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Waffle House Arbitration Ruling May Reach Past 11th Circ.

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Law360, New York (August 17, 2017, 12:55 PM EDT) -- On Aug. 7, 2017, the Eleventh Circuit unanimously vacated a district court decision denying Waffle House's motion to compel arbitration of the plaintiff job applicant's class action against Waffle House alleging Fair Credit Reporting Act violations, holding that the parties' arbitration agreement contained a broad, valid, and enforceable delegation provision that expressed the parties' clear intent to arbitrate gateway questions of arbitrability. Jones v. Waffle House Inc. (11th Cir. Aug. 7, 2017).

Of particular interest, the court also declined to apply the "wholly groundless" exception to arbitrability clauses, which allows an inquiry as to whether the assertion of arbitrability is "wholly groundless" even where said threshold issue was expressly delegated by the parties to the arbitrator(s), becoming the first circuit to join the Tenth Circuit in rejecting that exception.[1]

The impact of the Waffle House decision may be far-reaching, as it has significantly widened the circuit split on the "wholly groundless" exception, and has added persuasive authority that could sway undecided circuits, including the Ninth Circuit, to join in rejecting that exception.

Factual Background

This case arose after plaintiff William Jones applied for a job at a Waffle House in Florida, in December 2014. Waffle House informed Jones that it would run a background check on him, but Jones neither heard back from Waffle House nor received a copy of his background check, and his employment application was ultimately denied.

In October 2015, Jones sued Waffle House and various data reporting companies in federal district court, claiming that the defendants violated the FCRA by failing to give him a copy of his background checks and an opportunity to dispute the results thereof. Jones also sought to represent a class of United States residents who applied for employment or were employed with Waffle

House in the preceding five years, and against whom Waffle House took adverse employment actions based on background checks.

Interestingly, while Jones' class-action lawsuit was pending, he applied for and obtained employment at a Waffle House in Missouri, in February 2016. Upon his hiring, Jones signed an arbitration agreement delegating to arbitration "all claims and controversies [], past, present, or future, arising out of any aspect of or pertaining in any way to [his] employment," as well as delegating gateway questions of arbitrability to the arbitrator and waiving class-action arbitration.[2]

As soon as Waffle House discovered Jones had been employed in Missouri, it moved to compel arbitration. Waffle House claimed that the arbitration agreement prevented Jones from proceeding with his class action lawsuit and that, because of the delegation provision any threshold issues of arbitrability were issues for the arbitrator, not the district court, to decide. The district court denied the motion to compel, deeming the arbitration agreement to be an illegal communication between Waffle House's attorneys and Jones.

The Eleventh Circuit's Decision and Analysis

On appeal, the Eleventh Circuit overturned the district court's order, holding that the arbitration agreement clearly and unmistakably delegated gateway issues of arbitrability to the arbitrator, and rejecting the plaintiff's arguments that the arbitration agreement was unconscionable, an improper interference with the district court's managerial authority over class action communications, and/or an improper ex parte communication with a represented party.[3]

Although much of Waffle House's analysis addressed the unusual circumstances of the case, the decision is most significant in that the Eleventh Circuit is the first circuit to join the Tenth Circuit in expressly rejecting the "wholly groundless exception." In Waffle House, the court first determined that the language of the parties' arbitration agreement clearly and unmistakably delegated gateway issues of arbitrability to the arbitrator, then analyzed whether it should conduct an inquiry into whether the wholly groundless exception applies. The court observed that several other circuits end their analysis at the parties' clear and unmistakable intent to arbitrate arbitrability. However, the court noted that, in the Fifth, Sixth and Federal Circuits, courts have applied a "wholly groundless" exception to an otherwise clear and unmistakable intent to arbitrate gateway issues of arbitrability.[4]

In applying the "wholly groundless" exception, a court first determines whether the parties' agreement reflects a clear and unmistakable intent to delegate gateway arbitrability issues to the arbitrator. If it does, then the court determines whether the assertion of arbitrability is wholly groundless. If groundless, then the court may deny the motion to compel arbitration. Although not all circuits had adopted the wholly groundless exception, only the Tenth Circuit, in Belnap v. Iasis Healthcare, 844 F.3d 1272 (10th Cir. 2017), had expressly rejected it.

