

DISCUSSION DRAFT

Did the Arbitrator “Sneeze”? – Why the Federal Courts Do Not Have Jurisdiction Over “Interlocutory” Awards in Class Action Arbitrations

by

Kristen M. Blankley*

I. Introduction

Judge Posner once stated that courts do not have ability to conduct judicial review every time the arbitrator “sneezes.”¹

The use of the class action procedure in arbitration, particularly in the consumer context, has gained significant acceptance since the United States Supreme Court, in its 2003 decision in *Green Tree Financial Corp. v. Bazzle*, did not specifically prohibit the use of the procedure. Immediately following *Bazzle*, the American Arbitration Association (“AAA”) created a complex set of rules governing class action arbitrations, drawing from the Federal Rules of Civil Procedure. The American Arbitration Association Rules (“AAA Rules”) break the arbitration process into phases, including phases in which the arbitrator assigned determines whether a class procedure is possible and whether a class should be certified. After both of these points, the Rules allow the parties to seek judicial review or relief prior to continuing the arbitration process.

Although the AAA Rules contemplate judicial review of “interlocutory” rulings by the arbitrator, questions remain as to whether the federal courts (or state courts) have any jurisdiction to hear these less-than-final “awards.” These cases are now starting to work through the judicial

* Squire, Sanders and Dempsey L.L.P. THANKS TO . . .

¹ Judge Posner first coined the phrase in the case of *Smart v. IBEW, Local 702*, 315 F.3d 721 (7th Cir. 2002). The *Smart* case involved an appeal of a labor arbitration decision in which the arbitrator determined that the employee owed some money back to the union, but the arbitrator did not determine the amount of the money owed. *Id.* at 724. Smart, then, challenged the award for lack of finality. *Id.* (“Smart’s suit challenges the arbitrators’ award as invalid primarily because of lack of finality.”). Judge Posner noted: “There can be a jurisdictional question in cases challenging or seeking enforcement of arbitration awards, for although no statute corresponding to section 1291 tells the courts when an arbitration award is ripe for judicial enforcement or review, the courts are naturally reluctant to invite a judicial proceeding every time the arbitrator sneezes. But beyond that, generalization is difficult.” *Id.* at 725.

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system, and many courts are simply reviewing the “awards” without any reference to the jurisdiction of the reviewing court. Other courts have addressed the jurisdictional issue, focusing on constitutional ripeness doctrines – and these decisions across the nation are somewhat contradictory.

Although the few cases dealing with jurisdiction reference the Federal Arbitration Act, they almost uniformly ignore the requirement of an “award” and whether these interlocutory rulings – often titled “awards” – are actually “awards” within the meaning of the Act. This paper argues that such “awards” are not the type of “awards” contemplated by the Act and that federal jurisdiction does not lie until the entire class action procedure has been resolved on the merits. Although this position appears harsh, there may be an opportunity for parties to use appellate *arbitrators* to review these interlocutory decisions (under a contracted standard of review) in the absence of federal court jurisdiction.

II. The United States Supreme Court Does Not Expressly Reject the Class Action Arbitration Process, and Arbitral Providers Begin Providing Class Arbitration Services.

The idea of class action arbitration as an alternative to traditional class action litigation gained tremendous headway in 2003 when the United States Supreme Court in *Green Tree Financial Corp. v. Bazzle*² did not expressly prohibit the use of the procedure.³ Following the *Bazzle* decision, the AAA formulated new procedures specific to class-action procedures. This section discusses the *Bazzle* decision and its implications in the class-action arbitration industry.

In *Bazzle*, the Supreme Court was presented with the question of whether an arbitration clause that is silent on the issue of class arbitration forbid the use of a class action procedure:

² 539 U.S. 444 (2003).

³ *Id.* at 447 (holding that the question of the use of class action arbitration is both “a matter of state law” and “a matter for the arbitrator to decide”).

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“We are faced at the outset with a problem concerning the contracts' silence. Are the contracts in fact silent, or do they forbid class arbitration as petitioner Green Tree Financial Corp. contends?”⁴ The Supreme Court of South Carolina determined that the contracts “authorized class arbitration,” and the United States Supreme Court accepted the case to determine whether this ruling comported with the Federal Arbitration Act (“FAA”).⁵

The United States Supreme Court did not take issue with the determination by the South Carolina Supreme Court that the contracts allowed class arbitration.⁶ Instead, the Court took issue with *who made* the determination of whether class procedures were permissible.⁷ The Court made clear that the *arbitrator* – not the court – was required to make the determination of whether a silent arbitration clause forbid or permitted class-wide arbitration.⁸ The Court

⁴ *Id.* at 447. The arbitration clause at issue in the *Bazzle* case read:

ARBITRATION--All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract . . . shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1Shepardize [9 U.S.C.S. § 1Shepardize] THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO COURT ACTION BY US (AS PROVIDED HEREIN). . . . The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." App. 34 (emphasis added, capitalization in original).

Id. at 448.

⁵ *Id.* at 450 (“The South Carolina Supreme Court withdrew both cases from the Court of Appeals, assumed jurisdiction, and consolidated the proceedings. 351 S.C., at 249, 569 S.E.2d, at 351. That court then held that the contracts were silent in respect to class arbitration, that they consequently authorized class arbitration, and that arbitration had properly taken that form. We granted certiorari to consider whether that holding is consistent with the Federal Arbitration Act.”).

⁶ *See id.* at 451.

⁷ 539 U.S. at 451 (“At the same time, we cannot automatically accept the South Carolina Supreme Court's resolution of this contract-interpretation question. Under the terms of the parties' contracts, the question--whether the agreement forbids class arbitration--is for the arbitrator to decide.”).

⁸ *Id.* at 452 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). The Court recognized that some questions, such as the kind of questions that “contracting parties would likely have expected a court” to decide, are property before the courts; however, the question of whether a silent arbitration clause permits class procedures does not fall within that exception. *Id.* (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). The Court, however, did not elaborate on why this particular question is not one that parties would not have expected a court to decide.

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specifically noted that an arbitrator would be “well suited” for determining whether the parties intended in the contracts for allowing a class-wide procedure.⁹ Ultimately, the Court remanded the case so that the arbitrator could decide – in the first instance – whether the arbitration clauses, otherwise silent on the issue, permitted class-wide arbitration.

