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Seventh Circuit Agrees That Class Arbitrability is a Gateway Question Presumptively for the Court, Then Apparently Ignores the Delegation Issue

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The Seventh Circuit Court of Appeals has joined five other Circuits in determining, unremarkably, that class or collective arbitrability is a gateway question that is presumptively for the court to decide. It then apparently ignored the issue of whether the parties delegated such arbitrability questions to an arbitrator. See *Herrington v. Waterstone Mortgage Corp.*, No. 17-3609 (7th Cir. Oct. 22, 2018). (Yet we arguably may infer from the Court’s decision that incorporation by reference in an arbitration agreement of the Employment Arbitration Rules of the American Arbitration Association does *not* constitute a clear and unmistakable manifestation of the parties’ intent to delegate the class/collective arbitrability question to an arbitrator.)

The arbitration clause in the employment agreement in question provided in pertinent part that

“any dispute between the parties . . . arising out of their employment relationship shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims. Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement.” Slip Op. at 3.

The plaintiff commenced a class action against Waterstone, her former employer, alleging wage and hour violations. The District Court compelled arbitration, but (pre-*Epic*) held that the class arbitration waiver was unenforceable, and the arbitrator then conducted a collective (not class) arbitration. He eventually awarded more than \$10 million in damages and fees to Herrington and an opt-in “class” of 174 claimants that included employees who had not signed arbitration agreements with Waterstone. *Id.* at 1, 11n.6. Waterstone eventually appealed from a final judgment enforcing the arbitrator’s award. *Id.* at 6.

The Court first determined that a waiver of class and collective actions in an arbitration clause in an employment agreement is enforceable, consistent with the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). That was “the easy part of [the] appeal.” Slip Op. at 7.

Nevertheless, notwithstanding the presence of a valid waiver, claimant-appellee Herrington insisted on appeal that the agreement affirmatively permitted class or collective arbitration of her claims. The Court identified that argument as weak, but “someone must evaluate it – and we must decide who has that job.” Slip Op. at 2.

The Seventh Circuit held fairly easily too that the availability of class or collective arbitration is a gateway issue of arbitrability that is presumptively for the court, rather than for an arbitrator, to decide. See *id.* at 9. In so deciding, the Seventh Circuit joined the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits. (The Supreme Court has reserved the question, and has not yet decided it. See *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569n.2



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(2013).) The Court recognized that Herrington’s arbitration with Waterstone was conducted as a collective proceeding, rather than as a class proceeding, but opined that “the forms are so closely related that the same analysis applies.” Slip Op. at 9.

The Court noted that “the parties can agree to delegate to an arbitrator the question whether an agreement authorizes class or collective arbitration,” Slip Op. at 9n.3, *citing Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010), but that such an agreement must be clear and unmistakable, see Slip Op. at 9n.3. There, however, the Court apparently lost the thread, and said nothing more about delegation.

Yet the arbitration clause in question incorporated by reference the rules of the American Arbitration Association applicable to employment claims – presumably the Employment Arbitration Rules and Mediation Procedures (eff. 11/1/09) (“EAR”). They include the provision that

“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.” EAR 6(a).

Furthermore, in adopting those rules, the parties also arguably incorporated the AAA’s Supplementary Rules for Class Arbitrations (“SRCA”). See SRCA 1(a). SRCA 3 in turn provides that

“upon appointment, the arbitrator shall determine as a threshold matter, . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the “Clause Construction Award”).”

But the Seventh Circuit apparently ignored the question whether this incorporation of AAA rules constituted a “clear and unmistakable” manifestation of the parties’ intention to delegate to the arbitrator(s) the class or collective arbitrability issue. Other Circuits that have opined on this question are split.

The waiver or prohibition in the arbitration clause of class/collective arbitration concerned arbitrability, but did not foreclose or determine the “who decides” question vis-à-vis arbitrability. Therefore, an inference arguably to be drawn from the Seventh Circuit’s decision is that incorporation by reference in an arbitration clause of the rules of the American Arbitration Association, such as its Employment Arbitration Rules, does not constitute a clear and unmistakable manifestation of the parties’ intention to delegate the class/collective arbitrability issue to an arbitrator.

Interestingly, the Court did discuss other points regarding class arbitrability, some of which had not been paid much attention elsewhere. For example, the Seventh Circuit emphasized the importance of the *consent of the respondent* to arbitrate with a putative group of claimants that were not counterparties to the controlling arbitration agreement. For example, the Court noted that

“by proposing that the arbitration include additional employees, Herrington raised the question whether those employees had agreed to submit their claims against Waterstone to arbitration, *not to mention whether Waterstone had agreed to arbitrate rather than litigate with them.*” Slip Op. at 10 (emphasis added).

So too,

“an opt-in claimant’s willingness to arbitrate with the defendant does not establish that the defendant agreed to arbitrate with the opt-in claimant.” *Id.* at 11.

Therefore, an adjudicator would have to determine whether respondent Waterstone had agreed to arbitrate not only with Herrington, “but also with members of her proposed class.” *Id.*

Moreover, viewing the matter from another perspective, the Court considered the scope of controversies that the arbitration clause contemplated. That is, the contract in question required arbitration of “employment-related disputes” between the parties Herrington and Waterstone arising out of their employment relationship. But Herrington’s application in effect was that the arbitration should also resolve disputes between Waterstone and many other employees regarding their respective employment relationships. See Slip Op. at 12. That would arguably be beyond the scope of the controlling arbitration agreement.

Ultimately, the Seventh Circuit remanded the case to the District Court for further proceedings, beginning with an inquiry regarding whether the arbitration clause in question authorized the kind of arbitration – collective arbitration – that had been conducted. If, as is likely, the District Court determines that the agreement in question permits only bilateral arbitration, it would be required to vacate the award and to send the dispute back to the arbitrator for a new bilateral proceeding.

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