

WHO DECIDES CLASS ARBITRABILITY?: THE VANISHING CLASS ACTION MECHANISM'S LAST STAND

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I. INTRODUCTION

The class action and arbitration mechanisms are locked in an antagonistic relationship. As the prevalence of one expands, the other shrinks. Over the past few decades, the use and enforcement of arbitration agreements has dramatically increased while class actions have all but vanished in certain contexts.¹ A series of Supreme Court decisions since the 1990s have vigorously protected a “national policy favoring arbitration”² while simultaneously dismantling the class action. Since *AT&T Mobility v. Concepcion*,³ parties to a contract have largely been able to immunize themselves from class proceedings by including class action waivers in their standard arbitration agreements. Class action proponents have been unable to circumvent this limitation.

The Supreme Court has rejected arguments that class action waivers contained within arbitration agreements are unconscionable⁴ or in violation of another federal law.⁵ Additionally, arbitration agreements need not explicitly waive class proceedings so long as they specify that arbitration shall proceed on an individual basis.⁶ As a result, arbitration agreements foreclose class actions except where they contain no class action waiver and no terms specifying individualized proceedings. But what about

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¹ For a discussion of the prevalence of such agreements in employment contracts, see Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> (finding that the use of arbitration agreements in employment contracts has grown from two percent in 1991 to over 55 percent in 2017).

² *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

³ 563 U.S. 333 (2011).

⁴ *See id.* at 341.

⁵ *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

⁶ *See id.*

arbitration agreements that do not expressly waive class proceedings and are silent as to how they should proceed?

The Supreme Court has made plain that “class arbitration” is undesirable.⁷ The majority opinions in both *Concepcion* and *Stolt-Nielsen v. AnimalFeeds* detail the dangers of permitting class arbitration, opining that arbitration is “poorly suited” to class proceedings.⁸ This has created a legal landscape in which courts are loath to interpret general arbitration agreements as allowing for class arbitration. As such, it is only where the power of interpretation is vested in an entity *other* than the courts that class arbitration can realistically occur. This gives special significance to a current circuit split over the delegation of these interpretive powers to arbitrators. The Supreme Court has held that courts shall decide the scope of arbitration absent “clear and unmistakable” evidence that the parties have agreed to let an *arbitrator* make this determination.⁹ In the context of bilateral arbitration, a widely accepted method of satisfying this standard is through the incorporation of a set of arbitration rules granting arbitrators the power to rule on their own jurisdiction, such as the American Arbitration Association (AAA) rules.¹⁰ Though some courts have refused to adopt this reasoning¹¹ and certain circuits have limited their holdings,¹² “[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”¹³

When it comes to class arbitration, however, there is no such

⁷ See *Concepcion*, 563 U.S. at 348 (“class arbitration sacrifices the principal advantage of arbitration”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686 (2010).

⁸ See *Concepcion*, 563 U.S. at 350; *Nielsen*, 559 U.S. at 686.

⁹ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Techs., Inc. v. Comm’ns Workers of Am.*, 475 U.S. 643, 649 (1986).

¹⁰ See *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Qualcomm, Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Terminix Int’l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

¹¹ See *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LH, 2014 WL 2903752, at *11 (N.D. Cal. June 25, 2014); *Meadows v. Dickey’s Barbecue Rests., Inc.*, 144 F. Supp. 3d 1069, 1078 (N.D. Cal. 2015); *Allstate Ins. Co. v. Toll Bros., Inc.*, 171 F. Supp. 3d 417, 428 (E.D. Pa. 2016); *Richardson v. Coverall N. Am., Inc.*, No. 18-532, 2018 WL 4639225, at *4 (D.N.J. 2018).

¹² See *Oracle*, 724 F.3d at 1075 (“We hold that as long as an arbitration agreement is between sophisticated parties to commercial contracts, those parties shall be expected to understand that incorporation of the UNCITRAL rules delegates questions of arbitrability to the arbitrator.”).

¹³ *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 763 (3d Cir. 2016) (quoting *Oracle*, 724 F.3d at 1074).

2020]

COMMENT

1097

consensus. Some courts draw a hard line between class and bilateral arbitration when determining whether arbitrability may be delegated.¹⁴ Relying on language in *Concepcion* and *Nielsen*, the Third Circuit held in 2016 that referencing the AAA rules does not constitute “clear and unmistakable” evidence that the parties agreed to delegate *class* arbitrability to an arbitrator.¹⁵ In 2018, the Second Circuit held the opposite.¹⁶ Following the Second Circuit approach, a narrow avenue to class actions survives. Class actions involving an arbitration agreement may proceed where that agreement: (1) contains no class action waiver; (2) does not specify that it shall proceed on an individual basis; (3) delegates arbitrability to an arbitrator; and (4) the arbitrator determines, in his discretion, that proceeding as a class would be appropriate. Under the Third Circuit approach, this narrow road evaporates: only those class actions involving no arbitration agreement will survive. Since arbitration agreements have become overwhelmingly common in a majority of standard consumer and employment contracts,¹⁷ the path to class actions in these cases has become so narrow that it may as well not exist at all.

This Comment will focus on the vanishing class action mechanism in the context of consumer and employment contracts. Part II will examine foundational Supreme Court jurisprudence that endorsed the use of class action waivers in arbitration agreements. Part III will explore obstacles to judicial interpretation of arbitration agreements that would allow for class arbitration. Part IV will analyze legal and practical considerations relating to the circuit split over the delegation of class arbitrability. Part V will offer that the elimination of the class mechanism could have negative implications both for would-be plaintiffs *and* defendants before briefly concluding in Part VI. This Comment assumes that the pervasiveness of arbitration agreements in standard consumer and employment contracts will continue to grow and does not discuss the availability of class actions to claimants in other circumstances.

II. CLASS ACTION WAIVERS

A. *Concepcion: The FAA Preempts State Law Barring Class Action Waivers*

Concepcion heralded the beginning of the end for consumer and employment class actions. The case involved a contract between Vincent

¹⁴ *See id.*

¹⁵ *See id.* at 766.

