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Plurality Influence: *Reed Elsevier* and the Precedential Value of *Bazzle* on Class Arbitrability

*Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*¹

I. INTRODUCTION

Class arbitration is a tricky process to navigate as it introduces more parties, higher stakes, and more procedures than typical bilateral arbitration. Because class arbitration is more complex, the determination as to whether an arbitration agreement authorizes class arbitration (class arbitrability) is an important one, and the entity that makes the class determination should be knowledgeable about class procedures in order to be suited to make such an important finding. In *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, the Sixth Circuit held that the determination of class arbitrability should be presumptively reserved to judicial courts, not arbitrators, unless the arbitration agreement expressly provides otherwise.² This Note discusses the circuit split that arose following the Sixth Circuit's holding in *Reed Elsevier*, and then explores the precedential value of United States Supreme Court plurality opinions. In conclusion, this note argues that *Reed Elsevier* highlights the jurisprudence of recent Supreme Court cases; together, these cases indicate a shift away from *Bazzle*³ and are more persuasive than any single plurality opinion.

II. FACTS & HOLDING

Plaintiff Craig Crockett (Crockett), of the former law firm Dehart & Crockett, P.C., contracted with LexisNexis⁴ in 2007 for a Subscription Plan (Plan) to access legal research databases.⁵ For a flat, monthly fee, subscribers to the Plan would receive unlimited access to certain databases, but access to other databases would not be covered by the Plan and would result in additional fees.⁶ Crockett claimed that LexisNexis assured its subscribers that a warning sign, such as a dollar sign, would appear to notify subscribers before they accessed a database not included in the Plan.⁷

After several years of subscription to the Plan, Crockett made a complaint to LexisNexis that his firm was being charged additional fees and that LexisNexis

1. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).

2. *Id.* at 599. Commentators suggest that parties include express language in arbitration provisions regarding the availability of class arbitration. See, e.g., Ilana Haramati, *The Future of Class Arbitration: Lessons from Oxford Health Plans LLC v. Sutter*, 60-DEC FED. LAW. 73, 75 (2013).

3. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 454 (2003) (plurality opinion) (holding that arbitrators should presumptively determine class arbitrability).

4. LexisNexis is a division of Reed Elsevier, Inc. *Reed Elsevier*, 734 F.3d at 595.

5. *Reed Elsevier*, 734 F.3d at 596.

6. *Id.*

7. *Id.*

was not providing the promised warning signs before firm employees accessed non-Plan databases.⁸ Crockett alleged that LexisNexis insisted the fees be paid regardless.⁹ Dehart & Crockett dissolved, and Crockett then established the Crockett Firm, which subscribed to a materially similar Plan with LexisNexis.¹⁰

The Plan contained an arbitration provision.¹¹ In 2010, in accordance with the agreement, Crockett brought a demand for arbitration to the American Arbitration Association alleging numerous state-law claims against LexisNexis relating to the additional fees.¹² As other subscribers to LexisNexis encountered similar fee issues, Crockett made a request for class arbitration on behalf of two putative classes: one class composed of law firms charged additional fees by LexisNexis, and another class of the law firms' clients who ultimately bore the cost of the additional fees.¹³

LexisNexis responded by filing suit in the federal Southern District of Ohio, moving for a declaration that the Plan's arbitration clause did not permit class arbitration and an injunction that would prevent Crockett from continuing with the class certification.¹⁴ The district court held that the arbitration agreement did not permit classwide arbitration,¹⁵ granting summary judgment to LexisNexis on the declaratory claim and dismissing the injunctive claim without prejudice.¹⁶

Crockett appealed to the Sixth Circuit Court of Appeals, arguing that the determination of class arbitrability should have been a decision for an arbitrator, not the district court.¹⁷ Crockett also urged on appeal that if class arbitration was not permitted, the arbitration provision was unconscionable.¹⁸

The Sixth Circuit affirmed the district court in that the arbitration clause did not permit class arbitration.¹⁹ First, the Sixth Circuit dismissed Crockett's unconscionability argument, finding that the absence of a class arbitration provision is not unconscionable because the free market offers alternative subscriptions to

8. *Id.*

9. *Id.*

10. *Id.*

11. *Reed Elsevier*, 734 F.3d at 596. In relevant part, the arbitration agreement provided that each party would bear its own attorney's fees and costs, the parties would equally divide arbitrator fees, issues of arbitrability would be determined by federal substantive and procedural law, and other substantive issues would be governed by New York law unless otherwise specified. *Reed Elsevier, Inc. v. Crockett*, No. 3:10CV248, 2012 WL 604305, at *9 (S.D. Ohio Feb. 24, 2012), *aff'd sub nom.* *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).

12. *Reed Elsevier*, 734 F.3d at 596. The arbitration demand included claims of "fraud, negligent misrepresentation, breach of contract, negligence, gross negligence, unjust enrichment, and violation of the New York Consumer Protection Act" and alleged damages in excess of \$500 million. *Id.*

13. *Id.*

14. *Id.*

15. *Reed Elsevier*, 2012 WL 604305, at *8. The district court reviewed United States Supreme Court cases dealing with issues of arbitrability and class arbitration, and though no majority opinion was dispositive on the issue of class arbitrability, the district court found that the conclusion to make class arbitration a gateway issue to be decided by courts was most in keeping with the Supreme Court's rulings. *Id.*

16. *Reed Elsevier*, 734 F.3d at 596.

