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**Classwide Arbitration in California**  
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**Introduction**

California courts have a significant history of dealing with classwide arbitration that predates *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The California Arbitration Act gives California courts authority to consolidate arbitrations; on that authority, California courts routinely have certified classwide arbitrations and then sent them to arbitrators for adjudication of the merits of the dispute.

On the authority of *Bazzle*, California courts have begun to shift the management and certification responsibility for classwide arbitrations to arbitrators so that all aspects of classwide arbitration are under the authority of the arbitrator and the arbitral institution. Major arbitral institutions in the United States (AAA and JAMS) established supplemental rules after *Bazzle* for the conduct of classwide arbitration. Interim and final awards rendered in classwide arbitrations are reviewed in accordance with the California Arbitration Act or the Federal Arbitration Act, as appropriate.

This paper addresses the changed landscape in class action cases since *Bazzle* and assesses how successful arbitrators have been in California in conducting classwide arbitration under their exclusive authority compared to the pre-*Bazzle* division of authority between arbitrators and courts. The role courts have played in the review of clause construction and certification decisions by arbitrators is also assessed. How have courts exercised their right of review – deferential or *de novo* or something in between – and how have parties used the interlocutory review process established by arbitral institutions in their classwide arbitration rules?

**I. The California Arbitration Act**

The California Arbitration Act (“CAA”) provides for the consolidation of separate arbitration proceedings. A party may petition the court and the court to consolidate separate arbitration proceedings and the court may order consolidation when:

1. Separate arbitration agreements or proceedings exist between the same parties or one party is a party to a separate arbitration agreement or proceeding with a third party, and
2. The dispute arises from the same transactions or series of transactions, and

3. There is a common issue or issues of law or fact creating the possibility of inconsistent rulings by more than one arbitrator or panel of arbitrators.

Cal. Code Civ. Proc. § 1281.3<sup>1</sup>

If all the applicable arbitration agreements name the same arbitrator, arbitration panel or arbitral institution, the court, if it orders consolidation, will order all matters to be heard before that arbitrator, panel or institution agreed by the parties. If the applicable agreements name different arbitrators, panels or institutions, the court will, in the absence of an agreed method of selection by all parties, select the arbitrator in accordance with the procedures for arbitrator selection prescribed by the CAA, Cal. Code Civ. Proc. § 1281.6.

The court is authorized to resolve inconsistencies between the several arbitration agreements “and determine the rights and duties of the various parties to achieve substantial justice under all the circumstances.” Cal. Code Civ. Proc. § 1281.3. The court has power to consolidate the entire proceedings or just certain issues in those proceedings, leaving the remaining issues for determination in the separate cases. *Id.*

This provision has been a part of the CAA since at least 1978. It has been used as the authority to certify and hear class claims in arbitration. It also served as the model for the consolidation provision (§ 10) of the Revised Uniform Arbitration Act (“RUAA”) adopted in 2000. The RUAA has been adopted by 14 states as of January 1, 2007.

Under the CAA, courts were empowered to consolidate class claims and to certify a class in accordance with California law and then refer the matter to arbitration for adjudication of those class claims. *Keating v. Superior Court*, 31 Cal. 3d 584 (1982), *rev’d on other grounds in Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309 (1986); *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (1998).

*Keating* found that the court’s power to consolidate separate arbitrations under the CAA provided the basis for authorizing classwide arbitration where the several claims meet the standards of CCP § 1281.3 and the interests of justice so require. 31 Cal. 3d 584 at 610. Indeed, where a contract of adhesion is present (in *Keating* it was franchise agreements with convenience stores), the similarity of claims, facts and legal issues is likely to be higher than in other cases where the contracts varied between the several parties. “In these respects, an order for classwide arbitration in an adhesive context would call for considerably less intrusion upon the contractual aspects of the relationship . . . Moreover, the interests of justice that would be served by ordering classwide

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<sup>1</sup> By contrast, the United States Arbitration Act (“FAA”) does not permit consolidation of arbitrations absent agreement of the parties. *See, e.g., Del E. Webb Construction v. Richardson Hospital Authority*, 823 F.2d 145 (5th Cir. 1991); *American Centennial Ins. Co. v. National Casualty Co.*, 951 F.2d 107 (6th Cir. 1991); *Connecticut General Life Insurance Co. v. Sun Life Assurance Co. of Canada*, 210 F.3d 771 (7th Cir. 2000); *Baessler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Protective Life Insurance v. Lincoln National Life Insurance Corp.*, 873 F.2d 281 (11th Cir. 1989).

arbitration are likely to be even more substantial in some cases than the interests that are thought to justify consolidation.” *Id.* at 611.

