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Calif. High Court Goes Against The Arbitration Grain

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A seemingly straightforward question in the areas of class action litigation and arbitration has sharply divided federal courts, state courts and justices of the U.S. Supreme Court: Who decides whether an arbitration agreement allows for arbitration on a classwide basis — a court or an arbitrator? With the Supreme Court having sent signals in both directions, but not having issued a precedential decision, the answer to this question will depend on what circuit court, district court or state court is deciding the case.

Recently, in Sandquist v. Lebo Automotive,[1] the California Supreme Court weighed in on this "who decides" issue, ruling in favor of the arbitrator. Sandquist is notable for several reasons. Among other things, rather than simply adopting the reasoning of prior decisions finding that an arbitrator should determine whether an arbitration agreement allows for classwide arbitration, the court took a more nuanced position, holding that there is "[n]o universal one-size-fits-all rule" on the "who decides" issue and that the answer will vary depending on the language of the arbitration agreement.

Moreover, the court went against the grain of where federal courts have been trending on this issue, refusing to take the "leap" of relying on the U.S. Supreme Court's most recent language suggesting the availability of class arbitration should be decided by a court.

Given the Golden State's economic prominence, absent superseding authority, Sandquist will likely have a major impact on class action and arbitration litigation. Corporations and individuals doing businesses in California would be wise to take heed of Sandquist in considering how to craft and carry out their arbitration agreements.

A Split of Authority Among Federal Courts

Resolution of the "who decides" issue depends on whether the availability of class arbitration is deemed a question of "procedure" or "arbitrability." Arbitrators decide questions of procedure, that is, questions that "grow out of the dispute and bear on its final disposition,"[2] whereas courts decide questions of "arbitrability," that is, what claims or disputes are governed by an arbitration agreement.[3]

Recognizing that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,"[4] the U.S. Supreme Court has instructed

that "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator."[5]

Issues regarding what the parties agreed to arbitrate are known as "gateway" questions. The court has explained that "gateway" questions include "whether the parties are bound by a given arbitration clause" and whether an arbitration clause "applies to a particular type of controversy."[6] On the other hand, "procedural questions" are those which "grow out of the dispute and bear on its final disposition," or that are "prerequisites" to arbitration, such as "time limits, notice, laches [and] estoppel."[7]

The Supreme Court has not yet made clear whether the availability of class arbitration is a "gateway" question or a procedural one. Indeed, its decisions offer support for both sides. During the last decade, the court has issued four decisions that bear on this issue of class arbitration, but those decisions have left open the "who decides" issue.[8]

Given the Supreme Court's unsettled jurisprudence in this area, it should come as no surprise that lower courts are split on the "who decides" question. The Third, Fourth, Fifth, Sixth and Ninth Circuits have considered the "who decides" question, but only the Fifth Circuit has come down on the arbitrator's side.

In Robinson v. J & K Administrative Management Services Inc., the Fifth Circuit upheld the submission to an arbitrator of the question of whether an arbitration agreement permitted for class arbitration.[9] Notably, however, the court found itself bound by its precedent, Pedcor Management Co. Welfare Benefit Plan v. Nations Personnel of Texas Inc.,[10] which had relied what it conceded was an incorrect interpretation of an earlier case.[11] Further, the Fifth Circuit emphasized that Pedcor did not hold broadly that the question was "always" for an arbitrator, but rather decided that issue only where an arbitration agreement "includes broad coverage language."[12]

The other circuits that have considered the issue, and many district courts, on the other hand, have held that it is for the arbitrator to decide whether a plaintiff may arbitrate on a classwide basis.[13] The majority view "increasingly" favors the position that the availability of classwide arbitration is a "gateway" question for a court to decide.[14]

The California Supreme Court Weighs In

Like the federal courts, state courts are also split on the "who decides" issue. The California Supreme Court recently addressed a divergence among the courts of appeal in Sandquist.

