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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2016-2017

1151204

University Toyota and University Chevrolet Buick GMC

v.

Beverly Hardeman and Vivian Roberts

Appeal from Colbert Circuit Court
(CV-15-900364)

STUART, Justice.

University Toyota and University Chevrolet Buick GMC (hereinafter referred to collectively as "the University dealerships") appeal the order of the Colbert Circuit Court allowing Beverly Hardeman and Vivian Roberts to pursue their

claims against the University dealerships in arbitration proceedings conducted by the American Arbitration Association ("the AAA") instead of the Better Business Bureau of North Alabama ("the BBB"), the entity identified in the controlling arbitration agreements. We reverse and remand.

I.

In December 2011, Hardeman purchased a 2012 GMC Acadia sport-utility vehicle from Jim Bishop Buick in Tuscumbia; in April 2013, Roberts purchased a 2013 Toyota Tacoma pickup truck from Jim Bishop Toyota in Tuscumbia (Jim Bishop Buick and Jim Bishop Toyota are hereinafter referred to collectively as "the Jim Bishop dealerships"). In conjunction with their purchases of those vehicles, Hardeman and Roberts purchased service contracts entitling them to no-cost oil changes for as long as they owned their respective vehicles. The Jim Bishop dealerships thereafter provided Hardeman and Roberts free oil changes pursuant to those service contracts without issue.

At some point in time, the Jim Bishop dealerships were sold and rebranded as the University dealerships. Initially, the University dealerships honored the no-cost oil-change service contracts sold by their predecessors in interest, the

Jim Bishop dealerships; however, they eventually stopped providing no-cost oil changes to customers who held those contracts, such as Hardeman and Roberts. On October 29, 2015, Hardeman and Roberts filed a demand for arbitration with the BBB, the dispute-resolution entity identified in arbitration agreements they had executed when they purchased their vehicles, on behalf of themselves and all similarly situated individuals, based on the University dealerships' refusal to honor the service contracts sold by the Jim Bishop dealerships. The subject arbitration agreements provided, in relevant part:

> "Buyer/lessee and dealer agree that all claims, demands, disputes, or controversies of every kind or nature between them arising from, concerning or relating to ... service contracts or other products purchased as an incident to the sale, lease or financing of the vehicle ... shall be settled by binding arbitration conducted pursuant to the provision[s] of the Federal Arbitration Act, 9 U.S.C. Section 1 et seq. ...
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> "Either party may demand arbitration by filing with the Better Business Bureau of North Alabama, P.O. Box 383, Huntsville, AL 35804, (256) 532-1437, a written demand for arbitration along with a statement of the matter in controversy."

It appears, however, that the BBB informed Hardeman and Roberts that it did not conduct class-action arbitration

proceedings, and they accordingly withdrew their arbitration demand.

On December 2, 2015, Hardeman and Roberts filed a complaint in the Colbert Circuit Court naming as defendants the University dealerships and asserting breach-of-contract, conversion, and unjust-enrichment claims. Hardeman and Roberts also sought class certification of their claims, asserting that over 100 individuals had similarly been injured by the University dealerships' failure to honor certain service contracts sold by their predecessors in interest, the Jim Bishop dealerships. On January 17, 2016, the University dealerships moved the trial court to compel Hardeman and Roberts to arbitrate their claims in accordance with the arbitration agreements they had executed when they purchased their vehicles and accompanying service contracts. In support of that motion, the University dealerships submitted into evidence copies of the arbitration agreements and an affidavit from the former owner of the Jim Bishop dealerships authenticating the agreements and explaining the interstate nature of the underlying transactions with Hardeman and Roberts. Hardeman and Roberts thereafter filed a response

opposing the University dealerships' motion to compel arbitration, asking the trial court to allow their action to proceed either in state court or, in the alternative, in an arbitral forum other than the BBB, i.e., one that would conduct class-action arbitration proceedings. On May 19, 2016, the trial court entered an order directing that Hardeman's and Robert's claims be sent to arbitration before the AAA with the AAA arbitrator to subsequently decide whether class-action arbitration was available to them. On May 26, 2016, Hardeman and Roberts did in fact initiate an arbitration proceeding before the AAA.

