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Class Action ADVISORY ■

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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.

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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