Confusion About Class Arbitration

by Stephen K. Huber*

This article will examine the major issues associated with class arbitration. In *Green Tree v. Bazzle* (hereafter, *Bazzle*), the United States Supreme Court for the first time examined the topic of class arbitration. The Federal Arbitration Act (FAA) is silent about class arbitration, as is the Uniform Arbitration Act (UAA). The initial plan for this article was to focus on the *Bazzle* decision, and to use it as a springboard for discussion of several difficult or controversial aspects of class arbitration based on what the Supreme Court had to say about the subject. Alas, the opinions in *Bazzle* – there are four of them – are insubstantial, and fail to seriously address the difficult problems associated with class arbitration.

As a result, a different plan is required. This article will proceed in three phases: Pre-*Bazzle*, *Bazzle*, and Post-*Bazzle*. The Pre-*Bazzle* discussion will examine the state of the law regarding class arbitration before *Bazzle*, with particular emphasis on the *Keating* decision by the California Supreme Court. The Pre-*Bazzle* discussion will also examine the one procedural device that is similar to class arbitration (and class action litigation), which is the joinder of multiple parties who have an interest in the outcome of a dispute to produce a single consolidated proceeding. [*Consolidation* and “joinder” are used generically to encompass interpleader, vouching in, and similar procedural devices.]

This background material will introduce the major problems associated with class arbitration, and also serve to highlight the failure of the Supreme Court to seriously address these problems. The article concludes with some speculation about the future of class arbitration, which will be speculative indeed due to the absence of guidance from the Supreme Court. *Bazzle* did not produce a majority opinion in the Supreme Court. There is a plurality opinion of four Justices, with Justice Stevens providing the fifth vote to produce a majority result. That result was to send the case back to the arbitrator because the trial court, rather than the arbitrator, had made the determination that the contract language allowed
for class arbitration. The Court did so notwithstanding the decision of the South Carolina Supreme Court, on the basis on South Carolina law, which confirmed the class arbitration awards rendered by the arbitrator.

Although much is now muddled about class arbitration, one thing is quite clear after the Bazzle decision: class arbitration represents an acceptable dispute resolution mechanism. The Supreme Court, albeit without serious discussion, rejected the argument that class arbitration is an oxymoron. While the survival of class arbitration is now assured, whether it will thrive is quite a different matter.

Class arbitration is already present in Texas, not just in far off places like South Carolina and California. Within two months after the Bazzle decision, both the 5th Circuit and a state appellate court decided cases that raised class arbitration issues. These cases raise as many questions as they answer.

The discussion of class arbitration throughout this article presupposes the existence of a certifiable class, notwithstanding the numerous problems and issues related to class certification in both judicial and arbitral proceedings. To avoid possible confusion, “class action” refers to judicial proceedings, while “class arbitration” refers to the arbitration analogue. To be sure, courts will have some role in class arbitration, but the contours of that role are quite uncertain after Bazzle. I will have something to say on that vexed topic, which is sure to be the subject of considerable further litigation in state and federal courts throughout the country.

I. CLASS ARBITRATION BEFORE BAZZLE

Class arbitration is a relatively new idea. As with so many innovations, the origins are found in California. The first serious judicial examination of class arbitration was by the California Supreme Court in its 1982 Keating decision. Keating is still the law in California, and has been discussed by almost every court that has considered class arbitration – except for the Supreme Court in Bazzle. My goal here is not to explicate the law in California, but to consider the majority and dissenting opinions in Keating for what they say about class arbitration. Keating offers a striking contrast to Bazzle in that it offers more, and better thinking about class arbitration than did the Supreme Court some twenty plus years later.

The Keating discussion is followed by an examination of the one analogy that comes immediately to mind when considering class arbitration – consolidation of multiple proceedings. This part of the article closes with a summary of the state of the law regarding class arbitration before the Supreme Court issued its Bazzle decision.

A. The Keating Decision

Several California franchisees of 7-Eleven (represented by the same law firm) brought suit against Southland Corporation (the franchisor), asserting various theories of liability including noncompliance with the California Franchise Investment Law. The franchise agreement called for arbitration of all disputes by the American Arbitration Association (AAA). [Today, arbitration provisions are a standard feature of franchise contracts, although they sometimes provide for access to courts in specified circumstances. Naturally, these exceptions reflect the perceived needs of the drafting party, the franchisor.]

Keating asked the trial court to certify a class composed of all California 7-Eleven franchisees (about 700). The first choice of plaintiffs was a class action lawsuit. If that option was precluded due to the contractual arbitration provision, then their second choice was class arbitration.

This case is well known in arbitration circles because it proceeded to the U.S. Supreme Court, sub nom Southland v. Keating (hereafter, Southland), and resulted in an important decision about the preemptive impact of the FAA in state court proceedings. The California Supreme Court had declined to order arbitration of the Franchise Law claim because that statute provided for judicial determination of claims thereunder. However, ruled the Supreme Court, the Franchise Act was preempted by the FAA, and therefore the Franchise Law claim was subject to arbitration. [The contrary argument was that the FAA only governed federal court actions.] The Court reaffirmed its Southland decision in Allied-Bruce, despite an amicus brief filed by 20 state attorneys-general requesting the Court to abandon its Southland approach. An amicus brief filed by a group of law professors in Bazzle seeking the same result did not receive so much as a mention by the Court.

The matter of class arbitration did not proceed beyond the California Supreme Court, and it is to that aspect of Keating that we now turn. It is instructive to begin by considering what the Keating plaintiffs wanted from the courts (once class action litigation was ruled out due to the arbitration provision). They wanted the trial court to resolve the preliminary class issues, certify a class, and then send the matter to arbitration. On this issue, the California Supreme Court remanded the case to the trial court to determine whether an order compelling arbitration should be conditioned on Southland agreeing to class arbitration. This approach accepted the principle of class arbitration. If class certification was proper, unconscionability provided a basis for denying arbitration unless Southland agreed to the class arbitration. The “reasonable expectations” doctrine was not a barrier to enforcement of this contract of adhesion because even twenty years ago arbitration was commonly used in business transactions. [Today, arbitration is so common in all manner of consumer contracts that anyone with competence to contract should reasonably expect that the agreement might call for arbitration.]