Shortly after the *Bazze* decision and in direct response to the decision, the AAA issued its Supplementary Rules for Class Arbitrations.¹⁰ The AAA recognized that “the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted.”¹¹ Accordingly, the AAA instituted procedures for administering class arbitration procedures for disputes with arbitration clauses either: 1) contemplating class procedures, or 2) silent on the issue.¹²

The Supplementary Rules for Class Arbitration apply to any dispute providing for arbitration under the AAA Rules “where a party submits a dispute to arbitration on behalf of or against a class or purported class” or when a court refers a case to AAA for class-wide arbitration.¹³ A case proceedings under the Supplementary Rules proceeds in phases. The first

⁹ *Id.* at 453. This case involved two sets of consumers – the Bazzles and the Lackeys. For the Bazzles, the court determined whether the plaintiffs could proceed as a class. *Id.* For the Lackeys, however, the arbitrator appeared to have made a determination as to class procedure, but the arbitrator in the Lackeys’ action had the benefit of the court’s decision in the Bazzles’ action – especially considering that the arbitration clauses in the two actions was identical. *Id.* at 453-54. Thus, the Supreme Court concluded that on “balance, there is at least a strong likelihood that Lackey as well as in Bazzle that the arbitrator’s decision reflected a court’s interpretation of the contracts rather than an arbitrator’s determination.” *Id.* at 454.

¹⁰ AAA Policy on Class Arbitrations, *available at* www.adr.org/sp.asp?id=28779 (last visited November 4, 2009). The AAA Supplementary Rules for Class Arbitrations became effective on October 8, 2003. *See* Supplementary Rules for Class Arbitrations, *available at* www.adr.org/sp.asp?id=21936.

¹¹ *Id.*

¹² *Id.* The AAA instituted a policy that it would not administer class procedures in situations where the arbitration contract expressly prohibited class arbitration unless and until a court ordered the AAA to administer a class arbitration in those circumstances. *Id.* (“It has been the practice of the American Arbitration Association since its Supplementary Rules for Class Arbitrations were first enacted to require a party seeking to bring a class arbitration under an agreement that on its face prohibits class actions to first seek court guidance as to whether a class arbitration may be brought under such an agreement.”).

¹³ AAA Supplementary Rules for Class Arbitrations, Rule 1(a). The AAA Supplementary Rules for Class Arbitration specifically state that those rules trump other, inconsistent AAA rules. AAA Supplementary Rules for Class Arbitrations, Rule 1(b). To administer the class claims, the AAA maintains a separate roster of class arbitrators. AAA Supplementary Rules for Class Arbitrations, Rule 2.

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phase is the “Clause Construction” phase, which is governed by Supplementary Rule 3. In the Clause Construction phase, the arbitrator is required to determine “as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”¹⁴ In other words, the first phase of the proceeding is to determine whether the arbitration clause permits a class procedure. Importantly, after the arbitrator issues its Clause Construction Award, the “arbitrator shall stay all proceedings” for a period of at least thirty days “to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award.”¹⁵ If the parties seek judicial review, the arbitrator has the option to “stay further proceedings” – longer than the thirty days provided for in the rules – until the arbitrator “is informed of the ruling of the court.”¹⁶ This is the first instance in which the AAA Supplementary Rules contemplate judicial review of a non-final decision.

Following the class construction phase, the case moves to the certification phase. The arbitrator is required to determine whether certain criteria are met, and those criteria are similar to those found in Federal Rule of Civil Procedure 23.¹⁷ The certification phase culminates in the

¹⁴ AAA Supplementary Rules for Class Arbitrations, Rule 3. In Supplementary Rule 12, the AAA specifically notes that neither the AAA nor the arbitrator is a necessary or proper party to any procedure instituted in court challenging any award by the arbitrator. AAA Supplementary Rules for Class Arbitrations, Rule 12(b). Under Supplementary Rule 12(c): “Parties to a class arbitration under these Supplementary Rules shall be deemed to have consented that judgment upon each of the awards rendered in the arbitration may be entered in any federal or state court having jurisdiction thereof.” *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ AAA Supplementary Rules for Class Arbitration, Rule 4(a). Under Rule 4(a), the arbitrator must determine the named class members can represent the class. *Id.* Additionally, the arbitrator must make determinations as to: 1) numerosity; 2) commonality of law or fact; 3) typicality of claims or defenses; 4) adequacy of representation by the named party representatives; 5) adequacy of the counsel representing the class; and 6) determination that each class member is a party to an identical or substantially similar arbitration clause. If the arbitrator determines that these requirements are met, then the arbitrator must also determine that the “questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” AAA Supplementary Rules for Class Arbitration, Rule 4(b); *see also* Fed. R. Civ. Pro. R. 23.

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“Class Determination Award,” which is governed by Supplementary Rule 5,¹⁸ and which must include very specific information.¹⁹ Similar with the clause construction phase, following the issuance of the “Class Determination Award,” the arbitrator is required to issue another stay of thirty days to permit any “party to move a court of competent jurisdiction to confirm or vacate the Class Determination Award.”²⁰ Also similar is the provision allowing the arbitrator to “stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.”²¹ Following class certification, the arbitrator is required to give notice of the class to the class members,²² and proceed to hearing. For the “Final Award,” the Supplementary Rules require a “reasoned” award that defines “the class with specificity.”²³ The Rules further established a class arbitration docket and mandate that all “awards” issued under the rules be publicly available in a repository administered by the AAA.²⁴

SUMMARIZE

III. Courts Grapple With the Question of Whether “Interlocutory” Appeals May Be Taken Under Any Circumstances

A. The Federal Arbitration Act Allows Review of an “Award.”

The Federal Arbitration Act (“FAA”) provides only the most limited forms of judicial review, which is provided for in section 10 of the Act. As a general matter, the judicial review provided under the FAA is only available in the event of misconduct or if the arbitrator exceeded

¹⁸ AAA Supplementary Rules for Class Arbitrations, Rule 5(a) (“The arbitrator’s determination concerning whether an arbitration should proceed as a class arbitration shall be set forth in a reasoned, partial final award (the ‘Class Determination Award’), which shall address each of the matters set forth in Rule 4.”).

