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Client Alert Commentary

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Who Is Presumptively Authorized To Order Class Arbitration? Circuit Courts Weigh In

Recent circuit court decisions have strategic implications for companies facing potential class arbitration claims.

Key Points:

- The Eighth and Ninth Circuits both found in separate cases that the authority to determine whether an agreement allows for class arbitration lies with courts, unless contracting parties specify in advance that an arbitrator should decide all issues.
- Companies that wish to update their contracts and contracting policies in light of the recent decisions should consider specific factors.

Two recent Eighth and Ninth Circuit decisions have found that courts, rather than arbitrators, presumptively decide whether an agreement allows for class-wide arbitration. However, that presumption is not absolute. Contracting parties have the power to choose, in advance, whether they want an arbitrator to decide all issues (including the availability of class arbitration), or whether to carve out this particular question for the judicial system. As the "who decides" issue can be critically important for companies facing potential class arbitration claims, this *Client Alert* discusses the background of these recent cases, analyzes the pros and cons of an arbitrator versus a court deciding this important threshold issue, and provides some sample language that companies can consider as a potential starting point for drafting provisions to crystalize their intentions and avoid dispute.

Background

In *Stolt-Neilsen, S.A. v. AnimalFeeds, Int'l Corp.*,[1] the Supreme Court held that a party cannot be forced to engage in class-wide arbitration unless there is a "contractual basis for concluding that the party agreed to do so."[2] Following this ruling, however, parties still frequently dispute which party can decide whether a contract allows for class arbitration.

In recent weeks, both the Eighth and Ninth Circuits have weighed in on this issue, finding that courts not arbitrators presumptively decide whether courts allow class arbitration, unless the parties have delegated the authority to the arbitrator. The Eight and Ninth Circuit decisions are notable both because they join the majority of circuits in resolving the "who decides" issue in favor of the courts,[3] and because the facts demonstrate the importance of drafting unambiguous class arbitration waivers in the first instance to avoid lengthy and expensive disputes on this issue.

Recent Developments

Varela v. Lamps Plus, Inc.:[4] In *Varela*, an employee filed a class action complaint against Lamps Plus after the company experienced a data breach that leaked private employee data. Lamps Plus moved to compel arbitration pursuant to an employment agreement; the employee opposed, agreeing that the dispute was subject to arbitration, but arguing that the contract allowed for class-wide arbitration. The district court found that the court should decide the issue, and held that the court construed the contractual silence against Lamps Plus as the drafter of the agreement, meaning that the court allowed class arbitration.[5] On August 3, 2017, the Ninth Circuit affirmed.[6] The majority found that the district court was correct in interpreting the language of the employment agreement — stating that the employee agreed to "arbitration ... in lieu of any and all lawsuits or other civil legal proceedings related to my employment" — as broad enough to allow class arbitration.[7] Judge Fernandez dissented, finding that the "Agreement was not ambiguous" and refusing to join in what he saw as the majority's "palpable evasion of *Stolt-Nielsen*."[8]

Varela is therefore not only notable in finding that the court is the presumptive decision maker, but also underscores the importance of drafting a clear and unambiguous provision waiving the right to any class-wide arbitration claims. Although the *Varela* decision is unpublished, it may prove to be a cautionary tale for companies hoping to rely on silence, rather than an express provision, to avoid class arbitration.

Catamaran Corp. v. Towncrest Pharmaceuticals:[9] On July 28, 2017, the Eighth Circuit issued an opinion similarly finding that courts decide whether courts will allow class arbitration — not arbitrators. In *Catamaran Corp. v. Towncrest Pharmaceuticals*,[10] four pharmacies filed a demand for class arbitration against Catamaran — a pharmacy benefit manager that had contracts with 85 pharmacies, including claimants. Catamaran then filed a declaratory relief action in district court, asking the court to find that the agreement did not permit class arbitration. The district court held that the arbitrator should decide whether the case could proceed as a class action or as individual claims, explaining that the American Arbitration Association (AAA) rules state that "the arbitrator shall determine as a threshold matter ... whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."[10]