On June 3, 2016, the University dealerships moved the trial court to alter, amend, or vacate its May 19 order, arguing that the subject arbitration agreements required any arbitration proceedings between the parties to be conducted by the BBB and that Hardeman and Roberts had no right, contractual or otherwise, to engage in class-action arbitration proceedings. After becoming aware that Hardeman and Roberts had initiated the AAA arbitration proceeding, the University dealerships also moved both the trial court and the AAA to stay those proceedings until their pending motion to

alter, amend, or vacate the trial court's May 19 order was decided. Hardeman and Roberts opposed the University dealerships' motions, and, on August 19, 2016, the trial court entered its final order, stating:

> "In the above-styled case, [Hardeman and Roberts] claim that [the University dealerships] failed to honor lifetime oil change contracts to customers who purchased cars from their dealership[s]. The dealership[s] [were] sold, and [the University dealerships] deny any responsibility for the contracts. [Hardeman and Roberts] seek to enforce the contract for themselves, and any other customers similarly situated.
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> "At the time of [Hardeman's and Roberts's] purchase[s], ... arbitration agreement[s] [were] signed. The agreement[s] state[] that arbitration would be through the [BBB]. [Hardeman and Roberts] state, however that [the] BBB has refused, or is not capable of, making the initial determination as to whether they will be allowed to proceed as a class action.
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> "As a result of [the] BBB's inability to make this determination, [Hardeman and Roberts] asked this court for an order allowing arbitration to proceed through [the] AAA. [The University dealerships] object and request that the case proceed with a case-by-case arbitration with [the] BBB.
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> "After hearing arguments, this court does order that the parties shall begin arbitration with [the] AAA. The arbitrator should first determine whether [Hardeman and Roberts] may proceed as a class. If the arbitrator selected through the AAA determines that the parties may not proceed to seek a global settlement, arbitration by [the] AAA shall cease

> immediately. The parties, at that point, must seek arbitration through [the] BBB, on a case-by-case basis, in accordance with the agreement."

On August 23, 2016, the University dealerships filed their notice of appeal to this Court.[1]

II.

In BankAmerica Housing Services v. Lee, 833 So. 2d 609 (Ala. 2002), this Court considered a similar case in which the appellant had succeeded in the trial court in its attempt to compel arbitration but thereafter filed an appeal to this Court arguing that the trial court had compelled arbitration in a manner inconsistent with the governing arbitration provision. We stated then that we would review the order compelling arbitration de novo to determine whether the trial court, although granting the requested relief, had nevertheless committed an error substantially prejudicing the party seeking review. Lee, 833 So. 2d at 617.

III.

It is undisputed in this case (1) that Hardeman's and Roberts's purchases of automobiles and service contracts from

[1]On September 1, 2016, this Court entered an order staying all court and arbitration proceedings involving this case pending further order of the Court.

the Jim Bishop dealerships affected interstate commerce; (2) that both Hardeman and Roberts executed arbitration agreements in conjunction with their purchases; (3) that those arbitration agreements are valid;[2] and (4) that those arbitration agreements encompass the underlying dispute regarding the University dealerships' responsibility to honor the service contracts purchased by Hardeman and Roberts. Thus, it is also undisputed that the University dealerships were entitled to have the arbitration agreements enforced and their motion to compel arbitration granted. Elizabeth Homes, L.L.C. v. Gantt, 882 So. 2d 313, 315 (Ala. 2003). The issue before this Court is whether the trial court, though granting

[2]Hardeman and Roberts have not explicitly argued that the arbitration agreements they executed are unconscionable or otherwise invalid either because they do not specifically provide for class-action arbitration or because the chosen forum does not conduct class-action arbitration. Both federal and state caselaw is clear, however, that such arguments have no merit. See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010) ("[A] party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so."), and Med Center Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998) ("Although the plaintiffs' contentions are practically appealing, after reviewing the authorities we conclude that to require class-wide arbitration would alter the agreements of the parties, whose arbitration agreements do not provide for class-wide arbitration.").

the motion to compel arbitration, properly enforced the arbitration agreements inasmuch as it did not require Hardeman and Roberts to arbitrate their claims before the BBB, the forum agreed to by the parties. For the reasons that follow, we must answer that inquiry in the negative.

