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Five Years After Justice Alito's Oxford Health Concurrence, Have The Second Circuit and Southern District of New York Signaled The End of Opt-Out Class Arbitrations?

by Michael J. Breslin

In 2013, Justice Alito's concurrence in *Oxford Health* raised serious questions whether absent class members could be bound by an arbitrator's incorrect determination that an arbitration agreement authorized class arbitration. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013) (Alito, J., concurring). Even if the parties to the arbitration would be bound by the arbitrator's ruling (because they voluntarily had submitted the issue to the arbitrator), "absent class members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't." *Id.* at 574. Because the arbitration agreement did not authorize class arbitration explicitly (as required under *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 685 (2010)), "it is far from clear that [absent class members] will be bound by the arbitrator's ultimate resolution of this dispute." *Id.* And because every arbitration agreement requires consent of the parties, "at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used." *Id.* at 574-75 (emphasis in original).

Last month, Judge Rakoff of the Southern District of New York held, consistent with Justice Alito's concurrence, that an arbitrator lacks the authority to certify an "opt-out" class where the arbitration agreements did not explicitly authorize class arbitration. *Jock v. Sterling Jewelers Inc.*, 08 Civ. 2875, 2018 WL 418571 (S.D.N.Y. Jan. 15, 2018), *appeal filed*, No. 18-153 (2d Cir. Jan. 18, 2018). This potentially watershed ruling issued after the Second Circuit's reversal last year of the district court's 2015 ruling confirming in part the arbitrator's class certification award. *See Jock v. Sterling Jewelers, Inc.*, 703 Fed. Appx. 15 (2d Cir. 2017). Together, these decisions may signal the end of "opt out" class arbitrations where the underlying arbitration agreements do not include an explicit authorization for class arbitration (as required under *Stolt-Neilsen*).

The saga of *Jock v. Sterling Jewelers* began in 2008, when the plaintiffs (current and former female employees of Sterling) filed a class arbitration alleging that Sterling discriminated against them in pay and promotion. In 2009, the arbitrator ruled that the claimants' arbitration agreements authorized class arbitration, and Sterling moved to vacate that ruling. During the appeal of the district court's denial of the motion to vacate, the Supreme Court decided *Stolt-Nielsen*, which requires an explicit contractual basis for class arbitration. This prompted the district court to request a remand of the pending appeal, so that it could reconsider its prior denial of the motion

to vacate. *Jock v. Sterling Jewelers Inc.*, 725 F. Supp. 2d 444, 449 (S.D.N.Y. 2010). The Second Circuit remanded, and the district court vacated the arbitrator's ruling.

In the ensuing appeal, the Second Circuit reversed, holding the parties voluntarily had submitted to the arbitrator the question of whether their agreement authorized class proceedings. *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113 (2d Cir. 2011). Even if the arbitrator wrongly had determined that the arbitration agreement authorized class arbitration, that incorrect ruling did not authorize vacatur, which could only be sustained on the ground that the arbitrator had exceeded her authority (and not merely because the award was legally incorrect). *Id.* at 115.

In 2015, the arbitrator certified a class of approximately 70,000 people. Sterling again moved to vacate, arguing the arbitrator exceeded her authority by purporting to bind absent class members (*i.e.*, class members other than the plaintiffs and those who had affirmatively opted into the arbitration proceeding). The district court denied Sterling's motion, concluding that the "law of the case" effect of the Second Circuit's 2011 ruling foreclosed the argument that the arbitrator had exceeded her power by certifying the class. *Jock v. Sterling Jewelers Inc.*, 143 F. Supp. 3d 127 (S.D.N.Y. 2015).

The Second Circuit reversed and explained the limitations of its prior 2011 decision. In the earlier appeal, the Court of Appeals had held only that *the parties to the arbitration* had agreed the arbitrator could determine the availability of class arbitration. 703 Fed. Appx. at 17. This ruling did not determine the "pertinent" question of "whether an arbitrator, who may decide the question 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." *Id.* at 28 (emphasis in original).

On remand, the district court held the arbitrator could *not* bind absent class members to class procedures under an arbitration agreement that did not explicitly authorize class arbitration, even if the named parties had submitted the class issue to the arbitrator. 2018 WL 418571, at *3. The district court explained that a contrary ruling "would open the door to collateral lawsuits by absent class members." *Id.* "That is because, given that the Arbitrator was wrong as a matter of law about whether the [arbitration] agreement permits opt-out classes, it is hard to see how courts could bind individuals who did not opt out, but who have not otherwise opted in, to her decisions." *Id.* Thus, the district court concluded "that the Arbitrator here 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 proceedings before her." *Id.* at *4.

Three days after the district court's ruling (and despite the clear signals in the Second Circuit's 2017 decision), the class claimants again appealed. *See* No. 18-153 (2d Cir. Jan. 18, 2018). Assuming the Court of Appeals does not have a dramatic change of heart, the *Jock* decisions could mark the end of "opt-out" class arbitrations in any cases where the arbitration agreement does not include an explicit agreement to class arbitration (again, as required under *Stolt-Neilsen*).

Consistent with the teachings of the *Oxford Health* majority, any defendant presented with a class arbitration demand should insist upon a judicial determination of the class arbitration question at the outset, before the arbitrator has addressed the issue. *See* 569 U.S. at 569 n.2 (explaining availability of class arbitration constitutes a "question of arbitrability" presumptively for the court, rather than the arbitrator, to decide). But even where a defendant must proceed under an incorrect class arbitration ruling, the *Jock* rulings authorize a challenge to the authority of the arbitrator over absent class members who have not agreed to the arbitrator's determination of the class arbitration issue. Ultimately, these decisions could signal the end of "opt-out" class arbitrations in all but the most unusual of cases (*i.e.*, where the arbitration agreement explicitly authorizes class arbitration in accordance with *Stolt-Neilsen*).