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Second Circuit Affirms Expansion of Gender Bias Class Action against Sterling Jewelers

Proskauer on Class and Collective Actions on **November 25, 2019**

On November 18, 2019, the United States Court of Appeals for the Second Circuit revived a potentially sweeping class action against Sterling Jewelers, Inc. ("Sterling"), holding that potentially tens of thousands of female employees could take part in an arbitration class involving claims of sex discrimination. The Second Circuit's holding is the latest in the case *Jock v. Sterling Jewelers, Inc.*, an ongoing saga that has bounced between arbitration, the Southern District of New York, and the Second Circuit.

In 2008, a group of female Sterling employees brought claims alleging discrimination against female employees in pay and promotion opportunities. Sterling successfully moved to compel arbitration, and in 2015, the arbitrator certified a class of approximately 44,000 employees, holding that the class would include all female employees of Sterling, and not just those who had asserted claims. Sterling moved to vacate this determination, and in January 2018, District Court Judge Jed S. Rakoff held that the arbitrator exceed her powers by including in the class employees who had not affirmatively stated they wished to take part in it.

The Plaintiff class appealed, and on November 18, the Second Circuit reversed and remanded, holding that the arbitrator had the discretion to rule as she had. Writing for the unanimous Panel, Circuit Judge Peter Hall stated that because all Sterling employees had signed arbitration agreements with the company (referred to as the "RESOLVE" Agreement), all employees had agreed to be bound by the arbitrator's views of class membership. The Court held "that the arbitrator's determination that the [arbitration] agreement permits class arbitration binds the absent class members because, by signing the RESOLVE Agreement, they, no less than the parties, bargained for the arbitrator's construction of that agreement with respect to class arbitrability."

The Second Circuit followed the common doctrine requiring that arbitration decisions be reviewed under an extremely deferential standard. As long as an arbitrator acts within the scope of her contractually delegated authority, her decision cannot be challenged, even if a court disagrees with it. In other words, as the Second Circuit held, the District Court can only "decide that the arbitrator had the authority to reach such issues."

In the case at hand, all Sterling employees, including absent class members, had authorized the arbitrator, by the terms of the RESOLVE Agreement, to determine whether claims could proceed on a class-wide basis, and if so, who would be included in the class. The Agreement also stated that the arbitrator would determine all questions of arbitrability and procedural questions. This determination was therefore a matter of contractual interpretation, and within the arbitrator's discretion.

The case will now return to the District Court for a determination of whether the arbitrator acted within the scope of authority in certifying an opt-out rather than mandatory class, an issue that was not before the Second Circuit. As this case has proceeded, the potential class of Sterling employees has grown as high as 70,000. Accordingly, this recent decision will likely have strong implications for the parties' next steps in this longstanding litigation.

Takeaway: Employers opting to permit class arbitration, and to defer questions of arbitrability to the arbitrator, should consider the consequences of that all-in approach.

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