¹⁹ AAA Supplementary Rules for Class Arbitrations, Rule 5(b) and (c) (setting forth the requirements regarding the class and the proposed Notice of Class Determination to be disseminated to class members)

²⁰ AAA Supplementary Rules for Class Arbitrations, Rule 5(d).

²¹ *Id.*

²² AAA Supplementary Rules for Class Arbitrations, Rule 6.

²³ AAA Supplementary Rules for Class Arbitrations, Rule 7. As an alternative to a Final Award, the Supplementary Rules contemplate procedures by which an arbitrator can approve a class-wide settlement. AAA Supplementary Rules for Class Arbitrations, Rule 8.

²⁴ AAA Supplementary Rules for Class Arbitrations, Rule 9-10. The arbitration docket can be found at www.adr.org/sp.asp?id=25562.

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his or her powers in rendering the award.²⁵ The Act specifically uses the term “award,” but does not define it.²⁶ The statute, in its entirety, provides:

(a) In any of the following cases the United States court in and for the district *wherein the award was made may make an order vacating the award* upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an *award* is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.²⁷

In addition to providing a means for vacating an award, the FAA also provides a means by which an award may be modified or corrected.²⁸ This section does not define the word “award,” either.

²⁵ See 9 U.S.C. 10.

²⁶ *Id.*

²⁷ *Id.* (emphasis added).

²⁸ 9 U.S.C. § 11 provides:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

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To date, the United States Supreme Court has not specifically ruled as to the meaning of “award” under the FAA, but it recently interpreted Section 10 in another context.²⁹ In *Hall Street Associates v. Mattel*, the parties to a valid arbitration agreement contracted for a broader standard of review than available under the FAA.³⁰ The Court discussed how the FAA does not create jurisdiction in the federal courts, but that the federal courts must have an independent jurisdictional basis for being in federal court in the first place.³¹ The Court described the FAA as follows:

The Act also supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. §§ 9-11. An application for any of these orders will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court. § 6. Under the terms of § 9, a court “must” confirm an arbitration award “unless” it is vacated, modified, or corrected “as prescribed” in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.³²

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Id.

²⁹ *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

³⁰ *Id.* at 1400-01. The arbitration agreement provided: “[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator’s findings of facts are not supported by substantial evidence, or (ii) where the arbitrator’s conclusions of law are erroneous.”

³¹ *Id.* at 1401 (“As for jurisdiction over controversies touching arbitration, the Act does nothing, being ‘something of an anomaly in the field of federal-court jurisdiction’ in bestowing no federal jurisdiction but rather requiring an independent jurisdictional basis.”) (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1. 25 (1983)); *see also* 9 U.S.C. § 4 (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition **any United States district court which, save for such agreement, would have jurisdiction under Title 28**, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.”) (emphasis added).

³² *Hall Street*, 552 U.S. at 1402.

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After discussing the FAA, the Court addressed the issue of whether review other than that specifically provided for in FAA § 10 is permissible.³³ The Court held that FAA § 10 and §11 provided the “exclusive grounds for expedited vacatur and modification” of arbitration awards.³⁴

Although the Supreme Court did not address the definition of “award,” its rationale has application to the present discussion. The Court explicitly refused the argument that because arbitration is a creature of contract, that the courts should abide by the individually-crafted standard of review. To the contrary, the Court noted that although parties can “tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law,” parties cannot contract for review different from that provided by the FAA.³⁵ Allowing such practice would be contrary to the purposes of the FAA, which is intended to “maintain arbitration’s essential virtue of resolving disputes straightaway” and refrain from “cumbersome and time-consuming” procedures.³⁶

SUMMARIZE

B. Review of “Interlocutory” Awards in General

C. Courts Struggle With Whether a “Class Construction Award” is Reviewable Under the FAA.

1. A Handful of Courts Discuss The Issue Of An “Interlocutory” Appeal

Intro . . .

³³ Prior to deciding this case, the circuits has been split on the issue of whether review other than the standards set forth in Section 10 were consistent with the FAA. *Id.* at 1403.

³⁴ *Id.*

³⁵ *Id.* at 1404-05.

³⁶ *Id.* at 1405.

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Perhaps the first and only court to discuss the issue of “interlocutory” appeal of non-final arbitral awards is the case of *Marron v. Snap-On Tools, Co.*,³⁷ from the District of New Jersey. Plaintiffs are franchisees of the defendant, who brought suit against Snap-On Tools alleging fraudulent, deceptive, and illegal business schemes and practices.³⁸ The court compelled arbitration, and the arbitrator issued a decision allowing plaintiffs to “pursue class treatment of their claims against Snap-On in arbitration.”³⁹ With respect to the question of “interlocutory” appeal, the court noted that federal courts “commonly understand this provision of the FAA to allow review of final arbitration awards but not of interim or partial rulings.”⁴⁰ The court further recognized the virtue of finality in arbitration and the fact that FAA section 10 promotes finality *if* that section is read to apply only to final arbitration awards.⁴¹ The court correctly recognizes that although AAA Rule 3 “permits the parties in an arbitration to seek judicial review of a non-final award, it does not affect the district court's decision whether to entertain an interlocutory appeal under Section 10 of the FAA.”⁴²

³⁷ 2006 U.S. Dist. LEXIS 523 (D. N.J. Jan. 9, 2006).

³⁸ *Id.* at *3.

³⁹ *Id.* at *3-4. In a footnote, the court noted: “Plaintiffs also filed a Motion to Affirm Arbitrator Matthews' award in the Hobby Action but subsequently withdrew that motion on the grounds that it is not required by Rule 3 of the American Arbitration Association's Supplementary Rules for Class Arbitrations and further that it is prohibited by Section 10 of the Federal Arbitration Act.” *Id.* at *4 n.2. The court does not explain what a “Motion to Affirm” an arbitrator’s award is or why it immediately concluded that such motion is prohibited by Section 10 of the FAA. Presumably, a “Motion to Affirm” is a similar to a Confirmation Motion, which would not fall within Section 10, but under Section 9, regarding confirmation. The court’s note is unclear whether such motion does not fall within the FAA itself or if it does not fall within FAA Section 10.