¹⁶ *See Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 398 (2d Cir. 2018).

¹⁷ Colvin, *supra* note 1.

and Liza Concepcion and AT&T for telephone services, which were advertised to include free phones, but actually included a \$30.22 sales tax fee.¹⁸ The Concepcions filed a complaint in the United States District Court for the Southern District of California that was consolidated with a putative class action alleging fraud and false advertising, among other things.¹⁹ AT&T moved to compel individual arbitration in accordance with the terms and conditions of its contract with the Concepcions.²⁰ The district court denied AT&T's motion, finding the arbitration agreement unconscionable under California law, following *Discover Bank v. Superior Court*,²¹ because it waived class-wide proceedings.²² The Ninth Circuit affirmed, holding such a rule was not preempted by the Federal Arbitration Act (FAA).²³ The Supreme Court reversed in a 5-4 decision, finding the *Discover Bank* rule inconsistent with the goals of the FAA.²⁴ Since Congress's purpose in enacting the FAA was to ensure arbitration agreements are enforced by their terms, a state law rule requiring class-wide proceedings is in direct conflict because it interferes with the fundamental attributes of arbitration.²⁵ The result of *Concepcion* is that when arbitration and state law clash, arbitration is the victor. But it was not immediately clear whether this would extend to conflicts between the FAA and another federal interest.

B. Italian Colors: *Federal Law Must Demonstrate a "Contrary Congressional Command"*

The answer came in *American Express v. Italian Colors Restaurant*,²⁶ in which merchants filed a class action antitrust suit against American Express. The agreement between American Express and the plaintiffs provided that there would be "no right or authority for any Claims to be arbitrated on a class action basis."²⁷ Plaintiffs argued that the court should not compel arbitration because the costs associated with proving an antitrust violation would far exceed any individual plaintiff's recovery, even after treble damages.²⁸ The district court ordered arbitration and the Second Circuit reversed, holding that the prohibitive costs rendered the

¹⁸ AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 113 P.3d 1100, 1108–09 (Cal. 2005).

²² *Concepcion*, 563 U.S. at 338.

²³ *Id.*

²⁴ *Id.* at 348.

²⁵ *Id.* at 344.

²⁶ American Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).

²⁷ *Id.* at 231.

²⁸ *Id.*

2020]

COMMENT

1099

waiver unenforceable,²⁹ and declining to follow *Concepcion* because it dealt with state-law preemption, unlike the federal antitrust laws at issue.³⁰ The Supreme Court granted certiorari to consider whether the FAA allowed courts “to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.”³¹

The Supreme Court overturned the Second Circuit, finding no evidence that “the FAA’s mandate ha[d] been ‘overridden by a contrary congressional command.’”³² The Court noted that the Sherman Act and the Clayton Act make no mention of class actions and declined to extend an “effective vindication” exception to the FAA which would invalidate arbitration agreements that adversely impact a party’s right to *pursue* statutory remedies.³³ The Court cited *Concepcion*, restating its specific rejection of an argument that class arbitration is necessary to vindicate all of the rights at issue.³⁴

Italian Colors extended *Concepcion* beyond state-law preemption, demanding a “contrary congressional command” in another federal law to overcome the FAA’s presumption in favor of arbitration. Such a challenge was brought in 2018, and the Court was given an opportunity to add clarity to this standard.

C. Epic Systems: “Concerted Activities” Does Not Include Class Actions

In *Epic Systems v. Lewis*,³⁵ the Court faced the question: “[s]hould employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?”³⁶ Three cases were consolidated in which employees brought putative class actions claiming they and others had been misclassified under the Fair Labor Standards Act (FLSA).³⁷ The employers moved to compel arbitration in accordance with employment agreements that required *bilateral* arbitration.³⁸ The Plaintiffs

²⁹ *Id.* at 232.

³⁰ *Id.*

³¹ *Id.*

³² *Italian Colors*, 570 U.S. at 233.

³³ *Id.* at 234–36.

³⁴ *Id.* at 238.

³⁵ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

³⁶ *Id.* at 1619.

³⁷ *Id.* at 1619–20.

³⁸ “This ‘concerted action waiver’ required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in ‘separate proceedings.’” *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016), *rev’d sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), and *vacated*, 894 F.3d 1093 (9th Cir. 2018).

argued that the saving clause of the FAA³⁹ removed the obligation of arbitration because the agreements violated the National Labor Relations Act (NLRA), which safeguards the rights of employees to “engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]”⁴⁰ The Ninth Circuit held that agreeing to forgo all collective actions violated the NLRA.⁴¹ The Supreme Court reversed on the grounds that the saving clause recognized “only defenses that apply to ‘any’ contract.”⁴² Following its reasoning in *Concepcion*,⁴³ the Court rejected the argument that a contract is unenforceable “because it requires bilateral arbitration”⁴⁴ since this position “impermissibly disfavors arbitration.”⁴⁵ The Court explained that where two federal statutes apparently conflict, it must “give effect to both.”⁴⁶ The plaintiffs failed to carry their burden of showing “a clearly expressed congressional intention”⁴⁷ to displace the FAA with the NLRA.⁴⁸ *Epic Systems* solidified the extension of *Concepcion* in *Italian Colors*, and indicates that even laws that purport to protect concerted action will not prevail against the FAA.⁴⁹

III. CLASS ARBITRABILITY

Concepcion makes clear that there is no right to class proceedings where they have been expressly waived in an arbitration agreement.⁵⁰ But the opinion and its predecessor, *Stolt-Nielsen v. AnimalFeeds*,⁵¹ also

³⁹ The section provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2018).

⁴⁰ 29 U.S.C. § 157 (2018); *Epic Sys.*, 138 S. Ct. at 1620.

⁴¹ *Epic Sys.*, 138 S. Ct. at 1620.

⁴² *Id.* at 1622.

⁴³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁴⁴ *Epic Sys.*, 138 S. Ct. at 1623.