17. *Id.* at 597.

18. *Id.* at 600. Crockett argued the clause was fully one-sided in favor of LexisNexis: the clause required arbitration to occur in Dayton, Ohio (the location of LexisNexis's headquarters), required Crockett to pay his own legal fees even if LexisNexis's charges were found to be improper, and required Crockett to split the cost of arbitrator fees, an unusual practice for a corporation. *Id.*

19. *Id.* at 600.

legal databases without arbitration clauses.²⁰ Next, observing that the arbitration agreement was silent as to class arbitration,²¹ the Sixth Circuit dismissed the argument that the agreement authorized an arbitrator to make class arbitrability determinations.²² Looking to the collective thrust of United States Supreme Court cases dealing with class arbitrability,²³ the Sixth Circuit found class arbitration to be a “gateway issue” of arbitrability.²⁴ The Sixth Circuit held that the “gateway” question of whether an arbitration agreement permits class arbitration is to be decided by the judicial courts unless expressly stated otherwise by the parties.²⁵

III. LEGAL BACKGROUND

Arbitration is a matter of consent.²⁶ When a party moves to compel arbitration, unless otherwise provided in the contract, the first step is for a court to determine whether the parties’ contract authorizes the arbitration.²⁷ However, when a party seeks to compel class arbitration and the contract is silent as to class arbitration, it has been unclear whether the certification of the class should lie presumptively with the courts or with the arbitrator.²⁸ This issue has led to a circuit split.²⁹ Additionally, if an arbitration clause in a commercial contract is deemed to waive class arbitration, the lack of availability of class procedures for consumers does not by itself render the arbitration clause unconscionable or unenforceable.³⁰

A. The Issue of Arbitrability

Arbitrability is the threshold determination of whether parties consented to arbitration in a contract.³¹ In *Howsam v. Dean Witter Reynolds, Inc.*,³² the United States Supreme Court found arbitrability a “gateway” matter to be decided before a case can be sent to arbitration.³³ Gateway matters are presumptively “for judicial determination,” unless there is evidence in the agreement that “clearly and unmistakably” authorizes an arbitrator to determine arbitrability.³⁴ When an arbitration provision is unclear or ambiguous regarding arbitrability, the question should presumptively remain with the courts.³⁵ In *First Options of Chicago, Inc.*

20. *Id.* The Sixth Circuit noted that Westlaw, another legal research database provider, had no arbitration agreement at all in its contracts. *Id.*

21. *Id.* at 599.

22. *Reed Elsevier*, 734 F.3d at 599.

23. *Id.* at 597-98.

24. *Id.* at 599. Issues of arbitrability are those that must be determined by a court before the case can be sent to arbitration. *Id.*

25. *Id.*

26. *Volt Info. Scis. Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989).

27. *AT&T Techs., Inc. v. Comm’n Workers of Am.*, 475 U.S. 643, 649 (1986).

28. *See Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013).

29. *Compare Reed Elsevier*, 734 F.3d 594, and *Chassen v. Fidelity Nat’l Fin., Inc.*, No. 09-291 (PGS)(DEA), 2014 WL 202763 (D. N.J. Jan. 17, 2014), with *Vilches v. Travelers Cos., Inc.*, 413 F.App’x. 487 (3d Cir. 2011), and *Lee v. JPMorgan Chase & Co.*, 982 F. Supp.2d 1109 (C.D. Cal. 2013).

30. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

31. *AT&T Techs.*, 475 U.S. at 649.

32. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

33. *Id.* at 83-84.

34. *Id.* at 83 (quoting *AT&T Techs. Inc.*, 475 U.S. at 649).

35. *Id.* at 84.

v. *Kaplan*,³⁶ the Supreme Court provided a two-step test for classifying issues of arbitrability: first, the determination turns on whether a court or an arbitrator is authorized to decide arbitrability,³⁷ and second, whether the entity is authorized to interpret the contract to find if it authorizes arbitration.³⁸

The Court drew a distinction between “substantive” and “procedural” questions of arbitrability in *John Wiley & Sons, Inc. v. Livingston*.³⁹ Substantive arbitrability questions are considered gateway matters, probing whether the parties agreed to submit to arbitration, and are for the courts to determine.⁴⁰ Procedural, or subsidiary, questions are those that “grow out of the dispute and bear on its final disposition,” such as the determination of the procedures authorized by the parties for arbitration.⁴¹ Ultimately, courts decide “substantive” questions, and “procedural” questions are left to the arbitrator to decide.⁴²

B. Class Arbitration and Arbitrability

The United States Supreme Court has not squarely decided whether class arbitration is a gateway issue of arbitrability or merely a “procedural” question.⁴³ The Court has determined a number of issues about class arbitration that bear on the question of class arbitrability and provide helpful context to the “gateway” analysis.⁴⁴

When the parties to an arbitration agreement expressly authorize an arbitrator to decide if the provision permits class arbitration, the arbitrator is permitted to interpret the provision regarding class arbitration.⁴⁵ In *Oxford Health Plans LLC v. Sutter*,⁴⁶ the parties explicitly stipulated to allow the arbitrator to decide class arbitrability.⁴⁷ The Court found that because the parties had expressly authorized this, the arbitrator had the power to perform the task of determining class arbitrability.⁴⁸ In contrast, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,⁴⁹ no such explicit authorization existed, and the Court refused to impose class arbitration on the parties when there was no contractual basis to conclude the parties agreed to such procedures.⁵⁰

The only case in which the Court analyzed class arbitrability fully was in the plurality opinion of *Green Tree Financial Corp. v. Bazzle*.⁵¹ In *Bazzle*, the plurali-

36. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

37. Such authorization may be expressly included in the arbitration provision or the parties may stipulate as to which entity may decide arbitrability. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010).