In American Express Co. v. Italian Colors Restaurant, ___ U.S. ___, 133 S.Ct. 2304 (2013), the Supreme Court of the United States emphasized that arbitration agreements are simply a species of contract and, like all contracts, must be enforced according to their terms:

> "Congress enacted the [Federal Arbitration Act, 9 U.S.C. § 1 et seq.,] in response to widespread judicial hostility to arbitration. See AT&T Mobility [LLC v. Concepcion], [563 U.S. 333, 339 (2011)]. As relevant here, the Act provides:
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> > "'A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2.
>
> "This text reflects the overarching principle that arbitration is a matter of contract. See Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 67 (2010). And consistent with that text, courts must 'rigorously enforce' arbitration agreements according to their terms, Dean Witter Reynolds Inc.

> v. Byrd, 470 U.S. 213, 221 (1985), including terms that 'specify with whom [the parties] choose to arbitrate their disputes,' Stolt-Nielsen [S.A. v. AnimalFeeds Int'l Corp.], [559 U.S. 662,] 683 [(2010)], and 'the rules under which that arbitration will be conducted,' Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)."

This Court has held likewise, explaining this principle as follows in Lee:

> "When a trial court compels arbitration, it must do so in a manner consistent with the terms of the arbitration provision. See Ex parte Cappaert Manufactured Homes, 822 So. 2d 385, 387 (Ala. 2001) ('[section] 5 [of the Federal Arbitration Act] mandates that the method set forth in the arbitration agreement be followed'); Southern Energy Homes Retail Corp. v. McCool, 814 So. 2d 845 (Ala. 2001) (trial court directed to vacate its order because it failed to compel arbitration in a manner consistent with the terms of the agreement between the parties); Ex parte Dan Tucker Auto Sales, [718 So. 2d 33, 36-38 (Ala. 1998)] (trial court erred in assigning administrative fees of arbitration to the defendant when the Rules of the AAA provided for the relief of a party in the event of hardship). A trial court's order compelling arbitration that changes the terms of the arbitration provision will be reversed when
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> > "'it appears that the trial court, although it ordered the parties to arbitrate, failed to compel arbitration in a manner consistent with the terms of [the] arbitration provision.'
>
> "McCool, 814 So. 2d at 849."

833 So. 2d at 618. See also Okay v. Murray, 51 So. 3d 285, 291 (Ala. 2010) (holding that a trial court must give effect to the terms of an arbitration provision when compelling arbitration).

The arbitration agreements executed by Hardeman and Roberts in this case required them to resolve disputes "concerning or relating to ... service contracts or other products purchased as an incident to the sale, lease or financing of the vehicle ... by binding arbitration." Moreover, the arbitration agreements specifically set forth the procedure for initiating any arbitration proceedings -- "[e]ither party may demand arbitration by filing with the [BBB] ... a written demand for arbitration along with a statement of the matter in controversy." This fact distinguishes the instant case from cases like Robertson v. Mount Royal Towers, 134 So. 3d 862, 863 (Ala. 2013), in which the parties executed a predispute arbitration agreement that did not name a forum for arbitration and the trial court accordingly had to fill in the "gap" and appoint an arbitrator of its choosing to hear the dispute. This Court affirmed the order of the trial court compelling arbitration in Robertson,

concluding that the fact the parties did not name an arbitrator indicated that the identity of the arbitrator was not "an integral and essential part" of their agreement to arbitrate. 134 So. 3d at 869. Conversely, however, the arbitration agreements in this case do identify a forum for arbitration -- the BBB. The fact that the parties named a specific forum in which either party could initiate arbitration indicates that the specific forum was "an integral and essential part" of their agreement to arbitrate, and the trial court was accordingly required to give effect to that intent when it compelled arbitration.

