I. Alternative Dispute Resolution

John Jay Range

A. Introduction

Although it was enacted more than ninety-one years ago, many of the most basic provisions of the Federal Arbitration Act (FAA),[1] particularly as they relate to the issue of class arbitration, continue to generate controversy. The Supreme Court's

John Jay Range is a partner in the Washington, D.C., office of Hunton & Williams LLP. He is the chair of the Alternative Dispute Resolution Committee and a member of the Advisory Committee for the ABA Section of Dispute Resolution.

1. 9 U.S.C. §§ 1-307 (2012).

recent term included two cases[2] addressing the proper application of the FAA to the question of whether parties had contracted to arbitrate their disputes. In both instances, the Supreme Court found the state courts had misapplied, or perhaps refused to apply, the FAA, by failing to enforce contractual agreements to arbitrate.

Next, this report discusses the contradictory decisions by a number of circuit courts concerning whether: (1) availability of class arbitration presents a "gatekeeper" issue for courts, not arbitrators, to decide; and (2) reference to the American Arbitration Association (AAA) or its arbitration rules in a dispute resolution provision constitutes a "clear and unmistakable" agreement to delegate to arbitrators the initial and primary responsibility for determining whether the parties intended to participate in class arbitration. The report discusses the Third Circuit's decision in *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*,[3] which holds that mere reference to the AAA in a dispute resolution provision is not "clear and unmistakable" evidence that the parties intended to delegate "gatekeeper" decisional authority to arbitrators. It also discusses the decision in *Dell Webb Communities, Inc. v. Carlson*,[4] where the Fourth Circuit joins the Third and Sixth Circuits in holding that availability of class arbitration is a "gatekeeper" question to be decided by courts, not arbitrators. It then discusses the contrary Fifth Circuit decision in *Robinson v. J & K Administrative Management Services, Inc.*,[5] which affirms prior Fifth Circuit precedent and continues to maintain that class arbitration raises only a procedural, not substantive, issue of arbitrability and thus does not present a "gatekeeper" issue.

Based on these developments and recent cases in other circuits, it appears a circuit split may develop. A circuit split would have serious implications for the Supreme Court's holdings in *AT&T Mobility LLC v. Concepcion*[6] and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*.[7] The AAA and almost every institutional provider of arbitration services have rules providing that arbitrators have the authority to decide disputes concerning their own jurisdiction and arbitrability.[8] If mere reference to AAA (or similar) rules is sufficient to delegate arbitrability issues, the gatekeeper issue is essentially moot because perhaps 90 percent of dispute resolution clauses incorporate rules that provide arbitrators authority to resolve issues of arbitrability. In practice, this means arbitrators will decide most issues of arbitrability, and courts will have no

2. DirecTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015); Schumacher Homes of Circleville, Inc. v. Spencer, 136 S. Ct. 1157 (2016) (summary disposition).

3. 809 F.3d 746 (3d Cir. 2016).

4. 817 F.3d 867 (4th Cir. 2016).

5. 817 F.3d 193 (5th Cir. 2016).

6. 563 U.S. 333 (2011).

7. 559 U.S. 662 (2010).

8. *See, e.g.*, AAA Commercial Arbitration Rules and Mediation Procedures (AAA Commercial Rules), Rule 7(a) (amended & effective Oct. 1, 2013), *available at* http://www.adr.org; JAMS Comprehensive Arbitration Rules & Procedures, Rule 11(b) (July 1, 2014), *available at* http://www.jamsadr.com/rules-comprehensive-arbitration/; CPR Administered Arbitration Rules, Rule 8.1 and 8.2 (July 1, 2013), *available at* http://www.cpradr.org/; ICC Rules of Arbitration, Article 6(3) (Jan. 1, 2012), *available at* http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/.

meaningful oversight of the standards arbitrators apply, including with respect to the evidence required to compel participation in class arbitration.

Combined with the passing of Justice Scalia, and with him the five-to-four *AT&T Mobility* majority, this development could reflect the beginning of a sea change in FAA jurisprudence. The Supreme Court's aggressive use of the FAA to expand the scope of federal preemption and invalidate state law limitations on arbitration, particularly in the context of class actions and adhesion contracts in consumer matters, may have reached its high water mark. Unless courts act as the gatekeeper to review and construe arbitration agreements de novo, most decisions by arbitrators will be confirmed under the FAA deferential standard of review. For better or worse, the likely result is more class arbitration, *unless* waivers of class arbitration are included in dispute resolution provisions.

B. Supreme Court Rebukes California State Court in *DirecTV v. Imburgia*

1. Factual Background

The Supreme Court rebuked the California Court of Appeal for its hostility to arbitration in *DirecTV, Inc. v. Imburgia*.[9] Imburgia filed a class action complaint in California state court asserting DirecTV improperly charged early termination fees. A week after the superior court granted class certification, the U.S. Supreme Court held in *AT&T Mobility* that the FAA preempted the rule adopted by the California Supreme Court in *Discover Bank v. Superior Court*,[10] which invalidated class action waivers in consumer contracts as unconscionable. DirecTV immediately moved to stay or dismiss Imburgia's class action and to compel bilateral arbitration of the plaintiffs' claims.

DirecTV had delayed for three years asserting its right to arbitrate the dispute because, in another case,[11] the California Court of Appeal had held that the arbitration provision in DirecTV's customer agreement was unenforceable under *Discover Bank*. DirecTV therefore believed that a motion to compel arbitration in Imburgia's class action would be futile. Section 9 of DirecTV's 2007 customer agreement provides for arbitration under JAMS rules.[12] It states in part:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.[13]

9. 136 S. Ct. 463 (2015).
10. 113 P.3d 1100 (Cal. 2005).
11. *See* Cohen v. DirecTV, Inc., 48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006).
12. Imburgia v. DirecTV, Inc., 225 Cal. App. 4th 338, 341 (Cal. Ct. App. 2014).
13. *Id.* at 341.

