



Court Scorches Employer, Upholds Class Arbitration Decision

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In a blistering decision, the U.S. Court of Appeals for the Fifth Circuit upheld an arbitrator's determination that class arbitration was available under the parties' arbitration agreement. The court deferred to the arbitrator and agreed with the district court's decision that "the arbitrator had interpreted the agreement and that he therefore did not exceed his powers."

In [Sun Coast Resources, Inc. v Conrad](#), the plaintiff employee alleged that the defendant employer, a seller and transporter of "diesel, gas and other oil products" improperly excluded certain reimbursements from the "regular rate," and thus violated the Fair Labor Standards Act (FLSA) by miscalculating overtime. The plaintiff employee filed an arbitration demand, and sought class arbitration. The arbitrator determined that class arbitration was available under the arbitration agreement, and the district court rejected the defendant employer's petition to vacate the arbitrator's decision. On appeal, the Fifth Circuit affirmed.

"Gateway" Presumption

The Fifth Circuit has held that absent a contrary indication in the arbitration agreement, the availability of class arbitration is presumptively a "gateway" issue to be decided by the court, [not an arbitrator](#). The court held that the presumption was overcome here, explaining that various provisions of the

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arbitration agreement “strongly indicate that the parties bargained for the arbitrator to decide class arbitrability.”

Arbitration Agreement Terms

The court explained that an arbitrator’s decision is to be upheld if it “has *some* basis in the arbitration agreement.” The arbitrator found that the arbitration agreement:

- Covered a broad range of claims arising out of the employment relationship and exempted “relatively few,” suggesting to the arbitrator “a conscious choice” not to exclude class arbitration
- Provided for “all remedies” available in court, and that the defendant employer drafted the agreement without specifically carving out class arbitration, suggesting to the arbitrator that class arbitration was appropriate
- Adopted the American Arbitration Association’s (AAA) rules, which permit class proceedings

Employer’s Waiver

Setting aside the arbitration agreement provisions, the court’s decision took the defendant employer to task, repeatedly and at length, finding that the employer had waived the argument that the arbitrator lacked the authority to determine the availability of class arbitration. According to the court, the defendant employer “forfeited the issue, not once, but twice—first, by not presenting it to the arbitrator at all, and second, by not presenting it in a timely manner to the district court.” As the court explained, the defendant employer:

- “Affirmatively agreed” to put the question of class arbitration to the arbitrator and agreed that the arbitrator deciding that issue first was “efficient and expeditious”
- Failed to dispute the arbitrator’s authority to decide class arbitrability during the arbitration proceedings, finding that the defendant employer “needed to do *something* ‘to disabuse the arbitrator’ of any notion that he could decide the collective proceeding issue,” but did not do so
- Arguing to the District Court that the arbitrator failed to interpret the arbitration agreement, rather than arguing that the arbitrator lacked authority to determine the availability of class arbitration

As the court explained, it was not until the defendant employer moved for reconsideration under Rule 59 that the issue of the arbitrator’s authority was raised. According to the court, on the point of waiver, “the best that may be said for [the defendant employer] is that it badly misreads the record.” Indeed, the court went so far as to suggest that the defendant employer filed “a meritless appeal of an arbitration award won by the economically weaker party, and then maximize[d] the expense of litigating that appeal.”

It is unclear whether the arbitration agreement at issue in the *Conrad* decision could withstand scrutiny under the Supreme Court’s decision in *Lamps Plus*. However, the Fifth Circuit’s decision is an important reminder to employers

defending putative workplace class or collective actions to be mindful of the strategic choices surrounding arbitration. It also highlights the importance of careful drafting when developing an arbitration program.