The Eighth Circuit reversed, reasoning that the question of class arbitration was substantive in nature and too important to decide without the ability for meaningful judicial review, and so, typically, courts should take the decision. The Eight Circuit therefore remanded the case back to the district court to decide whether the contract allowed for class arbitration on the merits. In so holding, however, the Eighth Circuit clarified that "[e]ven though we presume the question of class arbitration lies with the courts, parties to an agreement may nonetheless commit the question to an arbitrator."[11] The *Catamaran Corp.* case highlights the ability for companies to make a conscious, strategic choice as to which party decides whether class arbitration is available.

Court Decision Versus Arbitrator Decision: the Pros and Cons

Given the unique situations in which contracts arise, there is no one-size-fits-all solution to the question of whether companies would be better off leaving the question of class arbitration to the arbitrator or to a judge. Nonetheless, the chart below includes some of the factors that companies interested in updating their contracts and contracting policies should consider in light of the recent decisions regarding delegating to a court versus an arbitrator:

Factors to Consider In Appointing a Court Versus an Arbitrator to Decide Class Arbitration Issue		
Issue	**Court**	**Arbitrator**
Judicial Review	If a court decides the class arbitration issue, then that issue is appealable, therefore allowing for meaningful judicial review.	If an arbitrator decides the issue of class arbitration, a federal court can only review the decision on the very limited grounds allowed by the Federal Arbitration Act.[12] Note, however, that many of the major arbitration associations, including AAA, JAMS, and Civil Procedure Rules (CPR), now have rules in place for appellate review in arbitration, if the agreement expressly allows for it.[13] Thus, a company concerned about the lack of appellate rights in an arbitral forum may consider including a provision stating the parties agree that a party may appeal any decision regarding or relating to the existence, validity, or enforceability of the no-class-arbitration clause pursuant to the arbitration association's appellate rules.
Speedy and Inexpensive Resolution	Electing to "battle it out" in district court could prove more time-consuming and be more expensive for the same reasons that litigation generally tends to be less expedient than arbitration. The Eighth Circuit's *Catalan* case, for instance, has been pending for almost three years, and the procedural issue of whether the agreement allows class arbitration is still yet to be decided.	Arbitrations, by their nature, tend to be resolved more quickly. Often, arbitration allows for less discovery than litigation, and over a shorter timeframe.[14] The AAA, for example, reports that the median case is resolved in its entirety 11.6 months from the date of filing.[15]
Privacy	Generally, all filings in district court are available to the public.	The filings in private arbitration, in contrast, generally are not publicly available. Thus, for parties who prefer arbitration because they are able to resolve disputes in a less public forum, may wisely choose to have the arbitrator decide the availability of class arbitration so that these benefits are not lost when the parties are forced to litigate the class arbitration issue in a public forum.[16]

Sample Language

The following sample clauses illustrate two potential ways that parties can clarify whether they want the court or the arbitrator to decide the class arbitration issue, and may provide a useful starting point in the drafting process:

Courts to Decide Non-Availability of Class Arbitration:

A. **No Class Action Procedure.** Notwithstanding any of the foregoing or any other provision of this Agreement, class arbitration is not permitted under any circumstance. You and Company agree that, by entering into this Agreement, YOU AND COMPANY MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

B. **Court To Decide Disputes Regarding Nonavailability Of Class Action Procedure.** Although the non-availability of any form of representative or class proceeding is clear from this Agreement, should any dispute arise regarding or relating to the existence, validity, enforceability, or interpretation of Section A above, the United States District Court for the Southern District of New York (or, if no federal jurisdiction exists, then the New York Supreme Court for the County of New York) shall have the sole and exclusive jurisdiction to hear and determine the issue.