The California Supreme Court majority declined to limit class proceedings to courts because of statutes and public policy supportive of arbitration “if means are available to give expression to the basic arbitration commitment of the parties.” In reaching this conclusion, the court relied on the consolidation of arbitration proceedings as an analogy. This analogy had both a statutory and a judicial component.

The statutory analogy was drawn from the California Arbitration Act (hereafter, CAA), which expressly provided for the consolidation of arbitration proceedings in specified circumstances. There was an obvious problem with this analogy, in that there is no similar statute that authorizes class arbitration. On the other hand, legislative action in a similar area provided a strong basis for the court to extend the legislative approach – better to extend legislation than to create a new approach out of silence.

The judicial analogy was based on case law that was generous in allowing consolidation to avoid multiple proceedings, and the attendant risk of inconsistent outcomes. Above all, the California Supreme Court relied on the 2nd Circuit’s Nereus decision. The Nereus court said that the goals of the FAA “clearly require that the Act be interpreted to permit and even encourage the consolidation of arbitration proceedings in proper cases.”

The Federal Rules of Civil Procedure allow for consolidation of related proceedings, so long as consistent with the FAA. From this conclusion, it was an easy and reasonable step to draw an analogy between class arbitration and judicial
class actions, as provided for in Rule 23.

The dissenting opinion in Keating, in which the pro-consumer Justice Stanley Mosk joined, would not permit class arbitration in the absence of authorization by statute or contract.\(^{22}\) Court involvement was deemed necessary to certify the class, and to supervise notification to the class.\(^{23}\) Judicial review would always be needed at the end of a class proceeding, if for no other reason than to certify fairness to the entire class. There might also be a need for judicial intervention during the proceeding itself. The substantial judicial role in class arbitration meant a slow and uncertain process, instead of the rapid and final resolution that is a central feature of arbitration.

Quite apart from delay, the dissent viewed arbitration as unsuited to class proceedings.\(^{24}\) Arbitration is ad hoc, and an arbitral tribunal (unlike a court) lacks institutional existence. Arbitrators often are not legally trained; the rules of evidence and civil procedure are inapplicable; and arbitrators typically do not provide written opinions. Taken together, these factors have the practical effect of precluding effective judicial review. Indeed, thwarting judicial review is a conscious goal of the AAA and other arbitration organizations.\(^{25}\)

Where the contract claims were “intertwined”, several lower courts had ruled that all the disputes should be litigated in one action to promote the goal of efficiency.\(^{26}\)

The dissent also argued that the Keating franchisees were not the sort of claimants who truly needed a class approach – those with claims for which no remedial avenue would be available unless they were aggregated, due to the associated costs.\(^{27}\) And for such claims, the preferred solution was to declare any attempt to prohibit class litigation to be unenforceable. In the end, said the dissent, the majority had invented a cumbersome hybrid procedure that was “fundamentally contrary to the purpose of arbitration.”\(^{28}\)

While the majority opinion allowed class arbitration, based on freedom of contract considerations, it was hardly enthusiastic about the concept.\(^{29}\) The court noted that “without doubt” class arbitration would require greater court involvement than conventional arbitration.\(^{30}\) Specific areas for judicial involvement included: initial class certification; notice to class members; ensuring adequate representation of absent class members; and review of any settlement or dismissal of the action.\(^{31}\) At the same time, the trial court had to avoid intruding on the merits of the dispute, a balancing act that would require “a good deal of care, and ingenuity.”\(^{32}\)

B. Consolidation After Keating

The basis for consolidation is the concern that multiple proceedings will produce internally inconsistent results among the parties, as well as the benefits of avoiding excessive costs and delay. For example, in a dispute about whether work by a subcontractor meets contract standards, different arbitrators might reach different results – so that the Prime owed the Sub, but the Owner did not owe the Prime (or vice-versa).\(^{33}\)

The consolidation analogy from the Federal Rules of Civil Procedure provided a sound basis for the Keating court to find support for class arbitration, by way of analogy to class actions under Rule 23. However, subsequent decisions by the United States Supreme Court in the Byrd and Volt cases undermined the efficiency approach that underlay Nereus and Keating, which in turn caused the 2nd Circuit to renounce Nereus and its pro-efficiency rationale.\(^{34}\)

In Byrd, the Court considered an arbitration agreement that required arbitration of some but not all the disputes that arose between the contracting parties.\(^{35}\) Where the contract claims were “intertwined”, several lower courts had ruled that all the disputes should be litigated in one action to promote the goal of efficiency. The Supreme Court correctly responded that the FAA calls for contract enforcement, and if the parties chose to arbitrate some but not all disputes, that is their business. To do otherwise would result in a failure to enforce an agreement to arbitrate according to its terms, in direct contravention of the FAA. Accordingly, said the Court, it must reject “the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.”\(^{36}\)

In Volt, the Court ruled that parties were welcome to choose to arbitrate their disputes pursuant to state arbitration law rather than the FAA, because arbitration is grounded in contract law.\(^{37}\) The FAA “simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”\(^{38}\) Interestingly, the practical impact of arbitration under the AAA instead of the FAA was to allow for consolidation of arbitration claims among multiple parties growing out of a construction dispute. [Meanwhile, litigation of related claims could be stayed, thus providing the parties a powerful impetus to agree to join the arbitration proceeding.]