Justice Murdock in his dissent argues that this case is essentially undistinguishable from Robertson, because, he asserts, once the BBB forum "became unavailable, a gap was effectively created, just as in Robertson, that was left to be filled by the trial court." ___ So. 3d at ___. In fact, however, there is no evidence indicating that the BBB forum is unavailable to Hardeman and Roberts. To the contrary, Hardeman and Roberts initiated arbitration before the BBB and, for all that appears, the BBB would have conducted arbitration proceedings resolving Hardeman's and Roberts's disputes with

the University dealerships had Hardeman and Roberts not voluntarily chose to withdraw their arbitration demand. Indeed, the BBB is presumably still willing and ready to conduct arbitration proceedings to resolve Hardeman's and Roberts's disputes with the University dealerships; it has merely indicated that it will not conduct a single class-action arbitration proceeding to resolve the claims of every aggrieved customer that purchased a no-cost oil-change service contract from the Jim Bishop dealerships that the University dealerships now will not honor.

To the extent the dissent is concluding that the BBB forum is unavailable because of the BBB's policy not to conduct class-action arbitration, we disagree. Hardeman and Roberts have no right to engage in class-action arbitration proceedings, because the arbitration agreements they entered into contain no provision authorizing the arbitration of class-action claims. The Supreme Court of the United States has recognized that the differences between bilateral and class-action arbitration are sufficiently great that it should not be assumed that the parties to an arbitration agreement have implicitly agreed to allow class-action arbitration

merely because they failed to address that issue in the arbitration agreement. See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010) ("We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the [Federal Arbitration Act], that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."). The United States District Court for the Middle District of Alabama has further explained:

> "It is helpful initially to address the effect of a valid arbitration agreement's silence as to the availability of class-wide relief in the arbitrable forum. Under Alabama law, 'classwide arbitration is permitted only when the arbitration agreement provides for it.' Taylor v. First N. Am. Nat'l Bank, 325 F. Supp. 2d 1304, 1320 n. 28 (M.D. Ala. 2004) (citing Med. Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998)); see also Hornsby v. Macon Cnty. Greyhound Park, Inc., No. 10cv680 ... (M.D. Ala. June 13, 2012) (explaining that, because the arbitration agreement 'says nothing about classwide arbitration,' Alabama's 'default rule, that "classwide arbitration is permitted only when the arbitration agreement provides for it," kicks in.') (quoting Taylor, 325 F. Supp. 2d at 1320 n. 28). Based upon these authorities, if Plaintiffs ultimately are required to arbitrate their disputes, class-wide arbitration would be unavailable because the Arbitration Agreement does not expressly provide for it.

> "Moreover, and more to the point for purposes of this opinion, the fact that there is no class-action vehicle available to Plaintiffs in the arbitral forum does not mean, as Plaintiffs contend, that the Arbitration Agreement is unenforceable and that class litigation is available in a judicial forum. As the district court highlighted in Hornsby, 'the Eleventh Circuit has held that arbitration clauses are enforceable even when their application may effectively prevent plaintiffs from pursuing their claims as a class action.' ... (citing Caley [v. Gulfstream Aerospace Corp.], 428 F.3d [1359,] 1378 [(11th Cir. 2005)], which rejected the plaintiffs' argument that the arbitration agreement was unconscionable under Georgia law because it 'preclude[d] class actions'). And post-Caley, the Supreme Court has ruled that 'a party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so' and that consent to class arbitration cannot be inferred where the agreement is silent as to the availability of class-action procedures. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010)."

Chambers v. Groome Transp. of Alabama, 41 F. Supp. 3d 1327, 1350 (M.D. Ala. 2014). In sum, Hardeman and Roberts have no basis on which to force the University dealerships to engage in class-action arbitration proceedings before the BBB -- or the AAA for that matter -- and the BBB's policy of not conducting class-action arbitrations accordingly in no way renders the BBB forum unavailable to Hardeman and Roberts.

