

Appeals Court Rules Courts Must Address Class Action Waivers Before Certifying Class

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Key Takeaway

This is the first federal appellate opinion to make express what many defense practitioners have argued should be the universe rule. Moving forward, courts within the Fourth Circuit (and likely beyond), will need to address similar waivers *before* certification. As such, corporate defendants should keep in mind the litigation and cost-savings advantages class action waivers can often provide when appropriately incorporated into key consumer-facing contracts.

The Fourth Circuit recently vacated a class certification order in a significant customer data breach case, finding the district court erred by failing to *first* address the effect a class-action waiver (signed by class members) would have on certification. The holding and rationale of the opinion are likely to impact many consumer class-action suits going forward.

In re Marriott International, Inc., Customer Data Security Breach Litigation concerns a consolidated litigation in which plaintiffs allege hackers gained access to the guest reservation database of the Marriott-owned Starwood Hotels chain. No. 22-1744 (4th Cir. Aug. 18, 2023). Plaintiffs ultimately moved to certify various proposed classes, which the district court allowed. However, it did so with knowledge that every putative class member was necessarily a member of the Starwood Preferred Guest Program and had previously signed a “Terms & Conditions” contract that waived the member’s right to pursue class litigation by agreeing to resolve disputes “individually [and] without any class action.” *Id.* at 15. The district court separately concluded the impact of the class waiver could be addressed *after* plaintiffs concluded merits discovery.

Marriott appealed the certification order, arguing that the contractual waiver bound its members and barred the entirety of the class action. Marriott further argued that such waivers must be addressed and enforced *at* the certification stage, not *after* a class action has been litigated on the merits. The Fourth Circuit agreed and held that “the time to address a contractual class waiver is before, not after, a class is certified.” *Id.* at 16.

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