A FIRST IN THE SECOND (CIRCUIT): ON REMAND, DISTRICT COURT BREAKS NEW GROUND BY VACATING ARBITRATOR'S CLASS CERTIFICATION AWARD

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By: Andrew C. Glass, Robert W. Sparkes, III, Elma Delic, Roger L. Smerage

In what appears to be a first-of-its-kind ruling, the District Court for the Southern District of New York recently concluded that a federal district court has the authority to vacate an arbitrator's class certification award based on the due process rights of absent class members. That this potentially ground-breaking decision arose from the long-standing litigation in *Jock v. Sterling Jewelers, Inc.* [1] is no surprise. Over the course of a decade in *Jock*, the district court and the Second Circuit Court of Appeals have rendered multiple decisions addressing the proper role of a court in reviewing an arbitrator's authority to determine whether parties have agreed to class arbitration. In the latest decision, the district court became the first court to apply Justice Alito's concurrence in *Oxford Health Plans LLC v. Sutter* [2] to strike down an arbitrator's ruling. The *Jock* court determined that, absent an express class arbitration provision in each putative class member's arbitration agreement, an arbitrator does not have the authority to bind absent class members to a class judgment—even if they signed the same form of arbitration agreement as the named plaintiffs. [3] As discussed below, this novel decision could have significant implications.

BACKGROUND

After employees brought a putative class action alleging gender discrimination in 2008, the district court compelled arbitration and concluded that the parties had agreed to submit the question of whether their arbitration agreement provided for class proceedings to the arbitrator. [4] The arbitrator eventually determined that the agreement permitted class arbitration, notwithstanding the absence of express language providing for or prohibiting class proceedings. [5] The company moved the district court to vacate the decision under Section 10(a) of the Federal Arbitration Act ("FAA"). [6]

The district court denied the motion to vacate, and the company appealed to the Second Circuit. [7] While the company's appeal was pending, the Supreme Court decided *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, [8] which held that imposing class arbitration on parties who have not affirmatively agreed to authorize class arbitration was inconsistent with the FAA. [9] In light of *Stolt-Nielsen*, the district court in *Jock* indicated that if it still had jurisdiction, it would reconsider its earlier ruling and vacate the arbitrator's decision permitting class arbitration. [10] The Second Circuit remanded to allow the district court to enter its order vacating the arbitrator's decision, and the district court did so. Thereafter, in connection with plaintiff's appeal, the Second Circuit reversed, concluding that there was no basis upon which to vacate the arbitrator's decision. [11] According to the

Second Circuit, "[w]here the district court strayed was in substituting its interpretation of the agreement for that already undertaken by the arbitrator when she performed the legal analysis she was asked by the parties to undertake." [12]

In 2013, after the Second Circuit's ruling, the Supreme Court issued its unanimous decision in *Oxford Health*. The Supreme Court—like the Second Circuit—held that an arbitrator does not exceed his or her power by interpreting an arbitration agreement as providing for classwide arbitration when the parties have authorized the arbitrator to rule on the issue, either in the agreement or by their conduct. [13] Justice Alito, however, separately concurred expressing his concern about potential due process implications for absent class members. In particular, Justice Alito noted that "absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration." [14] Because arbitration "is a matter of consent, not coercion," Justice Alito reasoned that "it is far from clear that [absent class members] will be bound by the arbitrator's ultimate resolution of this dispute." [15] Justice Alito based his concurrence on due process principles. He reasoned that an arbitrator cannot bind individuals who did not opt into the proceedings before the arbitrator decided the named plaintiff's claims, because they have not acquiesced to the "arbitrator's authority in any way," notwithstanding their agreement to arbitrate their disputes. [16]

THE *JOCK* ARBITRATOR'S CLASS CERTIFICATION DECISION

In 2015, the *Jock* arbitrator certified a class of 70,000 members, which set the stage for the district court's recent decision. But to get there, the case again had to wind its way from the district court to the Second Circuit and back again. After the arbitrator's class certification decision, the defendant moved to vacate that decision, arguing that "individuals other than [the few hundred opt-in] plaintiffs have not consented to join the class arbitration, and an opt-out notice to those individuals would not create consent." [17] The district court denied the motion, concluding that "the defendant's argument on this point is foreclosed by earlier rulings in this case," namely the Second Circuit's decision rejecting the earlier motion to vacate the arbitrator's decision construing the arbitration agreement. [18]

Not surprisingly, the defendant appealed again. But this time, the Second Circuit sided with the defendant, vacated the district court's decision, and remanded the case for further consideration of the defendant's motion. [19] Although the Second Circuit acknowledged that "it is law of the case that 'the issue of whether the agreement permitted class arbitration was squarely presented to the arbitrator,'" it concluded that its prior ruling "did not squarely address whether the arbitrator had the power to bind absent class members to class arbitration given that they, unlike the parties here, never consented to the arbitrator determining whether class arbitration was permissible under the agreement in first place." [20] Because "*Oxford Health Plans* does not speak … to whether an arbitrator in that scenario also has the authority to certify a class containing absent class members," the issue was one for the district court to grapple with in the first instance and is not bound by any law of the case. [21]

