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Class Arbitrability Is A Decision For The Court, Not The Arbitrator

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Continuing the recent theme of workplace arbitration cases, the U.S. Court of Appeals for the Fifth Circuit has held that the decision regarding the availability of class arbitration is a "gateway" issue to be decided by the court, not an arbitrator. According to the Fifth Circuit, only "clear and unmistakable" language to the contrary contained in an arbitration agreement can override a court's ability to determine this threshold issue. The Fifth Circuit now joins the Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh circuit courts in this holding.

In *20/20 Communications, Inc. v. Lennox Crawford*, the Fifth Circuit reversed two district court decisions, based on the same arbitration clause, holding that the respective arbitrators properly decided the issue of whether the arbitration agreement permitted class arbitration. In these consolidated cases, numerous field sales managers filed arbitrations against their employer, 20/20 Communications, Inc., asserting class claims. The arbitration clause at issue prohibited class arbitrations "to the maximum extent permitted by law."

While the employer sought a declaration in federal court that the availability of class arbitration must be decided by the court rather than an arbitrator, the claimant employees asked each individual arbitrator to find that the arbitration agreement's class arbitration bar was prohibited by federal law. One of the arbitrators obliged, and the defendant employer filed another action in federal court to vacate the arbitrator's decision.

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In each case filed by the employer, the district court found in favor of the employees. One court held that the arbitrator had the authority to determine the issue of class arbitrability. The other court confirmed the arbitrator's determination that federal law prohibited the class arbitration bar contained in the employer's arbitration clause.

The employer appealed each decision, and the Fifth Circuit reversed both. Agreeing with six sister circuits, the Fifth Circuit found that the question of class arbitrability, like contract formation, is a threshold issue to be decided by a court, rather than an arbitrator, because of the fundamental differences between class and individual arbitrations. That is, class arbitrations dramatically increase the size and complexity of the disputes, and can raise due process concerns. Thus, the court concluded that the availability of class arbitration is presumptively a "gateway" question to be answered by a court.

The Fifth Circuit also stated that the arbitration clause at issue did not specifically allow the arbitrator to make the determination of whether class-wide arbitration was permitted under the circumstances. The court explained that the threshold determination of the availability of class arbitration is for the arbitrator only where the arbitration clause "clearly and unmistakably" demonstrates that the parties agreed that the arbitrator would make such a determination. Otherwise, the presumption is that that questions of class arbitration are for courts to decide. Because the arbitration clause at issue did not "clearly and unmistakably" grant this authority to the arbitrator, the Fifth Circuit found that the decision of class arbitrability should have been made by the court, not the arbitrator.

This is another important decision in the workplace arbitration area for employers operating in the Fifth Circuit (Texas, Mississippi, and Louisiana). Post-*Epic* and *Lamps Plus*, the plaintiff's bar will no doubt be searching for cracks in these precedents through which they can bring workplace class and collective actions – just as the employees' counsel appeared to do in this case. The Fifth Circuit's decision provides another tool for employers to use to ensure that their arbitration clauses are properly enforced.