Byrd and Volt have been read – unfortunately, in my judgment – to reject efficiency as an important objective under the FAA. It is one thing to rule that express contract language trumps efficiency, but quite another to refuse to consider efficiency where a contract is silent about a matter. The federal courts have adopted the extreme position of prohibiting arbitral consolidation absent express authorization in a contract. In its Boeing decision, the 2nd Circuit recognized that Nereus was no longer good law due to the intervening Byrd and Volt decisions, and rejected consolidation in just about the most favorable imaginable circumstances.\(^{39}\)

Boeing sold aircraft to the United Kingdom (UK). A helicopter purchased by the UK from Boeing was damaged during testing of a new fuel control system designed by Textron. Both firms had contracts with the UK that included identical arbitration provisions, and these were silent about consolidation. Boeing and Textron were parties to an “Interface Agreement” that defined their respective obligations and responsibilities for the fuel control system project.\(^{40}\)

The UK invoked the arbitration provisions of both contracts, and then sought a consolidated proceeding, but Boeing refused. The AAA took the position that it would order consolidation only if the parties expressly agreed or a court so ordered, whereupon the UK sought a consolidation order in federal court. Relying on Byrd and Volt, the 2nd Circuit ruled that courts lacked the power to consolidate arbitration proceedings absent consent of all the affected parties. As for the consolidation provisions of the Federal Rules of Civil Procedure, these apply only to trials in federal court and not to arbitration proceedings. As for inefficiency, or the risk of inconsistent outcomes resulting from separate arbitration proceedings, that was just too bad. Consolidation requires consent, and a party that seeks the power to require consolidation should so provide in the agreement to arbitrate.\(^{41}\)
The Boeing facts nicely illustrate how the absence of a consolidation mechanism may involve major risks and costs for an innocent party. In a consolidated arbitration proceeding the position of the UK would be that Boeing and Textron are jointly responsible for the entire loss, and that the UK is simply an interested spectator. Assuming that the amount of the loss is undisputed and that both contractors have ample assets (as was the case here), the UK is indifferent about how the loss is divided between Boeing and Textron. The alternative of prosecuting two arbitration proceedings will be expensive for the UK. Far worse, the UK will have to educate itself about the causes of the accident. In each arbitration, the UK will be faced with a more knowledgeable adversary – both about helicopters in general and this accident in particular – each arguing that all or most of the responsibility should be placed on the other. The UK bears the burden of proof in both proceedings, so it faces a substantial risk of failing to recover the full amount of a clear loss due to uncertainty about whether Boeing or Textron was responsible for the loss. As for the costs associated with arbitration, these will be far higher because the UK is the moving party instead of a spectator. These dynamics will dramatically weaken the UK’s leverage in any settlement discussions, a circumstance that will not go unnoticed by Boeing or Textron. This consideration is extremely important because in arbitration, as in litigation, most cases settle.39

A few states, notably California, have enacted statutes that provide for involuntary consolidation or joinder in arbitration where the contract is silent.40 [Should this movement spread, “no consolidation” and “no joinder” provisions are likely to become a regular feature of form arbitration provisions, just as “no class actions” clauses are increasingly being adopted by sellers and lenders.] Even where consolidation is authorized by state law, there remains the question of whether the state law is preempted by the FAA. This is also an open question with respect to class arbitration.

The Revised Uniform Arbitration Act (RUAA), promulgated by the National Conference of Commissioners on Uniform State Laws in 2000, makes limited provision for consolidation of separate arbitration proceedings.41 Section 10 of the RUAA authorizes courts to order consolidation where the claims arise out of a single transaction or several related transactions.42 Even then, a court may not order consolidation where prohibited by the arbitration agreement. Put another way, the RUAA alters the default position to allow consolidation.

Section 10 is directed at multiple party transactions, and not at multiple similar transactions by one party with numerous, unrelated parties.43 Lest there be any doubt about the matter, the drafters of the RUAA explicitly stated that Section 10 was inapplicable to class arbitration.44

C. The Status of Class Arbitration Before Bazzle

Before turning to the Bazzle decision, let me summarize what seemed to be the state of the law pre-Bazzle. In Keating, the California Supreme Court authorized class actions where provided for by statute or contract, and, somewhat reluctantly, where the parties were silent on the issue.45 The two dissenting judges opposed class arbitration. The Court noted that when the amount at issue for each party was small the class approach was the only economically realistic way to bring a claim, and the appropriate solution was a class action in court. Otherwise, the courts should order the parties to individual arbitration. Since class arbitration would severely burden the courts, arguably parties should not even be allowed to contract for class arbitration. [An analogous dispute that currently has divided the federal courts of appeals is whether parties may, by contract, expand the scope of judicial review of arbitration awards beyond that called for in the FAA.]46

The majority opinion in Keating recognized that class arbitration would be a tricky matter, and would require much greater judicial supervision than regular arbitration.47 In particular, a court would need to make the class certification decision – typically, a highly contested process. The strongest part of the argument for class arbitration, the analogy to the aggressive approach to consolidation championed by the 2nd Circuit, was subsequently rejected by that court (and most others as well). Several later Supreme Court decisions read the FAA as being entirely about contract. This approach need not reject efficiency as a value, but it is at most a secondary consideration.

The major alternative to Keating is exemplified by the Champ decision from the 7th Circuit.48 There, the default position was held to be no class arbitration because the FAA required courts to order arbitration “in accordance with the terms” of the agreement, and the agreement does not call for class arbitration.49 Like Keating, Champ relied on the consolidation analogy, but the more recent anti-consolidation view rather than the earlier pro-consolidation approach.50

In sum, the very legitimacy of class arbitration was in doubt when the Supreme Court granted a writ of certiorari in Bazzle. At most, the strongly pro-contract approach to arbitration articulated in Byrd and Volt suggested that the Court would uphold an agreement that expressly provided for class arbitration – and that question is entirely theoretical because few, if any, contracts expressly provide for class arbitration.51

II. THE BAZZLE OPINIONS

The Bazzle case brought the class arbitration concept before the Supreme Court for the first time. The range of realistic options ranged from rejection of class arbitration as an oxymoron to one of considerable support for class arbitration, at least absent an express contractual prohibition thereof. Even then, a court might declare such a limitation to be unconscionable under the applicable state contract law. Thus, the realistic alternatives ranged from no arbitration even when the parties agreed to it, all the way to class arbitration even when the contract expressly prohibited it.

Bazzle grew out of two separate class arbitration proceedings, both conducted by the same arbitrator. The claims were based on loans by Green Tree to the plaintiffs, with materially identical form documentation for each transaction. The only difference was that the Bazzle class obtained home improvement loans, while the Lackey class borrowed to purchase mobile homes. The basis for each set of claims was that Green Tree failed to comply with a South Carolina statute that required lenders to inform customers that they could select their own attorney and insurance agent.52 The Bazzle and Lackey class arbitration proceedings resulted in total awards to the plaintiffs of $20+ million in statutory damages, plus attorney’s fees. Green Tree appealed and the two proceedings were subsequently consolidated by the South Carolina Supreme Court.

