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Winner's Playbook: Behind The Scenes Of Lamps Plus

By **Michael Grimaldi, Eric Kizirian, Jeff Miller, Andrew Pincus and Archis Parasharami**
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This article is part of an Expert Analysis series featuring reflections from attorneys who recently won high-profile cases — an inside look at the challenges they faced and the decisions they made that led to victory.

As another U.S. Supreme Court term draws to a close, we are looking back at a collaboration between two firms that led to a significant Supreme Court win in 2019.

In a ruling that continues to have an impact, the Supreme Court held in Lamps Plus Inc. v. Varela that, under the Federal Arbitration Act, an agreement that is ambiguous about whether class arbitration is permitted cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration.

In this oral history, Eric Kizirian, Jeff Miller and Michael Grimaldi at Lewis Brisbois Bisgaard & Smith LLP, and Andrew Pincus and Archis Parasharami at Mayer Brown LLP, explain how they successfully worked together to develop the law on how courts and arbitrators interpret thousands of arbitration agreements that do not include language that expressly addresses class arbitration.

Grimaldi: In 2016, there was a spate of email phishing attacks where hackers sought to trick employees into sending tax information and then file false tax returns. That's what happened to Lamps Plus.

A hacker, impersonating a company official, tricked an employee into disclosing the tax information of approximately 1,300 other employees. While Lamps Plus took immediate steps to remedy this attack, one of its employees, who alleged he had a false tax return filed, brought a class action. While Lamps Plus had an arbitration clause in its employment agreement, it did not have an express class action waiver.

Usually, in data breach cases, there is a dispute as to whether an individual's information was accessed and misused. But the plaintiff here alleged he had a false tax return filed. That wasn't true of every potential class member, but there was no doubt that the named plaintiff's case couldn't be readily dismissed on the merits at the pleadings stage.

We knew the best approach was to seek to compel arbitration even if there was no express class action

waiver in the employment contract. At this time, there was favorable California case law holding that if there was only bilateral language in the contract — such as terms referring to "you" in the singular — a court could not compel class arbitration. We thus thought we were taking a reasonable position consistent with California contract law.

Kizirian: The U.S. District Court for the Central District of California did something we have not seen before. It granted our motion to compel arbitration but awarded relief neither party asked for when it compelled class arbitration — Lamps Plus argued in favor of individual arbitration; the plaintiff argued for class litigation in court. Because the district court effectively denied the true relief Lamps Plus was seeking — individual arbitration — we had to appeal. Our client did not want to compel class arbitration since that option provides no effective path to appellate review.

Miller: I became involved in the appeal at the U.S. Court of Appeals for the Ninth Circuit. The jurisdiction issue was highly unusual. Arguably, the order being challenged could have been considered interlocutory in substance and therefore violative of the one final judgment rule. However, because the district court also dismissed the case — and did not stay the case when it denied the motion — we could appeal under the Federal Arbitration Act. Justice Stephen Breyer ultimately disagreed with this argument in his dissenting opinion but, fortunately for our client, he was in the minority.

Grimaldi: I argued the case in front of the Ninth Circuit but it primarily was an argument in front of the "liberal lion" U.S. Circuit Judge Stephen Reinhardt. Judge Reinhardt did not buy my argument that there had to be a contractual basis to compel class arbitration. Instead, he wanted to interpret the agreement against the drafter Lamps Plus. In a bit of foreshadowing, he mentioned that if you looked at the numbers for Supreme Court justice votes, it likely would end in Lamp Plus' favor.

Kizirian: We unfortunately lost at the Ninth Circuit. Despite the issue being of first impression in the Ninth Circuit, the court issued a short unpublished decision. But U.S. Circuit Judge Ferdinand Fernandez wrote a short dissent, succinctly stating: "I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist us in this palpable evasion of Stolt-Nielsen SA v. AnimalFeeds International Corp." Even though the opinion was unpublished, we thought Judge Fernandez's pointed and succinct dissent would be a powerful tool in a petition to the Supreme Court.