⁴⁵ *Id.*

⁴⁶ *See Morton v. Mancari*, 417 U.S. 535, 551 (1974).

⁴⁷ *Id.*

⁴⁸ *Epic Sys.*, 138 S. Ct. at 1624.

⁴⁹ As Professor Almendares concludes, *Italian Colors* and *Epic Systems* indicate that it would take an act of Congress to counteract the effect of *Concepcion*, and “such action would have to be rather explicit.” Nicholas Almendares, *Aggregation and Governance in Litigation*, (Seton Hall Public Law, Working Paper, Aug. 8, 2018), <https://ssrn.com/abstract=3228873>.

⁵⁰ *See generally* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

⁵¹ 559 U.S. 662 (2010).

2020]

COMMENT

1101

express hostility to class arbitration on the whole.⁵² Given this, under what circumstances, if any, can class arbitration occur? An agreement expressly providing for class arbitration would presumably be valid. But would the Supreme Court permit class arbitration where an agreement is silent as to whether it will proceed individually or as a class? The cases examined below indicate that the Supreme Court would likely answer that question in the negative.

A. Nielsen: *Implicit Agreements to Class Arbitration*

Stolt-Nielsen v. AnimalFeeds is perhaps less important for its holding than it is for its reasoning. The Court addressed a dispute between Stolt-Nielsen, a shipping company,⁵³ and AnimalFeeds, a customer that relied on Stolt-Nielsen to deliver its products around the world.⁵⁴ When Stolt-Nielsen came under investigation for engaging in an illegal price-fixing conspiracy, AnimalFeeds and other vendors initiated lawsuits.⁵⁵ The standard contract used by Stolt-Nielsen contained an arbitration agreement that made no mention of class arbitration.⁵⁶ The parties stipulated to silence on the availability of class arbitration and selected a panel of arbitrators to resolve the question.⁵⁷ After hearing arguments and evidence regarding arbitration customs and usage in maritime trade, the panel determined that class arbitration was available.⁵⁸ Stolt-Nielsen sought judicial review of the panel's determination.⁵⁹ The District Court for the Southern District of New York overturned the decision and was subsequently reversed by the Court of Appeals for the Second Circuit.⁶⁰

The Supreme Court granted certiorari and found that the arbitration panel erred in allowing class arbitration.⁶¹ The Court held that, where parties *stipulate* that a contract is silent as to class arbitrability, they cannot be compelled to submit to class arbitration.⁶² Resting its analysis on the "foundational FAA principle that arbitration is a matter of consent," the Court held that a party may not be bound to class arbitration unless there is

⁵² See *Concepcion*, 563 U.S. at 350; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686 (2010).

⁵³ *Nielsen*, 559 U.S. at 666.

⁵⁴ *Id.*

⁵⁵ *Id.* at 667.

⁵⁶ *Id.*

⁵⁷ *Id.* at 668.

⁵⁸ *Id.* at 669.

⁵⁹ *Nielsen*, 559 U.S. at 669.

⁶⁰ *Id.* at 669–70.

⁶¹ *Id.* at 674.

⁶² *Id.* at 684.

a “contractual basis” for concluding that they had “*agreed to do so.*”⁶³ The Court rejected the notion that an implicit agreement to class arbitration could *ever* exist,⁶⁴ explaining that class arbitration “changes the nature of arbitration” such that it cannot be agreed to simply by submitting to arbitration.⁶⁵ Dissenting, Justice Ginsburg pointed out that if the parties had chosen a *judicial* forum to resolve “any dispute” involving a contract, class proceedings would undeniably have been available.⁶⁶

The Court’s holding, while narrow in the sense that it addressed only situations in which a contract is silent as to class arbitration, has wide implications on the interpretation of arbitration agreements at large. A few years later, the Court answered whether an arbitral decision could bind parties to class arbitration where they did *not* stipulate to silence.

B. *Sutter: Limited Review of Arbitral Decisions*

*Oxford Health Plans v. Sutter*⁶⁷ similarly involved an appeal of an arbitrator’s decision to proceed as a class. The parties, unlike in *Nielsen*, did not stipulate to silence on the availability of class arbitration and submitted the question to an arbitrator.⁶⁸ When the arbitrator determined that class arbitration was available, Oxford appealed, arguing that the arbitrator could not have found sufficient evidence of an agreement to class arbitration.⁶⁹ The Court first clarified *Nielsen*, explaining that it “overturned the arbitral decision [in *Nielsen*] because it lacked *any* contractual basis for ordering class procedures, not because it lacked . . . a ‘sufficient’ one.”⁷⁰ The Court concluded that, due to the “limited judicial review” allowed under the FAA, it could not overturn the arbitrator’s decision where the parties agreed to let an arbitrator decide.⁷¹ The Court emphasized its limited power of review while expressing skepticism that the parties actually agreed to class arbitration.⁷² A concurring opinion by Justice Alito, the author of *Nielsen*, suggested that the Court could not have

⁶³ *Id.*

⁶⁴ Importantly, Justice Alito’s opinion recognized that parties could implicitly *delegate* the question to an arbitrator, but that an arbitrator (and presumably courts) could not *answer* that question by finding an agreement to class arbitration implicit in a general agreement to arbitrate. *Id.* at 685–86.

⁶⁵ *Nielsen*, 559 U.S. at 685.

⁶⁶ *Id.* at 698.

⁶⁷ 569 U.S. 564 (2013).

⁶⁸ *See id.* at 566.

⁶⁹ *Id.* 567–68.

⁷⁰ *Id.* at 571.

⁷¹ *Id.* at 573.

⁷² *Id.* at 568–69.

2020]

COMMENT

1103

upheld the arbitrator's determination on the merits.⁷³ In 2019, however, the Supreme Court clarified what the FAA requires for a court to decide in favor of class arbitration.

