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Third Circuit Holds That a Court, Not an Arbitrator, Must Decide Whether an Arbitration Agreement Authorizes Class-wide Arbitration

By Christian Sheehan

Who decides whether an arbitration agreement allows for class-wide arbitration — a court or an arbitrator? In the wake of mixed signals from the U.S. Supreme Court, lower courts have been reluctant to answer this question. However, on July 30, 2014, in *Opalinski v. Robert Half International, Inc*., the U.S. Court of Appeals for the Third Circuit became the second federal court of appeals to definitively hold that the availability of class-wide arbitration is a threshold question for the court, not a subsidiary question for the arbitrator.

The plaintiffs in *Opalinski* signed employment agreements with Robert Half International (RHI) that contained arbitration provisions requiring that "[a]ny dispute or claim arising out of or relating to Employee's employment, termination of employment or any provision of this Agreement" be submitted to arbitration. Neither agreement mentioned class-wide arbitration. The plaintiffs brought a putative class action against RHI in federal district court, asserting claims under the Fair Labor Standards Act. RHI moved to compel arbitration on an individual basis. The district court granted the motion in part, compelling arbitration but holding that the arbitrator must decide whether class-wide or individual arbitration was proper. The arbitrator subsequently entered an award in the plaintiffs' favor and ruled that the employment agreements allowed for class-wide arbitration. RHI filed a motion to vacate the award, which the district court denied.

The Third Circuit reversed, holding that the availability of class-wide arbitration is a threshold question for the court. Outlining the respective roles of courts and arbitrators, the Third Circuit explained that courts decide questions of arbitrability, *i.e.*, whether the parties agreed to submit a particular dispute to arbitration, and arbitrators then decide subsidiary questions arising out of a dispute that is properly before them. Questions of arbitrability generally fall into two categories: (1) disputes about whether a valid arbitration agreement exists between the parties (*i.e.*, whose claims (if any) the arbitrator may adjudicate), and (2) disputes about whether an admittedly valid arbitration agreement applies to the specific dispute (*i.e.*, what types of controversies the arbitrator may decide).

The Third Circuit held that the availability of class-wide arbitration implicates both categories, and thus, presents a question of arbitrability. First, the Court reasoned that class-wide arbitration enables the arbitrator to resolve claims of absent class members, and therefore affects whose claims may be arbitrated. Second, the Court explained that the differences between class-wide and individual arbitration are so fundamental that a choice between the two affects the "very type of controversy to be resolved."

The Court acknowledged that several decisions from the Supreme Court and the Third Circuit suggest a contrary conclusion. For example, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), a plurality of the Supreme Court concluded that class-wide arbitration did not present a question of arbitrability, but rather, a question about contract interpretation and arbitration procedures. Similarly, in *Quilloin v. Tenet Healthsystem Philadelphia, Inc.*, 673 F.3d 221 (3d Cir. 2012), the Third Circuit wrote that "the actual determination as to whether class action is prohibited is a question of interpretation and procedure for the arbitrator."

The *Opalinski* Court distinguished those decisions, emphasizing that it was not bound by *Bazzle* (as a plurality opinion) or the language in *Quilloin* (which was dicta). More importantly, the Third Circuit found strong indications in several post-*Bazzle* Supreme Court decisions that the Court

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would now hold that the availability of class arbitration is a question of arbitrability. In *Stolt-Nielsen S.A. v. Animal-Feeds International Corp.*, 559 U.S. 662 (2010), the Court stated that "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." And in a concurrence in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), Justice Alito expressed skepticism that the availability of class arbitration is a question the arbitrator should decide, noting that "it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members."

With its decision in *Opalinski*, the Third Circuit joins the Sixth Circuit as the only other court of appeals to have squarely decided that a court, not an arbitrator, must determine whether an arbitration agreement authorizes class-wide arbitration. It remains to be seen whether the Third Circuit's decision signals an increased willingness among federal appellate courts to address the "who decides" issue. Nonetheless, in light of the conflicting signals sent by the Supreme Court, there will continue to be uncertainty in this area of the law unless and until the Supreme Court provides more definitive guidance.

So, what can employers (and other parties to arbitration agreements) do on their own to eliminate this uncertainty? Most important, if the intention is to eliminate class arbitration, they should clearly state in the agreement that class arbitration is not permitted. Parties should also include clear and unambiguous language specifying whether they want the court or an arbitrator to decide questions of arbitrability in the event of a dispute such as a dispute over whether the agreement authorizes class-wide arbitration. Because "arbitration is a matter of contract, … a party cannot be required to submit to arbitration any dispute that he has not agreed to submit." ◆

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