Timothy Sandquist worked as a car salesman at Manhattan Beach Toyota from 2000 until 2011.[15] At the start of his employment, he quickly filled out a large number of forms which included three materially similar arbitration agreements.[16] With minor variations, each of these documents required that "any claim, or dispute, or controversy ... arising from, related to or having any relationship or connection whatsoever with [Sandquist's] seeking employment with, employment by or other association with the company ... shall be submitted to and determine[d] exclusively by binding arbitration."[17]

New owners purchased the dealership in 2007.[18] According to Sandquist, the new owners subjected him and other employees of color to routine racial harassment and discrimination, including passing him over for promotions and salary increases.[19] After four years under this management, he resigned in 2011 rather than continue in the allegedly hostile work environment.[20]

In 2012, Sandquist filed a class action complaint against his employers, Lebo Automotive, in Los Angeles County Superior Court.[21] On behalf of a class of current and former non-Caucasian employees, he alleged violations of California's Fair Employment and Housing Act[22] and Unfair Competition Law.[23] Lebo successfully moved to compel arbitration.[24] The court also interpreted Stolt-Nielsen to require a judicial decision as to whether the agreement permitted class arbitration.[25] Undertaking that task, he found that there was no "contractual basis" to compel class arbitration.[26]

The court of appeal reversed the order dismissing the class claims and remanded the case with instructions that the arbitrator, not the judge, should decide whether the parties agreed to arbitrate class claims.[27] The court of appeal held that the agreement's possible provision of class arbitration was a "procedural" matter for the arbitrator to decide.[28]

The California Supreme Court, in an opinion by Justice Kathryn Werdegar, affirmed the court of appeal in a four-to-three decision.[29] The court held that "no universal rule allocates" the determination of the availability of class arbitration "in all cases to either arbitrators or courts."[30] Instead, the "who decides" question was itself a matter for the parties to decide by agreement.[31]

The court found that the agreements' broad and "comprehensive" language supported an inference that the parties intended to submit to the arbitrator the determination as to whether class claims were arbitrable.[32] The parties had agreed to have "determined *exclusively* by binding arbitration ... *any* claim, dispute and/or controversy ... between [Sandquist] and the company."[33] And their agreement extended to all claims "arising from, related to *or having any relationship or connection whatsoever* with [Sandquist's] seeking employment with, employment by or other association with the company."[34]

The question of the availability of class arbitration, the court noted, "directly arises from [Sandquist's] underlying claims," which "would appear enough to satisfy this nexus requirement." Id. Moreover, two of the agreements had specifically excluded certain classes of claims, identified as the "sole exception" to the agreement's broad scope.[35] By the logic of expressio unius est exclusio alterius, this specific exemption suggested that agreement covered other questions, including the availability of class arbitration.[36]

Nonetheless, the court admitted that the language of the clause was "by no means conclusive" of the "who decides" question.[37] Justice Werdegar looked to general principles of contract and arbitration law to resolve the ambiguity. She began by noting that parties to an arbitration agreement generally expect to resolve their dispute "without necessity for *any* contact with the courts," because such judicial entanglement might defeat the considerations of efficiency and economy that led them to choose arbitration in the first place.[38] In light of those expectations, the court declared, it would "not lightly assume Lebo, or Sandquist, would have expected or preferred a notably less efficient allocation of decision-making authority."[39]

The court found two basic contract principles "[u]ltimately dispositive" of the agreement's interpretation.[40] "First, under state law as under federal law, when the allocation of a matter to arbitration or the courts is uncertain, we resolve all doubts in favor of arbitration."[41] And "[s]econd, ambiguities in written agreements are to be construed against their drafters."[42] Here, both of those principles militated in favor of construing these contracts of adhesion to commit the question of class arbitrability to the arbitrator, as Sandquist argued against his employer, despite their failure to explicitly specify this allocation of responsibility.[43]

The court also considered the Federal Arbitration Act and determined that it did not conflict with, and thus preempt, the conclusion dictated by state law. Thus, the court held that Sandquist's agreement committed the class arbitrability question to the arbitrator, and it established "a presumption that arbitrators decide the availability of class arbitration," although it declined to hold that California state law would embrace that presumption in all cases.[44]

Justice Leondra Kruger, joined by Justices Ming Chin and Carol Corrigan, dissented.[45] The dissent argued that the U.S. Supreme Court's recent decisions suggested that the availability of classwide arbitration was a "'gateway question of arbitrability' that is presumptively for a court to decide" under the FAA.[46] The dissent, accordingly, would prefer to "follow where the [c]ourt had led," and presumptively commit the question of classwide arbitration to a judge instead of an arbitrator.[47]

Lessons from Sandquist

Sandquist offers several lessons to individuals and businesses in California.

