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“WHO DECIDES?” THE THIRD CIRCUIT: CLASS ACTION AVAILABILITY IS A QUESTION OF
ARBITRABILITY?

By
Marcus Shand*

I. INTRODUCTION

In *Opalinski v. Robert Half Int’l, Inc.*, the Third Circuit joined the Sixth Circuit in answering the question of “who decides” whether an otherwise silent arbitration agreement between parties may be submitted to classwide arbitration.¹ The Third Circuit, in agreement with the Sixth Circuit in *Reed Elsevier, Inc. v. Crockett*,² held that the availability of classwide arbitration is a substantive question of arbitrability.³ The Third Circuit concluded that the availability of classwide arbitration was a substantive question of arbitrability, rather than a procedural question, because the fundamental characteristics and consequences of classwide arbitration significantly differ from bilateral arbitration.⁴ The Third Circuit relied primarily on the Supreme Court’s guidance in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and Justice Alito’s concurrence in *Oxford Health Plans LLC v. Sutter* to refute the Court’s plurality opinion in *Green Tree Financial Corp. v. Bazzle*.⁵

The Third Circuit reached this conclusion because the decision to proceed with classwide arbitration rather than individual arbitration implicated whose claims may be arbitrated and the type of controversy that would be submitted to the arbitrator.⁶ The court not only examined recent Supreme Court developments following the plurality opinion in *Bazzle*, but also looked to the other circuit courts for guidance.⁷ The Third Circuit noted that aside from the Sixth Circuit, no other circuit court had squarely answered the question of who decides class arbitrability.⁸ By holding that the question of who decides classwide arbitrability is for a court, the Third Circuit clearly resolves the

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¹ *Opalinski v. Robert Half Int’l, Inc.*, 761 F.3d 326, 335-36 (3d Cir. 2014).

² *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

³ 761 F.3d at 335-36.

⁴ *Id.* at 329.

⁵ *See generally id.* at 330-33.

⁶ *See id.* at 332.

⁷ *See generally id.* at 334-35.

⁸ 761 F.3d 326, 335.

ambiguity left by the Supreme Court, and blatantly departs from the Supreme Court’s guidance in *Bazzele*.

This comment will begin with a description of the background and reasoning of *Opalinski*. It will then discuss the practical significance of the case as well as critique of the Third Circuit’s reasoning in light of the relevant precedent and implications. Ultimately, it will conclude that drafters of commercial and consumer arbitration agreements will likely find this holding a positive one because it ensures that they will not be ensnared in class proceedings without judicial review of a disputed clause.

II. BACKGROUND FACTS

David Opalinski and James McCabe (“Plaintiffs”) sued their former employer, Robert Half International, Inc. (“RHI”), on behalf of themselves and other individuals,⁹ and alleged that RHI misclassified them as overtime exempt employees in violation of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201 *et seq.*¹⁰ As a result of the misclassification, Plaintiffs alleged that they were deprived of time-and-a-half overtime pay.¹¹ Plaintiffs had signed employment agreements that contained an arbitration clause.¹² The agreements were nearly identical, stating in relevant part that “[a]ny dispute or claim arising out of or relating to Employee’s employment or any provision of this agreement...shall be submitted to arbitration.”¹³ Facially, the employment agreements

⁹ The other individuals were RHI employees “who have performed duties as ‘staffing managers[.]’” *Opalinski v. Robert Half Int’l, Inc.*, 2011 U.S. Dist. LEXIS 115534, at *1, 2 (D. N.J. 2011).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Opalinski*, 2011 U.S. Dist. LEXIS 115534, at *4-6. The text of *Opalinski*’s arbitration agreement provided:

“Employer and Employee agree that, to the fullest extent permitted by law, any dispute or claim arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement, whether based on contract or tort or otherwise . . . shall be submitted to arbitration pursuant to the commercial arbitration rules of the American Arbitration Association. Claims subject to arbitration shall include contract claims, tort claims, or claims relating to compensation, as well as claims based on any federal, state, or local law, statute, or regulation This Agreement shall be governed by the Federal Arbitration Act (“FAA”). The arbitrator shall apply the same substantive law that would apply if the claims were brought in a court of law. . . . To the extent permitted by law, the parties agree that neither punitive damages nor attorneys' fees may be awarded in an arbitration proceeding required by this agreement. THE PARTIES UNDERSTAND AND AGREE THAT THIS AGREEMENT CONSTITUTES A WAIVER OF THEIR RIGHTS TO A TRIAL BY JURY OF ANY OF THE ABOVE MENTIONED CLAIMS OR CONTROVERSIES.”

were silent on the topic of classwide arbitration.¹⁴ However, it is significant that McCabe’s agreement provided for arbitration under the rules of the American Arbitration Association (“AAA”).¹⁵ The AAA rules grant an arbitrator the jurisdiction to resolve questions of arbitrability.¹⁶

In 2011, RHI moved to compel arbitration of Plaintiffs’ claims individually.¹⁷ The district court granted the motion in part, but held that the availability of classwide arbitration was a determination for the arbitrator to make.¹⁸ RHI did not appeal this decision.¹⁹ The district court then terminated the case, and the dispute continued to arbitration.²⁰

In 2012, Arbitrator Susan T. Mackenzie (“Arbitrator”) granted the Plaintiffs a Partial Final Award on Clause Construction (“Award”), and concluded that the otherwise silent arbitration agreements permitted classwide arbitration.²¹ In December 2012, RHI moved to vacate the Award on grounds that the arbitrator exceeded her powers in permitting class arbitration.²² RHI argued that the Arbitrator’s finding was erroneous and in violation of Supreme Court precedent, but the district court was not persuaded and denied RHI’s motion.²³

McCabe’s agreement differed slightly stating:

“Any dispute or claim arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement, whether based on contract or tort or otherwise . . . shall be submitted to arbitration pursuant to the commercial arbitration rules of the American Arbitration Association. This Agreement shall be governed by the United States Arbitration Act The parties agree that neither punitive damages nor attorneys' fees may be awarded in an arbitration proceeding required by this Agreement.”

¹⁴ 761 F.3d 326, 330.

¹⁵ *Id.*

¹⁶ EMPLOYMENT ARBITRATION RULES AND MEDIATIONS PROCEDURES, American Arbitration Association, Section 6(a) (stating, “The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.”) (hereinafter “AAA Rules”).

¹⁷ 761 F.3d 326, 329.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Opalinski v. Robert Half Int'l, Inc.*, 2012 U.S. Dist. LEXIS 171815, at *1, 2.

²² *Id.*, at *2.

²³ *See id.*

The district court found RHI's arguments unpersuasive in light of the Supreme Court's interpretation of *Stolt-Neilsen* in *Sutter v. Oxford Health Plans LLC*.²⁴ The district court found that *Sutter* was "directly on point" with the instant case, and as such the district court could not conclude that the arbitrator was prohibited from interpreting the agreement to permit class arbitration.²⁵ The District Court examined the Arbitrator's Award, and found that the conclusions and reasoning contained therein were rational and well supported.²⁶

On appeal of the district court's 2012 order denying the motion to vacate, RHI argued that the determination of whether to permit class arbitration should not have been left to the arbitrator, and instead should be a gateway "question of arbitrability" for district courts to decide.²⁷

III. COURT'S ANALYSIS

The Third Circuit began its analysis by establishing jurisdiction and describing the standard of appellate review of arbitration awards.²⁸ The analysis proceeded to refute two threshold arguments made by the appellees based on the timing of RHI's appeal, and then progressed into analysis of the merits of the case. The Third Circuit employed the two-part test provided by the Supreme Court in *Howsam v. Dean Witter Reynolds, Inc.*,²⁹ where the court asks whether the availability of class arbitration is a "question of

²⁴ *Opalinski v. Robert Half Int'l, Inc.*, 2012 U.S. Dist. LEXIS 171815, at *6.

