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Daivy P.E. Dambreville

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BROAD POWERS, SILENT INTENTIONS: COMPELLING CLASS ACTION ARBITRATION WITHOUT EXPRESS AUTHORIZATION

Daivy P. E. Dambreville*

I. INTRODUCTION

In a commercial landscape clouded by ever increasing litigation, where court dockets are full and the cost of litigation is extensive,¹ there remains a desperate need for a suitable form of alternative dispute resolution (“ADR”). In the United States, arbitration has surfaced as the preferred form of ADR for commercial disputes. Yet, the strength and effectiveness of arbitration rests on the efficacy of this private method of adjudication, and specifically, the ability to bind parties to arbitral awards. In such a climate, arbitrators are granted great powers and entrusted to make sound professional judgments when rendering decisions. Recently, however, a circuit split has arisen regarding the extent of an arbitrators’ power to compel class arbitration.² This circuit court split threatens to destabilize the nature and effectiveness of American arbitration. Courts must therefore adopt a clear, effective and consistent approach regarding arbitrators’ powers to ensure that the American arbitration system continues to thrive.

The statute governing arbitration in the United States is the Federal Arbitration Act (“FAA”). The FAA states that a provision in “a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”³ As this statutory language illustrates, legislators’ intended to ensure the arbitration decisions are binding, uncontested, and final. The U.S. Supreme Court has also interpreted the FAA as establishing a federal policy favoring arbitration. In accordance with this policy, the Court has consistently resolved ambiguities within arbitration clauses in favor of arbitration.⁴ Furthermore, the Court has determined that the primary role of the FAA is to make certain that arbitration agreements are enforced according to their terms.⁵ Yet, the Court has held that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not

* Daivy P. E. Dambreville is a Senior Editor of the Yearbook on Arbitration and Mediation and a 2013 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law. The author would like to thank Professor Thomas E. Carbonneau for his assistance and sound advice; and his parents, Evelyne and Pierre Dambreville, for their constant love and support.

¹ See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 669 (1986) (explaining that the need for ADR exists because the cost of litigation has significantly increased and a large number of cases are being filed in courts).

² The circuit court split being referred to here is between the Third Circuit Court of Appeals and the Fifth Circuit Court of Appeals. The details of the split will be discussed at length later in the article.

³ 9 U.S.C. § 2.

⁴ See, e.g., *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (explaining that “due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration”).

⁵ *Id.* at 479.

agreed so to submit.”⁶ The Supreme Court has since adopted the principle that arbitration agreements, like any other contractual agreements, should be enforced in accordance with the parties’ intentions.⁷ The evolution of the Court’s reasoning, outlined above, has continued to redefine the scope and depth of arbitral powers leading to some confusion in lower courts as to the current state of affairs.

This article will focus on the depths of an arbitrator’s power to compel class arbitration⁸ and how this power has been defined, interpreted, and applied in the Third and Fifth Circuits in the wake of the *Stolt-Nielsen* case. Recent Supreme Court decisions regarding class arbitration contain significant discussions regarding the unfairness and disadvantages of the procedure.⁹ The Court’s discussions pose the question of whether arbitrators can infer consent to class arbitration of disputes arising from multiple, bilateral contracts—when each contract contains one common party.¹⁰ As discussed below, lower courts have differed markedly on how they interpret and apply *Stolt-Nielsen*—the Court’s most recent proclamation regarding arbitral powers to compel class arbitration.

Part II provides a historical framework of the cases in question, delving into the facts, court analyses, and briefly discussing the application of their findings. The circuit split between the Third and Fifth Circuit Courts of Appeal is also identified and discussed. Part III examines the arbitrators’ power to compel class arbitration before and after *Stolt-Nielsen* and discusses how courts have interpreted *Stolt-Nielsen*.