The contracts in Lackey and Bazzle all included the same form arbitration term, which provided, in material part:

**ARBITRATION — All disputes ... shall be resolved by binding arbitration by one arbitrator selected by us with consent by you. ... [T]he arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies...**53
The South Carolina Supreme Court ruled that, under South Carolina law, the contract was silent with regard to class arbitration, and therefore did not present a barrier to class arbitration. Even if there was doubt about the meaning of the contract, any ambiguity should be resolved against the drafting party (contra proferentum). The court held, in accordance with Keating, “that class-wide arbitration may be ordered when the arbitration agreement is silent.”

Accordingly, the trial court’s certification of the class was upheld, as were the subsequent decisions of the arbitrator in both Bazzle and Lackey.

Now, at last, we are ready to turn to the discussion of Bazzle by the Supreme Court. The most important aspect of the Bazzle decision is that every one of the Justices appears to accept the concept of class arbitration, albeit for different reasons. There is not a square holding to that effect, but none of the four opinions cast doubt on this conclusion, or even discuss the many potential problems associated with class arbitration.

The court divided as follows: a plurality opinion by Justice Breyer (joined by Justices Scalia, Souter, and Ginsberg); a major dissenting opinion by Chief Justice Rehnquist (joined by Justices O’Connor and Kennedy); a short concurring and dissenting opinion by Justice Stevens; and a short dissenting opinion by Justice Thomas. The common ground among the two major opinions was that the transactions at issue were governed by the FAA. Beyond that, each approached the case quite differently. The discussion will begin with the two minor opinions, followed by the dissent, and finally the plurality opinion.

A. The Stevens and Thomas Opinions

The opinions of Justices Stevens and Thomas both are brief. Strikingly, these two Justices agreed about what the Supreme Court should do, even though they come out on opposite sides of the case.

Justice Stevens concurred in the judgment of the Court, while also dissenting in part. His reason for concurring was to have a controlling judgment in the case, and because the majority opinion expressed “a view of the case close to my own.” His preferred position, however, was to simply affirm the decision of the South Carolina Supreme Court, since the parties elected arbitration under South Carolina law. That court, which has the last word about South Carolina law, held that class arbitration is permitted absent a contrary provision by the parties. Nothing in the FAA prohibits this approach, so the Court should have affirmed.

Justice Thomas continues to maintain that the FAA is inapplicable to state court proceedings, notwithstanding that the Court has repeatedly rejected this position. Under this approach, the FAA does not provide a basis for preempting a state court interpretation of an arbitration agreement. Accordingly, Justice Thomas would “leave undisturbed” the decision of the South Carolina Supreme Court. While the majority opinion gives a greater place to state law than does the Rehnquist dissent, Thomas nevertheless joined the dissenters because the Court majority did not affirm the decision of the South Carolina Supreme Court.

B. The Rehnquist Dissent

Chief Justice Rehnquist’s view of the case was informed by the primacy of the FAA, although the majority justices agreed that the transactions in Bazzle were governed by the FAA. The key step was to conclude, without explanation, that arbitrator selection is a gateway issue, and therefore subject to judicial determination. But that step was not enough because the South Carolina Supreme Court had interpreted the contract language to permit class arbitration and, of course, contract interpretation is normally a question of state law.

Rehnquist rejected the contract interpretation of the South Carolina court, and would have ruled that a contract permits class arbitration only when it so states. Put another way, the default position should be no class arbitration. His central point was that the South Carolina court’s decision “contravenes the terms of the contract and is therefore preempted by the FAA.”

The position taken by the Chief Justice is puzzling. His approach, if adopted, would amount to nothing less than a federal common law of arbitration contract interpretation. As a devotee of a greater role for state law and state courts, why did Rehnquist question the contract interpretation by the South Carolina Supreme Court? The South Carolina approach to the contract language was not unreasonable, and it certainly did not undermine or limit arbitration. State courts have the last word on state contract law, so why quarrel with the decision of the South Carolina court on an issue of contract interpretation? After all, the difference is merely one of the default positions in the face of silence by the contracting parties about class arbitration. The goal of Congress in enacting the FAA, as the Court has often observed, was simply to put written arbitration agreements on the same footing as other contracts, and to make them “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

Although Rehnquist does not put the matter this way, his opinion appears, sub silentio, to adopt the 7th Circuit approach in the Champ case, which is to permit class arbitration only when the contract makes an express provision for it – effectively, never. Perhaps the dissenting Justices wanted to prevent class arbitration in fact, even as they supported the principle of freedom of contract. Certainly, this is the outcome most favorable to business interests.

C. Justice Breyer’s Plurality Opinion

Justice Breyer began with the contract, and concluded that it does not prohibit class arbitration. Each arbitration proceeding was conducted by a single arbitrator, selected by Green Tree with the consent of the plaintiffs, as called for by the contract. With that issue disposed of, one might have expected the Court to affirm the decision of the South Carolina Supreme Court confirming the class arbitration awards.

Instead, the Court chose a different direction based on the respective competencies of courts and arbitrators. The role of the courts is limited to deciding gateway arbitrability questions, notably whether there was an agreement to arbitrate between the parties, and if so whether the agreement encompassed the dispute at hand. Remaining questions are reserved for decision by the arbitrator, including questions surrounding class arbitration because these relate to the manner in which arbitration should be conducted. Whether class arbitration was authorized by this agreement was a question of contract interpretation regarding the type of arbitration proceeding agreed to by the parties that should have been decided initially by the arbitrator rather than the courts.

“Arbitrators are well suited to answer that question,” said Justice Breyer. The Bazzle class determinations were made by the trial court, not the arbitrator, so the matter was remanded in order that the arbitrator could provide the contract...
This outcome is strange indeed, because it granted Green Tree a remedy that it did not request, at least not in a timely manner. The basis for the Green Tree challenge was that the decision to permit class arbitration was wrong, not that it was made by the wrong decision maker. The approach adopted by the plurality simply does not require the disposition of the case ordered by the Court. And, like the dissent, the plurality ended up second-guessing the South Carolina Supreme Court’s sensible and thoughtful decision.