C. *Varela: Implicit Agreements to Class Arbitration*

In *Lamps Plus v. Varela*,⁷⁴ the Court granted certiorari to answer the question: "Does the Federal Arbitration Act foreclose a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements?"⁷⁵ The Ninth Circuit held that a failure to reference class arbitration is not the "silence" that *Nielsen* found insufficient to show agreement.⁷⁶ The court found the language ambiguous:

At its outset, the Agreement contains a paragraph outlining Varela's understanding of the terms in three sweeping phrases. First, it states Varela's assent to waiver of "any right I may have to file a lawsuit or other civil action or proceeding relating to my employment with the Company." Second, it includes an additional waiver by Varela of "any right I may have to resolve employment disputes through trial by judge or jury." Third, "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."⁷⁷

The Ninth Circuit determined that two reasonable constructions were possible, noting the more reasonable interpretation would authorize class arbitration.⁷⁸ The Court found that no "interpretive acrobatics" were necessary to include class proceedings within the meaning of "a lawsuit or other civil legal proceeding."⁷⁹ The Court explained: "[c]lass actions are certainly one of the means to resolve employment disputes in court. That arbitration will be 'in lieu of' a set of actions that includes class actions can be reasonably read to allow for class arbitration."⁸⁰ Accordingly, the Ninth Circuit found that, construing against the drafter in accordance with

⁷³ *Sutter*, 569 U.S. at 574 ("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.'" (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010))).

⁷⁴ 139 S. Ct. 1407 (2019).

⁷⁵ *Lamps Plus, Inc. v. Varela*, OYEZ, <https://www.oyez.org/cases/2018/17-988> (last visited Feb. 23, 2020).

⁷⁶ *Varela v. Lamps Plus, Inc.*, 701 Fed. App'x. 670, 672 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697 (2018).

⁷⁷ *Id.*

⁷⁸ *Id.* at 673.

⁷⁹ *Id.* at 672.

⁸⁰ *Id.*

California law, the language met the “contractual basis” standard under *Nielsen*.⁸¹

The Supreme Court granted certiorari and readily extended *Nielsen*. After deferring to the Ninth Circuit’s finding that the agreement was ambiguous as to class arbitration under California contract law, the Court held that an ambiguous agreement cannot provide the “necessary contractual basis” required for compelling class arbitration.⁸² Relying on the reasoning of *Nielsen*, the Court found no meaningful difference between an ambiguous agreement and a silent agreement.⁸³ The Court explained that “arbitration is strictly a matter of consent”—and that it had “emphasized that foundational FAA principle many times.”⁸⁴ The “crucial differences” between bilateral and class arbitration set forth in *Nielsen* provide “reason to doubt the parties’ mutual consent to resolve disputes through classwide arbitration.”⁸⁵ The Court’s extension of *Nielsen* to ambiguous agreements eradicates any possibility that courts might find an implicit agreement to class arbitration.

IV. DELEGATING CLASS ARBITRABILITY

Taking the *Nielsen* and *Concepcion* strands of jurisprudence together, a series of extremely specific circumstances must arise for a consumer or employment class action to take place. The Supreme Court has made clear that courts may not interpret general arbitration agreements as implicitly authorizing class arbitration. And since drafters generally want to avoid class proceedings, it is unlikely that an express provision would ever be found in such agreements. It follows that only in cases where an *arbitrator* has authority over this interpretive question could class arbitration come to pass.⁸⁶ Thus, *when* arbitrators are permitted to make this determination is of critical importance. As discussed in Part I, it is nearly settled law that incorporation of a set of arbitral rules granting arbitrators the power to rule on their own jurisdiction constitutes “clear and unmistakable” evidence that the parties agreed to arbitrate the question of *bilateral* arbitrability. But courts disagree as to the efficacy of such incorporations in the case of *class* arbitrability, even where class arbitration is contemplated by the incorporated rules.

⁸¹ *Id.* at 673.

⁸² *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1415 (2019).

⁸³ *See id.* at 1416 (“Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to ‘sacrifice[] the principal advantage of arbitration.’”).

⁸⁴ *Id.* at 1415 (internal citations omitted).

⁸⁵ *Id.* at 1416 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685–86 (2010)).

⁸⁶ Recalling the limited judicial review dispositive in *Sutter*.

A. *Reed: The Sixth Circuit Extends Nielsen Pre-Varela*

In *Reed Elsevier v. Crockett*, Craig Crockett sued LexisNexis, a division of Reed Elsevier, in a putative class action alleging fraud, negligent misrepresentation, breach of contract, and a number of other theories in connection with a subscription agreement between his former law firm and the legal-research service provider.⁸⁷ LexisNexis filed a lawsuit in an Ohio district court seeking a declaration that the arbitration clause in the subscription agreement did not authorize class arbitration.⁸⁸ The court ruled in favor of LexisNexis and, on appeal, Crockett argued that an arbitrator, rather than the court, should have decided the issue of class arbitrability.⁸⁹ Citing the reasoning of *Nielsen* and *Concepcion*, the court held that the agreement did not demonstrate “clear and unmistakable” evidence that the parties agreed to arbitrate class arbitrability.⁹⁰ The arbitration agreement in question provided:

Except as provided below, any controversy, claim or counterclaim (whether characterized as permissive or compulsory) arising out of or in connection with this Order (including any amendment or addenda thereto), whether based on contract, tort, statute, or other legal theory (including but not limited to any claim of fraud or misrepresentation) will be resolved by binding arbitration under this section and the then-current Commercial Rules and supervision of the American Arbitration Association (“AAA”).⁹¹

While the court did not directly address an argument that incorporation of the AAA rules delegated the decision to an arbitrator, it held that the ambiguous agreement could not wrest the decision from the court, noting that it failed to make any mention of class arbitration.⁹² The court proceeded to conduct its own analysis of the availability of class arbitration under *Nielsen* and, relying on the same reasoning ultimately applied in *Varela* which foreclosed an implicit agreement, held that class arbitration was not available.⁹³

B. *Chesapeake: The Third Circuit Decides the Incorporation Question*

In *Chesapeake Appalachia v. Scout Petroleum*, the Third Circuit

⁸⁷ *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 596 (6th Cir. 2013).