In addition, Section 10 of the customer agreement provides that " 'Section 9 shall be governed by the Federal Arbitration Act.' "[14]

In opposing arbitration, Imburgia argued that the arbitration clause explicitly referenced "the law of your state," and California state law unequivocally held class action waivers were unenforceable.[15] Imburgia therefore argued that the entire arbitration agreement was unenforceable pursuant to the agreement's express terms, because California law (but for federal preemption) would find the class action waiver unenforceable. The California Court of Appeal agreed with this interpretation of state law, and the California Supreme Court declined to review the case.

2. The Rationale Behind the Convoluted Arbitration Clause

Prior to the Supreme Court's decision in *AT&T Mobility*, state law varied widely concerning the enforceability of waiver of class arbitration in consumer contracts of adhesion. Companies seeking to avoid class action lawsuits were faced with a Hobson's choice. Was avoidance of class action litigation worth assuming the risks of class arbitration if the contractual waiver of class arbitration was not enforceable? For most companies, the answer was "no." Class arbitration was considered worse than class action litigation. It posed greater uncertainty with respect to discovery, class certification, and the enforceability of a settlement or award on absent class members.[16] Given this choice, many companies preferred the relative security of Federal Rule of Civil Procedure 23 or its state law equivalents. Class adjudication was perceived as providing a greater measure of certainty than the capriciousness of class arbitration, particularly since an arbitral award could not be reviewed on its merits by a court.

To avoid class arbitration, DirecTV included a provision in its service contract that invalidated the arbitration clause if the included waiver of class action arbitration was unenforceable under applicable state law. The goal was (1) to force cases into arbitration wherever waivers of class action arbitration were permitted, but (2) to revert to class action litigation if state law invalidated the waiver. The enforceability of the arbitration clause hinged on "the law of your state."[17] In what on its face seems like an illogical decision, the California Court of Appeal found that the reference to the "law of your state" included only the *invalid law* of California, not the law of California as preempted by the FAA under the Supreme Court's *AT&T Mobility* decision.

14. *Id.* at 342.

15. CAL. CIV. CODE §§ 1751, 1781(a).

16. Justice Alito, in his concurring opinion in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071–72 (2013), stated: "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which procedures are to be used."

17. The Supreme Court makes clear that nothing would prohibit parties from selecting, as the law applicable to their contract, state law exclusive of the preemptive effect of federal law, including the FAA. *DirecTV*, 136 S. Ct. at 468. But in *DirecTV*, the parties did not elect solely California law, as the dispute resolution agreement provided the FAA governed its interpretation. *Id.* at 466.

Shortly thereafter, the Ninth Circuit, construing the same contractual language in a similar DirecTV case, rejected the California Court of Appeal's decision as "nonsensical."[18] The Supreme Court granted a writ of certiorari to resolve the conflict between the Ninth Circuit and the California Court of Appeal.

3. The Supreme Court's Decision in DirecTV

The Supreme Court reversed the California Court of Appeal in a six-to-three decision.[19] Justice Breyer wrote a narrowly crafted opinion, which "falls well within the confines of (and goes no further than) present well-established law."[20] The majority's goal was to enforce compliance with the holding in *AT&T Mobility*, which had invalidated the rule in *Discover Bank* barring waivers of class arbitration. The majority was clearly frustrated that the California courts had once again relied on the rule in *Discover Bank* to effectively invalidate a waiver of class arbitration.

Despite its frustration, the Supreme Court could not vacate *DirecTV* in a summary order, as it has done in other instances where it detected "judicial hostility towards arbitration."[21] *DirecTV* presented a more difficult problem because the offending decision was based on the state court's interpretation of a state law contract. State courts are the ultimate authority on the proper application of state law to a contract governed by the law of that state.[22] Hence, the Supreme Court had to fashion an opinion that did not substitute its reading of the California contract for the interpretation of the state court.

The majority rested its decision on Section 2 of the FAA, which provides in relevant part that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[23] The Supreme Court held that the California Court of Appeal

18. *See* Murphy v. DirecTV, Inc., 724 F.3d 1218, 1226 (9th Cir. 2013). *Murphy* involved the same arbitration provision as *Imburgia*, setting up a state versus federal conflict.

19. The dissent authored by Justice Ginsburg and joined by Justice Sotomayor urges that arbitration provisions should be read in a light most protective of customers, who if subjected to class arbitration waivers are left "without effective access to justice." *DirecTV*, 136 S. Ct. at 471. Justice Thomas wrote separately to dissent based solely on his longstanding view that the FAA does not apply to state court proceedings. *Id. See, e.g.,* Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting); E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 314–15 (2002) (Thomas, J., dissenting); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 689 (1996) (Thomas, J., dissenting); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285–97 (1995) (Thomas, J., dissenting).

20. *DirecTV*, 136 S. Ct. at 471.

21. *See, e.g.,* Nitro-Lift Techs., LLC v. Howard, 133 S. Ct. 500 (2012) (Supreme Court rebukes Oklahoma Supreme Court by granting certiorari for the specific purpose of issuing a per curiam opinion to vacate the state court decision).

22. The Court stated in its opinion: "Although we may doubt that the Court of Appeal has correctly interpreted California law, we recognize that California courts are the ultimate authority on that law." *DirecTV*, 136 S. Ct. at 468.

23. 9 U.S.C. § 2. Thus, for example, it would not violate the FAA to invalidate an arbitration agreement for lack of consideration. *Cf.* Noohi v. Toll Bros., Inc., 708 F.3d 599 (4th Cir. 2013) (upholding Maryland law requiring arbitration agreement to be supported by consideration separate from

so misinterpreted DirecTV's service contract as to suggest deliberate discrimination against arbitration in violation of the FAA. The Court analyzed whether California law construed the "law of your state" to mean the same thing in contracts of general application and in arbitration agreements. The Court concluded the phrase "law of your state" is not ambiguous and takes its ordinary meaning: valid state law.[24] The Supreme Court could find no instance other than the arbitration agreement in *DirecTV* where California courts had construed the "law of your state" as including "invalid state law" preempted by federal law.[25] The Court therefore concluded "California's interpretation of the phrase 'law of your state' does not place arbitration contracts 'on equal footing with all other contracts.' "[26] For that reason, "it does not give 'due regard . . . to the federal policy favoring arbitration.' "[27] Thus, the Supreme Court held the hostile-to-arbitration interpretation was preempted by the FAA, requiring that the arbitration agreement be enforced, including its waiver of class arbitration.

