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2nd Circ. Courts Dive Into 'Class Arbitration' Questions

By **Gilbert Samberg** (February 15, 2018, 11:28 AM EST)


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In a series of articles over the past several months, we asked whether "class arbitration" — meaning the utilization of the Federal Rule of Civil Procedure 23 class action protocol in an arbitration proceeding — is ultimately viable in U.S. jurisprudence. We suggested that it arguably is not, considering the fundamental nature of arbitration. And we noted that the U.S. Supreme Court had not addressed core issues that will ultimately determine the viability of a class arbitration award, nor had the various courts of appeal grappled with those issues. But the courts in the Second Circuit have begun to do so.

Most recently, a federal district court in New York skewered "class arbitration" by undercutting one of its foundation features. Specifically, in Jock v. Sterling Jewelers (Jock Dist.), it vacated a class determination award, ruling that the arbitrator had exceeded her powers by "certifying" an arbitration class that included nonappearing claimants who had not even opted into the arbitral proceeding in question.[1] That is, the court determined that an arbitrator had no authority to "certify" a class of claimants that included nonappearing members, especially when the arbitration agreement upon which the proceeding relied did not authorize class arbitration. (The court left open the question of whether an arbitrator would have such authority if (a) the arbitration agreement upon which the proceeding was founded did authorize class arbitration; and (b) the nonappearing potential class members had each made identical agreements with the same respondent.)

The court also apparently considered whether, even if the arbitration agreement in question did not authorize class arbitration procedures, the parties to it could authorize the arbitrator to certify a typical broad class by their ad hoc agreement to submit to the arbitrator the question of whether the arbitration agreement permitted "class" procedures. The court concluded that that would not be the basis for certifying a class that included nonappearing potential class members.

Finally, the court implicitly determined that if an arbitrator were authorized — by the arbitration agreement or by ad hoc mutual consent — to determine whether class arbitration procedures were permitted (by any agreement) in the arbitral proceeding, the potential class of claimants could include (1) the original parties to the arbitration and (2) other claimants who opt into the proceeding on the basis of an identical arbitration agreement with the identical respondent. (We submit, however, that there is reason to question the viability of "opt-in class membership" in an arbitration, especially considering that most institutional arbitration rules include provisions regarding consolidation of arbitral proceedings.)

The principal effect of this decision — particularly if it is upheld on appeal, where it is most certainly heading — is to eviscerate "class arbitration" by eliminating the possibility that an arbitration "class" could include non-appearing members. Thus, an arbitrator does not have authority to create a class of arbitral parties in the same way as a judge may under Federal Rule of Civil Procedure 23. Hence, "class arbitration" is arguably an oxymoron.

The district court's ruling concerned a purported gender discrimination class arbitration where all of the potential class members, respectively, had presumably signed identical arbitration agreements with the defendant-employer. The court determined (1) that the arbitrator lacked the authority to decide whether a class arbitration procedure is to be applied insofar as it affected potential class members who had not affirmatively opted into the proceeding over which the arbitrator presided; and (2) that the arbitrator may decide that matter to the extent that the parties to an arbitration all "squarely presented" that question to the arbitrator for decision, in which case the decision would bind the named parties and potential class members who affirmatively opted into the proceeding. (According to the court, that authority to decide did not come from the terms of the arbitration agreement, which said nothing about class arbitration, but

rather from the joint ad hoc submittal of the question by the appearing parties to the arbitrator. Therefore, an absent potential class member — e.g., one who did not affirmatively opt in to the proceeding — could not have agreed to give such authority to the arbitrator.)

The Jock case has had a lengthy history in the Second Circuit, having been commenced on March 18, 2008, and bounced back and forth between the district court and the court of appeals regularly since then. In July 2017, in Jock v. Sterling Jewelers (Jock App.), the Second Circuit first took a swing at one of the core "class arbitration" issues, when it upset the district court's confirmation of an arbitrator's "class certification award," which had recognized a class of about 70,000 gender discrimination claimants.[2] The question on that appeal had been "whether the arbitrator had the authority to certify a class that included absent class members, i.e., employees other than (1) the named plaintiffs and (2) those who had opted into the class." The court of appeals pointed out that it had not previously addressed the question of "whether the arbitrator had the power to bind absent class members to class arbitration given that they ... never consented to the arbitrator determining whether class arbitration was permissible under the agreement in the first place,"[3] and it cited the U.S. Supreme Court's prior decisions in Oxford Health and Stolt-Nielsen.

