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Practice Group:

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It's a Whole New Game in *Opalinski v. Robert Half International, Inc.* – Third Circuit Rules That Courts Decide the Availability of Classwide Arbitration

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There are significant differences between individual (or "bilateral") arbitration and classwide arbitration that can substantially affect the nature of arbitration as a dispute resolution mechanism. Individual arbitration can be an inexpensive, fast method for solving disagreements. In contrast, classwide arbitration can have all the drawbacks of classwide litigation but with limited ability to seek review of the results, not to mention due process concerns about the preclusive effect on absent class members. While the United States Supreme Court has recognized these differences,[1] it has yet to decide whether the availability of classwide arbitration is a "question of arbitrability" presumptively decided by courts, or whether it is a procedural question presumptively decided by arbitrators.

In *Opalinski v. Robert Half International Inc.*,[2] the Third Circuit became the second federal court of appeals to decide the issue, aligning itself with the Sixth Circuit in holding that courts rather than arbitrators should ordinarily decide whether an agreement authorizes classwide arbitration. The Third Circuit's holding, and the trend it represents, will be welcome news to corporate defendants. Having a court decide the question preserves the greatest ability for a defendant to obtain appellate review of an outcome allowing classwide arbitration even though the agreement lacks a term providing for it.

Background

In 2003, the Supreme Court issued a plurality decision, *Green Tree Financial Corp. v. Bazzle*,[3] which suggested that ordinarily an arbitrator, whose decisions are subject to limited review under the Federal Arbitration Act,[4] should make that decision.[5] Subsequent Supreme Court cases, however, have cast doubt on the *Bazzle* plurality's decision. For instance, in *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*,[6] the Supreme Court reiterated that *Bazzle* was a mere plurality ruling and stated that "consistent with our precedents emphasizing the consensual basis of arbitration, we see the question as being whether the parties agreed to authorize class arbitration," suggesting (without deciding) that the question was one of

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[1] *See Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 686–87 (2010) (explaining the numerous differences between bilateral and classwide arbitration); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) ("changes brought about by the shift from bilateral arbitration to class-action arbitration are fundamental").

[2] No. 12-444, --- F.3d ----, 2014 WL 3733685 (3d Cir. July 30, 2014).

[3] 539 U.S. 444 (2003).

[4] *See* 9 U.S.C. § 10.

[5] *Bazzle*, 539 U.S. at 451, 452–53 (plurality op.).

[6] 559 U.S. 662 (2010).

arbitrability, not procedure.[7] In 2013, the Sixth Circuit considered the question in *Reed Elsevier, Inc. v. Crockett*[8] and, in light of *Stolt-Nielsen*, reached the opposite conclusion from the *Bazzle* plurality.[9] Until the Third Circuit's decision in *Opalinski*, no other court of appeals had ruled on the question.

Analysis

On July 30, 2014, the Third Circuit issued a decision in *Opalinski*, holding that whether an arbitration agreement provides for classwide arbitration is a gateway "question of arbitrability" presumptively for a court, not an arbitrator, to decide.[10] The Third Circuit noted that although federal policy favors arbitration agreements, courts play a limited role in determining gateway "questions of arbitrability" such as whether the parties are bound by a given arbitration clause or whether an arbitration clause applies to a particular type of controversy.[11] On the other hand, ordinary procedural questions are not "questions of arbitrability" and are presumptively for an arbitrator to decide.[12] The Third Circuit concluded that the availability of classwide arbitration falls in the gateway category for courts to decide, because the issue implicates whose claims an arbitrator may resolve and the type of controversy submitted to arbitration.[13]

In support of its holding, the Third Circuit cited to three post-*Bazzle* Supreme Court decisions. First, the Third Circuit noted that in *Stolt-Nielsen*, the Supreme Court stated "only the plurality" in *Bazzle* had decided that an arbitrator should determine whether a contract permits classwide arbitration. Thus, the Third Circuit recognized that *Bazzle* is not binding on this point.[14] The *Stolt-Nielsen* Court also expressly disclaimed classwide arbitration as simply procedural.[15] Second, in *AT&T Mobility LLC v. Concepcion*,[16] the Supreme Court re-emphasized its statement in *Stolt-Nielsen* that the "changes brought about by the shift from bilateral arbitration to class-action arbitration are fundamental."[17] Third, in *Oxford Health Plans LLC v. Stutter*,[18] the Supreme Court again stated that it "has not yet decided whether

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[7] *See id.* at 680, 687.