I conclude with the assertion that the Third Circuit’s application of *Stolt-Nielsen* is more appropriate because it defers to arbitrators’ decisions as to whether the agreement empowers them to compel class arbitration, where the parties have not explicitly stated their intentions. The Fifth Circuit’s application of *Stolt-Nielsen* empowers the judiciary to further infringe on the arbitrator’s domain and ability to effectively conduct arbitration proceedings. Therefore, because the Third Circuit’s interpretation gives more deference to arbitrators’ professional judgment, this article argues that the Third Circuit’s is the correct approach to follow.

II. BACKGROUND

A. *The Issue With Silence: The Stolt-Nielsen Case*

In *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, the United States Supreme Court addressed the issue of whether an arbitration clause—which is *silent* regarding class

⁶ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)) (emphasis added).

⁷ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1774 (2010).

⁸ In the context of arbitration, the terms “class arbitration” and “class action arbitration” are widely used to describe “consolidated arbitration proceedings.”

⁹ See Nicholas Goodrich, *Dispensing Injustice: Stolt-Nielsen and Its Implications*, 2011 J. DISP. RESOL. 197, 205 (2011); see also Ginevra Ventre, *The Federal Arbitration Act Preempts A State Law That Renders Unconscionable A Class Arbitration Waiver in A Consumer Adhesion Contract Likely to Involve Disputes over Small Sums of Money: AT&T Mobility LLC v. Concepcion*, 50 DUQ. L. REV. 919, 925 (2012).

¹⁰ Philip J. Loree Jr., *More FAA: Why AT&T Mobility Makes Sense—And Why It Likely Isn’t the End of Class Arbitration*, 29 ALTERNATIVES TO HIGH COST LITIG. 145, 155 (2011).

arbitration—permits imposing class arbitration on the parties.¹¹ The dispute arose when AnimalFeeds served the petitioners, collectively Stolt-Nielsen, with a demand of class arbitration to resolve various antitrust claims even though the arbitration agreement was silent on the issue.¹² Stolt-Nielsen challenged the class arbitration on the basis that the parties had not explicitly agreed to arbitrate antitrust issues.¹³ Ultimately, the Court held that parties who have agreed to bilateral arbitration, not class-action arbitration, have to consent to resolve their disputes in class proceedings – mere *silence* in the contract is not sufficient.¹⁴ The Court’s rationale was “that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”¹⁵ The lasting effect of this decision has been that courts have emphasized the specific nature and language of arbitration agreements to decide whether the parties’ disputes are subject to arbitration. As such, in order to bring forth a claim under the FAA, each party must have agreed to arbitrate the issue of class arbitration in the arbitration agreement or subsequently consented to resolve the matter as a class arbitration.

B. Our Powers Must Be Broad: The Sutter Case

In *Sutter v. Oxford Health Plans LLC*,¹⁶ the United States Court of Appeals for the Third Circuit faced the issue of whether an arbitrator exceeds his powers under the FAA by ordering parties to class arbitration—based solely on the use of broad language precluding litigation in their contracts. Dr. John Ivan Sutter and Oxford Health Plans LLC (“Oxford”) were parties to a Primary Care Physician Agreement (“agreement”).¹⁷ Under the agreement, Sutter agreed to provide primary health care services to members of Oxford’s health plan and Oxford agreed to pay Sutter prearranged reimbursement rates.¹⁸ The agreement also contained an arbitration clause that stated: “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.”¹⁹

¹¹ *Stolt-Nielsen*, 130 S. Ct. at 1764.

¹² *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1765 (2010) (“Arbitration: Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act [the FAA], and a judgment of the Court shall be entered upon any award made by said arbitrator.”).

¹³ *Id.*

¹⁴ *Id.* at 1776 (“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.”).

¹⁵ *Id.* at 1775.

¹⁶ *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012).

¹⁷ *See id.* at 217. Note that the Primary Care Physician Agreement was drafted by Oxford Health Plans LLC.