It is not clear what is to happen after remand to the South Carolina courts. Presumably, the matter will end up back in the trial court, which is supposed to send it on to the original arbitrator. Then, the arbitrator could promptly rule that class arbitration was proper in both Bazzle and Lackey, and otherwise leave the prior awards unchanged. Unfortunately, the FAA does not contemplate such an approach. Section 11 permits a court to modify or correct an arbitration award in very limited circumstances, which the Supreme Court did not purport to do. Alternatively, Section 10 authorizes a court to vacate an arbitration award in limited circumstances, none of which were present in the Bazzle or Lackey arbitrations. The consequence of vacating an award is that the proceedings must be started anew. The FAA simply does not provide for the reconsideration of an arbitration proceeding by an arbitrator. Neither does the UAA, under the facts in Bazzle. The plurality opinion has nothing to say about this matter and provided no explanation about what was to happen next or why, except to say that “the case is remanded for further proceedings.”

The other opinions are similarly silent.

III. THE FUTURE OF CLASS ARBITRATION

State contract and procedural law will yield a variety of approaches to class arbitration. Some may adopt the position of the Keating dissent – class dispute resolution must take place in the courts, or not at all. Other states are likely to uphold contract provisions that prohibit class arbitration. After all, arbitration involves waiver of the Constitutional right to a trial by jury; it is a smaller step to waive any resort to class arbitration, which is a creature of court rules or statute. Some courts will permit class arbitration where the contract is silent, as the South Carolina Supreme Court did in Bazzle (and Lackey). Most courts will authorize class arbitration where the parties so provide, but few, if any, contracts expressly contemplate class arbitration. Even if the agreement authorizes class arbitration, a state might refuse to recognize class arbitration because of the burden such a process would place on the courts and because of concerns about fairness to absent parties. The Supreme Court might reject this approach as anti-arbitration, therefore preempted by the FAA.

Despite the centrality of contract to arbitration, some courts will refuse to enforce provisions that prohibit class arbitration in contracts of adhesion. The doctrinal vehicle for achieving this result is unconscionability. The same result should be obtained whether the matter is heard in a state or a federal court, because the federal courts apply state contract law. Once again, California offers an example. In the Ingle case, the 9th Circuit applied California unconscionability law to strike down a contract provision that prohibited class arbitration. Ingle involved a claim by an individual so the discussion of class arbitration is dicta, but the language used by the court is striking.

The ban on class arbitration in Ingle applied equally to both the employer and the employee, but the court replied that this limitation was effectively one-sided since the court could not think of a circumstance where an employer would bring a class action against its employees. The 9th Circuit quoted, with approval, a California decision in a consumer credit card case that characterized a provision barring class arbitration as “harsh and unfair”; and the “manifest onesidedness” of this limitation was “blindingly obvious” to the court.

Accordingly, the Ingle court rejected the attempt by the employer to “insulate itself from class proceedings while conferring no corresponding benefit on its employees in return.” This approach demonstrates the tension between unconscionability and conventional consideration doctrine. Normally, all that is needed to form a binding agreement is an exchange transaction, but there is no requirement of a quid pro quo for each term in a contract. Recall the bedrock principle of contract law that while consideration is required to create an enforceable agreement, the law does not enquire about the adequacy of consideration. The implicit response of the 9th Circuit was that the class arbitration restriction in Ingle was “manifestly and shockingly one-sided.”

Many states, probably the majority, will simply apply class arbitration provisions as written. That leaves only the default position, when an agreement is silent about class arbitration. The South Carolina approach of permitting class arbitration unless expressly prohibited is likely to prevail. The Champ approach of requiring an explicit provision is tantamount to barring class arbitration, an outcome clearly at variance with the views expressed by the plurality opinion in Bazzle. The debate about what should be the default position is likely to be largely academic because many firms that care about the matter already prohibit class arbitration, and many more will amend their form arbitration provisions to do so in the near future.

In short, a variety of approaches are likely to be adopted by different states. This should not be regarded as a problem; such variety is the glory of federalism. It permits the states to try out an array of potential solutions to a difficult matter such as class arbitration. The ultimate outcome is uncertain. A consensus may develop that class arbitration is unworkable, or it may turn out that the expected problems turn out to be quite manageable. [It appears from the judicial opinions that the class arbitration process worked reasonably well in Lackey and Bazzle.] Any number of in-between results are possible. Specific legislation may be enacted that addresses class arbitration, as occurred in California for consolidation of arbitration proceedings – which approach was subsequently adopted by the drafters of the RUAA.

Maybe no national consensus will develop. I am not wise enough to know (or foolish enough to predict) whether class arbitration has a useful future, but the federalism approach offers a mechanism for testing the alternatives.

There is a final option, which is that the Supreme Court will "nationalize" the law related to class arbitration based on the FAA, as it has done with so much of arbitration law. The certain result of this approach would be (relatively) uniform national law regarding class arbitration. The uniform doctrine almost certainly would enforce arbitration agreements as written, including “no class arbitration” or “no joinder” provisions, while rejecting contrary decisions based on state contract law, notably the unconscionability doctrine. Bazzle does not seem to provide support for such an approach, but seven of the Justices voted for outcomes at variance with that reached by the South Carolina Supreme Court.

There is an easy route for the Court to nationalize class arbitration law, should it desire to do so. Southland teaches...
that the FAA requires the enforcement of predispute arbitration agreements despite contrary state consumer protection (and other) legislation, and that the FAA applies in state as well as federal courts. As the Supreme Court put the matter in the *Casarotto* decision (relying on *Southland* and *Allied-Bruce*):

States may regulate contracts, including arbitration clauses, under general contract law principles.... What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. 84

*Casarotto* was an 8-1 decision, with only Justice Thomas dissenting (based on his rejection of *Southland*). The Court stated its strong support for arbitration, and expressed a thinly veiled irritation at the failure of state courts to get the message: “In *Southland*, we held”; “In *Perry*, we reiterated”; “In *Allied-Bruce* we restated”; “Repeating our observation in *Perry*”; “What states may not do”; “By enacting § 2, we have several times said”; “Courts may not”; “Montana’s [statute] directly conflicts”; “It bears reiteration”; and, “This Court’s precedent indicates.” 85 All of this language is found in a short opinion whose text fills only seven pages of the U.S. Reports (and less than four pages in the Supreme Court Reports).

