

## Charlotte Garden: Opinion analysis: The meaning of consent to class arbitration

Of the three arbitration cases on the Supreme Court's docket this term, two were decided unanimously in decisions issued relatively soon after argument. That trend did not hold for *Lamps Plus v. Varela*: The court split 5-4, with the more conservative justices rejecting the application of the common-law rule that ambiguous contracts are construed against their drafter when the contract in question is an arbitration contract and the ambiguity concerns whether plaintiff-employees may arbitrate on a class basis.

The underlying claim in *Lamps Plus* arose from a data breach that led to the disclosure of about 1,300 employees' tax information. Employee Frank Varela filed a class action in federal district court, and Lamps Plus moved to compel individual arbitration based on the arbitration agreement that Varela signed when he started at the company. The district court agreed that Varela could bring his claim only in arbitration, but also held that he could arbitrate on a class-wide basis; it then dismissed his complaint. The U.S. Court of Appeals for the 9th Circuit affirmed, concluding that the arbitration agreement was ambiguous about whether it allowed class arbitration, and then applying the contra proferentem doctrine – a common-law rule that contract ambiguities should be construed against the party that drafted the contract, especially when the other party did not have an opportunity to help with the drafting.

Although the main issue in the case was whether the lower-court's approach to construing the arbitration agreement was proper, there was also a preliminary question about whether the 9th Circuit, and by extension the Supreme Court, had jurisdiction over Lamps Plus' appeal. Writing for the majority, Chief Justice John Roberts first held that the 9th Circuit had jurisdiction under a provision of the Federal Arbitration Act that allows a party to appeal "a final decision with respect to an arbitration." That was so even though Lamps Plus both moved for arbitration and appealed the order granting it; usually, a party cannot appeal from a win, but Roberts wrote that the district court's order was not really a win because "Lamps Plus did not secure the relief it requested" – individual, rather than class-wide, arbitration.

Turning to the meaning of Lamps Plus' arbitration agreement, Roberts first invoked three principles at the core of the court's modern arbitration caselaw. First, parties must agree to arbitrate, and the FAA requires courts to enforce arbitration agreements according to their terms. Second, courts usually interpret arbitration agreements by applying state contract law, but the FAA pre-empts state law that treats arbitration contracts differently from other contracts. Third, there is a "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA."

The last of those principles was key to the court's 2010 decision in *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, which held that arbitrators cannot order class arbitration when the arbitration agreement is silent as to the use of class procedures. Relying on *Stolt-Nielsen*, the *Lamps Plus* majority held that ambiguity, like silence,

“does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to ‘sacrifice the principal advantage of arbitration.’” This conclusion relied in part on the majority’s skepticism about class arbitration, which the majority deemed more expensive and cumbersome than individual arbitration – a conclusion that is uncontroversial if one compares Varela’s own individual arbitration to class arbitration, but which is not so clear if one instead considers the expense and effort involved in 1,300 individual arbitrations as compared to one class arbitration involving 1,300 class members. (Of course, not all 1,300 potential class members will pursue individual arbitration.) Additionally, the court rejected the application of *contra proferentem*, both because it viewed that doctrine as a reflection of “public policy” rather than of the contracting parties’ intentions, and because of the doctrine’s potential to undermine individual arbitration. In addition to Roberts’ opinion for the court, Justice Clarence Thomas filed a concurring opinion, and each of the four more liberal justices wrote a dissent. Thomas first suggested that Lamps Plus’ arbitration agreement unambiguously required individual arbitration, and he then questioned the court’s approach to implied pre-emption. Thomas nonetheless joined Roberts’ opinion “because it correctly applies our FAA precedents.”

Justice Elena Kagan wrote the main dissent. After positing that Lamps Plus’ arbitration agreement unambiguously allowed class arbitration, Kagan offered a full-throated defense of *contra proferentem*, focusing on the role that the FAA preserves for state contract law that does not “discriminate[] against arbitration agreements.” She reasoned that resolving ambiguities against a contract’s drafter is “as even-handed as contract rules come,” because, for example, Lamps Plus’ contract could have been interpreted as calling for individual arbitration either if Varela had drafted the contract or if it were Varela who sought individual arbitration. Further, she added that, as the drafter of the contract, Lamps Plus could have avoided class arbitration simply by being clear about its intentions.

Justice Sonia Sotomayor’s dissent criticized the majority for failing to conclude that the arbitration agreement was actually ambiguous before addressing how ambiguity should be resolved. And Justice Ruth Bader Ginsburg took aim at the majority’s view that employees’ or consumers’ consent to arbitrate is meaningful when it is required as a condition of being hired or engaging in a transaction. The resulting proliferation of arbitration agreements, Ginsburg continued, has eroded workers’ and consumers’ abilities to vindicate their rights. Finally, Justice Stephen Breyer focused on the majority’s jurisdictional holding, writing that when a district court orders arbitration, “there should be no appellate interference with the arbitral process unless and until that process has run its course.”

<https://www.scotusblog.com/case-files/cases/lamps-plus-inc-v-varela/>