Parasharami: I remember reading the opinion and finding myself agreeing with the dissent's view that the decision could not be squared with Supreme Court precedent, including cases like Stolt-Nielsen, which was decided in 2010, and AT&T Mobility LLC v. Concepcion, which was decided in 2011. Andy Pincus had argued Concepcion and I had worked on it along with our partners Evan Tager and Donald Falk. I decided to dig in more and watched the oral argument on YouTube. I was struck both by the great job Mike had done, but even more so by Judge Reinhardt's interest in finding a way to have class arbitration go forward.

Grimaldi: After the decision came down. Eric, Jeff and I debated whether this might be a candidate for Supreme Court review. We thought the dissent was very helpful, along with the fact that there was a circuit split. But the Supreme Court almost never grants review of unpublished cases. Right around that time, Archis from Mayer Brown called me about the case and asked if we were seeking review.

It was reaffirming to think that other smart lawyers thought there was a chance. This is especially true since the Supreme Court in the prior Stolt-Nielsen case said it was an open issue on "what contractual basis may support a finding that the parties agreed to authorize class action arbitration."

Parasharami: After talking about the case with Evan — who gave me a bit of a nudge — I decided to give Mike a call. Because we had never spoken before, I started to introduce myself and provide a little background. But when he heard my name, Mike jumped in and said, "Archis, I know you — I read your blog!" That was a great start to what has turned out to be a terrific working relationship. We talked about the case and the argument. I was enthusiastic about seeking review — I thought there was a real possibility of a summary reversal. That prediction turned out to be wrong.

Kizirian: I had worked with Donald on another Ninth Circuit decision before. We thought it made sense to team up with Mayer Brown again since our prior joint efforts produced another groundbreaking class action decision in 2012, Mazza v. American Honda Motor Co.[1]

After the Supreme Court granted our petition, Justice Anthony Kennedy retired and President Donald Trump nominated Justice Brett Kavanaugh for the open seat. Mere weeks before our October 2018 hearing date, the seat remained open as Congress debated Justice Kavanaugh's nomination. Justice Kavanaugh took his seat on the court mere weeks before our oral argument. Given that the final decision was 5-4, Lamps Plus would have tied, and thus lost, if there were only eight justices on the day of our hearing. They say timing is everything, and it certainly was so in this case.

Grimaldi: There were five or six forks in the road where we easily could have lost or not been granted review. In the prior term, while we were appealing, the Supreme Court decided Epic Systems Corp. v. Lewis[2] finding the National Labor Relations Act did not prevent courts from enforcing class action waivers in employment arbitration agreements. We would have lost if the court went the other way.

My first time in the Supreme Court courtroom was for our oral argument. What an experience.

Pincus: I have argued 30 cases in the Supreme Court, but this was the first time that I had to argue two cases in the same week — first Lamps Plus and then Frank v. Gaos two days later, the latter on behalf of Google Inc. I began preparing for the second argument first, then turned back to preparing for Lamps Plus up through that argument.

Then I spent the intervening day-and-a-half refreshing myself on Frank. Moving from one case to another in such a short amount of time was a significant challenge, but our team's experience on leading arbitration cases in the court — especially Concepcion, which I had argued almost nine years before the Lamps Plus argument — helped set the foundation for Lamps Plus.

Grimaldi: In August 2019, soon after we won, I cited Lamps Plus and won a motion to compel individual arbitration on the same issue in Yu v. Volt Information Sciences Inc. in the U.S. District Court for the Northern District of California.[3] As I was drafting the motion, I was working off my copy of the opinion hot off the presses of the Supreme Court printer's office. It is awe-inspiring to recognize that this decision will affect the interpretation of thousands of arbitration agreements, many of which will be decided by arbitrators.

Pincus: It was gratifying to prevail in Lamps Plus, which both reaffirmed our prior win in Concepcion and made clear that the court will reject efforts by lower courts to circumvent Supreme Court decisions interpreting and applying the Federal Arbitration Act. The decision has been cited over 170 times in the two years since it was handed down; it is clearly having an impact.

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[1] Mazza v. American Honda Motor Co., 666 F.3d 581 (9th Cir. 2012).

[2] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[3] Yu v. Volt Info. Scis., Inc., 2019 U.S. Dist. LEXIS 129031 (N.D. Cal. Aug. 1, 2019).