[8] 734 F.3d 594 (6th Cir. 2013), *cert denied* 134 S. Ct. 2291 (2014). For more information regarding the Sixth Circuit's decision in *Reed Elsevier*, along with the Supreme Court's denial of the petition for writ of certiorari in that case, see K&L Gates's prior client alert, Supreme Court Will Not Review Sixth Circuit Ruling That Courts Decide the Availability of Classwide Arbitration.

[9] 734 F.3d at 599.

[10] *Opalinski*, 2014 WL 3733685, at *7.

[11] *Id.* at *3. The parties may delegate such questions to an arbitrator through use of a clear and unmistakable delegation clause in the arbitration agreement. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

[12] *Opalinski*, 2014 WL 3733685, at *3. Similarly, the parties may reserve such questions for a court through a clear and unmistakable reservation clause in the arbitration agreement. *See Howsam*, 537 U.S. at 83.

[13] *Opalinski*, 2014 WL 3733685, at *4–5.

[14] *See Stolt-Nielsen*, 559 U.S. at 680.

[15] *Id*. at 687 (the differences between class and individual arbitration cannot be characterized as a question of "merely what 'procedural mode' [i]s available to present [a party's] claims"); *id*. at 685 ("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"); *see also id*. at 686–87 (explaining the numerous differences between individual and class arbitration).

[16] 131 S. Ct. 1740 (2011).

[17] *Id*. at 1750.

[18] 133 S. Ct. 2064 (2013).

the availability of class arbitration" is for the court or for an arbitrator to resolve.[19] The Third Circuit also took into consideration Justice Alito's warning in his concurrence in *Oxford Health* that courts should be wary of concluding that the availability of classwide arbitration is for an arbitrator to decide, because the decision implicates the rights of absent class members without their consent.[20]

In addition to examining the Supreme Court's post-*Bazzle* jurisprudence, the Third Circuit looked to see how the other courts of appeals that have considered the question had resolved it. The Third Circuit stated that the Sixth Circuit's analysis in *Reed Elsevier* "is persuasive and guides our own." [21] The Sixth Circuit had also drawn from the reasoning in in *Stolt-Nielsen*, *Concepcion*, and *Oxford Health*, holding that "whether an arbitration agreement permits classwide arbitration is a gateway matter," which is presumptively "for judicial determination[.]"[22] The Third Circuit rejected appellees' argument that decisions from the First, Second, and Eleventh Circuits suggested that the availability of class arbitration is a question of procedure for an arbitrator to decide, concluding that "none of those Circuits ruled, or even expressed a view" on this issue.[23]

Conclusion

As a result of the Third Circuit's decision in *Opalinski*, the only two federal courts of appeals to have resolved the "who decides" issue both concluded that where an arbitration agreement does not delegate the question of arbitrability to an arbitrator and is otherwise silent on the issue, the availability of class arbitration should be decided by a court and not by an arbitrator. These rulings are significant because they mark a shift away from a line of district court cases which, in relying on the *Bazzle* plurality decision, found that an arbitrator should decide the issue. Having a court make that decision, however, may be of great importance to entities such as corporate defendants, which generally desire to avoid classwide arbitration and want to preserve their ability to obtain *de novo* appellate review of a decision allowing such a proceeding—available from a court's decision but not from an arbitrator's decision. The Third Circuit's *Opalinski* decision, as with the Sixth Circuit's *Reed Elsevier* decision, continues the trend toward an approach that preserves *de novo* appellate review of this important question.

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[19] *Id.* at 2069 n.2.

[20] 133 S. Ct. at 2071–72 (Alito, J., concurring) ("at least where absent class members have not been required to *opt in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used") (emphasis in original).

[21] *Opalinski*, 2014 WL 3733685, at *6.

[22] *Reed Elsevier*, 734 F.3d at 699.

[23] *Opalinski*, 2014 WL 3733685, at *6. The Third Circuit distinguished the First Circuit's decision in *Fantastic Sam's Franchise Corp. v. FSRO Ass'n Ltd.*, 683 F.3d 18 (1st Cir. 2012), as involving associational arbitration, not class arbitration, and as expressly recognizing that an "associational action . . . is [not] equivalent to a class action." *Opalinski*, 2014 WL 3733685, at *6 (quoting *Fantastic Sams*, 683 F.3d at 23). The Third Circuit noted that in *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011), the Second Circuit stated repeatedly that the parties had submitted the question whether their contract allowed for classwide arbitration to the arbitrator, and that the "who decides" question was not before the Court. *Id.* Finally, the Third Circuit noted that the Eleventh Circuit has specifically stated in *Southern Communications Services Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013), that the question remains unresolved. *Id.* (citing *S. Commc'ns Servs.*, 720 F.3d at 1359 ("Like the Supreme Court, we also have not decided whether the availability of class arbitration is a question of arbitrability[.]")).

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