⁴⁰ *Id.* at *5 (citing *Nolu Plastics, Inc. v. Valu Eng'g, Inc.*, 2004 U.S. Dist. LEXIS 20416 (E.D. Pa. Oct. 12, 2004) (recognizing that a district court does not have the power to review an interlocutory ruling by an arbitrator) (citing *Travelers Ins. Co. v. Davis*, 490 F.2d 536, 541-42 & n. 12 (3d Cir. 1974)); see also *IDS Life Ins. Co. v. Royal Alliance Assocs.*, 266 F.3d 645, 650 (7th Cir. 2001) (“We take ‘mutual’ and ‘final’ to mean that the arbitrators must have resolved the entire dispute (to the extent arbitrable) that had been submitted to them.”); *Michaels v. Mariforum Shipping, SA*, 624 F.2d 411, 414 (2d Cir. 1980) (holding that section 10(a)(4) “has no application to an interim award that the arbitrators did not intend to be their final determination on the issues submitted to them”).

⁴¹ 2006 U.S. Dist. LEXIS 523, at *7 (citing *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 233 (1st Cir. 2001); *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 136-37 (3d Cir. 1998); and *Metallgesellschaft A.G. v. M/V Capitan Constante*, 790 F.2d 280, 283 (2d Cir. 1986).).

⁴² *Id.* at *8. See *infra* note ___ regarding additional courts holding that the Supplementary Rules do not create jurisdiction in the federal courts. Similarly, in the *In Re Universal Services Fund* litigation, the court was reluctant to conduct an interlocutory appeal of the AAA *administrator’s letter* indicating the potential for the case to proceed

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In so deciding, the court relied on the very limited nature of the arbitrator's decision at this stage in the proceedings.⁴³ Specifically, the arbitrators' decisions dealt specifically with the issue of whether class proceedings could occur, and not on the merits of the dispute.⁴⁴ Given the "early stage of the proceedings and the breadth of issues submitted to the arbitrator that have not even been reached, this arbitral award is not ripe for review by this Court."⁴⁵ The court specifically rejected the argument that judicial review should lie because such review is contemplated by the AAA, noting that arbitration is meant to be an "efficient and economical dispute resolution" procedure that would be "thwarted by repeated interlocutory appeals to the

under the AAA Supplementary Rules for class action arbitrations. *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 370 F. Supp. 2d 1135, 1138-39 (D. Kan. 2005).

⁴³ *Id.* at *8-9 ("The arbitrators' awards in these actions are limited in scope and preliminary in nature. The awards only address the question of whether the standard Snap-On franchise agreement precludes class treatment of claims that may otherwise be appropriate for class treatment. In finding that the agreement does not preclude such claims, Arbitrator Matthews was clear that he made 'no determination as to whether the claims are in fact proper for class treatment at this stage of the proceedings.' Similarly, Arbitrator Slater limited his award to construction of the arbitration provision contained in the franchise agreement between Richard Fortuna and Snap-On and as to whether or not the provision permits class action arbitration by the franchisees.").

⁴⁴ *Id.* at *9.

⁴⁵ *Id.* at *9-10 (citing *Fradella v. Petricca*, 183 F.3d 17, 19 (1st Cir. 1999) ("Normally, an arbitral award is deemed 'final' provided it evidences the arbitrators' intention to resolve all claims submitted in the demand for arbitration.")). In *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 370 F. Supp. 2d 1135, 11340 (D. Kan. 2005), the court noted:

Nonetheless, with that being said, the FAA does not authorize the court to interfere with ongoing arbitration proceedings by making interlocutory rulings concerning the arbitration. Under the FAA, the court's role is limited to determining, first, the issue of whether arbitration should be compelled. *Id.* §§ 3-4. If so, then the court may next confirm, vacate, or modify the award. *Id.* § 9-11. The court may not, however, interfere with the ongoing arbitration proceeding. *See LaPrade*, 146 F.3d at 903 (the FAA contemplates that courts should not interfere with arbitrations by making interlocutory rulings); *Smith, Barney, Harris Upham & Co. v. Robinson*, 12 F.3d 515, 520-21 (5th Cir. 1994) (as long as a valid arbitration agreement exists and the specific dispute falls within the substance and scope of that agreement, the court may not interfere with the arbitration proceedings); *Miller v. Aaacon Auto Transport, Inc.*, 545 F.2d 1019, 1020-21 (5th Cir. 1977) (per curiam) (once the court is satisfied that the dispute is referable to arbitration, the court must allow the arbitration to proceed in accordance with the terms of the parties' agreement). This principle is grounded in the notion that allowing such interference would frustrate the FAA's purpose to ensure "that the arbitration procedure, when selected by the parties to a contract, [is] speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, 18 L. Ed. 2d [*1139] 1270, 87 S. Ct. 1801 (1967); *see also Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983) (stating that the purpose of the FAA is to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

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district court, which lead to protracted arbitration.”⁴⁶ The court proceeded to assume, “without deciding,” that it had jurisdiction, but still ruled that “[i]t is not in the interest of judicial economy for this Court to entertain repeated interlocutory appeals that further delay the arbitration that Snap-On moved this Court to compel two years ago. Snap-On won what it sought and now shall proceed with the arbitration.”⁴⁷

COMMENT

In *Genus Credit Management Corp. v. Jones*,⁴⁸ the District of Maryland, with little discussion, determined that it had jurisdiction to review a Partial Final Clause Construction Award, in which the arbitrator determined that “the agreement does not preclude class arbitration.”⁴⁹ The defendants in the court case are consumers who initiated arbitration against Genus Credit and who received a favorable award from the arbitrator.⁵⁰ Genus Credit filed a motion to vacate the “award.” Defendants argued that the district court had “no jurisdiction to review the Partial Final Clause Construction Award because it amounts to an interlocutory

⁴⁶ *Id.* at *11 (citing *Lloyd v. Hovensa, LLC*, 369 F.3d 263, 270 (3d Cir. 2004) (“The legislative scheme of the FAA thus reflects a policy decision that, if a district court determines that arbitration of a claim is called for, the judicial system’s interference with the arbitral process should end unless and until there is a final award.”). Further, the opinion noted that Snap-On Tools previously asked the court to exercise jurisdiction over other non-final matters ruled on by the arbitrator. *Id.* at *11-12. Given Snap-On Tool’s propensity to request judicial review at the proverbial “drop of the hat,” the decision of the district court in this case is not surprising.