C. Supreme Court Vacates Decision of West Virginia Supreme Court of Appeals in *Schumacher Homes*

1. Factual Background

Shortly after issuing its decision in *DirecTV*, the Supreme Court granted certiorari to review *Schumacher Homes of Circleville, Inc. v. Spencer*.[28] The Court proceeded to enter a summary disposition vacating the judgment of the West Virginia Supreme Court of Appeals and remanded the case "for further consideration in light of *DIRECTV, Inc v. Imburgia*, . . ."[29] The case involves a construction dispute between a homebuyer and a contractor. The parties' arbitration clause provided in part: "any claim, dispute or cause of action, of any nature . . . shall be subject to final and binding arbitration by an arbitrator."[30] It had a delegation clause that further provided: " 'The arbitrator(s) shall determine all issues regarding the arbitrability of the dispute.' "[31]

A West Virginia trial court ignored the delegation clause and refused to enforce the arbitration clause, finding it was "unconscionable."[32] The homebuilder

---

the underlying contract in which the arbitration agreement was incorporated even though the Maryland requirement placed some additional burden on arbitration).

24. *DirecTV*, 136 S. Ct. at 469.

25. *Id.* at 470.

26. *Id.* at 471, quoting *Buckeye Check Cashing*, 546 U.S. at 443.

27. *Id.*, quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989).

28. 136 S. Ct. 1157 (2016) (No. 15-316).

29. *Id.* (citation omitted).

30. Schumacher Homes of Circleville, Inc. v. Spencer, 774 S.E.2d 1, 6 (W. Va. 2015).

31. *Id.*

32. Spencer v. Schumacher Homes of Circleville, Inc., No. 13-C-116, 2014 WL 7800969 (W. Va. Cir. Ct. Mar. 6, 2014).

appealed, asserting the delegation clause required an arbitrator, not the court, to decide any challenge to the enforceability of the arbitration clause.

The West Virginia Supreme Court of Appeals affirmed, holding that "the delegation provision does not clearly and unmistakably reflect an intention by the parties to assign to the arbitrator all questions about the enforceability of the arbitration clause."[33] In reaching this decision, the court was critical of the alleged lack of clarity in the relevant U.S. Supreme Court precedents, stating:

> In recent years, the United States Supreme Court has doled out several complicated decisions construing the Federal Arbitration Act, 9 U.S.C. §§ 1–16. Read together, these decisions create an eye-glazing conceptual framework for interpreting contracts with arbitration clauses. . . . The Supreme Court sees its arbitration decisions as a series of 'clear instruction[s].' . . . But experience suggests that the rules derived from these decisions are difficult for lawyers and judges—and nearly impossible for people of ordinary knowledge—to comprehend.[34]

Based on the supposed impenetrability of the Supreme Court's precedents, the West Virginia Supreme Court of Appeal held that the term "arbitrability" was ambiguous and as such did not reflect a clear and unmistakable intent on the part of the parties to delegate to the arbitrator the issue of whether the arbitration clause was unconscionable.[35]

A vigorous dissent was filed accusing the majority of "[f]eigning confusion about the term 'arbitrability. . . .'"[36] The dissent asserted that the "majority of this Court reveals its biases and blatant 'judicial hostility' toward arbitration by invalidating a plain and unmistakable agreement between the parties to arbitrate issues regarding whether a claim is subject to arbitration in the first instance."[37]

2. The Supreme Court's Summary Disposition in *Schumacher Homes*

The Supreme Court obviously agreed with the dissent. Numerous Supreme Court opinions have used and discussed the term "arbitrability." In *Howsam v. Dean Witter Reynolds, Inc.*, the Supreme Court identified two types of "questions of arbitrability": substantive and procedural. Issues of substantive arbitrability include whether: (1) a party is bound by an arbitration clause; (2) parties have submitted a particular dispute to arbitration; (3) the contract binds parties who did not sign the arbitration agreement; and (4) the arbitration agreement applies to a particular type of controversy.[38] Issues of substantive arbitrability are for courts to decide unless delegated to arbitrators. Issues of procedural arbitrability include disputes that grow out of the dispute and bear on its final

33. *Schumacher Homes*, 774 S.E.2d at 6.
34. *Id.* at 5 (internal citation omitted).
35. *Id.* at 6.
36. *Id.* at 14 (Loughry, J., dissenting).
37. *Id.*
38. 537 U.S. 79, 83–84 (2002).

disposition, such as allegations of waiver, delay, time limits, notices, and estoppel.[39] Issues of procedural arbitrability are for arbitrators to decide.

When the parties in *Schumacher Homes* agreed that "the arbitrator(s) shall determine all issues regarding the arbitrability of the dispute," there was a clear delegation to the arbitrators to decide every arbitrability issue normally reserved to courts. The Supreme Court's summary disposition vacating the decision and directing the West Virginia Supreme Court of Appeals to reconsider in light of *DirecTV* sends a clear message. Judicial hostility to enforcement of arbitral agreements, including by adopting nonsensical interpretations of state law that are essentially gimmicks to skirt enforcement of the FAA, will not be tolerated.

D. Third Circuit Holds That Mere Reference to AAA Arbitration Is Not a "Clear and Unmistakable" Agreement to Authorize Arbitrators to Decide Party Consent to Class Arbitration

1. Factual Background

In 2015, the Third Circuit, in *Opalinski v. Robert Half International Inc.*,[40] joined the Sixth Circuit[41] in holding class arbitration presented a question of arbitrability for courts to decide, unless the parties' arbitration agreement clearly and unmistakably provided otherwise. Immediately thereafter, two district courts in the Middle District of Pennsylvania split over how to apply the *Opalinski* holding.[42] To resolve the split between its district courts, the Third Circuit accepted an interlocutory appeal in the *Scout Petroleum* case.

