ARBITRATION

COURT SHOULD DECIDE CLASS ARBITRABILITY QUESTIONS

JPay, Inc. v. Kobel, 904 F.3d 923 (11th Cir. 2018).
http://media.ca11.uscourts.gov/opinions/pub/files/201713611.pdf

FACTS: Defendant-Appellants, Cynthia Kobel and Shalanda Houston, purchased services from Plaintiff-Appellee, JPay, Inc., allowing them to send electronic money transfers to inmates. Kobel and Houston alleged JPay charged exorbitant transfer fees and dissuaded users from sending money through paper money orders for free by intentionally making the money order process slow and complicated and by deceptively marketing money orders as unreliable. Kobel and Houston filed a Demand for Arbitration against JPay, alleging contractual violations and violation of a Florida consumer protection statute, and sought to represent a class consisting of "all natural persons who paid a fee to JPay for electronic money-transfer services and who agreed to arbitrate their claims with JPay." JPay filed suit in state court, seeking to stay class arbitration and to compel bilateral arbitration. Kobel and Houston removed the case to federal court and moved to compel arbitration on the question of whether class arbitration was available under JPay's Terms of Services.
The district court denied Kobel and Houston's motion to compel arbitration, finding that the availability of class arbitration was a substantive "question of arbitrability" that was presumptively for a court to decide. Kobel and Houston appealed.
HOLDING: Reversed and remanded.
REASONING: Kobel and Houston argued that class availability is a "procedural" question. Kobel and Houston relied on Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003), which held that the availability of class arbitration concerned neither the validity of the arbitration clause nor its applicability to the underlying dispute, but rather contract interpretation and arbitration procedures that arbitrators were well situated to analyze.

The availability of class arbitration is a gateway question because it determines what type of proceeding will determine the parties' rights and obligations.

The court rejected that argument by explaining that the *Bazzle* plurality's holding is nonbinding and that the question remained an open one. The court cited two cases, in which the Supreme Court stated that *Bazzle* did not yield a majority decision and that the Court has not yet decided whether the availability of class arbitration is a question of arbitrability.
The court found instead that the availability of class arbitration is a gateway question because it determines what type of proceeding will determine the parties' rights and obligations. Formally, the availability of class arbitration determined the scope of the arbitration proceedings because allowing a class proceeding would determine the rights of parties that are not actively involved or represented by their own counsel. Functionally, the availability of class arbitration allowed plaintiffs to pool resources to collectively argue for recovery of small dollar amounts that otherwise would not be cost effective. Finally, unlike a procedural question, how the court determined the question did not depend on how one viewed the merits of the case, but was a separate matter of contract interpretation.

ARBITRATOR DECIDES ISSUE OF CLASS ARBITRATION

DISH Network L.L.C. v. Ray, 900 F.3d 1240 (10th Cir. 2018)
https://law.justia.com/cases/federal/appellate-courts/ca10/17-1013/17-1013-2018-08-21.html