38. *Id.* at 944-45.

39. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-58 (1964).

40. *Id.* at 558.

41. *Id.* at 557.

42. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 945 (1995).

43. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013).

44. See generally *Oxford*, 133 S. Ct. 2064; *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

45. *First Options*, 514 U.S. at 943.

46. *Oxford*, 133 S. Ct. 2064.

47. *Id.* at 2065.

48. *Id.* at 2071.

49. *Stolt-Nielsen*, 559 U.S. at 662.

50. *Id.* at 664-65.

51. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

ty found that the presumption of determining class arbitration is given to the courts, not an arbitrator.⁵² The plaintiffs in *Bazzle* obtained various real estate loans from Green Tree, a commercial lender,⁵³ and each loan contract contained an arbitration clause that did not expressly mention class arbitration.⁵⁴ The plaintiffs alleged that Green Tree failed to provide them with a particular form at the time of the transaction that would allow the plaintiffs to name their own lawyer and insurance agent, and Green Tree's failure to do so violated South Carolina state law.⁵⁵ Green Tree moved to compel arbitration pursuant to the arbitration clauses in the contracts, and the plaintiffs sought to certify the claims as a class action.⁵⁶ The state court compelled arbitration, and upon selection of an arbitrator, the arbitrator made the determination to certify class arbitration.⁵⁷

On appeal to the United States Supreme Court, the Court found that the parties' arbitration clauses authorized the arbitrator to decide all disputes relating to the contract, including the issue of class arbitration.⁵⁸ Additionally, the Court explained that class arbitration was not a gateway dispute of arbitrability to be decided by a court, but rather dealt with arbitration procedures and should be determined by the arbitrator.⁵⁹

In recent cases, the United States Supreme Court highlighted the fact that *Bazzle*, as a plurality opinion, was not conclusive as to the issue of class arbitrability.⁶⁰ In *Stolt-Nielsen*, the Court described the switch from bilateral arbitration to classwide arbitration as "fundamental,"⁶¹ which contrasts with the description of class arbitration as merely "procedure" in *Bazzle*.⁶² Elaborating on the differences between bilateral and classwide arbitration, the Court first noted that class arbitration no longer simply resolves a single dispute between two parties to an agreement, but could also potentially include hundreds of parties that were not originally contemplated by an arbitration provision.⁶³ The Court recognized that while privacy and confidentiality considerations are benefits of bilateral arbitration, the structure of class arbitrations does not allow for such benefits.⁶⁴ Finally, the costs and commercial value of class arbitration is comparable to class litigation, but class arbitration provides fewer protections to parties due to limited judicial review of arbitral awards.⁶⁵

52. *Id.* at 445.

53. *Id.* at 447-48.

54. *Id.* at 448.

55. *Id.*

56. *Id.* at 449.

57. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 449 (2003).

58. *Id.* at 451-52.

59. *Id.* at 452-53.

60. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 679 (2010); *see also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013).

61. *Stolt-Nielsen*, 559 U.S. at 686.

62. *Bazzle*, 539 U.S. at 453.

63. *Stolt-Nielsen*, 559 U.S. at 686.

64. *Id.* *See* SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, RULE 9(a), American Arbitration Association (2011), http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf.

65. *Stolt-Nielsen*, 559 U.S. at 686-87.

Another concern raised by the Court regarding class arbitration involved due process protections for absent class members.⁶⁶ For class action litigation in court, there are procedural protections in place requiring notice and consent for absent class members.⁶⁷ In the arbitration context, the switch to classwide arbitration expands the binding nature of the outcome beyond the two parties to affect the rights of absent parties.⁶⁸ Thus, notice and consent protections normally present in class action litigation may be absent in class arbitration.⁶⁹ This poses a significant problem: a person is not bound by a judgment unless that person is named as a party or made a party by service of process, so unnamed absent class members may not be bound by a class arbitral ruling.⁷⁰ Additionally, arbitrators are not generally knowledgeable about the procedural aspects of certification and notice for absent parties when employing class procedures.⁷¹

Justice Alito, in his concurrence to *Oxford*, reiterated, “class arbitration is a matter of consent.”⁷² Absent class members are never afforded the opportunity to consent to class arbitration in a contract between the parties in dispute.⁷³ Because they do not assent to inclusion in the class, absent parties may not be bound because they gave no authority to the arbitrator to make that determination.⁷⁴ Providing opt-out notices does not remedy the problem because silence is not normally construed to alter the terms of a contract.⁷⁵ Justice Alito argued that class arbitral awards could be subject to collateral attack, allowing absent class members to claim the benefit of a favorable judgment while remaining unbound in the case of an unfavorable judgment.⁷⁶

C. Circuit Split on Class Arbitrability Determinations: Presumptively Court or Arbitrator?

Aside from the 2013 Sixth Circuit decision in *Reed Elsevier*, which held class arbitrability to be a gateway matter to be presumptively decided by courts,⁷⁷ one circuit court of appeals⁷⁸ and two district courts in other circuits⁷⁹ have weighed in on the issue.⁸⁰ The District of New Jersey agreed with the *Reed Elsevier* analysis favoring courts,⁸¹ while the Third Circuit and the Central District of California

66. *Id.* at 686. See also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-46 (1999); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2071-72 (2013).