2. The Third Circuit's Analysis in *Scout Petroleum*

The Third Circuit started its analysis by stating: "The availability of class arbitration implicates two questions or inquiries: (1) the 'who decides' inquiry; and (2) the 'clause construction' inquiry."[43] The court further stated that "the 'who decides' inquiry, in turn, consists of two basic components."[44] Quoting from its *Opalinski* decision, the Third Circuit stated the first component is "whether the availability of classwide arbitration is a 'question of arbitrability.' "[45] If not, the arbitrator decides the issue. If a question of arbitrability is presented, the second component of the analysis "presume[s] that the issue is 'for

39. *Id.*

40. 761 F.3d 326 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015).

41. Reed Elsevier, Inc. v. Crockett, 734 F.3d 594 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014). The *Opalinski* case closely tracked the Sixth Circuit's reasoning in *Reed Elsevier.*

42. *See* Chesapeake Appalachia, LLC v. Scout Petroleum, LLC, 73 F. Supp. 3d 488 (M.D. Pa. 2014) (AAA Rules not a "clear and unmistakable" agreement to delegate gatekeeper decision on class arbitrability to arbitrators) and Chesapeake Appalachia, LLC v. Burkett, No. 3:13-3073, 2014 WL 5312829 (M.D. Pa. Oct. 17, 2014) (Reliance on AAA Rules in dispute resolution provision is "clear and unmistakable" agreement to allow arbitrator to decide issue of class arbitrability).

43. *Scout Petroleum*, 809 F.3d at 753.

44. *Id.*

45. *Id.* (quoting *Opalinski*, 761 F.3d at 330).

judicial determination unless the parties clearly and unmistakably provide otherwise.' "[46] The Third Circuit stated: " 'The burden of overcoming the presumption is onerous, *as it requires express contractual language unambiguously delegating the question of arbitrability to the arbitrator*.' "[47]

The Third Circuit examined the arbitration provision in the parties' lease agreement to determine if it met this exacting standard. The arbitration clause in *Scout Petroleum* and all other Chesapeake Appalachia cases closely resembles the model arbitrator clause recommended by the AAA.[48] It provides

> In the event of a disagreement between Lessor and Lessee concerning this Lease, performance thereunder, or damages caused by Lessee's operations, the resolution of all such disputes shall be determined by arbitration in accordance with the rules of the American Arbitration Association. All fees and costs associated with the arbitration shall be borne equally by Lessor and Lessee.[49]

The Third Circuit discussed Pennsylvania law requirements for incorporation by reference, noting that no specific AAA arbitration rules were mentioned in the arbitration agreement.[50] The court also agreed with Chesapeake that "this case implicates 'a daisy-chain of cross-references'—going from the Leases themselves to 'the rules of the American Arbitration Association' to the Commercial Rules and, at last, to the Supplementary Rules."[51] Without rendering a specific ruling on Scout Petroleum's incorporation by reference argument, the Third Circuit stated: "Having examined the various AAA rules, we believe that the Leases still fail to satisfy the onerous burden of undoing the presumption in favor of judicial resolution of the question of class arbitrability."[52]

---

46. *Id.*

47. *Id.* (quoting *Opalinski*, 761 F.3d at 335, citing Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs, 357 F.3d 272, 280–81 (3d Cir. 2004)) (emphasis added).

48. The AAA Guideline for drafting model clauses has been updated to correspond with the AAA's Commercial Arbitration Rules in effect on October 1, 2013, and is available at http://www.adr.org. It suggests the following clause for invoking AAA arbitration:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules [including the Optional Rules for Emergency Measures of Protection], and judgment on the award rendered by the arbitrators(s) may be entered in any court having jurisdiction thereof.

49. *Scout Petroleum*, 809 F.3d at 749.

50. *Id.* at 760–61. The AAA has adopted more than fifty sets of active rules, including the AAA Commercial Rules ultimately applied in the Chesapeake Appalachia cases. While the AAA Supplementary Rules for Class Arbitrations (Class Arbitration Rules) are not mentioned in these fifty sets of rules, the Class Arbitration Rules provide they are incorporated into all other AAA arbitration rules. The Third Circuit's decision in *Scout Petroleum* did not rest on a technical "incorporation by reference" analysis. Such an analysis might have noted that under the common law, incorporation would have to identify specific rules to be incorporated. In *Scout Petroleum* and many other cases, the arbitration agreement left the AAA to decide which of its fifty plus sets of rules would apply, thus complicating (and perhaps defeating) a potential incorporation by reference argument.

51. *Id.* at 761.

52. *Id.*

The Third Circuit's decision did not explicitly reject the substantial body of cases arising in other circuits holding adoption of AAA arbitration rules is a delegation of authority to arbitrators to decide arbitrability issues.[53] Instead, the Third Circuit distinguished those cases as relevant only to bilateral arbitration, stating bilateral arbitration case law was "entitled to relatively little weight in the class arbitrability context."[54] This result is potentially problematic. Nothing in the Supreme Court's jurisprudence to date suggests the Court intends one set of rules to apply to arbitrability issues arising in the context of bilateral arbitration, and another set to apply for class arbitration.

E. The Fourth Circuit Joins the Third and Sixth Circuits in Holding Availability of Class Arbitration Presents a Question of Arbitrability for Courts, Not Arbitrators, to Resolve

The Fourth Circuit in *Dell Webb Communities, Inc. v. Carlson*[55] followed the Third and Sixth Circuits, holding that the question of consent to class arbitration is a "gateway" issue of arbitrability that has to be decided by courts absent unmistakable evidence that the parties agreed to delegate that decision to the arbitrator(s). The court's decision addresses in substantial detail its rationale for concluding the Supreme Court's *Bazzle* decision is no longer operative and that participation in class arbitration raises a substantive question of arbitrability. Notably absent from the Fourth Circuit's decision, however, is any discussion of whether the parties agreed to delegate arbitrability questions simply by virtue of agreeing that the AAA Construction Rules applied to their dispute.

