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Availability of Class Arbitration an Issue for the Courts

The availability of class arbitration is an issue for the courts to decide in the first instance—at least when the parties' arbitration agreement is *silent* on this issue. *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016).

Home purchasers, the plaintiffs, filed an arbitration demand arising from alleged construction defects. The plaintiffs in their demand sought class arbitration. The relevant agreement contained an arbitration clause, and the arbitration case manager subsequently notified the parties that the arbitrator would decide whether the home sales agreement permitted class arbitration.

The defendants then filed a federal-court complaint seeking to compel bilateral (as opposed to class) arbitration and a motion for summary judgment that the availability of class arbitration should be decided by the court in the first instance, not the arbitrator. The district court denied the defendants' motion for summary judgment. The district court held that the availability of class arbitration under the parties' contract was a "threshold inquiry" for the arbitrator rather than the court. It reasoned that whether the arbitration clause permitted class arbitration was a "simple" contract interpretation issue that "concerns the procedural arbitration mechanisms available to" the plaintiffs. The defendants appealed, but the Fourth Circuit disagreed and reversed.

In reaching its decision, the Fourth Circuit observed that the Supreme Court "has identified two categories of threshold questions—procedural questions for the arbitrator, and questions of arbitrability for the court." It acknowledged that a plurality of the Supreme Court in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) had found that the availability of class arbitration "was a procedural one for the arbitrator" but then noted that more recent Supreme Court precedent—including *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___, 133 S.Ct. 2064 (2013) and *Stolt-Nielsen S.A. v. AnimalFeeds Intern'l Corp.*, 559 U.S. 662 (2010)—pointed in the opposite direction. Also guiding the Fourth Circuit's analysis was the notion that review of class arbitrations is far more limited than traditional class actions, as well as the Supreme Court's observation in *Stolt-Nielsen* that class-action arbitration "changes the nature of arbitration to such a degree that it cannot be presumed that the parties consented to it simply by agreeing to submit their disputes to an arbitrator."

The Fourth Circuit recognized that parties *could* agree that the issue was one for the arbitrator to decide in the first instance, but it held that unless the parties "unmistakably" provided that the issue should be decided by the arbitrator, the availability of class arbitration was a threshold issue for the courts, not the arbitrator.

Practice Pointer: Counsel should be mindful of this decision, particularly when faced with an effort to seek class arbitration. Parties opposing class arbitration should immediately invoke the protection of the courts, and ask a court to decide the issue. On the other hand, if a party wants an arbitrator to decide the availability of class arbitration, the party should make that preference explicit and unequivocal in the governing arbitration clause.

Keywords: alternative dispute resolution, adr, litigation, class arbitration, class arbitrability, threshold question, procedural question, *Stolt-Nielsen*, *Oxford Health Plans*

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