WHEN "CLEAR AND UNMISTAKABLE" IS NEITHER CLEAR NOR UNMISTAKABLE: CIRCUIT SPLIT EMERGES AS TO WHETHER ARBITRATOR OR COURT SHOULD DECIDE CLASS ARBITRABILITY WHEN PARTIES INCORPORATE ARBITRATION FACILITY RULES INTO THEIR AGREEMENTS

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Less than a week apart, the U.S. Courts of Appeals for the Tenth and Eleventh Circuits issued similar rulings regarding class arbitration. Both courts examined the question of whether the incorporation of American Arbitration Association ("AAA") rules into agreements with consumers or employees presents clear and unmistakable evidence that an arbitrator, rather than a court, should determine whether the agreements permit class arbitration. And both courts answered in the affirmative. [1] These decisions create a circuit split with the Third, Fourth, Sixth, and Eighth Circuits, which have each held that the incorporation of AAA rules alone does not delegate the question of class arbitrability to an arbitrator. [2] As discussed below, this split may lead to the U.S. Supreme Court granting certiorari to resolve the issue.

BACKGROUND

In *Spirit Airlines, Inc. v. Maizes*, members of Spirit's $9 Fare Club initiated class arbitration against Spirit alleging that they did not receive the benefits that were guaranteed in exchange for their yearly membership fees. [3] Spirit sought to enjoin the class arbitration. [4] It argued that the applicable arbitration agreement did not provide for class proceedings. [5] A federal district court denied the injunction, ruling that because the arbitration agreement incorporated Rule 3 of AAA's Supplementary Rules for Class Actions, an arbitrator rather than a court must determine the question of class arbitrability. [6]

DISH Network LLC v. Ray reached a similar outcome. There, a DISH Network employee initiated an arbitration asserting state law class claims as well as collective claims under the federal Fair Labor Standards Act. [7] In construing the arbitration clause, the arbitrator decided that class arbitrability was not a gateway issue for a court but instead a question for the arbitrator. [8] In turn, the arbitrator ruled that the applicable arbitration agreement provided for both class and collective proceedings. [9] DISH Network petitioned a federal district court to vacate the ruling, but the court denied the petition. [10]

ANALYSIS

On appeal, both the Tenth and Eleventh Circuits focused on the impact the parties' incorporation of AAA rules had on the class arbitrability question. Both courts did so by assuming, without deciding, that the class arbitrability question is a so-called "gateway" question of arbitrability that a court decides unless the parties delegate it to an arbitrator through "clear and unmistakable" language in their arbitration agreement. [11]

Addressing the effect of the parties' incorporation of AAA rules on the gateway question, both courts relied upon existing circuit precedent to conclude that such incorporation is "clear and unmistakable" evidence of delegation of gateway questions to arbitrators. In *Maizes*, the Eleventh Circuit followed the reasoning in *Terminix International Co. v. Plamer Rach Ltd. Partnership* [12] and concluded that "the agreement's choice of American Arbitration Association rules, standing alone, is clear and unmistakable evidence that Spirit intended that the arbitrator decide th[e] question" of class arbitrability. [13] The *Ray* court concluded that the Tenth Circuit's "holding in *Belnap* (*v. Iasis Healthcare* [14]) is instructive," such that "when contracting parties incorporate the AAA rules into a broad arbitration agreement, … such an incorporation clearly and unmistakably evinces their intent to arbitrate arbitrability." [15] The courts also found support for their holdings in the state contract law applicable to each case. [16]

Both courts also noted that other circuits—namely the Third, Fourth, Sixth, and Eighth—have come to the opposite conclusion. Those circuits have held that incorporation of an arbitration facility's rules into the arbitration agreement is not "clear and unmistakable" evidence that the class arbitrability issue should be delegated to the arbitrator. [17] The courts based their decisions in large part on Supreme Court arbitration jurisprudence. But the Eleventh Circuit, while "respect[ing] the work of [its] sister circuits, … read Supreme Court precedent differently," concluding that jurisprudence "address[ed] the question of whether an agreement allows class arbitration at all, separate from the issue of who decides the question to begin with." [18] The Tenth Circuit was not so courteous. The court expressly "disagree[d] with the reasoning of these circuits." [19] The *Ray* court separated the issue of whether the class arbitrability question is a gateway question from the issue of whether, assuming it is, the parties nevertheless delegated it to the arbitrator. In doing so, the court noted that "[t]he fundamental differences between bilateral and classwide arbitration," which underlie the Supreme Court jurisprudence, "are irrelevant to us at this second stage of the analysis." [20]

POTENTIAL IMPLICATIONS

A distinct line has been drawn. At least four circuits had previously ruled that incorporating arbitration rules like the AAA rules was not by itself "clear and unmistakable" evidence that the parties intended to delegate the class arbitrability issue to an arbitrator, even if those rules provide that an arbitrator may determine whether the agreement provides for class proceedings. But now the Tenth and Eleventh Circuits have positioned themselves on the other side of the line. If the parties seek, and the Supreme Court grants, certiorari, it likely will be to decide the narrow issue presented in the Tenth and Eleventh Circuit decisions. It remains to be seen whether these decisions can adequately present the undecided question underlying all of these cases—namely whether the class arbitrability question is, in fact, a threshold question of arbitrability that a court decides absent clear and unmistakable evidence of delegation.

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[1] *Spirit Airlines, Inc. v. Maizes* --- F.3d ----, 2018 WL 3866335 (11th Cir. Aug. 15, 2018); *DISH Network LLC v. Ray*, --- F.3d ----, 2018 WL 3978537 (10th Cir. Aug. 21, 2018).

[2] *See Catamaran Corp. v. Towncrest Pharm.*, 864 F.3d 966, 972–73 (8th Cir. 2017); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 762–63 (3d Cir. 2016); *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 876–77 (4th Cir. 2015); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013).

[3] 2018 WL 3866335, at *1.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Ray*, 2018 WL 3978537, at *1.

[8] *Id.*

[9] *Id.* at *2.

[10] *Id.*

[11] *Maizes*, 2018 WL 3866335, at *2 n.1; *Ray*, 2018 WL 3978537, at *4. Notably, in *Ray*, Chief Judge Tymkovich of the Tenth Circuit issued a concurring opinion setting forth his view that the availability of class arbitration is *not* a gateway question of arbitrability. *See Ray*, 2018 WL 3978537, at *12-15 (Tymkovich, C.J., concurring). In doing so, Chief Judge Tymkovich split from and rejected the contrary decisions of the Third, Fourth, Sixth, and Eighth Circuits. *See id*. at 12-13.

[12] 432 F.3d 1327, 1331 (11th Cir. 2005).

[13] *Maizes*, 2018 WL 3866335, at *1; *see also id*. at *2-3.

[14] 844 F.3d 1272, 1280 (10th Cir. 2017).

[15] *Ray*, 2018 WL 3978537, at *4-5.

[16] *See Maizes*, 2018 WL 3866335, at *5; *Ray*, 2018 WL 3978537, at *5.

[17] *See Maizes*, 2018 WL 3866335, at *3; *Ray*, 2018 WL 3978537, at *5.

[18] *Maizes*, 2018 WL 3866335, at *4 (discussing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010)).

[19] *Ray*, 2018 WL 3978537, at *5-6.

[20] *Id.* at *6.

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