Dell Webb involves a construction contract between a homebuyer and homebuilder PulteGroup, Inc. The contract's dispute resolution provision provides in relevant part:

> After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act. . . . The rules of the American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding and the method of appointment of the arbitrator.[56]

53. At least seven circuit courts and many district courts have held reference to or incorporation of AAA or other institutional arbitration rules that authorize arbitrators to decide arbitrability issues is consent for arbitrators to decide questions of arbitrability. *See* notes 61 and 63.

54. *Scout Petroleum*, 809 F.3d at 764. The Ninth Circuit has suggested that perhaps distinctions can be drawn between different types of substantive questions, such that delegation would occur in some contracts that reference AAA rules, but not in others. In *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015), the Ninth Circuit stated: "we hold that incorporation of the AAA rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability." But the Ninth Circuit limited the application of its decision to contracts involving sophisticated parties, indicating a different rule of decision might apply for unsophisticated litigants.

55. 817 F.3d 867 (4th Cir. 2016).

56. *Id.* at 869.

Despite the arbitration clause, the homebuyer filed suit in state court seeking class adjudication on behalf of approximately 2,000 homeowners. Pulte moved to compel bilateral arbitration. The trial court denied that motion, but the appeals court reversed. As a result, the homeowner filed a demand for class arbitration with the AAA. The case manager advised that the AAA would decide whether class arbitration was permitted by the parties' contract. Pulte then filed a federal court action seeking a declaration under the FAA that the issue of class arbitration was a question of arbitrability to be decided by the court, not the AAA. The district court, relying on the Supreme Court's plurality decision in *Green Tree Financial Corp. v. Bazzle*[57] and an unpublished decision of the Fourth Circuit from 2007[58] held the issue of class arbitration was a procedural, not substantive, issue of arbitrability. As such, the district court held the arbitrator should decide the question of class arbitrability.

On appeal, the Fourth Circuit reversed. It held that the Supreme Court's decisions in *Stolt-Neilsen* and *Oxford Health Plans* had all but renounced the non-binding plurality decision in *Bazzle*, suggesting the issue would be decided differently if presented again.[59] Accordingly, the Fourth Circuit reversed and remanded the case to the district court with instructions that the court should decide whether the parties agreed to class arbitration.

Notably, the Fourth Circuit's opinion omits any comment on or analysis of the fact that the parties' dispute resolution agreement adopted the AAA Construction Rules. AAA Construction Rule 9 provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement."[60] Identical language in other AAA arbitration rules, such as the AAA Commercial Rules, has been repeatedly held, generally in the context of bilateral arbitration, to constitute a "clear and unmistakable" agreement that arbitrators and not the

57. 539 U.S. 444 (2003).

58. Davis v. ECPI Coll. of Tech., L.C., 227 F. App'x 250 (4th Cir. 2007).

59. The Fourth Circuit stated:

> [T]he [Supreme] Court's treatment of *Bazzle* in subsequent decisions has effectively disavowed that [*Bazzle's*] rationale, *see Oxford Health Plans LLC v. Sutter*, __ U.S. __, 133 S. Ct. 2064, 2068 & n.2, 186 L. Ed. 2d 113 (2013) (explaining the high bar for overturning an arbitrator's decision on the grounds that he exceeded his powers, but stating, "We would face a different issue if [the petitioner] had argued below that the availability of class arbitration is a so-called 'question of arbitrability.' Those questions . . . are presumptively for courts to decide."); *Stolt-Nielsen*, 559 U.S. at 680, 130 S. Ct. 1758 ("Unfortunately, the opinions in *Bazzle* appear to have baffled the parties in this case. . . . [T]he parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration. *In fact, however, only the plurality decided that question*." (emphasis added) (citation omitted)).

Dell Webb, 817 F.3d at 874.

Of course, with Justice Scalia's death, it is once again an open question whether *Bazzle* would be decided differently.

60. AAA Construction Industry Arbitration Rules and Mediation Procedures (July 1, 2015), *available at* http://www.adr.org.

court will decide the issue of arbitrability.[61] District courts that have considered the issue in the context of class arbitration have split. Some hold reference to or incorporation of AAA arbitration rules is not sufficient to constitute a "clear and unmistakable" agreement to delegate arbitrability issues, including class arbitration, to arbitrators.[62] Others hold reference to or incorporation of the AAA arbitration rules reflects a clear intent by the parties to delegate decisional authority to the arbitrator.[63]

The Fourth Circuit has never joined the majority of its sister circuits in holding that mere reference to or incorporation of the AAA arbitration rules in a dispute resolution provision is, even in the context of bilateral arbitration, "clear and unmistakable" evidence of an intent to delegate to arbitrators substantive questions of arbitrability. Nevertheless, it seems unusual that the Fourth Circuit would cite a number of cases that addressed the delegation issue raised by incorporation of AAA arbitration rules without itself specifically addressing that issue.[64]

The Fourth Circuit's conclusion that the parties had not "unmistakably" agreed that the arbitrator would decide issues of arbitrability is essentially unsupported by any analysis. The final and dispositive paragraph of the court's opinion provides:

> In this case, the parties did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration. In fact, the sales agreement says

61. At least the First, Second, Fifth, Eighth, Ninth, Eleventh, and Federal Circuits have held that reference to the AAA or its arbitration rules in an arbitration clause constitutes clear and unmistakable evidence that the parties agreed to arbitrate substantive questions of arbitrability. *See, e.g.*, Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 10–12 (1st Cir. 2009); Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005); Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 675 (5th Cir. 2012); Fallo v. High-Tech Inst., 559 F.3d 874, 878 (8th Cir. 2009); Oracle Am., Inc. v. Myriad Grp. A.G., 724 F.3d 1069 (9th Cir. 2013); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir. 2005); Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1373 (Fed. Cir. 2006). At least one circuit court has suggested, however, that this presumption is rebuttable. *See* Riley Mfg. Co. v. Anchor Glass Container Corp., 157 F.3d 775, 777 & n.1, 780 (10th Cir. 1998) (although AAA commercial rules were incorporated into arbitration agreement, subsequent settlement agreement created ambiguity regarding the parties' intent to delegate to the arbitrator the issue of arbitrability).

