CARLTON FIELDS

Seventh Circuit: Class Arbitration Is For Courts to Decide, Not Arbitrators

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In 2011, a former employee of Waterstone Mortgage Corp. filed a class action against Waterstone alleging violation of the Fair Labor Standards Act and breach of contract. The U.S. ates District Court for the Western District of Wisconsin compelled arbitration pursuant to an agreement between the plaintiff and Waterstone, but it struck as unlawful a waiver clause that appeared to forbid class or collective arbitration of her claims, reasoning that the plaintiff could not waive her right to bring a class action under the National Labor Relations Act. Over Waterstone's objection, the arbitrator conducted a collective arbitration and ultimately awarded more than $10 million in damages and fees to the plaintiff and 174 similarly situated employees. On appeal, the Seventh Circuit was faced with reconciling the district court's decision with a subsequently decided U.S. Supreme Court case, *Epic Systems Corporation v. Lewis,* 138 S.Ct. 1612 (2018). *Epic Systems* upheld the validity of waiver provisions like the one at issue here, and therefore, if the district court's imposition of collective arbitration on Waterstone violated that waiver, the Seventh Circuit would be required to instruct the district court to vacate the award.

The primary issue on appeal in *Herrington v. Waterstone Mortgage Corp.*, No. 17-3609 (7th Cir. Oct. 22, 2018) was whether the district court incorrectly struck the subject waiver from the parties' arbitration agreement. The arbitration clause in plaintiff's employment agreement with Waterstone stated:

> In the event that the parties cannot resolve a dispute by the [alternative dispute resolution] provisions contained herein, any dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims. Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement.

Yet, despite the Supreme Court's holding in *Epic Systems*, the plaintiff here did not concede that collective arbitration violated the waiver; instead, she argued that the arbitration agreement permitted collective arbitration of her claims despite the agreement's express waiver language. Therefore, the Seventh Circuit framed the issue on appeal as such: "If the availability of class or collective arbitration is a threshold question of arbitrability, the district court has to decide it. Otherwise, it falls to the arbitrator."

The Panel ultimately agreed with "every federal court of appeals to reach [that] question," which included the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits, and held that the availability of class or collective arbitration is a threshold question of arbitrability. In so finding, the court reasoned that "[d]etermining whether [an] agreement reflects the parties' consent to class or collective arbitration requires the decision maker to determine whether the parties agreed to arbitrate those disputes as well. And that is a gateway matter for the court to decide." In addition, the court reasoned that such "fundamental" questions belong in the "gateway" category in part due to the Supreme Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation,* 559 U.S. 662 (2010), which found that class arbitration is available only if an arbitration agreement contains evidence that the parties affirmatively consented to that procedure. As such, the court noted that the structural features of class arbitration make it a "fundamental" change from the norm of bilateral arbitration. Therefore, on remand, the district court, rather than the arbitrator, must evaluate the plaintiff's contract with Waterstone to determine whether it permits class or collective arbitration.

Although predictions are hazardous, in all likelihood, the district court will find that the applicable arbitration clause does not authorize class or collective arbitration, particularly due to the fact that the putative class—as well as the ultimate opt-in class—includes employees who did not sign arbitration agreements with Waterstone.

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