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Class Arbitration: Is it for the Court or an Arbitrator to Decide?

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I. INTRODUCTION

The number of companies that use arbitration clauses has increased.[1] For example, common news outlets such as CNN have incorporated arbitration clauses into their terms of service.[2] The increase in popularity of arbitration clauses has caused questions regarding the interpretation of arbitration agreements when an arbitration clause is not specific and is ambiguous as to class arbitration. This occurs when an arbitration clause contains direct language that certain matters will be arbitrated but the clause is ambiguous on class arbitration.[3] The ambiguity creates a problem determining whether the consumer or employee can join with other class members when the arbitration clause does not explicitly waive it.

Currently, the United States has a strong policy in favor of arbitration evidenced by the Federal Arbitration Act.[4] In light of this policy, courts will uphold arbitration clauses unless there are "grounds in law or equity" to revoke the clause.[5] Who makes the decision whether class arbitration is permissible under an arbitration agreement has become an increasingly important issue. The issue of who decides whether class arbitration is permissible arises when an arbitration clause does not have a class action waiver and does not specifically state that arbitrators are decide whether or not class arbitration is permissible.[6]

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[1] Kathleen Pender, *Wells Fargo Tightens Tough Arbitration Agreement*, SF TIMES, (Jan. 17, 2012) http://www.sfgate.com/business/article/Wells-Fargo-tightens-tough-arbitration-agreement-2575609.php ("more companies have added clauses to forced arbitration agreements prohibiting consumers from initiating or participating in class-action suits."); David S. Clancy & Matthew M.K. Stein, "*An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*," 63 BUS. LAW. 55, 56 (2007); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 880, 882-84 (2008)

[2] *See Terms of Service* (January 18, 2015) http://www.cnn.com/2015/01/06/world/terms-service/

[3] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1764, 1772 (2010); *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326, 332-334 (3d Cir. 2014)

[4] *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858 (1984); *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 476, 109 S.Ct. 1248, 1254 (1989); 9 U.S.C.S § 2

[5] 9 U.S.C.S § 2

[6] *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1764, 1772 (2010)

The Supreme Court has not yet decided whether courts or arbitrators decide if an arbitration clause permits class-wide arbitration. Currently, there is a split in the circuit courts on the issue. Two circuit courts have ruled that a court rather than an arbitrator should decide whether an arbitration clause allows class arbitration.[7] Alternatively, the Fifth Circuit, prior to the most recent Supreme Court decisions on class arbitration, held that arbitrators should decide whether or not an arbitration clause permits class arbitration.[8]

It is important to classify the question of class arbitrability as a "gateway" matter or a "subsidiary" matter in order to address whether the question of class arbitrability is for an arbitrator or a court to decide. Gateway matters address whether the parties' action is governed by the arbitration agreement.[9] In other words, they relate to whether or not the parties are bound by the arbitration agreement or whether a binding arbitration clause applies to the particular issue.[10] For example, jurisdictional or threshold issues are gateway matters. [11] Conversely, subsidiary questions are questions that "grow out of the dispute and bear on its final disposition."[12] Normally, gateway matters are for the court to decide and subsidiary matters are for the arbitrators to decide.[13] Unless the parties explicitly allocate gateway issues to an arbitrator, the gateway matters are for a court to address.[14]

Because class arbitration is inherently different than bilateral arbitration, this note focuses

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[7] *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326 (3d Cir. 2014); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013)
[8] *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*, 343 F.3d 355, 358 (5th Cir. 2003)
[9] *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84, 123 S.Ct. 588, 592 (2002)
[10] *Id.*
[11] Paul Bennett IV, *Waiving" Goodbye to Arbitration: A Contractual Approach*, 69 WASH & LEE L. REV. 1609, 1628 (2012)
[12] *Id.* (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S.Ct. 909, 918 (1964))
[13] *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84, 123 S.Ct. 588, 592 (2002)
[14] Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielson, Rent-A-Center, Concepcion And The Future Of American Arbitraiton*, 22 AM. REV. INT'L ARB. 323, 347-349 (2011); *See e.g. AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 106 S.Ct. 1415 (1986);

on why a court should decide whether or not the arbitration agreement permits class-wide arbitration. This note does not address non-class joinder issues or other multiparty arbitration issues. Class arbitration is different from non-class joinder because of the class size[15] and the type of relief requested and therefore this analysis focuses solely on class arbitration.[16]

Part II provides a brief background on the Federal Arbitration Act, Supreme Court decisions discussing class arbitrability, and the circuit split addressing who decides the question of class arbitration. Part III will explain why the Third and Sixth Circuit analyses are correct in determining that a court should decide whether or not an agreement permits class arbitration. The analysis will focus on why that the question of class arbitrability is a gateway matter and why the courts are better equipped to deal with the issue of class arbitrability. Further, it will discuss the repercussions of having a court decide whether an arbitration clause permits class-wide arbitration. Part IV will summarize the analysis.

II. BACKGROUND

A. THE FEEDERAL ARBITRATION ACT

The United States has a strong policy in favor of arbitration.[17] In 1925, the United States Congress passed the Federal Arbitration Act ("FAA") in order to ensure that parties' agreements were enforced.[18] The Savings Clause of the FAA states,

> 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,

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[15] AAA Supplementary Rules for Class Arbitration, Rule 4(a)(1) *available at* https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf; *See also* Fed. R. Civ. P. 23(a); JAMS Class Action Procedures, Rule 3(a) *available at* http://www.jamsadr.com/rules-class-action-procedures/

[16] S.I. Strong, *Does Class Arbitration Change the Nature of Arbitration? Stolt- Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 218-19 (2012) ("Class arbitrations involve representative, rather than individual, claims"); Maureen Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1711 (discussing due process concerns with class arbitration)

[17] *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S.Ct. 852, 858 (1984)

[18] *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220, 105 S.Ct. 1238, 1242 (1985)

> 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.S § 2. This portion of the FAA is important because it makes arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[19] Therefore, arbitration agreements will control how parties proceed in their dispute despite whether or not a party prefers to resolve the matter in court. The FAA also states that the court can make an "order directing the parties to proceed to arbitration in accordance with the terms of the agreement."[20] This means that arbitration agreements are contracts and will be interpreted by the court through the lens of contract law. Furthermore, the Supreme Court has maintained that parties have leeway to limit their own arbitration agreement.[21] Thus, parties may incorporate terms into their arbitration agreement if they so choose. The strong policy favoring arbitration and a policy adherencing to the terms agreed upon by the parties creates the backdrop for the class arbitrability issue at hand.

