# ABSENT BUT NOT FORGOTTEN: THE SECOND CIRCUIT ADDRESSES THE IMPACT OF ARBITRATION ON ABSENT CLASS MEMBERS

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**U.S. Financial Institutions and Services Litigation Alert**

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In their 2013 concurrence in *Oxford Health Plans LLC v. Sutter*, Justice Samuel Alito, joined by Justice Clarence Thomas, questioned whether absent class members "will be bound by the arbitrator's ultimate resolution of th[e] dispute" in a class arbitration.[1] Justice Alito suggested that where an arbitration agreement provides "no reason to think that the absent class members ever agreed to class arbitration," an affirmative answer was unlikely.[2] He posited that "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."[3] Taken to its logical end, Justice Alito's rationale would support an argument that class arbitrations should be limited to adjudicating only the claims of class members who affirmatively opt in to the class arbitration proceedings.

In the wake of *Oxford Health*, until recently, neither the Supreme Court nor any of the circuit courts of appeal provided meaningful guidance on what, if any, impact Justice Alito's concurring opinion would have on class arbitration broadly. The U.S. Court of Appeals for the Second Circuit broke that silence in *Jock v. Sterling Jewelers, Inc*.[4], taking a different tack from Justice Alito. Specifically, the Second Circuit held that an "arbitrator's determination that the [arbitration] agreement permits class arbitration binds the absent class members because, by signing . . . [similar or identical] [a]greement[s], they, no less than the parties, bargained for the arbitrator's construction of that agreement with respect to class arbitrability."[5] Accordingly, under these circumstances, an arbitrator does not exceed his or her authority when he or she certifies a class and purports to bind absent class members to a decision on the merits.[6]

The point: After *Jock*, courts in the Second Circuit will likely enforce arbitration awards that purport to bind absent class members, at least where the class members all executed similar arbitration agreements that clearly and unmistakably delegate the availability of class proceedings to the arbitrator.

## CASE BACKGROUND

The *Jock* case has a long history, which has generated four separate arbitration-related decisions from the Second Circuit.[7] The underlying claims, however, are relatively straightforward. The plaintiff sought to represent a putative class of current and former retail sales employees of defendant Sterling Jewelers Inc. ("Sterling"), alleging that defendant paid female employees less than their male counterparts in violation of Title VII of the Civil

 

Rights Act of 1964 and the Equal Pay Act.[8]

As a condition of employment, Sterling required all of its employees to execute arbitration agreements that mandated all disputes be resolved in arbitration before the American Arbitration Association ("AAA").[9] Although plaintiff, joined by at least 18 other claimants, initially filed a putative class action in the U.S. District Court for the Southern District of New York, the plaintiff later moved to stay those proceedings pending resolution of a class arbitration complaint filed with the AAA.[10] The arbitrator construed the arbitration agreements as permitting classwide arbitration and eventually certified a class. The class was comprised of the 254 plaintiffs who had opted into the case and absent class members "who had neither submitted claims nor opted in to the arbitration proceedings."[11] The class was certified as an opt-out class seeking only injunctive and declaratory relief.[12]

Sterling moved to vacate the class award on the grounds that the arbitrator exceeded her authority by "'purporting to bind absent class members who did not express their consent to be bound.'"[13] The District Court denied the motion, but the Second Circuit reversed and remanded for the District Court to consider "whether an arbitrator, who may decide . . . whether an arbitration agreement provides for class procedures because the parties 'squarely presented' it for decision, may thereafter purport to bind *non-parties* to class procedures on this basis."[14]

On remand, the District Court vacated the class arbitration award, reasoning that: (1) the arbitration agreement did not authorize class procedures (effectively substituting its judgment for that of the arbitrator), and (2) even though the parties to the arbitration submitted the question of whether the agreement permitted class arbitration to the arbitrator, that submission could not bind absent class members who had not affirmatively agreed to submit the question to the arbitrator.[15] According to the District Court, "individuals who did not affirmatively opt in to the class proceeding here did *not* agree to permit procedures by virtue of having signed [arbitration] agreements" and, therefore, could not be bound the arbitrator's decision.[16] Simply put, the District Court found that the arbitrator "had no authority to decide whether the [arbitration] agreement permitted class action procedures for anyone other than the named parties who chose to present her with that question and those other individuals who chose to opt in to the [arbitration] proceeding."[17] In arriving at its decision, the District Court relied primarily on Justice Alito's concurring opinion in *Oxford Health*.[18]

## THE SECOND CIRCUIT SPEAKS

On appeal, the Second Circuit reversed the District Court's decision to vacate the class arbitration award.