¹⁸ *See id.*

¹⁹ *Id.*

A dispute arose between the parties when Sutter alleged that Oxford routinely improperly denied, underpaid, and delayed reimbursement for services rendered by participating physicians.²⁰ Accordingly, Sutter filed a complaint with the state court alleging breach of contract on behalf of all physicians who were parties to an agreement with Oxford.²¹ Based on the agreement's arbitration clause, Oxford successfully moved to compel arbitration of Sutter's claims.²² During arbitration, the arbitrator—upon the parties' request—reviewed the arbitration clause and determined that it allowed for class arbitration.²³ As such, the arbitrator ordered arbitration on a class-wide basis and ultimately issued a class award.²⁴

Oxford subsequently moved to vacate the award in the District Court, arguing that “the arbitrator had exceeded his powers and manifestly disregarded the law by ordering class arbitration”; however, the court denied its motion.²⁵ Within three years of the District Court's decision, the Supreme Court decided the *Stolt–Nielsen* case.²⁶ Based on the *Stolt–Nielsen* decision, Oxford appealed to the Third Circuit Court of Appeals.²⁷

The Third Circuit court began its analysis by recognizing the strong federal policy favoring commercial arbitration and pointed out the four narrow grounds for vacatur listed in the FAA.²⁸ The basis for Oxford's claim that the class award should be vacated was that “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.”²⁹ The court conceded that, as held in *Stolt–Nielsen*, an arbitrator could exceed his powers by ordering class arbitration without authorization.³⁰ It further explained that the *Stolt–Nielsen* established a rule that required a contractual basis for concluding that the parties agreed to submit to class arbitration.³¹ The court found that, given the existence of a

²⁰ *See id.* Sutter sought to compel class action litigation against Oxford in the New Jersey Superior Court.

²¹ *See id.* at 217.

²² *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 217 (3d Cir. 2012).

²³ *See id.* at 218 (“The arbitrator thus determined that the clause's first phrase, ‘No civil action concerning any dispute arising under this Agreement shall be instituted before any court,’ embraces all conceivable court actions, including class actions. Because the clause's second phrase sends ‘all such disputes’ to arbitration, he reasoned that class disputes must also be arbitrated. Thus, the arbitrator concluded that the clause expressed the parties' intent to authorize class arbitration ‘on its face.’”).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 218 (In *Stolt–Nielsen*, the Court “held that an arbitral panel had exceeded its authority by allowing class arbitration when the parties had reached no agreement on the issue”).

²⁷ *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 218 (3d Cir. 2012).

²⁸ *See id.* at 219 (An award may be vacated only upon one of the four narrow grounds enumerated in the Federal Arbitration Act: (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. 9 U.S.C. § 10(a)).

²⁹ *Id.*

³⁰ *Id.* at 220.

³¹ *Id.*

contractual basis, an arbitrator may compel class arbitration under the FAA.³² The court distinguished this case from *Stolt-Nielsen*, however, by pointing out that the arbitrators for Sutter and Oxford were not constrained by the parties' intentions regarding class arbitration—as had been the case in *Stolt-Nielsen*.³³ In *Sutter*, the arbitrator stated that the contractual basis for his decision to compel arbitration was in the first clause of the arbitration agreement, which states: “No civil action concerning any dispute arising under this Agreement shall be instituted before any court.”³⁴ The Third Circuit agreed and found that the language was broad enough to encompass all conceivable civil actions, including class actions.³⁵

Ultimately, the Third Circuit affirmed the District Court's decision holding that the arbitrator did not exceed his powers by construing the arbitration agreement to authorize class arbitration.³⁶ The Third Circuit noted that *Stolt-Nielsen* only prohibits an arbitrator from inferring parties' consent to class arbitration based on *silence* in the agreement.³⁷ According to the court, where the parties' intent regarding class arbitration is not known, the depths of the powers delegated to the arbitrator is important to making the final determination.³⁸

C. A Class By Last Resort: The Reed Case

The Court of Appeals for the Fifth Circuit recently held that an arbitrator exceeded his powers³⁹ by ordering parties to submit to class arbitration because the arbitration agreement failed to state the parties' intentions regarding the procedure.⁴⁰ In *Reed v. Florida Metro. Univ., Inc.*, a dispute arose between Jeffrey Reed and Florida Metropolitan University (the “University”) over claims that the University violated certain provisions of the Texas Education Code.⁴¹ Reed graduated from the University's distance learning program, but had accrued \$51,000 in debt while attending.⁴² Unfortunately, Reed later learned that he was precluded from attending law school

³² *Id.* at 220.

