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"Silence Is Golden": Lamps Plus, Inc. v. Varela *Holds That Ambiguous Arbitration Agreements Bar Class Actions*

By Paul W. Cane, Jr.[1]

Most well-drawn employment arbitration agreements have included an express class-action waiver since the Supreme Court enforced such waivers in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Confusion abounded, however, over agreements that were unclear whether the parties intended to permit or foreclose class proceedings. The Supreme Court dispelled the confusion April 25 with its decision in *Lamps Plus, Inc. v. Varela*, 587 U.S. ___ (No. 17-988), a decision that will affect the disposition of many pending cases.

Facts and Procedural History

Employee Frank Varela sought to represent a class of plaintiffs who contended that Lamps Plus mistakenly had disclosed to a hacker tax information for 1,300 company employees. Varela, however, previously had entered into an agreement requiring him to arbitrate any disputes he might have with Lamps Plus. When Varela filed his class action in court, Lamps Plus moved to enforce his arbitration agreement and to dismiss the class allegations. The trial court enforced the arbitration agreement but refused to dismiss the class allegations. The U.S. Court of Appeals for the Ninth Circuit affirmed in a 2-1 decision. Varela's agreement said nothing one way or the other about class actions, so the court of appeals applied the rule of *contra proferentem*—construe any ambiguity against the party who drafted the document—and held that the case was arbitrable on a class basis. *Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672 (9th Cir. 2017).

But the U.S. Supreme Court reversed.

Majority Opinion

Writing for the majority, Chief Justice Roberts explained that the Court "face[d] the question whether, consistent with the [Federal Arbitration Act], an ambiguous agreement can provide the necessary 'contractual basis' for compelling class arbitration. We hold that it cannot." Slip op. at 6 (citation omitted). "'[T]he first principle that underscores all of our arbitration decisions' is that '[a]rbitration is strictly a matter of consent.'" *Id*. at 7 (citation omitted). In evaluating whether the parties consented to a class action, "it is important to recognize the 'fundamental' difference between class arbitration and the individualized form of arbitration envisioned by the FAA." *Id*. (citations omitted). Those differences are many: "In individual arbitration, 'parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater

efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.'" *Id*., *quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l, Inc*., 559 U.S. 662, 685 (2010). A class action "lacks those benefits"; "[i]t 'sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.'" Slip op. at 8. Courts therefore "may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.' Silence is not enough." *Id*. (emphasis in original; citation omitted). And, "[l]ike silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage[s] of arbitration.'" *Id*., *quoting Concepcion*, 563 U.S. at 348. Varela's case therefore must be arbitrated on an individual basis only, the majority held.

The *contra proferentem* rule did not produce a different result. That "rule cannot be applied to impose class arbitration in the absence of the parties' consent." Slip op. at 12. "Courts may not infer from an ambiguous agreement that parties have consented" to class litigation. *Id.*

Dissenting Opinions

Four justices dissented. Justice Ginsburg, writing for herself and two others, contended that all of the Court's arbitration cases over the past decade were incorrectly decided. Justice Breyer separately dissented on technical jurisdictional grounds. Justice Sotomayor dissented, saying that the incorporated AAA rules could be read to permit class arbitration here, and that the lower courts correctly resolved any ambiguity against Lamps Plus. Justice Kagan also separately dissented, joined by the three other dissenters, also contending that any ambiguity should be construed against the drafter.

Take Aways

Before *Lamps Plus*, plaintiffs urged courts to read tea leaves in arbitration agreements to allow class relief. Such tea leaves, for example, were references to American Arbitration Association or JAMS rules (because each organization has a set of class arbitration rules); statements that "any and all claims" were subject to arbitration; and provisions allowing the arbitrator to grant "all relief that a court could award." *Lamps Plus* teaches, however, that such tea leaves at most raise an ambiguity, and an ambiguous agreement cannot "provide the necessary contractual basis" to allow class proceedings. Slip op. at 6. Many cases now in litigation, especially those involving older agreements that did not include express class- and collective-action waivers, should succumb to the rule in *Lamps Plus*.

Nevertheless, best practice is still to include an express class- and collective-action waiver. In addition, employers out of an abundance of caution should specify that a court, and not an arbitrator, should make the threshold decision whether a class arbitration can proceed. *Lamps Plus* should have ended any debate on the availability of a class arbitration, but expressly assigning the question to a court helps guard against a decision by a rogue arbitrator. Without such a provision in the arbitration agreement, a few courts assign the question to the arbitrator, and the Supreme Court has not definitively resolved that issue. Finally, employers should be mindful that, notwithstanding the Supreme Court's pro-arbitration majority, courts and legislatures in many states continue to express (or at least harbor unspoken) hostility to predispute arbitration agreements. Employers are well advised periodically to review their arbitration programs with legal counsel to ensure that they are, and remain, state of the art.

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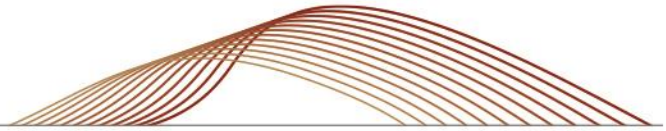

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