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Reading between the lines: the Seventh Circuit's recent class arbitrability ruling suggests a paradigm for squaring delegation clauses with class action waivers

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Takeaway: In the wake of the U.S. Supreme Court's continued vigorous enforcement of class action waivers, more and more corporate parties can be expected to include broad class action waivers in their contracts with consumers and employees. But many of these agreements also will include (sometimes unwittingly) delegation clauses broadly sending any "arbitrability" issues to the arbitrator. Among other things, the agreements may incorporate rules such as those of the American Arbitration Association, which explicitly authorize arbitrators to resolve questions of "arbitrability." *See* AAA Commercial Arbitration Rules, R-7(a). Where an arbitration agreement contains both an unambiguous class action waiver and a delegation clause, must a district court send the class action arbitrability issue to the arbitrator? A recent Seventh Circuit decision presented with these facts held that the court, and not the arbitrator, must determine the availability of class arbitration. Although the Court of Appeals did not address the interplay between a delegation clause and a class action waiver, its holding finds support in both class arbitration decisions and general judicial policies against engaging in futile acts.

Background of the *Herrington* case

In *Herrington v. Waterstone Mortgage Corp.*, 907 F.3d 502 (7th Cir. 2018), an employee (Ms. Herrington) sued her employer (Waterstone) for wage and hour violations, asserting both a collective action under the Fair Labor Standards Act and a breach of contract class action under Federal Rule 23. Waterstone moved to compel arbitration, relying on an arbitration agreement that both (1) provided for the arbitration to be conducted "in accordance with the rules of the American Arbitration Association applicable to employment claims" and (2) prohibited that arbitration from being "joined with or join or include any claims by any persons not party to this Agreement." *Id.* at 504.

Ms. Herrington responded by challenging the enforceability of the entire arbitration agreement as imposing excessive costs, and also by challenging the class action waiver in particular as violative of the National Labor Relations Act (NLRA). *Id.* at 504-05. At the time the district court ruled on this issue, the National Labor Relations Board had ruled that the NLRA protected the right to pursue legal claims collectively; that employers who require employees to sign class action waivers violate the NLRA; and that class action waivers were unenforceable under the NLRA. Relying on the Board's decision, the district court struck the class action waiver and sent the parties to arbitration, instructing the arbitrator that Ms. Herrington "must be allowed to join other employees to her case." *Id.* at 505. Ultimately, the

arbitrator conducted a collective proceeding in arbitration, awarding over $10 million in damages and fees to Herrington and 174 other claimants who had opted in to the arbitration proceeding. *Id.* at 505-06. The district court confirmed the arbitrator's award, and Waterstone appealed. *Id.* at 506.

During the pendency of Waterstone's appeal, the U.S. Supreme Court decided *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). In *Epic*, the Supreme Court reversed an earlier Seventh Circuit decision and held that an arbitration agreement does not violate the NLRA. 138 S. Ct. at 1624-29. Thus, the Court of Appeals reversed the district court's decision to invalidate the class action waiver based on the NLRA. *Herrington*, 907 F.3d at 506.

The Seventh Circuit's decision

The Seventh Circuit then turned to what it characterized as "the hard part," specifically, "what happens next?" *Id.* Although the Court of Appeals viewed the validity of the class action waiver to be incontestable, it still had to decide whether the district court or the arbitrator would be tasked "to interpret the arbitration agreement – this time, including the waiver – to determine whether it authorized the collective action that occurred." *Id.* Notably, until the Supreme Court's decision in *Epic*, Ms. Herrington herself "assumed that this waiver, if enforceable, would require her to proceed in a bilateral arbitration." *Id.* & n.1 (discussing employee's failure below to argue in the alternative that the arbitration agreement permitted class arbitration even if class action waiver found enforceable).

The Seventh Circuit then joined every other circuit to have addressed the issue (the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits) in holding that the availability of class arbitration constitutes a gateway issue of arbitrability presumptively for a court to decide. *Id.* at 507-11. In a footnote, it recognized that "parties can agree to delegate to an arbitrator the question whether an agreement authorizes class or collective arbitration," but stated that such an agreement must "'clearly and unmistakably provide' for such delegation." *Id.* 507 n.3 (citation omitted). But the Court of Appeals did not further address the delegation issue.