⁴⁷ *Id.* In addition to the repeated requests for interlocutory appeal, the court appeared particularly concerned that Snap-On Tools moved to compel arbitration, followed by repeated requests to the court for judicial intervention. The litigation strategy by Snap-On Tools appears to be one in which it wanted the “best of both worlds” by attempting to utilize both procedures in the most aggressive way possible. Again, given Snap-On Tool’s aggressive nature in using both of these procedures, the district court’s decision is not surprising.

⁴⁸ 2006 U.S. Dist. LEXIS 16933 (D. Md. April 6, 2006).

⁴⁹ *Id.* at *4.

⁵⁰ *Id.* at *3-4.

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appeal.”⁵¹ The *Genus Credit* court distinguished *Marron* and relied on other cases reviewing “interlocutory” appeals of arbitration awards, but those cases relied upon did not squarely decide the issue of the “interlocutory” nature of the appeal.⁵² Ultimately, however, the court summarily determined that “it [is] prudent to render a decision on the class determination award before Green and the parties are forced to adjudicate the entire dispute.”⁵³ The court proceeded to uphold the arbitrator’s decision under the “manifest disregard” standard of review.⁵⁴

COMMENT on GENUS CREDIT CASE.

2. Courts Addressing Jurisdiction Consider The Issue of Ripeness

In 2008, the Sixth Circuit, in *Dealer Computer Services, Inc. v. Dub Herring Ford*⁵⁵ held that a dispute was not ripe for the federal courts to review a Class Construction Award issued by an arbitrator.⁵⁶ In *Dealer Computer*, the plaintiff was a dealer in computer hardware and software systems, and the defendants were dealers who contracted with the plaintiff for equipment and services.⁵⁷ The contract between the plaintiff and the dealers included a broad arbitration clause, which incorporated the Commercial Rules of the American Arbitration

⁵¹ *Id.* at *4. Defendants relied on *Marron v. Snap-On Tools, Co., LLC*, 2006 U.S. Dist. LEXIS 523, No. Civ. 03-4563(FSH), (D.N.J. Jan. 9, 2006), discussed *supra* in notes __ to __ and accompanying text. However, the *Genus Credit* found *Marron* unpersuasive because the court assumed, without deciding, that the court had jurisdiction to hear the “interlocutory” appeal.

⁵² 2006 U.S. Dist. LEXIS 16933, at 4-5, relying on *Long John Silver's Rests., Inc. v. Cole*, 409 F. Supp. 2d 682 (D.S.C. 2006) (reviewing class determination partial final award) and *Sutter v. Oxford Health Plans, LLC*, 2005 U.S. Dist. LEXIS 25792, No. 05-2198 (JAG), (D.N.J. Oct. 28, 2005) (reviewing arbitrator's decision to allow class arbitration and to certify a class).

⁵³ *Id.* at *5.

⁵⁴ *Id.* at *8-10.

⁵⁵ 547 F.3d 558 (6th Cir. 2008).

⁵⁶ *Id.* at 559 (“We conclude the district court lacked jurisdiction to consider DCS’s motion to vacate the arbitration award because the matter was not ripe for judicial review.”).

⁵⁷ *Id.* It is worth noting that this case involves a commercial dispute among business entities, and it does not involve any consumers. Accordingly, this case would not turn on any of the stickier or murkier issues that relate to consumer arbitrations and consumer class action arbitrations.

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Association (“AAA”).⁵⁸ After a dispute arose regarding the contracts arose, the dealers filed a Demand for Arbitration against the plaintiff “as a class rather than individually.”⁵⁹ The arbitration clause at issue was silent as to the ability to proceed as a class. The three-arbitrator panel granted a “Clause Construction Award” in favor of the dealers, “ruling the arbitration provisions found in the various contracts did not preclude class arbitration.”⁶⁰ The plaintiff filed a motion to vacate the Clause Construction Award in federal court under, *inter alia*, 9 U.S.C. § 10(a)(4).⁶¹ The district court ruled in favor of the dealers, and the plaintiff appealed.⁶²

The Sixth Circuit held that the *Dealer Computer Services* case was not ripe for judicial review.⁶³ The Sixth Circuit focused on a ripeness test – as opposed to an analysis of whether the Clause Construction Award is an “award” as contemplated under the Federal Arbitration Act. First, the court considered the “likelihood of harm” if the case was not considered at that time.⁶⁴ The court recognized that the Class Construction Award was not a certification award and, therefore, the case might not ultimately proceed as a class action.⁶⁵ In other words, the Class

⁵⁸ *Id.* As noted immediately above in footnote ___, this case involves all commercial parties, so this set of AAA rules appears to be the logical choice of procedural rules for disputants who are interested in taking advantage of general rules already designed by the AAA, as opposed to creating a new set of rules specific to the arbitration between these parties.

⁵⁹ 547 F.3d at 559.

⁶⁰ *Id.*; see also *Green Tree*, 539 U.S. at 453 (“Arbitrators are well suited to answer that question [of availability of class procedures]. Given these considerations, along with the arbitration contracts’ sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.”). Under the AAA rules, as noted supra in notes ___ to ___ and accompanying text, the Clause Construction Award does not certify a class, but it serves the preliminary step of determining whether a class action procedure may occur under the parties’ arbitration agreement.

⁶¹ *Dealer Computer Services*, 547 F.3d at 560. In addition to moving to vacate the award under 9 U.S.C. § 10(a)(4) on the basis that the arbitrator panel “exceeded its powers,” the plaintiff argued that the panel acted in “manifest disregard” of the law. Although outside of the scope of this argument, the “manifest disregard” standard may no longer be a recognized standard of review, following the United States Supreme Court decision in *Hall Street Associates v. Mattel*, **CITE. CITE JOURNAL ARTICLES MAYBE?**

⁶² *Dealer Computer Services*, 547 F.3d at 560.