⁸⁸ *Id.*

⁸⁹ *Id.* at 596–97.

⁹⁰ *Id.* at 599.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Reed*, 734 F.3d at 600.

addressed for the first time whether incorporation of the AAA rules delegates the question of class arbitrability to the arbitrator. In a dispute over various oil and gas leases, the United States District Court for the Middle District of Pennsylvania granted Chesapeake an order vacating an arbitral decision on the grounds that the leases did not “clearly and unmistakably” delegate the availability of class arbitration to the arbitrators.⁹⁴ The relevant arbitration agreement provided:

In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee’s operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.⁹⁵

The Third Circuit first reviewed the AAA rules, noting they are “couched in terms of individual or ‘bilateral’ arbitration proceedings” and then examined the portions that would grant an arbitrator authority to determine her own jurisdiction.⁹⁶ The court then examined precedent and explained that no binding authority required it to follow *Reed* or its prior decision, *Opalinski*, since the question was not presented in either case.⁹⁷

Nevertheless, after restating the “contractual basis” holding of *Nielsen*,⁹⁸ the court held that referencing the AAA rules did not delegate class arbitrability to an arbitrator.⁹⁹ The court expressed concerns over the “daisy-chain of cross-references” from the leases to the AAA Commercial Rules and finally to the AAA Supplementary Rules.¹⁰⁰ Concluding that the daisy-chain was susceptible to more than one reasonable interpretation, the court found that “express contractual language unambiguously delegating the question of [class] arbitrability to the arbitrator[]” was lacking.¹⁰¹ The court went on to note that, while “[v]irtually every circuit to have considered the issue has determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability,”¹⁰² “this ‘bilateral arbitration case law’ is

⁹⁴ *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 748 (3d Cir. 2016).

⁹⁵ *Id.* at 749.

⁹⁶ *Id.* These rules are discussed in more depth *infra* Part IV.D.1.

⁹⁷ *Chesapeake*, 809 F.3d at 757.

⁹⁸ *Id.* at 759.

⁹⁹ *Id.* at 766.

¹⁰⁰ *Id.* at 761.

¹⁰¹ *Id.* at 763 (quoting *Opalinski v. Robert Half Int’l, Inc.*, 761 F.3d 326, 335 (3rd Cir. 2014)).

¹⁰² *Chesapeake*, 809 F.3d at 763 (quoting *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013)).

2020]

COMMENT

1107

entitled to relatively little weight in the class arbitrability context.”¹⁰³ Relying heavily on *Nielsen* and *Concepcion*, the court enumerated concerns over the “serious consequences” of permitting class arbitration.¹⁰⁴ These consequences, it summarized, included:

[(1) a]n arbitrator . . . no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties . . . [; (2)] the presumption of privacy and confidentiality that applies in many bilateral arbitrations [does] not apply in class arbitrations[,] thus potentially frustrating the parties’ assumptions when they agreed to arbitrate[; (3) t]he arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well[; and (4)] the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited.¹⁰⁵

After concluding that the parties did not delegate the question to an arbitrator, the court adopted the district court’s analysis and held that class arbitration was unavailable.¹⁰⁶

C. Sappington: *The Second Circuit Breaks from Chesapeake*

Since *Chesapeake*, the Eighth Circuit has subsequently joined the Third Circuit on the delegation issue.¹⁰⁷ But in 2018, the Second Circuit broke from its sister circuits in *Wells Fargo Advisors, LLC v. Sappington*.¹⁰⁸ *Sappington* concerned unpaid overtime wages under the FLSA.¹⁰⁹ Former employees of Wells Fargo filed a putative class action in the Southern District of New York despite a broad arbitration agreement in their employment contracts.¹¹⁰ Wells Fargo petitioned the court to compel

¹⁰³ *Chesapeake*, 809 F.3d at 764.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (quoting *Opalinski*, 761 F.3d at 333).

¹⁰⁶ *Chesapeake*, 809 F.3d at 766.

¹⁰⁷ *See, e.g., Catamaran Corp. v. Towncrest Pharm.*, 864 F.3d 966, 973 (8th Cir. 2017) (incorporating the language of *Chesapeake*).

¹⁰⁸ 884 F.3d 392 (2d Cir. 2018).

¹⁰⁹ *Id.* at 393–94.

¹¹⁰ *Id.* at 394. Two agreements were analyzed in *Sappington*. The agreement relevant to our discussion provided:

You are agreeing to arbitrate any dispute, claim or controversy that may arise between you and Wells Fargo Advisors [Y]ou agree that any controversy or dispute . . . shall be submitted for arbitration before the [Financial Industry Regulatory Authority (“FINRA”)]. If the FINRA does not accept the controversy . . . [it] shall be submitted for arbitration before the American Arbitration Association [(“AAA”)] pursuant to its Securities

bilateral arbitration and the court denied their petition, holding that an arbitrator, not the court, must decide the availability of class arbitration.¹¹¹ The court noted that the Securities Arbitration Rules were replaced by the Commercial Arbitration Rules long before the present controversy arose, and that Rule 7 allows an arbitrator to rule on her own jurisdiction.¹¹² Since the Supplementary Rules include language referencing class proceedings, the court concluded that the combination of these rules clearly grants the question of class arbitrability to the arbitrator.¹¹³

Undeterred by “bilateral terminology” (i.e. “you and Wells Fargo”) similar to language the Third Circuit found significant in *Chesapeake*, the Second Circuit explained that references to the employee and employer are to be expected in an employment contract.¹¹⁴ The court declined to join its sister circuits, and lightly chastised them for ignoring state law in arriving at their conclusion.¹¹⁵ The court explained that while concerns about the increased stakes of class arbitration are valid, they do not bear on the appropriate question.¹¹⁶ The two-step analysis is: “(1) determining whether the question is one of arbitrability . . . and, if so (2) determining, on a case-by-case basis, whether there is clear and unmistakable evidence of the parties’ intent to let an arbitrator resolve that question.”¹¹⁷ The court found that concerns over the impact of class arbitration apply only to the first step of this analysis and that they should not bleed into the second step.¹¹⁸ Under state law, nothing more than the language of the contract¹¹⁹ was required to grant the question to an arbitrator.¹²⁰

Since *Sappington*, the Eleventh Circuit has joined the Second Circuit, evaluating an arbitration agreement stating: “Any dispute arising between [the parties] will be resolved by submission to arbitration in Broward County, State of Florida in accordance with the rules of the American Arbitration Association then in effect.”¹²¹ The court agreed that this language sufficiently incorporated the AAA Commercial Rules and

Arbitration Rules, effective May 1, 1993.