As an initial step, the Second Circuit rejected the District Court's premise that "because the absent class members did not affirmatively opt in to the arbitration proceeding and thereby consent to the arbitrator's authority to decide whether the [arbitration] Agreement permits class procedures, [the court's] usual deferential standard of review does not apply."[19] Instead, the Court confirmed that the normal, "extremely deferential standard of review" set forth in the Federal Arbitration Act applied.[20] Thus, the Second Circuit framed the relevant question as whether the arbitrator had the contractual authority to determine if the agreement permitted class proceedings

 

and if the proposed class should be certified, not whether the arbitrator's decisions on those issues were correct on the merits.[21]

In answering that question, the Second Circuit held that the arbitrator did not exceed her authority in purporting to bind absent class members to class procedures.[22] The Court explained that "[a]lthough the absent class members have not affirmatively opted in to this arbitration proceeding, by signing the [arbitration] Agreement, they consented to the arbitrator's authority to decide the threshold question of whether the agreement permits class arbitration."[23] That consent was reflected in the arbitration agreement each absent class member signed, which (1) incorporated the AAA rules that provide for the arbitrator to determine threshold issues, including "whether the applicable arbitration clause permits the arbitration to proceed on behalf of . . . a class"; and (2) expressly delegated questions of arbitrability to the arbitrator.[24] Due to the absent class members' "contractually expressed consent," the Second Circuit held that "they, like the parties, may be bound by the arbitrator's determination that the [arbitration] Agreement permits class procedures regardless of whether that determination is, as the District Court believes, wrong as a matter of law."[25] As such, the Second Circuit found that the arbitrator did not exceed her authority in certifying a class binding absent class members.[26]

The Second Circuit buttressed its holding with a common-sense policy argument. That is, whether in court or in arbitration, class actions regularly bind absent class members in mandatory and opt-out classes, and requiring absent class members to affirmatively opt in "would be inconsistent with the nature of class litigation and would in effect negate the power of the arbitrator to decide the question of class arbitrability."[27]

## REMAND TO CONSIDER OPT-OUT CLASS CERTIFICATION

Although the Second Circuit reversed the District Court's decision vacating the class arbitration award, it did not simply reinstate that award.[28] Instead, the Court remanded the case for the District Court to consider "whether the arbitrator exceeded her authority in certifying an opt-out, as opposed to a mandatory, class for injunctive and declaratory relief."[29] Typically, classes seeking predominately injunctive or declaratory relief are certified as mandatory classes (meaning that the absent class members cannot opt out), whereas "opt-out" classes are normally reserved for classes seeking monetary damages.[30] On that general basis, the District Court had previously found that the arbitrator did in fact exceed her authority by certifying an opt-out class.[31] In other words, stay tuned; the *Jock* case may provide additional opportunities for the District Court and the Second Circuit to address not-yet-decided arbitration issues.

## CONCLUSION

After 11 years of arbitration, litigation, appeals, and four Second Circuit decisions, the long and winding road of the *Jock* case is likely to continue for some time as the District Court (and perhaps the Second Circuit) untangle the remaining issue. In the short term, however, the Second Circuit's latest *Jock* decision is informative. Indeed, *Jock IV* represents the first time a federal circuit court of appeals has addressed the issue raised in Justice Alito's

 

concurring opinion in *Oxford Health*. Ultimately, if provided with the opportunity to consider the matter, it will be for the Supreme Court to decide whether to take a different approach, perhaps one more closely aligned with Justice Alito's view.