After surveying the case law for and against the wholly groundless exception, the Eleventh Circuit in Waffle House sided with the Tenth Circuit in rejecting the exception. The court agreed that the exception "is in tension with the [U.S.] Supreme Court's arbitration decisions — 'in particular, with the Court's express instruction that when parties have agreed to submit an issue to arbitration, courts must compel that issue to arbitration without regard to its merits.'"[5]

Further, the Eleventh Circuit agreed with Belnap's reasoning that "'delegation provisions are as enforceable as any other provision in an arbitration agreement' and the parties' intent must be

respected."[6] In other words, just like courts compel merits disputes to arbitration under an arbitration agreement where there is a clear and unmistakable intent to arbitrate, they must similarly compel gateway arbitrability disputes to arbitration under a delegation provision, where there is a clear and unmistakable intent to delegate such issues to arbitration. The Eleventh Circuit emphasized that, "[i[f the parties clearly and unmistakably intended to arbitrate *all* gateway issues, then *all* gateway issues — regardless of how frivolous the court may deem them to be — should be arbitrated."[7]

The court explained that its approach in rejecting the wholly groundless exception was consistent with the Federal Arbitration Act's "liberal federal policy favoring arbitration agreements," and its "overarching purpose ... to ensure the enforcement of arbitration agreements according to their terms."[8] The court also rejected the notion that concerns of judicial economy justified the wholly groundless exception. It noted that, firstly, the FAA is "focused on streamlining judicial — not arbitral — proceedings," and that, regardless, "it's by no means clear that the court would save time by initially deciding the gateway questions rather than referring them to the arbitrator for resolution."[9]

Impact of the Waffle House Decision

The Waffle House decision will likely impact the enforcement of arbitrability provisions far beyond the Eleventh Circuit. For example, the Ninth Circuit has not yet provided clarity on the wholly groundless exception, even though that question is frequently considered by its district courts.[10] Given this lack of clear controlling authority, certain district courts within the Ninth Circuit have adopted the wholly groundless test [11], while others have compelled gateway issues of arbitrability to the arbitrator where there is clear and unmistakable intent to so delegate, refusing to conduct any additional inquiry under the wholly groundless exception.[12] This latest decision by the Eleventh Circuit may tip the scale in favor of more courts within the Ninth Circuit, and elsewhere, refusing to apply the exception.

In sum, now that the Eleventh Circuit has expressly joined the Tenth Circuit, as set forth in its Waffle House decision, it is more likely that motions to compel arbitration will be granted where the parties have clearly delegated threshold "arbitrability" issues to the arbitrators. Further, given the growing split among the circuits, as well as the prevalence of arbitration delegation provisions, the wholly groundless exception could soon make its way before the Supreme Court.

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[1] Jones v. Waffle House Inc., 2017 WL 3381100, at *18 (11th Cir. Aug. 7, 2017).

[2] Id., at *2.

[3] Id. at *11.

[4] Id. at *7.

[5] Id., at *8, citing Belnap v. Iasis Healthcare, 844 F.3d 1272, 1286 (10th Cir. 2017)

[6] Id , at *9, citing Belnap, 844 F.3d at 1287 n.10.

[7] Id., at *9 (emphasis in original).

[8] Id. at *9, citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); and AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011).

[9] Waffle House, 2017 WL 3381100, at *9.

[10] Portland General Electric Company v. Liberty Mutual Insurance Company, 862 F.3d 981, 986 n.3 (9th Cir. 2017).

[11] See, e.g., Bitstamp Ltd. v. Ripple Labs Inc., No. 15-CV-01503-WHO, 2015 WL 4692418, at *4 (N.D. Cal. Aug. 6, 2015); Baysand Inc. v. Toshiba Corp., No. 15-CV-02425-BLF, 2015 WL 7293651, at *3 (N.D. Cal. Nov. 19, 2015).

[12] See, e.g., Simmons v. Hankey, 2017 WL 424850, at *5 (C.D. Cal. Jan. 30, 2017) (holding that the Tenth Circuit's approach is more in line with the text of the FAA and Supreme Court precedent and, therefore, declining to apply the "wholly groundless" exception).
