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Court, not arbitrator, decides class status

By Michael R. Lied
Michael R. Lied, of Howard & Howard Attorneys PLLC, has practiced employment, labor and immigration law for more than 30 years. A frequent author and lecturer on these subjects, he is former chair of the Illinois State Bar Federal Civil Practice Section Council and Employment Law Section Council. He can be reached at mlied@howardandhoward.com and 309-999-6311.

Roger and Mary Jo Carlson signed a sales agreement with PulteGroup Inc. and its subsidiary Del Webb Communities Inc. for the purchase of a lot and construction of a home.

Section 4.3 of the agreement contained an arbitration clause that, in relevant part, stated:

"Any controversy or claim arising out of or relating to this agreement or your purchase of the property shall be finally settled by arbitration.…

"After closing, every controversy or claim arising out of or relating to this agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act. … The rules of the American Arbitration Association (AAA), published for construction industry arbitrations, shall govern the arbitration proceeding and the method of appointment of the arbitrator.…

"Any party to this agreement may bring action to compel arbitration.…"

The Carlsons filed suit in South Carolina state court against PulteGroup and two other parties. The Carlsons later moved to amend their complaint to add class-action allegations. The state court granted the motion over PulteGroup's objection.

PulteGroup then moved to dismiss the amended complaint, or in the alternative, to compel bilateral arbitration of the Carlsons' claims. The state court denied both motions, but the South Carolina Court of Appeals reversed, finding the Carlsons' claims subject to arbitration under the agreement.

The Carlsons subsequently filed a demand for arbitration with the AAA. Their demand sought class arbitration and class certification and set the claim amount at $75,000 "until such time as the class is certified."

The AAA manager notified the parties that the arbitrator would decide whether the sales agreement permitted class arbitration.

Three days later, PulteGroup filed in federal court a petition and complaint to compel bilateral arbitration under the Federal Arbitration Act, 9 U.S.C. Section 1, et seq.

PulteGroup asserted that whether the agreement authorized class arbitration was a question of arbitrability for the court to determine.

The U.S. District Court denied PulteGroup's partial summary judgment motion and dismissed the petition.

On appeal, the court said that the U.S. Supreme Court has identified two categories of threshold questions — procedural questions for the arbitrator and questions of arbitrability for the court. See *Howsam v. Dean Witter Reynolds Inc.*, 537 US 79, 83-84 (2002). Procedural questions arise once the obligation to arbitrate a matter is established and may include such issues as the application of statutes of limitations, notice requirements, laches and estoppel.

According to the court, questions of arbitrability are different. If the answer to a question determines whether the underlying controversy will proceed to arbitration on the merits, that question necessarily falls within the narrow circumstances of arbitrable issues for the court to decide.

Those circuit courts that have considered the question have concluded that unless the parties clearly and unmistakably provide otherwise, whether an arbitration agreement permits class arbitration is a question for the court. *Reed Elsevier Inc. ex rel. LexisNexis Div. v Crockett*, 734 F 3d 594. 597-9S (6th Cir 2013); *Opalinski v. Robert Half International Inc.*, 761 F 3d 326, 331-34, 335-36 (3d Cir 2014).

Here, the parties did not unmistakably provide that the arbitrator would decide whether their agreement authorized class arbitration. In fact, the agreement said nothing at all about the subject.

Accordingly, the district court erred in concluding that the question was a procedural one for the arbitrator. On remand, the district court was to determine whether the parties agreed to class arbitration.

The case is *Del Webb Communities Inc. v. Carlson*, 817 F.3d 807 (4th Cir. 2016).