**Notes**

[1] *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 574-75 (2013) (Alito, J., concurring). The treatment of absent class members in arbitration was not directly on appeal in *Oxford Health Plans*; the Supreme Court considered only the issue of whether the arbitrator exceeded his authority under the Federal Arbitration Act by construing the applicable arbitration agreement as permitting class arbitration. *See id.* at 566, 568-70 (holding that the arbitrator did not exceed his authority).
[2] *See id.* at 574 (Alito, J., concurring).
[3] *Id.*
[4] *Jock v. Sterling Jewelers Inc.*, No. 18-153-cv, --- F.3d ---, 2019 WL 6108551, at *3-6 (2d Cir. Nov. 18, 2019) ("*Jock IV*").
[5] *Id.* at *1.
[6] *Id.*
[7] *See id.* at *3-6; *Jock v. Sterling Jewelers Inc.*, 691 F. App'x 665 (2d Cir. 2017) ("*Jock III*"); *Jock v. Sterling Jewelers, Inc.*, 703 F. App'x 15 (2d Cir. 2017) ("*Jock II*"); *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d Cir. 2011) ("*Jock I*").
[8] *See Jock IV*, 2019 WL 6108551, at *1; *see also* 42 U.S.C. § 2000e, *et seq.*; 29 U.S.C. § 206(d).
[9] *See id.*
[10] *See Jock I*, 646 F.3d at 116.
[11] *Jock IV*, 2019 WL 6108551, at *2.
[12] *Id.* at *2, *6.
[13] *Id.* at *2 (quoting *Jock v. Sterling Jewelers, Inc.*, 143 F. Supp. 3d 127, 128-29 (S.D.N.Y. 2015), *rev'd, Jock II*, 703 F. App'x at 17).
[14] *Jock II*, 703 F. App'x at 18 (emphasis in original).
[15] *See Jock IV*, 2019 WL 6108551, at *2 (citing *Jock v. Sterling Jewelers Inc.*, 284 F. Supp. 3d 566, 570-71 (S.D.N.Y. 2018)).
[16] *Jock*, 284 F. Supp. 3d at 570-71 (emphasis in original).
[17] *Id.* at 571.
[18] *Id.* at 570-71 (citing and quoting *Oxford Health*); *see also Jock IV*, 2019 WL 6108551, at *3 (discussing the District Court's decision).
[19] *Jock IV*, 2019 WL 6108551, at *3.
[20] *See id.* at *3-5 (citing 9 U.S.C. § 10(a)(4)).
[21] *See id.* at *3, *5; *see also Oxford Health*, 569 U.S. at 569 (where parties "bargain [ ] for [an] arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits. Only if the arbitrator acts outside the scope of his contractually delegated authority . . . may a court overturn his determination").
[22] *Id.* at *5.
[23] *Id.* at *4.
[24] *Id.* (internal quotation marks omitted). The Supreme Court has suggested (but not decided) and the Second

 

Circuit has assumed (but not decided) that the availability of class arbitration is a threshold question of arbitrability. *Id.* Every other circuit court of appeal that has addressed the issue has found that the question of whether an arbitration agreement permits class arbitration is a question of arbitrability that is presumptively for the courts to decide, absent clear and unmistakable evidence that the parties delegated the question to an arbitrator. *See 20/20 Comm'cs Inc. v. Crawford*, 930 F.3d 715, 718-19 (5th Cir. 2019); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506-11 (7th Cir. 2018); *JPay, Inc. v. Kobel*, 904 F.3d 923, 930-36 (11th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 873-77 (4th Cir. 2016); *Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 331-35 (3d Cir. 2014); *Eshagh v. Terminex Int'l Co., L.P.*, 588 F. App'x 703, 704 (9th Cir. 2014) (unpublished); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 598-99 (6th Cir. 2013); *see also Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1245-56 (10th Cir. 2018) (assuming, without deciding, that whether an agreement authorizes class arbitration is a gateway arbitrability issue).

[25] *Jock IV*, 2019 WL 6108551, at *5 (internal quotation marks omitted).

[26] *Id.*

[27] *Id.*

[28] *See id.* at *6.

[29] *Id.*

[30] *See, e.g.*, Fed. R. Civ. P. 23(c)(2)(B) (requiring that the notice for absent members of a Rule 23(b)(3) class must provide "that the court will exclude from the class any member who requests exclusion" and "the time and manner for requesting exclusion").

[31] *See Jock IV*, 2019 WL 6108551, at *6 (noting that "[a]pplying the appropriate Section 10(a)(4) standard, the District Court concluded that . . . the arbitrator acted 'outside her authority' and 'in manifest disregard of the law' by providing putative class members with the opportunity to opt out" (quoting *Jock*, 143 F. Supp. at 130)).

## KEY CONTACTS

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