration clause was broad enough to include class actions and that the second phrase required "all such disputes," including class actions, to be arbitrated. The arbitrator noted that, given the breadth of the arbitration provision, if the parties had wished to preclude class arbitrations, they would have needed to include an express carve-out to that effect. The arbitrator therefore ordered class arbitration, which award was confirmed by the district court.

The Third Circuit, after discussing *Stolt-Nielsen* at length, affirmed the district court. The Third Circuit recognized that the Supreme Court established a "default rule under the [FAA]: 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."[80] The court found, however, that the arbitrator had grounded his analysis in the language of the arbitration agreement, which was broad. The court found no fault in the arbitrator's reliance on the breadth of the arbitration agreement, opining that "where, as here, the parties' intent with respect to class arbitration is in question, the breadth of their arbitration agreement is relevant to the resolution of that question."[81] Nor did the arbitrator's statement concerning the lack of an express exclusion of class arbitration run contrary to *Stolt-Nielsen*, as the arbitrator had not inferred the parties' intent to authorize class arbitration from their failure to preclude it.[82] The Third Circuit concluded that the arbitrator found the lack of an express exclusion merely corroborated his holding that the arbitration clause permitted class arbitration.[83]

77. Such evidence might include testimony that the parties did or did not discuss the subject of class arbitration and therefore intended that the arbitration clause permitted or barred class arbitration at the time of contracting, as was the case in *Stolt-Nielsen*.

78. In a recent California state court decision, *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (2012), the court concluded that an arbitration clause covering disputes "between myself and [Legacy Partners]" excluded class arbitration because inclusion of disputes involving additional parties was contrary to the arbitration clause even though the language in the clause did not expressly reference class arbitration.

79. *Oxford Health Plans*, 675 F.3d at 217.

80. *Id.* at 222.

81. *Id.* at 224.

82. *Id.*

83. *Id.*

3. Fifth Circuit's Decision in *Reed v. Florida Metropolitan University, Inc.*

Six weeks after the Third Circuit's decision, the Fifth Circuit issued its decision in *Reed v. Florida Metropolitan University, Inc.*,[84] holding an arbitrator exceeded his powers by certifying a class arbitration where the arbitration agreement was on its face silent on the issue. Reed, a student, filed suit against the online university he had attended. The university obtained an order from the district court compelling arbitration based on the arbitration agreement contained in Reed's enrollment agreement. Reed filed a motion for class arbitration under the AAA Supplementary Rules for Class Arbitration, which the arbitrator granted. Reed sought to confirm the arbitrator's award and the university sought to vacate it as inconsistent with *Stolt-Nielsen*. The district court confirmed the award over the university's objections. On appeal, the Fifth Circuit reversed.

As an initial matter, the Fifth Circuit agreed with the district court that the question whether the arbitration clause permitted class arbitration was properly referred to the arbitrator.[85] Contrary to the district court, however, the Fifth Circuit held the arbitrator had exceeded his powers in permitting class arbitration. In making his award, the arbitrator had focused on two provisions of the arbitration agreement. The first provided: "any dispute arising from my enrollment at Everest University, no matter how described, pleaded or styled, shall be resolved by binding arbitration."[86] The second stated: "any remedy available from a court under the law shall be available in arbitration."[87] The arbitrator held that these two provisions, read in the context of the agreement, showed that the university "implicitly agreed to class arbitration."[88] The arbitrator also relied on the Texas Education Code, which provides for class action suits, and the fact that the university had not expressly barred class arbitrations in the arbitration agreement.

The Fifth Circuit criticized the arbitrator's analysis of the parties' arbitration agreement. The student's counsel had conceded that the parties did not discuss whether class arbitration was authorized and admitted that the agreement failed to address class arbitration. Thus, the court said, the "arbitrator should have con-

84. 681 F.3d 630 (5th Cir. 2012), *reh'g en banc denied* (June 15, 2012).