B. SUPREME COURT PRECEDENT

Currently, there is no majority Supreme Court decision that addresses who decides whether an arbitration agreement permits class arbitration when the arbitration agreement does not specify who decides the issue.[22] *Bazzle* was the first Supreme Court decision to directly discuss the issue of who decides if an arbitration agreement permits class arbitrability.[23] Following *Bazzle*, the court has addressed the issue of class arbitration in several Supreme Court decisions, but has not decided

[19] 9 U.S.C.S § 2
[20] 9 U.S.C.S § 4
[21] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011) ("[The arbitration agreement] can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets."
[22] *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2068 n.2 (2013)
[23] *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003)

whether class arbitration is a gateway issue or subsidiary issue when an arbitration agreement is silent on whether it permits class arbitration.[24]

1. Green Tree Fin. Corp. v. Bazzle

Green Tree Fin. Corp. v. Bazzle was the first Supreme Court case to address the issue squarely, but the Supreme Court failed to obtain a majority of the justices in its decision.[25] Respondents Lynn and Burt Bazzle received a home improvement loan with an arbitration clause from Green Tree.[26] The arbitration clause read:

> "ARBITRATION--All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . *shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.* This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1 [9 U.S.C.S. § 1] . . . . THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN). . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief."[27]

Both sets of customers claimed that Green Tree failed to provide a form that explained that they had a right to name their own lawyers and insurance agents.[28]

The Bazzles wished to certify a class in their action, and Green Tree "sought a stay of the court proceeding."[29] The South Carolina state trial court certified the class and compelled

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[24] *See Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011)
[25] *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003)
[26] *Id.* at 447 ("Daniel Lackey and George and Florine Buggs [also] entered into loan contracts and security agreements for the purchase of mobile homes with Green Tree.")
[27] *Id.* at 448
[28] *Id.*
[29] *Id.* at 449

arbitration and the arbitrator awarded "the class $10,935,000 in statutory damages, along with attorney's fees.[30]" Lackey and the Buggses also sought class certification in court.[31] The trial court denied Green Tree's motion to compel arbitration and the state court of appeals reversed. [32] The parties proceeded to pick an arbitrator and the arbitrator certified class arbitration.[33] The arbitrator "awarded the class $9,200,000 in statutory damages in addition to attorney's fees."[34] Green Tree appealed both cases, and the Supreme Court of South Carolina consolidated the cases. [35] The court held that the contracts "were silent in respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form."[36] The Supreme Court of the United States granted certiorari.[37]

The Supreme Court examined whether the arbitration clause at issue permitted class-wide arbitration.[38] Green Tree argued that class arbitration was impermissible under the arbitration agreement.[39] The plurality held that the arbitrator should decide whether the arbitration agreement permitted class arbitration.[40] The plurality stated that the question of whether class arbitration is permitted in the arbitration agreement is not a gateway matter.[41] Gateway matters are for the court to decide and include issues "such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."[42] The plurality reasoned that the question at issue was not about the "validity of the arbitration clause

[30] *Id.*
[31] *Bazzle*, 539 U.S. at 449
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 450
[36] *Bazzle*, 539 U.S. at 450
[37] *Id.*
[38] *Id.* at 450
[39] *Id.* at 450
[40] *Id.* at 453
[41] *Id.*
[42] *Bazzle*, 539 U.S. at 452

nor its applicability to the underlying dispute between the parties" but about "what kind of arbitration proceeding the parties agreed to," therefore it is a procedural matter for the arbitrator to decide.[43] The plurality further explained that the question "concern[ed] contract interpretation and arbitration procedures" which the Court believed "[a]rbitrators [were] well situated to answer."[44]

In his dissent, Chief Justice Rehnquist disagreed with the plurality on the issue of class arbitrability. The Chief Justice stated that the question of what to be submitted to arbitration is an issue for the courts to decide, and not for an arbitrator.[45] The Chief Justice believed that "the decision of *what* to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator."[46] After providing reason for the court to make the ultimate decision about the arbitration clause, the Chief Justice then interpreted the arbitration agreement to "expressly define 'us' as petitioner, and 'you' as the respondent or respondents named in that specific contract."[47] Chief Justice Rehnquist believed that the arbitration agreement made clear that the parties had not agreed to class arbitration.[48]

2. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*

After *Bazzle*, the Supreme Court addressed whether an arbitrator can require class arbitration when the parties are silent on the issue in the arbitration agreement in *Stolt-Nielsen*.[49] Stolt-Nielson is a shipping company that ships products for their customers and AnimalFeeds is a supplier of raw ingredients.[50] AnimalFeeds shipped its products pursuant to a charter party

[43] *Id.*
[44] *Id.* at 453
[45] *Id.* at 455 (Rehnquist, C.J. dissenting)
[46] *Id.* at 456 (Rehnquist, C.J. dissenting)
[47]. *Bazzle*, 539 U.S. at 458-59 (Rehnquist, C.J. dissenting)
[48] *Id.* at 459-460 (Rehnquist, C.J. dissenting)
[49] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)
[50] *Id.* at 666

contract.[51] Stolt-Neilsen was engaged in a price fixing scheme, and AnimalFeeds sued Stolt-Neilsen in federal district court asserting antitrust claims.[52] Many other parties sued Stolt-Neilsen and the "Judicial Panel on Multidistrict Litigation ordered the consolidation of then-pending actions against petitioners, including AnimalFeeds' action."[53] AnimalFeeds then served Stolt-Nielsen with a demand for class arbitration and the parties agreed that "the question of class arbitration be submitted to a panel of three arbitrators."[54] The parties picked three arbitrators and agreed that their arbitration agreement was silent on the issue of class arbitration.[55] The panel of arbitrators then concluded that the arbitration agreement permitted class arbitration.[56] The District Court then vacated the award and held that the arbitrators' decision was in "manifest disregard of the law." [57] The Court of Appeals reversed, and the Supreme Court granted certiorari.[58]