THE IMPORTANT IMPLICATIONS OF THE DISTRICT COURT'S LATEST DECISION IN *JOCK*

With the background set by *Oxford Health* and Justice Alito's concurrence therein, the district court again

addressed the defendant's motion to vacate. In what appears to be the first decision of its kind, the district court applied Justice Alito's *Oxford Health* concurrence to a challenge to an arbitrator's authority regarding the scope of potential class arbitration. The court concluded that due process does not allow arbitrators to determine the fate of absent class members, who (1) had not opted-in to be a member of the class, and (2) had signed an arbitration agreement that did not expressly provide for class-based arbitration. [22] In doing so, the court granted the company's motion to vacate the class certification decision because the arbitrator had exceeded her authority where the arbitration agreement did not discuss class arbitration and thus did not "authorize[] class procedures." [23]

The district court reasoned that absent class members could not be deemed to have assented to the arbitrator's authority to conduct class arbitration—and be bound thereby—simply by virtue of signing the same form of arbitration agreement that the named plaintiff signed. [24] In other words, that the named plaintiff and the defendant had agreed to the arbitrator's authority to construe the arbitration agreement as providing for class proceedings could not bind absent class members. [25] Citing Justice Alito's *Oxford Health* concurrence, the district court explained that "distribution of opt-out notices does not cure this fundamental flaw in the class arbitration proceeding because an offeree's silence does not normally modify the terms of a contract." [26] Finally, the district court recognized that a contrary ruling could result in a potential flood of additional litigation brought by absent class members to contest the arbitrator's authority to bind them. [27]

How the latest decision in *Jock* may impact businesses that use arbitration agreements remains to be seen, particularly pending the Second Circuit's ruling on the appeal plaintiffs have filed. As a practical matter, many businesses have already incorporated express class waiver provisions into their arbitration agreements. And Congress's recent nullification of the Consumer Financial Protection Bureau's arbitration agreements rule (which sought to curb the use of class action waiver provisions in consumer financial service contracts), should allow consumer finance companies to continue to do so. Such provisions serve to limit the interpretive role of the arbitrator as it relates to the potential for class proceedings. But for companies whose arbitration agreements do not contain class waiver provisions, this latest development may provide some insulation from the risk of class arbitration.

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[1] No. 08 CIV. 2875 (S.D.N.Y.).
[2] 569 U.S. 564 (2013).
[3] *Jock v. Sterling Jewelers, Inc.*, --- F. Supp. 3d ----, 2018 WL 418571, at *2-4 (S.D.N.Y. Jan. 15, 2018), appeal docketed No. 18-153 (2d Cir. Jan. 18, 2018).
[4] *Jock v. Sterling Jewelers, Inc.*, 564 F. Supp. 2d 307, 310-12 (S.D.N.Y. 2008). The district court did so based upon its view that the question of whether an arbitration agreement provides for class proceedings is a "procedural issue[]." *Id*. at 310. Although several federal courts of appeals have concluded differently (namely that the question is substantive and thus presumptively for a court to decide), the Second Circuit has not decided the issue, and there is disagreement even among the sessions of the Southern District of New York. *Compare Anwar v. Fairfield Greenwich Ltd.*, 950 F. Supp. 2d 633, 639 (S.D.N.Y. 2013), *with Wells Fargo Advisors, L.L.C. v. Tucker*, 195 F. Supp. 3d 543, 547-51 (S.D.N.Y. 2016). *Tucker* is presently on appeal, and was argued on August 17, 2017. *See* No. 16-3854 (2d Cir.).
[5] *Jock v. Sterling Jewelers, Inc.*, 677 F. Supp. 2d 661, 663 (S.D.N.Y. 2009).

[6] *Id*.
[7] *Id*. at 665-68.
[8] 559 U.S. 662 (2010).
[9] *Id*. at 685-687.
[10] *Jock v. Sterling Jewelers, Inc*., 725 F. Supp. 2d 444, 444, 447-51 (S.D.N.Y. 2010).
[11] *Jock v. Sterling Jewelers, Inc*., 646 F.3d 113, 115-18, 121-27 (2d Cir. 2011), *cert. denied* 565 U.S. 1259 (2012).
[12] *Id*. at 123-24.
[13] 569 U.S. at 571-73 ("Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court.").
[14] *Id*. at 574 (Alito, J., concurring).
[15] *Id*.
[16] *Id*. ("It is true that they signed contracts with arbitration clauses materially identical to those signed by the plaintiff who brought this suit. But an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination.").
[17] *Jock v. Sterling Jewelers, Inc*., 143 F. Supp. 3d 127, 128-29 (S.D.N.Y. 2015).
[18] *Id*. ("All members of the class certified by the Arbitrator signed the RESOLVE agreements; the Arbitrator interpreted these agreements to permit class arbitration; and the Second Circuit upheld the Arbitrator's authority to do so. Given that holding, this Court sees no basis for vacating the Class Determination Award on the ground that the Arbitrator has now exceeded her authority in purporting to bind absent class members.").
[19] *Jock v. Sterling Jewelers, Inc*., 703 F. App'x 15, 16-17 (2d Cir. 2017).
[20] *Id*. at 17.
[21] *Id*. at 17-18.
[22] *See* 2018 WL 418571, at *4.
[23] *Id.* at *2.
[24] *Id*. at *3.
[25] *Id*.
[26] *Id*.
[27] *Id*.

KEY CONTACTS

ANDREW C. GLASS
PARTNER

BOSTON
+1.617.261.3107
ANDREW.GLASS@KLGATES.COM

ELMA DELIC
ASSOCIATE

BOSTON
+1.617.951.9228
ELMA.DELIC@KLGATES.COM

ROBERT W. SPARKES, III
PARTNER

BOSTON
+1.617.951.9134
ROBERT.SPARKES@KLGATES.COM