Id.

¹¹¹ *Id.*

¹¹² *Id.* at 397.

¹¹³ *Id.*

¹¹⁴ *Sappington*, 884 F.3d at 397.

¹¹⁵ *Id.* at 398.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 398–99.

¹¹⁹ *See id.* at 394.

¹²⁰ *Sappington*, 884 F.3d at 399.

¹²¹ *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1232 (11th Cir. 2018) (emphasis in original).

Supplementary Rules and thereby met the clear and unmistakable standard required to delegate the question of arbitrability to an arbitrator.¹²² The court echoed the reasoning of the Second Circuit, explaining that it read *Nielsen* to bear only on the question of “whether an agreement allows class arbitration at all, separate from the issue of who decides the question to begin with.”¹²³ Soon after, the Tenth Circuit joined the Eleventh and Second Circuits, similarly finding: “[t]he fundamental differences between bilateral and classwide arbitration are irrelevant to us at this second stage of the analysis.”¹²⁴

D. *Resolving the Circuit Split*

The legal issue in the circuit split over the delegation of class arbitrability is essentially whether the reasoning of *Nielsen* bears on the “who decides” question. Did the Third Circuit allow the “crucial differences” between bilateral and class arbitration emphasized in *Nielsen* to improperly impact its reasoning? These differences are arguably irrelevant, and the *Nielsen* Court did not face the “who decides” question, but rather whether the parties had actually consented to class arbitration. But the Third Circuit extended *Nielsen* even beyond *Varela*, decided three years later, finding that the dangers of class arbitration are so formidable that arbitrators cannot be trusted with the question of whether the parties had indeed consented to such class proceedings.¹²⁵

Further, the *Chesapeake* decision has a paradoxical effect: standard arbitration agreements with no mention of class proceedings whatsoever effectively become class action waivers.¹²⁶ This is especially unjust since a hypothetical plaintiff who actually reads the entirety of the AAA rules would likely assume that they permit class arbitration—because they do.¹²⁷ The same legal principle that justifies mandating bilateral arbitration in contracts of adhesion works an injustice upon the prudent party scrupulously upholding their duty to read. Affirming *Sappington* would, at the very least, require drafters to disclaim the unavailability of class actions

¹²² *Id.* at 1233–34.

¹²³ *Id.* at 1234.

¹²⁴ *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1247 (10th Cir. 2018).

¹²⁵ *See generally* *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016).

¹²⁶ Justice Ginsburg alluded to a similar concern at oral argument in *Varela*. *See* Oral Argument at 18:16, *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (No. 17-988), https://apps.oyez.org/player/#/roberts10/oral_argument_audio/24633.

¹²⁷ In fact, there is an entire set of supplementary rules dedicated to the procedure. *See infra* note 132. Any logical person reviewing the AAA rules would never suspect that an arbitrator could not decide to implement a procedure that had a set of rules created specifically for that purpose.

in order to absolutely preclude them. The threat of an arbitrator having leeway to allow class arbitration would presumably motivate parties with superior bargaining power to be upfront about such limitations instead of relying on the ambiguity of silence. But history teaches that the just result and the legal result are not always one and the same.

1. Legal Analysis

The crux of the debate between *Chesapeake* and *Sappington* concerns two competing readings of the *Nielsen* opinion. The courts agree that the analysis involves a two-part test, but disagree about whether the skepticism in *Nielsen* toward class arbitration is relevant to both parts of the test, or only the first. The *Nielsen* and *Varela* decisions undoubtedly contributed to the discussion of *whether* arbitrators should permit class arbitration, but did it also bear on *when* they should decide the question?

Logically, it seems that *Sappington* more closely adheres to the weight of authority. As mentioned, an overwhelming majority of circuit courts have held that incorporation of the AAA rules delegates matters of bilateral arbitrability to the arbitrator. *Chesapeake* refused to extend this precedent to class arbitration because of the harsh consequences of class proceedings. Obviously, these consequences tend to bear on what the parties reasonably understood the contract to mean—what they “clearly and unmistakably” intended—but is it reasonable to withhold certain matters of arbitrability where the plain language draws no such lines? Considering the fact that the AAA rules provide for class arbitration, this seems like a contrived effort by defendants to take only the good without the bad. In a world where cross-referencing a separate set of rules constitutes “clear and unmistakable” evidence of intent, it cannot reasonably be suggested that certain rules be followed and others ignored absent any language to that effect.

A careful review of *Nielsen* does not disrupt this conclusion. Throughout the opinion, the Court addressed the ways in which an arbitrator may *answer* the class arbitrability question, but never whether they had authority to do so in the first place. If anything, the Court acknowledged that parties may implicitly grant arbitrators this authority: “In certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties’ agreement.”¹²⁸

¹²⁸ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684–85 (2010). *But see id.* at 686 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995) (noting “that ‘one can understand why courts might hesitate to interpret silence or ambiguity on the ‘who should decide arbitrability’ point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate’ contrary to their expectations”)).