FACTS: Appellee, Matthew Ray worked as a sales associate for Appellant, DISH Network L.L.C. While employed, Mr. Ray signed an Arbitration Agreement ("Agreement") drafted by DISH. The Agreement stated, "any claim…arising out of and/or in any way related to…employment…shall be resolved by arbitration…" and "[a] single arbitrator…from the American Arbitration Association ("AAA") shall conduct the arbitration under… current procedures of the AAA's National Rules..." After his termination, Mr. Ray filed suit in federal district court alleging violations of FLSA, Colorado's Minimum Wage and Wage Claim Acts, and a common law claim for breach of contract. DISH moved to dismiss, demanding Mr. Ray arbitrate his claims according to the Agreement. Mr. Ray dismissed the suit and filed the same claims with the AAA. Mr. Ray then pursued his claims as a class action under Fed. R. Civ. P. 23, and a collective action under 29 U.S.C. §216(b).
One issue presented to the arbitrator was whether the Agreement permitted class arbitration. The arbitrator reasoned this question was not a "gateway issue" normally decided by the court and concluded that the Agreement permitted collective action covering these claims. The court agreed that the arbitrator had jurisdiction to decide the issue. However, the court concluded that a determination of class wide arbitrability was a "gateway issue," which should be determined by the court. Nevertheless, the court found that the Agreement clearly and unmistakably expressed the parties' intention to have the arbitrator resolve questions of arbitrability. DISH appealed.
HOLDING: Affirmed.
REASONING: DISH argued that the arbitrator exceeded his powers in determining the gateway issue of jurisdiction over class wide arbitrability. Under the Federal Arbitration Act, vacation of an award was limited to certain instances such as fraud, corruption, and arbitrator misconduct. This level of deference only applied to disputes that the parties agreed to submit to arbitration. The Supreme Court has recognized that "arbitration is a matter of contract" and has found the "question of arbitrability" – whether the parties have submitted a dispute to arbitration – is a gateway issue for judicial determination, unless the parties clearly and unmistakably provided otherwise. The court reasoned it was not necessary to decide the gateway issue because it found the par-

ties showed clear and unmistakable evidence of their intention to delegate the decision. The court concluded that the incorporation of the AAA Rules in the Agreement language provided clear and unmistakable evidence the parties intended to delegate all matters of arbitrability to the arbitrator, including class wide claims.

DISH further argued that the arbitrator's decision manifestly disregarded applicable law and must be vacated. Courts have found vacation of an award appropriate when an arbitrator's decision is based on a "manifest[ed] disregard of the law." However, because the court found the arbitrator had jurisdiction to decide arbitrability, the court's deferential review narrowed to only whether the arbitrator interpreted the parties' Agreement, not whether the interpretation was correct. Summarizing the arbitrator's interpretation, the court reasoned the arbitrator "clearly considered their contract and decided whether it reflected an agreement to permit class proceedings."

PLAINTIFF MUST ARBITRATE FCRA CLAIMS AGAINST LOAN SERVICER

Howard v. Navient Sols., LLC, ___ F. Supp. 3d ___ (W.D. Wash. 2018).
https://scholar.google.com/scholar_case?case=12759717535915419279&q=Howard+v.+Navient+Solutions,+LLC&hl=en&as_sdt=6,44&as_vis=1

FACTS: Plaintiff Adrienne Howard entered into three student loans with Navient, a student-loan servicer, formerly known as Sallie Mae. Equifax and Experian are consumer credit reporting agencies as defined under Fair Credit Reporting Act ("FCRA"). The promissory note ("Note") associated with each loan contained an arbitration agreement that covered any claim that "arose from or related in any way to the promissory note." Howard signed the Note and failed to opt out of the Note's arbitration clause. Howard filed for bankruptcy and Sallie Mae agreed to a stipulated settlement that consolidated Howard's loans under the three Notes and reduced their principal balance. The Bankruptcy court approved and dismissed the case.
Howard contends that from 2011 on, Sallie Mae and then Navient failed to report Howard's updated and reduced loan balance to the credit reporting agencies and also reported Howards loans as delinquent when Howard made payments lower than the amount she owed prior to the settlement, even though those payment amounts were approved under the settlement agreement. Howard alleged that Navient's inaccurate reporting of the loan balance caused Experian and Equifax to report various delinquencies on Howard's credit report.
Howard filed a complaint against Navient, Experian, and Equifax asserting causes of action against each defendant under the FCRA, 15 U.S.C §1681. Navient moved to compel all parties to arbitration.
HOLDING: Motion granted.
REASONING: Howard argued that the arbitration agreement did not apply to her FCRA claims. Howard claimed she did not bring a claim that could be arbitrated under the agreement because her cause of action did not arise from Navient's failure to comply with its duties under the promissory note, but instead stemmed from Navient's failure to report accurate information after the settlement. The court rejected that argument by reasoning that any challenge Howard made against Navient's reporting or investigatory actions on the loans were inherently related to the underlying promissory notes. Because Howard challenged the amounts she owed under the Notes, and the arbitration agreement was controlling over the Notes, the arbitration agreement controlled Howard's claim.

