

## Labor and Employment Alert

### Is *Stolt-Nielsen* a Game-Changer for Companies Considering the Use of Arbitration?

August 19, 2010

In weighing the pros and cons of alternative dispute resolution in the employment context, the scale often tips against the use of arbitration agreements due to concerns such as whether the promised speed and efficiency will, in fact, materialize in practice, as well as the unpredictability of arbitrators, the potential drawbacks of limited discovery and the extreme difficulty in appealing arbitration decisions. However, in light of the Supreme Court's April 27, 2010 decision in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 176 L.Ed. 2d 605 (2010), which strengthened the ability of companies to avoid the imposition of classwide arbitrations, employers without arbitration agreements may want to reconsider whether the balance has shifted in favor of such alternative means of resolving employment disputes.

#### *Stolt-Nielsen's* Alteration of the Class Arbitration Landscape

In *Stolt-Nielsen*, the Supreme Court emphasized the "basic precept" that arbitration "is a matter of consent, not coercion" in holding that an arbitration panel exceeded its authority under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, by presuming that "the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."<sup>1</sup> The Court held that the arbitration panel impermissibly imposed "its own view of sound policy regarding class arbitration" rather than identifying the rule of law for construing silent arbitration clauses and interpreting and enforcing the contract in light of such a default rule.<sup>2</sup> As the Court explained, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."<sup>3</sup>

The Court's ruling that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so" dramatically altered a growing "consensus among arbitrators that class arbitration is beneficial in 'a wide variety of settings'" and should be permitted unless the party opposing class treatment can "establish that the parties to the charter agreements intended to *preclude* class arbitration."<sup>4</sup> In short, the Court essentially replaced the arbitration panel's presumption in favor of class arbitration with a presumption against class arbitration where the parties to an arbitration agreement have not expressly agreed to class arbitration.<sup>5</sup>

<sup>1</sup> 130 S. Ct. at 1773, 1776.

<sup>2</sup> *Id.* at 1767-68.

<sup>3</sup> *Id.* at 1775-76. The Court identified the following "fundamental changes" that would result from shifting from bilateral to class action arbitration: (1) resolution of numerous claims versus a single claim; (2) the binding of absent parties versus the named parties to the agreement; and (3) the suddenly comparable commercial stakes between class action litigation and class action arbitration, but with a much more limited scope of judicial review. *Id.*

<sup>4</sup> *Id.* at 1769, 1775. As noted by the Court, the trend toward class arbitrations appears to have grown out of confusion over its decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), in which a plurality of the Court concluded "that the arbitrator and not a court should decide whether the contracts were indeed 'silent on the issue of class arbitration,'" but "did not establish the rule to be applied in deciding whether class arbitration is permitted." *Id.* at 1771-72.

<sup>5</sup> The Court did not decide "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 1776 n.10. See also *id.* at 1782-83 (Ginsburg, J. dissenting) (noting that the majority did not "insist on express consent to class arbitration" but that "[t]he breadth of the arbitration clause, and the absence of any provision waiving or banning class proceedings, will not do.")



[www.twitter.com/akin\\_gump](http://www.twitter.com/akin_gump)

## Possible District Court “Trend” Towards Broad Application of *Stolt-Nielsen*

Noting that “disallowance of class proceedings severely shrinks the dimensions of the case or controversy a claimant can mount,” the *Stolt-Nielsen* dissenters suggested that the decision should be read to spare “from its affirmative authorization requirement contracts of adhesion presented on a take-it-or-leave-it basis” in light of the majority’s observation that the parties at issue were “sophisticated business entities” and “that it is customary for the shipper to choose the [contract] that is used for a particular shipment.”<sup>6</sup> To date, however, district courts have not viewed *Stolt-Nielsen* so narrowly and have readily applied its holding to both employment and consumer contracts in which the bargaining power between the parties was not equal.

Specifically, in *Jock v. Sterling Jewelers, Inc.*, 2010 U.S. Dist. LEXIS 75064 (S.D.N.Y. July 26, 2010), the district court held that, in light of *Stolt-Nielsen*, if its jurisdiction were restored, it would vacate the arbitrator’s ruling permitting class arbitration of employment discrimination claims where there was no record evidence of an intent to arbitrate.<sup>7</sup> The court refused to narrow its decision based on the contextual factors outlined by the *Stolt-Nielsen* dissenters, noting that the majority’s holding was clear and unqualified.<sup>8</sup>

Second, in *Fensterstock v. Educ. Fin. Partners*, 2010 U.S. App. LEXIS 14172 (2nd Cir. July 12, 2010), a consumer student loan case involving breach of contract, fraud, unfair business practices and false advertising, the Second Circuit held that an express class arbitration waiver clause was unconscionable as a matter of California law.<sup>9</sup> However, following severance of the unenforceable clause, the court deemed the contract to be silent as to the permissibility of class arbitration and held it was without authority to order class-based arbitration in light of *Stolt-Nielsen*.<sup>10</sup>

## Conclusion

Viewed in combination, *Stolt-Nielsen*, *Jock* and *Fensterstock* have dramatically enhanced the ability of employers to avoid the imposition of classwide arbitration procedures in numerous contexts. Short of an express agreement to allow such procedures, plaintiffs likely will be hard-pressed to demonstrate an intent by the parties to do so. In addition, next Term, the Supreme Court will consider in *AT&T Mobility LLC v. Concepcion*, whether the FAA preempts “States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures -- here, class-wide arbitration -- when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.”<sup>11</sup> If the Supreme Court holds that such preemption applies, it would provide an additional barrier to classwide arbitrations.

Although this area clearly is still evolving—i.e., appellate and district courts beyond the Second Circuit may be more amenable to the *Stolt-Nielsen* dissenters’ attempt to place contextual “stopping points” on the majority decision, and there could be congressional reaction to the Supreme Court’s decisions in the future<sup>12</sup>—employers who have decided not to utilize arbitration agreements in the past should reevaluate whether this early “trend” against allowing classwide arbitrations except under narrow circumstances tips the scale in favor of a different approach to resolution of employment disputes. Employers with existing arbitration agreements also may want to review such agreements to ensure that existing language offers protection against class claims in light of the above decisions.

---

## CONTACT INFORMATION

If you have any questions concerning this alert, please contact [our labor and employment practice](#).

<sup>6</sup> *Id.* at 1783 (Ginsburg, J., dissenting).

<sup>7</sup> *Id.* at \*3.

<sup>8</sup> *Id.* at \*20. The court noted that, although factors such as the sophistication of the parties and relative bargaining power might be relevant in construing ambiguous manifestations of the parties’ intent, they could not establish consent where “the contract itself provides no reason to believe that parties reached any agreement on [the class] issue.” *Id.* The court stated in dicta that contracts of adhesion *might* warrant different treatment, but the contracts at issue did not fall into that category. *Id.* at \*16.

<sup>9</sup> *Id.* at \*14.

<sup>10</sup> *Id.*

<sup>11</sup> 176 L. Ed. 2d 1218.

<sup>12</sup> For example, the pending Arbitration Fairness Act of 2009 seeks, among other things, to ban mandatory arbitration in employment, as well as in consumer, franchise and civil rights disputes. See H.R. 1020 and S. 931.