2020]

COMMENT

1111

Certainly, there are cases and controversies in which the class action mechanism might be considered a “necessary procedure.” The question then remains whether incorporating the AAA rules constitutes an “implicit[] authoriz[ation].”¹²⁹

In answering this question, a review of the AAA rules is necessary. The Commercial Rules indicate: “The arbitrator *shall have the power* to rule on his or her own jurisdiction, including any objections with respect to the existence, *scope*, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.”¹³⁰ Arbitrability is essentially a question of scope. Is the controversy at hand within the scope of what the parties agreed to arbitrate? The answer to this question will vary depending on the language in the contract, but *who* answers is plainly indicated in the rule: “the arbitrator shall have th[is] power.”¹³¹

The Supplementary Rules are applicable “to any dispute arising out of an agreement that provides for arbitration . . . on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules.”¹³² The express language of the rule provides for “arbitration on behalf of or against a class.”¹³³ Under any reasonable interpretation, this text undeniably brings class arbitration within the contemplation of the parties. In combination with Commercial Rule 7, it is the logical conclusion that this constitutes an implicit agreement to grant an arbitrator the question of class arbitrability.

The *Chesapeake* court cites no precedent for its “daisy-chain” concerns¹³⁴ and there is no reason that, where the source of an extrinsic writing is apparent, multiple documents may not be linked in this fashion. With no legal principle that would otherwise preclude the AAA rules from constituting a valid delegation of the question, the *Sappington* approach should prevail.

2. Practical Considerations

Having considered the legal questions presented by *Sappington* and *Chesapeake*, it is helpful to also consider what practical effects may result

¹²⁹ *Id.* at 684–85.

¹³⁰ *Commercial Arbitration Rules and Mediation Procedures* 13, AM. ARB. ASS’N, <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf> (last visited Nov. 4, 2018) (emphasis added).

¹³¹ *Id.*

¹³² *Supplementary Rules for Class Arbitrations* 3, AM. ARB. ASS’N, <https://www.adr.org/sites/default/files/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf> (last visited Nov. 4, 2018).

¹³³ *Id.*

¹³⁴ See *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 761 (3d Cir. 2016) (quoting only the appellees’ brief).

from their resolution. The *Nielsen* court, after answering the inquiry before it, presented a list of “fundamental” differences between bilateral and class arbitration.¹³⁵ The court’s discussion of the differences between arbitration and litigation underscores a foundational disagreement on which this discussion lies: should proceeding as a class be presumptively available in arbitration, as it is in court? The Court answers that it should not, since arbitration is contractual in nature.¹³⁶ Parties are submitting only to what they “agree” to in a contract. But, in practice, arbitration really serves as a substitute for the court system. This issue is highlighted by Justice Ginsburg in her *Nielsen* dissent:

Suppose the parties had chosen a New York *judicial forum* for resolution of “any dispute” involving a contract for ocean carriage of goods. There is little question that the designated court, state or federal, would have authority to conduct claims like AnimalFeeds’ on a class basis. Why should the class-action prospect vanish when the “any dispute” clause is contained in an arbitration agreement?¹³⁷

While the Court’s insistence that arbitration *agreements* be put on “equal footing” with any other contract is logical, it is undermined by its refusal to acknowledge that arbitral *relief* is not given the same equality.¹³⁸

¹³⁵ A portion of the opinion is reproduced below to demonstrate the Court’s fervency on this point:

Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. Under the Class Rules, “the presumption of privacy and confidentiality” that applies in many bilateral arbitrations “shall not apply in class arbitrations,” thus potentially frustrating the parties’ assumptions when they agreed to arbitrate. The arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. 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.

Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 130 S. Ct. 1758, 1776 (2010) (citations omitted).

¹³⁶ “The Court ties the requirement of affirmative authorization to the basic precept that arbitration is a matter of consent, not coercion.” *Nielsen*, 130 S. Ct. at 1782 (Ginsburg, J., dissenting) (internal quotation marks omitted).

¹³⁷ *Nielsen*, 130 S. Ct. at 1783.

¹³⁸ For further discussion of the not-so-equal footing on which American Arbitration has been placed, see Richard Frankel, *Corporate Hostility to Arbitration*, 50 SETON HALL L. REV. 707, 737 (2020).

The obvious issue with mandatory arbitration agreements, ignored by modern contract law, is that, in many cases, the “agreement” is no more than a legal fiction.¹³⁹ In its endeavor to ensure that voluntary agreements are legally binding, modern contract law assumes that contractual obligations are voluntarily entered into by informed participants.¹⁴⁰ But this assumption is made on shaky grounds and, because of it, mechanisms like the class action stand to be eliminated in many circumstances. Recall the paradox created by *Chesapeake*: the silent class action waiver.¹⁴¹ The goal of contract law has always been to give force to the intent of the parties, often at the expense of all else. But when the zeal with which we protect one party’s understanding of a term results in the judicial fabrication of another term, we must abandon this logic. To think that the delegation of an interpretation question could result in a silent waiver of rights is mind boggling, and yet this is the result that *Chesapeake* yields.

V. THE CONSEQUENCES OF ELIMINATING THE CLASS ACTION MECHANISM

There is much literature on the reasons why class actions benefit plaintiffs and those with limited bargaining power,¹⁴² but it is entirely possible that the mechanism stands to protect businesses as well. Consider the history of our country’s “race to the bottom” during the New Deal era. In the first decades of the twentieth century, businesses successfully raised federalism-based constitutional challenges to each piece of legislation seeking to deal with the pervasive, abhorrent workforce conditions.¹⁴³ The federal government contended that state legislation was ineffective at achieving minimum wage and maximum hour restrictions because employers would simply flee to another state with more favorable laws as soon as one passed.¹⁴⁴ The result forced employers to compete for the lowest possible personnel costs or go out of business. With no federally enacted “floor” on working standards, it created a “race to the bottom.” Ultimately, the government prevailed, creating a set of minimum standards,¹⁴⁵ but businesses still have little incentive to go beyond them.

