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One Minute Memo®

Court, Not Arbitrator, Decides If Arbitration Proceeds As Class Claim

By David D. Kadue and Coby M. Turner

In *Garden Fresh Restaurant Corp. v. Superior Court*, the California Court of Appeal provided its most recent answer to a lingering question—who decides whether an arbitration agreement permits arbitration of class or representative claims when the agreement itself is silent on the issue? The court? Or the arbitrator? In a small victory for employers, the Court of Appeal concluded that the arbitrability of class or representative claims is a "gateway issue" for the *court*, not the arbitrator.

The Facts

A former employee of Garden Fresh (Moreno) sued the company for unpaid overtime, inaccurate wage statements, unpaid termination wages, and unlawful competition. Moreno attempted to proceed on both a class basis and a representative basis, under California's Private Attorneys General Act ("PAGA"). Although Garden Fresh demanded that Moreno honor her agreements to arbitrate her claims, she refused.

Garden Fresh then petitioned to compel individual arbitration and dismiss (or stay) the class and representative claims pending the outcome of arbitration. Moreno argued that the availability of class and representative treatment was a matter for the arbitrator to decide.

The Trial Court's Decision

The trial court granted Garden Fresh's petition to compel arbitration, but left it to the arbitrator to decide whether the arbitration agreements allowed for class and representative arbitration.

The Appellate Court Decision

On Garden Fresh's petition for a writ of mandate, the Court of Appeal directed the trial court to decide whether the parties had agreed to class and representative arbitration, and to determine whether the arbitration agreements contemplate class and representative arbitration. The Court of Appeal relied on federal authority to conclude that parties cannot be presumed to have consented to classwide arbitration by simply agreeing to submit their disputes to an arbitrator. The shift from individual to class arbitration "fundamentally changes the nature of the arbitration proceeding and significantly expands its scope." The benefits of bilateral arbitration, such as lower costs, efficiency, speed, and confidentiality, can be lost in a class arbitration, which "potentially frustrate[s] the parties' assumptions when they agreed to arbitrate." And having class or representative claims heard in arbitration is further problematic because the parties typically lose any option of appellate review. The Court of Appeal, after noting these serious concerns about finding an implied contract to arbitrate class or representative claims, held that the arbitrability of these claims was for the court—not the arbitrator—to decide.

The Court of Appeal declined to reach any issue regarding the impact of the Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*, which held that an employee's waiver of the right to bring PAGA representative claims in arbitration is unenforceable. That issue is left for the trial court to decide in the first instance.

What *Garden Fresh* Means for Employers

Garden Fresh provides employers some assurance that the arbitrator who would benefit from conducting a large, expensive class action will not be deciding whether the parties' agreement calls for such a massive undertaking. That threshold question of whether class and representative claims are arbitrable should be determined by the court, which has no financial stake in the matter. But note that *Garden Fresh* still permits courts to determine, based on the circumstances surrounding an arbitration agreement or industry custom, that the parties intended to arbitrate class, collective, and representative claims. Employers thus should take a close look at their arbitration agreements to ensure that they adequately reflect the intent to authorize only individual claims.

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