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Howard further argued that the arbitration agreement was unconscionable because it contained a unilateral right of appeal and a class waiver provision. The court rejected that argument also, stating that because neither the class waiver provision nor the language presumably creating a unilateral appellate right were oppressive, the agreement was not unconscionable.
The court compelled Howard to arbitrate her claims against Navient because Howard's claims arose from Navient's performance of its duties under the promissory notes, the arbitration agreement was not substantively unconscionable, and the settlement stipulation itself was directly related to the promissory notes.

NAMED PLAINTIFF IN A PUTATIVE CLASS ACTION DID NOT HAVE TO ARBITRATE HER CLAIMS FOR VIOLATIONS OF THE COMMUNICATIONS ACT

Perez v. DirecTV, LLC, 740 F. App'x 560 (9th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca9/17-55764/17-55764-2018-10-19.html

FACTS: Plaintiff-Appellant Doneyda Perez, owner of a beauty salon, was a subscriber of Defendant-Appellee, DirecTV. A DirecTV salesman walked into Perez's salon and persuaded her to sign-up for a promotional deal. The salesman started the service the same day and made the programming available for her salon customers to view. Unbeknownst to Perez, DirecTV classified her account as a residential account whose terms of service prohibited programming from being displayed in commercial establishments, such as Perez's salon. For nearly two years, DirecTV never indicated to Perez that she might be misusing its service until a DirecTV lawyer called Perez and accused her of violating DirecTV's terms of service and the Communications Act. The lawyer declared Perez owed $75,000 in penalties and threatened to sue in federal court. After several harassing calls, the lawyer offered Perez a settlement of $5,000. Without the benefit of legal counsel and fearing the prospect of a federal lawsuit, Perez accepted the settlement offer. Perez filed a class-action suit seeking redress and DirecTV invoked the arbitration provision in the customer agreement.

DirecTV filed a motion to compel arbitration. The district court denied the motion. DirecTV appealed.
HOLDING: Affirmed.
REASONING: Section 9(d)(ii) of DirecTV's Customer Agreement exempted from arbitration "any dispute involving a viola-

tion of the Communications Act of 1934…or any statement or law governing theft of service." The court found both exemptions unambiguously covered Perez's claims. First, because Perez's claim alleged DirecTV's scheme against small minority-owned businesses involved threatening customers with lawsuits for violating the Communications Act, the court reasoned her claim involved a violation of the Communications Act. Second, because Perez's claim alleged DirecTV accused her of theft of satellite cable television services and pressured her into a settlement, the court reasoned that Perez's claim involved statements or law governing theft of service. As a result, the court concluded that the district court did not err in holding Perez's claims were outside the scope of the arbitration agreement.

Although finding DirecTV's conduct deplorable, the dissenting opinion concluded current law allows DirecTV to enforce its arbitration provision against Perez. First, the dissent found a valid arbitration agreement existed and asserted Perez signed a document stating in plain terms that she agreed to arbitrate all disputes. Second, the dissent argued Perez's claims are covered by the arbitration agreement and reasoned that although the scope of the arbitration exemptions is ambiguous, these types of ambiguities must be resolved in favor of arbitration. Further, the dissent found that the arbitration provision unfairly one-sided because it allows DirecTV to bring suit in court against customers while requiring customer claims against the company to be resolved in arbitration. However, the dissent concluded that the one-sided aspect does not render the provision invalid and noted California law dictates that the one-sided aspect of the provision may be severed, leaving the underlying arbitration agreement enforceable.