85. The Fifth Circuit noted that the Supreme Court has not definitively decided whether the issue of class arbitration constitutes a gateway issue of arbitrability that is to be decided by a court at the outset of arbitration, or whether it is a procedural matter for the arbitrator to decide, subject to limited review under the FAA after an award is rendered. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (four Justices concluded that the class arbitration issue was procedural, and the Supreme Court refused to revisit the question in *Stolt-Nielsen* as the parties had agreed to submit the question to the arbitrator rather than the court). The Fifth Circuit concluded in the *Reed* case, however, that by agreeing to the AAA Commercial Rules in their arbitration agreement, the parties also consented to the AAA Supplementary Rules for Class Arbitration. The Supplementary Rules provide that the arbitrator should determine the threshold matter of whether the arbitration may proceed as a class. Therefore, the Fifth Circuit concluded that the parties' consent to the Supplementary Rules constituted "a clear agreement to allow the arbitrator to decide whether the party's [sic] agreement provides for class arbitration." *Reed*, 681 F.3d at 635–36.

86. *Reed*, 681 F.3d at 641.

87. *Id.*

88. *Id.*

sulted state or federal law to determine if a certain 'default' class arbitration rule existed in the absence of an agreement. Instead, the arbitrator focused upon the terms of the parties' contract," none of which "even remotely relates to or authorizes class arbitration."[89] The "any dispute" clause "merely reflect[ed] an agreement between the parties to arbitrate their disputes."[90] It could not be a valid basis for class arbitration as "*Stolt-Nielsen* makes clear, . . . that an 'implicit agreement to authorize class-arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate.' "[91] Additionally, the "any remedy" clause was inapposite because a class action is not itself a remedy, merely a procedural means to obtain a remedy.[92] Thus, the supposed "breadth" of the clause could not by itself support the inference that the parties intended to authorize class arbitration. The Fifth Circuit acknowledged the deferential standard of review required by § 10(a)(4) of the FAA, but held that standard of review did not preclude inquiry into the arbitrator's construction of the contract to determine whether there was a legal basis for asserting jurisdiction.[93]

4. Supreme Court's Decision in *Oxford Health Plans LLC v. Sutter*

The Supreme Court granted certiorari to address the circuit split between the Second and Third Circuits and the Fifth Circuit on the application of § 10(a)(4) of the FAA.[94] The Court unanimously affirmed the Third Circuit's decision in *Oxford Health Plans* in a decision that closely follows existing precedent.

The Supreme Court began its analysis by noting that the arbitrator in *Oxford Health Plans* had approved class arbitration before the decision in *Stolt-Nielsen* and had revisited his award in light of the Court's decision. The arbitrator issued a new opinion finding that *Stolt-Nielsen* had no effect on the case because the arbitration agreement authorized class arbitration. Citing long-standing precedent, the Court held that "an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits."[95] The Court concluded that "the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[96] Since the arbitrator had conducted two textual analyses of the arbitration agreement, each time concluding that the "text of the clause itself authorizes" class arbitration, the arbitrator's decision had to be confirmed. The Court was clear that "[n]othing we say in this opinion should be taken to reflect

89. *Id.* at 642.
90. *Id.*
91. *Id.* at 642–43.
92. *Id.* at 643.
93. *Id.* at 645–46.
94. Oxford Health Plans, LLC v. Sutter, No. 12-135, 2013 WL 2459522, at *3, n.1 (U.S. June 10, 2013).
95. *Id.* at *4, citing E. Assoc. Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000), quoting Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960).
96. *Id*.

any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading."[97] An "arbitrator's error—even his grave error—is not enough" to overturn his award under the deferential standard of review required by § 10(a)(4).[98]

Oxford argued that under *Stolt-Nielsen*, the court could vacate " 'as *ultra vires*' " an arbitrator's decision misconstruing a contract to approve class proceedings.[99] The Court stated this was a misreading of *Stolt-Nielsen*, because in that case (by virtue of the stipulation that the parties had no agreement respecting class arbitration) the arbitrator "lacked *any* contractual basis for ordering class procedures," whereas the best Oxford could argue was that its arbitrator had lacked a "sufficient" one.[100] Since reviewing the sufficiency of the arbitrator's contract construction would involve substituting the court's judgment for the arbitrator's respecting the proper interpretation of the contract, Oxford's argument had to be rejected.[101]

Nothing in the Court's decision in *Oxford Health Plans* breaks any new ground and, unlike the decision in *American Express*, the outcome is not controversial. The decision, however, does little if anything to clarify interpretive difficulties arbitrators and courts face in applying *Stolt-Nielsen*. For example, the standard form arbitration clauses recommended by the major arbitral institutions, such as the American Arbitration Association (AAA),[102] do not explicitly reference or authorize class arbitration. Standard form clauses reflect the parties' intent to submit their disputes to arbitration, but say nothing expressly about class arbitration and arguably therefore are silent on that issue. In many, if not most, instances, the parties will not have made an express agreement about class arbitration. As a result, there will be no extrinsic evidence to assist in determining whether the parties intended to submit to that process. Arbitrators and/or courts will have to draw inferences from the standard form language as to whether the parties intended to submit to class arbitration.

