# EXPOUNDING ON ARBITRABILITY: THE SEVENTH CIRCUIT JOINS THE GROWING RANKS OF CIRCUIT COURTS FINDING THAT COURTS PRESUMPTIVELY DECIDE THE AVAILABILITY OF CLASS ARBITRATION

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The U.S. Supreme Court has issued numerous decisions over the past decade addressing arbitration agreements. [1] In one of the Roberts Court's first forays into the arbitration arena, the Court held that class or collective arbitration is only available where the parties have affirmatively agreed to resolve their disputes through such procedures. [2] But who determines whether the parties have so agreed — a court or an arbitrator?

The Supreme Court has not yet answered that question. [3] But the federal courts of appeals have, largely ruling that the availability of class arbitration is a gateway question of arbitrability presumptively for a court to decide. [4] In *Herrington v. Waterstone Mortgage Corp.*, [5] the Seventh Circuit agreed. [6] The decision bolsters businesses' ability to obtain a decision as to whether they can compel individual arbitration from a court — especially in the absence of an express class arbitration waiver provision — and thus preserve their ability to seek an appeal of an unfavorable decision as of right.

## CASE BACKGROUND

Herrington filed a putative class and collective action against her employer Waterstone Mortgage Company ("Waterstone"), alleging wage and hour violations under the Fair Labor Standards Act and breach of her employment contract. [7] Based on the arbitration clause in Herrington's employment agreement, the district court compelled the case to arbitration. [8] The arbitration agreement contained a class action waiver, but Herrington argued that it was unenforceable under the National Labor Relations Act ("NLRA"). [9] Specifically, she asserted that because the NLRA grants workers the right "to engage in … concerted activities," it allows them to pursue class and collective actions against their employers. [10] The district court agreed, [11] and Herrington's claims proceeded on a class and collective-basis in arbitration.

The arbitrator then determined that despite the class action waiver provision, the parties' agreement authorized class and collective arbitration. [12] The arbitrator certified a class, and at the conclusion of the collective arbitration, issued a $10 million judgment for Herrington and the class. [13] After the district court entered a judgment enforcing the arbitration award, Waterstone appealed to the Seventh Circuit. [14]

## SEVENTH CIRCUIT DECISION

The Seventh Circuit considered two issues on appeal, namely (1) whether the district court incorrectly found that the class action waiver was unenforceable, and (2) whether it is for a court or an arbitrator to decide if an arbitration agreement permits class or collective arbitration. [15]

The Seventh Circuit dispatched the first question easily. While *Herrington* was on appeal, the Supreme Court ruled definitively that class action waivers in employment arbitration agreements are enforceable and do not violate the NLRA. [16] Accordingly, the Seventh Circuit held that the district court erred in striking the class action waiver. [17]

As to the second question, Herrington argued that notwithstanding the class action waiver, the arbitration agreement "reflects the parties' affirmative consent to class and collective arbitration." [18] The Seventh Circuit described Herrington's argument as "implausible" but found itself compelled to decide in which venue — court or arbitration — the argument should be considered. [19]

The Seventh Circuit first noted that "[e]very federal court of appeals to reach the question has held that the availability of class arbitration is a question of arbitrability." [20] The court next declared its agreement with those decisions, aligning itself with the Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits in holding that courts must decide whether an arbitration agreement permits class or collective arbitration. [21]

The Seventh Circuit predicated its decision on three bases. First, the court explained that the class-arbitration question requires determination of the scope of persons "with whom" the parties have agreed to arbitrate, a "foundational question of arbitrability" typically reserved for the courts. [22] Second, the court reasoned that the class-arbitration question implicates "whether the agreement to arbitrate covers a particular controversy," another fundamental question of arbitrability. [23] Third, and "most important," the court opined that "the structural features of class arbitration make it a 'fundamental' change from the norm of bilateral arbitration" [24] and "'fundamental' questions belong in the 'gateway' category" of questions that the courts decide. [25] In short, "[b]ecause of their distinct structure, class and collective arbitration require procedural rigor that bilateral arbitrations do not." [26]