The Supreme Court reversed the circuit court, holding that the arbitrators' decision was contrary to the FAA, which requires consent to arbitrate.[59] The Court reasoned that the arbitrators lacked a contractual basis for ordering class arbitration because the parties had previously agreed that their arbitration agreement was silent on the whether class arbitration was permitted.[60] In addition, the court stated that "class arbitration changes the nature of bilateral 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."[61] In so holding, the Court distinguished *Bazzle* because the parties in *Stolt-Nielson* had expressly agreed that contract interpretation was to be submitted to an arbitration

[51] *Id.* at 667
[52] *Id.*
[53] *Id.* at 667-668
[54] *Stolt-Nielsen S.A.*, 559 U.S. at 668
[55] *Id.*
[56] *Id.* at 668-669
[57] *Id.* at 669 (internal quotations omitted)
[58] *Id.* at 670
[59] *Stolt-Nielsen S.A.*, 559 U.S. at 684
[60] *Id.*
[61] *Id.* at 685

panel.[62] Thus, the Court did not believe it needed to address the issue of who decides the class arbitrability, because the parties in *Stolt-Nielson* assigned the issue of arbitrability to an arbitrator.[63] In addition, the Court explained that *Bazzle* was a plurality decision and did not bind the court to permit the arbitrator to decide whether class arbitration is permitted.[64]

3. AT&T Mobility LLC v. Concepcion

In *AT&T Mobility LLC v. Concepcion*, the Supreme Court addressed "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures."[65] The Concepcions[66] entered into a contract with AT&T for the servicing of cell phones.[67] The arbitration agreement stipulated that there be arbitration for all disputes and that the claims "be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[68] The Concepcions filed a complaint in district court and argued that the arbitration agreement was unconscionable because it prevented class procedures.[69] The Ninth Circuit and the District Court believed that the arbitration agreement was unconscionable.[70] The Ninth Circuit did not believe that the California Supreme Court decision, *Discover Bank* v. *Superior Court*, was preempted by the FAA.[71]

The Supreme Court reversed, holding that California's *Discover* Rule was preempted by the FAA because it interferes with arbitration.[72] The Court reasoned that class arbitration

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[62] *Id.* at 680
[63] *Id.*
[64] *Id.*
[65] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1744 (2011)
[66] *Id.* (referring to Vincent and Liza Concepcion)
[67] *Id.*
[68] *Id.* (internal quotations omitted)
[69] *Id.* at 1744- 1745
[70] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1745 (2011)
[71] *Id.* at 1745
[72] *Id.* at 1750

"manufactured by *Discover Bank* rather than consensual" was inconsistent with the FAA because of the inherent differences between bilateral arbitration and class arbitration.[73] The Court addressed several factors of class arbitration that make it inherently different than bilateral arbitration, including sacrificing the informality of bilateral arbitration, mandating procedural formality, and increasing the risk to defendants because there are more defendants to one decision.[74]

4. Oxford Health Plans LLC v. Sutter

Most recently in *Oxford Health LLC v. Sutter*, the Supreme Court addressed whether an arbitrator exceeded his powers under the FAA when he found that an arbitration agreement permitted class arbitration.[75] The respondent, John Sutter, was a pediatrician who agreed to provide healthcare to Oxford Health Plans' members within its network.[76] Sutter entered into a contract with Oxford Health Plans, which contained an arbitration agreement.[77] Sutter, on behalf of a class, filed a complaint in New Jersey Superior Court.[78] The suit was referred to arbitration and the parties agreed to have an arbitrator decide if class arbitration was permissible under the agreement.[79] The arbitrator found that class arbitration was permissible.[80] The arbitrator reasoned the intent of the arbitration clause was to mandate arbitration for all civil actions that could be brought in court and the arbitrator found that a class action is a type of civil action.[81] Oxford filed a motion in the district court to vacate the arbitrator's decision and the district court denied the

[73] *Id.* at 1750-1751
[74] *Id.* at 1751-1752
[75] *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2066 (2013)
[76] *Id.* at 2067
[77] *Id.* (The arbitration agreement read: "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.")
[78] *Id.*
[79] *Id*
[80] *Sutter*, 133 S.Ct. at 2067 (2013)
[81] *Id.*

motion.[82] The Third Circuit affirmed the decision.[83] The Supreme Court granted certiorari.[84]

The Supreme Court found that the arbitrator did not exceed his powers when he reviewed the contract.[85] The Court explained that the holding in *Stolt-Nielson* could not be applied because the parties in that case had agreed beforehand that the agreement was silent on the issue of class arbitration.[86] The Supreme Court further distinguished *Stolt-Nielson* because the arbitration decision in that case "lacked *any* contractual basis for ordering class procedures, not because it lacked… a sufficient one."[87] The Supreme Court noted that it has not addressed "whether the availability of class arbitration is a question of arbitrability" and would not do so within the *Oxford Health* decision.[88] Thus, the question of class arbitrability was left open.

C. Circuit Cases Agreeing That An Arbitrator May Determine If Class Arbitration is Permitted Under An Arbitration Agreement

The recent Supreme Court decisions have expanded on the issue of class arbitration. Currently, there is a circuit split amongst the circuit courts as to who decides if an arbitration agreement permits class arbitration if the contract is silent on the question. The Fifth Circuit, in an older opinion, has taken the *Bazzle* stance and it has ruled that the arbitrators are better positioned to address whether an arbitration agreement permits class arbitration. The Third and Sixth Circuits have used recent Supreme Court precedent and dicta in their reasoning and have concluded that courts are better positioned to address whether an arbitration agreement permits class arbitration.

1. Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.