Finally, in spite of the clear language in the arbitration agreements, Hardeman and Roberts make the argument -- unsupported by any citations to caselaw, statute, or other authority -- that "[a]ll the arbitration agreement explicitly states is that 'either party may demand arbitration by filing with the [BBB].' What occurs after filing this demand is left unsaid." Hardeman and Roberts's brief, p. 10. To the extent that Hardeman and Roberts are arguing that they were required only to initiate arbitration with the BBB, but were then free to withdraw that claim and to pursue a resolution in some other forum, their argument is clearly without merit; to accept it would defeat the very purpose of having an arbitration agreement.

IV.

The University dealerships appeal the order of the trial court allowing Hardeman and Roberts to arbitrate the claims they asserted against the University dealerships in arbitration proceedings conducted by the AAA, notwithstanding the fact that the arbitration agreements executed by Hardeman and Roberts identify the BBB as the entity that is to resolve any disputes that are subject to the arbitration agreements.

Because a trial court can compel arbitration only in a manner consistent with the terms of the applicable arbitration agreement, we reverse the trial court's order compelling arbitration and remand the cause for the entry of a new order compelling Hardeman and Roberts to arbitrate their claims against the University dealerships before the BBB if they wish to pursue those claims.

REVERSED AND REMANDED.

Bolin, Shaw, Main, Wise, and Bryan, JJ., concur.

Parker, J., concurs in the result.

Murdock, J., dissents.

MURDOCK, Justice (dissenting).

I respectfully dissent. I see no basis in the text of the parties' arbitration agreements for concluding that the provision in the agreements that a party may demand arbitration by making a filing with the Better Business Bureau of North America ("the BBB") establishes a requirement that such a claim be arbitrated with the BBB that is "an integral and essential part" of the parties' contract that, if incapable of being performed, undermines the parties' more fundamental agreement to arbitrate their disputes. This is especially true given the strong federal policy in favor of arbitration upon which this Court has frequently relied.

The arbitration agreements executed by Beverly Hardeman, Vivian Roberts, and Jim Bishop Buick and Jim Bishop Toyota, the predecessor dealerships to University Toyota and University Chevrolet Buick GMC ("the University dealerships"), require them to resolve disputes "concerning or relating to ... service contracts or other products purchased as an incident to the sale, lease or financing of the vehicle ... by binding arbitration." Although those agreements subsequently set forth a procedure for initiating an arbitration proceeding

-- "[e]ither party may demand arbitration by filing with the [BBB] ... a written demand for arbitration" -- nothing in the arbitration agreements explicitly states that only the BBB may conduct the arbitration. At a minimum, nothing in the agreements states that the agreement to arbitrate is a nullity if the organization chosen to conduct the arbitration is unable to do so.

This Court often has acknowledged, and espoused, that the policy in favor of arbitration imposed by the Federal Arbitration Act ("the FAA") is a strong one. See, e.g., Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6, 14 (Ala. 2006) (noting that the United States Supreme Court recognized a strong federal policy favoring arbitration and that any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration); Ameriquest Mortg. Co. v. Bentley, 851 So. 2d 458, 463 (Ala. 2002); Auto Owners Ins., Inc. v. Blackmon Ins. Agency, Inc., 99 So. 3d 1193, 1196 (Ala. 2012). See generally Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Consistent with this policy, in Robertson v. Mount Royal Towers, 134 So. 3d 862, 863 (Ala. 2013), when the chosen arbitrator was not available,

the Court nonetheless said that arbitration must go forward with the trial court filling the gap.

I disagree with the main opinion that this case is distinguishable from cases like Robertson, in which the parties executed a predispute arbitration agreement that did not name a forum for arbitration. Even reading the parties' agreements as designating the BBB as the forum for arbitration, once that forum became unavailable, a gap was effectively created, just as in Robertson, that was left to be filled by the trial court. Nothing in the arbitration agreements states that the use of arbitration will be contingent upon the availability of the BBB as the forum. And any effort somehow to glean this intent from the language of the agreements (which, in my view, would fail in any event) is made that much more difficult by the strong federal policy in favor of arbitration. In short, as was the case in Robertson, and especially in the context of the strong federal policy favoring arbitration, I do not find in the language of the parties' agreements any language that allows me to agree with the main opinion that the agreements indicate that the

identity of the arbitrator was "an integral and essential part" of their agreements to arbitrate.