The Court in *Casarotto* made a point of noting that the FAA imposes the same restrictions on courts as on legislatures, particularly as regards unconscionability. “It bears reiteration ... [that] a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what... the state legislature cannot.” 86

**IV. TEXAS CLASS ARBITRATION DEVELOPMENTS**

The possibility of class arbitration is not some strange and distant phenomenon; it has produced an immediate impact on the law in Texas. In the two months after the *Bazzle* decision, both the 5th Circuit and a state appellate court have considered class arbitration. Each of these decisions leaves important questions unanswered, so much more litigation about class arbitration in the Texas state and federal courts is a certainty.

**A. State Courts – The O’Quinn Decision**

The *O’Quinn* decision by the Tyler Court of Appeals held that the underlying contract did not allow for class arbitration, so a class arbitration order by the trial court was rejected. 87 The appellate remedy in Texas courts is by way of mandamus for abuse of discretion. The standard appellate court practice in Texas is to grant relief conditionally and allow the lower court to vacate its prior order. Thus, the appellate court avoids telling the trial court that it engaged in an abuse of discretion. The trial court then acts accordingly and the original proceeding is dismissed as moot – precisely what took place in *O’Quinn*. 88

The *O’Quinn* plaintiffs were three women represented by the *O’Quinn* firm in breast implant litigation.  *O’Quinn* retained 1.5 percent of the gross settlement proceeds for expenses common to all his clients. Plaintiffs sued, alleging that the expense deduction was not authorized under their materially identical contracts with *O’Quinn*. The suit was brought as a class action, on behalf of all *O’Quinn* clients who settled breast implant claims and were subject to the 1.5 percent expense deductions – about 2,000 individuals. 89

The trial court directed that the disputes be heard in a class arbitration proceeding. The order sending the case to arbitration is striking for its clear statement of the arbitrator’s authority:

“The arbitrator is specifically authorized to have the full limit of authority to determine the issues related to class action and to address and resolve all issues related to due process rights of putative class members and to determine all class action issues, including...the issue of whether proceeding on class or individual claims is proper.” 90

The court of appeals ruled that “class arbitration cannot proceed until the trial court has first certified the class,” because the FAA rules do not include a mechanism for class certification. 91 This approach is in direct conflict with *Bazzle*, but the court responded that *Bazzle* was inapplicable here. 92 The parties chose the FAA Commercial Arbitration Rules, and, under these rules, the arbitrator lacks the authority to determine class certification issues. The court order purporting to grant such authority to the arbitrator was improper because it contravened the governing FAA rules whose use was called for by the contract between the parties.

If the Tyler Court of Appeals had stopped here, its disposition and decision would be acceptable. To be sure, an alternative would be to rule that if the FAA declined to administer the arbitration in the manner ordered by the trial court, then the method of appointment called for in the contract failed, and the court could appoint a different arbitrator. As for use of the FAA Commercial Arbitration Rules, these can be downloaded from the AAA web site, and applied by any arbitrator. The court’s ruling that the method chosen by the parties should not be undermined by the courts is a reasonable one, but it reads a “no class arbitration” term into an agreement that does not address the topic.

Absent a specific provision that prohibits class arbitration, the teaching of *Bazzle* is that the question of whether a contract allows for class arbitration should be decided by the arbitrator. If the answer is yes, the matter could be returned to the trial court for certification of a class. In *Bazzle*, all the Justices took the position that the default position, where a contract is silent on the matter, is that class arbitration is permitted.

The *Champ* decision, which held that the default position was no class arbitration unless the parties expressly agreed to allow it, is the leading decision that contradicts *Bazzle*. 93 Prior to *Bazzle*, this was a reasonable approach because it tracked the Supreme Court’s treatment of consolidation, permitting it only where the parties agreed. The *O’Quinn* court cites and quotes *Champ*, suggesting that the default position should be no class arbitration. 94 After *Bazzle*, this approach is no longer viable.

The *O’Quinn* decision is of limited value as precedent because the premise on which it is based – the AAA will not administer class arbitration absent prior judicial class certification – has already changed. The AAA is in the process of adopting class arbitration procedures that will accommodate the *Bazzle* approach. 95
B. Fifth Circuit – The Pedcor Decision

In Pedcor, the 5th Circuit followed Bazzle. North American Indemnity (NAI) had reinsurance contracts with more than 400 Employer Self-Funded ERISA plans throughout the United States. Each of the contracts called for arbitration of all disputes, with the arbitration “governed by the laws of the State of Texas.” A method for selection of arbitrators was specified: each party chooses one arbitrator, and these two select a third arbitrator. Nothing is stated about class arbitration or consolidation of claims.

The Plans alleged that NAI breached these contracts by failing to make required payments. NAI responded by bringing suit against the third party administrator of the Plans, American Heartland Health Administrators (AHHA), for negligent underwriting. Several Plans intervened as plaintiffs against NAI. After a hearing, the district court certified a class consisting of all unpaid employer plans that purchased reinsurance through NAI after a specified date. Pedcor, one of the ERISA Plans, appealed the certification order. All of this happened prior to the Bazzle decision.

There are major differences between the factual circumstances in Pedcor and Bazzle – three arbitrators instead of one; Texas law instead of South Carolina law; and sophisticated commercial entities instead of consumers as plaintiffs. While these differences may be important, even outcome-determinative, in the actual arbitration proceeding, they do not appear to be material for purposes of the class certification issue.

The 5th Circuit rightly ruled that Pedcor was governed by Bazzle, which made for an easy disposition of the case. Bazzle requires that the arbitrator rather than the court should decide whether the contract allows class arbitration, so the decision of the district court about arbitration was vacated, with the matter to be determined by the arbitrators.