¹³⁹ See, e.g., Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 BALTIMORE L. REV. 1 (2011); Matt Meinel, Comment, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer’s Reality*, 18 N.C.J.L. & TECH. 180 (2016), <http://ncjolt.org/requiring-mutual-assent-21st-century-modify-wrap-contracts-reflect-consumers-reality/>.

¹⁴⁰ Hart, *supra* note 139, at 4.

¹⁴¹ See *supra* Part III.A.

¹⁴² See, e.g., COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS?, (eds. Stefan Wrbka, et al., Cambridge University Press, 2012).

¹⁴³ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550–51 (1935).

¹⁴⁴ See *id.* at 549.

¹⁴⁵ See *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1, 45–47 (1937).

The class action mechanism allows the population at large to participate in this process of determining where lines should be drawn by allowing individuals to band together over small injustices. Businesses are therefore tasked with responding not only to regulation, but to customers and employees. While these victories are often small for each individual plaintiff, the real winner is the market at large.

Take, for example, a class action against McCormick. The case involved a small change to the packaging of McCormick pepper tins.¹⁴⁶ McCormick faced a class action lawsuit for reducing the amount of pepper sold in their four ounce tin to three ounces.¹⁴⁷ Under today's commercial standards, packaging may use air only to protect the goods (such as in bags of chips) or some other practical purpose, not simply to give the impression that there is more product within.¹⁴⁸ McCormick moved to dismiss, but the case survived.¹⁴⁹

At first blush, it is hard to imagine a smaller injustice than being fooled into buying one ounce less pepper than you expected. But while the harm to the individual is very small, what about McCormick's competitors? How many billions of ounces of pepper does McCormick sell a year?¹⁵⁰ Assuming individuals continue to use the same amount of pepper, regardless of the empty space inside, the repackaging equates to a raw 25% profit gain. But for class actions like this one, competitors would have little choice other than to engage in similar practices to keep up. While class actions routinely deal blows to individual market participants, their value as a check on unfair competition is vital to the health of the market. It requires no leap of logic to see how this principle could apply in consumer and employment contracts. Without the availability of class actions, it is possible that a "race to the bottom" situation could arise once again.

¹⁴⁶ Jacob Goldstein, *Too Much Empty Space in Pepper Tin Prompts Class-Action Lawsuit*, NPR (Apr. 20, 2016, 5:15 AM), <https://www.npr.org/2016/04/20/474935457/plane-t-money-class-action-lawsuit>.

¹⁴⁷ See *In re McCormick & Co., Inc., Pepper Prods. Mktg. & Sale Practices Litig.*, 215 F. Supp. 3d 51, 56 (D.D.C. 2016).

¹⁴⁸ *Id.* at 60.

¹⁴⁹ Tamara Burns, *McCormick Attempts to Sidestep Pepper False Ad Lawsuit*, TOP CLASS ACTIONS (July 22, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/340441-mccormick-attempts-sidestep-pepper-false-ad-lawsuit/>.

¹⁵⁰ McCormick has projected \$5 billion in sales in 2019. Lorraine Mirabella, *McCormick Expects to Hit \$5 Billion in Sales by 2019*, BALTIMORE SUN (Apr. 4, 2017, 11:06 AM), <https://www.baltimoresun.com/business/bs-bz-mccormick-investor-day-20170404-story.html>. Notably, the advertisement of its new plastic packaging makes no mention of its quantity reduction.

2020]

COMMENT

1115

VI. CONCLUSION

The Class Action and Arbitration mechanisms have been set against one another by American jurisprudence. As the use of arbitration agreements expands, the availability of class actions diminishes. The Supreme Court has determined that the congressional intent of the FAA to give force to arbitration agreements is paramount, and neither state law nor federal statutes have managed to offset this reality.¹⁵¹ Since *Concepcion*, the Court has taken the stance that a party's interest in proceeding collectively cannot override the existing "national policy favoring arbitration."¹⁵² Extensions of *Concepcion* have indicated that it makes no difference that statutory rights are impacted,¹⁵³ and that agreements need not make express mention of the class mechanism to waive it.¹⁵⁴

The Court has also expressed great skepticism in *Nielsen* and *Concepcion* that class proceedings should ever take place in an arbitral setting.¹⁵⁵ Except where parties grant the question of class arbitrability to an entity other than the judiciary, it has become extremely unlikely that such proceedings will occur. This reality has thrust weight upon a circuit split concerning when an arbitrator may decide questions of class arbitrability.¹⁵⁶ The narrow issue, presented by the *Chesapeake-Sappington* circuit split, appears to be no more than a simple matter of contract interpretation. But its effect on the class action mechanism is enormous. Following the *Chesapeake* approach, a paradoxical 'silent class action waiver' results, whereupon parties may waive their right to a class action by signing a contract making no mention of class proceedings. By contrast, the *Sappington* approach preserves an already narrow avenue to class actions.

Regardless of how the *Chesapeake-Sappington* circuit split is resolved, the class mechanism is in danger of extinction in the consumer and employment setting. This is obviously harmful to would-be plaintiffs, as they lose a significant source of power to collectively influence the way businesses conduct activities. But the market itself stands to suffer as well. Our nation's history makes plain the dangers of an entirely unregulated

¹⁵¹ See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018); *Italian Colors Rest. v. Am. Express Co.*, 133 S. Ct. 2304, 2309 (2013); *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

¹⁵² See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

¹⁵³ See *Italian Colors*, 133 S. Ct. at 2312.

¹⁵⁴ See generally *Epic Sys.*, 138 S. Ct. at 1617–18.

¹⁵⁵ See *Concepcion*, 563 U.S. at 347–48; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1775–76 (2010).

¹⁵⁶ See *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 755–56 (3d Cir. 2016); *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 398 (2d Cir. 2018).

market. Class actions are one of several necessary checks on businesses that prevent competitors from being forced to decide between copying less scrupulous practices or going out of business. The future of the class action mechanism in other contexts remains uncertain. But unless our jurisprudence changes course, it is entirely possible that we will face yet another economic downturn once arbitration extinguishes the class action mechanism for consumers and employees altogether.