COURT DENIES ARBITRATION UNDER "EFFECTIVE VINDICATION" EXCEPTION TO THE FEDERAL ARBITRATION ACT

Titus v. ZestFinance, Inc., ___ F. Supp. 3d ___ (W.D. Wash. 2018).
https://www.leagle.com/decision/infdco20181023d42

FACTS: Plaintiff, Teresa Titus, received a series of loans from Defendants, ZestFinance, Inc. ("Zest"), BlueChip Financial, and Douglas Merrill. Each time Plaintiff received a loan from BlueChip, Plaintiff electronically signed internally inconsistent loan agreements. The loan agreements specified the law of the Turtle Mountain Band of Chippewa Indians applied to the loan agreement and that state law did not apply in any way. However, the loan agreements also included an arbitration clause and jury waiver, which provided that state law applies if a court found the Federal Arbitration Act inapplicable – contradicting the previous statement in the agreement.

Plaintiff filed suit against Defendants, alleging the loans violated Washington usury law and the Washington Consumer Protection Act, and unjustly benefitted Defendants. Zest and BlueChip moved to compel arbitration under the loan agreement.

HOLDING: Motion denied.

REASONING: Plaintiff argued the arbitration clause was invalid because the only reasonable construction of the loan agreement was that it implicitly forbade the application of state and federal law. Additionally, Plaintiff argued that the loan agreement was invalid because it prospectively waived her state and federal statutory rights under the effective vindication exception to arbitration, which, "serves to harmonize competing federal policies" by allowing courts to invalidate arbitration agreements that "operate as a waiver of a party's right to pursue statutory remedies." Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013). Plaintiff also argued how this effort to force the arbitration further showed how the contract was designed to circumvent federal law and thus invalid.

Zest and BlueChip argued arbitration should be compelled because the effective vindication exception only applied to the waiver of federal rights, and the loan agreement permitted the application of federal law by indicating that certain federal law applied.

The court rejected Zest and BlueChip's argument, holding that the arbitration clause operated as a prospective waiver of Plaintiff's right to pursue federal statutory remedies. The court stated that the only reasonable way to interpret the loan agreement, as a whole, was to conclude that Tribal law applied, thus barring the application of federal law except where it was expressly included. By implicitly excluding all other federal law, there was an implicit prospective waiver of federal rights. The court stated that an agreement that is "a substantive waiver" of federal statutory rights will not be upheld.

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Defendants asserted that because the contract referenced other federal laws there could not be a prospective waiver of federal rights. The court stated that this was not persuasive because if a mere reference to federal law was sufficient to save the contract, then it would render the "effective vindication" exception meaningless. Accordingly, under the effective vindication exception and the Federal Arbitration Act's §2 public policy grounds, the arbitration clause was invalid.

CONSUMER BOUND BY ARBITRATION AGREEMENT CONTAINED ON PACKAGING OPENED BY ROOFER

Dye v. Tamko Bldg. Products Inc., 908 F.3d 675 (11th Cir. 2018).
https://law.justia.com/cases/federal/appellate-courts/ca11/17-14052/17-14052-2018-11-02.html

FACTS: Plaintiffs hired roofers to purchase and install shingles that were manufactured by Tamko. On each package of shingles was a section that read "IMPORTANT" and "READ CAREFULLY BEFORE OPENING BUNDLE." The Shingles' thirty-year Limited Warranty was printed on the packaging. The Limited Warranty contained a mandatory arbitration clause.

Plaintiff filed multiple causes of action regarding the shingles. In response, Tamko filed a motion to compel arbitration, arguing that plaintiffs are required to arbitrate their claims individually pursuant to the arbitration clause contained in the Limited Warranty.

The district court granted Tamko's motion and dismissed the plaintiffs' complaint. Plaintiff appealed.

HOLDING: Affirmed.
REASONING: Plaintiffs' main contention was that the arbitration clause was not binding on the Plaintiffs because Tamko could not establish that the Plaintiffs assented to the arbitration agreement. Further, plaintiffs argue that because the roofers were the ones to purchase and install the shingles, plaintiffs were unaware that there was an arbitration agreement and could not be bound by it.

Through principles of agency, the roofers' knowledge of the arbitration agreement was imputed to the plaintiffs and, therefore, the plaintiffs were bound by the agreement to arbitrate.

