

BLOGS
Arbitration

Third Circuit Rules That the Availability of Classwide Arbitration Is a Question for the Courts, Not an Arbitrator

The Third Circuit has announced a decision regarding the availability of classwide arbitration in an employment agreement that could have significant impact on arbitration agreements in franchising. *Opalinski v. Robert Half Int'l, Inc.*, 2014 U.S. App. LEXIS 14538 (3rd Cir. July 30, 2014). The underlying dispute arose when two former employees of Robert Half International filed a class action complaint against it for alleged violations of the Fair Labor Standards Act. Robert Half moved to compel arbitration of the claims, which the district court granted while also holding that the question of whether the former employees could pursue their claims as a class was for the arbitrator to decide. The Third Circuit disagreed, holding that absent a clear agreement to the contrary, the availability of classwide arbitration is a substantive "question of arbitrability" to be decided by a court rather than an arbitrator.

The Third Circuit noted in its opinion that courts play a limited role in determining the question of "arbitrability." It concluded that because classwide arbitration would implicate the rights of absent class members without their consent, the threshold decision about its availability must be made by the court. Further, the court reasoned classwide arbitration was a distinct type of controversy that differed from the individual arbitration envisioned by the Federal Arbitration Act, and therefore it was for a court to determine whether an arbitration agreement applied to this specific type of controversy. These two reasons create a presumption that the availability of classwide arbitration must be determined by the courts, and the Third Circuit concluded that because RHI's arbitration clause was silent on the issue, the presumption had not been rebutted. The reasoning in *Opalinski* follows that of the Sixth Circuit, the only other appellate court to rule on the issue of arbitrability in this context, while recent decisions from the Supreme Court have indicated that it is still an open question.

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