



Fifth Circuit Holds That Class Arbitration is a Gateway Issue For Courts, Not Arbitrators

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The United States Court of Appeals for the Fifth Circuit recently joined other federal appellate courts finding that class arbitration is a “gateway” issue for judicial determination, not the arbitrator. *See 20/20 Communications, Inc. v. Crawford*, No. 18-10260, 2019 WL 3281412 (5th Cir. July 22, 2019). The plaintiff, 20/20 Communications, required that its sales managers execute mutual arbitration agreements. Those agreements expressly prohibited class arbitration and affirmatively required that all employment disputes be resolved on an “individual” basis.

Multiple sales managers filed individual arbitrations relating to their employment, and then attempted to amend to being class arbitration claims. One arbitrator found that the class arbitration bar was unenforceable under the National Labor Relations Act. In response, 20/20 filed suit in federal district court to vacate the arbitrator’s decision. The district judge, however, upheld the ruling finding that the arbitration agreement allowed the arbitrator, not courts, “to determine class arbitrability.”

On appeal, the Fifth Circuit vacated the district court’s ruling. It found that threshold questions of arbitrability require judicial determination absent “clear and unmistakable language” in the agreement to the contrary. The court found that neither the Supreme Court nor it had previously decided “whether class arbitrability is such a gateway issue.” The Fifth Circuit observed that “class arbitrations differ from individual arbitrations in fundamental ways.” Among other things, it noted that class actions “increase not only the size but also the complexity of the dispute” and “raise important due process concerns” relating to the unnamed parties. Thus, the court had “no difficulty agreeing” with the Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, holding “that class arbitrability is a gateway issue,” presumptively to be decided by the court. Based on the explicit “class arbitration bar” in the arbitration agreement, the Fifth Circuit found no “clear and unmistakable” intent of the parties to overcome the presumption in favor of judicial determination of class arbitrability.

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