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Tenth Circuit Sends Class-Action Plaintiffs to Arbitration Over Interpretation of Agreement

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In *Brayman v. KeyPoint Government Solutions*, the U.S. Court of Appeals for the Tenth Circuit considered whether a judge or an arbitrator must decide whether an exception in the parties' arbitration agreement applied. In its analysis, the appellate court harmonized two competing clauses and held that the arbitrator must decide arbitrability. *Brayman* gives guidance to companies wanting to shore up their arbitration agreements against similar court challenges.

Legal Background

Arbitration is “a matter of contract,” so contracting parties can agree to have an arbitrator decide whether the dispute even belongs in arbitration. *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1280 (10th Cir. 2017). This issue is called “arbitrability,” and it is distinct from “the merits of the underlying disputes.” *Coinbase v. Bielski*, 143 S. Ct. 1915, 1923 (2023). A court will decide arbitrability unless there is “clear and unmistakable evidence” that the parties meant to delegate arbitrability to the arbitrator. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943–44 (1995) (alterations removed).

Factual Background

Defendant KeyPoint Government Solutions, Inc. provides investigative and background-screening services to federal agencies. *Brayman v. KeyPoint Government Solutions*, 83 F.4th 823, 827 (10th Cir. 2023). KeyPoint employs field investigators to perform interviews, search public records, and write investigative reports. Field investigators are hourly employees eligible for overtime pay under the Fair Labor Standards Act (FLSA), but they are bound by an arbitration agreement for all compensation-related disputes.

The agreement contains an “arbitrator decides clause” giving an arbitrator the “exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this agreement.” But the clause specifies that it does not apply to the agreement's class action waiver provision, whose validity or enforceability must be decided by a court. Another provision (the “pending litigation exception”) clarifies that

> [n]otwithstanding any other language in this agreement, this agreement does not apply to any currently pending litigation between employee and KeyPoint as of the date this agreement is signed by employee, and this agreement does not apply to any class, collective, or other representative action proceeding that is currently pending and to which you are a current or purported class member as of the day this agreement is signed by employee.

In a collective-action complaint filed in the District of Colorado, plaintiff Rachel Brayman alleged that KeyPoint violated the FLSA by failing to pay its field investigators for overtime worked. The district court conditionally certified the collective action, and the plaintiffs' counsel began assembling the class. Two hundred fourteen plaintiffs joined the FLSA collective, with 63 from California. The California plaintiffs added California-law class-action claims about overtime pay, rest breaks, and meal breaks. KeyPoint then moved to compel arbitration of those California-law claims for some of the California plaintiffs, which the district court denied.

The district court concluded that it, not individual arbitrators, should decide whether the pending litigation exception applied, reasoning that if arbitration were the "necessary gateway to invoking the pending litigation exception," the exception would be a "farce." *Brayman v. Keypoint Government Solutions*, No. 18-cv-0550-WJM-NRN, 2021 U.S. Dist. LEXIS 21240, at *7 (D. Colo. Feb. 4, 2021). The court then held that the exception allowed the California plaintiffs' claims to proceed in federal court. Id. at *11. Under 9 U.S.C. § 16(a)(1)(C), KeyPoint filed an interlocutory appeal of the district court's denying its motion to compel arbitration. *Brayman*, 83 F.4th at 831.

The Tenth Circuit's Opinion

On appeal, KeyPoint argued that by deciding that the pending litigation exception applied, the district court usurped the arbitrator's role. The Tenth Circuit agreed, concluding that the exception's applicability "is in the hands of the arbitrator." The Tenth Circuit reversed the district court's denial of KeyPoint's motion to compel arbitration of the California-law claims.

In reaching its conclusion, the appellate court compared the arbitrator decides clause to an "essentially identical" clause in *Rent-A-Center, West v. Jackson*, 561 U.S. 63 (2010). In *Rent-A-Center*, the Supreme Court held that the clause properly delegated authority to the arbitrator to decide whether the arbitration agreement was unconscionable. Because the clauses were so similar, the Tenth Circuit reasoned that the drafters here "intended the broadest possible authority for the arbitrator," which included the narrower issue of the "meaning of [the pending litigation exception]." *Brayman*, 83 F.4th at 833. This was "clear and unmistakable evidence" that the parties intended that an arbitrator decide arbitrability.

Yet the plaintiffs contended that the pending litigation exception applied "[n]otwithstanding any other language in this agreement," which the plaintiffs said exempted the exception from the arbitrator decides clause. The Tenth Circuit disagreed, noting that the exception and the clause did not contradict each other and that "nothing in the exception sa[id] anything

about who interprets the exception."

Buttressing the appellate court's conclusion was the second sentence of the arbitrator decides clause, that "the preceding sentence shall not apply to the 'class action waiver' described below." Under the *expressio unius est exclusio alterius* canon of construction, the parties' including this exception to the arbitrator decides clause excluded all other exceptions.

Conclusion

Brayman is among many Tenth Circuit cases that strictly enforce arbitration agreements against plaintiffs. From *Brayman*, the keys to a strong arbitrability clause include clearly indicating which issues must be decided by a court over an arbitrator, avoiding unnecessary "notwithstanding any other language" clauses that could give plaintiffs ammunition to argue against arbitration, and clearly spelling out which arbitration exceptions apply and when. Companies that wish to have arbitrators, not courts, interpret their arbitration agreements should take care to draft clear and consistent language underscoring that intent to arbitrate.

Jessica Smith and Nathan Lilly are attorneys at Holland & Hart. Smith is a partner who leads the firm's religious institutions and First Amendment practice and handles a wide range of state and federal appeals. Lilly is an associate who supports clients throughout every stage of business litigation matters.

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