By design, standard form arbitration clauses, such as the one recommended by the AAA, are "broad form" agreements intended to capture "all disputes" arising from the parties' contractual relationship. By their nature, many standard form arbitration clauses are broad enough to capture disputes involving not only the direct parties to the contract, but disputes one of the contracting parties has with other similarly situated persons. As such, the possibility of class arbitration might objectively be said to be foreseeable to both parties to a bilateral contract

97. *Id.* at *6.
98. *Id.*
99. *Id.* at *4.
100. *Id.* at *5.
101. *Id.* The Court characterized the arbitrator in *Stolt-Nielsen* as making "public policy" as opposed to performing his assigned task, which was "to interpret and enforce a contract." *Id.*
102. The AAA provides the following model arbitration clause in its drafting guide: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules . . ." American Arbitration Association, A Guide to Drafting Dispute Resolution Clauses-A Practical Guide (amended and effective Sept. 1, 2007).

even if they have neither discussed nor reached an agreement concerning class arbitration. In addition, adopting a standard form arbitration clause may result in automatic incorporation of an arbitral institution's class arbitration rules. For example, consent to arbitrate under the AAA's Commercial Arbitration Rules includes consent to the AAA's Supplemental Rules for Class Arbitration. An arbitrator construing a standard form arbitration clause could point to these factors as textual support to conclude the parties intended their arbitration agreement to include consent to class arbitration.[103]

To the extent arbitrators continue to make the determination whether an arbitration clause authorizes class arbitration, similar contract language may not necessarily be construed consistently. Each arbitrator or tribunal will have the responsibility to independently interpret the contract to determine the intent of the parties to the contract. To the extent that similar facts and contractual provisions result in conflicting results, the courts will have limited ability to address these inconsistencies under the FAA's deferential standard of review. As matters presently stand, the federal courts cannot closely scrutinize application of *Stolt-Nielsen* because in most instances arbitrators are making the determinations, and the courts must give wide deference to those determinations. In short, notwithstanding the holdings in *Stolt-Nielsen, AT&T Mobility*, and *American Express*, parties seeking class arbitration may have an avenue into class arbitration if they can persuade an arbitrator that the arbitration clause is sufficiently broad that the parties must have intended to authorize class arbitration. Rarely will the arbitrator's determination be subject to annulment under § 10(a)(4), as applied in *Oxford Health Plans*.

The Supreme Court could close this avenue if it revisits the plurality decision in *Green Tree Financial*[104] allowing the determination of consent to class arbitration to be made by arbitrators. The concurring opinion in *Oxford Health Plans* by Justices Alito and Thomas suggests that at least two members of the Court may be interested in revisiting *Green Tree Financial* so the full Court can determine whether the issue of class arbitrability is a gateway issue that must be determined de novo by the courts under the FAA. After noting that *Oxford Health Plans* had consented to the arbitrator's authority to decide in the first instance whether the contract authorizes class arbitration, Justice Alito writes as follows in his concurring opinion:

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103. The Fifth Circuit in *Reed* did not find that automatic adoption of the AAA Supplemental Rules for Class Arbitration resulting from consent to AAA arbitration was contractual evidence of consent to class arbitration. However, the court concluded it was evidence the parties gave the arbitrator authority to determine whether the contract permitted class arbitration. Reed v. Florida Metro. Univ., Inc., 681 F.3d 630, 635, 646 (5th Cir. 2012), *reh'g en banc denied* (June 15, 2012). An arbitrator deciding whether the arbitration clause authorizes class arbitration might reach a different result, which decision would be subject to review only under the highly deferential standard in FAA § 10(a)(4). Accordingly, parties with contracts that might be subject to class disputes, but that wish to avoid that possibility, would be well-advised to consider negotiating for an express provision in their future contracts stating whether they consent or object to class arbitration.

104. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003). *See* the discussion of the plurality decision in *Green Tree Financial* at footnote 85, *supra*.

> But unlike petitioner, absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't. If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred "[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate."[105]

Justice Alito also questioned whether absent class members ever agreed to class arbitration and therefore whether they would be bound to any arbitral award, concluding that they would not and that distribution of opt-out notices would not cure this fundamental flaw in class arbitration proceedings.[106] The concurring opinion argues that "[c]lass arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the 'benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one. . . .' "[107] The concurrence then concludes by asserting "this possibility should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide."[108]

As acknowledged by Justice Kagan, the author of the Court's unanimous opinion:

> 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.[109]

The decision in *Stolt-Nielsen* makes clear that the Supreme Court has not yet decided whether the availability of class arbitration is a gateway question for the courts to decide de novo under the FAA.[110] In light of the outcome of *Oxford Health Plans* and considering the concurring opinion in that decision, it would not be surprising to see the Court grant certiorari in a case that would permit it to address squarely the gatekeeper issue. If the courts are allowed to decide de novo the issue of class arbitrability, the Supreme Court will have the ability to more closely police compliance with the holding in *Stolt-Nielsen*, further limiting access to class arbitration.[111]

105. Oxford Health Plans, LLC v. Sutter, No. 12-135, 2013 WL 2459522, at *7 (U.S. June 10, 2013).
106. *Id.*
107. *Id.*, quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974).
108. *Id.*
109. *Id.*
110. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp, 130 S. Ct. 1758, 1771–72 (2010).
111. Laughlin v. VMWare, Inc., 2012 U.S. Dist. LEXIS 180531 (N.D. Cal. Dec. 20, 2012), *appeal docketed*, No. 13-15149 (9th Cir. Jan. 23, 2013), is a recent example of how the deferential standard of review under the FAA limits a district court's authority to vacate arbitral awards permitting class arbitration. *VMWare* involved a more or less standard form AAA arbitration clause, providing in

E. Recent Cases Construing the Federal Arbitration Act

1. Fifth Circuit Addresses District Court's Authority to Appoint Arbitrators in Multiparty Disputes

Complications often arise when standard form arbitration clauses are utilized in multiparty contracts. A common problem is that the drafter fails to consider how the process for arbitrator appointment will work when the dispute involves two or more claimants and/or two or more respondents. Each claimant and each respondent may want to appoint its own arbitrator. That is not possible, however, if the arbitration clause specifies three arbitrators, one appointed by each party and the chair appointed by the party-appointed arbitrators. If multiple claimants or multiple respondents are unable to agree on a single arbitrator to represent all the claimants or respondents, the appointment process may reach an impasse. If the parties' arbitration agreement does not specify an appointing authority in the event of an impasse, and if the arbitration rules selected by the parties do not have a default procedure for appointing arbitrators when there are multiple parties, one or more of the parties may elect to file suit requesting a district court to appoint arbitrators under § 5 of the FAA.

A recent Fifth Circuit case demonstrates how a simple contract drafting failure can delay the arbitral process while the parties spend years and incur substantial expense litigating to have a court appoint an arbitral tribunal. *BP Exploration Libya Limited v. ExxonMobil Libya Limited*[112] involved a drilling services agreement that ExxonMobil Libya Limited executed with Noble North Africa Limited to provide deep water offshore drilling contractor services using a semi-submersible drilling rig. Thereafter, Exxon executed an assignment agreement to assign this contract (with Noble's consent) to BP Exploration Libya Limited. The parties anticipated that any dispute under the assignment agreement would be arbitrated between Exxon and BP in accordance with the terms of the arbitration provision in the assignment agreement. The parties further anticipated that any dispute with Noble would be arbitrated under the arbitration provision in the drilling services agreement. The parties apparently did not anticipate, although it appears they should have, that a dispute would arise involving all three parties.

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pertinent part: " . . . I agree that any dispute or controversy arising out of or relating to any interpretation, construction, performance or breach of this Agreement, shall be settled by arbitration to be held in Santa Clara County, California, in accordance with the rules then in effect of the American Arbitration Association." *Id.* at *1. The arbitrator permitted class arbitration, and the respondent sought to vacate the award under § 10(a)(4) of the FAA on the grounds that the arbitrator had exceeded the powers granted her in the arbitration clause and engaged in a manifest disregard of the law. The district court held that "[i]n light of [the FAA's] highly deferential standard, the Court finds that Defendant's argument is without merit." *Id.* at *4.