[82] *Id.* at 2068
[83] *Id.*
[84] *Id.*
[85] *Id.* at 2069
[86] *Sutter*, 133 S.Ct. at 2069 (2013)
[87] *Id.* at 2069-2070 (internal quotation marks omitted) (emphasis in the original)
[88] *Id.* at 2068 n.2

In *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.*,[89] the Fifth Circuit held that an arbitrator should determine if the arbitration agreement permits class-wide arbitration, citing the decision of the *Bazzle* plurality.[90] North American Indemnity[91] had "entered into reinsurance contracts with 408 [self funded ERISA] Plans throughout the United States" and there were arbitration clauses[92] in each contract.[93] North American Indemnity allegedly breached the contracts by defaulting on payments of claims and then sued American Heartland Health Administrators, the third party administrator of the plans, for poor underwriting of the plans.[94] The employer self-funded ERISA plans[95] that contracted with North American Indemnity intervened in the action and the district court then discussed the possibility of certifying a class for arbitration.[96] Pedcor argued against the class being certified and appealed the district court's decision to certify the class.[97]

The Fifth Circuit believed the question of class arbitrability was resolved by the *Bazzle* plurality decision.[98] The court reasoned that this case was analogous to *Bazzle* and should be decided under the *Bazzle* rule; therefore, the arbitrator should decide the question of class

[89] 343 F.3d 355 (5th Cir. 2003).
[90] *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nations Pers. of Texas, Inc.,* 343 F.3d 355, 363 (5th Cir. 2003)
[91] *Id.* at 357 (North American Indemnity is an insurance company)
[92] *Id.* (internal quotations omitted) (The arbitration agreements required "(1) any dispute between the parties hereto in connection with the Agreement be submitted to arbitration; (2) as a general matter each party chooses one arbitrator, and the two chosen arbitrators then select a third to constitute a panel; and (3) arbitration shall be governed by the laws of the State of Texas. There is no express provision in the clause regarding consolidation or class treatment of claims in arbitration.")
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Pedcor Mgmt. Co. Welfare Benefit Plan,* 343 F.3d at 357
[97] *Id.*
[98] *Id.* at 359

arbitrability.[99] The court agreed with the *Bazzle* analysis because the question of whether an arbitration clause permits class arbitration is a subsidiary question.[100]

D. Circuit Cases Disagreeing That An Arbitrator May Determine If Class Arbitration is Permitted Under An Arbitration Agreement

1. Reed Elsevier, Inc. v. Crockett

The Sixth Circuit in *Reed Elsevier, Inc. v. Crockett,*[101] was the first circuit after the recent Supreme Court decisions[102] to consider the question of whether a court or an arbitrator may decide when an arbitration clause permits class-wide arbitration.[103] Crockett was a customer of LexisNexis, a business division of Reed Elsevier, and he had a plan with the company that contained an arbitration clause.[104] Crockett filed an arbitration demand on behalf of two classes and LexisNexis brought suit in district court "seeking a declaration that the Plan's arbitration clause does not authorize class arbitration."[105] The arbitration agreement did not specifically mention class arbitration.[106] The District Court in Ohio granted LexisNexis summary judgment based on the arbitration agreement not permitting class arbitration.[107]

In the decision, the Sixth Circuit first addressed whether an arbitrator or a court determines

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[99] *Id.*
[100] *Id.* at 350 (quoting *Bazzle*, 539 U.S. at 2407) (internal quotation marks omitted) ("The question whether a contract forbids class arbitration concerns the *kind of arbitration proceeding* the parties agreed to, and not the validity of the arbitration clause [ ]or its applicability to the underlying dispute between the parties, the plurality concluded that arbitrators are well situated to answer that question.")
[101] 734 F.3d 594 (6th Cir. 2013) (hereinafter short name referred to as 'Reed Elsevier').
[102] *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 123 S.Ct. 2402 (2003); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064 (2013)
[103] *Reed Elsevier*, 734 F.3d at 597
[104] *Id.* at 596
[105] *Id*
[106] *Id.* at 599 (The arbitration agreement stated "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")
[107] *Id.* at 596

if class-wide arbitration is permitted under the arbitration agreement.[108] The Court explained that gateway disputes[109] are for judicial determination and subsidiary questions[110] are for an arbitrator to decide.[111] The court reasoned that recent Supreme Court decisions have alluded that class-wide arbitrability is a gateway question and not a subsidiary question.[112] The Court stated that because the Supreme Court has found the differences between bilateral arbitration and class arbitration to be "fundamental" the issue is a gateway question.[113] The Court relied on *Stolt-Nielson* and *Concepcion* to explain some of the inherent differences between class arbitration and bilateral arbitration.[114] The court stated the benefits of bilateral arbitration, including "lower costs, greater efficiency and speed," are less secure in class arbitration.[115] These benefits, therefore, give rise to the assumption that the parties may not have mutually consented to class arbitration if it was not specifically stated in the arbitration agreement.[116] The court also stated that confidentiality becomes more difficult with class arbitration.[117] In addition, the Sixth Circuit acknowledged that "the commercial stakes of class-action arbitration are comparable to those of class-action litigation."[118]

The Sixth Circuit also claimed that a switch from bilateral arbitration to class arbitration

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[108] *Reed Elsevier, Inc.*, 734 F.3d at 597

[109] *Id.* at 597 (quoting *Bazzle*, 539 U.S. at 452)(The court noted that "Gateway disputes include whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.)

[110] *Id.* at 597 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964) (internal quotations omitted)) (explaining that "subsidiary questions grow out of the dispute and bear on its final disposition); *Id.* (quoting *Howsam v. Dean Witter Reynolds, Inc.*,, 537 U.S. 84-85 (2002) (internal quotations omitted))
("Subsidiary questions include, for example, issues related to waiver, delay, or whether a condition precedent to arbitrability has been fulfilled.")

[111] *Id.* at 597

[112] *Id.* at 598

[113] *Id.* at 598

[114] *Reed Elsevier, Inc.*, 734 F.3d at 598 (6th Cir. 2013)

[115] *Id.* at 598 (citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 685 (2010))

[116] *Id.* at 598 (citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686, (2010))

[117] *Id.* at 598

[118] *Id.* at 598 (citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686, (2010))))

may raise due process concerns.[119] The Court stressed how consequential the class-wide arbitrability question was.[120] The Court held that whether an arbitration agreement permits class arbitration is a gateway issue and therefore is for a court to decide.[121] The Court went on to hold that the arbitration agreement did not permit class-wide arbitration, and, thus, affirmed the lower court.[122]

2. Opalinski v. Robert Half Int'l, Inc.

The Third Circuit has also addressed the question of whether a court or an arbitrator may decide when an arbitration clause permits class-wide arbitration.[123] McCabe and Opalinski were employees of Robert Half International, Inc.[124] McCabe and Oplainski brought a class claim on behalf of themselves and other employees based on Robert Half's failure to pay them overtime.[125] They signed employment agreements with Robert Half in which the arbitration clause makes no mention of class-wide arbitration.[126] Robert Half moved to compel arbitration on an individual basis. [127] The District Court affirmed in part and compelled arbitration, but ruled that the issue of whether it would be bilateral or class arbitration would be for an arbitrator to decide.[128] Robert Half appealed to the Third Circuit for a determination of whether the arbitrator or the court makes the decision about the arbitration agreement permitting class arbitration.[129]