⁶³ *Id.* at 561 (“But, as discussed below, the application of the first and second factors [of the ripeness test] compels us to conclude the matter is not yet ripe for judicial review.”).

⁶⁴ *Id.*

⁶⁵ *Id.* (“DCS’s motion to vacate remains unripe because the AAA panel’s ruling did not conclusively determine that Dealers’ claims *should* proceed as a class arbitration.”) (emphasis in original).

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Construction Award “did not preclude class arbitration,”⁶⁶ and the “significant hurdles” put in place by the AAA Supplementary Rules made it “far from certain” that the plaintiff’s fear of class arbitration would “come to pass.”⁶⁷ With respect to the second prong, “hardship in withholding judicial review,” the Sixth Circuit held that no hardship existed given the fact that the AAA Supplementary Rules would allow for judicial review after an arbitrator certifies a class.⁶⁸ For these reasons, the Sixth Circuit found that the dispute was not ripe for review.⁶⁹

In addition to ruling on the ripeness issue, the Sixth Circuit, in dicta, addressed the interplay between the AAA Supplementary Rules and the federal courts’ jurisdiction. The district court concluded that the AAA’s rules allowing for a stay pending judicial review “evidences an intent that such matters are properly reviewed by a federal district court even

⁶⁶ *Id.* (“The Clause Construction Award at issue on appeal merely held the distinct arbitration clauses in the various contracts between DCS and Dealers did not preclude class arbitration. The decision to affirmatively authorize class arbitration under the AAA rules is governed by a separate ‘Class Determination Award.’”).

⁶⁷ *Id.* at 562. In similar litigation involving Dealer Computer Services in Texas, the Southern District of Texas followed this Sixth Circuit opinion, finding a dispute not ripe for review when the arbitrator, at the Class Determination Award stage found only that a clause did *not prohibit* class arbitration. *Dealer Comp. Servs., Inc. v. Randall Ford, Inc.*, 2009 U.S. Dist. LEXIS 8242, *12-13 (S.D. Tex. Feb. 4, 2009). Just as the Sixth Circuit did, the Southern District of Texas presumes that the court would have jurisdiction in the event that the arbitrator eventually certifies a class:

Thus, if the arbitrators in this case ultimately decide to certify Randall Ford's class, which is no certainty, Rule 5(d) would nonetheless provide DCS ample opportunity to obtain judicial review of any arguments it may have against class arbitration, including those challenging the soundness of the arbitration panel's prior Clause Construction Award, as well as the panel's exercise of jurisdiction. Given this prospective opportunity for judicial review, it does not appear DCS will suffer any material hardship if review is withheld at this preliminary stage of arbitration.

Id. at *13.

⁶⁸ 547 F.3d at 562-63 (“The stay procedures set forth in Rule 5(d) enable a party to contest an unfavorable decision on class certification in court *before* commencement of class arbitration and resolution of the merits by the arbitration panel.”) (emphasis in original). The Sixth Circuit did not address the issue of whether the federal courts would have jurisdiction to review an arbitrator’s decision certifying a class.

⁶⁹ *Id.* at 563 (“The absence of hardship for DCS at this juncture renders DCS’s motion to vacate the sort of premature adjudication the ripeness doctrine seeks to avoid. Indeed, we should remain ‘reluctant to invite a judicial proceeding every time the arbitrator sneezes.’”) (quoting *Smart v. Int’l Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002)); *see also id.* at 564 (“Dealers may ultimately fail to secure class certification for their claims, thus the potential harm to DCS involved in defending against a class arbitration may never occur. Furthermore, if Dealers obtain class certification, DCS will not suffer any material hardship if this Court denies review at this stage because DCS can still obtain judicial review through Rule 5(d) before actual commencement of class proceedings.”).

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though a final result has not been reached [on the merits].”⁷⁰ The Sixth Circuit noted that while “the AAA is free to permit parties to seek judicial review for the purposes of its own proceedings, Article III ripeness requirements will not necessarily be satisfied whenever the AAA allows such review. . . . The AAA . . . does not have the authority to waive away Article III-based ripeness deficiencies.”⁷¹ The court further noted that federal courts “should not grant judicial review of arbitration awards simply because the organization conducting the arbitration would like them to do so.”⁷²

Thus, the Sixth Circuit held that no dispute is ripe for review under Article III of the Constitution at the “Clause Construction” stage of the proceedings. The Sixth Circuit implies, but does not rule, that jurisdiction *would lie* in the federal courts following an actual certification of a class – as opposed to a finding that an arbitration clause does not *prohibit* the class procedure.⁷³ The court implies that if a class is certified, then the ripeness test may be satisfied, particularly as it relates to the hardship prong of the ripeness test.

Following this Sixth Circuit decision, the arbitrator proceeded and made a Partial Final Class Determination, denying the claimants’ motion for class certification.⁷⁴ After this “award” issued, the plaintiff moved to re-open the case, and the district court granted the motion.⁷⁵ The plaintiff then moved to confirm the Partial Final Class Determination, which the defendants

⁷⁰ *Id.* at 563 (quoting *Dealer Computer Servs v. Dub Herring Ford*, 489 F. Supp. 2d 772, 777 (E.D. Mich. 2007)).

⁷¹ *Id.* In a decision that implies the contrary, the court in *Haro v. NCR Corp.*, 2008 U.S. Dist. LEXIS 102070, *5 (S.D. Ohio 2008) lists the AAA Supplementary rules as a potential source of authority for jurisdiction. Ultimately, the court in *Haro* confirmed the arbitrator’s “awards” regarding class construction. *Id.* at *6; *see also Haro v. NCR Corp.*, 2008 U.S. Dist. LEXIS 71532 (S.D. Ohio Sept. 22, 2008) (similar, earlier order in the *Haro* litigation).

⁷² 547 F.3d at 563

⁷³ *See Dealer Computer Servs.*, 547 F.3d at 563-54, distinguishing this case from the cases of *Sutter v. Oxford Health Plans L.L.C.*, 227 Fed. Appx. 135 (3d Cir. 2007) and *Long John Silver’s Restaurants, Inc. v. Cole*, 409 F. Supp. 2d 682 (D.S.C. 2006), on the basis that *Sutter* and *Long John Silver* both involve a review of an “arbitration award granting class certification rather than one merely interpreting a clause construction – a key distinction given” the court’s earlier discussion.