First, Sandquist reveals the difficulties in trying to predict whether a certain rule of law is plaintiff- or defendant-friendly. While defendants typically prefer to arbitrate disputes rather than litigate them in a public forum, in part because of a perception that arbitrators may have more expertise and be less likely to award runaway verdicts, in this case the defendant opposed the arbitration of class claims and wanted those decided in court. We do not know what motivated Lebo, but two facets of court may be more attractive to defendants facing class claims: the possibility of substantive appellate review and the absence of an incentive to allow the litigation to proceed to conclusion.

Second, Sandquist is notable in that, rather than adopting a "universal, one-size-fits-all" approach, it held that "'who decides' is a matter of party agreement."[48] Parties drafting arbitration agreements after Sandquist would do well to pay careful attention to the issue of class arbitration, and to the means of resolving any questions not explicitly addressed in the agreement. The court seemed to suggest that it might have reached a different conclusion on the "who decides" question if Sandquist's arbitration agreement had been more narrowly drafted to apply only to individual claims, or if the contract had not been signed under conditions of such unequal bargaining power.

It is thus critical that parties work to ensure that their agreements address all possible claims, including class claims, and allocate decision-making authority as precisely as possible. Parties with existing arbitration agreements may consider updating their contracts or terms and conditions to address this issue, though they will need to think carefully about whether such an update needs to be supported by consideration.

Finally, perhaps the most interesting facet of Sandquist is that, while the decision encourages parties to be more explicit about who they want to decide whether class claims are arbitrable, the true takeaway might be that parties should be clearer about whether the agreement provides for the arbitration of class claims. Presumably, if the parties clearly lay out their intention as to whether the agreement provides for arbitration of class claims, it matters less who interprets that language. It is only in situations in which there is some ambiguity that the "who decides" question becomes more important.

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[1] --- Cal. ---, 2016 WL 4045008 (2016).

[2] Howsam v. Dean Witter Reynolds Inc., 537 U.S. 79, 84-85 (2002).

[3] Id. at 84.

[4] Id. at 83 (citations and internal quotation marks omitted).

[5] AT&T Tech. Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986).

[6] Howsam, 537 U.S. at 83-84.

[7] Id. at 84-85 (citations and internal quotation marks omitted).

[8] Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 451 (2003); Stolt-Nielsen S.A. v. Animalfeeds International Corp., 559 U.S. 662, 680 (2010); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011); and Oxford Health Plans LLC v. Sutter, 569 U.S. ---, 133 S. Ct. 2064 (2013).

[9] 817 F.3d 193 (5th Cir. 2016).

[10] 343 F.3d 355 (5th Cir. 2003).

[11] Id. at 196.

[12] Id. (citing, as an example, language in Pedcor, 343 F.3d at 359).

[13] See, e.g., In re A2P SMS Antitrust Litig., 12 CV 2656 (AJN), 2014-1 Trade Cas. ¶ 78,791, 2014 WL 2445756, at *10 (S.D.N.Y. May 29, 2014) ("[T]he court is persuaded by the Supreme Court's decision in Bazzle that the arbitrator, rather than the court, should decide whether class arbitration is available."); Hesse v. Sprint Spectrum LP, No. C06–592JLR, 2012 WL 529419, at *4 (W.D. Wa. Feb. 17, 2012) (stating that class-arbitration availability "is a procedural issue that should be left for the arbitrator to decide"); Guida v. Home Sav. of Am. Inc., 793 F. Supp. 2d 611, 616 (E.D.N.Y. 2011) ("This court concludes, in light of Stolt–Nielsen and Bazzle, that the ability of a class to arbitrate a dispute where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue is a procedural question that is for the arbitrator to decide."); Lee v. JP Morgan Chase & Co., 982 F. Supp. 2d 1109,1114 (C.D. Cal. 2013) (disagreeing with courts that have concluded that Stolt-Nielsen undermined Bazzle, explaining that Stolt-Nielsen "had no occasion ... to rule on whether the availability of class arbitration is a question for the court or an arbitrator," and, instead, had simply ruled on "how to decide whether an arbitration