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[119] *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 598 (6th Cir. 2013) (citing *Oxford Health*, 133 S. Ct. at 2071-72) (Alito, J., concurring) ("where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a class-wide basis which arbitration procedures are to be used.")
[120] *Id.* at 599
[121] *Id.* at 598-599
[122] *Id.* at 599
[123] *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 329 (3d Cir. 2014)
[124] *Id.* at 329 (hereinafter short name referred to as "Robert Half")
[125] *Id*
[126] *Id.* The arbitration clause states "[a]ny dispute or claim arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement" shall be submitted to arbitration.
[127] *Id.*
[128] *Robert Half Int'l, Inc.*, 761 F.3d at 329
[129] *Id.*

The Third Circuit held that availability of class arbitration in an arbitration agreement is a matter for courts to decide.[130] The court cast doubt on the plurality decision in *Bazzle* citing *Stolt-Nielson* and *Oxford Health,* which both mentioned a Supreme Court majority had yet to decide the specific issue at bar.[131] Further, the Third Circuit addressed its previous decision *Quilloin v. Tenet HealthSystem Philadelphia Inc.*,[132] which stated that class-wide arbitration is not a question of arbitrability. [133] The Third Circuit stated that that specific line in their *Quilloin v Tenet HealthSystem Philadelphia Inc.* case was dictum and should therefore not be followed.[134]

The Third Circuit reached its decision in *Robert Half* after discussing several factors that demonstrate that class-wide arbitrability is a gateway matter for the courts to decide. The court began by stating class-wide arbitrability "affects whose claims may be arbitrated" because it includes people not aparty to the action.[135] The court next stated that the "availability of class-wide arbitration implicates the type of controversy submitted to arbitration."[136] The court cited to *Stolt-Nielson* and reasoned that class arbitration is not a procedural issue but a substantive one.[137] The court also acknowledged the differences between bilateral arbitration and class arbitration addressed in *Stolt-Nielson*. [138] The court next stated that the only other court decision to address

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[130] *Id.* at 332
[131] *Id.* at 331
[132] 673 F.3d 221 (3d Cir. 2012),
[133] *Robert Half Int'l, Inc.*, 761 F.3d at 331
[134] *Id.*
[135] *Id.* at 332-333
[136] *Id.* at 333
[137] *Id.* (citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685, 130 S.Ct. 1758, 1775 (2010))("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.")
[138] *Id.* (quoting *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 686, 130 S.Ct. 1758, 1776 (2010)) ("[(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.")

whether the availability of class arbitration in an arbitration agreement is a gateway issue or a subsidiary issue was the Sixth Circuit in *Reed Elsevier*.[139] The Third Circuit acknowledged that its decision was guided by the Sixth Circuit decision in *Reed Elsevier*.[140] The Third Circuit distinguished cases from the Eleventh,[141] First[142] and Second[143] Circuits because the Court believed that they did not squarely address the issue of class-wide arbitrability.[144]

III. ANALYSIS

The Third and Sixth circuits focused on the inherent differences between bilateral and class arbitration. The inherent differences make class arbitrabilty a gateway issue for the courts to decide. The procedural differences of arbitration become enhanced in class arbitration and change the nature of what is agreed to. Hence, class arbitration magnifies all the procedural differences of bilateral arbitration, which can cause harm on the parties because class arbitration incorporates a large number of parties. Courts should also decide whether or not an arbitration agreement permits class arbitration because the courts are better equipped to deal with the consequences of making the determination whether or not class arbitration is appropriate. For example, courts have procedural safeguards to protect the parties if an improper decision is made and they also are able to reduce some of the issues with bilateral arbitration that get expounded in class arbitration.

A. The Inherent Differences Between Bilateral Arbitration and Class Arbitration Make the Issue of Class Arbitrability a Gateway Matter

Gateway matters address whether or not the parties are bound by the arbitration agreement or whether a binding arbitration clause applies to the particular issue.[145] Specifically, gateway

[139] *Robert Half Int'l, Inc.*, 761 F.3d at 334
[140] *Id.* at 334
[141] *Southern Communs. Servs. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013)
[142] *Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd*., 683 F.3d 18 (1st Cir. 2012)
[143] *Jock v. Sterling Jewelers Inc*., 646 F.3d 113 (2d Cir. 2011)
[144] *Id.* at 334-335(internal quotations and citations omitted)
[145] *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84, 123 S.Ct. 588, 592 (2002)

matters are matters that determine if the arbitration agreement applies to the parties' dispute. Subsidiary questions are questions that "grow out of the dispute and bear on its final disposition. [146] Judge Ambro explained that subsidiary questions are questions the parties would want an arbitrator to decide and include allegations of waiver, delay, or similar defenses to arbitrability.[147] Because bilateral arbitration and class arbitration are so different, it cannot be assumed that one party bilaterally agreeing to arbitrate the issue is the same as that party agreeing to arbitrate the issue on a class-wide basis. The question of class arbitrability, when an arbitration agreement does not specify that an arbitrator will decide the issue, examines whether the arbitration agreement incorporates class action into the terms of the agreement. Therefore, it determines whether the parties can be bound by the agreement if the dispute is arbitrated through class arbitration instead of bilateral arbitration. Furthermore, deciding whether to allow class arbitration under arbitration clauses is a gateway matter because the question seeks to include other parties not originally bound by the arbitration clause. The inclusion of other parties directly bears on the question of whether or not the parties are bound by the arbitration agreement.

a. Due Process Issues Heightened in Class Arbitration

Class arbitration requires the arbitrator to resolve disputes for multiple parties instead of two parties, which magnifies due process concerns within class arbitration.[148] Class arbitration is structured as opt-out rather than an opt in proceedings.[149] During the proceeding, arbitrators follow either JAMS or AAA procedures for class arbitration.[150] The AAA rules mandate that the arbitrator