⁷⁴ *Dealer Comp. Servs. v. Dub Herring Ford*, 2009 U.S. Dist. LEXIS 45325, at *2 (May 29, 2009).

⁷⁵ *Id.* at *3.

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opposed, again, on the basis of lack of subject matter jurisdiction.⁷⁶ The district court, taking cues from the Sixth Circuit decision discussed above, held that the dispute was still not ripe for judicial review because the arbitrator *denied* class certification to the arbitration claimants.⁷⁷ Again, the court's opinion centered on the issue of harm or hardship. The district court, picking up on the concerns noted by the Sixth Circuit, noted that the "potential harm" to the dealer "will never occur" because the dealer will not have to defend against a class action.⁷⁸ Again, the court remained reluctant to invoke jurisdiction "every time the arbitrator sneezes."⁷⁹ The district court further reinforced the idea that the AAA Supplementary rules do not create federal jurisdiction absent a ripe dispute.⁸⁰

SILENT ON THE ISSUE

In 2008, the Second Circuit, in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*,⁸¹ involved the review of a Class Construction Award in an international maritime case.⁸² The case started in litigation, but the Second Circuit, in a previous appeal, found that the dispute was subject to

⁷⁶ *Id.* at *3-4

⁷⁷ *Id.* at *9 ("Applying Article III's ripeness requirements, this Court concludes that this matter is not yet ripe for judicial review. Accordingly, Defendants' motion to dismiss is GRANTED, and Plaintiff's motion to confirm AAA panel's December 2, 2008 'Partial Final Class Determination Award' is denied.").

⁷⁸ *Id.* at *6-7. Presumably, the party possessing the "hardship" argument is the arbitration claimant because the claimant will no longer be able to proceed as a class action. However, this argument is difficult to make for the reasons stated above in the Sixth Circuit *Dealer Computer* decision. See *supra* notes ___ and accompanying text. As a legal matter, the plaintiffs should not be deemed to have suffered a hardship because each individual plaintiff's claim can still go forward, and the plaintiff's alleged substantive rights can still be determined and adjudicated. However, as a practical matter, both the named claimant and the named claimant's attorneys will suffer some sort of hardship. The arbitration claimants lose any leverage that accompanies a class certification. Similarly, the claimants' attorneys lose on the potential for a large fee based on an award (or settlement) to an entire class, as opposed to a single disputant.

⁷⁹ *Id.* at *7.

⁸⁰ *Id.* (citing *Dealer Computer Servs.*, 547 F.3d at 563).

⁸¹ 548 F.3d 85 (2d Cir. 2008).

⁸² *Id.* at 87.

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arbitration.⁸³ In arbitration, the claimants sought class-wide arbitration and requested a Class Construction Award from the arbitral panel.⁸⁴ The arbitral panel, focusing on the broad scope of the arbitration clause⁸⁵ and the fact that all published Class Construction Awards analyzing a silent clause found in favor of the class procedure, determined that the clause permitted class procedures.⁸⁶ Stolt-Neilsen petitioned the district court to vacate the Clause Construction Award, and the district court vacated the award under the manifest-disregard standard of review.⁸⁷ The Second Circuit reviewed the case on the merits of the “manifest disregard” standard, but did not question whether the Class Construction Award constituted an “award” for the purposes of Section 10 of the FAA.⁸⁸ The United States Supreme Court subsequently granted certiorari on this case,⁸⁹ but the question presented deals solely with the issue whether a class action procedure can proceed when the arbitration clause is silent on the issue.⁹⁰

⁸³ *Id.* at 87-88.

⁸⁴ *Id.* at 88.

⁸⁵ The arbitration clause at issue required:

Any dispute arising from the making, performance or termination of this Charter Party shall be settled in New York, Owner and Charterer each appointing an arbitrator, who shall be a merchant, broker or individual experienced in the shipping business; the two thus chosen, if they cannot agree, shall nominate a third arbitrator who shall be an Admiralty lawyer. Such arbitration shall be conducted in conformity with the provisions and procedure of the United States Arbitration Act, and a judgment of the Court shall be entered upon any award made by said arbitrator. Nothing in this clause shall be deemed to waive Owner's right to lien on the cargo for freight, dead freight or demurrage.

548 F.3d at 89.

⁸⁶ *Id.* at 90 (“The panel based its decision largely on the fact that in all twenty-one published class construction awards issued under Rule 3 of the Supplementary Rules, the arbitrators had interpreted silent arbitration clauses to permit class arbitration”).

⁸⁷ *Id.* “In this light, ‘manifest disregard’ has been interpreted ‘clearly [to] mean[] more than error or misunderstanding with respect to the law.’” *Id.* at 92 (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986)).

⁸⁸ The continuing viability of the “manifest disregard” standard of review is beyond the scope of this article. The *Stolt-Neilsen* case was decided after the Supreme Court’s decision in *Hall Street*, and the *Stold-Neilsen* court discusses *Hall Street*, but still never considered whether the arbitration “award” constitutes an “award” for the purposes of the FAA.

⁸⁹ *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 129 S. Ct. 2793 (2009).

⁹⁰ The Question Presented to the Supreme Court is:

In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act permits the imposition of class arbitration when the parties’ agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that the

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In *Sutter v. Oxford Health Plans LLC*,⁹¹ the Third Circuit, in an unpublished decision, reviewed a “final class determination award” in an arbitration without any discussion of jurisdiction. *Sutter* involved a class action in the medical billing context beginning first in litigation, but compelled to arbitration.⁹² After the arbitrator “defined the class of claimants and certified the class,” Oxford filed a motion to vacate the award.⁹³ Sidestepping the issue of jurisdiction, the court in *Sutter* concentrated on the standard of review of an award rendered under the AAA Supplementary rules.⁹⁴ Ultimately, the *Sutter* court concluded: “Here, the arbitrator neither exceeded his authority nor evidenced manifest disregard for the law. The arbitrator individually went through each requirement for a class action set forth in Rule 4 of the AAA Rules.”⁹⁵

arbitrator first needed to address whether the agreement there was in fact “silent.” That threshold obstacle is not present in this case, and the question presented here - which continues to divide the lower courts - is the same one presented in *Bazzle*: Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

08-1198 *Stolt-Nielsen S.A. v. AnimalFeeds International*, at <http://www.supremecourtus.gov/qp/08-01198qp.pdf>.

