UNTANGLING THE *WEBB* OF ARBITRABILITY: THE FOURTH CIRCUIT HOLDS THAT COURTS DETERMINE THE AVAILABILITY OF CLASS-WIDE ARBITRATION

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Is the availability of class-wide arbitration a "gateway" question for courts, or are arbitrators charged with such a decision once a matter is compelled to them? In *Dell Webb Communities, Inc. v. Carlson*, the Fourth Circuit Court of Appeals followed the lead of the Third and Sixth Circuits and held that courts — not arbitrators — should ordinarily make the decision.[1] The Fourth Circuit's decision should be welcome news to corporate defendants seeking to enforce individual ("bilateral") arbitration agreements while preserving the ability to obtain meaningful appellate review of a determination allowing class-wide arbitration.

BACKGROUND

The U.S. Supreme Court has stressed the significant differences between bilateral arbitration and class-wide arbitration, which substantially affect the nature of arbitration as a dispute resolution mechanism.[2] Bilateral arbitration can be a less expensive and more efficient method of resolving disputes between parties. In contrast, class-wide arbitration can have all of the drawbacks and risks of class-action litigation without the procedural protections afforded to defendants in litigation.[3] Moreover, the Federal Arbitration Act provides limited options for parties to obtain appellate review of adverse arbitration decisions.[4] These are critical factors in the recent "who decides" analysis.

In a 2003 plurality decision, the U.S. Supreme Court suggested (but did not decide) that an arbitrator should decide whether an agreement authorizes class-wide arbitration.[5] In a subsequent decision in 2010, however, the Supreme Court criticized its prior plurality ruling and suggested (again without deciding) that the question of arbitrability is one for the court, not for the arbitrator.[6]

Against this backdrop, the Sixth Circuit and the Third Circuit have more recently considered the "who decides" question, and have held that the availability of class-wide arbitration is a question for the court.[7] By contrast, the Fifth Circuit has remained staunchly committed to its earlier precedent adopting the Supreme Court's 2003 plurality decision, and recently held that "if parties agree to submit the issue of arbitrability to the arbitrator, then the availability of class or collective arbitration is a question for the arbitrator instead of the court."[8] Notably, however, the Fifth Circuit's decision was limited, speaking only to instances in which the parties have otherwise agreed to submit the issue to the arbitrator; the court did not go so far as to hold that the availability of class-wide arbitration is always, or presumptively, for an arbitrator.[9]

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ANALYSIS

Enter the Fourth Circuit. In *Dell Webb*, the Fourth Circuit reviewed the district court's decision denying the defendant's petition to compel individual arbitration and for a declaratory judgment that the parties did not agree to class arbitration.[10] The district court had primarily relied on the Supreme Court's 2003 plurality decision in holding that whether an agreement permits class-wide arbitration "concerns the procedural arbitration mechanisms available" to the plaintiffs and "is therefore a question for the arbitrator rather than for the court."[11]

The Fourth Circuit reversed, holding that whether the parties agreed to class-wide arbitration is "a gateway question for the court" unless the parties "clearly and unmistakably provide otherwise."[12] The Fourth Circuit reasoned that, although the Supreme Court has not "conclusively" resolved the "who decides" issue, the "evolution of the Court's cases are but a short step away from the conclusion that whether an arbitration agreement authorizes class arbitration presents a question as to the arbitrator's inherent power, which requires judicial review."[13] That short step, according to the Fourth Circuit, rests on "the significant distinctions between class and bilateral arbitration," and the "fundamental differences confirm that whether an agreement authorizes the former is a question of arbitrability."[14] Indeed, as the benefits of arbitration "are dramatically upended in class arbitration," the Fourth Circuit showed little hesitation in following what it describes as the "not surprising" conclusions of the Third and Sixth Circuits.[15] Thus, because "the parties did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration," the Fourth Circuit remanded the case to the district court for a *judicial* determination as to whether the parties had agreed to class arbitration.

CONCLUSION

The Fourth Circuit's holding in *Dell Webb* rests upon the acknowledgment, firmly rooted in evolving U.S. Supreme Court jurisprudence, that class-wide arbitration "'changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.'"[16] The Fourth Circuit's holding — that courts should ordinarily decide whether an arbitration agreement permits class-wide arbitration — flows naturally from that precedent and provides an important safeguard to corporate defendants' due process rights and the ability to seek *de novo* appellate review of the class-arbitration-availability question.

Notes:

[1] No. 15-1385, --- F.3d ---, 2016 WL 1178829 (4th Cir. Mar. 28, 2016).

[2] *See, e.g., Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–86 (2010) ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator . . . .").

[3] *See, e.g., id.* (recognizing that "the commercial stakes of class-action arbitration are comparable to those of class-action litigation").

[4] *See* 9 U.S.C. § 10 (setting forth the limited circumstances in which a court may overturn the decision of an arbitrator).

[5] *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451, 452–53 (2003) (plurality op.)

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[6] *Stolt-Nielsen,* 559 U.S. 662 at 680, 687. Notably, the *Stolt-Nielsen* Court did not resolve the "who decides" issue because the parties in that case had agreed that the question was to be determined by the arbitration panel.
See id. at 680.

[7] *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013), *cert denied*, 134 S. Ct. 2291 (2014); *Opalinski v. Robert Half Int'l, Inc.*, 761 F.3d 326, 331 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015). For more information regarding these decisions, along with the Supreme Court's denial of the petition for writ of certiorari in both instances, *see* K&L Gates' prior client alerts: Supreme Court Will Not Review Sixth Circuit Ruling That Courts Decide the Availability of Classwide Arbitration; It's a Whole New Game in Opalinski v. Robert Half International, Inc. – Third Circuit Rules That Courts Decide the Availability of Classwide Arbitration and Supreme Court Won't Review Class Arbitrability Question Now, But Second Circuit May Hear Case That Could Generate Circuit Split. *See also* "Who Decides" Whether Class Arbitration Is Available?: The Third Circuit Provides New Guidance in Chesapeake Appalachia, LLC v. Scout Petroleum, LLC.

[8] *Robinson v. J & K Administrative Mgmt. Servs., Inc.*, No. 15-10360, --- F.3d ----, 2016 WL 1077102, at *3–4 (5th Cir. Mar. 17, 2016) (relying on *Pedcor Mgmt. Co. Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (5th Cir. 2003)).

[9] *Id.*

[10] *Dell Webb*, 2016 WL 1178829, at *2.

[11] *Id.*

[12] *Id*. at *2, 8.

[13] *Id*. at *7.

[14] *Id*. at *7.

[15] *Id*. at *8.

[16] *Id*. at *6 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

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