³³ *See Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 222-23 (3d Cir. 2012) (“No stipulation between Oxford and Sutter is conclusive of the parties' intent and, indeed, the parties dispute whether or not they intended to authorize class arbitration. Therefore, *the arbitrator in this case was not constrained to conclude that the parties did not intend to authorize class arbitration. . .*”) (emphasis added); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1769-70 (2010).

³⁴ *See Sutter*, 675 F.3d at 223.

³⁵ *Id.*

³⁶ *Id.* at 223.

³⁷ *Id.* at 224.

³⁸ *See Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 224 (3d Cir. 2012). The court found, in this case, that the powers granted to the arbitrator were sufficiently broad enough to include the authority to interpret the agreement and compel class arbitration.

³⁹ *Reed v. Florida Metro. Univ., Inc.*, 681 F.3d 630, 644 (5th Cir. 2012) (“[T]he arbitrator lacked a contractual basis upon which to conclude that the parties agreed to authorize class arbitration. At most, the agreement in this case could support a finding that the parties did not preclude class arbitration, but under *Stolt-Nielsen* this is not enough. The arbitrator therefore exceeded his authority in ordering the parties to submit to a class arbitration proceeding, and the district court should have vacated the award”).

⁴⁰ *Id.* at 644 (citing 9 U.S.C. § 10(a)(4)).

⁴¹ *Id.* at 632.

⁴² *Id.*

because his bachelor's degree was not accepted by educational institutions and employers.⁴³ Thereafter, Reed filed a class action suit—on behalf of every Texas resident who contracted to receive distance education from the University—claiming that the University engaged in fraudulent practices by soliciting students without the appropriate certifications.⁴⁴

The University moved to compel individual arbitration pursuant to the arbitration clause in its enrollment agreement.⁴⁵ Yet, during arbitration, the arbitrator allowed for class arbitration.⁴⁶ The issue presented to the Fifth Circuit Court of Appeals was whether the arbitrator exceeded his powers when he concluded that the parties' agreement permitted class arbitration.⁴⁷

The Fifth Circuit began its analysis by recognizing the guidance provided by the U.S. Supreme Court regarding class arbitration in the *Stolt-Nielson* and *Concepcion*⁴⁸ decisions. The Fifth Circuit found that these Supreme Court cases highlighted the significant disadvantages of class arbitration.⁴⁹ In light of this, the court held that an arbitrator should not conclude that parties consented to such a proceeding absent a contractual basis for doing so;⁵⁰ and that in the absence of a contractual basis, the arbitrator should look to the FAA or state law to see if it allows for class arbitration.⁵¹ The court concluded that nothing in the enrollment agreement provided the arbitrator with a contractual basis for compelling class arbitration;⁵² and therefore, the arbitrator should have consulted state or federal law to see if a rule existed which addressed class arbitration.⁵³ The court determined that his failure to do so and to rely merely on his interpretation of the arbitration clause is where he exceeded his powers.⁵⁴ The Fifth Circuit noted that *Stolt-Nielson* held that “arbitrators should not ‘presume . . . that the parties' mere silence . . . constitutes consent’ to class arbitration.”⁵⁵ Accordingly,

⁴³ *Id.*

⁴⁴ Reed v. Florida Metro. Univ., Inc., 681 F.3d 630, 632 (5th Cir. 2012).

