

# Client Alert

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## Eleventh Circuit: Let the Arbitrator Decide Whether Agreement Permits Arbitration of Class Claims

### What Happened

The Eleventh Circuit held in *Spirit Airlines, Inc. v. Maizes*, No. 17-14415, 2018 WL 3866335, at \*1 (11th Cir. Aug. 15, 2018) that an arbitrator, rather than the district court, must decide whether the arbitration agreement allows for arbitration of class claims.

### The Takeaway

Before parties enter into arbitration agreements they should consider who they want to decide questions of arbitrability and carefully examine the rules they choose because there may be provisions that could lead to unintended consequences relating to arbitrability and procedural issues.

### Procedural Background

On April 12, 2017, Steven Maizes and three other class representatives filed a claim in arbitration against Spirit Airlines, Inc., on behalf of a class of consumers based on Spirit's alleged violations of its \$9 Fare Club Agreement. On May 30, 2017, Spirit filed suit against the class representatives in federal court in the Southern District of Florida, seeking a declaration that the agreement's arbitration clause does not authorize class arbitration claims. The relevant language of the agreement's arbitration clause states: "Any dispute arising between Members and Spirit will be resolved by submission to arbitration in Broward County, State of Florida in accordance with the rules of the American Arbitration Association then in effect." *Id.* (emphasis in original).

Spirit moved for a preliminary injunction to stop the arbitration of class claims. The class representatives then moved to dismiss Spirit's lawsuit, arguing that the federal court lacked subject matter jurisdiction. The district court denied Spirit's motion for a preliminary injunction and dismissed the case for lack of jurisdiction. It held that the agreement's choice of AAA rules incorporated Rule 3 of the Supplementary Rules for Class Actions, which designates the arbitrator to decide whether the arbitration agreement permits class arbitration.

Spirit appealed and argued that the agreement's choice of AAA arbitration rules does not amount to clear and unmistakable evidence of the parties' intent to have an arbitrator decide whether the agreement permits class arbitration. Spirit further argued that there should be a higher burden for showing clear and unmistakable evidence for questions of class arbitrability than for ordinary questions of arbitrability.

### The Court's Analysis

The Eleventh Circuit began its analysis by stating that lower courts should "never assume the parties agreed to have an arbitrator decide questions of arbitrability 'unless there is clear and unmistakable evidence that they did so.'" *Id.* at \*2 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938,

944 (1995)). The court then explained its earlier decision in *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005). In *Terminix*, based on Rule 8(a) of the AAA Commercial Arbitration Rules, the Eleventh Circuit held that “the parties’ choice of AAA’s Commercial Arbitration Rules was clear and unmistakable evidence that they intended an arbitrator to decide whether the arbitration agreements were enforceable.” *Spirit Airlines*, 2018 WL 3866335, at \*3 (citing *Terminix*, 432 F.3d at 1332). This was because Rule 8(a) “provides that ‘the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.’” *Id.* (quoting *Terminix*, 432 F.3d at 1332).

Relying on *Terminix*, the Eleventh Circuit explained that the “parties’ agreement plainly chose AAA rules. Those rules include AAA’s Supplementary Rules for Class Arbitrations, ... and Supplementary Rule 3 provides that an arbitrator shall decide whether an arbitration clause permits class arbitration.” *Id.* Based on *Terminix*, “this is clear and unmistakable evidence that the parties chose to have an arbitrator decide whether their agreement provided for class arbitration.” *Id.*

Moreover, the court held that Supreme Court precedent did not require a higher burden for showing clear and unmistakable evidence for questions of class arbitrability than for ordinary questions of arbitrability. *Id.* at \*4. The court also ruled that the agreement was not ambiguous—Florida law covers the parties’ substantive rights and duties and the choice of AAA rules covers dispute resolution procedures. *Id.* at \*5.

This case illustrates the importance of considering who a party wants to decide questions of arbitrability before entering into an arbitration agreement and then carefully selecting the rules to be included in the agreement. Otherwise, a party may be found to have clearly and unmistakably intended that an arbitrator decide questions of arbitrability due to its choice of AAA rules.

The international arbitration and transnational litigation group at Hunton Andrews Kurth will continue closely monitoring related jurisprudence. Please contact us if you have any questions or would like further information regarding this decision.

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