²⁵ *Id.*

²⁶ *Id.*, at *8-9. The Arbitrators Awards stated in relevant part:

"[T]he language of [the arbitration provision] on its face supports an intent of the parties to include all statutorily-based claims under [the arbitration provision] unless expressly excluded. All terms of any contract are to be given force and effect, and [the arbitration provision] states expressly that "any dispute or claim arising out of or relating to Employee's employment" is subject to arbitration. . . . [U]se of this inclusive and generic term ["any"] on its face indicates that all claims are covered absent a demonstration of exclusion. . . . Other language included in [the arbitration provision] is also persuasive of a reading of the term "any claim" . . . as inclusive of FLSA class claims. The 2001 Employment Agreement further defines "covered claims" as those "based on contract or tort or otherwise." . . . [Amendments to the arbitration provision] include express language stating that coverage extends to "claims based on any federal or state or local law or statute." . . . Nowhere does [the arbitration provision] state or indicate that one type of FLSA claim, one filed individually, is covered but another type of FLSA claim, one filed on behalf of others similarly situated, is not covered."

²⁷ 761 F.3d 326, 329.

²⁸ *Id.* at 329-30.

²⁹ *See* *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002).

arbitrability.”³⁰ If the answer is yes, then there is a presumption that the issue is “for judicial determination unless the parties clearly and unmistakably provide otherwise.”³¹ If the answer is no, the issue is not a “question of arbitrability,” then the matter “is presumptively for the arbitrator to resolve.”³²

A. The Court Rejects Appellees Arguments of Untimely Appeal and Waiver

Plaintiff-appellees Opalinski and McCabe argued that RHI’s appeal was untimely because the appeal challenged the district court’s 2011 order as opposed to the 2012 order that it purports to challenge.³³ The appellees characterized the 2011 order as a final decision that should have been appealed immediately on an interlocutory basis.³⁴ The Third Circuit disagreed, and found that the district court’s 2011 order was not a final decision as defined by the Supreme Court in *Green Tree Fin. Corp.-Ala. v. Randolph*,³⁵ because the order “effected only a non-final, administrative closure, and explicitly acknowledged the potential need for further litigation before the [d]istrict [c]ourt.”³⁶

Similarly, the Third Circuit rejected the appellees’ argument that RHI waived its right on appeal to argue that the district court should have determined the availability of class arbitration instead of the arbitrator because RHI had failed to raise this argument in its motion to vacate.³⁷ The Third Circuit explained that waiver did not apply in this case because RHI had maintained its objection to the district court’s ruling to let the arbitrator decide the availability of classwide arbitration throughout the litigation and arbitral proceedings.³⁸ Therefore, neither the district court nor the appellees were prejudiced as a result the court addressing the “who decides” issue.³⁹

³⁰ 761 F.3d 326, 330.

³¹ *Id.* (citing *Howsam*, 537 U.S. at 83).

³² 761 F.3d 326, 330 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1994)).

³³ 761 F.3d 326, 330.

³⁴ *Id.*

³⁵ *See Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 86 (2000).

³⁶ 761 F.3d 326, 330.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

B. Overcoming Unfavorable Precedent

The Third Circuit began its analysis of the merits by defining the “question of arbitrability.”⁴⁰ Simply put, the court explained that a “question of arbitrability” is a jurisdictional determination of “whether the parties have submitted a particular dispute to arbitration.”⁴¹ The court then provided examples of typical questions of arbitrability, and the contractual premise underlying questions of arbitrability.⁴² Due in part to the federal policy favoring arbitration agreements, “[q]uestions of arbitrability’ are limited to a narrow range of gateway issues[,]” while questions that the parties would typically expect an arbitrator to decide, such as procedural issues that arise as a result the dispute, are not questions of arbitrability.⁴³

In direct contradiction of the Supreme Court plurality opinion in *Bazzle*, the Third Circuit concluded that availability of class arbitration was a “question of arbitrability.”⁴⁴ The court examined Supreme Court decisions following *Bazzle*, and found support in *Stolt-Nielsen* and *Oxford Health* for the conclusion that the Supreme Court had moved away from the *Bazzle* plurality opinion.⁴⁵