Working from a consolidation model, *Keating* set a roadmap for the conduct of a classwide arbitration. The role of the court in certifying the class contemplates a greater involvement by the court in the arbitration process than is normally associated with arbitration (ideally, a complete proceeding without resort to court involvement). The court here would have to make initial determinations regarding certification and notice to the class, and if classwide arbitration proceeds, it may be called upon to exercise a measure of external supervision in order to safeguard the rights of absent class members to adequate representation, as well as in the event of a dismissal or settlement. *Id.*, at 613. A good deal of ingenuity would be required to avoid judicial intrusion upon the merits of the dispute or upon the conduct of the proceedings themselves and to minimize complexity, cost and delay.

In *Izzi, supra*, land purchasers asserted tort claims on their own behalf and on behalf of all others similarly situated. The developer successfully compelled arbitration of the tort claims on the basis that they derived from the purchase agreement which contained an arbitration clause. The court ordered a classwide arbitration on the authority of *Keating* and other cases in which classwide arbitrations were ordered (*e.g.*, *Lewis v. Prudential Bache Securities, Inc.*, 179 Cal. App. 3d 935 (1986) (hundreds of thousands of class members) and based on the manageability of a proposed class of 140, each of whom had a compensatory damage claim of about \$3,000, and the desirability of avoiding a multiplicity of proceedings. The case was remanded to the trial court for determination of class action issues, certification of the class, provision of notice and any related discovery problems. (The appellate court posited that the trial court might send the case to arbitration prior to determination of class issues and have them determined, in the first instance, by the arbitrator. But it concluded that “frequent interruptions of the arbitration proceeding for due process review of the arbitrator’s class action determinations would be disruptive and largely destructive of the benefits to be had from arbitration, so at least until greater experience with these problems has been had, judicial determination of the class action problems would seem preferable.” 186 Cal. App. 3d 1309, 1322 n.6.)

Under this regime, classwide arbitrations have been arbitrated in California for more than a decade. Certification, class definition and notice issues were determined by the trial court, and the certified case was sent to arbitration for determination of the merits of the controversy and then returned to court for confirmation as of any other arbitration award.

There is no case law on review of arbitration awards in class arbitrations in California prior to *Bazzle*. This may mean that certified class actions sent to arbitrators for arbitration of the merits settled prior to any merits determination or settled during the process. It is likely that if any awards were actually issued in classwide arbitrations pre-*Bazzle*, they would have been subject to trial court confirmation and eventually appellate court review which would have generated a published decision, given the magnitude of the typical class action.

## **II. The United States Supreme Court Decides *Bazzle***

This statute-based arbitral procedure for classwide arbitrations in California was dramatically altered following the United States Supreme Court decision of *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). That case has been interpreted by state courts in California to shift to arbitrators the decision whether to consolidate arbitrations in spite of contrary statutory language. See *Independent Association of Mail Box Center Owners v. Superior Court*, 133 Cal. App. 4th 396 (2005); *Garcia v. DIRECTV, Inc.*, 115 Cal. App. 4th 297 (2004) (applying *Bazzle* by analogy); *Yuen v. Superior Court*, 121 Cal. App. 4th 1133 (2004) (arbitrator decides consolidation even if FAA governs arbitration).

In *Bazzle*, the borrowers separately entered into loan agreements with their lender, Green Tree Financial. The agreements were governed by South Carolina law. Borrowers alleged that Green Tree had failed to provide them with a form mandated by a South Carolina statute. That form would have alerted them to the borrowers' rights to name their own lawyers and insurance agents.

Mr. Bazzle filed his claim in a South Carolina state court and moved for class certification. Green Tree moved for a stay and to compel arbitration based on the arbitration clause in the loan agreement. The state court sent the case to arbitration after determining that the case could proceed in arbitration as a class action. Other borrowers also sought class certification and their case, upon Green Tree's motion, was also sent to arbitration. The arbitrator then certified a class and issued an award in each case. The South Carolina Supreme Court eventually affirmed the judgments on the awards, agreeing that the cases were properly heard as class actions because the arbitration clauses did not forbid the claimants from arbitrating as a class.

