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Consumer Protection Review



The U.S. Supreme Court denied a petition for writ of certiorari filed by Spirit Airlines Inc. in *Spirit Airlines Inc. v. Steven Maizes et al.*, which sought review of the Eleventh Circuit's decision that when an arbitration agreement cites the American Arbitration Association ("AAA") rules but is otherwise silent on the issue of who determines class arbitrability, the arbitrator, not the court, should determine whether the arbitration clause allows for class proceedings.

The case involved a dispute between Spirit and a class of its \$9 Fare Club Members. In April 2017, plaintiffs representing the putative class of club fare members filed an arbitration claim against Spirit alleging it

misrepresented benefits of membership published in the \$9 Fare Club Agreement located on its website. About a month later, Spirit filed a separate lawsuit in the United States District Court for the Southern District of Florida requesting declaratory relief and a preliminary injunction to stop the class arbitration. Spirit argued that 1) the Court, not the arbitrator, should determine whether a class action should be arbitrated; and 2) Spirit did not agree to class arbitration. In response, the class representatives asserted that by incorporating the AAA Rules into the arbitration agreement the parties agreed to allow the arbitrator to decide whether any claim, including class claims, are arbitrable. The District Court and 11th Circuit agreed with the class representatives that the inclusion of the AAA rules in the \$9 Fare Club Agreement incorporated Rule 3 of the Supplementary Rules for Class Actions, which designates the arbitrator as the one to determine whether the arbitration clause permits of class arbitration. However, as noted by Spirit Airline's petition for cert, this decision is contrary to four other circuits, who have concluded that the adoption of the AAA rules in an agreement does not automatically result in the arbitrator deciding whether class arbitration is available. **Takeaway:** Check your arbitration agreement, and do not take for granted that a court, not the arbitrator, will decide the issue of class arbitration--or vice-versa. The Supreme Court's refusal to hear *Spirit Airlines Inc.* means inconsistency between the circuits on this issue remains.

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