



Class Action ADVISORY ■

NOVEMBER 12, 2013

In *Crockett*, the Sixth Circuit Denied Class Arbitration Because the Contract Didn't Expressly Call for It

Last week, in *Reed Elsevier, Inc. v. Crockett*, No. 12-3574 (6th Cir. Nov. 5, 2013), the Sixth Circuit took a deep dive into the Supreme Court's recent arbitration jurisprudence and continued the trend of pro-defendant arbitration decisions. Following the Supreme Court's recent decision in *AMEX*, the circuit court held that the arbitration clause at issue did not authorize classwide arbitration because "the clause nowhere mention[ed] it."

***Crockett* is a promise that the Sixth Circuit will construe arbitration provisions strictly.**

Craig Crockett, a Texas attorney, filed an arbitration demand against Reed Elsevier (LexisNexis's parent company) alleging that, without warning, Reed charged him fees on top of his standard rate plan. Crockett filed the demand "on behalf of himself and a putative class of other LexisNexis customers." In response, LexisNexis filed suit in Ohio federal court seeking a declaratory ruling that the arbitration clause in Crockett's contract did not authorize class arbitration. The trial court granted LexisNexis summary judgment on its declaratory claim.

The Sixth Circuit affirmed. The circuit court rejected Crockett's argument that the arbitrator, not the court, should decide whether the contract authorized classwide arbitration. The court recognized the recent *Oxford Health Plans* decision where the Supreme Court stated that it "has not yet decided whether the availability of class arbitration" is a gateway question that should be resolved by a court. Nevertheless, the circuit court noted that the Supreme Court "recently . . . has given every indication, short of an outright holding, that classwide arbitrability is a gateway question rather than a subsidiary one."

Citing a variety of Supreme Court opinions, the court held that "the question of whether an arbitration agreement permits classwide arbitration is a gateway matter, which is reserved 'for judicial determination unless the parties clearly and unmistakably provide otherwise.'" Because the contract included no such provision, the court went on to decide the class-arbitration issue.

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Turning to the merits of Crockett's argument, the Sixth Circuit reasoned that the "principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it." Beyond that, the court noted, the arbitration agreement was limited to disputes arising from Crockett's contract (as opposed to other putative class members' contracts). Despite the favorable ruling from the *Crockett* court, defendants can avoid sleepless nights simply by spelling out in the contract that class arbitration is prohibited.

***Crockett* continues the trend toward courts sticking to an arbitration clause's text (whatever it provides or doesn't provide).**

Time and again, the Supreme Court has emphasized that arbitration is fundamentally a matter of contract. See *AMEX*, *Concepcion*. *Crockett* is the latest in a growing line of cases assiduously following that teaching. On one side, you have cases like *AMEX*, where the Court affirmed that an arbitration clause containing a class-action waiver is enforceable despite purported concerns over the cost of individual arbitration. On the other, you have cases like *Crockett*, where courts refuse to infer from silence an agreement to arbitrate on a classwide basis. Either way, the arbitration agreement's text controls. For defendants (the ones who typically draft the arbitration clause in question), this is a welcome result.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Randall L. Allen
randall.allen@alston.com
404.881.7196

Gidon M. Caine
gidon.caine@alston.com
650.838.2060

John A. Jordak, Jr.
john.jordak@alston.com
404.881.7868

Michele A. Powers
michele.powers@alston.com
213.576.1030

Joshua L. Becker
joshua.becker@alston.com
404.881.4732

Stephanie D. Clouston
stephanie.clouston@alston.com
214.922.3403

William H. Jordan
bill.jordan@alston.com
404.881.7850

Tiffany L. Powers
tiffany.powers@alston.com
404.881.4249

Debra D. Bernstein
debra.bernstein@alston.com
404.881.4476

Charles W. Cox
charles.cox@alston.com
213.576.1048

Michael P. Kenny
mike.kenny@alston.com
404.881.7179

Matthew D. Richardson
matt.richardson@alston.com
404.881.4478

Adam J. Biegel
adam.biegel@alston.com
404.881.4692

Cari K. Dawson
cari.dawson@alston.com
404.881.7766

J. Thomas Kilpatrick
tom.kilpatrick@alston.com
404.881.7819

Jon G. Shepherd
jon.shepherd@alston.com
214.922.3418

Teresa T. Bonder
teresa.bonder@alston.com
404.881.7369

Derin B. Dickerson
derin.dickerson@alston.com
404.881.7454

Peter Kontio
peter.kontio@alston.com
404.881.7172

Brian Stimson
brian.stimson@alston.com
404.881.4972

Brian D. Boone
brian.boone@alston.com
704.444.1106

Daniel F. Diffley
dan.diffley@alston.com
404.881.4703

Peter E. Masaitis
peter.masaitis@alston.com
213.576.1094

Kyle G.A. Wallace
kyle.wallace@alston.com
404.881.7808

Kristine McAlister Brown
kristy.brown@alston.com
404.881.7584

Frank A. Hirsch, Jr.
frank.hirsch@alston.com
919.862.2278

Matthew P. McGuire
matt.mcguire@alston.com
919.862.2279

Jonathan E. Wells
jonathan.wells@alston.com
404.881.7472

Lisa R. Bugni
lisa.bugni@alston.com
404.881.4959

Susan E. Hurd
susan.hurd@alston.com
404.881.7572

Andrew E. Paris
drew.paris@alston.com
213.576.1119

Amber C. Wessels
amber.wessels@alston.com
212.210.9594

ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719

CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100

NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260

SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333

VENTURA COUNTY: 2801 Townsgate Road ■ Suite 215 ■ Westlake Village, California, USA, 91361 ■ 805.497.9474 ■ Fax: 805.497.8804