Not only did the Third Circuit have to overcome the Supreme Court in *Bazzle*, but also its own precedent in *Quillon v. Tenet Health System Phila., Inc.*⁴⁶ The Third Circuit stated in *Quillon v. Tenet Health System Phila., Inc.* that “the actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator.”⁴⁷ The Court dismissed this statement as *dictum* because the parties in *Quillon* had already agreed that the arbitrator should decide whether the contract provided for classwide arbitration.⁴⁸ In addition, the court stated that the *Quillon* opinion incorrectly relied on *Stolt-Nielsen* because the Supreme Court stated in *Stolt-Nielsen* that the Court had not yet decided whether the availability of classwide arbitration was a “question of arbitrability.”⁴⁹

⁴⁰ 761 F.3d 326, 331.

⁴¹ *Id.* (citing *Howsam*, 537 U.S. at 83)

⁴² 761 F.3d 326, 331.

⁴³ *Id.* (citing *Howsam*, 537 U.S. at 84)

⁴⁴ 761 F.3d 326, 331.

⁴⁵ *Id.*

⁴⁶ *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221 (3d Cir. 2012).

⁴⁷ *Id.* at 232.

⁴⁸ 761 F.3d 326, 331.

⁴⁹ *Id.* at 331-32.

C. The Availability of Classwide Arbitration is a “Question of Arbitrability”

The Third Circuit concluded that the of the availability of classwide arbitration is a jurisdictional question of arbitrability and therefore should be left to the courts in the absence of language to the contrary based on two implications of the class arbitration.⁵⁰ Additionally, the Third Circuit examined how other circuit courts have answered the question of who decides the availability of classwide arbitration.⁵¹

1. The Availability of Classwide Arbitration Implicates Whose Claims the Arbitrator May Resolve

The Third Circuit cited and quoted a number of Supreme Court and Third Circuit decisions that supported the proposition that the determination who is bound by an arbitral agreement is a question of arbitrability.⁵² The court explained that “[t]he determination whether RHI must include absent individuals in its arbitration with Opalinski or McCabe affects whose claims may be arbitrated and it thus a question of arbitrability.”⁵³ The court supported this conclusion with Justice Alito’s concurrence in *Oxford Health* that stated in part that a “court should be wary of concluding that the availability of classwide arbitration is for the arbitrator to decide, as that decision implicates the right of absent class members without their consent.”⁵⁴

2. The Availability of Classwide Arbitration Implicates the Type of Controversy Submitted to Arbitration

The Third Circuit separately concluded, due to the drastic effects that classwide arbitration would have on the nature of arbitral proceedings, the determination of the availability of class arbitration is a “question of arbitrability.”⁵⁵ The plaintiff-appellees argued that availability of classwide arbitration is merely a procedural question.⁵⁶ The Court, however, found extensive support for their position in both *Stolt-Nielsen* and *AT&T Mobility*, stating that “we read the Supreme Court as characterizing the possibility of classwide arbitration not solely as a question of procedure or contract interpretation,

⁵⁰ 761 F.3d 326, 332.

⁵¹ *Id.* at 334-35.

⁵² *See id.* at 332.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 761 F.3d 326, 332 (citing *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, at 2071-72 (2013) (Alito, J., concurring)).

⁵⁶ 761 F.3d at 333.

but as a substantive gateway dispute qualitatively separate from deciding and individual quarrel.”⁵⁷ The Court reasoned that because of the distinct differences between classwide arbitration and traditional individual arbitration, “the choice between the two goes, we believe, to the very type of controversy to be resolved.”⁵⁸

3. *Similar Conclusions in the Sixth Circuit Court of Appeals*

The Third Circuit examined the decisions of the other circuits, and found that the Sixth Circuit was the only other court to have squarely resolved the issue of who decides the availability of classwide arbitration.⁵⁹ In *Elsevier*, the Sixth Circuit Court held that “whether and arbitration agreement permits classwide arbitration is a gateway matter” and is presumptively “for judicial determination[.]”⁶⁰ Similar to the Third Circuit’s reasoning, the Sixth Circuit cited the Supreme Court decisions in *Conception, Oxford Health*, and *Stolt-Nielsen* to conclude that the Supreme Court has shifted away from the *Bazze* plurality.⁶¹ On that point, the Sixth Circuit noted that “the [Supreme] Court has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one.”⁶²

