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Courts still wrestling with arbitration question

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Federal and state courts have long struggled with the role that arbitrators should play in determining whether an arbitration agreement permits or prohibits classwide arbitration. Last month, in *Sandquist v. Lebo Automotive Inc.*, 1 Cal. 5th 233 (2016), the California Supreme Court provided a definitive answer — the determination should be made by the arbitrator. While this remains an open issue in federal court and in other states, the reasoning in *Sandquist* may provide guidance.

Until 2003, California state courts routinely found that, in the absence of a class waiver, courts should decide the issue of whether classwide arbitration is permitted under a given arbitration agreement. *See, e.g., Sanders v. Kinko's Inc.*, 99 Cal. App. 4th 1106 (2002); *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42 (1998); *Lewis v. Prudential-Bache Securities Inc.*, 179 Cal. App. 3d 935 (1986); *Keating v. Superior Court*, 31 Cal. 3d 584 (1982).

In 2003, the U.S. Supreme Court addressed this issue in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). *Green Tree* involved an arbitration clause that was silent on the issue of classwide arbitration. The resulting plurality opinion found that there were "gateway" questions that should be left to the court (i.e., whether a valid arbitration agreement had been formed) and procedural questions that should be left to the arbitrator (i.e., the rules of the arbitration proceeding). The Supreme Court held that, at least in *Green Tree*, the question of classwide arbitration constituted a procedural question for arbitrators to decide. But the plurality decision meant the opinion was not binding, leaving the issue unresolved.

After *Green Tree*, a split began to develop in California. In *Garcia v. DIRECTV Inc.*, 115 Cal. App. 4th 297 (2004), for example, the California Court of Appeal recognized the "clarity [in] *Green Tree*'s holding — that arbitrators are supposed to decide whether an arbitration agreement forbids or allows class arbitration." Several years later, however, in *Network Capital Funding Corp. v. Papke*, 230 Cal. App. 4th 503 (2014), the Court of Appeal noted that *Green Tree* is not binding, and held that the issue of classwide arbitration is really a gateway question that should be left to the courts to decide.

Federal courts also came to differing conclusions. Several circuit courts held that the issue should be decided by the courts, for a variety of reasons. *See, e.g., Opalinski v. Robert Half Intern. Inc.*, 761 F.3d 326 (3rd Cir. 2014); *Reed Elsevier Inc. v. Crockett*, 734 F.3d 594 (6th Cir. 2013). While the 9th U.S. Circuit Court of Appeals has not addressed the issue in a published opinion, it held in *Eshagh v. Terminix Int'l Co., L.P.*, 588 F. App'x 703 (9th Cir. 2014), that the issue is a gateway question that should be left to the courts.

In contrast, many district courts within the 9th Circuit have found that the issue is a procedural question that should be left to the arbitrators. *See, e.g., Guess? Inc. v. Russell*, 2015 WL 7175788, at *5 (C.D. Cal. Nov. 12, 2015), appeal docketed, No. 15-56870 (9th Cir. Dec. 4, 2015) ("[P]laintiff's argument is belied by the weight of … authority holding that incorporation of the AAA's model rules constitutes consent to have an arbitrator decide the availability of class arbitration."); *Accentcare Inc. v. Jacobs*, 2015 WL 6847909, at *4 (N.D. Cal. Nov. 9, 2015) appeal docketed, No. 15-17427 (9th Cir. Dec. 10, 2015) ("Therefore, the Court finds that the question of arbitrability may be, and was, delegated to the arbitrator by the incorporation of the AAA rules. Accordingly, the arbitrator, not the Court, shall determine whether the arbitration agreement allows class-wide arbitration."); *Okechukwu v. DEM Enterprises Inc.*, 2012 WL 4470537, at *3 (N.D. Cal. Sept. 27, 2012) ("the Court still finds that the issue of contract interpretation to determine whether the arbitration provision permits class arbitration should be addressd [sic] by the arbitrator").

Courts have long struggled with the role that arbitrators should play in determining whether an arbitration agreement permits or prohibits classwide arbitration. Last month, in *Sandquist v. Lebo Automotive Inc.*, 1 Cal. 5th 233 (2016), the California Supreme Court provided a definitive answer — the determination should be made by the arbitrator

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Sandquist resolves this issue, at least in California. In its analysis, the *Sandquist* court considered the "parties' likely expectations about allocations of responsibility," basic principles of contract interpretation, and the "gateway question" framework laid out in *Green Tree*. In analyzing the parties' likely expectations, the court relied upon *Blanton v. Womancare Inc.*, 38 Cal. 3d 396 (1985), in opining that parties to an arbitration agreement "expect that their dispute will be resolved without necessity for any contact with the courts" — with the benefit of "reduced expense and increased efficiency."

The court then analyzed two basic interpretive principles: (1) when the allocation of a dispute to arbitration or court is uncertain, doubt should be resolved in favor of arbitration; and (2) ambiguities in an agreement should be construed against the drafter. The court found that both principles weighed in favor of having arbitrators decide whether classwide arbitration is permitted under a given arbitration agreement. The court also rejected the familiar argument that arbitrators will inherently favor class arbitration for their own financial benefit, stating that courts "may not presume categorically that arbitrators are ill-equipped to disregard institutional incentives and rule fairly and equitably."

The court finally addressed *Green Tree*'s gateway framework. The court interpreted *Green Tree*'s plurality to vest the court only with the power to decide gateway questions — issues like whether the parties agreed to arbitration and whether a particular dispute fell within the scope of that agreement. Ultimately, the court held that the issue of classwide arbitration is simply a question of procedure — not a gateway question — to be decided by the arbitrator once a dispute is before the arbitrator.

California is the first state to resolve this thorny issue. While at odds with several federal circuits, *Sandquist* may provide guidance for other appellate courts — both state and federal — as they continue to struggle with the issue.

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