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[146] *Id.* (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557, 84 S.Ct. 909, 918 (1964))
[147] Half Int'l, Inc., 761 F.3d at 331
[148] See *e.g. Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686, 130 S.Ct. 1758, 1776 (2010) (*"*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.")
[149] 25 ABA Journal Lab. & Emp. Law 25, 29-30
[150] *See* JAMS Class Action Procedures, *supra* note 15; *See* AAA Supplementary Rules for Class Arbitration, *supra* note 15

certify the class, stay arbitration after the class has been certified, and direct notice requirements.[151] In order to certify a class, the AAA provides that "each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members."[152] This procedural requirement does not mandate that the class members all agree to the arbitrator appointed or have an identical arbitration agreement. Arbitration agreements are contractual and therefore are a "matter of consent."[153] The decision to allow an arbitrator to decide the availability of class arbitration implies that the parties (including absent class members) agreed to allow the arbitrator to decide issues pertaining to the dispute. Although each class member stipulated to arbitration of the dispute, each class member did not specifically agree to adjudicate the issue on a large scale or with the particular arbitrator. This issue is an important difference because arbitration awards cannot be reviewed on the merits.[154] Class arbitration implicates absent party members and therefore makes the issue of class arbitrability more than just a mere procedural question for an arbitrator to decide.

b. Conflicts of Interest

There are inherent conflicts of interest involved with class arbitration that may not be as apparent in bilateral arbitration. The arbitrator in class arbitration must select counsel for the class while the arbitrator in bilateral arbitration just receives notice if the party selects representation.[155] This small difference may cause ethical problems for the arbitrator in class arbitration that are not

[151] *See* AAA Supplementary Rules for Class Arbitration Rule 4(a), *supra* note 15
[152] *See* AAA Supplementary Rules for Class Arbitration Rule 4(a)(6), *supra* note 15
[153] *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 298 n.6, 130 S.Ct. 2847, 2857 (2010); *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 1256 (1989) ("Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.")
[154] *Universes Colliding: The Constitutional Implications of Arbitral Class Actions* at 1743-1744, *supra* note 16
[155] *Consumer Arbitration Rules*, Rule R-25 (November 3, 2014) *available at* https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTAGE2021424&_afrLoop=33912258204794 64&_afrWindowMode=0&_afrWindowId=76cgzl5kf_1#%40%3F_afrWindowId%3D76cgzl5kf_1%26_afrLoop%3 D3391225820479464%26doc%3DADRSTAGE2021424%26_afrWindowMode%3D0%26_adf.ctrl-state%3D76cgzl5kf_71 ; [155] *Supplementary Rules for Class Arbitrations*, *supra* note 15, Rule 6(b)(7)

apparent in bilateral arbitration. The AAA Supplemental Guidelines for class arbitration do not specify any rules in which an arbitrator needs to follow to select counsel.[156] Moreover, the arbitrator is appointed by the original counsel in the dispute.[157] The potential conflict occurs after the appointment of the arbitrator and before the certification of the counsel.[158] Here the arbitrator that was chosen by the counsel must choose/ certify the counsel that appointed him. This is an inherent conflict of interest because the arbitrator may be inclined to appoint someone that appointed him as a possible return of the favor.

Moreover, arbitrators may face difficult decisions after settlements have been approved. For example, an arbitrator may be "asked to apportion the arbitration costs between the plaintiffs and the defendants."[159] Further, an arbitrator may have to award counsel fees or decide if the settlement fund will "reimburse class counsel for arbitration expenses (including the arbitrator's fees)."[160]

The main cause of concern comes with the large number of parties in class arbitration. For example, one biased arbitrator has the potential to affect hundreds of class members in one decision, whereas a biased arbitrator in a bilateral arbitration proceeding will only affect two parties. The conflicts are not apparent in bilateral arbitration, which depicts a substantial difference

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[156] Andrew Powell & Richard A. Bales, *Ethical Problems in Class Arbitration,* 2011 J. Disp. Resol. 309, 320 (2011)
[157] *Ethical Problems in Class Arbitration*, *supra* note 156, at 320-21 ("Unless there is another method in the contracted arbitration clause, the AAA provides a four-step system for counsel to select an arbitrator. First, the AAA sends each party a copy of the same prepared list of possible arbitrators. Second, the guidelines provide the parties 15 days to strike names they object to and order the remaining possible arbitrators. Third, after the parties return the lists, the AAA notes the mutual selections for assignment of an arbitrator. Fourth, if the parties cannot agree on an arbitrator, the AAA will administratively appoint one. Once the original counsel has selected the arbitrator, the arbitrator then must certify the class in a fashion similar to the Federal Rules class certification process for judges.")
[158] *Id*. at 322 ("Here is how arbitrator and class counsel selection can play out hypothetically: Counsel X chose Arbitrator Y for a potential class arbitration proceeding. This selection may be financially lucrative for Arbitrator Y, especially if the class action is complex. Counsel X may also like to have an appointment as class counsel because the selection is financially lucrative. Counsel X will then apply to Arbitrator Y for the financially lucrative appointment as class counsel. If Arbitrator Y appoints Counsel X as class counsel, the appointment may appear as an unspoken quid pro quo for the Counsel X's appointment of Arbitrator Y.")
[159] *supra*, Note 141
[160] *Id.*

between the two types of arbitration. The difference depicts why class arbitratbility is a gateway matter because it substantially changes the nature of the arbitration agreement parties agreed to. An arbitrator should not be determine whether the arbitration agreement allows class arbitration unless the parties specifically stipulate that the arbitrator has the power to do so.

c. Procedural Formalities of Class Arbitration Limit the Benefits of Arbitration

The procedural formalities of class arbitration create an increased burden on the parties, which limit the benefits of class arbitration.[161] The Supreme Court in *Stolt-Nielson* warned that "the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties' mutual consent to resolve disputes through class-wide arbitration."[162] For example, class arbitration tends to last longer than bilateral arbitration.[163] This increase in time ultimately changes one of the most significant aspects of arbitration—speed. A major benefit of arbitration is the speed of the action and the lack of reliance on courts to decide the action, which can take months or years. Allowing an arbitrator to decide if an arbitration clause allows for class arbitration allows the arbitrator to make a substantial decision.