67. See FED. R. CIV. P. 23(c)(2)-(3) (2006).

68. *Stolt-Nielsen*, 559 U.S. at 686.

69. *Id.*

70. *Ortiz*, 527 U.S. at 846.

71. *Concepcion*, 131 S. Ct. at 1750.

72. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 2072.

77. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

78. See *Vilches v. Travelers Cos., Inc.*, 413 F.App'x. 487 (3d Cir. 2011).

79. See *Chassen v. Fidelity Nat'l Fin., Inc.*, No. 09-291, 2014 WL 202763 (D. N.J. Jan. 17, 2014); *Lee v. JPMorgan Chase & Co.*, 982 F. Supp.2d 1109 (C.D. Cal. 2013).

80. As of May, 2014.

81. *Chassen*, 2014 WL 202763, at *6.

favored the *Bazzle* plurality opinion that arbitrators should presumptively decide issues of class arbitrability.⁸²

Vilches v. Travelers Cos., Inc., was a Third Circuit Court of Appeals decision in 2011 that found arbitrators should be the presumptive decision maker for waiver of class arbitrability.⁸³ The plaintiffs were employees of Travelers who sought to bring a class action suit against Travelers to recover unpaid wages and overtime compensation.⁸⁴ The plaintiffs' contracts with Travelers each contained an identical arbitration provision that did not expressly address class arbitration, but authorized Travelers to amend the provision at any time upon appropriate notice to the employees.⁸⁵ Prior to the instigation of this suit, Travelers amended the contracts to include an express waiver of class arbitration, and then notified employees by electronic communications.⁸⁶ Both parties agreed to arbitrate their dispute, but the plaintiffs claimed that the amended arbitration provision did not bind them because they never assented to its terms.⁸⁷ Drawing heavily on *Bazzle*, the Third Circuit found class arbitration waivers to be a "procedural" question of arbitration, within the presumptive province of the arbitrator.⁸⁸

After the *Reed Elsevier* decision, the federal district court for the Central District of California⁸⁹ in 2013 decided *Lee v. JPMorgan Chase & Co.* and held class arbitrability determinations are "procedural" and therefore a question presumptively for arbitrators.⁹⁰ *Lee* arose regarding claims by appraisers, who worked for JPMorgan, alleging that JPMorgan violated California and federal labor laws as well as a California unfair competition law.⁹¹ Pursuant to the appraisers' employment contracts containing an arbitration clause silent as to class arbitration, JPMorgan successfully moved to compel arbitration.⁹² Because the appraisers sought class procedures, the parties asked the district court to resolve the issue of who should determine class arbitrability: the arbitrator or the court.⁹³ Persuaded by *Bazzle* and *Vilches*, the district court found that the arbitrator should presumptively determine whether an arbitration provision authorizes class arbitration.⁹⁴ The court specifically rejected an analysis using *Stolt-Nielsen*, finding that *Stolt-Nielsen* only addressed the issue of how to interpret whether an arbitration provision authorizes class arbitration, not who should make the interpretation.⁹⁵

In 2014, the district court for the District of New Jersey decided *Chassen v. Fidelity National Financial, Inc.*⁹⁶ Although it sits in the Third Circuit, the district court refused to follow *Vilches*, instead approving the analysis in *Reed Elsevier* that gives the determination of class arbitrability to the courts.⁹⁷ The plaintiffs

82. *Vilches*, 413 F.App'x. at 491; *Lee*, 982 F. Supp.2d at 1112.

83. *Vilches*, 413 F.App'x. at 492.

84. *Id.* at 489.

85. *Id.*

86. *Id.* at 489-90.

87. *Id.* at 490.

88. *Id.* at 491.

89. The Central District of California is in the jurisdiction of the Ninth Circuit.

90. *Lee v. JPMorgan Chase & Co.*, 982 F. Supp.2d 1109, 1114 (C.D. Cal. 2013).

91. *Id.* at 1109.

92. *Id.*

93. *Id.* at 1111.

94. *Id.* at 1113.

95. *Id.*

96. *Chassen v. Fidelity Nat'l Fin., Inc.*, No. 09-291, 2014 WL 202763 (D. N.J. Jan. 17, 2014).

97. *Id.* at *6.

were a class who paid settlement agents to facilitate their real estate settlement transactions, and then brought a class action suit against the agents to recover excess fees allegedly collected by the agents.⁹⁸ Pursuant to the arbitration provisions in their contracts, the agents sought to compel individual arbitration,⁹⁹ even though the provisions were silent as to class arbitration.¹⁰⁰ In finding that the court should presumptively decide class arbitrability, the district court relied on both the statement in the United States Supreme Court case *AT&T Mobility LLC v. Concepcion* that arbitration is poorly suited to the higher stakes of class actions¹⁰¹ and also the four factors in *Stolt-Nielsen* that observe the impact of class procedures on arbitration.¹⁰² Because the factors from *Stolt-Nielsen* were present, and because the facts were similar to *Reed Elsevier*, the district court found class procedures to be poorly suited for arbitration and determined that arbitration should be presumptively reserved as a gateway matter to the court.¹⁰³

