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Federal Appellate Court Rules That Arbitration Of Class Action Claims Is An Issue For Courts And Not Arbitrators To Decide

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One of the difficulties associated with alternative dispute resolution procedures, and particularly binding arbitration, is that the process occasionally can become bogged down by questions of procedure: instead of battling over the merits of the dispute itself, the parties spend considerable time and resources on where the dispute should be resolved (in court or in front of an arbitrator). This can be even more taxing when the question is over *who gets to decide* the issue of whether the claim should be arbitrated (the court or the arbitrator). Viewed from a cynic's perspective, an arbitrator paid by the parties is unlikely to rule that he doesn't have the authority to hear their dispute. On the flipside though is the equally-cynical notion that judges hard-pressed to clear their dockets would welcome the opportunity to send a claim to arbitration and get it off their desk. Class actions magnify the scope of everything in the law and issues relating to arbitration are no exception. The last few years have seen considerable discussion over the circumstances under which class actions can be arbitrated and whether such actions can be waived through a binding arbitration agreement. Entering into this field, the Federal Third Circuit Court of Appeals now has decided that the issue of whether a class action should be arbitrated is something for a judge – and not an arbitrator - to decide. The case is *David Opalinski et al v. Robert Half International Inc.* The case originally was brought as an overtime wage claim under the FLSA by several Robert Half employees. The employees had signed agreements with mandatory arbitration provisions, but the provisions made no mention of class actions and also didn't include a class action waiver. Robert Half successfully convinced a lower federal court to submit the claim to arbitration, and the court ruled that the issue of whether the claims could be brought on a class basis also was for the arbitrator to decide. The Third Circuit reversed the second aspect of the decision, ruling that class-wide arbitration was a question to be decided by a court, "absent a clear agreement" by the parties to the contrary. Since the underlying arbitration provision was silent on the issue of class claims, the Third Circuit held that the arbitrator had no authority to decide the class action issue, particularly given what the court characterized as the "fundamental" differences between the arbitration of an individual claim and that of a class claim. The immediate takeaway from this decision is that employers who have mandatory arbitration provisions should make sure to include language in those documents relating to class actions. Since class waivers have been held to be enforceable by many courts, employers should consult with their counsel to incorporate waiver language which might help them avoid class action claims. Addressing these issues by contractual agreement also would

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allow employers to avoid disputes like this one – which has progressed all the way to the appellate court level and seems poised to continue on to rehearing and beyond – where the parties spend time, energy, resources and money fighting over where to have their fight before even beginning to discuss the actual merits of the underlying case.