



December 4, 2019

ADR Case Update 2019 - 24

Federal Circuit Courts

- **ABSENT CLASS MEMBERS CONSENTED TO ARBITRATOR'S CONSTRUCTION OF CLASS ARBITRABILITY**

Jock et al., v. Sterling Jewelers Inc.

2019 WL 6108551

United States Court of Appeals, Second Circuit

November 18, 2019

Laryssa Jock and co-Plaintiffs sued Sterling Jewelers, alleging that they were paid less than their male counterparts in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. As a condition of employment, all Sterling employees were required to sign the RESOLVE Program Agreement, mandating that they participate in arbitration in accordance with AAA Rules. The case proceeded to arbitration and in *Jock I*, the arbitrator issued an award in favor of the then-named plaintiffs, construing the RESOLVE Agreement to permit class-wide arbitration. The lower court vacated, the employees appealed, and this Court reversed. The arbitrator certified a class comprised of named plaintiffs as well as absent class members. The lower court denied Sterling's motion to vacate based on the holding in *Jock I*. This Court reversed and remanded, clarifying that *Jock I* did not address 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. The lower court vacated the arbitrator's ruling and the employees appealed.

The United States Court of Appeals for the Second Circuit reversed and remanded. Although absent class members had not affirmatively opted in to this arbitration proceeding, by signing the RESOLVE Agreement, they consented to the arbitrator's authority to decide the threshold question of whether the agreement permitted class arbitration. The RESOLVE Agreement's incorporation of the AAA Rules evinced agreement to have the arbitrator decide the question of class arbitrability. Because the absent class members bargained for the arbitrator's construction of their agreement with respect to class arbitrability, the arbitrator acted within her authority in purporting to bind the absent class members to class procedures. The Court remanded the issue of whether the arbitrator exceeded her authority in certifying an opt-out class.

Texas

- **NO CONTRACTUAL BASIS FOR ARBITRATION OF CLASS CLAIMS**

Robinson v. Home Owners Management Enterprises
2019 WL 6223128
Supreme Court of Texas
November 22, 2019

Nathan and Misti Robinson purchased a home that was enrolled in a limited warranty program operated by Home Owners Management Enterprises (HOME). The Robinsons sued HOME and other defendants, alleging that construction-related defects were not promptly or properly resolved. The court compelled arbitration in accordance with the terms of the limited warranty and its addendum, which provided for mandatory binding arbitration governed by FAA procedures. One month before their arbitration, the Robinsons filed an amended statement of claims seeking to add class-action claims against HOME to the arbitration proceeding. The new claims alleged that HOME routinely demanded overbroad releases as a precondition to fulfilling its warranty obligations. The arbitrator bifurcated the class claims from the construction defect claims and proceeded with the individual arbitration, ultimately awarding the Robinsons substantial damages. The Robinsons proceeded to demand arbitration of the class claims. The court granted HOME's motion to dismiss and the court of appeals affirmed. The Robinsons appealed.

The Supreme Court of Texas affirmed. The Court held that arbitrability of class claims is a gateway issue for the court unless the arbitration agreement clearly and unmistakably expresses a contrary intent. Silence or ambiguity on who should decide arbitrability is not sufficient. In this case, neither the limited warranty nor the addendum mentioned delegation of the arbitrability questions. Given the differences between bilateral and class arbitration, a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. The arbitration provisions in the limited warranty and addendum did not reference class claims at all, providing no affirmative basis for concluding that the parties agreed to classwide arbitration. The Robinsons' argument that HOME consented, by its conduct, to the arbitrator's authority to determine whether class claims were arbitrable was unavailing. None of the conduct cited, such as moving to compel arbitration of individual claims, demonstrated HOME's intent to arbitrate class claims.

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

Contact Information

David Brandon
Program Manager
JAMS Institute
415-774-2648

DBrandon@jamsadr.com