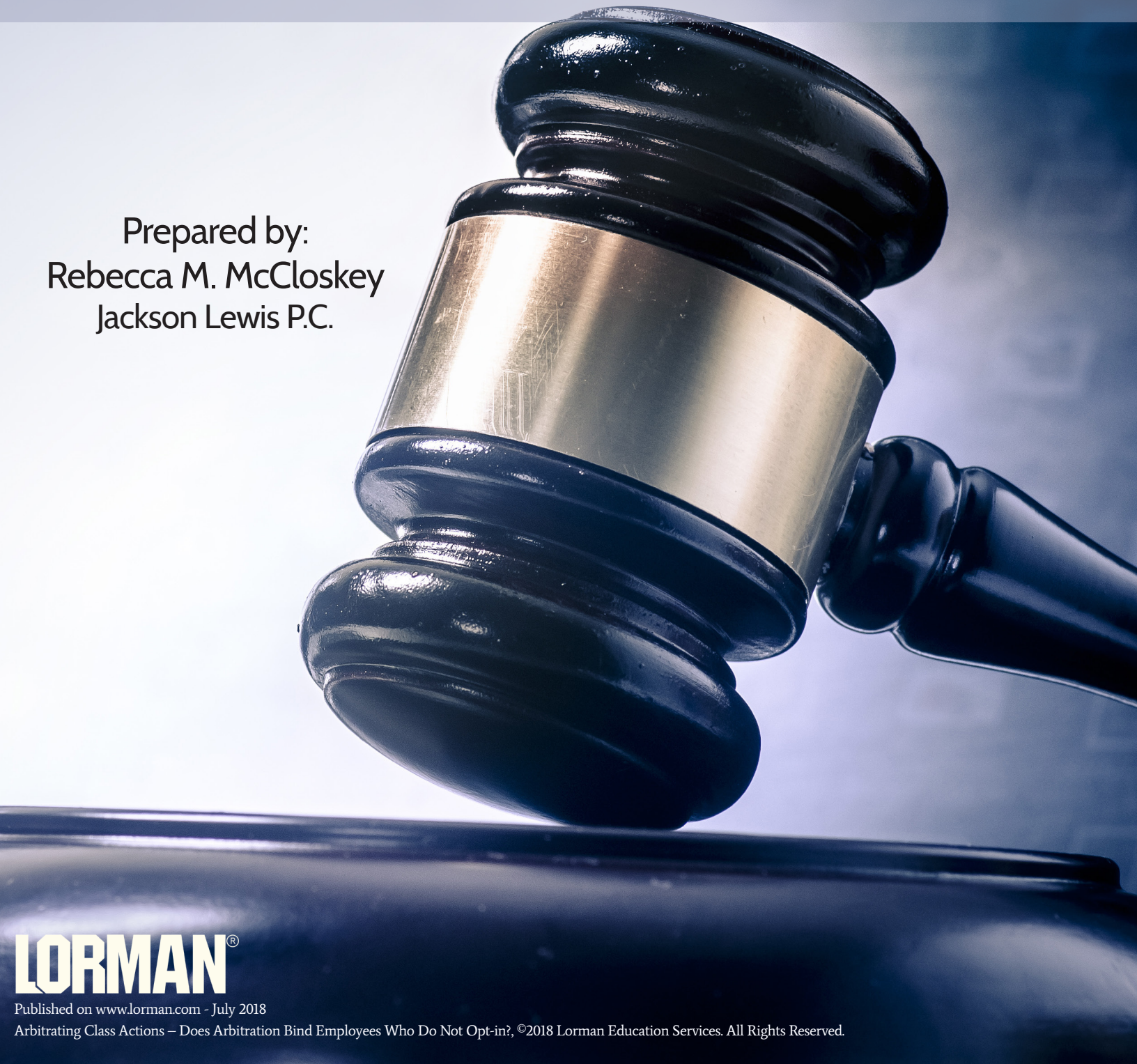
Arbitrating Class Actions – *Does Arbitration Bind Employees Who Do Not Opt-in?*



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Arbitrating Class Actions – Does Arbitration Bind Employees Who Do Not Opt-in?

Written by Rebecca M. McCloskey on May 17, 2018

The Second Circuit Court of Appeals heard arguments last week to determine whether an arbitrator's award in a Title VII class action applies only to the 254 employees who are named plaintiffs or otherwise opted in to the class, *or* whether it extends to all 70,000 similarly situated employees. (Jock et al. v. Sterling Jewelers, Inc., Case No. 18-153 (2d Cir.)). The Second Circuit's decision could have a huge impact on employers whose arbitration agreements are silent on arbitrability of class actions claims (as in this case), because it raises the stakes in a forum where arbitrators are not bound to follow the law and their decisions are not appealable except in extremely narrow circumstances.

A major difference between class actions proceeding in federal court and class actions proceeding in arbitration is that federal courts derive jurisdiction over litigants pursuant to Article III of the U.S. Constitution, while arbitrators' jurisdiction is derived exclusively from contractual agreements. Thus, while similarly situated individuals can be included in a class action unless they opt out under Rule 23 of the Federal Rules of Civil Procedure, arbitrators have no jurisdiction in the first instance over individuals who have not agreed to arbitrate their claims.

In a 2010 decision in this case, the Second Circuit held that an agreement to arbitrate class claims may either be expressly stated in an arbitration agreement, or it may be implied by the parties' consent to have an arbitrator decide the issue of class arbitrability. Appearing as a named plaintiff or opt-in plaintiff in a class arbitration constitutes consent.

Subsequently, in a 2017 decision in this case, the Second Circuit clarified that putative class members who did not opt-in to class arbitration may not have agreed to arbitrate their class claims if the arbitration agreement is silent on class actions, and remanded the issue to Judge Rakoff in the U.S. District Court for the Southern District of New York.

In 2018, Judge Rakoff held that, absent language in the arbitration agreement compelling class arbitration, similarly situated employees who had not opted in to the class arbitration were not part of the class before the arbitrator because their consent to arbitrate could not be implied. Judge Rakoff's decision is currently being challenged on appeal to the Second Circuit.

In the Jock case, the plaintiffs are the ones who pursued their class claims in arbitration in the first instance, which constituted their consent to arbitrate class claims. No matter the outcome in the Jock case, there is still an argument to avoid arbitration of class actions in the typical case where a plaintiff files suit in court and resists arbitration. If an arbitration agreement is silent on class action arbitrability, a plaintiff may be limited to pursuing an individual claim in arbitration because they may not have consented to having the issue of class action arbitrability decided

by an arbitrator. We will continue to keep you abreast of developments in the arbitration of class actions. Should you have any questions regarding this or other related cases, please reach out to the Jackson Lewis attorney with whom you regularly work with.