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District Court Quickly Reinstates Class Certification in Marriott Data Breach Litigation

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Earlier this fall, the Fourth Circuit vacated the district court's class certification order in the Marriott data breach MDL because of the potential applicability of a class action waiver defense. *See In re Marriott Int'l Consumer Data Security Breach Litig.*, 78 F.4th 677 (4th Cir. 2023). Our post on this decision can be found here. On remand, the district court took little time to conclude that Marriott had waived the class action waiver in the Choice of Law and Venue provision of the putative class members' contracts and that regardless "the adhesive provision, buried on the last page of the Terms cannot direct this Court to ignore the provisions of Rule 23 of the Federal Rules of Civil Procedure." *In re Marriott Int'l Consumer Data Security Breach Litig.*, 2023 WL 8247865 (D. Md. Nov. 29, 2023). The district court thus reinstated the classes as earlier certified.

The class action waiver at issue in the putative class members' contracts was found in the Choice of Law and Venue provision, which provided in relevant part that "[a]ny disputes arising out of or related to the [loyalty program or its terms] will be handled individually without any class action." The provision went on to state that disputes would be governed by New York law and that such disputes would be litigated exclusively in New York. The district court determined that by Marriott asking for the data breach cases to be consolidated into an MDL in the District of Maryland, Marriott waived the Choice of Law and Venue provision, including the class action

waiver. Specifically, the court found that "[a]n MDL is the antithesis of handling each claim on an individual basis." The court further found that Marriott's joint suggestion with plaintiffs to utilize a bellwether process was also "inconsistent with handling cases on an individual basis." Further, the district court seemed to indicate that the Fourth Circuit had found that Marriott had adequately preserved its class action waiver defense but stated that it "respectfully disagrees" with such a position.

In addition to what the district court viewed as Marriot's clear waiver, the court was also critical of the drafting and placement of the class action waiver provision. Indeed, according to the court, the Choice of Law and Venue provision "was buried on the last page of the Terms," as shown here:

Of note, the court took issue with the following material flaws:

1. the entire provision only contains two sentences;
2. the heading makes no reference to individual handling of claims;
3. while it is described as a class action waiver, the provision is actually broader than that, requiring the handling of all claims on an individual basis;
4. it requires New York law and New York jurisdiction over all claims; and
5. the provision does not reference the parties at all. Instead, the provision directs the court's management of the litigation (claims will be handled individually).

The court contrasted this provision with the placement of the class action waiver upheld in *Deluca v. Royal Caribbean Cruises*, *LTD*, 244 F. Supp. 3d 1342 (S.D. Fla. 2017), where the contract boldly and clearly directed consumers to important terms and conditions, including the class action waiver:

These opposing examples further highlight how important it is to carefully consider and draft class action waiver provisions with the help of experienced counsel.

Finally, the district court found that even if Marriott had not waived the defense, the provision was nonetheless unenforceable because it requires the district court to ignore the provisions of Rule 23 of the Federal Rules of Civil Procedure – in contravention of *Shady Grove Orthopedic Assoc. v. Allstate Ins. Co.,* 559 U.S. 393 (2010) and its progeny. The court found that contractual provisions cannot override a court's discretion to certify a class under Rule 23. In doing so, it distinguished class action waivers in the arbitration context because the Federal Rules of Civil Procedure are not implicated.

Stay tuned to see whether Marriott seeks Fourth Circuit review again under Rule 23(f). In the meantime, if you are involved in a dispute that implicates a class action waiver, this decision highlights the importance of timely invoking it and taking actions consistent with its application.

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