MAY 11, 2020

Fifth Circuit: arbitrator's decision to conduct class arbitration cannot be vacated

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Takeaway: A lot of ink has been spilled on the issue of class arbitration, but this much is clear: If a federal court decides the class arbitration issue, then the proponent of class arbitration should lose, unless the arbitration agreement explicitly provides for class arbitration. But if the arbitration agreement commits that "gateway" issue to an arbitrator and the arbitrator permits class arbitration, then the parties almost certainly will be held to that decision, even if the decision is later demonstrated to be wrong.

These issues recently played out before the Fifth Circuit in *Sun Coast Resources, Inc. v. Conrad*, 956 F.3d. 335 (5th Cir. 2020). There, Roy Conrad, an hourly employee of Sun Coast Resources, initiated an arbitration proceeding against Sun Coast under the Fair Labor Standards Act (FLSA), claiming he was denied overtime pay. Under the terms of an arbitration clause in the employment agreement between Mr. Conrad and Sun Coast, he brought his FLSA claim on behalf of a class of similarly-situated employees.

After an arbitrator was appointed, he issued a "clause construction award," in which he concluded that "the agreement ... clearly provides for collective actions." *Id*. at 337. Sun Coast then filed an application with the Southern District of Texas, seeking to vacate the award under Section § 10(a)(4) of the Federal Arbitration Act (FAA) (9 U.S.C. § 10(a)(4)). The district court denied the application, ruling that the arbitrator did not exceed his powers because he simply interpreted the contract. Sun Coast appealed and the Fifth Circuit affirmed.

The key point, according to the Fifth Circuit, was that the parties' arbitration agreement authorized the arbitrator to interpret the agreement, and that is what he did. Whether he was correct (or not) was beside the point: "The correctness of the arbitrator's interpretation is irrelevant so long as it was an *interpretation*." *Id*. (emphasis in original). The panel noted that Section 10(a)(4) of the FAA authorizes vacatur "only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly." *Id*. (quoting *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572 (2013)). And, according to the panel, the arbitrator did not do such a poor job of interpreting the agreement: the arbitration clause broadly required the arbitration of "any claim that could be asserted in court or before an administrative agency" and "any controversy or claim" arising out of the parties' relationship; the agreement required arbitration of "all remedies which might be available in court"; the corporate defendant (Sun Coast) drafted the agreement but made no effort to "carve out" class or collective actions; and the agreement incorporated the rules of the American Arbitration Association, which authorize class proceedings. *Id*. at 337-38.

This ruling brings into focus two Supreme Court decisions that were handed down last year. In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), the Supreme Court ruled that ambiguous language in an

arbitration agreement cannot be construed against the drafter as authorizing class arbitration. This means two things: (1) unless an arbitration clause explicitly *authorizes* class arbitration, then the agreement in all likelihood cannot be interpreted as providing for class arbitration; and (2) if a federal court decides the arbitrability issue, then that federal court is of course bound by the Supreme Court's decision in *Lamps Plus* and should prohibit class arbitration.

But if the arbitration agreement delegates the arbitrability issue to the arbitrator, then the *Lamps Plus* decision does not provide a basis for rejecting the arbitrator's award as having exceeded his or her authority under the contract (and the FAA). Moreover, under *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019), where an arbitration agreement delegates the arbitrability issue to an arbitrator, a district court must honor the delegation, even where the district court considers the arbitrability argument to be "wholly groundless." Thus, even where an arbitration agreement simply selects arbitral rules that delegate arbitrability to the arbitrator (as with the arbitral rules at issue in *Henry Schein*), a party will face a nearly insurmountable burden in challenging an award authorizing class arbitration, even if the decision would not pass muster under *Lamps Plus*.

Sun Coast took a run at the delegation issue, asserting that whether an arbitration agreement authorizes class proceedings "is a gateway issue for courts, not arbitrators, to decide, absent clear and unmistakable language to the contrary." *Id*. at 338 (citation omitted). But the Fifth Circuit ruled that the Sun Coast-drafted arbitration provision did indeed assign the issue to the arbitrator, because the clause required arbitration of "any controversy or claim arising out of or relating to [the] employment relationship with Sun Coast" and further incorporated the AAA rules, which authorize an arbitrator to decide the issue. *Id*.

A number of appellate court hold that the selection of the AAA's rules "serves as clear and unmistakable delegation of questions of arbitrability to an arbitrator." *See, e.g., JPay, Inc. v. Kobel*, 904 F.3d 923, 936 (11th Cir. 2018). The Third Circuit recently so held in *Richardson v. Coverall North America*, --- Fed. Appx. ---, Nos. 18-3393, 18-3399, 20202 WL 2028523 (3d Cir. Apr. 28, 2020), where it held that the incorporation of the AAA's rules provided clear and unmistakable evidence of delegation, even with respect to an "unsophisticated" party.

But that was not all. The Fifth Circuit further held that Sun Coast "forfetited" the delegation argument, first by presenting the issue directly to the arbitrator, and second by not timely raising the issue before the district court. 956 F.3d at 338-40.

Finally, the Fifth Circuit took issue with Sun Coast's motion requesting that the appellate court conduct oral argument. Sun Coast argued that resolving the appeal without oral argument would amount to "cafeteria justice." The Fifth Circuit scolded Sun Coast for taking that position, given that Sun Coast itself drafted the agreement, submitted the delegation issue to the arbitrator, etc. And the panel chastised Sun Coast for the drawing out the proceeding against Mr. Conrad, an hourly employee without Sun Coast's financial resources. *Id*. at 340-41. "Dispensing with oral argument where the panel unanimously agrees it is unnecessary, and where the case for affirmance is so clear, is not cafeteria justice—it is simply justice." *Id*. at 341.

In the wake of the Supreme Court's numerous decisions upholding class action (and class arbitration) waivers, an employer intending to preclude class arbitration should not blindly incorporate arbitration rules but should include unambiguous language precluding class treatment. An arbitrator who disregards a class action waiver and authorizes class arbitration would exceed his or her authority under

an arbitration agreement, and any such award should be vacated, even under the difficult standard for vacating an award under the FAA. And an employer that is the beneficiary of a class action waiver always has the option of going into court at the outset of a dispute and securing an order compelling only individual arbitration.