⁴⁵ See *id.* at 632 (“Terms of Arbitration: 1) Both student and Everest University irrevocably agree that any dispute between them shall be submitted to Arbitration. 2) Neither the student nor Everest University shall file or maintain any lawsuit in any court against the other, and agree that any suit filed in violation of this Agreement shall be dismissed by the court in favor of an arbitration conducted pursuant to this Agreement. . . . 4) The arbitrator's decision shall be set forth in writing and shall set forth the essential findings and conclusions upon which the decision is based. 5) Any remedy available from a court under the law shall be available in the arbitration.”).

⁴⁶ *Id.* at 638.

⁴⁷ *Id.*

⁴⁸ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The U.S. Supreme Court held that the FAA preempts California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. This decision effectively legitimized the use of class actions waivers in all commercial arbitration agreements.

⁴⁹ Reed v. Florida Metro. Univ., Inc., 681 F.3d 630, 640 (5th Cir. 2012).

⁵⁰ *Id.*

⁵¹ *Id.* at 641.

⁵² *Id.* at 642.

⁵³ *Id.*

⁵⁴ Reed v. Florida Metro. Univ., Inc., 681 F.3d 630, 642 (5th Cir. 2012).

⁵⁵ See *id.*; see also *Stolt-Nielson S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010) (“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.”).

arbitrators should only compel class arbitration if they are granted the powers to by contract or law.

III. ANALYSIS

A. *The Brewing Silence Preceding Stolt-Nielsen*

Prior to *Stolt-Nielsen*, arbitrators would often order class arbitration when an arbitration agreement was silent on the issue, and courts would generally affirm arbitrators' decisions.⁵⁶ Although this outcome was usually contrary to business interests, businesses did not prohibit class action arbitration because class action waivers were generally held as unconscionable and unenforceable.⁵⁷ As such, many arbitration agreements remained silent on the issue of class actions.⁵⁸ The *Stolt-Nielsen* decision was revolutionary insofar as it provided some guidance for lower courts and businesses with respect to the functionality and applicability of class arbitration.⁵⁹ Yet, the Court's reliance on "contractual basis" for a class arbitration determination left unclear whether that contractual basis always had to be expressly written into the contract language.⁶⁰ For arbitrators, the uncertainty regarding what constitutes "contractual basis" has provided space for arbitral interpretation regarding the parties' intentions to submit to class arbitration. As a result, lower courts have been left with the task of deciding whether sufficient contractual basis exists to authorize arbitral interpretations.⁶¹ In making these decisions, lower courts must often reckon with the U.S. Supreme Court's clear distaste for the class arbitration procedure.⁶²

⁵⁶ See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (The U.S. Supreme Court held that the arbitration clause did not preclude class arbitration, therefore the FAA did not foreclose class arbitration); *Cable Connection, Inc. v. DirectTV, Inc.*, 49 Cal. Rptr. 3d 187 (Cal. Ct. App. 4th 2006), *rev'd*, 82 Cal. Rptr. 3d 229 (Cal. 2008) (holding that the arbitrators did not exceed power by permitting classwide arbitration); *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 623 F.3d 348 (6th Cir. 2006) (the court held that the arbitral panel's decision to allow class action arbitration was not ripe for judicial review).

⁵⁷ See Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 482 (2011).

⁵⁸ See *id.*

⁵⁹ See *Stolt-Nielsen*, 130 S. Ct. at 1775 (holding that parties may not be compelled to submit to class arbitration under the FAA, unless a contractual basis could be provided to justify a conclusion that the parties agreed to the procedure).

⁶⁰ Jay W. Waks & Carlos L. Lopez, *Stolt-Nielsen, Silence and Class Arbitration: "Same As It Ever Was,"* 29 ALTERNATIVES TO HIGH COST LITIG. 193, 206 (2011) ("It noted only that express language referring to class arbitration was not always required but that '[a]n implicit agreement to authorize class-action arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate.'").

⁶¹ See generally *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d Cir. 2011) *cert. denied*, 132 S. Ct. 1742, 182 L. Ed. 2d 529 (2012); *Reed v. Florida Metro. Univ., Inc.*, 681 F.3d 630 (5th Cir. 2012); *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215 (3d Cir. 2012).

