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Class Action Litigation | Alert

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Split California Supreme Court Holds that without Express Agreement, Classwide Arbitrability is not a 'Gateway Issue' that must be Decided by the Court

In a 4-3 decision, the California Supreme Court recently determined that the question of "who decides whether [an arbitration] agreement permits or prohibits classwide arbitration" is not subject to a "universal rule [that] allocates this decision in all cases to either arbitrators or the courts." *See Sandquist v. Lebo Automotive, Inc.*, Case No. S220812, 2016 WL 4045008 (Cal. July 28, 2016). Instead, the question depends on contract interpretation under California law, unless it conflicts with federal law. The arbitration agreement in *Sandquist* was silent concerning classwide arbitration, so the broad language confirming the parties' agreement to have an arbitrator decide "any claim, dispute, or controversy" was sufficient to demonstrate that the parties expected the arbitrator to resolve the issue.

The class-action complaint in *Sandquist* asserted employment claims for discrimination and hostile work environment under California's Fair Employment and Housing Act (Gov. Code, § 12940, *et seq*.) and unfair competition law (Bus. & Prof. Code, § 17200, *et seq*.). The employer moved to compel individual arbitration of the named plaintiff's claims based on the three different arbitration agreements that it drafted and he signed as a condition of his employment. The trial court found that the agreements were enforceable, granted the motion, and struck the class allegations based on a finding that the agreements did not permit classwide arbitration. The Court of Appeal reversed, in part, and held that the availability of classwide arbitration is a question of contract interpretation that must be decided by the arbitrator. The employer appealed, and the Supreme Court granted review to address the split in authority on the topic.

The Supreme Court affirmed. First, the Court analyzed various provisions stating that "any claim, dispute, and/or controversy . . . which would otherwise require or allow resort to any court . . . between [me/myself] and the Company" would be "submitted to and determined exclusively by binding arbitration." *Id.* at 4 (brackets in original). The Court found that this broad language suggested a mutual expectation that the arbitrator decide the question of classwide arbitrability, but that the language was not conclusive. Therefore, the Court turned to principles of contract construction that broadly apply to arbitration agreements, including: (i) that "when the allocation of a matter to arbitration or the courts is uncertain, [the courts] resolve all doubts in favor of arbitration;" and (ii) that ambiguous arbitration clauses are construed

against the drafting party. The Court held that, as a matter of state law, the parties' agreements appointed the arbitrator to decide whether the claims could be resolved through class arbitration.

The Supreme Court then examined whether any specific "pro-court" or "pro-arbitrator" presumptions concerning the availability of classwide arbitration compelled a contrary result, and found that the California Arbitration Act does not address class arbitration or who should decide that issue. Turning to the Federal Arbitration Act (FAA), the Court relied heavily on the United States Supreme Court's plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) (*Green Tree*) and its progeny, which indicate that the FAA also does not contain any presumption in favor of the court or arbitrator deciding whether a dispute may be arbitrated on a classwide basis.

Finally, the Court considered whether the issue of classwide arbitration fell within the "limited scope" of "gateway inquiries" that the FAA presumptively assigns to the court, or the "correspondingly broad" range of questions that are within the arbitrator's province to decide. Generally speaking, "gateway questions" are limited to "whether there is an enforceable arbitration agreement or whether it applies to the dispute at hand." In answering this question, the Court again deferred to the U.S. Supreme Court's opinion in *Green Tree*, which reasoned that the question of class arbitration does not concern "the validity of the arbitration clause," "its applicability to the underlying dispute," or "any threshold matter necessary to establish as a condition precedent an agreement to arbitrate, but rather . . . what *kind of arbitration proceeding* the parties agreed to." *Sandquist* at 17 (citing *Green Tree* at 452; emph. in original). Therefore, the *Sandquist* court held that the arbitrator should decide whether the arbitration may be conducted as a class action.

The three dissenting justices in *Sandquist* reached a different conclusion because, in their view, the United States Supreme Court has indicated – but not held – that classwide arbitrability has become a "gateway question." Relying on cases like *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662 (2010), the dissent reasoned that the U.S. Supreme Court would not hold that "silence on the issue of class-action arbitration" constitutes consent to such proceedings, much less "presume that the parties have consented to allow an arbitrator to make an essentially unreviewable determination to the same effect." *Sandquist* at 8 (Kruger, J., dissenting). The dissent also raised concerns that the arbitrator's decision concerning class arbitration would bind absent class members, who might not have an opportunity to question the validity or applicability of the arbitration agreements they signed.

The *Sandquist* decision provides additional clarity on the distinction between "gateway issues," which are presumptively reserved for the courts, and other "procedural" questions, which are not. The decision underscores why arbitration agreements must be drafted deliberately to ensure predictability in enforcement. For example, arbitration agreements should contain express terms concerning classwide adjudication and identify the questions that the court or arbitrator should resolve (*e.g.*, the enforceability of any class action waiver). As noted by the dissent, vagueness can result in unexpected exposure with little hope for judicial review.

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