After reviewing the policies and doctrines supporting the view that class arbitration is a gateway issue of arbitrability presumptively reserved for a court – including the "most important" rule that class arbitration constitutes a "fundamental" change to "the norm of bilateral arbitration" (*see id.* at 509) – the *Herrington* court concluded its decision as follows: "On remand, the district court should conduct the threshold inquiry regarding class or collective arbitrability to determine whether Herrington's agreement with Waterstone authorizes the kind of arbitration that took place. If the district court determines that the agreement allows such an arbitration, our decision leaves the district court free to confirm the award. If, however, the district court determines that Herrington's agreement with Waterstone requires single-plaintiff arbitration, it should vacate the award and send the dispute to the arbitrator for a new proceeding." *Id.* at 511.

This disposition tracks the Seventh Circuit's introduction, where it described its ruling as holding "the district court, rather than the arbitrator, must evaluate Herrington's contract with Waterstone to determine whether it permits class or collective arbitration." *Id.* at 504.

Reading between the lines of *Herrington*: displacement of delegation by an unambiguous class action waiver and the judiciary's unwillingness to require a futile act

The *Herrington* court did not address explicitly the relationship between a class action waiver and a delegation clause. But it acknowledged that the parties' arbitration agreement contained a delegation clause, as well as the normal rule that such a clause will be enforced as long as it "clearly and unmistakably" delegated the arbitrability issue to the arbitrator. 907 F.3d at 507 n.3. And it unambiguously said – twice – that the district court, rather than the arbitrator, had to address the enforceability of the class action waiver. *Id.* at 504, 511. A district court presented with this mandate would be hard-pressed to interpret it as requiring anything other than a prompt determination as to whether the class action waiver should be enforced and the attendant disposition (confirmation or vacatur) of the arbitrator's prior class arbitration award.

At least two different rationales support a straightforward application of the Seventh Circuit's mandate. First, an unambiguous class action waiver displaces a general delegation provision, by eliminating any reasonable interpretative issue about the availability of class arbitration. In other words, if the parties unambiguously have agreed that an arbitration cannot proceed on a class-wide or collective basis, then no reasonable interpretative issue as to the availability of class arbitration remains for delegation to the arbitrator. The *Herrington* court strongly suggested that the class action waiver before it – together with Ms. Herrington's own position, pre- *Epic*, that the waiver mandated individual arbitration – unambiguously foreclosed class arbitration, thereby obviating any need for a reasonable interpretative dispute on this point to be submitted to the arbitrator. *See id.* at 506 & n.2 (asking how the availability of class arbitration "reasonably" could be in dispute, given the language of the class action waiver and the employee's position in the court below, and characterizing any argument to the contrary as "implausible").

Second, courts do not "require the doing of a futile act." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); *Wisconsin Res. Prot. Council v. Flambeau Mining Co.*, 727 F.3d 700, 710 (7th Cir. 2013) (same, quoting *Roberts*); *Cross v. Hardy*, 632 F.3d 356, 361 (7th Cir. 2011). Given the Supreme Court's recent series of rulings upholding class action waivers (including *Epic*), any decision by an arbitrator refusing to enforce an unambiguous class action waiver would be subject to vacatur as exceeding the arbitrator's authority under the parties' arbitration agreement. *See Herrington*, 907 F.3d at 509 n.8 (noting party's ability to seek vacatur of an award where the arbitrators "exceeded their powers"). If the district court would have no choice but to vacate an arbitral award refusing to enforce the class action waiver, then no value would be served by forcing the district court and the arbitrator to engage in that futile exercise.

The failure of the *Herrington* court to address the precise grounds for its holding may reflect the unique procedural posture of the case before it, in which the only issue originally presented on appeal – the claimed invalidity of the class action waiver under the NLRA – has been resolved by the Supreme Court's intervening ruling in *Epic*. But the Seventh Circuit's holding could provide a critical piece of the class

arbitration puzzle as corporate defendants endeavor to shut down potential class arbitrations. Where an arbitration agreement contains an unambiguous class action waiver, defendants can argue that no reasonable interpretation issue remains to be delegated to the arbitrator and that any delegation of the class arbitration issue to the arbitrator would be a futile act.