62. *See, e.g.*, Chesapeake Appalachia, LLC v. Suppa, 91 F. Supp. 3d 853, 864 (N.D. W.Va. 2015); Bird v. Turner, No. 5:14CV97, 2015 WL 5168575, at *7–9 (N.D. W.Va. Sept. 1, 2015); Herzfeld v. 1416 Chancellor, Inc., No. 14-4966, 2015 WL 4480829, at *5–6 (E.D. Pa. July 22, 2015); Chassen v. Fidelity Nat'l Fin., Inc., No. 09-291 (PGS)(DEA), 2014 WL 202763, at *6 (D.N.J. Jan. 17, 2014).

63. *See, e.g.*, Order, Marriott Ownership Resorts, Inc. v. Sterman, No. 6:14CV1400-ORL-41TBS, at 5–10 (M.D. Fla. Jan. 16, 2015); Marriott Ownership Resorts, Inc. v. Flynn, No. 14-00372 JMS-RLP, 2014 WL 7076827, at *7–15 (D. Haw. Dec. 11, 2014); Medicine Shoppe Int'l, Inc. v. Edlucy, Inc., No. 4:12-CV-161 CAS, 2012 WL 1672489, at *1–5 (E.D. Mo. May 14, 2012); Bergman v. Spruce Peak Realty, LLC, No. 2:11-CV-127, 2011 WL 5523329, at *2–4 (D. Vt. Nov. 14, 2011); Yahoo! Inc. v. Iversen, 836 F. Supp. 2d 1007, 1010–12 (N.D. Cal. 2011).

64. For example, the Fourth Circuit noted that "at least two district judges in this circuit have held that whether an agreement permits class arbitration is a question of arbitrability for the court," citing *Suppa*, 91 F. Supp. 3d 853; *Bird*, 2015 WL 5168575. *See Dell Webb*, 817 F.3d at 876. Both of those opinions specifically addressed whether incorporation of AAA Commercial Rule 7 was clear and unmistakable evidence of intent to delegate the class arbitrability question to the arbitrator and held it was not.

> nothing at all about the subject. Accordingly, the district court erred in concluding that the question was a procedural one for the arbitrator. We therefore reverse the district court's order denying Pulte's motion for partial summary judgment, vacate the judgment dismissing the Petition, and remand for further proceedings. On remand, the district court shall determine whether the parties agreed to class arbitration.[65]

The second sentence of this paragraph, where the Fourth Circuit states "the sales agreement says nothing at all about the subject," reflects the only contractual support provided by the court for the proposition that there was no evidence of delegation to the arbitrators.[66] In fact, however, the sales agreement incorporates the AAA Construction Rules. As other circuits have held, AAA Construction Rule 9(a) arguably addresses the second prong of the "who decides" question by stating the arbitrator has the power to decide issues of arbitrability. This suggests discussion of the AAA Construction Rules should have been part and parcel of the Fourth Circuit's analysis.

F. Fifth Circuit Continues to Hold Class Arbitrability Is a Procedural Question for Arbitrators

Contrary to the Third, Fourth and Sixth Circuits, the Fifth Circuit decided in *Robinson v. J & K Administrative Management Services, Inc.*[67] to continue following its prior decision in *Pedcor Management Co. Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*,[68] which adopted the Supreme Court's *Bazzle* plurality decision in holding that consent to class arbitration presented a procedural, not substantive, issue of arbitrability for arbitrators to decide. The Fifth Circuit acknowledged in *J & K* that it had erroneously concluded in *Pedcor* that *Bazzle* was a binding precedent. It believed the plurality opinion combined with the concurring opinion of Justice Stevens constituted a majority.[69] In fact, as the Supreme Court made clear in *Stolt-Neilsen*, *Bazzle* was a nonbinding plurality decision.[70]

65. *Id.* at 877.

66. *Id.* The Fourth Circuit's additional determination that "the district court erred in concluding that the question [of class arbitration] was a procedural one for the arbitrator" because "the parties did not unmistakably provide that the arbitrator would decide whether their agreement authorizes class arbitration" appears analytically incorrect. If a *procedural* question of arbitrability is presented, then under *Howsam* and other Supreme Court cases, that question is *presumptively* for the arbitrator to decide. That is true even if the parties' arbitration agreement is silent about delegating arbitrability issues to the arbitrator. Delegation is only an issue with respect to substantive issues of arbitrability, which is why the Fourth Circuit logically should have addressed whether incorporation of the AAA Construction Rules is a delegation to the arbitrator to decide the issue.

67. 817 F.3d 193 (5th Cir. 2016).

68. 343 F.3d 355 (5th Cir. 2003).

69. *J & K*, 817 F.3d at 196.

70. *Stolt-Neilsen*, 559 U.S. at 678–79.

J & K urged the Fifth Circuit to abrogate *Pedcor* in light of the Supreme Court's more recent decisions critical of the *Bazzle* plurality. But the Fifth Circuit rejected this argument. *Stolt-Neilsen* did not actually resolve the "who decides" question, nor did it overrule prior Supreme Court and Fifth Circuit decisions. Accordingly, the panel hearing *J & K* believed it was compelled by the Fifth Circuit's "rule of orderliness" to continue to follow the prior panel decision in *Pedcor* as the controlling precedent.[71] As a result, it held that JAMS, which had been appointed by the district court to administer the arbitration, would decide whether the parties consented to class arbitration.[72]

Despite this outcome, *J & K* does not present a clear circuit split.[73] The Fifth Circuit did not need to rely on incorporation of the JAMS arbitration rules to find that the parties had delegated the "who decides" question to arbitrators. As an independent ground of decision, the court found that Section (g) of the parties' arbitration agreement subjects " 'claims challenging the validity or enforceability of this Agreement (in whole or in part) or challenging the applicability of the Agreement to a particular dispute or claim' " to arbitration.[74] In light of the Supreme Court's recent decision in *Schumacher Homes*, there is no doubt this provision was an express delegation by the parties to arbitrators to decide questions of arbitrability. As such, regardless whether continued adherence to *Pedcor* ultimately turns out to be correct, the Fifth Circuit's holding in *J & K* is supported by the express delegation clause.