In addition, many parties agree to arbitration to avoid expensive costs of litigation.[164] The

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[161] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1751 (2011) ("First, the switch from bilateral to class arbitration 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")

[162] *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685-86, 130 S.Ct. 1758, 1775-76 (2010)

[163] Analysis of the American Arbitration Association's Consumer Arbitration Caseload *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 ("Cases conducted by documents only were awarded in approximately four months. In- person hearings were awarded in approximately six months."); *Contra* Search Case Dockets and Awards (searched November 9, 2014) https://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration/classarbitration/casedocketsearch?_afrWindowId=mlkkvxayb_182&_afrLoop=3302530603099027&_afrWindowMode=0&_adf.ctrl-state=mlkkvxayb_132 (where 39 out of 83 active class arbitrations were from the year 2012 or earlier.); *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1751 (2011) (The Supreme Court discussed class arbitration listed on the AAA's docket stating "[f]or those cases that were no longer active, the median time from filing to settlement, withdrawal, or dismissal--not judgment on the merits--was 583 days, and the mean was 630 days.")

[164] *See e.g. Circuit City Stores v. Adams*, 532 U.S. 105, 123, 121 S.Ct. 1302, 1313 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257, 129 S.Ct. 1456, 1464

procedural benefit of avoiding expensive costs cannot be inferred in class arbitration because class arbitration is much more costly than bilateral arbitration due to the procedural requirements such as notice.[165] For example the court in *Eisen* found the notice cost to be roughly $225,000.[166] The notice cost only incorporated mailing letters to roughly two million people at a stamp rate of six cents, which would be much higher today.[167] The price on notice is astronomical for a party that just wants to settle a small claim and did not intend their arbitration clause to be construed to allow class arbitration. This jump in cost is substantial and cannot just be regarded as a subsidiary issue to the arbitration dispute. This issue would be important enough to change the intent of the parties because the plaintiff would bear the burden of the notice costs. Although the plaintiff makes the decision to bring the dispute forward as class arbitration, absent class members that have not opted out may not have wanted to move forward with the dispute as a class arbitration.

Privacy of the arbitration agreement is also changed in regard to class arbitration. The AAA's Rules on Class arbitration mandate that privacy and confidentiality of the proceeding will not apply to class arbitration.[168] Parties that agreed to arbitration may not have agreed to arbitration that is not confidential. For example, companies may prefer arbitration due to the confidentiality and the efficiency of the process, but class arbitration potentially frustrates their assumption for a speedy confidential process. The lack of confidentiality may cause certain issues to leak to the press and cause bad publicity for the company. Further, plaintiffs may have wanted a confidential

(2009) ("Parties generally favor arbitration precisely because of the economics of dispute resolution.")

[165] *Blue Cross Blue Shield of Mass. v. BCS Ins. Co*., 671 F.3d 635, 640 (7th Cir. 2011) ("Class actions always have been treated as special. One self-selected plaintiff represents others, who are entitled to protection from the representative's misconduct or incompetence. Often this requires individual notice to class members, a procedure that may be more complex and costly than the adjudication itself.")

[166] *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 167, 94 S.Ct. 2140, 2147 (1974),

[167] *Id.*

[168] *See supra* note 15, Rule 9("(a) The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and filings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members, or their individual counsel, if any, be excluded from the arbitration hearings.")

proceeding when they argue their issue with the court. Under the lack of confidentiality, not only does an entire class know the proceeding, but anyone can be informed about the arbitration. The lack of privacy is a substantial difference between bilateral and class arbitration and would be a reason why the courts should determine whether of not the parties agreed to class arbitration.

d. Class Arbitration Binds Absent Party Members

Class arbitration differs principally from bilateral arbitration because of its nature to bind class members not part of the original contract. Arbitration is a matter of consent, but class arbitration allows parties to be part of a class where the individuals did not consent to the arbitration.[169] The AAA's Supplemental Rules for Class arbitration track Fed. Civ. R. 23 but add the requirement that each class member have a similar arbitration clause to one another.[170] Although this rule adds more commonality amongst the class members, it does not require the class members to agree to class arbitration. This lack of consent by other parties denotes that class arbitration is not just an issue that grows out of the dispute, but an issue that has potentially far reaching affects. As previously discussed, class arbitration changes the nature of the arbitration at hand. The parties no longer have privacy in their dispute, there are increased costs, and the arbitration proceeding lasts longs. Therefore, the parties that have not opted out become members of the class arbitration with no judicial review of the merits of the arbitration award.[171]

e. Increased Risk to the Parties in Class Arbitration

In *Concepcion* the Supreme Court discussed the increased risk in class arbitration. They stated,

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[169] *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 298 n.6, 130 S.Ct. 2847, 2857 (2010) (citing *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) ("Arbitration is strictly a matter of consent"); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943(1995) ("arbitration is a way to resolve those disputes, but only those disputes, that the parties have agreed to submit to arbitration")

[170] *See supra* Note 15, Rule 4(a)(6)

[171] *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, *supra* note 12, at 1743-1744

> Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.[172]

The magnitude of the dispute resolution inherently changes how parties will act or settle a matter. This new bargaining power associated with class action claims is significant and could potentially alter the outcome of the dispute, which makes class arbitration very different from bilateral arbitration. As the Supreme Court noted, the risk is substantial to the defendant because the defendant essentially could lose thousands of claims that were decided once through aggregation.

Furthermore, some of the important procedural aspects of court proceedings are not available in arbitration. This causes a minor issue in an individual arbitration proceeding to have catastrophic effects in a class arbitration proceeding because the impact exponentially grows. For example, in bilateral arbitration discovery is limited and is not governed consistently.[173] Instead of this limited discovery being an issue in one small matter, class arbitration makes limited discovery the basis of a decision that could potentially affect thousands of individuals.