In fact, the indistinguishability of this case from Robertson is borne out by this Court's decision in Ex parte Warren, 718 So. 2d 45 (Ala. 1998). In Warren, as in the present case (according to the University dealerships' reading of the arbitration agreements), the arbitration agreement specified a particular arbitrator but, as in the present case, the designated arbitrator was not available to conduct the arbitration. Nonetheless, as in Robertson, the parties' agreement to arbitrate was upheld. The Warren opinion reasons as follows:

> "The Warrens next argue that the arbitration agreement is void because the arbitrator that it specifies ... is no longer in existence. ...
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> "Under the Federal Arbitration Act, the fact that an arbitrator named in the arbitration agreement is unable to act as an arbitrator over the parties' controversy does not necessarily void the arbitration agreement. ...
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> "'....'
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> "Based upon § 5 [of the FAA], federal courts have established the general rule that, where the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead appoints a different arbitrator. Astra Footwear Industry v. Harwyn Int'l

> Inc., 442 F. Supp. 907 (S.D. N.Y. 1978); see, also, McGuire, Cornwell & Blakey v. Grider, 771 F. Supp. 319 (D. Colo. 1991). ...
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> "However, the federal courts have also recognized an exception to the general rule: where it is clear that a specific failed term of an arbitration agreement is not an ancillary logistical concern but, rather, is as important a consideration as the arbitration agreement itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail. Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 742 F. Supp. 1359 (N.D. Ill. 1990)."

718 So. 2d at 48. The Warren opinion then proceeds to uphold the parties' arbitration agreement despite the unavailability of the designated arbitrator, citing, inter alia, McGuire, Cornwell & Blakey v. Grider, 771 F.Supp. 319 (D. Colo. 1991), for the proposition that "where there was no indication that the naming of a specific arbitrator was central to the parties' agreement to arbitrate, the named arbitrator's unwillingness to arbitrate the parties' dispute did not void the arbitration agreement." 718 So. 2d at 48-49. It appears to me that the same proposition applies to the present case.

The main opinion takes issue with the proposition that the BBB is unavailable to arbitrate this matter because, it posits, the parties have no right to engage in class-arbitration proceedings in the first place. Because the only

type of claim that may be arbitrated, according to the main opinion, is the individual claim of each plaintiff, and because the BBB is available to arbitrate such a claim, the BBB is not "unavailable." In this regard, the main opinion states:

> "To the extent the dissent is concluding that the BBB forum is unavailable because of the BBB's policy not to conduct class-action arbitration, we disagree. Hardeman and Roberts have no right to engage in class-action arbitration proceedings ...."

___ So. 3d at ___.

But the question whether Hardeman and Roberts have a right to engage in class-action arbitration is itself, as the trial court held, a question for the arbitrator. As Hardeman and Roberts point out, their contracts with the University dealerships expressly state that "any question regarding whether a particular controversy is subject to arbitration shall be decided by the arbitrator." Compare, e.g., Max of Birmingham, Inc. v. Edwards, 973 So. 2d 1050, 1054 (Ala. 2007); Polaris Sales, Inc. v. Heritage Imports, Inc., 879 So. 2d 1129, 1133-34 (Ala. 2003).

And, contrary to the main opinion, existing precedents do not establish that the proper answer to the question of

arbitrability necessarily turns on the lack of any verbiage in the parties' agreements expressly authorizing the arbitration of such claims. It is certainly true that the United States Supreme Court made a couple of statements in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 687 (2010), that, at first glance, might appear to indicate that arbitration of class claims requires contractual language that expressly provides for the arbitration of such claims. For example, the Court stated:

> "An implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."