G. Analysis of Potential Circuit Split on the "Who Decides" Question

It appears that the circuit courts are splitting over both components of the two-prong "who decides" question. First, the courts are divided over whether class arbitration presents a procedural or substantive issue of arbitrability and hence whether arbitrators or courts should decide whether parties consented to class arbitration. Second, and more fundamentally, it appears a circuit split will develop regarding whether reference to or incorporation of AAA or similar institutional arbitration rules presumptively delegates questions of arbitrability to arbitrators.

71. *J & K*, 817 F.3d at 197.

72. *Id*. at 198.

73. JAMS arbitration rules specifically direct arbitrators to decide their own jurisdiction, including disputes concerning arbitrability of any claim presented in the arbitration. As such, the JAMS arbitration rules are arguably even more indicative of party consent to an arbitrator rather than a court deciding issues of substantive arbitrability than comparable AAA arbitration rules. *See, e.g*., JAMS Comprehensive Arbitration Rules & Procedures, Rule 11(b) (July 1, 2014) ("Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, *shall be submitted to and ruled on by* the Arbitrator." (Emphasis added). *Available at* http://www.jamsadr.com/rules-comprehensive-arbitration/.

74. *J & K*, 817 F.3d at 197.

The present division between the circuits on the delegation issue cannot be explained away by arguing bilateral precedents have little weight in class arbitration. There is no reason to think the Supreme Court intends that arbitrability questions will be resolved differently in bilateral versus class arbitration. Former Justice Scalia—no friend of class actions—stated during oral argument in *Oxford Health Plans* that he did not want to adopt special rules for class actions as opposed to applying general principles.[75] None of the Supreme Court precedents to date have suggested the rules related to resolving the "who decides" question should differ in bilateral and class arbitration.

With respect to the goal of inferring party intent from contract language, no circuit court has focused on the requirement in *Stolt-Neilsen* that consent to class arbitration *cannot be inferred merely from the agreement to arbitrate*.[76] Dispute resolution provisions are commonly structured so that reference to the AAA or its arbitration rules is found in the sentence or paragraph of the contract where the parties' primary purpose is simply to agree to arbitrate. Additionally, the contractual reference to the AAA or its arbitration rules often tracks closely to the standard incantation recommended by the AAA's Guidelines for drafting agreements to arbitrate. Both of these factors suggest the "intent of the parties" in referencing the AAA rules in dispute resolution provisions is primarily to agree to arbitrate. Many times, parties do not even select which of the fifty plus sets of AAA rules will govern their dispute, suggesting they focused no attention on the details of individual arbitration rules and whether those rules empower arbitrators to decide questions of arbitrability.

By contrast, delegations of authority to arbitrators to decide issues of arbitrability are generally found in a separate sentence or paragraph of the dispute resolution provision. That difference in contract structure is clear in the *Schumacher Homes* and *J & K* cases discussed in this article. When the delegation language appears in a separate portion of the contract from the standard form language consenting to arbitration, there is greater assurance the parties focused on that language. Thus, the Supreme Court's decisions have enforced express delegation clauses, but have not to date embraced a rule of interpretation that would permit mere reference to the AAA or its rules to create a presumptive delegation to arbitrators to resolve the "who decides" question in class arbitration.

The recent trend that class arbitration raises a "gatekeeper" issue has thus far advanced only in those circuit courts that never recognized mere reference to AAA arbitration as creating a presumption that parties delegated to arbitrators questions of arbitrability. In other circuits, even if class arbitration is ultimately deemed to raise a question of arbitrability, it seems unlikely that reference to the

75. Transcript of Oral Argument at 9, lines 22–25, Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (No. 12-135).

76. The Court in *Stolt-Neilsen* made clear that when construing an arbitration provision, "courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." 559 U.S. at 684. But "[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties agreement to arbitrate." *Id*. at 685.

AAA rules will not be deemed a delegation to arbitrators consistent with long-standing authority. A circuit split thus seems likely to develop in relatively short order. Without Justice Scalia, and considering that Justice Breyer wrote the plurality opinion in *Bazzle*, and that Justice Thomas dissents from application of the FAA to state law arbitrations, there is no assurance either that: (1) the Court's strong voice in *Stolt-Neilsen* and *Oxford Health Plans* will continue to reflect the view of a future Court addressing the *Bazzle* plurality; or (2) that the Third Circuit's high standard of proof on delegability issues will be applied.

H. Conclusion

DirecTV and *Schumacher Homes* demonstrate the continuing resistance by some state courts to the Supreme Court's broad construction of the FAA, which preempts state laws intended to protect consumers in adhesion contracts. Many advocates believe that without access to class actions, whether in court or in arbitration, the financial incentives necessary for consumers to secure good legal representation are not present, leaving them without protection from predatory corporate behavior.[77] *DirecTV* and *Schumacher Homes* break no new ground and are best understood as policing actions to enforce compliance with prior Supreme Court precedent. With the passing of Justice Scalia, the present Court is unlikely to expand further the breadth of the FAA's preemption of state law.

Scout Petroleum and *Dell Webb* follow indications that the Supreme Court would reject the *Bazzle* plurality and find that class arbitration presents a "gatekeeper" issue to be decided by courts. Justice Scalia's death has significant implications for whether the Supreme Court will continue on a trajectory to reject *Bazzle*.

