Class Action Monitor

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Class Action Honors

Avoiding Unreviewable Surprises in Arbitration Agreements

By Gregory Silbert, Brian Liegel and Nathalie Sosa

Over the past decade, the Supreme Court has issued a series of decisions consistently limiting the availability of class-wide arbitration. The Court has reasoned that class arbitration is inherently different from bilateral arbitration. *See, e.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685–86 (2010) (discussing how the "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes" that are part of bilateral arbitration do not exist in class-action arbitration). In 2010, the Court held that silence on the issue of class arbitration did not suffice to provide consent to proceed on a class-wide basis. *Stolt-Nielsen*, 559 U.S. at 687. More recently, and surprising no one, the Court held that ambiguity on the issue of class arbitration was also inadequate. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019). Perhaps more interesting – and of particular importance to businesses using arbitration agreements – is what the court has consistently left undecided: whether the availability of class arbitration is a gateway issue that must be decided by a court. It would seem that by the time cases make their way to the Court, the parties have already agreed on the decision-maker, effectively removing the issue from Supreme Court review. *Id.* at 1417 n.4; *Stolt-Nielsen*, 559 U.S. at 680. Yet, a nationwide review of federal and state court decisions citing *Lamps Plus* reveals that this gateway issue of who determines whether arbitration proceeds on a class-wide basis remains particularly salient.

There is a circuit split on whether the adoption of institutional arbitration rules is evidence of the parties' intent to have an arbitrator determine the gateway issue of class arbitrability. Some courts have concluded that "that the question of class arbitration belongs with the courts as a substantive question of arbitrability." *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017) (discussing how class arbitration: (1) reduces the benefits of arbitration; (2) raises challenges for confidentiality, (3) imposes "the bet-the-

company stakes of class-action litigation"; and (4) raises due process concerns). "We cannot find the three-word reference to AAA rules and regulations incorporates a panoply of collective and class action rules applied by AAA once the matter is properly before the arbitrators by consent or waiver." *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 762 (3d Cir. 2016) (internal citations and quotations omitted); *see also Del Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 876 (4th Cir. 2016). On the other hand, the Eleventh Circuit has determined that adoption of the American Arbitration Association rules is "clear and unmistakable evidence that [the parties] intended an arbitrator to decide whether the arbitration agreements were enforceable." *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1233 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 1322 (2019). The Eleventh Circuit reasoned that the other circuits had relied on *Stolt-Nielsen* in "answering the 'who decides' question," but that this interpretation was inaccurate. *Id.* at 1234. (internal citations omitted).

While arbitrators may decide upon the availability of class arbitration in some circuits, oversight of arbitral decisions is limited under the Federal Arbitration Act. 9 U.S.C. §10. This means that if the arbitrator determines that a contract unambiguously allows for collective arbitration, notwithstanding that the contractual language is actually ambiguous, there may be no recourse because the arbitrator has found actual consent solely on the basis of the contract language itself. This is exactly what happened in *Torgerson v. LCC Int'l, Inc.*, No. 16-2495-DDC-TJJ, 2020 WL 108706 (D. Kan. Jan. 9, 2020). There, plaintiffs, employees who had worked as Migration Analysts, alleged that their employer had violated the Fair Labor Standards Act ("FLSA") by improperly classifying their position as exempt from FLSA's overtime requirements. *Id.* at *1. Plaintiffs sought to recover unpaid overtime compensation on behalf of themselves and others similarly situated. *Id.* The parties had signed an arbitration agreement and begun arbitration with the American Arbitration Association. *Id.* at *1-2. When the arbitrator denied Defendant's motion to decertify FLSA Collective Arbitration, Defendants filed suit. *Id.* at *2.