D. Precedential Value of Plurality Opinions

The precise precedential value of Supreme Court plurality decisions, such as *Bazzele*, is unclear. In *Marks v. United States*,¹⁰⁴ the Supreme Court developed the “narrowest grounds” doctrine for interpreting decisions by a fragmented Court.¹⁰⁵ Under this doctrine, the holding of a no-clear-majority Court is construed as the “position taken by those [Justices] who concurred in the judgments on the narrowest grounds.”¹⁰⁶ The federal circuit courts have applied this doctrine in generally two ways. The first is the “implicit consensus” approach, in which the courts look to the plurality opinion and other concurring opinions to determine the narrowest holding that is common to all plurality and concurring opinions.¹⁰⁷ Second, there is the “predictive” approach, which identifies the “narrowest grounds” among plurality and concurring opinions and treats that opinion as controlling for its utility in predicting the outcome of future cases of similar factual patterns.¹⁰⁸

The Supreme Court has not applied the *Marks* doctrine consistently to cases that revisit issues previously decided by plurality opinion. The doctrine was applied in a straightforward manner in early cases,¹⁰⁹ but disregarded entirely in other cases like *Nichols v. United States*.¹¹⁰ The Court intimated that lower courts may have to determine whether the outcome of the “narrowest grounds” test

98. *Id.* at *1.

99. *Id.* at *1.

100. *Id.* at *6.

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

102. *Chassen v. Fidelity Nat'l Fin., Inc.*, No. 09-291, 2014 WL 202763, at *5 (D. N.J. Jan. 17, 2014); see also *supra* notes 61-67 and accompanying text (factors in *Stolt-Nielsen*).

103. *Chassen*, 2014 WL 202763, at *6.

104. *Marks v. United States*, 430 U.S. 188 (1977).

105. *Id.* at 193.

106. *Id.*

107. See, e.g., *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), cert. denied, 112 S. Ct. 3054 (1992).

108. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 693 (3d Cir. 1991), aff'd in part and rev'd in part, 112 S. Ct. 2791 (1992).

109. See, e.g., *City of Lakewood v. Plain Dealer Publ'n Co.*, 486 U.S. 750 (1988), and *Casey*, 947 F.2d 682.

110. 511 U.S. 738 (1994). See also *Texas v. Brown*, 460 U.S. 730, 737 (1983) (holding that a “plain view” doctrine requirement set forth in a prior plurality opinion was “not a binding precedent”).

would be a viable “logical possibility,” making the *Marks* doctrine one of selective applicability.¹¹¹

E. Unconscionability

The affirmative defense of unconscionability exists when there is “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”¹¹² The Third Circuit Court of Appeals¹¹³ and New York state courts have found that even when an arbitration provision does not permit class arbitration, the contract is not rendered unconscionable.¹¹⁴ A number of courts have found that decisions regarding unconscionability based on a lack of a class arbitration provision are to be decided under federal law, regardless of whether the parties’ contract calls for the application of state law.¹¹⁵

In the commercial contracts context, the United States Supreme Court determined that a contractual waiver of class arbitration does not itself render an arbitration clause unenforceable.¹¹⁶ In *American Express Company v. Italian Colors Restaurant*,¹¹⁷ a number of merchants brought antitrust claims against American Express for using monopoly power to set its prices artificially high.¹¹⁸ These merchants had contracted with American Express to accept its credit cards at their venues, and the contracts contained arbitration clauses that expressly waived class arbitration.¹¹⁹ American Express moved to compel individual arbitration pursuant to the arbitration clause, but the merchants countered by arguing that the lack of availability of class procedures made the cost of individual arbitration prohibitively high, and therefore the waiver of class arbitration made the arbitration clause unenforceable.¹²⁰ The Supreme Court, in analyzing the Federal Arbitration Act (FAA),¹²¹ found that because the FAA, the federal antitrust statutes, nor any other congressional command provided for the rejection of a waiver of class arbitration, the waiver remained enforceable because the parties specifically contracted for it.¹²² In the absence of a contrary congressional command, the Court found that a waiver of class arbitration does not render an arbitration clause unenforceable.¹²³

111. *Nichols*, 511 U.S. at 745-46. The Court found it “not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it[,]” pointing to such confusion among lower courts as a possible reason to reexamine the doctrine at issue. *Id.*

112. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

113. *See Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

114. *See Ranieri v. Bell Atl. Mobile*, 759 N.Y.S.2d 448 (App. Div. 2003).

115. *See, e.g., In re Am. Express Merchants’ Litigation*, 634 F.3d 187 (2d Cir. 2011); *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2011); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006).

116. *See Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

117. *Id.*

118. *Id.* at 2308.

119. *Id.*

120. *Id.*

121. 9 U.S.C. §§ 1-16 (2012).

122. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

123. *Id.*

IV. INSTANT DECISION

In the instant case, the Sixth Circuit Court of Appeals affirmed the district court in finding that the arbitration agreement did not authorize class arbitration, thereby granting summary judgment to LexisNexis, denying injunctive relief to Crockett, and dismissing Crockett's unconscionability claim.¹²⁴ In so holding, the Sixth Circuit found that absent an express agreement to the contrary, certification of class arbitration is an issue of arbitrability reserved to the courts.¹²⁵

Dismissing Crockett's argument that class arbitrability should by default be determined by the arbitrator, the Sixth Circuit looked to a number of United States Supreme Court decisions to discern the Supreme Court's likely position on the issue,¹²⁶ and found that gateway issues are fundamental issues to be determined by courts.¹²⁷ The Sixth Circuit also found that courts have been wary to regard silence and ambiguity in arbitration provisions as the basis for allowing arbitrators to make such determinations.¹²⁸

In finding class arbitrability a gateway issue, the Sixth Circuit first debunked Crockett's reliance on the holding in *Bazzle*.¹²⁹ Because *Bazzle* was a plurality opinion, the Sixth Circuit noted that it is not precedential, pointing to the recent cases of *Stolt-Nielsen* and *Oxford Health Plans*, which both stated that the issue of class arbitrability had not been expressly decided by the Supreme Court.¹³⁰

The Sixth Circuit recounted the Supreme Court's four observations about the fundamental differences between bilateral and classwide arbitration.¹³¹ First, while the purpose of arbitration is to be low-cost and efficient, classwide procedures increase costs, reduce efficiency, and call into question all parties' mutual consent to such procedures.¹³² Second, a certain level of confidentiality is expected in arbitration, but class arbitration often raises confidentiality issues, likely unanticipated by parties who agree to arbitration.¹³³ Third, class arbitration raises the commercial value of the case greatly, even though the scope of available judicial review remains limited in the arbitral setting.¹³⁴ Finally, due process concerns arise with classwide arbitration, as class arbitration purports to adjudicate the rights of absent parties and those parties should be afforded notice.¹³⁵ Without a showing that absent parties authorized an arbitrator to decide the issue on a classwide basis, such as the opportunity to opt in, the absent parties may not even be

124. Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 596 (6th Cir. 2013).

125. *Id.* at 599 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 83 (2002)).

126. *Id.* at 597-98.

127. *Id.* at 597 (citing *Howsam*, 537 U.S. at 83). An example of such a fundamental issue would be whether the parties have a valid arbitration agreement. *Id.* (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion)).

128. *Id.* (citing *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 945 (1995)).

129. *Id.*

130. Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 680 (2001), and *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013)).

131. *Id.*

132. *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 685).

133. *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011), and *Stolt-Nielsen*, 559 U.S. at 686).

134. *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 686-87).

135. Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013) (quoting *Stolt-Nielsen*, 559 U.S. at 686, and *Concepcion*, 131 S. Ct. at 1751).

bound by the arbitrator's decision.¹³⁶ The Sixth Circuit found these differences between bilateral and class arbitration to be fundamental, determining that the issue of class arbitrability lies presumptively with the courts as a gateway issue of arbitrability, unless the parties clearly and explicitly provided otherwise.¹³⁷

Having determined that class arbitrability is an issue that falls by default to the courts, the Sixth Circuit refused to find the arbitration provision under review expressly assigned authority to the arbitrator to make the class arbitrability determination.¹³⁸ The Sixth Circuit conceded that the phrase "any controversy . . . arising out of or in connection with this Order" could include the issue of class arbitration,¹³⁹ but because the provision lacked any reference to class arbitration, it could also be easily read to apply only to bilateral arbitration.¹⁴⁰ As the arbitration agreement was, at best, silent or ambiguous on class procedures, the Sixth Circuit found this was insufficient to overcome the presumption that class arbitrability should be decided by a court.¹⁴¹ The parties' mere agreement to arbitrate did not implicitly authorize class arbitration.¹⁴²

Finally, the Sixth Circuit rejected Crockett's claim that the arbitration provision was unconscionable.¹⁴³ Although the court agreed with Crockett that the clause was highly one-sided in favor of LexisNexis,¹⁴⁴ the Sixth Circuit determined that the presence of an arbitration clause that is one-sided or adhesive in nature, or that lacks a class action provision, does not by itself make the provision unenforceable.¹⁴⁵ Finding this arbitration agreement to be no different, the Sixth Circuit did not find it unconscionable.¹⁴⁶

V. COMMENT

In *Reed Elsevier*, the Sixth Circuit confronted the class arbitrability issue that the United States Supreme Court had avoided in *Oxford*,¹⁴⁷ holding that courts and not arbitrators should presumptively determine class arbitrability, absent express agreement to the contrary.¹⁴⁸ This precipitated a circuit split on the issue: a New Jersey district court in the Third Circuit followed the Sixth Circuit's analysis in *Reed Elsevier*,¹⁴⁹ whereas a California district court in the Ninth Circuit rejected the *Reed Elsevier* approach in favor of a *Bazzle*-based analysis.¹⁵⁰ These contrasting approaches to class arbitrability, coupled with the Supreme Court's lan-

136. *Id.* (quoting *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071-72 (2013) (Alito, J., concurring)).

137. *Id.* at 598-99 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

138. *Id.* at 599.

139. *Id.*

140. *Id.*

141. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013).

142. *Id.* at 600 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2001)).

143. *Id.* (citing *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013)).

144. *Id.* See *supra* note 18 for a discussion of the provisions favoring LexisNexis.

145. *Id.* The Sixth Circuit suggested seeking a solution in the free market, such as the alternate legal database Westlaw, which compels no such arbitration provision. *Id.*

146. *Id.*

147. See *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n. 2 (2013).

148. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

149. See *Chassen v. Fidelity Nat'l Fin., Inc.*, No. 09-291, 2014 WL 202763, at *6 (D. N.J. Jan. 17, 2014).

150. See *Lee v. JPMorgan Chase & Co.*, 982 F. Supp.2d 1109, 1114 (C.D. Cal. 2013).

guage in *Oxford*,¹⁵¹ make it likely that the Supreme Court will take up the issue in the near future.

