CARLTON FIELDS

California Supreme Court Holds that Whether Arbitration Will Proceed on Class Basis is an Issue for Arbitrator, not Court

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California's back-and-forth on arbitrations and class actions continued again this week.

In a key 4-3 decision the California Supreme Court held that the arbitrator—not the court—can decide whether an arbitration agreement permits or prohibits class-wide arbitration. This means plaintiffs will find themselves in arbitration and unable to use courts to delay or frustrate employment and consumer agreements with arbitration/class action waiver provisions.

In *Sandquist v. Lebo Automotive, Inc.*, No. S220812 (Cal. July 28, 2016), the California Supreme Court affirmed the Court of Appeal's holding that the availability of class proceedings under an arbitration agreement is a question of contract interpretation for the arbitrator to decide.

The court explained that the issue is first a matter of party agreement. Where the arbitration agreement is ambiguous, as it was here, general state laws governing contract interpretation should apply. The court found that under California contract law, the broad language in the parties' arbitration provisions allocate the decision about the availability of class arbitration to the arbitrator, not the court. However, because the parties had not expressly opted for the application of state law, the court examined whether the Federal Arbitration Act (FAA) imposes a presumption in favor of a court deciding the issue of class arbitration.

In finding that there is no presumption under the FAA in favor of a court deciding this issue, the majority relied on the U.S. Supreme Court's decision in *Green Tree Financial Inc. v. Bazzle*, 539 U.S. 444 (2003), in which the plurality found that whether an agreement permits class-wide arbitrations

is a procedural question that does not fall within the "narrow" class of gateway questions for a court to decide.

However, the majority noted that the U.S. Supreme Court has issued several decisions after *Green Tree* which suggest that *Green Tree* does not contain a controlling view concerning what presumption, if any, the FAA requires when interpreting the agreement as to who decides class arbitration availability. The dissenting opinion also pointed out that where an agreement is ambiguous, "every federal court of appeals to consider the issue on the merits has held that the availability of class arbitration is a question for a court, rather than an arbitrator."

The California Supreme Court's decision contributes to existing state and federal split of authority over who should decide whether an arbitration agreement permits class arbitration. Given this split, it is likely that the U.S. Supreme Court will eventually take up the issue. Until then, this is a significant development under California law and highlights the importance of drafting arbitration agreements that expressly address whether the agreement applies to class claims and include language specifying that questions of class arbitrability are for a court to decide. Additionally, employers should consider including express class action waivers in arbitration agreements.

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