The appellees argued that the First, Second, and Eleventh Circuits had ruled that the availability of classwide arbitration is a procedural issue for the arbitrator to decide.⁶³ The Third Circuit was unconvinced. The court concluded that the three cases cited by the appellees were factually distinguishable, and therefore unpersuasive.⁶⁴ The Third Circuit concluded its analysis by affirmatively joining “the Sixth Circuit Court of appeals in holding that the availability of class arbitration is a ‘question of arbitrability.’”⁶⁵

D. The Absence of Evidence to Rebut The Presumption

In keeping with the two-part analysis described above, the Third Circuit examined RHI’s employment agreements with the appellees, and concluded that the agreements

⁵⁷ 761 F.3d 326, 334.

⁵⁸ *Id.*

⁵⁹ *Id.* (examining Reed Elsevier, 734 F.3d 594).

⁶⁰ *See* 734 F.3d at 599.

⁶¹ 761 F.3d 326, 334.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 334-35.

⁶⁵ *Id.* at 335.

were silent on the topic of class arbitration.⁶⁶ The court noted that the burden of rebutting the presumption that a “question of arbitrability” is one for the courts to decide and is “onerous, and requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator.”⁶⁷ The court explained further that silence or ambiguity in the “contractual language is insufficient to rebut the presumption.”⁶⁸

IV. SIGNIFICANCE

The Third Circuit’s holding in *Opalinski* marked a clear shift away from the Supreme Court’s plurality opinion in *Bazzle*, and provided much needed clarity to some ambiguities left in the wake of *Stolt-Nielsen*. The Third Circuit established a clear rule that in the absence of express language to the contrary, the availability of classwide arbitration is a gateway question of arbitrability for the district courts to decide.⁶⁹

Opalinski is significant because the Third Circuit became one of two circuit courts to strip a threshold issue of jurisdictional power from the arbitrators. In spite of the federal policy favoring arbitral independence and autonomy, the Third Circuit further injects the courts into arbitration due to its apparent distaste for class wide arbitration. As a consequence of this jurisdictional demarcation, whenever a party within the Third Circuit seeks to initiate classwide arbitration, the opposing party, namely corporate entities, will be able to challenge the courts determination through *de novo* appellate review. Prior to *Opalinski*, a corporate defendant that sought to compel arbitration could unexpectedly find itself embroiled in a large class action arbitral proceeding without the right to *de novo* review. While the court in *Opalinski* does not articulate this policy consideration in its analysis, the court’s rationale clearly takes in to account the disruptive nature of classwide arbitration.⁷⁰

Moving forward, practitioners representing corporate clients in employment disputes or other actions potentially subject to classwide arbitral proceedings (products liability, etc.) should understand that omission of any mention of classwide arbitration in the arbitral agreement will result in the preservation of their client’s right to judicial determinations on the matter, thereby providing an additional means of challenging an arbitrator’s determination on the availability of class proceedings. Conversely, a practitioner representing a plaintiff seeking classwide arbitration should understand that even outside the jurisdiction of the Third and Sixth Circuits, the arbitrator’s award may be subject to vacatur in the event that another circuit court is persuaded by the Third and Sixth Circuits’ reasoning in *Opalinski* and *Elsevier* respectively.

⁶⁶ 761 F.3d 326, 335.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 334.

⁷⁰ *See id.* at 334-35.

While the significance of *Opalinski* can hardly be understated, it is important to recognize that the ruling was actually somewhat narrow. The holding in *Opalinski* only applies when the arbitral agreement between the parties is silent on the topic of classwide arbitration, and the parties actually disagree over whether the dispute should be submitted to classwide arbitration.⁷¹ In accordance with fundamental freedom of contract principles that provide the basis of arbitration law in the United States, a party may avoid judicial determination of the availability of classwide arbitration by simply inserting a clause in arbitral agreement delegating that power to the arbitrator.