The 5th Circuit did not specify how the arbitrators were to be selected. NAI effectively must appoint an arbitrator, even if it is opposed to class arbitration, on penalty of being deemed to have waived its appointment power. In that event, the FAA calls for judicial appointment – “the court shall appoint.” The plaintiffs’ side of the appointment process is more difficult. They may not agree, and there is every reason to believe that Pedcor, which opposes class arbitration, will not be agreeable to nominees of other plaintiffs. While Pedcor must also nominate an arbitrator, this person may well be unacceptable to the other plaintiffs. Indeed, why should not every plaintiff be permitted to nominate an arbitrator? Once a class is created, class representation can be coerced, but the point of Bazzle (and Pedcor) is that the court lacks the authority to decide that issue. As for the arbitrators, they cannot consider the matter until they are appointed – pursuant to 400+ separate contracts.

Arbitral class determinations may produce inconsistent results despite (materially) identical contract language, even in the same jurisdiction. An arbitrator could reasonably conclude that the appointment problem suggested in the previous paragraph is evidence of an intention not to permit class arbitration. Chief Justice Rehnquist’s dissenting opinion would find that to be true as a matter of law under the FAA, taking the matter out of state contract law.

If the arbitrators rule that the contract does not contemplate class arbitration, what happens next is clear: there will be multiple separate arbitration proceedings. If the arbitrators rule that class arbitration is authorized, what happens next is less than clear. In Bazzle, the arbitrator simply proceeded to conduct the entire process through to completion and verdicts, without any consultation with a court. What of all the problems that might arise with class proceedings, and the interests of class members? Such issues are real, but none were raised by members of the Bazzle or Lackey classes. The awards of $20+ million in the two actions suggest that class counsel did extremely well for the claimants, but, of course, not all class proceedings have a similarly happy ending (for plaintiffs).

Maybe the appropriate course of action for the arbitrator is to decide whether class arbitration is permitted, and, if so, send the matter back to the trial court to determine issues related to class certification, notification, and similar matters. However, there is nothing in the Bazzle or Pedcor decisions to suggest anything of the sort. Accordingly, it appears that the proper course for arbitrators is to proceed on their own. Concerns about that approach might be drawn to the attention of the trial court by a party to the arbitration, but the grounds for interim relief are extremely limited. The result is a final award by the arbitrators.

The Pedcor decision included an interesting discussion about the interaction of state choice of law provisions and the FAA. Contracts commonly include a choice of law clause, as did those at issue in Pedcor (Texas) and Bazzle (South Carolina). The laws of the State of Texas encompass federal as well as state law. This means that the FAA, with its preemptive effect over state law, is part of the contract. A party might further specify that arbitration shall be governed by the Texas Arbitration Act instead of the FAA, in which case the FAA is displaced under conventional contract law principles. This approach is clearly correct, and should be uncontroversial. It warrants mention only because some state courts in Texas (and a few other states, notably Alabama and Montana) have declined to recognize that federal law is part of state law, for the purpose of thwarting arbitration.

The 5th Circuit gently criticized the Supreme Court for not being sufficiently deferential to arbitrators in the allocation of authority between court and arbitrator. The Bazzle plurality said that the Court must initially examine the contract to determine whether it prohibited class arbitration. Only if the answer is “no” will the matter proceed to the arbitrator to determine whether the contract permits class arbitration. In effect, the trial court is to determine whether the contract is reasonably susceptible to an interpretation that class arbitration is permitted and, if so, then the arbitrator proceeds to interpret the contract. The 5th Circuit suggested that the courts should do even less. Once a trial court determines that the parties agreed to arbitrate, and that the arbitration agreement covers the dispute at hand, the parties should be sent directly to arbitration.
V. CONCLUSION

The most important aspect of the Bazzle decision is that every one of the Justices appeared to accept the concept of class arbitration, albeit for different reasons and without explicit discussion of this centrally important matter. The Bazzle court did not squarely hold in favor of class arbitration, but none of the four opinions cast doubt on this conclusion. The plurality opinion not only allowed for class arbitration (under state law), it even directed that the class be created by the arbitrator. The major dissenting opinion stated that the FAA permits parties to choose (“does not prohibit”) class arbitration. However, the dissent argued, “the parties simply did not so choose.”

Astonishingly, the Court makes its most significant ruling without expressly stating it, and the plurality opinion fails to discuss the problems associated with putting the arbitrator in charge of class certification. Before Bazzle, the accepted premise about class arbitration was that it had to be preceded by judicial certification of the class. If the courts have no role in the certification process, as posited by Bazzle, presumably the courts have no role during the arbitration process either. What about protection of absent parties? Who will monitor the adequacy of representation? Do the courts have a role in reviewing a settlement prior to a class award? After an award, will the scope of judicial review be the same as for other arbitral awards (extremely limited)? How is meaningful judicial review possible in the absence of a record of the proceeding or a written decision, as is standard in commercial, consumer, and employment arbitration? The list of questions goes on and on.

None of the many potential problems with class arbitration that were raised in Keating over 20 years ago were even mentioned, let alone resolved, in Bazzle. Both the majority and dissenting opinions in Keating carefully examined class arbitration, and thoughtfully addressed the problems attendant to this approach. The best that can be said for the Supreme Court in Bazzle is that the justices failed to seriously consider the issues related to class arbitration. At worst, the Court threw sand in the gears of class arbitration by insisting that arbitrators rather than judges must make the initial decisions regarding class certification. The Supreme Court could have left the implementation issues related to class arbitration to the state courts, but both the plurality and the major dissent were willing to “second-guess” the thoughtful approach of the South Carolina Supreme Court.

In view of the Supreme Court’s favorable attitude toward class arbitration, as evidenced by Bazzle, one has to wonder if the Court or the lower courts will become more receptive to consolidation of related arbitration proceedings – in effect, resurrecting the Nereus approach and rejecting the anti-consolidation position adopted by the federal courts of appeals in Boeing and other cases. Parties that draft form contracts are likely to respond to these developments by explicitly rejecting any consolidation or class arbitration. Prior case law suggests that such provisions will be widely enforced even in contracts of adhesion. The logic of Bazzle suggests that these questions should be decided by the arbitrator rather than the court. Many courts, including the 5th Circuit, previously required that the consolidation decision be made by a court, but the 5th Circuit now reads Bazzle as mandating that the issue be decided by the arbitrator.

