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SCOTUS declines review of Second Circuit ruling endorsing class arbitration

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Takeaway: The concept of class arbitration has endured stiff headwinds. In *Lamps Plus, Inc. v. Varella*, 139 S. Ct. 1407 (2019), the Supreme Court ruled that a party cannot be required to participate in a class arbitration unless the parties' arbitration agreement *explicitly* authorizes class arbitration. Because agreements expressly authorizing class arbitration generally do not exist, we thought the *Lamps Plus* ruling – for the most part – signaled the end of class arbitration. *See What the Lamps Plus court did not say about class arbitration* (May 13, 2019). But in *Jock v. Sterling Jewelers Inc*., 942 F.3d 617 (2d Cir. 2019), *cert. denied*, No. 19-1382, __ S. Ct. __, 2020 WL 5882321 (U.S. Oct. 5, 2020), the Second Circuit reminded us that class arbitration works just fine, so long as the entire putative class executed identical arbitration agreements that incorporated the rules of the American Arbitration Association (AAA) and do not include an express class action waiver.

In *Jock*, Plaintiff Laryssa Jock, a retail sales employee of Sterling Jewelers, sued Sterling Jewelers over 10 years ago (in 2008), claiming that she and other female employees were paid less than their male counterparts, in violation of Title VII of the Civil Rights Act of 1964. All Sterling employees agreed to compulsory arbitration through Sterling's "RESOLVE Program" agreement, which provided (a) the arbitrator "shall have the power to award any types of legal or equitable relief that would be available in a court of competent jurisdiction"; (b) "[q]uestions of arbitrability" and "procedural questions" "shall be decided by the arbitrator"; and (c) arbitration would be conducted "in accordance with the National Rules for the Resolution of Employment Disputes of the American Arbitration Association." Ultimately, the arbitrator certified a class of roughly 44,000 women with respect to the plaintiffs' Title VII disparate impact claims for declaratory and injunctive relief. This class of 44,000 women consisted of Ms. Jock and other individually-named plaintiffs, other claimants who had specifically opted *in* to the class arbitration proceeding, and unnamed claimants who had not opted in.

The Southern District of New York vacated the arbitrator's class certification ruling, holding 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. 284 F. Supp. 3d 566 (S.D.N.Y. 2018). But the Second Circuit reversed, ruling the entire class had agreed that the arbitrator could decide the class issue because each employee had agreed to the same "RESOLVE Program" agreement. 942 F.3d at 623 .

The appellate court observed that the incorporation of the AAA rules into the RESOLVE Program agreement gave the arbitrator the power under those rules to decide issues of arbitrability. *Id*. at 623-24. Because the arbitrator had the power to decide the class issue (an issue of arbitrability), the district court was not free to second-guess that decision, even though it disagreed with the arbitrator's reasoning. *Id*. at 625-25.

This was so even though the Supreme Court's decision in *Lamps Plus* held that a party cannot be forced to participate in a class arbitration unless the arbitration agreement *explicitly* authorizes class arbitration. *Id*. at 626. In the Second Circuit's view, the *Lamps Plus* decision could be distinguished because the parties in that case "agreed that a court, not an arbitrator, should resolve the question about class arbitration." *Id*. (citing *Lamps Plus, Inc. v. Varela*, 138 S. Ct. 1407, 1417 n.4 (2019)). The "RESOLVE Program" agreement, in contrast, "clearly and unmistakably" delegated the class issue to the arbitrator. *Id*. at 624. Thus, the arbitrator's decision to certify the class had to be upheld, even if Sterling Jewelers could show, by reference to the *Lamps Plus* decision and other authorities, that the arbitrator committed an error of law in certifying a class.

Sterling Jewelers then applied for certiorari, asking the Supreme Court to consider whether an arbitrator can certify a class and bind all parties – including absent class members – without finding that all members of the putative class consented to the process. On October 5, the Supreme Court denied Sterling Jewelers' application, providing employers with yet another reminder about the danger of blindly incorporating arbitration rules into an arbitration agreement. *See* 2020 WL 5882321.

While it might seem convenient to incorporate the AAA rules, those rules not only authorize class arbitration, but also assign virtually all decision-making authority to the arbitrator. Any employer that puts in place an arbitration program and which does not intend to expose itself to class arbitration procedure must take the necessary (and easy) step of setting out a class action waiver in the arbitration agreement. An express class action waiver should displace the "default" AAA rules and limit the authority of the arbitrator to authorize class arbitration. An entity adopting the AAA rules without expressly prohibiting class arbitration runs the risk of an outcome similar to *Jock*.