⁶² See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). In *Stolt-Nielsen* and *Concepcion*, the majority expressed disdain for the class action arbitration process; even characterizing it as unfair for defendants.

B. Split Circuits Amid A Mute Chorus

A number of circuit courts—in particular the Third and Fifth Circuits—have interpreted and applied the *Stolt-Nielsen* decision in very different ways.⁶³ In *Sutter*, Third Circuit Judge Fuentes’ opinion emphasized that a default rule was established by *Stolt-Nielsen*, which provided that a contractual basis was required for concluding that the party agreed to class arbitration.⁶⁴ By relying solely on the contractual basis as the rule, the court ultimately deferred to the arbitrator’s professional judgment. The court stated that “[w]ithout a conclusive statement of the parties’ intent or clear evidence of arbitral overreaching, we must conclude that the arbitrator performed his duty appropriately and endeavored to give effect to the parties’ intent.”⁶⁵ In light of the court’s deference, the arbitrator’s explanation that the contractual basis rested in the broad language of the arbitration clause was readily affirmed by the court.⁶⁶ The *Sutter* court also concluded that the arbitrator’s decision to order class arbitration was in line with public policy.⁶⁷ In sum, the *Sutter* court’s reliance on contractual terms and, to a lesser extent, public policy led the majority to determine that the arbitrator possessed the power to compel class arbitration where the arbitration clause was written broadly.

Conversely, the *Reed* court interpreted *Stolt-Nielsen* as not only requiring a contractual basis for ordering class arbitration, but also identifying the governing rule of law and following the procedure that it prescribed.⁶⁸ The *Reed* majority explained that the primary mishap in *Stolt-Nielsen* was that, in the absence of the parties’ consent, the arbitrators developed and ordered what they viewed as the best approach for the situation.⁶⁹ In light of the *Reed* court’s interpretation, it was very reluctant to defer to the best professional judgment of arbitrators. Moreover, the court emphasized the importance of following statutory prescriptions rather than baseless arbitral determinations.⁷⁰

⁶³ American Arbitration Association, *U.S. Courts of Appeal Are Split on the Interpretation of Stolt-Nielsen on Class Actions*, 67-JUL DISP. RESOL. J. 4 (2012) (“The *Reed*, *Jock* and *Sutter* decisions demonstrate three differing interpretations regarding the analysis and standards that arbitrators must follow when determining whether an arbitration clause permits classwide arbitration proceedings”).

⁶⁴ *Sutter*, 675 F.3d at 222.

⁶⁵ *See id.* at 224 (showing clear deference to the arbitrator and placing the burden on the Appellant—Oxford Health Plans, LLC—to provide evidence suggesting that the arbitrator did not performed his duties appropriately).

⁶⁶ *Id.* (finding that the appellant’s allegations were “simply dressed-up arguments that the arbitrator interpreted its agreement erroneously”).

⁶⁷ *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 233 (3d Cir. 2012) (excepting appellees argument that individual arbitration was contrary to New Jersey public policy).

⁶⁸ *Reed v. Florida Metro. Univ., Inc.*, 681 F.3d 630, 638 (5th Cir. 2012). The governing laws were presumed to be either the FAA or state law.

⁶⁹ *Id.* at 638-39 (stating that “instead of ‘inquiring whether the FAA, maritime law, or New York law contains a ‘default rule’ under which an arbitration clause is construed as allowing class arbitration in the absence of express consent, the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.’ The arbitrators perceived a consensus favoring class arbitration, and considered only whether there was a ‘good reason not to follow that consensus.’ Finding no such reason, the arbitration panel determined that the parties’ agreement permitted class arbitration.”).

⁷⁰ *Id.* at 638 (explaining that “the arbitrator should have consulted state or federal law to determine if a certain “default” class arbitration rule existed in the absence of an agreement.”).