The contrasting foundational arguments made in these opposing cases are of note. The district court's argument in *Lee* rests upon the perception of class arbitration as a "procedure" of arbitration.¹⁵² Under this analysis, the use of class procedures does not bear on whether a dispute is arbitrable, but merely alters the mechanisms employed by the arbitrator in facilitating the arbitration.¹⁵³ Because arbitration clauses generally provide that all disputes arising out of the contract are subject to arbitration, the availability of class procedures could be considered another dispute to be resolved by an arbitrator.¹⁵⁴ This outcome rests heavily on the Supreme Court's plurality decision in *Bazzle* for support.¹⁵⁵

The courts in *Reed Elsevier* and *Chassen* relied instead on policy justifications promulgated by the Supreme Court that suggest arbitration is a venue poorly situated to employ class procedures.¹⁵⁶ Both courts first noted that in *Stolt-Nielsen* and *Oxford*, the Supreme Court has explicitly found the *Bazzle* plurality is not controlling authority and that no holding on the issue of class arbitrability has yet been made.¹⁵⁷ Looking instead to the language in *Stolt-Nielsen* and *Concepcion*, the courts found the shift from bilateral to classwide arbitration to be fundamental and not well suited to arbitration.¹⁵⁸ The courts observed policy factors such as reduced efficiency, absent party consent, confidentiality concerns, and higher commercial stakes such as changing the nature of arbitration with the addition of class procedures.¹⁵⁹ Such fundamental issues, they asserted, are meant to be substantive gateway matters of arbitration to be presumptively determined by courts.¹⁶⁰

The basic differentiation in these conflicting arguments lies in the courts' perceptions of "class arbitration." Courts such as those in *Lee* and the similar Third Circuit case of *Vilches*, relying on *Bazzle*, view class procedures as mechanisms of arbitration, perceiving no problems by allowing the arbitrator to interpret the contract and determine the availability of class arbitration.¹⁶¹ The opposing view of the *Reed Elsevier* and *Chassen* courts looks beyond the mechanism of class procedures to the functional impact that class procedures will have on arbitration.¹⁶² While the formalist approach of the *Lee* and *Vilches* courts provides a fair analysis

151. *Oxford*, 133 S. Ct. 2068 n.2. The Court's language, "this Court has not yet decided whether the availability of class arbitration is a question of arbitrability . . . [b]ut this case gives us no opportunity to do so . . ." suggests that such a decision may be soon forthcoming. *Id.*

152. *Lee*, 982 F. Supp.2d at 1112.

153. *Id.*

154. *Id.*

155. *Id.* at 1113.

156. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 598 (6th Cir. 2013); *Chassen v. Fidelity Nat'l Fin., Inc.*, No. 09-291, 2014 WL 202763, at *5 (D. N.J. Jan. 17, 2014) (both quoting *Concepcion*, 131 S. Ct. at 1742).

157. *Reed Elsevier*, 734 F.3d at 598; *Chassen*, 2014 WL 202763, at *4 (both citing *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n. 2 (2013)).

158. *Reed Elsevier*, 734 F.3d at 598; *Chassen*, 2014 WL 202763, at *5.

159. *Id.*

160. *Reed Elsevier*, 734 F.3d at 598-99; *Chassen*, 2014 WL 202763, at *6.

161. *Lee v. JPMorgan Chase & Co.*, 982 F. Supp.2d 1109, 1113 (C.D. Cal. 2013); *Vilches v. Travelers Cos., Inc.*, 413 F.App'x 487, 492 (3d Cir. 2011).

162. *Reed Elsevier*, 734 F.3d at 598; *Chassen*, 2014 WL 202763, at *5.

of the role of arbitration, the more persuasive view is the prudential and predictive arguments of the courts in *Reed Elsevier* and *Chassen*.

The precedential value of plurality opinions, such as *Bazzle*, is highly suspect. Plurality opinions are often considered “inherently muddled and fragmented,”¹⁶³ and they “create confusion and inefficiency in the lower courts.”¹⁶⁴ The erratic application of the *Marks* doctrine in interpreting plurality opinions on their “narrowest grounds”¹⁶⁵ does little to dispel this problem. If the *Marks* doctrine can indeed be applied selectively as suggested by recent Court decisions like *Nichols*, lower courts appear to have substantial discretion in deciding whether to give deference to Supreme Court plurality opinions.¹⁶⁶ This discretion is apparent in the recent class arbitrability cases, with the courts in *Vilches* and *Lee* considering *Bazzle* to be persuasive, while the *Reed Elsevier* and *Chassen* courts refused to follow it.

Plurality opinions should be persuasive, not mandatory, authority.¹⁶⁷ Instead of imposing the views of a non-majority of the Supreme Court on lower courts, such an approach would allow the lower courts to observe the plurality for guidance,¹⁶⁸ but would also permit the courts to seek additional persuasion elsewhere. This would allow courts that would otherwise feel bound to a plurality opinion to look to other sources, such as subsequent Supreme Court cases or the opinion’s application in other circuits. Such outside persuasive sources can help a court to make a more informed and well-rounded decision.

