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Who decides if class arbitration is OK?

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The Federal Arbitration Act and the California Arbitration Act reflect a public policy favoring arbitration, and as a result courts are increasingly called upon to determine whether a dispute is covered by an arbitration agreement. The FAA broadly provides for enforcement of arbitration provisions in any contract evidencing a transaction involving commerce. However, as arbitration is a matter of contract, it can be compelled only if the parties have agreed to arbitrate the particular controversy at issue. *AT&T Technologies Inc. v. Communication Workers of America*, 475 U.S. 643 (1986).

When the dispute involves a putative class action, the process is no different. Once the court finds there is a valid agreement to arbitrate and there is no basis for its revocation or waiver, the court looks to the arbitration agreement itself to determine whether the parties agreed to arbitrate class claims: Does the agreement allow the plaintiff to pursue class and representative claims in arbitration, or does it require arbitration of claims on an individual basis only?

Class arbitration may be ordered if there is a contractual basis to conclude that the parties agreed to arbitrate class claims. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). While an express provision agreeing to class arbitration is not required, that the parties have agreed to arbitrate a dispute does not mean they have consented to class arbitration. *Id.*; *Truly Nolen of America v. Superior Court*, 208 Cal. App. 4th 487 (2012). Conversely, class arbitration will not be ordered if the agreement includes a class action waiver. The California Supreme Court, overruling prior law, recently resolved any doubt about the enforceability of class waivers in *Iskanian v. CLS Transportation of Los Angeles*, 59 Cal. 4th 348 (2014).

Where the arbitration agreement covers the individual claims, but is silent on the issue of class arbitration (meaning it neither expressly authorizes nor prohibits class arbitration), who decides whether the arbitration will include class claims? Is it a procedural question for the arbitrator, or is it a question of arbitrability - i.e., for the court to decide as part of its gatekeeper function? This question has not yet been definitively answered, but probably soon will be for California practitioners.

A plurality of the U.S. Supreme Court agreed in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), that determining whether certain arbitration agreements authorized class action properly lay in the first instance with an arbitrator, not a court. The court said the issue concerned what kind of arbitration proceeding the parties agreed to, a question that arbitrators were well suited to answer.

The first published California case to squarely address the issue was *Sandquist v. Lebo Automotive Inc.*, 228 Cal. App. 4th 65 (2014), in which the 2nd District Court of Appeal agreed that whether the parties agreed to class arbitration in cases where the arbitration agreement is silent is determined by the arbitrator. Relying on *Bazzle* and other federal decisions, the court determined that the interpretive question as to whether the plaintiff can pursue claims in arbitration on a class basis concerns the procedural mechanisms available for the arbitrator to decide.

However, recognizing *Bazzle* is not controlling and is merely persuasive, other California courts have reached a different conclusion. Most recently, and since *Sandquist* was decided, the 4th District Court of Appeal has decided that whether the parties agreed to classwide arbitration is a fundamental gateway question for the court. See *Network Capital Funding Corporation v. Papke*, 230 Cal. App .4th 503 (2014); *Garden Fresh Restaurant Corporation v. Superior Court*, 231 Cal. App. 4th 678 (2014). These cases view the issue as an arbitrability question for courts to decide because it essentially asks what the parties agreed to arbitrate.

The state Supreme Court has granted review of the issue. *Sandquist v. Lebo Automotive Inc.*, S220812. We can at least expect that the question as to "who decides" the class versus individual arbitration issue will be settled shortly in California.

The potential implications are noteworthy. An arbitrator's interpretation of the arbitration agreement to determine the scope of claims contemplated is virtually unassailable - it will not be overturned if the arbitrator actually undertakes an effort to construe the contract. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013). JAMS and AAA arbitrators, as well as others, have found that arbitration agreements requiring arbitration of "all disputes" or "all claims" include class claims, and each has complex designations and rules to specifically handle class actions. A defendant eager to avoid court and compel arbitration without a class waiver may find itself paying for classwide arbitration that a court would have overseen without charge.

If the court decides the issue, its determination as to the scope of arbitration is appealable from final judgment entered after confirmation of the arbitration award. De novo review applies unless there is conflicting extrinsic evidence offered as to the meaning of the arbitration clause. If the court orders arbitration of only individual claims and dismisses all class claims with prejudice, immediate appellate review is available.

Practitioners should carefully review their client's arbitration agreement. If class claims are expressly authorized or prohibited, the nature of the ensuing arbitration should be readily ascertainable. If the agreement is silent, *Sandquist* will soon determine who decides whether the arbitration will include class claims.