The arbitration clause interpreted by the South Carolina Supreme Court spoke of the right to arbitrate in the singular and gave each party either the right to select or to veto an arbitrator who would be hearing the dispute between "Green Tree" and "you," referring to the borrower. Green Tree argued that the syntax clearly implied that class actions were precluded. The United States Supreme Court reversed the South Carolina Supreme Court, holding that it was for an arbitrator, and not a court, to determine whether the arbitration could be maintained as a class action. Justice Stevens, who dissented in part, concurred in this aspect of the plurality opinion in order to form a five member majority. The four remaining Justices filed two other dissenting opinions.<sup>2</sup>

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<sup>2</sup> In dissent, Chief Justice Rehnquist, joined by Justices Kennedy and O'Connor, observed that "the decision of what to submit to the arbitrator is a matter of contractual agreement by the parties, and the interpretation of that contract is for the court, not for the arbitrator." They believed that the case was governed by the rule in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), and not by the rule enunciated in the later *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002). They also argued that the South Carolina court had misinterpreted the language in the arbitration clause in the *Bazzle* loan agreement and that the language of the clause clearly implied that class actions were precluded. The three in dissent believed that the parties should get what they contracted for – a one-on-one arbitration.

Importantly, from an arbitrator’s perspective, *Bazzle* only dealt with an arbitrator’s ability to opine on the availability of class action relief, what is now generally referred to as “clause construction.” It said nothing about the other issues involved in class action cases, such as certification and notice issues. *See generally* F. R. Civ. P. Rule 23. Notwithstanding that limitation, the California cases uniformly read *Bazzle* (and related cases such as *First Options* and *Howsam*), as placing all class issues before the arbitrator. *See Cable Connection, Inc. v. DIRECTV, Inc.* 44 Cal. 4th 1334 (2008).

Nor does *Bazzle* alter the well-established rule that the court determines the existence of an agreement to arbitrate (9 U.S.C. § 2; Code Civ. Proc. § 1281.2). But where the existence of an agreement to arbitrate is not in dispute, pursuant to *Bazzle* arbitrators have been given the responsibility to decide the issue of clause construction – did the parties in their agreement contemplate classwide arbitration? *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003). More broadly, *Bazzle* is generally also read as establishing the proposition that all substantive and procedural class determination issues are for the arbitrator as well. In addition to the California cases cited above, other state courts have referred to arbitrators all decision-making in putative classwide arbitrations.<sup>3</sup>

### **III. Arbitral Institutions Respond to *Bazzle***

Faced with these early court decisions that seemingly give arbitrators the right to make all class-related decisions, the major arbitration providers – the American Arbitration Association and JAMS – promulgated supplementary class action rules for the conduct of classwide arbitrations. Both provider organizations have multi-step procedures that begin with clause construction, proceed to class certification, consider the nature of proper notice and then proceed to a hearing on the merits and (eventually) issuance of a final award.<sup>4</sup>

The important difference between the two sets of rules is that the AAA mandates that the arbitrator issue a separate award embodying the arbitrator’s decisions on clause construction and (later) on class certification, and then stays the effect of each such award for a period of at least 30 days to permit any party to apply to a court to confirm or to vacate the award. AAA Supplementary Rules 3, 5. In effect, a partial final award is mandated by the AAA Supplementary Rules. The JAMS Class Action Procedures leave it to the arbitrator’s discretion whether or not to embody the clause construction and class definition and certification decisions in partial final awards subject to immediate judicial review. JAMS Rules 2, 3.<sup>5</sup>

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<sup>3</sup> *E.g., Pedcor, supra; In Re Wood*, 140 S.W.3d 367 (Tex.); *Johnson v. Chase Manhattan Bank*, 13 A.D.3d 332, 786 N.Y.S.2d 302, 2004 (1st Dep’t 2004) (affirming lower court’s dismissal of the lawsuit and referral to arbitration of all issues, including possible class action status).

<sup>4</sup> The class action rules of these providers are available on their web sites – [www.adr.org](http://www.adr.org) and [www.jamsadr.com](http://www.jamsadr.com).