The court likened the shingles' packaging to shrinkwrap on certain products that contain agreements by which the customer is bound by once the product is opened and found the arbitration agreement to be enforceable against the plaintiffs. Tamko's packaging provided conspicuous notice of its offer. According to the court, opening and retaining the shingles was the conduct from which their assent could be inferred.

The court also explained that, through principles of agency, the roofers' knowledge of the arbitration agreement was imputed to the plaintiffs and, therefore, the plaintiffs were bound by the agreement to arbitrate. The court noted that whether or not the plaintiffs actually read the warranty is irrelevant. The essential elements of an agency relationship are: 1) acknowledgement by the principal that the agent will act for him, 2) the agent's acceptance of the undertaking, and 3) control by the principal over the actions of the agent.

The court concluded that acceptance of Tamko's purchase terms, including the arbitration agreement, was incidental and necessary to accomplish the plaintiff's express grant of agency authority to their roofers to purchase and install shingles, and in any event, the roofers' notice of the terms printed on the shingle wrappers was properly imputed to the homeowners.

WHETHER CLASS OR COLLECTIVE ARBITRATION AGREEMENT IS A THRESHOLD QUESTION FOR THE DISTRICT COURT, NOT AN ARBITRATOR

Herrington v. Waterstone Mortg. Corp., 907 F.3d 502 (7th Cir. 2018).
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2018/D10-22/C:17-3609:J:Barrett:aut:T:fnOp:N:2237495:S:0

FACTS: Pamela Herrington brought federal collective and class actions against her former employer, Waterstone Mortgage Corporation ("Waterstone"). However, Herrington signed an agreement with Waterstone to arbitrate employment disputes. Waterstone moved to enforce this agreement. The arbitration agreement included a waiver clause that forbade the joinder of "claims by any persons not party to this Agreement." Pursuant to that clause, Waterstone asked the district court to dismiss Herrington's claims for lack of jurisdiction. Herrington retorted that the arbitration agreement was unenforceable, and that the waiver clause was unlawful. The district court compelled arbitration pursuant to the employment agreement, but agreed with Herrington that the waiver clause was unlawful under the National Labor Relations Act (NLRA).

The arbitrator issued an award of more than $10 million to Herrington and 174 other claimants. Waterstone appealed from the district court's final judgment enforcing the arbitration award.
HOLDING: Award vacated. Remanded to district court for questions of arbitrability.
REASONING: Waterstone argued that the waiver clause was valid, and that the collective arbitration violated its agreement with Herrington.

The court agreed that the waiver clause was valid. While the appeal was pending, the Supreme Court held that waiver clauses requiring employment disputes to be decided in single-claimant arbitrations do not violate the NLRA. The resulting issue was who would have the authority to decide whether the class and collective arbitration violated the parties' agreement. The court held that this was a question of arbitrability for the district court for two primary reasons.

First, the availability of class or collective arbitration involves two foundational arbitrability questions: 1) whether the potential parties to the arbitration agreed to arbitrate, and 2) whether the agreement to arbitrate covers a particular controversy. Questions of arbitrability are decided by courts, while subsidiary issues are for the arbitrator. Therefore, the issue of the availability of class or collective arbitration are matters for the district court to decide.

Second, questions involving the "fundamental" structural features of the arbitration—i.e., whether it is bilateral or class arbitration—belong in the "gateway" category. If arbitrators were required to make these decisions, the informality and efficiency of arbitration would be sacrificed. Furthermore, placing such a fundamental question in the hands of the arbitrator would expose the parties to restricted access to appellate review.

Herrington argued contrarily that arbitrators should be able to determine whether class or collective arbitration is available by pointing to a prior decision in which the court held that an arbitrator may decide whether to consolidate multiple arbitrations into one proceeding. The court rejected Herrington's argument, asserting that the cited precedent expressly holds the opposite—making a clear distinction between class and consolidated arbitration.