⁹¹ 227 Fed Appx. 135 (3d Cir. 2007).

⁹² *Id.* at 137.

⁹³ *Id.*

⁹⁴ *Id.* The court noted:

In the instant case, the agreement between *Sutter* and *Oxford* specified that all disputes “shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association. “ The American Arbitration Association’s Supplementary Rules for Class Arbitrations (“AAA Rules”) allow for “judicial review” within 30 days of a class determination award. The AAA Rules also require that class determinations be set forth in a “reasoned, partial final award.” *Oxford* argues that, “[a]s a matter of logic, these rules envision de novo review at least as to whether proper legal standards have been applied and followed.” (*Appellant’s Brief* at 23).

Oxford’s argument is not persuasive. While the AAA Rules call for judicial review, they never specify what standard of review the courts should use. Considering the silence of the AAA Rules on this issue, we are unable to conclude that the parties manifested a clear intent to opt out of the FAA rules.

Id. The Third Circuit’s presumption that parties could opt-out of the FAA rules, however, should not be considered good law in light of the Supreme Court’s pronouncement in *Hall Street* [FULL CITE] that judicial review in the federal courts is limited to the grounds specified in the FAA.

⁹⁵ *Id.* at 138.

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The Fourth Circuit, in *Long John Silver's Restaurants, Inc. v. Cole*,⁹⁶ decided a case involving the appeal of a Class Construction Award in a case involving alleged violations of the Fair Labor Standards Act.⁹⁷ The claimants initiated class action proceedings before the AAA, and the arbitrator initially determined that the arbitration clause “did not preclude a class arbitration proceeding.”⁹⁸ At this point, Long John Silver’s initiated suit to vacate the Class Construction Award, but the district court dismissed the case for lack of jurisdiction.⁹⁹ Next, the arbitrator issued a Class Award, determining that class could proceed with the named representatives, proceeding on an “opt-out” basis under AAA Supplementary Rule 7.¹⁰⁰ Then Long John Silver’s initiated proceedings again in the district court to vacate the Class Award.¹⁰¹ The district court refused to vacate the Class Award under the “manifest disregard” standard.¹⁰² The Fourth Circuit appealed, without discussing either constitutional ripeness or the question of whether the award is appealable under the FAA.¹⁰³

Additionally, a sizeable number of district courts have reviewed clause construction and class awards without considering their own jurisdiction to do so.¹⁰⁴

⁹⁶ 514 F.3d 345 (4th Cir. 2008).

⁹⁷ *Id.* at 347.

⁹⁸ *Id.* at 348.

⁹⁹ *Id.*

¹⁰⁰ 514 F.3d at 349.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Prior to appeal, at the trial court level, the court discussed the court’s jurisdiction, but determined that it had jurisdiction when the parties’ established the diversity jurisdiction requirements (i.e., diversity and amount in controversy). See *Sutter v. Oxford Health Plans, LLC*, 2005 U.S. Dist. LEXIS 25792 (D.N.J. Oct. 31, 2005).

¹⁰⁴ See, e.g., *Veliz v. Cintas Corp.*, 2009 U.S. Dist. LEXIS 57695 (N.D. Cal. June 22, 2009) (reviewing class construction awards under a “manifest disregard” and citing the FAA review provisions, without ever discussing whether a class construction award is an “award” for the purposes of the FAA); *JSC Surgutneftegaz v. President & Fellows of Harvard College*, 2007 U.S. Dist. LEXIS 79161 (S.D.N.Y. Oct. 11, 2007) (confirming an arbitral “award” “does not preclude this arbitration from proceeding on a class basis” without any discussion of jurisdiction);

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PRELIMINARY INJUNCTION PENDING APPEAL

TIMING – 30 d. NOT LONG ENOUGH. In *Rollins, Inc. v. Garrett*,¹⁰⁵ Garrett filed a class action arbitration against Orkin relating to a contract for protecting her home against termites.¹⁰⁶ The AAA issued a Partial Final Clause Construction Award finding that class action arbitration was not prohibited by the silent arbitration clause.¹⁰⁷ The arbitrator stayed the arbitration for thirty days to allow for review of the award, but otherwise retained jurisdiction over the case.¹⁰⁸ The court initially denied Orkin’s (and Rollins’) motion to vacate the clause construction award, and they appealed to the Eleventh Circuit.¹⁰⁹ When the arbitrators would not stay the proceedings pending appeal, Orkin sought a stay with the district court.¹¹⁰ The court applied the traditional four-part test for determining whether it could issue an injunction and concluded that an injunction was not warranted because no irreparable harm exists.¹¹¹ The court did not credit Orkin’s argument that the financial burden of class arbitration would be irreparable: “The financial burden of arbitration does not constitute irreparable injury, as injuries measured in terms of time and money spent in the absence of an injunction are not deemed irreparable.”¹¹² Further, the court was not persuaded that Orkin was likely to succeed on the merits given Florida’s law encouraging the use of arbitration procedures.¹¹³

¹⁰⁵ 2005 U.S. Dist. LEXIS 464215 (M.D. Fla. Sept. 6, 2005).

¹⁰⁶ *Id.* at *2.

¹⁰⁷ *Id.* at *5.

¹⁰⁸ *Id.* (“The panel retained jurisdiction of the dispute but stayed all further proceedings for a period of thirty days to allow the parties to appeal the award in a court of competent jurisdiction.”).

¹⁰⁹ 2005 U.S. Dist. LEXIS 464215, at *6.

¹¹⁰ *Id.*

¹¹¹ *Id.* at *6-7. The four-part test is “(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest.” *Id.* at *7.

¹¹² *Id.* at *8.

¹¹³ *Id.* at *11-12.

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IV. Appellate Arbitration Could Fill Need For Judicial Review

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