<sup>5</sup> There are other differences between the AAA and JAMS rules. *See Michael Dore, Arbitrating Complex Litigation*, 187 N.J. Law J. 582 (Feb. 19, 2007)

What standard of review should a trial court use in reviewing such partial final awards? Generally, courts do not review the legal correctness of an arbitration award. 9 U.S.C. §§ 9, 10; *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994); Cal. Code Civ. Proc. § 1286.2; *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992). Until recently, some federal courts have recognized non-statutory grounds for vacating arbitration awards, such as manifest disregard of the law. The Ninth Circuit Court of Appeals (covering California) has recognized that ground in a non-arbitration context. *Todd Shipyards Corp. v. Cunard Line, Inc.*, 943 F.2d 1056 (9th Cir. 1991). *But see Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (*vacatur* based on a non-statutory ground is a doctrine of last resort to cure an egregious impropriety where no statutory ground is available). But recently in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1396 (2008), the Supreme Court, in *dictum*, indicated that the FAA does not support the application of non-statutory for *vacatur* of an arbitration award. Since that decision, several federal courts have cited *Hall Street* as authority for rejecting challenges to arbitration awards on the ground of manifest disregard of the law.<sup>6</sup>

Prior to the decision in *Hall Street*, one class action partial final award (finding that a maritime clause permitted class actions) was vacated on the ground of manifest disregard of the law. *Stolt-Nielsen SA v. Animalfeeds International Corp.*, 435 F. Supp. 2d 382 (S.D.N.Y. 2006). The *Stolt-Nielsen* court did not note any difference between the standard of review applicable to this putative classwide arbitration and any other arbitration award.

State courts that have reviewed partial final awards determining intermediate steps in a classwide arbitration have employed traditional statutory review of those awards. *E.g., Long John Silver's Restaurants, Inc. v. Cole*, 409 F. Supp. 2d 682 (D.S.C. 2006) (AAA arbitration determining certification of an opt-out class under the Fair Labor Standards Act).<sup>7</sup>

Only one California case has addressed the standard of review issue directly. *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334 (2008). In *Cable Connection*, several dealers sued DIRECTV for breach of dealer agreements on behalf of a class of similarly situated dealers. The AAA arbitration clause in each of the dealer agreements was silent as to whether a classwide arbitration was permitted or not. The arbitration panel considered that issue after limited discovery and briefing and argument on the issue. It concluded (2-1) that the clause permitted classwide arbitration. Respondent's petition for an order vacating that award was granted by the Los Angeles

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<sup>6</sup> *Prime Therapeutics LLC v. Omnicare, Inc.*, 55 F. Supp. 2d 993 (D. Minn. 2008); *Robert Lewis Associates, Ltd. v. Webb*, 566 F. Supp. 2d 228 (SDNY 2008). See also *Ramos-Santiago v. United parcel Services*, 524 F.3d 120 (1st Cir. 2008).

<sup>7</sup> In *Cheng v. Oxford Health Plans, Inc.*, 846 N.Y.S.2d 16 (1st Dep't 2007), the Appellate Division unanimously reversed a trial court decision vacating a clause construction award in an AAA arbitration which award found that the clause allowed classwide arbitration. The *vacatur* by the trial court was on grounds of manifest disregard of the law, and the reversal of that decision was based on the determination that the arbitration panel (2-1) knew and considered the applicable law; at best the decision was erroneous and not a circumstance where the doctrine of manifest disregard of the law could apply.

Superior Court, the court finding that the majority arbitrators had incorrectly decided the clause construction issue.

The arbitration clause in *Cable Connection* provided in part as follows:

**The arbitrators shall apply California substantive law to the proceeding, except to the extent federal substantive law would apply to any claim . . . The arbitrators shall prepare in writing and provide to the parties an award including factual findings and the reasons on which their decision is based. The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected [by petition] to a court of competent jurisdiction for any such error.**

Two previous California Court of Appeal cases have held such clauses ineffective to impose any additional duty on the trial court in reviewing an award under the CAA. *Crowell v. Downey Community Hospital*, 95 Cal. App. 4th 730 (2002) and *Oakland-Alameda Co. Coliseum Auth. v. CC Partners*, 101 Cal. App. 4th 635 (2002).<sup>8</sup> The United States Supreme Court had ruled similarly applying the FAA. *Hall Street Associates v. Mattel, Inc.* \_\_\_ U.S. \_\_\_, 128 S. Ct. 1396 (2008)

The California Supreme Court found the enhanced review clause, as drafted, enforceable under the CAA based on a reading of *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992). *Cable Connection*, 44 Cal. 4th at 1361-1363.