While it is unclear whether the other circuit courts will follow suit with their treatment of the issue of who decides the availability classwide arbitration, the implications of the Supreme Court's reasoning in *Stolt-Nielsen* surely cast substantial doubt on the precedential value of *Bazzle*. This doubt coupled with the holdings of *Opalinski* and *Elsevier* strongly indicate that other circuits will likely agree with the Third and Sixth Circuits' reasoning.

V. CRITIQUE

The Third Circuit's rationale for the holding in *Opalinski* was well-grounded and consistent with Supreme Court precedent. The holding is an inevitable consequence of the Supreme Court's post-*Bazzle* shift away from leaving the determination of classwide arbitrability to arbitrators. The Third Circuit effectively catalogs the Supreme Court's treatment of the issue, and then proceeds to pragmatically apply the implications of classwide arbitration, as articulated by the Supreme Court in *Stolt-Nielsen*, to the standards for questions of arbitrability set forth by the Supreme Court in *Howsam*.⁷² District courts in the Third Circuit should have no issue interpreting and applying the holding in *Opalinski* because it is clear: "the availability of class arbitration is a 'question of arbitrability' for a court to decide unless the parties unmistakably provide otherwise."⁷³

However, the reasoning and holding in *Opalinski* is grounded on the potentially faulty assumption that *both* Plaintiffs' employment agreements were actually silent on the topic of classwide arbitration.⁷⁴ McCabe's agreement provided for arbitration under the AAA rules, which delegate to the arbitrator the power to determine "jurisdiction."⁷⁵ In light of the Supreme Court's ruling in *First Options of Chi., Inc. v. Kaplan*, such a jurisdictional delegation would remove the issue of classwide arbitrability from the court's jurisdiction.⁷⁶ It is possible that either the Third Circuit chose to ignore the AAA

⁷¹ 761 F.3d 326, 329, 330.

⁷² *Howsam*, 537 U.S. 79, 84.

⁷³ 761 F.3d at 335-336.

⁷⁴ 761 F.3d at 330.

⁷⁵ See *supra* note 13; see also AAA Rules, *supra* note 16 and accompanying text.

⁷⁶ See *First Options of Chicago*, 514 U.S. at 944-45.

provision in McCabe's agreement as a result of hostility toward class wide arbitration or it was simply overlooked by both the court and the Plaintiffs. Regardless the issue of whether or not McCabe's agreement was in fact a Kaplan jurisdictional delegation should have been addressed in *Opalinski*.

Whether a Circuit split will arise on the issue of "who decides" the availability of classwide arbitration is unclear; however, the lower courts within the remaining circuits will likely find the Third and Sixth Circuits' nearly identical reasoning persuasive, making it only a matter of time until another Circuit Court of appeals weighs in on the issue. While the *Opalinski* holding is well-supported and unambiguous, the other circuits could take issue with the inevitable consequence of injecting the court further in to the arbitral process.

The apparent judicial distaste for classwide arbitration becomes even more apparent when the rule in *Opalinski* is viewed in conjunction with the enforceability of class-action waivers. While corporate entities cannot use both *Opalinski* and class-action waivers to protect themselves from classwide arbitration, these two cases provide corporate entities with the means to sufficiently insulate themselves from classwide arbitration and discourage potential plaintiff's attorneys from attempting to initiate classwide arbitration. If the remaining circuits adopt the same opinion as the Third and Sixth Circuit, *Opalinski* and *Elsevier* could very well mark the beginning of the end for classwide arbitration.

VI. CONCLUSION

While the Third Circuit grounded *Opalinski* in the Supreme Court's and Sixth Circuit's developing distaste for classwide arbitration, it left critical questions unanswered. In subsequent decisions, the Third Circuit, and other courts, will have to further wrestle with the "who decides" question, to determine what evidence is required to meet its clear and unmistakable standard.⁷⁷ Despite failing to answer this question, however, the Third Circuit has joined in sounding the death knell of classwide arbitration.

⁷⁷ 761 F.3d 326, 335-336.