112. 689 F.3d 481 (5th Cir. 2012), *reh'g en banc denied* (Sept. 5, 2012). The Fifth Circuit's jurisdiction was invoked under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (New York Convention), which in the United States is implemented by the FAA, 9 U.S.C. §§ 201, et seq. Because the Fifth Circuit's decision is based on application of the FAA to the parties' contracts and chosen rules of arbitration, the court's analysis applies with equal force to U.S. parties and domestic contracts involving multiparty disputes.

A dispute arose when BP inspected the rig and found it violated certain safety and operational standards. BP notified Exxon and Noble of the deficiencies, which were not initially disputed by Exxon. Noble thereafter acquired certain parts for the rig, whereupon Exxon took the position that the assignment to BP became effective. BP asserted a continuing breach of contract, denied the assignment was effective, and issued a notice of termination of the assignment agreement.

Because Noble was not being paid by either Exxon or BP, it filed a Request for Arbitration on August 27, 2010, naming both Exxon and BP as respondents. The arbitration provision in the drilling services agreement provided that "[a]ny dispute arising out of, or in connection with, this contract shall be finally settled by arbitration under the rules of the Arbitration and Conciliation Act of 1990, by three (3) arbitrators appointed in accordance with such rules. . . ."[113] The Arbitration and Conciliation Act (ACA) Rules of Arbitration provide that "[i]f three arbitrators are to be appointed, each party shall appoint one arbitrator; and the two arbitrators thus appointed shall choose the third arbitrator."[114] The rules further provide that "[i]f within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed, the first party may request the court to appoint the second arbitrator."[115] Similarly, the rules provide that the court may appoint the presiding arbitrator if the two arbitrators cannot agree on selection of the presiding arbitrator.

Noble designated its party arbitrator when it submitted its request for arbitration. As the Fifth Circuit noted: "Almost immediately, BP and Exxon, as co-respondents to Noble's demand, realized the arbitrator appointment procedure set forth in article 7 [of the ACA rules] appeared unworkable for a dispute among three parties." BP and Exxon resisted appointment of a joint arbitrator to represent them and instead sought Noble's agreement on an alternative selection procedure. When these negotiations irretrievably broke down, BP filed suit on October 22, 2010, in federal district court in Houston, seeking judicial appointment of a tribunal pursuant to § 5 of the FAA.[116] Section 5 directs the district court to follow any method provided in the agreement for naming or appointing an arbitrator, but states in pertinent part:

> If no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy,

113. *BP Exploration,* 689 F.3d at 485, citing the Arbitration and Conciliation Act of 1990, ch. 19, Laws of the Federation of Nigeria.

114. ACA Rules, at art. 7(1).

115. *Id.* at art. 7(3).

116. After BP filed suit, both BP and Exxon designated their own arbitrators. As such, three arbitrators were designated, leaving no room on the panel for appointment of a neutral presiding arbitrator. Further negotiations failed to resolve the controversy, so BP proceeded with its suit in the district court.

> then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire. . . .[117]

BP requested the district court to adopt one of four alternative procedures for appointing a tribunal: "(1) order that the parties exchange lists of suitable arbitrators, from which each party would exercise a certain number of strikes before the court selected a panel from the remaining names; (2) order an appointing authority, such as the PCA [Permanent Court of Arbitration at The Hague], to select the entire panel; (3) order the parties to proceed to arbitration before a five-member panel, comprised of the three party-appointed arbitrators, who would choose two other arbitrators; or (4) order the parties to arbitrate before a three-member panel selected by the district court."[118] The district court entered an order directing that the three arbitrators previously appointed by the parties should select two additional neutral arbitrators such that the arbitration would be conducted by a panel of five arbitrators.

Noble appealed from the district court's order, contending (1) that it lacked authority to intervene under § 5 of the FAA; and (2) even if it did have authority, it erred in appointing a five-member tribunal because the arbitration agreement specified a three-member tribunal. The Fifth Circuit affirmed in part and vacated in part the district court's judgment.

