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Class arbitration – can it even work?

by Jay Bogan

Courts continue to devote a lot of attention on the area of class arbitration. The U.S. Supreme Court has a case on its docket, the Eleventh Circuit just decided an issue of first impression, and another important case is teed up before the Second Circuit.

But the most important question underlying all of this jurisprudential activity remains: Can class arbitration even work?

Think about your typical consumer fraud class action. The class representative files the class action in a trial court (such as an Article III federal district court), where it will be governed by rules of procedure constituting, essentially, legislative enactments (such as Federal Rule of Civil Procedure 23). Most of these cases seek damages (such as under Federal Rule 23(b)(3)), with the result that all class members will receive notice and an opportunity to opt out if the court grants certification or approves a class settlement. In other words, your typical class action (as opposed to a collective action under the federal Fair Labor Standards Act) will not be structured as an ***opt-in*** class. If the class member receives notice and fails to opt out, the class member ultimately will be bound by the judgment entered by the trial court (whether favorable or unfavorable to the class).

How do you bind absent class members through an arbitration process, where the arbitrator's power derives solely from the parties' private contractual framework, and without the recognized authority of a court acting pursuant to procedural rules that have the force of law?

As we reported in a prior post (*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?*), Justice Alito raised the issue of whether a class arbitration can effectively bind absent class members in his concurring opinion in *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013) (Alito, J., concurring), and the issue has been ruled on by Southern District of New York in a case now pending on appeal before the Second Circuit.

In that New York case, 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 agreed to submit the class issue to the arbitrator. *Jock v. Sterling Jewelers Inc.*, 284 F. Supp. 3d 566 (S.D.N.Y. 2018), *appeal filed*, No. 18-153 (2d Cir. Jan. 18, 2018). According to the district court, only the named parties to the arbitration proceeding and specific class members who agreed to ***opt in*** could be bound by the arbitrator's decision.

As we reported in another post (*U.S. Supreme Court puts class action doubleheader on the calendar – cy*

pres awards and class arbitration), the U.S. Supreme Court soon will hear a class arbitration case out of the Ninth Circuit. In that case, a 2-1 Ninth Circuit panel affirmed the district court's ruling that class arbitration claims could proceed, because ambiguous language in the contract regarding class arbitration had to be construed against the drafter of the contract under the state law contractual interpretation doctrine of *contra proferentem*. *See Varela v. Lamps Plus, Inc.*, 701 F. App'x 670, 672-73 (9th Cir. 2017), *cert. granted*, No. 17-988 (U.S. Apr. 30, 2018). Whether the Supreme Court will address the deeper question of whether opt-out class arbitration can ever work – or address only whether the Ninth Circuit's ruling can be squared with *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* , 559 U.S. 662 (2010) – remains to be seen.

In *JPay, Inc. v. Kobel*, -- F.3d --, No. 17-13611, 2018 WL 4472207 (11th Cir. Sep. 19, 2018), a 2-1 Eleventh Circuit panel decided, as matter of first impression, that the availability of class arbitration constitutes a substantive, gateway question of arbitrability that is presumptively for a court (rather than an arbitrator) to decide. But the Court of Appeals went on to hold that the parties had "clearly and unmistakably" assigned that question to a private arbitrator in their arbitration agreement (*i.e.*, the parties' contractual language overcame the presumption). The arbitration agreement in *JPay* said nothing specifically about class arbitration, prompting a strong dissent to the majority's interpretation of the contract. And the dissent noted the Supreme Court soon would be addressing the contractual interpretation issue in *Lamps Plus*. *See* 2018 WL 4472207, at *17 n.2 (Graham, J., dissenting).

As the dissent in *JPay* notes, a Supreme Court ruling in *Lamps Plus* that the Federal Arbitration Act displaces contractual interpretation rules such as *contra proferentem* likely would require vacatur of the *JPay* majority's ruling. But the Supreme Court (or one or more concurring justices) may take the occasion to address the deeper question of whether a class arbitration can ever work. If an arbitrator could never bind absent class members to an "opt out" class arbitration award, questions about whether an ambiguous arbitration agreement assigns the class arbitration issue to the arbitrator in the first instance would become purely academic. And even if *Lamps Plus* does not provide the vehicle to address this question of arbitrator power, the Second Circuit's forthcoming decision in *Jock v. Sterling Jewelers* may constitute the first federal appellate court decision to address the issue directly.