In reviewing the arbitrators' order on the merits, the court noted several erroneous aspects of the clause construction award – the majority arbitrators' reliance on (i) *Keating v. Superior Court*, 31 Cal. 3d 584 (1982) and *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (1998), *supra*, which view the right to pursue classwide arbitration as a substantive right, and (ii) the provisions of AAA rules and policy which suggest that the AAA will administer demands for classwide arbitration where the agreement is silent with respect to class claims. The former authority supports the right of a *court* to order classwide arbitration where the arbitration clause appears in an contract of adhesion and “gross unfairness would result from the denial of opportunity to proceed on a classwide basis.” 31 Cal. 3d 584 at 613. This is no authority for *an arbitrator* to find a right to classwide arbitration where the clause is silent as to that issue. As to the AAA, those rules expressly state that “in construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules or any other AAA rules to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.” AAA Supplementary Rule 3. *Cable Connection, supra*, 44 Cal. 4th at 1364-1365.

The court returned the case to the arbitrators to reconsider the issue as a matter of contract interpretation and AAA arbitration procedure. *Id.*, 44 Cal. 4th at 1366.

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<sup>8</sup> This was also true in the Ninth Circuit. *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).

Because the Supreme Court upheld the parties' enhanced review provision of their clause, and its review of the correctness of the award was consistent with that provision, it is unclear what standard of review of the award would have been applicable if no enhanced review provision were present.<sup>9</sup>

Hypothetically, the application of the principles of *Moncharsh, supra*, to the review of partial final awards would limit the reviewing court to deferential review only and would not allow error correction unless it fell within one of the statutory grounds.<sup>10</sup>

This raises the question why one would establish a procedure for the interlocutory review of class arbitration determinations as to clause construction and certification if not to allow trial courts to determine if the due process rights of class members are being protected (in the same way that trial court interim decisions on class issues might be reviewed by an appellate court)? If the ultimate award on the merits of a classwide arbitration is subject only to deferential review under the FAA or any applicable state statute, where does the process assure adherence to due process standards in adjudicating the rights of a class or purported class?

#### IV. Actual Institutional Experience in Administering, Managing and Deciding Classwide Arbitrations since *Bazzle*

##### A. A Word About Class Preclusion or Waiver Clauses

Some consumer agreements (credit card agreements, telephone contracts, etc.) include arbitration clauses and also purport to limit the right of the parties to combine separate disputes under separate contracts into classwide arbitrations. The case law is mixed as to whether this is or is not "unconscionable" thereby making the arbitration agreement unenforceable.

Several state courts and the Ninth Circuit (which includes the State of California) have held class action preclusion clauses to be unenforceable. *E.g., Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007); *Ting v. AT&T Corp.*, 319 F.3d 1126 (9th Cir. 2003); *Kristian v. Comcast*, 446 F.3d 25 (1st Cir. 2006). By contrast, class action preclusion clauses have been upheld by the Third, Fourth, Seventh and

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<sup>9</sup> The intermediate appellate court (which chose to follow *Crowell, supra*, and *Oakland Alameda Co. Coliseum, supra*) declined to enforce the enhanced review provision of the parties' agreement. In the absence of any grounds for non-statutory review, the argument was made to that court that by virtue of the parties' agreement to the issuance of a partial final award as prescribed in the AAA Supplemental Class Action Rules, they were entitled to a *de novo* review of the arbitrators' decision on clause construction. The intermediate appellate court rejected that interpretation of the AAA Rules, finding no basis in those rules to compel a review of such partial final awards for legal correctness. 53 Cal. Rptr. 3d 318 n.9 (2006)

<sup>10</sup> It would be unlikely, for reasons explained at length in *Cable Connection*, that statutory review would result in effective error correction. *Cable Connection, supra*, 44 Cal. 4th 1345-1346 & n.8.