The Fifth Circuit held that the FAA granted district courts " 'very limited' jurisdiction . . . to intervene in the arbitral process before an award," including the authority to appoint an arbitrator upon application of a party in only three instances: "(1) if the arbitration agreement does not provide a method for selecting arbitrators; (2) if the arbitration agreement provides a method for selecting arbitrators but any party to the agreement has failed to follow that method; or (3) if there is 'a lapse in the naming of an arbitrator or arbitrators.' "[119] The Fifth Circuit held there was a "lapse" or "mechanical breakdown" in naming the arbitrators that authorized the district court to intervene under § 5 of the FAA.[120]

The Fifth Circuit concluded, however, that the district court erred in directing the formation of a five-member tribunal. Citing the Supreme Court's direction in *AT&T Mobility* that arbitration agreements had to be placed on equal footing with other contracts and "enforced according to their terms,"[121] the Fifth Circuit held that "in exercising its appointment authority under § 5, the district court must respect the intentions of the parties, as demonstrated in their arbitration agreement, while at the same time, pay heed to the principle that each party

117. 9 U.S.C. § 5.

118. *BP Exploration,* 689 F.3d at 487–88.

119. *Id.* at 490–91, quoting Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co., 304 F.3d 476, 486, 490 (5th Cir. 2002).

120. *Id.* at 491. See also *In re Salomon Shareholders Derivative Litigation*, 68 F.3d 554, 560 (2d Cir. 1995) and *Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp.*, 814 F.2d 1324, 1327 (9th Cir. 1987) for examples of circumstances where delay or impasse in the appointment process constituted a "lapse" or "mechanical breakdown" justifying court intervention under the FAA.

121. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011).

should be treated fairly, if not equally, in the appointment process."[122] Another concern was that, as articulated in *Gulf Guaranty*, "there is no authorization under the FAA's express terms for a court to *remove* an arbitrator from service."[123] Because the arbitration clause and ACA Rules adopted by the parties were silent on the issue of arbitrator appointment in multiparty arbitration, the Fifth Circuit took as its starting point that the parties' contract required disputes to be resolved by a three-member tribunal. As a result, it concluded the district court erred by ordering the appointment of a five-member tribunal, which would subject any award from that tribunal to potential annulment.[124]

The more difficult problem was how the three-member tribunal should be appointed. By the time the case arrived at the Fifth Circuit, all three parties had appointed arbitrators, arguably raising the issue of whether under the FAA, any of the arbitrators could be removed from service. The Fifth Circuit did not address this issue explicitly in its opinion.[125] Rather, it started from the premise that Noble's arbitrator was appointed, and that the district court was to appoint one arbitrator for the respondent parties and, if necessary, the chair of the tribunal.

The result reached by the Fifth Circuit closely tracks the parties' arbitration agreement, but is contrary to the default appointment rules of many arbitration institutions for disputes involving multiple parties. For example, the AAA Commercial Arbitration Rules provide with respect to cases involving two or more claimants or respondents that, unless the parties agree otherwise, the AAA may appoint all the arbitrators.[126] The ICC Rules of Arbitration encourage in multiparty disputes that all the claimant parties and all respondent parties jointly

122. *BP Exploration*, 689 F.3d at 495.

123. *Gulf Guar. Life Ins. Co.*, 304 F.3d at 490. Even when an arbitrator is challenged for misconduct, bias, conflict of interest, etc., the usual procedure is not to allow the court to intervene in an ongoing arbitration. Judicial review generally must wait until the final award is rendered. At that time, the court can consider whether the arbitrator's conduct requires vacating the award. This is obviously a blunt after-the-fact procedure for addressing a problem that may be clear from the outset of an arbitration, but it serves to protect the integrity of the arbitral process by avoiding numerous court interventions that would undermine the authority and independence of the arbitrators to conduct their own proceedings.

124. *See* Bulko v. Morgan Stanley DW Inc., 450 F.3d 622, 625 (5th Cir. 2006) (citing cases where an arbitral award was vacated for failure to appoint the arbitration panel in accordance with the method specified in the arbitration provision).