The *Torgerson* court pointed out the arbitrator's determination "that the parties' [a]greement authorizes plaintiffs to arbitrate their FLSA claims on a collective basis." *Id.* at *6. Defendants moved to vacate the class determination award, arguing that the arbitrator exceeded his authority because his decision contravened *Lamps Plus* by "provid[ing] for collective arbitration" based on their agreement which contained language that was "virtually identical" to the language that the Supreme Court in *Lamps Plus* had found to be ambiguous. *Id.* In their motion to decertify FLSA Collective Arbitration, Defendants argued that *Lamps Plus* required the result they sought, but the arbitrator disagreed. *Id.* The arbitrator found that the agreement at issue was not ambiguous; therefore, "*Lamps Plus* has no bearing on whether this matter may proceed on a collective basis." *Id.* (internal citations omitted). Given 9 U.S.C. §10(a)(4), the *Torgerson* court had limited review over whether the arbitrator had interpreted the contract correctly. See *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) ("Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances. That limited judicial review, we have explained, maintains arbitration's essential virtue of resolving disputes straightaway.") (internal citations and quotations omitted). The *Torgerson* court also showed some exasperation with Defendants' repeated applications for relief from the court in relation to their arbitration agreement. *Id.* at *1. It begins: "Here we go again." *Id.* There may be more than one lesson to learn from *Torgerson*.

Practice Pointers

The Court has made it clear that arbitrators cannot rely on a policy preference as the rationale to allow for class arbitration when the agreement is "silent." *See Stolt-Nielsen*, 559 U.S. at 676. And the Court has further made clear that class arbitration cannot be compelled merely on the basis that the agreement is ambiguous and should be construed against the drafter, because that is a policy preference and not a finding that the parties actually consented to class treatment. *Lamps Plus*, 139 S. Ct. at 1419. Yet, while businesses and practitioners await an answer to whether class arbitrability is a gateway matter or a question of procedure, there is an easy fix for that issue: ensure that your agreements expressly prohibit class arbitration and then assign questions of arbitrability to a court. "The FAA requires courts to enforce arbitration agreements according to their terms." *Lamps Plus*, 139 S. Ct. at 1415 (internal quotations and citations omitted). This will ensure that the decision of whether to proceed with arbitration on a class basis is decided in court and reviewable on appeal.

What's the Harm? Circuit Splits in Finding Concrete Injury Under *Spokeo*

By Lori Pines and Rachel Crosswell

In the three years since *Spokeo, Inc. v. Robins*, lower courts have struggled to apply the Supreme Court's definition of a "concrete injury" in a variety of cases alleging violations of a statutory right when plaintiffs do not also allege real world harm. Despite widely acknowledged inconsistencies across circuits, the Supreme Court has repeatedly declined to provide further clarification on this issue. In addition, in the class action context, *Spokeo*'s impact continues beyond Rule 12, creating tension between demonstrating standing and predominance.

Defining "Concrete" Injury

Spokeo asked under what circumstances violation of a procedural right would rise to the level of a concrete injury absent any showing of actual damages. The majority declined to rule on named plaintiff Thomas Robins' specific claims, but purported to offer guidance on distinguishing concrete injuries from "bare procedural violation[s]." The Court observed that "both history and the judgment of Congress," as well as whether the alleged harm has historically been considered actionable in English or American common law, are instructive.

Circuit Splits: Similar Facts, Opposite Outcomes

Since *Spokeo* was decided in 2016, it has been cited in over three thousand decisions across the country. However, lower courts have grappled with applying the Supreme Court's analysis, often reaching conflicting results on virtually identical facts:

- For many years post-*Spokeo*, courts routinely found standing in suits under the Telephone Consumer Protection Act based on receipt of minimal unwanted phone calls or text messages. *See, e.g.*, *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017) (two text messages); *Susinno v. Work Out World Inc.*, 862 F.3d 346 (3d Cir. 2017) (one phone call). Recent decisions, however, have begun walking back this broad view of standing, rejecting the notion that a single message is sufficiently intrusive. In one instance, a California district court that had previously found standing ultimately granted summary judgment to the telemarketer when the plaintiff was unable to demonstrate that she knew of and was inconvenienced by the single missed call when it occurred. *See Shuckett v. DialAmerica Mktg., Inc.*, No. 17CV2073-LAB (KSC), 2019 WL 3429184 (S.D. Cal. July 30, 2019). Likewise, the Eleventh Circuit held that receipt of a single unsolicited text message did not confer standing because it was a brief and inconsequential annoyance (unlike a telephone ringing during dinner), did not cause the plaintiff to incur charges or expend paper and ink to receive the message, and, unlike a fax, did not prevent him from using his cellphone or receiving other messages. *See Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019).
- The Sixth and Seventh Circuits reached opposite conclusions under identical facts alleging that debt collectors violated the Fair Debt Collection Practices Act by failing to inform debtors that they must dispute the debt in writing. Neither set of plaintiffs claimed to be actually harmed by the lack of notice. The Sixth Circuit found the procedural violation to be a sufficient harm without the need to allege any further injury. *See Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747 (6th Cir. 2018). In contrast, the Seventh Circuit expressly declined to follow that decision, and instead concluded that the lack of notice was a "bare procedural violation" insufficient to support standing when there was "no harm, no foul." *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019).
- Perhaps the most significant divide is whether plaintiffs have standing when their personal information is stolen in a data breach. The Third, Sixth, Seventh, Ninth, and D.C. Circuits have all held that exposure of personal data