Eleventh Circuits,<sup>11</sup> and by district courts in Massachusetts, Louisiana, Illinois, Georgia and Delaware.<sup>12</sup>

California is among the states that have held that such clauses may be unenforceable in certain circumstances. *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). *See also Gentry v. Superior Court*, 42 Cal. 4th 443 (2007) (clause precluding class treatment of wage and hours claims unenforceable). Many state courts have upheld class action waiver clauses, but others have not.

This issue is beyond the scope of the principal inquiry in this paper, but the limitation placed on consumer agreements by California state and federal courts has resulted in a reduced number of class actions that have actually proceeded to arbitration in California. That is because the effect of a class preclusion provision is often to void the arbitration clause in its entirety, thereby placing the case back in court litigation. Only if the unenforceable class preclusion claim is severed would the matter be able to proceed in arbitration as a class claim. This issue is addressed in *Gentry, supra*, 42 Cal. 4th 443 at 446.

## B. Clause Construction

The Reasoned Partial Final Award. AAA rules require and JAMS rules permit issuance of a partial final award (*i.e.*, one that is subject to confirmation or *vacatur*).

AAA cases: With one exception, all of the AAA class action cases arising in California which have made determinations on the merits of class-related issues have dealt with clause construction only.<sup>13</sup> A few cases are awaiting hearing on certification. The only case among this database which reached certification (*Tarek v. Media Arts et al.*) did so because Respondent waived the clause construction issue and proceeded directly to discovery and then a certification hearing. The panel denied certification and the matter proceeded separately as to each individual Claimant (five in all).

All cases in which clause construction was placed in issue, the arbitrator or panel determined that the clause admitted of a class proceeding. Those cases are now pending, awaiting the certification step. None (other than *Cable Connection v. DIRECTV, supra*),

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<sup>11</sup> *See Cappalli v. Nat'l Bank of the Great Lakes*, 281 F.3d 219 (3d Cir. 2001); *Lloyd v. MBNA America Bank, N.A.*, 27 Fed. Appx. 82, 2002 WL 21932 (3d Cir. 2002); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627 (D. Del. 1999), *aff'd*, 254 F.3d 1078 (3d Cir. 2001); *Snowden v. CheckPoint Check Cashing, Inc.*, 290 F. 3d 631 (4th Cir.), *cert denied*, 537 U.S. 1087 (2002); *Livingston v. Assoc. Finance, Inc.*, 339 F.3d 553 (7th Cir. 2003).

<sup>12</sup> *Mattox v. Decision One Mortgage Co., LLC*, 2002 WL 31121087 (D. Mass. 2002); *Vigil v. Sears Nat'l Bank*, 205 F. Supp. 2d 566 (E.D.La. 2002); *McIntyre v. Household Bank*, 216 F. Supp. 2d 719 (N.D. Ill. 2002); *Zawikowski v. Beneficial Nat'l Bank*, 1999 WL 290402 (N.D. Ill. 2001); *Lomax v. Woodmen of the World Life Ins. Soc.*, 228 F.Supp. 2d 1360 (N.D. Ga. 2002); *Sagal v. First USA Bank, supra*, n.7.

<sup>13</sup> AAA class action orders are available on the AAA web site at [www.adr.org](http://www.adr.org). They are indexed by case name only.

has resulted in a published decision of a California court reviewing the clause construction issue.

JAMS cases: Of the dozen or so class action cases filed at JAMS since *Bazzle*, only a few have proceeded to the clause construction phase. Those which did found that the clause allowed class treatment. One case was sent to arbitration by a court which had already determined that the class waiver language was enforceable, and the arbitrator refused to reconsider that ruling. None of these cases was reviewed by a trial court. The decisions in those cases are unexceptional. A few such cases have reached class certification, some on an agreed settlement basis, others on a contested basis. Rulings granting and denying certification have been issued. None has been appealed as of the date of completion of this paper.

Court decisions: Only one case in California has proceeded to court to test a clause construction decision – the *Cable Connection v. DIRECTV* case discussed above.

### C. Certification

The Reasoned Partial Final Award. As with the clause construction phase, AAA rules require and JAMS rules permit issuance of a partial final award (*i.e.*, one that is subject to confirmation or *vacatur*).