559 U.S. at 685. Later in the opinion the Court concluded: "We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." 559 U.S. at 687.

But, in actuality, the Stolt-Nielsen opinion is one that merely holds -- and this really was nothing novel but, instead, was the application of a very basic principle -- that the arbitrators could not decide to arbitrate class claims, as they attempted to do, without basing that decision on some contractual agreement by the parties to do so. In Stolt-Nielsen, the arbitration panel actually undertook to arbitrate the class claims in deference to policy concerns, not based on a contractual agreement, express or implied, for the arbitration of such claims. The panel was forced to resort to such policy concerns as the basis for its decision because -- and this is the distinguishing characteristic of Stolt-Nielsen -- the parties had actually stipulated to the arbitration panel that they did have any agreement between themselves on this issue. In effect, the parties actually stipulated that their arbitration agreement could not be read as either expressly or implicitly providing for arbitration of class claims.

The Stolt-Nielsen Court explained itself as follows:

> "The parties selected a panel of arbitrators and stipulated that the arbitration clause was 'silent' with respect to class arbitration. Counsel for AnimalFeeds explained to the arbitration panel that

> the term 'silent' did not simply mean that the clause made no express reference to class arbitration. Rather, he said, '[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue.'"
>
> _____
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> "Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.' Volt [Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468] at 479 [(1989)]. In this endeavor, 'as with any other contract, the parties' intentions control.' Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985). This is because an arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution. See AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 648-649 (1986) ('[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration'). ...
>
> "....
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> "From these principles, it follows that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached 'no agreement' on that issue .... The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent."

559 U.S. at 668-69, 682-84 (some emphasis added).

As the United States Court of Appeals for the Second Circuit noted in Jock v. Sterling Jewelers Inc., 646 F.3d 113 (2d Cir. 2011):

> "The [Supreme] Court's interpretation of the parties' 'silence' is key. Our dissenting colleague states that he believes the 'silence' in Stolt-Nielsen was interpreted as 'simply reflect[ing] the fact each party recognized the arbitration clause neither specifically authorized nor specifically prohibited class arbitration.' Dissenting Op. at 128 (citing Brief for Respondent at 26, Stolt-Nielsen ...). The dissent, however, fails to acknowledge that although that is the interpretation that the Respondent in Stolt-Nielsen wished the Court to adopt, that is not the interpretation that the Court did adopt. To the contrary, the Court interpreted the stipulated silence to mean that 'the parties agreed their agreement was "silent" in the sense that they had not reached any agreement on the issue of class arbitration.' Stolt-Nielsen, 130 S.Ct. at 1768. See also id. at 1766 ('The parties ... stipulated that the arbitration clause was "silent" with respect to class arbitration. Counsel for [the Respondent] explained to the arbitration panel that the term "silent" did not simply mean that the clause made no express reference to class arbitration. Rather, he said, "[a]ll the parties agree that when a contract is silent on an issue there's been no agreement that has been reached on the issue."'). The Court further noted that 'parties were in complete agreement regarding their intent.' Id. at 1770. That is to say, according to the majority in Stolt-Nielsen, there was no express or implicit intent to submit to class arbitration. Indeed, the dissent in Stolt-Nielsen pointed out that the majority's interpretation of 'silence' was incongruous with the Respondent's interpretation. Id. at 1781 (Ginsburg, J., dissenting) ...."

646 F.3d at 120 (some emphasis added).

In other words, the facts before the Supreme Court in Stolt-Nielsen involved a unique situation in which the parties had stipulated that they there was no agreement between them -- express or implied -- regarding the arbitrability of class claims. Because of this, the Jock court concluded in the case before it that "[t]he plaintiffs' concession that there was no explicit agreement to permit class arbitration ... is not the same thing as stipulating that the parties had reached no agreement on the issue." 646 F.3d at 123 (emphasis added).