The rigidity of the *Reed* court’s interpretation of *Stolt–Nielsen* serves as a significant weakness to the arbitral process. By leaving no room for arbitral interpretation, arbitrators’ hands are tied because they lack the requisite authority to use their professional judgment to determine the parties’ intent. For instance, in one case a contract between two contractors contained an arbitration provision that established that “any dispute[] between them would be resolved by binding arbitration .”⁷¹ Theoretically, one party to the contract could argue that the issue of class arbitration is not agreed upon because it is contained within the four corners of the contract. Under a strict application of *Reed*, an arbitrator lacks the authority to determine the scope of this plainly stated arbitration provision, which could potentially render the entire American arbitration system ineffective and nonsensical. Moreover, under *Reed*, it seems that whenever a party to an arbitration agreement successfully claims that party intent is unclear, the judiciary *could* be called upon to render a final decision on the matter. This sort of broad judicial intervention is contrary to the purpose of the FAA⁷² and the spirit of the American arbitration system.⁷³

Ideally, parties agree to submit their disputes to arbitration and entrust arbitrators with the authority to render just decisions in an efficient manner. The *Sutter* court’s interpretation of *Stolt–Nielsen* more closely follows the spirit of the FAA by deferring to arbitrators’ professional judgment. The *Sutter* court’s deference to arbitrator judgment enhances the legitimacy of arbitration and reduces the tendency of judicial intervention. In a recent First Circuit case, the court adopted the *Sutter* decision and applied it to a commercial arbitration dispute.⁷⁴ In that case, the arbitration agreement between a franchisor and franchisees did not *expressly* authorize class arbitration, yet the First Circuit Court rejected the argument “that there must be express contractual language evincing the parties’ intent to permit class or collective arbitration.”⁷⁵ The Court reasoned that no bright-line rule was created by *Stolt–Nielsen* that required the words “class arbitration” to be written into every agreement in order for parties to use the procedure.⁷⁶ To require parties to specifically state each and every term that they are agreeing to—in spite of language indicating that *all disputes* must go to arbitration—would turn the formation of arbitration agreements into an extremely arduous process. In the spirit of the FAA, courts should follow the precedent set by the *Sutter* court and entrust arbitrators with the authority to correctly discern the parties’ intent based on the arbitration agreement.

⁷¹ *Hofer Builders, Inc. v. Capstone Bldg. Corp.*, CIV.A. 12-1367, 2012 WL 5877986 (E.D. La. Nov. 20, 2012).

⁷² *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“The ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’”).

⁷³ *See Int’l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, Indus. Y Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990) (“The whole point of arbitration is that the merits of the dispute will *not* be reviewed in the courts, wherever they be located. Indeed, this principle is so deeply imbedded in American, and specifically, federal jurisprudence, that no further elaboration of the case law is necessary.”).

⁷⁴ *See generally* *Fantastic Sams Franchise Corp. v. FSRO Ass’n Ltd.*, 683 F.3d 18 (1st Cir. 2012).

⁷⁵ *Id.* at 22.

⁷⁶ *Id.*

IV. CONCLUSION

Because arbitration is an alternate form of adjudication, arbitrators require the authority to rule on matters submitted to arbitration without judicial intervention or second-guessing. Determining whether an arbitration agreement empowers an arbitrator to compel class arbitration, where party intent is not explicitly stated, should rightfully be decided by the arbitrator. Otherwise, more cases will be submitted to the judiciary for final adjudication, which is directly in opposition of the FAA's purpose. The Third Circuit's application of *Stolt-Nielsen* empowers the arbitral process and stimulates growth of alternative dispute resolution processes. In no instance should the judiciary infringe on an arbitrators' domain and ability to effectively conduct arbitration proceedings. Therefore, because the Third Circuit's interpretation gives deference to arbitrators' professional judgment, is in line with the FAA's purpose, and adds legitimacy to the arbitral process, it is the more appropriate approach that should be followed by the judiciary.