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## Is the End Near for Class Arbitration?

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Mark Shields noted, "There is always strength in numbers. The more individuals or organizations that you can rally to your cause, the better."

Those in favor of class actions share Mark Shields's view on strength in numbers. One purpose of class actions is to enable classes of similarly situated parties to collectively obtain relief that they might not have the means to obtain individually. Class action arbitration ("class arbitration") provides classes an alternative to litigation, where they resolve disputes through arbitration rather than in court.

Initially, companies used arbitration as a method to avoid class action claims; courts held that unless an arbitration agreement expressly permitted class arbitration, the judge did not have the authority to approve it and parties would be subject to mandatory arbitration as individuals. However, over time, parties and courts became more comfortable with the idea of class arbitration. New precedent was created in a 2003 United

State Supreme Court decision, *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 456 (2003), in which the Court held that an arbitration agreement requiring arbitration of all “disputes” does not preclude class arbitration, as many previously thought. Such agreements instead mean that the issue of whether or not class arbitration is appropriate is one of the “disputes” that should be decided by an arbitrator. This case essentially shifted the presumption from the prohibition of class arbitration to a presumption in favor of class arbitration.

Class arbitration differs from class action litigation in various ways. In need of rules to govern class arbitration proceedings post-Bazzle, the American Arbitration Association (“AAA”) issued Supplementary Rules for Class Arbitrations (“Supplementary Rules”). Whereas traditional class actions generally go to court to resolve all issues, the Supplementary Rules provide that, in class arbitration, even preliminary issues such as class certifications are primarily resolved outside of court. For example, under Supplementary Rule No. 3, “[i]f the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration ... the arbitrator shall determine whether the arbitration should proceed as a class arbitration,” taking into consideration criteria in the Supplementary Rules and any relevant law or agreement between the parties.

However, the rules do not require that the arbitrator decide *all* issues; there are times when the Supplementary Rules require court involvement. For example, when a party seeks to bring class arbitration under an agreement that expressly prohibits class actions, the AAA requires the parties to initially seek court guidance regarding whether or not class arbitration is appropriate under the agreement. Because class arbitration’s unique characteristics are favorable to some and objectionable to others, “the marriage of arbitration and class-action has not by a long shot[] been universally favored.”

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Jillian Morphis graduated from Pepperdine University School of Law in 2012, where she obtained her Juris Doctor and Certificate in Dispute Resolution, and served on the editorial board of Pepperdine’s Dispute Resolution Law Journal. Prior to law school,