Client Alert

August 2018

Tenth Circuit Further Fuels the Circuit Split Over Who Decides Whether Agreement Permits Class Arbitration

What Happened

In agreement with the Second and Eleventh Circuits, the Tenth Circuit held in *Dish Network L.L.C. v. Ray*, No. 17-1013, 2018 WL 3978537, at *6 (10th Cir. Aug. 21, 2018) that the arbitration agreement's incorporation of AAA rules was "clear and unmistakable" evidence that the parties intended that an arbitrator decide whether the agreement allows for arbitration of class claims.

The Takeaway

Circuit courts are split over whether the adoption of the AAA rules is clear and unmistakable evidence that the parties intended to have an arbitrator decide whether an agreement allows class arbitration. Parties entering into arbitration agreements need to examine whether the applicable circuit court has ruled on this issue and then carefully select the rules they choose.

The Circuit Split

The Tenth Circuit, relying on the Second Circuit's decision in *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 398–99 (2d Cir. 2018), held that incorporation of the AAA rules "provides clear and unmistakable evidence" that "the parties intended to delegate *all* issues of arbitrability to the arbitrator," including the question of class arbitration. *Dish*, 2018 WL 3978537, at *6 (emphasis in original). Noting its disagreement with the Third, Sixth and Eighth Circuits, the Tenth Circuit held that Colorado law did not require more specific language to delegate questions of classwide arbitrability to the arbitrator. *Id.* at *5.

The Tenth Circuit's decision is aligned with that of the Second Circuit in *Sappington*, 884 F.3d at 398–99, on which it relies, and, most recently, the Eleventh Circuit in *Spirit Airlines, Inc. v. Maizes*, No. 17-14415, 2018 WL 3866335, at *3 (11th Cir. Aug. 15, 2018). In *Sappington*, the Second Circuit held that the incorporation of AAA rules was "clear and unmistakable" evidence that the parties intended to delegate any questions of arbitrability to an arbitrator, including the question of class arbitrability, which trumped the presumption that courts should answer questions of arbitrability. 884 F.3d at 398–99. It held that state law determines how explicit the language must be to satisfy the "clear and unmistakable" standard, and Missouri law did not require more explicit language to demonstrate a clear and unmistakable intent to delegate the question of class arbitrability to an arbitrator. *Id.*

Six days before the Tenth Circuit issued its opinion, the Eleventh Circuit similarly held in *Spirit* that the parties' choice of AAA rules, which includes AAA's Supplementary Rules for Class Arbitrations, was "clear and unmistakable evidence that the parties chose to have an arbitrator decide whether their agreement provided for class arbitration." *Spirit Airlines*, 2018 WL 3866335, at *3. Like the Tenth Circuit, the Eleventh Circuit noted its disagreement with the Third, Fourth, Sixth and Eighth Circuits, and held that Supreme Court precedent did not require a higher burden for showing clear and

unmistakable evidence for questions of class arbitrability than for ordinary questions of arbitrability. *Id.* at *3–4.

The Third, Fourth, Sixth and Eighth Circuits, however, have held that adoption of the AAA rules is not clear and unmistakable evidence of the parties' intent to have an arbitrator decide whether the agreement allows class arbitration. *See Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972–73 (8th Cir. 2017); *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 876–77 (4th Cir. 2016); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 762–63 (3d Cir. 2016); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013). Unlike the Second, Tenth and Eleventh Circuits, these courts have held that there should be a higher burden for showing clear and unmistakable evidence for questions of class arbitrability than for ordinary questions of arbitrability. *See Catamaran*, 864 F.3d at 973; *Dell*, 817 F.3d at 875; *Chesapeake*, 809 F.3d at 763-64; *Reed Elsevier*, 734 F.3d at 599. They require more specific language delegating the question of classwide arbitrability because class arbitration is fundamentally different from individual arbitration in that it lacks both speed and efficiency. *Id.*

Due to this circuit split, parties entering into arbitration agreements need to educate themselves on whether the applicable circuit court has ruled on this issue and then draft their arbitration agreements accordingly. And if the applicable circuit court has not ruled on this issue, parties would be best advised to carefully consider and select the rules they choose because there may be provisions that could lead to unintended consequences relating to arbitrability.

The international arbitration and transnational litigation group at Hunton Andrews Kurth LLP will continue closely monitoring related jurisprudence. Please contact us if you have any questions or would like further information regarding this decision.

Contacts

Gustavo J. Membiela
gmembiela@HuntonAK.com

Beth Coplowitz
bcoplowitz@HuntonAK.com