agreement authorizes class arbitration, not who decides," id. at 1113); In re A2P, No. 12 CV 2656 AJN, 2014 WL 2445756, at *10 (S.D.N.Y. May 29, 2014). See also, e.g., Williams-Bell v. Perry Johnson Registars Inc., No. 14 C 1002, 2015 WL 6741819, at *6 (N.D. Ill. Jan. 8, 2015) (endorsing the "majority opinion" in the Northern District of Illinois that the question is procedural, drawing on an analogy to the availability of consolidated arbitration); Vazquez v. ServiceMaster Glob. Holding Inc. No. C 09-05148 SI, 2011 WL 2565574, at *3 (N.D. Cal. June 29, 2011) (holding that the question is for the arbitrator because it does not implicate gateway issues of the arbitration agreement's enforceability).

[14] Guess? Inc. v. Russell, No. 216CV00780CASASX, 2016 WL 1620119, at *3 (C.D. Cal. April 18, 2016) (internal quotation omitted); Dell Webb Communities Inc. v. Carlson, 817 F.3d 867 (4th Cir 2016); Opalinski v. Robert Half Int'l Inc. 761 F.3d 326, 332-33 (3d Cir. 2014) (holding that the availability of class arbitration is "question of arbitrability to be decided by the court" because it "affects whose claims may be arbitrated"); Reed Elsevier Inc. ex rel. LexisNexis Division v. Crockett, 734 F.3d 594, 598-99 (6th Cir. 2013) (holding that the availability of class arbitration is a court question since it is "fundamental to the manner in which the parties will resolve their dispute" and "vastly more consequential than even the gateway question whether they agreed to arbitrate bilaterally"); Eshagh v. Terminix Int'l Co. LP, 588 F. App'x 703, 704 (9th Cir. 2014) (holding that the question of class arbitration is a "gateway" question in that it "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator" (citing Stolt-Nielsen, 559 U.S. at 685)).

[15] Sandquist, 228 Cal. App. 4th at 69-71.

[16] Id.

[17] Id. at 70 (second alteration in original) (internal quotation omitted).

[18] Id. at 71.

[19] Id.

[20] Id.

[21] Id.

[22] Cal. Gov't Code § 12940 et seq. (West 2016).

[23] Cal. Bus. & Prof. Code § 17200 et seq. (West 2016).

[24] Id.

[25] Sandquist, 2016 WL 4045008, at *1.

[26] Sandquist, 228 Cal. App. 4th at 71.

[27] Id. at 80.

[28] Id. at 79.

[29] Sandquist, 2016 WL 4045008, at *1.

[30] Id. at *1.

[31] Id.

[32] Id. at *4.

[33] Id. (second emphasis added) (internal quotation omitted).

[34] Id. at *5 (internal quotation omitted).

[35] Id.

[36] Id.

[37] Id.

[38] Id. (quoting Blanton v. Womancare Inc., 38 Cal. 3d 396, 402 (1985) (emphasis in original)).

[39] Id.

[40] Id. at *6.

[41] Id. (citing Wagner Const. Co. v. Pac. Mech. Corp., 41 Cal. 4th 19, 26 (2007)).

[42] Id. (citing Cal. Civ. Code § 1654 (West 2016)).

[43] Id. at *6–7.

[44] Id. at *8, *20.

[45] Id. at *16, *22 (Kruger, J., dissenting).

[46] Id. at *16.

[47] Id.

[48] Id. at *1 (majority opinion).