The JAMS and AAA Class Action Rules identify factors that must be satisfied to justify certification. Those factors largely follow F. R. Civ. P. Rule 23 standards for certification of a class action although there are slight differences between the three provisions. Usually the moving party submits evidence and argument in writing to prove the existence of necessary elements to support certification. The evidence is usually developed through information exchange between the parties including documents and sometimes depositions. Testimony is offered through deposition excerpts and affidavits or declarations of putative class members. Opposition evidence and argument usually consist of documents, deposition excerpts and affidavits or declarations of Respondent's personnel. Certification hearings are usually "paper hearings" without live testimony, but the rules do not preclude the presentation of percipient and expert witnesses. (There are no details given in either set of rules regarding the hearing on clause construction or certification. Presumably, the Commercial Rules (in the case of the AAA) and the Comprehensive Arbitration Rules and Procedures (in the case of JAMS) supply any missing details. The arbitrator typically works with counsel to establish a procedure that is acceptable to all and then documents that agreed procedure in a scheduling order.

Generally, the arbitrator is required to find that specified requirements are met, that common questions of fact or law predominate over questions affecting only individual members of the class, and that class arbitration is superior to other methods in assuring a fair and efficient adjudication of the controversy. AAA Rule 4(b); JAMS Rule 3(b).

Case Analysis. Only one AAA case in California has proceeded to certification (*see above*). It resulted in a denial of certification; there was no review sought in the trial court. Three cases on the JAMS class action docket have reached the certification stage (not including several class settlements for which a settlement class has been certified). In one case a class was certified, there was no interlocutory review of that decision, and the matter proceeded to hearing as a classwide arbitration. A final award was entered in that case. In a Federal Fair Labor Standards Act case, an Order was issued certifying two separate opt-in classes. The parties are in the process of agreeing on notice to the classes. In one other case, certification was denied for lack of commonality. (In the cases in which certification was denied, each proceeded to hearing on the individual claims.)

#### D. Notice

Once a class is “certified,” the arbitrator must direct the giving of “the best notice practicable under the circumstances” (JAMS Rule 4). That rule also specifies the contents of the notice. Notice issues must await any interlocutory review of the certification decision in the JAMS procedure.

The AAA rules contemplate the fashioning of notice as part of the certification process and that a copy of the notice (detailing the mode of intended delivery) must be attached to the certification award. AAA Rule 5(b).

Both sets of rules (AAA Rule 6, JAMS Rule 4) require the notice to include biographical information about the arbitrator(s). This highlights the public/private sector differences of arbitration versus court litigation and the sensitivity of ethical concerns about arbitrators selected to hear a particular case. *See, e.g.,* Code of Ethics for Arbitrators in Commercial Cases (AAA/ABA 2004), Canon II. It is not suggested that the arbitrator would have been subject to disqualification based on the identity of anyone to whom notice is given, and disclosures would be made long in advance of any class determination. But the prospect exists that some further disclosure might be triggered by subsequent events in the certification and hearing process.

There is no case law on the issue of the adequacy of notice to the class, the mode of acceptable notice in a particular case, or the manner in which the cost of notice shall be borne by the parties. It is expected that these determinations will be guided by Rule 23 and applicable state court jurisprudence.

#### E. Management of the Prehearing and Hearing Process

Once a matter is certified and the class is defined, the matter proceeds as would any complex commercial case. The scope of the issues to be arbitrated is defined by the Statement of Claim and also the arbitrator’s definition of the class. The certification process defines who is a class member, and in that process, the claims asserted in the original Statement of Claim are likely to have been refined by the certification process, so the arbitrator must look to both for the scope of arbitral authority in the hearing.

All complex arbitrations require great attention to detail by the arbitrator and skillful management and control of the proceeding. Classwide arbitrations are inherently complex if only because of the representative nature of the proceeding; in all likelihood, a great deal of money and or important equitable issues will be at issue in most such cases. Moreover, the arbitrator will at all times focus on protecting the due process rights of absent class members in managing the process and conducting the hearing.<sup>14</sup>

For a general discussion of management of complex cases and guidance in conducting the hearing, *see* The College of Commercial Arbitrators' *Guide to Best Practices in Commercial Arbitration*, Ch. 6, 9 (Juris, 2006).

