ALTERNATIVE DISPUTE RESOLUTION
AMERICAN BAR ASSOCIATION SECTION OF LITIGATION

Availability of Class Arbitration Is For the Courts to Decide

Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013)

In *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013) the Sixth Circuit affirmed a district court's rulings that: (a) whether class arbitration was available was for the court to decide, not the arbitrator; and (b) the arbitration clause at issue did not permit class arbitrations.

The defendant and his law firms, subscribed to LexisNexis legal-research plans (the Subscription Plans). A billing dispute arose when the defendant contended that LexisNexis—a division of the plaintiff—improperly charged for accessing research databases without warning that there would be additional charges.

The Subscription Plans each contained an arbitration clause (the Arbitration Clause) requiring that the arbitration to take place where LexisNexis was located and the parties to split the arbitration costs. These requirements made it financially unfeasible for the defendant to arbitrate his claims. The defendant filed an arbitration demand for fraud, breach of contract, and violation of the New York Consumer Protection Act and seeking class status.

In response, the plaintiff sued for a declaration that the Arbitration Clause did not authorize class arbitration. The district court ruled in the plaintiff's favor. The defendant appealed arguing that the arbitrator, rather than the district court, should decide whether the Arbitration Clause allowed class arbitration and that the Arbitration Clause—if read not to permit class arbitration—was unconscionable. The Sixth Circuit rejected both arguments.

The Sixth Circuit's decision turned largely on whether the availability of class arbitration was a "gateway" or "subsidiary" question. The court said that "gateway" questions—e.g., whether the parties have a valid arbitration agreement or whether an arbitration clause applies to a particular controversy—are presumptively for courts to decide unless the parties "unmistakably" provided otherwise. In contrast, "subsidiary" questions are presumptively for the arbitrator to decide, unless, again, the parties clearly provided otherwise. "Subsidiary" questions, the court stated, are those that "grow out of the dispute and bear on its final disposition"—e.g., waiver, delay, or "whether a condition precedent to arbitrability has been fulfilled."
The defendant argued that *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), held that class arbitration was a subsidiary issue for the arbitrator to decide, rather than a district court. The Sixth Circuit disagreed.

The court noted that *Bazzle* was a plurality decision, and that the Supreme Court (in *Oxford Health Plans LLC v. Sutter*, ____ U.S. ____, 133 S.Ct. 2064, 2068 n.2 (2013) later "flatly stated" that the issue *Bazzle* dealt with remained unresolved. The Sixth Circuit also interpreted *Sutter* and other more recent Supreme Court decisions, i.e., *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), *AT&T Mobility LLC v. Concepcion*, ____ U.S. ____, 131 S.Ct. 1740 (2011), as pointing rather decisively against the *Bazzle* plurality:

> Gateway questions are fundamental to the manner in which the parties will resolve their dispute -- whereas subsidiary questions ... concern details.... [T]he question whether the parties agreed to classwide arbitration is vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally. An incorrect answer in favor of classwide arbitration would "forc[e] parties to arbitrate" not merely a single "matter that they may well not have agreed to arbitrate[,]" ... but thousands of them.

The court held that "whether an arbitration agreement permits classwide arbitration is a gateway matter" to be decided by the courts unless the parties "clearly and unmistakably provide otherwise."

Here, the Sixth Circuit ruled that the parties had not unmistakably provided that the arbitrator could decide if class arbitration was appropriate. Among other things, the Arbitration Clause did "not mention classwide arbitration at all." And, although it referred to arbitral rules that permitted class arbitration, the court noted that those rules stated "that one should 'not consider the existence of these [rules] ... to be a factor either in favor of or against permitting [class arbitration].'"

The court also rejected the defendant's argument that the Arbitration Clause was unconscionable. It conceded that the clause was a "one-sided" adhesion contract that made it economically unfeasible for the defendant to assert individual claims. Nevertheless, it stated that all of the things that made the Arbitration Clause purportedly unconscionable also were present in *American Express Co. v. ItalianColors Restaurant*, ____ U.S. ____, 133 S.Ct 2304 (2013), yet the Supreme Court had held there that the absence of a class-action right was not unconscionable.

According to the Sixth Circuit, the Supreme Court has not yet decided whether the availability of class arbitration generally is a "gateway" question, so it will be interesting to see how other courts address this issue, and whether the Supreme Court will put it to rest.

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