If *Bazzle* were treated instead as persuasive authority, the lower courts could look instead to the practical effects of *Bazzle* on the court system. *Bazzle* was the first Supreme Court case to tacitly approve class arbitration as a valid form of arbitration,¹⁶⁹ which resulted in the development of Class Rules by the American Arbitration Association.¹⁷⁰ For example, the arbitration panel in *Stolt-Nielsen* perceived a consensus among arbitrators that *Bazzle* was generally considered the rule regarding class arbitrability.¹⁷¹ The influence of *Bazzle* appears well-ingrained in the arbitration system, supporting the courts in *Vilches* and *Lee* in their reliance on the Supreme Court’s reasoning in *Bazzle*.

In contrast, the lower courts could also observe the Supreme Court cases that have been decided recently. As noted, the Court’s language in *Stolt-Nielsen*,¹⁷²

163. Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J. L. & POL’Y 261, 287 (2000).

164. James A. Bloom, Note, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of United States v. Winstar Corp.*, 85 WASH. U. L. REV. 1373, 1373 (2008). See also John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62 and Mark Alan Thurmon, Note, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419 (1992).

165. See *supra* notes 104-11 and accompanying text.

166. Hochschild, *supra* note 163, at 282.

167. For a similar approach, see Thurmon, *supra* note 164, at 451-57.

168. Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 760 (1980).

169. 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, 206 (2012).

170. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 662 (2001), and Supplementary Rules for Class Arbitrations, *supra* note 62.

171. *Stolt-Nielsen*, 559 U.S. at 673-74.

172. *Id.* at 679, 686 (finding the shift from bilateral to classwide arbitration to be “fundamental”).

Concepcion,¹⁷³ and *Oxford*¹⁷⁴ indicates a shift in the Court's attitude toward class arbitrability that favors courts to make the determination.¹⁷⁵ Because the Court's recent cases regarding class arbitrability indicate a probable shift away from the reasoning that *Bazzle* employed, these cases become highly persuasive, as depicted in the arguments made by the courts in *Reed Elsevier* and *Chassen*.¹⁷⁶

Ultimately, when *Bazzle* is taken as a persuasive plurality opinion, the influence of recent Supreme Court discussions on class arbitrability outweighs the influence of *Bazzle* on the practical application of class arbitrability in the field of arbitration. Absent the Supreme Court indicating such a shift in recent cases, the practical influence of *Bazzle* would surely be more persuasive. However, in light of the Court's strong language indicating that courts should presumptively decide class arbitrability, lower courts would do better to observe where the Supreme Court is heading in the future, rather than relying on the framework established by a plurality of the past. Thus, the courts in *Reed Elsevier* and *Chassen* have a better-supported outcome by deferring to the recent Supreme Court indications and selecting courts as the presumptive body to decide class arbitrability.

VI. CONCLUSION

In *Reed Elsevier*, the Sixth Circuit held that class arbitrability decisions should be the province of courts, absent an express agreement by the parties to the contrary.¹⁷⁷ This decision precipitated a circuit split on the issue, with one court agreeing with the Sixth Circuit that courts should make such determinations,¹⁷⁸ while two others favored arbitrators to decide class arbitrability.¹⁷⁹ Whereas *Reed Elsevier* and *Chassen* depart from the plurality holding in *Bazzle*,¹⁸⁰ *Lee* and *Vilches* embrace the *Bazzle* reasoning as strongly persuasive,¹⁸¹ even though the Supreme Court has pointedly stated that the class arbitrability issue "has not yet [been] decided."¹⁸² Because the Supreme Court's decisions on how to apply plurality decisions have been muddled,¹⁸³ lower courts would do better to observe plurality opinions as persuasive and supplement their analysis with outside sources. *Bazzle*'s general acceptance and application in the field of arbitration might be considered very persuasive,¹⁸⁴ but the language used by the Supreme Court in recent cases strongly indicates a departure from the *Bazzle* opinion,¹⁸⁵

173. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (finding arbitration to be poorly suited to class procedures).

174. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n. 2 (2013) (noting that the issue of class arbitrability was not settled, despite the plurality opinion in *Bazzle*).

175. See notes 155-58 and accompanying text.

176. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 597-99 (6th Cir. 2013); *Chassen v. Fidelity Nat'l Fin., Inc.*, No. 09-291 (PGS)(DEA), 2014 WL 202763, at *5-6 (D. N.J. Jan. 17, 2014).

177. *Reed Elsevier*, 734 F.3d at 599.

178. *Chassen*, 2014 WL 202763, at *6.

179. *Lee v. JPMorgan Chase & Co.*, 982 F. Supp.2d 1109, 1112-14 (C.D. Cal. 2013); *Vilches v. Travelers Cos., Inc.*, 413 F.App'x. 487, 491-92 (3d Cir. 2011).

180. *Reed Elsevier*, 734 F.3d at 597-98; see also *Chassen*, 2014 WL 202763, at *4.

181. *Lee*, 2013 WL 6068601, at *2; *Vilches*, 413 F.App'x. at 491-92.

182. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n. 2 (2013).

183. See *supra* notes 107-111 and accompanying text.

184. See *supra* notes 171-73 and accompanying text.

185. See *supra* notes 174-78 and accompanying text.

which carries greater influence than the mere adherence of arbitrators to the *Bazze* approach. Because lower courts should give greater deference to the marked indications of the Supreme Court majority than to the plurality of the past, *Reed Elsevier* achieved the preferable result, which will likely align with a future Supreme Court decision resolving this current circuit split.

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