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ARBITRATION

Expert Analysis

Overcoming the Presumption That Courts Must Decide Class Arbitrability

Arbitration columnists Samuel Estreicher and Holly H. Weiss write: In light of 'Epic Systems', the question whether the court or arbitrator decides that an arbitration agreement authorizes a class-wide proceeding when the agreement is silent on the issue has taken on enhanced significance. A recent decision in the Eleventh Circuit addresses this question.

By **Samuel Estreicher**

And **Holly H. Weiss**

Three arbitration cases are on the U.S. Supreme Court's docket this month. Each involves various aspects of the Federal Arbitration Act (FAA). In *New Prime v. Oliveira,* the court will decide whether the FAA applies to independent contractors of a transportation company. See Samuel Estreicher & Holly H. Weiss, "SCOTUS to Decide If the Federal Arbitration Act Exemption for Transportation Workers Extends to Independent Truckers," *New York Law Journal* (March 16, 2018). In *Lamps Plus v. Varela,* the court will address how parties can indicate their agreement to participate in class arbitration. See Samuel Estreicher & Holly H. Weiss, "High Court to Decide When a Contract Is Ambiguous on Question of Class Arbitration," *New York Law Journal* (May 31, 2018). Finally, the court will consider whether a court or arbitrator should determine the arbitrability of a claim for injunctive relief, when the claim is carved out from the arbitration agreement, in *Henry Schein v. Archer White Sales*.

More arbitration cases may lie on the horizon. For example, the Supreme Court's decision earlier this year in *Epic Systems v. Lewis* indicated further judicial acceptance of class action waivers in rejecting a challenge under the "concerted activity" provision of §7 of the National Labor Relations Act to agreements to arbitrate that include such waivers. In light of *Epic Systems*, the question whether the court or arbitrator decides that an arbitration agreement authorizes a classwide proceeding when the agreement is silent on the issue has taken on enhanced significance. A recent decision in the Eleventh Circuit, in *JPay v. Koebel,* Case No. 17-13611 (Sept. 19, 2018), addresses this question.

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In *JPay*, two customers sought to arbitrate their consumer claims

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against JPay on a classwide basis. JPay sought to compel bilateral arbitration, arguing that it had not agreed to arbitrate on a class basis. The district court determined that the class arbitrability question was for the court to decide, and determined that, because the agreement was silent on class arbitration, class arbitration was not available.

The Eleventh Circuit agreed that when a contract is silent on the availability of class arbitration, the court should decide the class-arbitrability question, because it is a "gateway" question. Such "gateway" questions of arbitrability are "presumptively" for the courts to decide. "If class proceedings are available, the arbitration is fundamentally changed," the Eleventh Circuit wrote. Therefore, "we cannot read consent to arbitration and silence on the class availability question as necessarily implying consent to an arbitrator's deciding whether a very different 'type' of proceeding is available. As a result, class availability is a question of arbitrability." The Eleventh Circuit's view is consistent with decisions in the Third, Fourth and Eighth Circuits.

The Eleventh Circuit's decision diverges from decisions of other courts, however, with respect to the question whether language in the arbitration agreement clearly and unmistakably evinced a joint intent to overcome the presumption that the court must decide the class-arbitrability question. See *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 83 (2002). The court of appeals found compelling that the arbitration agreement referenced the rules of the American Arbitration Association (AAA) three times, holding that "this alone serves as a clear and unmistakable delegation of questions of arbitrability to an arbitrator." By contrast, the Third, Sixth and Eighth Circuits have held that the incorporation of AAA Rules by reference did not delegate the question of class action of availability. See *Catamaran v. Towncrest Pharmacy,* 864 F.3d 966, 973 (8th Cir. 2017); *Chesapeake Appalachia v. Scott Petroleum*, 809 F.3d 746, 761-62 (3d Cir. 2016); *Reed Elsevier v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

The Eleventh Circuit also found that general delegation language in the arbitration agreement "quite independently" overcame the presumption. The parties to the arbitration agreement expressly agreed that "[t]he ability to arbitrate the dispute, claim or controversy shall likewise be determined in the arbitration," and the arbitration agreement required the parties to arbitrate "*any and all* such disputes, claims or controversies" (emphasis in original) Accordingly, the expression of their intent to delegate questions of arbitrability to the arbitrator was "unequivocal." The Second and Fifth Circuits have found comparable language sufficient to overcome the presumption. See *Wells Fargo Advisors v. Sappington,* 884 F.3d 392, 395 (2d Cir. 2018) ("Any controversy relating to your duty to arbitrate hereunder, or to the validity or enforceability of this arbitration clause, or to any defense to arbitration, shall also be arbitrated."); *Robinson v. J&K Admin. Mgmt. Servis.*, 817 F.3d 193, 194 (5th Cir. 2016) (Arbitration agreement required arbitration of "claims challenging the validity or enforceability of this Agreement … or challenging the applicability of the Agreement to a particular dispute or claim.").

If the questions presented in *JPay* advance to the Supreme Court, the court will have the opportunity to determine whether the availability of class arbitration is a "gateway" question, reserved for resolution by courts rather than arbitrators, or a procedural one to be determined by arbitrators. In addition, the Supreme Court could provide guidance to parties as to how to ensure the parties' agreement—be it a determination of arbitrability by courts or by arbitrators—is enforced as the parties intended.

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