The United States Court of Appeals for the Fifth Circuit in Reed v. Florida Metropolitan University, Inc., 681 F.3d 630 (5th Cir. 2012), reached the opposite conclusion about what Stolt-Nielsen meant. The Fifth Circuit surmised that an agreement stating that "any dispute" could be arbitrated could not be interpreted as implicitly permitting arbitration of class claims because the agreement did not expressly discuss such claims. The Fifth Circuit concluded: "At most, the agreement in this case could support a finding that the parties did not preclude class arbitration, but under Stolt-Nielsen this is not enough." Id. at 644.

After Jock and Reed were decided, the Supreme Court decided Oxford Health Plans LLC v. Sutter, ___ U.S. ___, 133 S. Ct. 2064 (2013). Sutter involved a putative class action in state court by physicians who alleged that Oxford had failed to make "full and prompt" payment in violation of their agreements and state laws. Oxford moved to compel arbitration pursuant to a clause in the agreements, and the state court granted the motion. The arbitrator allowed the arbitration to proceed on a class basis, on the ground that the agreement permitted in arbitration everything that it prohibited from being brought in court. In the arbitrator's view, because class action "is plainly one of the possible forms of civil action that could be brought in a court," but had been prohibited by the agreement from being brought in court, it must be permitted in arbitration. ___ U.S. at ___, 133 S. Ct. at 2067. While the arbitration proceeded, the United States Supreme Court issued its ruling in Stolt-Nielsen, and Oxford asked the arbitrator to reconsider his class-arbitration decision. The arbitrator issued a new opinion holding that Stolt-Nielsen had no effect because, unlike the parties in Stolt-Nielsen, the parties before him disputed the meaning of

their contract, and, in his view the agreement authorized class arbitration. On appeal, the district court declined to vacate the arbitrator's decision, and the United States Court of Appeals for the Third Circuit affirmed it.

The United States Supreme Court granted certiorari to address the split among the Second, Third, and Fifth Circuits on the issue whether an arbitrator who has allowed class arbitration in circumstances in which the agreement is silent on the matter "exceeded [his] powers" under § 10(a)(4) of the FAA. In unanimously affirming the judgment of the Third Circuit, the Supreme Court ruled that, under § 10(a)(4), the "sole question" for a reviewing court is whether the decision as to arbitrability is based in the parties' contract: the "sole question" "is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all." ___ U.S. at ___, 133 S. Ct. at 2071. The Court specifically emphasized that

> "[w]e overturned the arbitral decision [in Stolt-Nielsen] because it lacked any contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a 'sufficient' one. The parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on class arbitration. See 559 U.S., at 668-669. In that circumstance, we noted, the panel's decision

> was not -- indeed, could not have been -- 'based on a determination regarding the parties' intent.' Id., at 673, n.4."

___U.S. at ___, 133 S. Ct. at 2069.[3]

The main opinion quotes Chambers v. Groome Transportation of Alabama, 41 F. Supp. 3d 1327, 1350 (M.D. Ala. 2014), as summarizing Alabama's position on the matter. And, indeed, this Court has stated: "[C]lass-wide arbitration is not permitted absent an agreement permitting disposition of claims on such a basis ....." Leonard v. Terminix Int'l Co., L.P., 854 So. 2d 529, 535 n.2 (Ala. 2002) (citing Med Ctr. Cars, Inc. v. Smith, 727 So. 2d 9, 20 (Ala. 1998) (emphasis added)). This Court's very few pronouncements on the issue, however, do not go further than do the pronouncements of the United States Supreme Court and, in particular, do not hold that an intent by the parties to provide for the disposition of class claims through arbitration may be found only in express contractual language to that effect and may not be implied from more general contractual language providing for the arbitration of disputes.

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[3]See Stuart Boyarsky, Silence Is Golden: How Oxford Health Affects Class Arbitration, 20 westlawjournalclassaction 1 (August 23, 2013), for a succinct summary of federal case history on this issue.

In accordance with the foregoing, I am compelled to conclude that the trial court did not err in consigning to the arbitrator the question of arbitrability presented here or in designating an arbitrator other than the BBB in this regard.