THE
NATIONAL LAW REVIEW

Supreme Court Again Declines to Review Ruling that Courts Determine Availability of Classwide Arbitration

Monday, November 13, 2017

The United States Supreme Court recently declined to review a ruling that courts, not arbitrators, determine the availability of classwide arbitration. Previous attempts by putative collective or class representatives to obtain certiorari on the issue were unsuccessful. *See, e.g., Opalinski v. Robert Half International Inc.*, 61 F.3d 326, 330-35 (3d Cir. 2014) ("Opalinski I") (For K&L Gates' coverage on the denials of the prior petitions see here and here). The Court's most recent decision in *Opalinski v. Robert Half International Inc.* suggests that the Court still does not perceive sufficient disagreement, if any, among the federal courts of appeals on the issue. 677 F. App'x 738, 740 (3d Cir. 2017) ("Opalinski II"). As a result, the trend continues that the availability of classwide arbitration is a gateway issue for the courts.

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In *Opalinski* I, two former employees filed a collective action against Robert Half International, Inc. claiming that they were misclassified as "overtime exempt" in violation of the Fair Labor Standards Act. Robert Half sought to compel arbitration, and an arbitrator interpreted the governing agreement as permitting class arbitration. On review, however, the Third Circuit joined the Sixth Circuit in concluding that whether an arbitration agreement provides for classwide arbitration is a gateway "question of arbitrability" and thus is presumptively a question for the courts. The Supreme Court denied certiorari.

In *Opalinski II*, the district court reviewed the governing agreement on remand from the Third Circuit. Disagreeing with the arbitrator who had originally reviewed the agreement, the district court concluded the agreement did not provide for classwide arbitration. In particular, the court ruled that the agreement contained no terms that the parties had expressly or impliedly agreed to such a mechanism. On appeal, the Third Circuit ruled that it would not revisit the issue of the district court's authority to make the determination. Nor did the Third Circuit find any error in the district court's analysis.

After the Third Circuit denied the employees' petition for rehearing *en banc*, the employees again sought certiorari on the question of whether the availability of classwide arbitration is a gateway question for the courts. The employees argued that several federal courts of appeal allow an arbitrator to determine the availability of classwide arbitration. In response, Robert Half argued that many of the cases on which the employees relied did not actually consider the question presented and that the Fourth, Sixth, Eighth, and Ninth Circuits had held that a court must decide the question. See; *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 867 (4th Cir. 2016), cert denied, 137 S. Ct. 567 (2016); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 596 (6th Cir. 2013); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F. 3d 966, 972 (8th Cir. 2017); *Eshagh v. Terminix Int'l Co.*, No. 12-16718, 2014 U.S. App. LEXIS 24194, at *3 (9th Cir. Dec. 22, 2014). As noted, the Supreme Court declined to take the case. Even though the trend continues that courts, not arbitrators, should decide the question, businesses that use consumer arbitration agreements should still consider whether the language of those agreements could be read as permitting classwide arbitration absent the inclusion of an express class waiver provision.

Elma Delic also contributed to this article.

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