"WHO DECIDES" WHETHER CLASS ARBITRATION IS AVAILABLE?: THE THIRD CIRCUIT PROVIDES NEW GUIDANCE IN *CHESAPEAKE APPALACHIA, LLC V. SCOUT PETROLEUM, LLC*

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Consumer Financial Services Alert

The U.S. Court of Appeals for the Third Circuit (the "Court") has spoken again on the issue of "who decides" whether parties must arbitrate a dispute on a classwide basis. In 2014, the Court ruled that "unless the parties clearly and unmistakably provide otherwise," the court, not the arbitrator, decides the question.[1] Now, in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, the Court provides guidance on assessing when an arbitration agreement clearly and unmistakably delegates the question of classwide arbitration to an arbitrator.[2]

ANALYSIS

Scout Petroleum LLC ("Scout") filed a putative class arbitration demand with the American Arbitration Association ("AAA") against Chesapeake Appalachia LLC ("Chesapeake") and similarly situated entities based on allegations that Chesapeake and putative defendant class members failed to pay sufficient royalties under natural gas leases. The leases provided for arbitration of certain disputes between the parties. Chesapeake objected to class arbitration, contending the leases neither contemplated class arbitration nor that an arbitrator would decide the question. Accordingly, Chesapeake filed suit seeking a judicial declaration on these points.

The arbitration provision stated that in the event of "a disagreement … concerning this Lease … the resolution of all such disputes shall be determined by arbitration" under AAA rules. The arbitration provision itself did not reference class arbitration, but the AAA Supplementary Rules for Class Arbitrations provided that an arbitrator has the authority to decide whether an agreement permits class arbitration. Thus, Scout asserted that by incorporating the AAA's rules into the arbitration provision, the parties clearly and unmistakably agreed to have an arbitrator decide the question. The district court disagreed, ruling that the arbitration provision was "silent and ambiguous as to class arbitration" and thus, "far from the 'clear and unmistakable' allowance needed for an arbitrator, and not a court" to determine whether class arbitration is permitted.[3]

The Court agreed with the district court, affirming that an arbitration provision that is silent on the issue of who decides the availability of class arbitration does not clearly and unmistakably delegate the question to an arbitrator. The Court explained that an agreement that fails to reference class arbitration and makes only a general reference to an arbitral body's rules is insufficient to clearly delegate authority to an arbitrator to decide whether the parties agreed to class arbitration.[4] In so holding, the Court distinguished jurisprudence finding that incorporation of AAA rules is sufficient to delegate to an arbitrator the question of whether a dispute is subject to bilateral arbitration. Rather, the Court ruled that classwide arbitration is significantly different from two-party

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arbitration.[5] Consequently, the Court held that caselaw addressing bilateral arbitrations "is entitled to relatively little weight in the class arbitrability context," because "the whole notion of class arbitration implicates a particular set of concerns that are absent in the bilateral context."[6]

CONCLUSION

The *Scout Petroleum* decision cements the notion in the Third Circuit that the availability of class arbitration is a gateway question reserved for a court to decide absent clear and unmistakable language delegating that authority to an arbitrator. Grounded in U.S. Supreme Court precedent that there are fundamental differences between bilateral and class arbitration, *Scout Petroleum* will likely be persuasive to other federal courts considering this question in the future.

Notes:

[1] *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 330 (3d Cir. 2014) (citing *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014)), *cert. denied*, -- U.S. --, 135 S. Ct. 1530, 191 L. Ed. 2d 558 (2015). The K&L Gates alerts on *Opalinksi* are available here and here; the K&L Gates alert on *Reed Elsevier* is available here.

[2] --- F.3d ---, 2016 WL 53806 (3d Cir. Jan. 5, 2016) ("*Scout Petroleum*").

[3] *Id.* at *4 (summarizing lower court decision).In examining the same question regarding the same arbitration provision, a different judge in the same district court had reached the opposite conclusion, finding the arbitration provision satisfied the high burden in *Opalinski* by incorporating the AAA's rules. *See Chesapeake Appalachia, LLC v. Burkett*, No. CIV. A. 3:13-3073, 2014 WL 5312829, at *8 (M.D. Pa. Oct. 17, 2014). The earlier district court decision is abrogated by *Scout Petroleum*.

[4] 2016 WL 53806, at *11.

[5] *Id.* ("[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume … that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.") (quoting *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010)).

[6] 2016 WL 53806, at *15.

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