Arbitrator to Decide Non-Availability of Class Arbitration:

A. **No Class Action Procedure.** Notwithstanding any of the foregoing or any other provision of this Agreement, class arbitration is not permitted under any circumstance. You and Company agree that, by entering into this Agreement, YOU AND COMPANY MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings or more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

B. **Arbitrator to Decide Disputes Regarding Nonavailability of Class Action Procedure.** Although the non-availability of any form of representative or class proceeding is clear from this Agreement, should any dispute arise regarding or relating to the existence, validity, enforceability or interpretation of Section A above, the arbitrator (and not the courts) shall have the sole and exclusive jurisdiction to hear and determine the issue.

Companies should keep in mind that these sample provisions are merely examples, and that particular contracts may require different language, depending on the type of contract, the goals of the parties, and the state law governing the agreement.

Conclusion

Given the very significant liability that companies may face in class-wide arbitration, the question of whether class arbitration is available — and who decides that issue — is one of tremendous importance for any company that regularly enters into contracts with consumers, employees, website visitors, and others. Fortunately, recent court decisions have clarified that this issue is typically up to the contracting parties to decide. Accordingly, parties should not leave this issue to chance. Instead, companies should

consider their individual circumstances, as well as the risks and benefits of allowing a court versus an arbitrator to decide whether class arbitration is available in their unique situation, and expressly incorporate their choice of decision-maker into their agreements. Above all, companies should use the clearest terms possible to state that arbitrations must proceed solely on an individual basis, and that any right to engage in class-wide arbitration has been waived.

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Endnotes

1 559 U.S. 662 (2010).

2 *Id.* at 684 (2010).

3 *Compare, e.g., Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016) (holding consent to class arbitration is presumptively for the court to decide); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016) (same); & *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013) (same), *with Robinson v. J & K Admin. Mgmt. Servs., Inc.*, 817 F.3d 193 (5th Cir. 2016) (holding that consent to class arbitration is presumptively for the arbitrator to decide).

4 No. 16-56085, 2017 U.S. App. LEXIS 14284 (9th Cir. Aug. 3, 2017) (unpublished).

5 *Varela v. Lamps Plus, Inc.*, No. ED CV 16-577, 2016 U.S. Dist. LEXIS 188771, at *6 (C.D. Cal. Dec. 27, 2016).

[6] *Varela*, 2017 U.S. App. LEXIS 14284, at *6.

[7] *Id.* at *3-4.

[8] *Id.* at *6 (Fernandez, J., dissenting).

[9] No. 16-3275, 2017 U.S. App. LEXIS 13689 (8th Cir. July 28, 2017).

[10] *Catamaran Corp. v. Towncrest Pharm.*, No. 4:14-cv-00383, 2016 U.S. Dist. LEXIS 180868, at *16 (S.D. Iowa July 5, 2016).

[11] *Catamaran Corp.*, 2017 U.S. App. LEXIS 13689, at *10-11.

[12] Hall Street Assoc. v. Mattel, Inc., 552 U.S. 576 (2008).

[13] *See, e.g.*, American Arbitration Association, Optional Appellate Arbitration Rules, (Nov. 1, 2013), *available at* https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf; JAMS Optional Arbitration Appeal Overview (June 2003), *available at* https://www.jamsadr.com/appeal/; CPR Appellate Arbitration Procedure (2015); *available at* https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure.

[14] *See Galvan v. Michael Kors USA Holdings, Inc.*, No. 16-cv-07379, 2017 U.S. Dist. LEXIS 9059, at *22-23 (C.D. Cal. Jan. 19, 2017) (noting that "a limitation on discovery is one important component of the simplicity, informality, and expedition of arbitration")

[15] *See* American Arbitration Association, Measuring the Costs of Delays in Dispute Resolution (June 2017), *available at* http://go.adr.org/impactsofdelay.html.

[16] *See Stolt-Nielsen*, 559 U.S. at 686 (noting that parties often prefer arbitration because of the "presumption of privacy and confidentiality that applies in many . . . arbitrations").