#### F. Attorney Fee Awards

Every class proceeding presents unique issues relating to the award of attorneys' fees. There is a large body of case law on such issues, and the arbitrator will likely be guided by such authorities once it is determined that fees may be awarded. AAA and JAMS Rules provide no guidance on this issue other than to remind the arbitrator that arbitral authority derives from the parties' agreement and applicable law. AAA Class Action Rules are also silent on this issue. AAA does have a somewhat unique provision in its Commercial Rules that if both sides request an award of fees, it is within the discretion of the arbitrator to award such fees even in the absence of any other contractual or legal basis. AAA Commercial Rules, Rule R-43(d) (ii).

#### G. The Final Award

The final award should set forth not only a decision on the merits of the controversy, but also provide a clear roadmap for the reviewing court of the clause construction and certification decisions (whether or not the subject of prior interlocutory proceedings), the definition of the class as determined in the certification phase and any alterations in that scope wrought by the hearing process, a recitation of the giving of notice and the results thereof (including appropriate discussion of opt-outs) so that a complete understanding of the applicability of the final award to all class members can be determined from the four corners of that award.

#### H. Settlement, Voluntary Dismissal and Compromise

Many class proceedings result in a settlement prior to a hearing on the merits or prior to the issuance of an award on the merits. Arbitrators must strictly comply with the requirements of any applicable rules relating to the approval of settlements, dismissals or compromises and, in the absence of such rules, should seek guidance from the applicable class action rules and from Rule 23.

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<sup>14</sup> It is the general rule that rendering a partial final award makes arbitrator *functus officio* as to that issue; AAA Rules suggest that arbitrator may change a class determination decision later (Rule 5(e)) There is no JAMS equivalent. (There is also no JAMS requirement of rendering a Partial Final Award.)

There is no legal authority regarding the scope of an arbitrator's authority and duties when parties to a class proceeding jointly propose to settle or compromise a pending class proceeding or in which claimants seek unilaterally to dismiss a proceeding. Rule 23 provides some guidance and the AAA and JAMS rules both require that the arbitrator formally approve any settlement, compromise or voluntary dismissal. Those rules require that a hearing be conducted on the question whether to approve the proposal after notice to all interested parties. AAA Rule 8; JAMS Rule 6. These rules remind the arbitrator that the rights and interests of absent class members must be protected throughout these proceedings.

### I. Confidentiality

The AAA Supplemental Procedures provide for the public disclosure of class action hearings and filings and decisions. The AAA maintains a docket on its web site that details key information about every class action case. AAA also requires at least one of the arbitrators in each class action to be a member of the AAA national pane of class action arbitrators. The JAMS rules have no similar publicly available information and do not have special procedures for the selection of the arbitrator in a class action case.

The arbitrator must rethink traditional notions of confidentiality in allowing observers at the hearing because of the quasi-public interest nature of a class proceeding. At the very least, class members and their representatives should be allowed to observe the proceedings.

Other, more traditional issues of confidentiality (sensitive documents, trade secrets) may be addressed in the same manner as a non-class proceeding by use of a stipulated protective order or confidentiality agreement. But any concern of confidentiality must not override the protection of the rights of absent class members to adequate notice of the many substantive and procedural matters which will be determined in the proceeding.

### V. Conclusion

As a result of the *Bazzle* decision, the obligation to determine important procedural issues relating to classwide arbitration has shifted from the courts to arbitrators. The major arbitral institutions have played an important role in establishing orderly procedures and sensible rules for that process. Arbitrators appear prepared to deal with the many procedural and substantive issues concerning the contractual right to arbitrate claims, the formation and definition of the class and the giving of notice to unrepresented class members. Courts will play a secondary role in this process in spite of the institution of a rules-based interlocutory review process for such decisions.

Arbitrators who are used to dealing with complex issues in commercial arbitrations appear capable of dealing effectively with classwide arbitrations; their procedural complexity is no different than the kinds of issues that are routinely presented to arbitrators in the typical complex commercial arbitration.

What is lost in this process is the review available in class actions pending in courts through appellate review of trial court certification and notice decisions. While there is no difference in substance than for all other arbitration awards – absent an agreed appeal process, the merits of arbitration awards are largely unreviewable – but the involvement of large numbers of absent but represented parties raises unique due process issues. Ultimately, it seems, the courts rest on the conclusion that as long as the arbitration process is “voluntary,” as required by the FAA, material process differences between court litigation and arbitration should be found to be acceptable to litigants.

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