Following Bazzle, the state of the law regarding class arbitration is that the lower courts, both state and federal, are left rudderless, and without guidance about how to proceed. No guidance was offered about the standards for judicial review of class arbitration awards, or of pre-award settlements. Prepare yourself, dear readers, for a decade of uncertainty about class arbitration (and consolidation of arbitration proceedings), punctuated by much litigation.

Footnotes

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The author gratefully acknowledges the support of the University of Houston Law Foundation.

2. 9 U.S.C. §§ 1 et seq. Subsequent FAA citations are limited to section numbers.
3. 7 U.L.A. 1 (1955). The UAA, or a close variant thereof, has been enacted in thirty-seven states, and the remaining states (except Alabama) have enacted broadly similar statutes.
6. For everything you ever wanted to know about this topic (and perhaps more), see Jean R. Sternlight, As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive?, 42 WM. & MARY L. REV. 1 (2000).
8. See Keating, 645 P.2d at 1194-1195.
10. Id.
11. Id.
15. Id. at 1208.
18. Id. at 975.
19. See Rules 42(a) and 81(a)(3).
21. Id. at 1215.
22. Id. at 1216.
23. While the AAA does not prohibit reasoned awards, it discourages them, and the AAA “has stricken from its panel ... arbitrators who ... insist on explaining their arbitral awards, even where the explanation may consist of no more than a short statement of the arbitrator's findings relating to the critical issues in dispute.” Stephen A. Hochman, Judicial Review to Correct Arbitral Error – An Option to Consider, 13 OHIO ST. J. DISP. RES. 103, 105 (1997)
24. Keating, 645 F.2d at 1210.
25. Keating, 645 F.2d at 1217.
26. Keating, 645 F.2d at 1209.
27. Id.
28. Id. at 1209-1210.
29. Id.
33. Id. at 219.
35. Id. at 478.
37. Id. at 69.
38. Id.
41. The Revised Uniform Arbitration Act can be found at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>
42. Id.
43. Id. These issues commonly arise in construction, insurance, maritime and sales transactions. The classic situation to which section 10 is addressed is the construction project, where there is a series of contracts among the owner, architect, prime contractor, and subcontractors. All the contracts call for arbitration, often incorporating by reference the master contract for the project, so that everyone has agreed to arbitrate any dispute that arises, but not all the parties are contractually bound to one another.
44. Id. at comment 3 (“not intended to address” the issue).
45. Keating, 645 F.2d at 1208.
46. For an overview of this debate in the courts and among the academic commentators, see Richard C. Solomon, Appeal of Arbitration by Agreement, DISP. RES. J., May-July 2003, at 58. In LaPine Technology Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997), the three judges produced three divergent opinions. The decision, which permitted expanded review, was reversed in an en banc rehearing.
49. FAA, section 4.50. Champ, 55 F.3d 269.
50. Champ, 55 F.3d 269.
53. Bazzle, 123 S.Ct. at 2405.
55. Id. at 360.
56. Id. at 349.
57. Bazzle, 123 S. Ct. at 2409.
58. Bazzle, 123 S. Ct. 2402.
60. Bazzle, 123 S. Ct. at 2411. Justice Thomas's preferred approach was powerfully argued by Justice O'Connor in her Southland dissent. Even she, however, abandoned that position in Allied-Bruce— not because she had recanted her earlier views, but because of stare decisis. Southland has not proven to be unworkable, and further changes, if any, should come from the legislative branch of government.
For Justice Thomas to continue to cast his vote based on what the law ought to be is unusual. Imagine if a judge thought that the Erie doctrine was a mistake, and decided cases as if Swift v. Tyson was still the law of the land. Even Supreme court judges are supposed to uphold the law.
61. Id.
62. Bazzle,123 S. Ct. at 2407.
63. Id.
64. Id. at 2409.
65. FAA, § 2.
67. Id.
68. Id. at 2407.
69. The matter actually was more complicated. A court ordered the Bazzle claims to class arbitration, while the arbitrator subsequently certified the Lackey class. Since the arbitrator was the same person, and the contract was identical, Justice Breyer sensibly concluded that there was “at least a strong likelihood” that the Lackey class certification reflected the earlier court decision rather than an independent determination by the arbitrator.
70. Justice Stevens makes this point.
71. FAA, § 11.
72. FAA, § 10.
73. The UAA, in section 9, contemplates clarification of an award by an arbitrator, but only upon request of a party — not at the behest of a court — within twenty days after delivery of the award.
74. Bazzle, 123 S. Ct. at 2408.
75. Keating, 645 P.2d at 1217.
76. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003).
77. Id.
78. See Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003) (similar analysis of no class arbitration term in contract between AT&T and its customers); Circuit City Stores v. Adams, 279 F.3d 889 (9th Cir. 2002) (Adams III). The leading California cases regarding unconscionability and arbitration are Little v. Auto Stigler, Inc., 63 P.3d 979 (Cal. 2003), and, Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000).


80. Ingle, 328 F.3d at 1177.

81. Id. at 1176.


85. Id. at 684-688.

86. Id. at 687, quoting Perry v. Thomas, 482 U.S. 483, 492 (1987).


88. In re John M. O’Quinn, P.C., ___S.W.3d___ (Tex. App.-Tyler 2003, no pet.h.).

89. O’Quinn, 2003 WL 21468619 at 1-2.

90. Id. at 1 (emphasis omitted).

91. Id.

92. Id. at 6 (FN 1).


94. O’Quinn, 2003 WL 21468619 at 17.


97. Id. at 1.

98. Id.

99. Id.

100. Id.

101. FAA, section 5. The UAA, section 6, adopts the same approach.


107. Id. at. 2402 (Rehnquist, C.J., dissenting).

108. The rationales offered for this outcome were slightly different. Justice Stevens thought the South Carolina decision should be affirmed because it was correct as a matter of law. Justice Thomas would have affirmed because the FAA governs only federal courts, and is inapplicable to state court proceedings.