In addition, the checks and balances associated in the judicial process are not available in class arbitration, which make class arbitration riskier to the parties than bilateral arbitration that

[172] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011)

[173] Randy Sutton, Annotation, *Discovery in Federal Arbitration Proceedings Under Discovery Provision of Federal Arbitration Act (FAA), 9 U.S.C.A. § 7, and Federal Rules of Civil Procedure, as Permitted by Fed. R. Civ. P. 81(&setaskeyeda;)(6)(B)*, 45 A.L.R. Fed. 2d 51 ("Discovery is governed, not only by an arbitrator's discretion, but also by the arbitration clause in the applicable agreement, arbitration rules adopted by the parties, statutes, and case law.")

just deals with two parties. In class arbitration, the final award is not as easily appealed as a final court judgment. Arbitral awards are only vacated

> **(1)** where the award was procured by corruption, fraud, or undue means; **(2)** where there was evident partiality or corruption in the arbitrators, or either of them; **(3)** where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[174]

This processes makes vacating an arbitral award more difficult than regular class action awards decided by a court. The Supreme Court has also noted that the judicial review of the arbitrator's decision lacks the necessary review to decrease the risk of error.[175] The difficulty in vacating an arbitral award coupled with the added complexity stemming from multiple parties creates an increased risk of error if the arbitrator decided the issue incorrectly. Whereas, in bilateral arbitration, the risk of error is small because only the one dispute would be sided incorrectly as opposed to thousands of parties.

f. Courts Are Better Suited to Deal Class Arbitration because It Will Provide Binding Precedent for Parties to Follow

Courts should make the determination of class arbitrability because they are better suited to deal with all of the repercussions of class arbitration determinations than arbitrators are. They are better suited because of the structure of the judicial system. Arbitrators are free to make a decision in their dispute based on applicable law but their decisions are not binding on the next

[174] 9 U.S.C § 10

[175] *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1752 (2011) ("The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under § 10 focuses on misconduct rather than mistake.")

arbitration matter.[176] Therefore, if arbitrators are allowed to decide disputes about of class arbitrability, there will be no precedent for them to follow when trying to formulate a framework or decision process. On the other hand, courts function on precedential opinion, and they therefore can formulate a framework on how to address if a party can proceed to class arbitration.

There reliance on precedent will provide more stability in what constitutes an arbitration clause that permits class arbitration and what does not; thus it benefits employers/corporations and employees/consumers. This reliance on precedent allows for more confidence in the arbitration clause at hand. Mike Jones, a Reed Smith LLP partner, stated that "Employers ought to be confident now that they can adopt polices to completely eliminate the risk of class-based litigation and have a faster, cheaper alternative to the litigation of employment claims in court."[177] Courts deciding whether or not class arbitration is permitted create more stability in what constitutes an arbitration clause that allows class arbitration. Courts will have binding precedent to guide their decisions; whereas arbitrators make independent decisions and have no precedent to follow.

Courts deciding whether or not an arbitration clause is permitted allows for more uniformity not just in their basing their decision on precedents, but the availability of appeals for the parties affected by the decision. For example, courts deciding class arbitrability makes it easier for employers to appeal the decision.[178] Employers no longer have to find some type of misconduct in the arbitrator's decision because they can appeal the decision through regular court procedures. This is especially helpful if there is a mistake made in the analysis. Employers would now be able

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[176] *See* Regulatory Notice 09-16, *available at* https://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p118141.pdf ("As with current FINRA awards, explained decisions will have no precedential value in other cases. Arbitrators will not be required to follow any findings or determinations set forth in prior explained decisions.")

[177] Ben James, *Employers To Embrace Arbitration After 3rd Circ. Ruling*, (July 30, 2014), *available at* http://www.law360.com/articles/562489/employers-to-embrace-arbitration-after-3rd-circ-ruling

[178] ***supra*** note 167 ("The biggest reason employers don't want an arbitrator deciding whether class proceedings are available is the same reason they don't want arbitrators overseeing class actions: because arbitrators' decisions are extremely difficult to overturn.")

to cite to the law and appeal the decision. This cuts the same way for employees, who would also have a procedural mechanism to appeal the court's decision if it is not based on precedential law.[179] Therefore, the ability to appeal will allow for more stability because the courts will base their decisions on existing law.

Further, allowing courts to decide whether or not an arbitration agreement permits class-wide arbitration reduces the risk of bias. Arbitrators are paid based on their role in the arbitration, whereas judges are governmental employees that are not paid based on their role in a particular dispute. Arbitrators may be more inclined to find that the arbitration agreement permits class arbitration because they financially benefit from this finding.[180] Taking this decision away from arbitrators allows arbitrators to focus on the dispute if it does warrant class arbitration and takes away the risk that they will focus more on their personal gain than the dispute at hand. Furthermore, it is good for employees/consumers because they can avoid arbitrator bias.[181] Arbitrator bias is inherent when employers/ large corporations hire arbitrators that make decisions in corporation/employer's favor.[182] Although courts would make the decision of class arbitrability when the parties are silent on the issue of class arbitration, the decision of the Third and Sixth Circuits would still allow parties to stipulate that an arbitrator should make that decision.

IV. CONCLUSION

An arbitration agreement that does not specifically mention class arbitration but has a contractual basis for assuming that class arbitration is included, poses many issues. Currently there

[179] 28 U.S.C.S § 1292
[180] *supra* note 167
[181] Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 238-39 (1998) (study of arbitrations between 1993 and 1995)
[182] *supra* note 171

is no binding Supreme Court precedent to follow in deciding whether a court or an arbitrator makes the decision. The Sixth and Third Circuits, using Supreme Court dicta, have held that the differences between bilateral and class arbitration cause the decision of class arbitrability to be a gateway question instead of a subsidiary question.

The analysis by Sixth and Third Circuits are correct because they focus on the extensive differences of bilateral and class arbitration. Because bilateral arbitration and class arbitration are so different, it cannot be assumed that one party bilaterally agreeing to arbitrate the issue is the same as that party agreeing to arbitrate the issue on a class-wide basis. Put differently, the differences between the class and bilateral arbitration change the agreement so much that it makes question of class arbitrability is a gateway issue. It cannot presumed that arbitrators have the power to decide the issue, when the question of class arbitrability is about whether or not the specific issue is permitted in the arbitration agreement. The two types of arbitration differ so substantially, that allowing arbitrators to make the class arbitrability decision would give arbitrators more power under the arbitration agreement.

In addition, courts should determine the availability of class arbitration under an arbitration agreement because they are better suited to weigh the inherent issues with class arbitration. Courts provide safeguards of their decision by allowing parties to appeal. This will limit the amount of instances that parties will need to proceed with class arbitration when their arbitration clause did not provide for it at all. Further, the impartiality of the judges in the court system will provide for a uniform manner of addressing class arbitration that will give the topic more stability.