125. It appears the Fifth Circuit had at least two possible grounds for concluding the BP and Exxon arbitrators were not properly appointed, thus avoiding an issue of *removing* them from service under the FAA. First, BP and Exxon did not appoint their arbitrators until *after* BP had filed suit, and the Fifth Circuit found the lapse in the appointment process giving the district court jurisdiction under § 5 had occurred *before* suit was filed, suggesting the arbitrators were never properly appointed. Alternatively, the Fifth Circuit could have concluded that the arbitration agreement contemplated one "complainant party" arbitrator and one "respondent party" arbitrator, such that appointment of more than one arbitrator by the respondents was not proper and hence BP's and Exxon's arbitrators never properly entered into service so there was no issue of *removing* them from service in violation of the FAA.

126. AAA Commercial Arbitration Rule 11(c) states: "Unless the parties agree otherwise when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators."

agree on appointment of a single arbitrator. Failing agreement, the ICC Court of Arbitration has the authority to appoint all the arbitrators.[127] The CPR Rules of Arbitration provide that if there is more than one claimant or respondent and the parties do not agree as to the appointment of any of the arbitrators, CPR will appoint all the arbitrators.[128] The UNCITRAL Rules, upon which the ACA Rules in the *BP Exploration* case were modeled, were modified in 2010 with respect to multiparty cases to give the "appointing authority" the power to select all the arbitrators, including the power to revoke appointments previously made by a party.[129]

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127. ICC Rule of Arbitration 13 provides in relevant part as follows:

6) Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to article 13.

* * *

8) In the absence of a joint nomination pursuant to articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying article 13 when it considers this appropriate.

128. CPR Arbitration Rules 5.5 and 6.4 provide as follows:

5.5 Where the arbitration agreement entitles each party to appoint an arbitrator but there is more than one Claimant or Respondent to the dispute, and either the multiple Claimants or the multiple Respondents do not jointly appoint an arbitrator, CPR shall appoint all of the arbitrators as provided in Rule 6.4.

6.4 Except where a party has failed to appoint the arbitrator to be appointed by it, CPR shall proceed as follows:

a. Promptly following receipt by it of the request provided for in Rule 6.3, CPR shall convene the parties in person or by telephone to attempt to select the arbitrator(s) by agreement of the parties.

b. If the procedure provided for in (a) does not result in the selection of the required number of arbitrators, CPR shall submit to the parties a list, from the CPR Panels, of not less than five candidates if one arbitrator remains to be selected, and of not less than seven candidates if two or three arbitrators are to be selected. Such list shall include a brief statement of each candidate's qualifications. Each party shall number the candidates in order of preference, shall note any objection it may have to any candidate, and shall deliver the list so marked to CPR, which, on agreement of the parties, shall circulate the delivered lists to the parties. Any party failing without good cause to return the candidate list so marked within 10 days after receipt shall be deemed to have assented to all candidates listed thereon. CPR shall designate as arbitrator(s) the nominee(s) willing to serve for whom the parties collectively have indicated the highest preference and who appear to meet the standards set forth in Rule 7. If a tie should result between two candidates, CPR may designate either candidate.

If this procedure for any reason should fail to result in designation of the required number of arbitrators or if a party fails to participate in this procedure, CPR shall appoint a person or persons whom it deems qualified to fill any remaining vacancy.

129. The 2010 UNCITRAL Arbitration Rules added article 10(1), which provides that "where three arbitrators are to be appointed and there are multiple parties as claimant or as respondent, unless the parties have agreed to another method of appointment of arbitrators, the multiple parties jointly, whether as claimant or respondent, shall appoint an arbitrator." But, "in the event of any failure to constitute the arbitral tribunal under these Rules," newly added article 10(3) states that "the appointing authority shall, at the request of any party, constitute the arbitral tribunal and, in doing so, may

The advantage of rules that give the appointing authority the right to designate all the arbitrators in a multiparty case is that they avoid allowing one party to gain a procedural advantage simply by being the first to file a dispute. In *BP Exploration*, for example, the Request for Arbitration could just as easily have been filed first by BP, as it was the party claiming both Exxon and Noble were in breach, and that the assignment agreement was void. Had BP filed first, it would have been allowed as the sole "claimant party" to designate the arbitrator of its choice, and Exxon and Noble would either have had to agree jointly on a "respondent party" arbitrator, or they would have been forced to accept whomever the district court appointed as their joint arbitrator. Obviously, a rule that favors first to file over other considerations is likely to engender a "race to the courthouse" mentality to avoid losing the right to select one's preferred arbitrator. Of course, the issue of arbitrator appointment is avoided if parties take the time at the outset of their contract to consider whether, if a dispute arises, there might be a need for a multiparty appointment procedure for arbitrators.[130]