is sufficient to grant standing due to the increased risk of identity theft. *See In re Zappos.com, Inc.*, 888 F.3d 1020 (9th Cir. 2018), cert. denied sub nom. *Zappos.com, Inc. v. Stevens*, 139 S. Ct. 1373 (2019); *Dieffenbach v. Barnes & Noble, Inc.,* 887 F.3d 826 (7th Cir. 2018); *Galaria v. Nationwide Mut. Ins. Co.*, 663 Fed. App'x. 384 (6th Cir. 2016); *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017)*; In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625 (3d Cir. 2017). Taking the opposite tack, the Second, Fourth and Eighth Circuits have declined to find standing based on hypothetical future risk of misuse. *See In re SuperValu, Inc.*, 870 F.3d 763 (8th Cir. 2017)*; Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017)*; Whalen v. Michael Stores Inc.*, 153 F. Supp. 3d 577 (E.D.N.Y. 2015), aff'd sub nom. *Whalen v. Michaels Stores, Inc.*, 689 F. App'x 89 (2d Cir. 2017). For example, both the Seventh and Eighth Circuits addressed the issue of stolen credit card information, which included customers' names, card numbers, expiration dates, and PINs. The Seventh Circuit in *Dieffenbach v. Barnes & Noble* found that payment for credit-monitoring services as a result of the breach constituted actual damages. 887 F.3d 826 (7th Cir. 2018). On the other hand, the Eighth Circuit in *In re SuperValu* took the view that the information obtained was unlikely to enable identity theft and thus plaintiffs obtaining credit monitoring to protect themselves against a speculative threat could not create an injury. 870 F.3d 763 (8th Cir. 2017). It is worth noting that the *SuperValu* court *did* find standing for a single plaintiff, who alleged that he experienced a fraudulent charge as a result of the data breach. *See id.*

Spokeo's Impact on Class Actions

In class actions, *Spokeo*'s concreteness requirement extends beyond standing and can have significant implications for class certification. As exemplified by the TCPA cases above, class certification may be granted more readily in some jurisdictions (where plaintiffs need only allege receipt of unwanted messages) versus others (where plaintiffs must allege actual inconvenience or disruption). Additionally, plaintiffs attempting to ward off *Spokeo* challenges by alleging individualized harms could find that their injuries are not typical of the putative class, or that individualized issues preclude finding commonality and predominance. For example, on remand, the Ninth Circuit found that, in Robins' circumstances, Spokeo's inaccurate information about him was sufficiently harmful to violate his concrete interest in accurate credit reporting. *See* 867 F.3d 1108 (9th Cir. 2017). While the parties settled before class certification, this kind of individualized inquiry is not conducive to classwide resolution.

Absent further clarification from the Supreme Court, the issue of standing in statutory violation cases—and its corresponding impact on class certification—remains uncertain, with litigants caught in the middle not knowing what to expect.

Practice Pointers

- Defendants should consider challenging standing, even if plaintiffs could amend their complaint to allege some type of harm. While plaintiffs may survive a *Spokeo* challenge, their injuries may be sufficiently individualized to preclude class certification.
- Decisions vary wildly by circuit – know the case law in your circuit.
- Remain cognizant of standing issues as the case progresses – Article III standing can be raised at any point, including *sua sponte* by an appellate court.
- Defendants should take care to consider possible state law claims. Defendants who successfully challenge Article III standing may find themselves defending a case re-filed in state court, without the possibility of removal, after demonstrating that federal jurisdiction does not exist.

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Guided by our ability to exert leverage at all phases of the case – especially at trial – we develop tailored litigation strategies based on our clients' near- and long-term business objectives. Whether facing a nationwide class action in one court or statewide class actions in courts across the country, our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters—their businesses.

For more information on Weil's class action practice please visit our website.

Class Action Honors (cont.)

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