The continuing dispute in the circuit courts over "who decides," courts or arbitrators, whether parties have consented to class arbitration, is one of the most important issues in consumer arbitration. Resolution of the gatekeeper issue is often outcome determinative. If courts initially decide the issue, judicial review occurs at the outset of the dispute under a de novo standard. If arbitrators primarily decide, judicial court review occurs only during the confirmation or annulment process and then only under the deferential review standard required by Article 10 of the FAA. This means that even if the arbitrator "gets it wrong," most of the time courts will have no authority to correct the error. Limited post-award judicial review, combined with anecdotal evidence that arbitrators rule more frequently than courts in favor of class arbitration, suggests there will be more class arbitrations if arbitrators primarily decide whether parties have consented to class arbitration.

77. This view is reflected in the dissent of Justice Ginsburg in *DirecTV*, 136 S. Ct. at 471–72.

I. Recommendations for Drafting Arbitration Clauses in an Uncertain Legal Environment

To avoid unexpected results in the present uncertain and perhaps changing legal environment, it is important that parties draft dispute resolution provisions that reflect their intentions. As this report demonstrates, relying on standard form provisions from the AAA or other arbitral institutions can result in categorically different outcomes, depending on the circuit or district court that is construing the contract. To avoid this uncertainty, dispute resolution clauses should clearly and unmistakably identify whether parties intend courts or arbitrators to decide substantive issues of arbitrability.

This can be accomplished with a provision that expressly delegates arbitrability issues either to courts or to arbitrators. If the parties want arbitrators to decide all arbitrability questions, their contract should include a provision that expressly directs arbitrators to exercise this authority. The following clause should work under the Supreme Court's *Howsam* precedent:

> The arbitrator(s) shall determine all issues regarding the arbitrability of a dispute, including without limitation the validity of the arbitration agreement, whether parties are bound by it, and whether the arbitration agreement applies to a particular type of controversy.[78]

If parties want courts to decide all substantive arbitrability questions in a contract where they have selected AAA arbitration, the contract should include a provision such as:

> The parties intend for courts to resolve all substantive questions of arbitrability. By referencing the AAA arbitration rules, the parties do not consent to the arbitrator(s) deciding substantive questions of arbitrability, including without limitation the validity of the arbitration agreement, whether parties are bound by it, and whether the arbitration agreement applies to a particular type of controversy.[79]

If parties do not want to participate in class arbitration, they should separately include a disclaimer, such as:

> The parties do not consent to the incorporation of the AAA Supplementary Rules for Class Arbitration into the rules governing this arbitration, do not consent to class arbitration of any dispute, and hereby waive any right to arbitrate any disputes subject to arbitration under this Agreement through representative or class arbitration.[80]

78. *Howsam*, 537 U.S. at 83–84.

79. *Id*. If a different arbitral institution is utilized for arbitration, the name of that institution can be substituted for the AAA.

80. If arbitral rules of a different arbitration institution have been selected, the name of that institution should be substituted and, if that institution has class arbitration rules, consent to arbitrate under those rules should be disclaimed. Further, based on the Seventh Circuit's decision in *Lewis v. Epic Systems Corp*., No. 15-2997, 2016 U.S. App. LEXIS 9638 (7th Cir. May 26, 2016), waivers of class

ADDENDUM[81]

The Seventh Circuit's recent decision in *Lewis v. Epic Systems Corp.*[82] creates a circuit split with the Second, Fifth, Ninth, and Eleventh Circuits[83] by holding that a waiver of class action arbitration in a contract between an employer and a group of union employees violates rights granted by the National Labor Relations Act (NLRA)[84] by requiring employees to address wage and hour claims only through individual (bilateral) arbitration. *Lewis* is also the first official departure by a circuit court from the Supreme Court's rationale in *AT&T Mobility*, namely, that restrictions on class waivers are preempted by the FAA because they inappropriately burden the right to arbitration, including party autonomy to select the conditions for consenting to arbitration.

In *Lewis*, the plaintiff was an employee at a union shop, where he individually entered into an arbitration agreement with his employer that included a waiver of class arbitration prohibiting collective arbitration or collective action in any forum concerning wage and hour disputes. When a dispute arose, Lewis filed suit in federal court, arguing that the arbitration agreement violated the NLRA by interfering with his collectively bargained right to concerted activities against his employer. The district court denied the employer's motion to compel arbitration, and the Seventh Circuit affirmed, holding that class proceedings are one of the rights granted under the NLRA and that the arbitration agreement was consequentially illegal. The Seventh Circuit also noted that the holding was consistent with the FAA because illegality is a standard contract defense contemplated by the FAA's savings clause.

AT&T Mobility involved California state law barring waivers of class arbitration in consumer adhesion contracts rather than a collectively bargained labor agreement in a union shop. Nevertheless, the Supreme Court's rationale applies broadly to arbitration in general, holding that class action waivers permit arbitration to function as a quick and inexpensive alternative to litigation. The Seventh Circuit's decision in *Lewis* asserts that the Supreme Court's *AT&T Mobility* decision should be limited to its facts, thereby allowing lower courts to more readily distinguish the case. Also, since arbitrators are increasingly addressing

---

arbitration in union shops where the collective bargaining agreement does not authorize such waivers are unenforceable.

81. The Seventh Circuit's decision discussed in this Addendum was published the day this report was completed for publication. To avoid delaying publication by redrafting a portion of the report, this Addendum was added to allow the author to bring this important decision to the readers' attention.

82. No. 15-2997, 2016 U.S. App. LEXIS 9638 (7th Cir. May 26, 2016).

83. Every circuit to address the issue so far has found that the FAA's policy of favoring arbitration overrides the right to collective actions under the NLRA. *See* Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326, 1336 (11th Cir. 2014); D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053–55 (8th Cir. 2013); Sutherland v. Ernst & Young LLP, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *see also* Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (noting the trend).

84. 29 U.S.C. §§ 151–169 (2012).

the threshold question of whether parties have consented to class arbitrability, *Lewis* potentially legitimizes attempts by arbitrators to distinguish *AT&T Mobility* in other contexts as well. Finally, although *Lewis* creates a circuit split, in the absence of former Justice Scalia's vote, it appears the current Court is evenly divided, potentially preventing any resolution of the circuit split next term.