2. Second and Sixth Circuits Hold Federal Common Law Defines the Term "Arbitration" for Purposes of Applying the FAA

There is a circuit split concerning whether the term "arbitration" as used in the FAA should be defined using state law or the federal common law. This is an important distinction because obtaining jurisdiction under the FAA depends on whether the proceeding for which federal court review is sought qualifies as an "arbitration" for purposes of the FAA. The First and Tenth Circuits have held that the federal common law should be used to define what constitutes arbitration[131] while the Fifth and Ninth Circuits have applied state law.[132] Recently, both the Second and Sixth Circuits have joined the First and Tenth Circuits in holding the definition of arbitration in the FAA should be determined by the federal common law.[133]

The issue of what constitutes an "arbitration" for purposes of FAA jurisdiction arises in a surprising variety of contexts. For example, courts have held that an agreement calling for "appointment of an independent tax counsel" to resolve a

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revoke any appointment already made and appoint or reappoint each of the arbitrators and designate one of them as the presiding arbitrator."

130. Although default appointment rules can address the issue of multiple claimants and/or respondents if the parties fail to address the issue in their contract, they can lead to their own set of surprises. For instance, a sole claimant in a dispute with two respondents might well be distressed to learn that because the respondents were unable to agree on a joint arbitrator, the appointing authority revoked the appointment of the claimant's arbitrator and appointed all three of the arbitrators for the parties.

131. Fit Tech, Inc. v. Bally Total Fitness Holding Corp., 374 F.3d 1, 6–7 (1st Cir. 2004); Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc., 390 F.3d 684, 689 (10th Cir. 2004).

132. Hartford Lloyd's Ins. Co. v. Teachworth, 898 F.2d 1058, 1061–63 (5th Cir. 1990); Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1582 (9th Cir. 1987).

133. Bakoss v. Certain Underwriters at Lloyds of London Certificate, 707 F.3d 140 (2d Cir. 2013); Evanston Ins. Co. v. Cogswell Properties, LLC, 683 F.3d 684 (6th Cir. 2012).

dispute constitutes "arbitration."[134] In its recent *Bakoss* decision, the Second Circuit concluded an agreement to submit a medical dispute to "a third Physician who [would] make a final and binding decision" constituted arbitration.[135] In its *Cogswell Properties* decision, the Sixth Circuit addressed the issue in the context of whether the appraisal award reached by an umpire pursuant to the Michigan appraisal statute constituted "arbitration."[136]

Under the federal common law, the Second Circuit in *Bakoss* concluded that all "arbitration" requires is that the contractual "language clearly manifests an intention by the parties to submit **certain** disputes to a specified third party for binding resolution."[137] So far as the federal common law is concerned, "[a]n adversary proceeding, submission of evidence, witnesses and cross-examination are not essential elements of arbitration" because "[i]f the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration."[138] In deciding that the federal common law was the proper source of guidance for defining the term "arbitration" in the FAA, the Second Circuit disagreed with the circuits applying state law because that would create "a patchwork in which the FAA will mean one thing in one state and something else in another."[139] The Second Circuit relied instead on "congressional intent to create a uniform national arbitration policy," which would be promoted by reliance on the federal common law.[140]

134. McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co., 858 F. 2d 825 (2d Cir. 1988).

135. *Bakoss*, 707 F.3d at 143, quoting district court decision, 2011 WL 459668 (E.D.N.Y. Sept. 27, 2011) at *7.

136. *Cogswell Props.*, 683 F.3d at 686.

137. *Bakoss*, 707 F.3d at 143, citing with approval *McDonnell Douglas*, 858 F.2d at 830 (emphasis in original).

138. *Id.* at 143, citing with approval AMF Inc. v. Brunswick Corp., 621 F. Supp. 456, 460 (E.D.N.Y. 1985).

139. *Id.* at 144, quoting Portland Gen. Elec. Co. v. U.S. Bank Trust Nat'l Ass'n, 218 F.3d 1085, 1091 (9th Cir. 2000).

140. *Id.*