The Seventh Circuit thus remanded the case to the district court to "conduct the threshold inquiry" to determine whether or not the agreement requires individual arbitration. [27]

## CONCLUSION

Every federal court of appeals that has considered the issue has found that the availability of class or collective arbitration is a question of arbitrability presumptively for a court to determine, with only clear and unmistakable delegation sufficing to shift the question to an arbitrator. Nonetheless, business entities that use arbitration agreements with employees, customers, or clients should carefully consider the law in all jurisdictions in which they operate and take care in drafting arbitration agreements to minimize the risk of being forced to arbitrate claims on a class or collective basis. This may include incorporation of an express class waiver provision. Indeed, the inclusion of that provision may turn out to be dispositive when the district court in *Herrington* considers the gateway question on remand, now that the Seventh Circuit has decided that the question is for the court, not the arbitrator, to decide.

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## NOTES

[1] *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010).

[2] *Id.* ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the parties agreed to do so.").

[3] *See* Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 n.2 (2013) ("*Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures." (internal citations omitted)); *Stolt-Nielsen*, 559 U.S. at 680 (noting that the Court "need not revisit that question here because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible.").

[4] *See* JPay, Inc. v. Kobel, --- F.3d ---, 2018 WL 4472207, at *8 (11th Cir. Sept. 18, 2018); Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 972 (8th Cir. 2017); Del Webb Cmties., Inc. v. Carlson, 817 F.3d 867, 877 (4th Cir. 2016); Eshagh v. Terminix Int'l Co., 588 F. App'x 703, 704 (9th Cir. 2014); Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594, 599 (6th Cir. 2013); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 331, 335 (3d Cir. 2014). *But see* Dish Network LLC v. Ray, 900 F.3d 1240, 1253–57 (10th Cir. 2018) (Tymkovich, C.J., concurring) (expressing the Chief Judge's belief that the majority position is flawed and that the availability of class arbitration is not a question of arbitrability for the Court).

[5] --- F.3d ---, 2018 WL 5116905 (7th Cir. Oct. 22, 2018).

[6] *Id.* at *1; *see also id.* at *3–7.

[7] *Id.* at *1.

[8] *Id.* at *2.

[9] *Id.*

[10] *Id.*

[11] *Id.* The district court ruled before the Supreme Court reached the opposite conclusion in *Epic Sys. Corp. v. Lewis*, --- U.S. ---, 138 S. Ct. 1612, 1619, 1632 (2018). To read more about the Supreme Court's decision in Epic Systems, see the K&L Gates alert *It's Epic: Supreme Court Approves Class-Action Waivers in Employment Agreements*.

[12] *See Herrington*, 2018 WL 5116905, at *3.

[13] *Id.*

[14] *See id.*

[15] *See id.*

[16] *Epic Sys. Corp.*, 138 S. Ct. at 1619, 1632.

[17] *Herrington*, 2018 WL 5116905, at *3.

[18] *Id.*

[19] *Id.*

[20] *Id.* at *4.

[21] *Id.* at *4-5; *see also JPay, Inc.*, 2018 WL 4472207, at *8; *Catamaran Corp.*, 864 F.3d at 972; *Del Webb Cmties.*, 817 F.3d at 877; *Eshagh*, 588 F. App'x at 704; *Reed Elsevier*, 734 F.3d at 599; *Opalinski*, 761 F.3d at 331, 335.

[22] *Herrington*, 2018 WL 5116905, at *5.

[23] *Id.*

[24] *Id.* at *5-6 (relying on U.S. Supreme Court decisions emphasizing the "fundamental" differences between individual and class arbitration).

[25] *Id.* at *5 (quoting *Reed Elsevier*, 734 F.3d at 598). For example, "the size of the suit and its potential impact on absent class members—cause class arbitration to diverge sharply from the bilateral model." *Id.*

[26] *Id.* at *6.

[27] *Id.* at *7.

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