In a summary order, the court of appeals vacated the district court's confirmation order and remanded "for further consideration of whether the arbitrator exceeded her authority in certifying a class that contained absent class members who had not opted in."[4] Specifically, the Second Circuit instructed that the pertinent issue on remand was:

> "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."[5]

On remand, the district court determined that the arbitrator may not bind nonparties to class action procedures, at least where "the Court has determined that the arbitration agreement does not ... permit class action procedures."[6] The court ultimately held that the arbitrator had exceeded her powers (see Federal Arbitration Act § 10(a)(4)), and thereupon granted defendant Sterling's motion to vacate the arbitrator's class determination award "insofar as that Award certifies a class that includes individuals who had not formally opted into the arbitral proceedings."[7]

The court recalled that it had previously ruled that the arbitration agreement in question — which presumably had been agreed with Sterling separately by each of its employees, including all of the potential class members — did not itself authorize class arbitration.[8] Thus, the arbitration agreement could not have been the source of the arbitrator's authority to certify a class for arbitration. And therefore, "those individuals who did not affirmatively opt into the class proceedings [in Jock] did not agree to permit class procedures by virtue of having signed [their own identical form of the arbitration agreement in question]."[9]

The remaining question, then, was whether the arbitrator had authority from another source to certify a 70,000-person class; and in particular, did such authority emanate simply from the ad hoc submittal by the name plaintiffs and the defendant to the arbitrator of the question of whether the agreement in question allowed for class procedures.[10] U.S. District Judge Jed Rakoff held that it did not. As anticipated, the court relied in part on U.S. Supreme Court Justice Samuel Alito's concurring opinion (joined by Justice Clarence Thomas) in Oxford Health. ("[I]t 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 class-wide basis which arbitration procedures are to be used." Oxford Health, 133 S.Ct. at 2072.)

In Jock Dist., the plaintiffs argued that the potential class members — those named and those absent — all executed the same arbitration agreement, and that the arbitrator had interpreted that agreement to permit class arbitration "as long as the due process requirements of [FRCP] 23, tracked in AAA Supplementary Rules 4, are satisfied."[11] But the distinction to be drawn was clear to the court, which opined that "unlike the named plaintiffs and defendants, the 'absent members of the plaintiff class [who have not chosen to opt into the class] have not submitted themselves' to the Arbitrator's authority 'in any way'."[12]

Second, the court pointed out, it had earlier decided that the agreements in question did not authorize class arbitration, and so it was irrelevant that absent class members had signed arbitration agreements materially identical to those signed by the name plaintiffs. In any case, an "arbitrator's erroneous interpretation of contracts that did not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination."[13] Ultimately, the court found it "hard to see how courts could bind individuals who do not opt out, but who have not otherwise opted in, [to the arbitrator's] decisions,"[14] especially when the arbitrator was wrong as a matter of law about whether the arbitration agreements in question even permitted classes.

In sum, the district court decided in the circumstances that the arbitrator "had no authority to decide whether the [arbitration] agreement permitted class action procedures for anyone other than (1) the named parties who chose to present her with that question and (2) those other individuals who chose to opt into the proceedings before her."[15] (We submit that one could question the second part of that decision. If arbitration is a creature of contract, it requires bilateral consent. In that case, the defendant (Sterling) arguably should be able to argue that it had not agreed to delegate to an arbitrator any issue raised by a person (a) who was not a party to the bilateral agreement that formed the basis for the active arbitration in question; and (b) whose separate arbitral claim had not been consolidated with the proceeding that was before the arbitrator at the time.)

The court arguably relied on the foundation principle that arbitration is a matter of consent, not coercion. Therefore, private citizen-arbitrators do not have the power "to bind individuals and businesses except insofar as the relevant individuals and businesses have bound themselves."[16] Thus, for example, even if a named claimant and the respondent agreed to the arbitrator's authority to determine if their arbitration agreement authorized class arbitration procedures, the arbitrator's determination in that regard would not bind others, including, nonappearing, nonconsenting potential class members.

In any case, much remains to be decided definitively in this realm of the law. As we have noted previously, some U.S. Supreme Court justices have articulated reservations concerning the inherent nature of "class arbitration." And they have, largely in dictum, identified certain difficulties in trying to graft the jurisdictionally aggressive and procedurally demanding judicial Rule 23 class action mechanism onto the essentially consensual, flexible and presumably streamlined private dispute resolution process of arbitration. But the Supreme Court has yet to address questions that ultimately will determine the viability and enforceability, or the res judicata effects, of a class arbitration award vis-à-vis (a) a noncontracting nonparticipant purported "arbitral class" member; (b) a contracting (albeit with a distinct arbitration agreement) nonparticipant purported "arbitral class" member; (c) a contracting purported "arbitral class" member who unilaterally opts into an arbitration among other parties; or (d) an arbitration respondent who made no agreement, bilateral or otherwise, to arbitrate with a purported "arbitral class."

In the meantime, courts in the Second Circuit are taking the lead in addressing such issues.

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[1] Jock v. Sterling Jewelers,2018 U.S. Dist. LEXIS 6752 (S.D.N.Y., Jan. 16, 2018) (Rakoff, J.)

[2] Jock v. Sterling Jewelers,703 Fed. Appx. 15, 2017 U.S. App. LEXIS 13243 (2d Cir., July 24, 2017)

[3] Jock App.at *2-*3

[4] Id.at *5.

[5] Jock Dist.at *6,citingJock App., at *4.

[6] Jock Dist.at *6-*7.

[7] Id.at *10.

[8] See Id.at *7, *7 n.l.

[9] Id.

[10] Id. at *7-*8.

[11] Id.at *8.

[12] Id., citingOxford Health Plans v. Sutter, 569 U.S. 564, 574, 133 S.Ct. 2064 (2013) (Alito, J., concurring).

[13] Id. at *9.

[14] Id.

[15] Id.

[16] Id.
