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PRACTICE POINTS

Eleventh Circuit Adds to Circuit Split Over Class Arbitrations

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According to a recent Eleventh Circuit decision, incorporating AAA Rules into an arbitration agreement is sufficient evidence that the parties intended the arbitrator, and not a court, to determine whether the agreement allows for arbitration of class claims. *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230 (11th Cir. 2018). Determinative of the question was the fact that the AAA Rules incorporate the AAA Supplementary Rules for Class Arbitrations, which, in turn, provide that the arbitrator shall decide whether an arbitration clause permits class arbitration. In so ruling, the Eleventh Circuit relied heavily on *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and declined to follow the Third, Fourth, Sixth, and Eighth Circuits, which have held that adoption of the AAA Rules is not clear and unmistakable evidence of the parties' intent to have an arbitrator decide whether the agreement allows class arbitration. *See Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966 (8th Cir. 2017); *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3rd Cir. 2016); *Dell Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013).

In *Spirit*, four putative class representatives filed a class claim in arbitration against Spirit, alleging that Spirit broke several promises to members of their special "Fare Club." Spirit then sought a declaratory judgment in federal court that the operative arbitration clause did not authorize arbitration of class claims. The district court dismissed Spirit's complaint, finding that the arbitration agreement's choice of AAA Rules incorporated Rule 3 of the Supplementary Rules for Class Arbitrations, which designates the arbitrator to decide whether the agreement permits class arbitration. The Eleventh Circuit affirmed.

The Eleventh Circuit noted the Supreme Court's direction in *First Options* that lower courts should not assume parties have agreed to have an arbitrator decide questions of arbitrability, "unless there is clear and unmistakable evidence that they did so." 514 U.S. at 944. Thus, the question was whether incorporation of the Supplementary Rules for Class Arbitrations into the AAA Rules constituted

such "clear and unmistakable evidence." The Third, Fourth, Sixth, and Eighth Circuits relied on *Stolt-Nielsen*, 559 U.S. 662 (2010) in ruling that it does not. The Eleventh Circuit, however, read *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.* as addressing a separate question, namely whether an arbitration agreement allows class arbitration at all, and not the issue before the court of *who* gets to decide that question in the first place.

Spirit argued that its position found support in the last paragraph of Supplementary Rule 3, which provides that "the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA Rules, to be a factor either in favor or against permitting the arbitration to proceed on a class basis." Similar to its interpretation of *Stolt-Nielsen*, however, the Eleventh Circuit read this portion of Supplementary Rule 3 to address the question of whether an arbitration agreement permits class arbitration, and not the separate question of who gets to decide that issue.

Ultimately, the Eleventh Circuit found that inclusion of the AAA Rules (which incorporate the AAA Supplementary Rules for Class Arbitrations) in an arbitration agreement is sufficiently "clear and unmistakable evidence" that the parties intended the arbitrator to decide whether the parties had agreed to submit class claims to arbitration. In support, the Eleventh Circuit cited *Terminix Intern. Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327 (11th Cir. 2005), in which it held that the parties' choice of the AAA's Commercial Arbitration Rules was itself clear and unmistakable evidence that the parties intended an arbitrator to decide whether the parties' arbitration agreements were enforceable. Extrapolating to the facts before it, the Court in *Spirit* found that the parties' choice of the AAA Rules—which include the AAA Supplementary Rules, which in turn provide that the arbitrator decides whether an arbitration agreement permits class arbitration—similarly constituted clear and unmistakable evidence of the parties' intent.

In so ruling, the Eleventh Circuit joins the Second and Tenth Circuits in what has become a developing circuit split on the issue. *See Dish Network, LLC v. Ray*, 900 F.3d 1240 (2018); *Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392 (2nd Cir 2018).

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