CLIENT ALERT

Supreme Court OK's Arbitrator's Decision Ordering Class Arbitration

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The Supreme Court on Monday issued a rare unanimous opinion. In *Oxford Health Plans LLC v. Sutter*, the Court held that an arbitrator did not exceed his authority in permitting class arbitration of a contractual reimbursement dispute between a physician and a health insurance plan, notwithstanding the fact that the agreement did not explicitly permit class arbitration. *Oxford Health* has been closely watched by class action litigators for indications of how far the Court is likely to go in permitting companies to bar class arbitration in agreements calling for mandatory arbitration. The Court declined to decide the important question of whether class arbitration is a "gateway" question of arbitrability that is presumptively reserved to a court (instead of an arbitrator) for determination. And the Court's decision is a disappointment for observers who were hoping for an enthusiastic extension of the Court's decision in *Stolt Nielsen, S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 622 (2010), to overturn arbitrators' decisions permitting class proceedings under general mandatory arbitration clauses.

Factual Background

Oxford Health began as a putative class action lawsuit filed in New Jersey state court in 2002 by a pediatrician alleging violations of payment terms in his medical services contract with the health insurance company. The contract had a general arbitration clause requiring that all contractual disputes "shall be submitted to final and binding arbitration" pursuant to rules promulgated by the American Arbitration Association. Oxford relied on that provision in moving to compel arbitration. The court granted the motion and the parties proceeded to arbitration, where they agreed that the arbitrator should decide whether the arbitration provision authorized class arbitration. The arbitrator decided that it did. Oxford filed an action in federal court to vacate that decision, arguing that the arbitrator exceeded his powers within the meaning of Section 10(a)(4) of the Federal Arbitration Act (FAA), 9 U.S.C. § 10(a)(4) (Section 10). The district court denied the motion, and the Third Circuit affirmed. 227 Fed. Appx. 135 (3d Cir. 2007). During the subsequent arbitration proceeding, the Supreme Court decided *Stolt-Nielsen*,which vacated an arbitrator's decision approving class proceedings in case in which the parties had stipulated that they had never reached an agreement on class arbitration. The Court concluded that in the absence of any such agreement, the arbitrators "simply imposed . . . [their] own view of sound policy." *Stolt-Nielsen,* 559 U.S.at 672.

Oxford sought reconsideration of the arbitrator's decision in light of *Stolt-Nielsen.* The arbitrator denied the request, concluding that *Stolt-Nielsen* did not change his contractual analysis, because, unlike in that case, the parties' contract implicitly authorized class arbitration. Oxford returned to federal court and moved to vacate the arbitrator's second decision. As before, the district court denied the motion and the Third Circuit affirmed. 675 F.3d 215, 220 (3d Cir. 2012).

The Court's Decision

Justice Kagan's opinion began by stressing that "[c]lass arbitration is a matter of consent." The Court then observed that Section 10 permits a court to vacate an arbitrator's award only in "very unusual circumstances," and that a party "bears a heavy burden" in arguing that the arbitrator exceeded his powers, concluding: "It is not enough . . . to show that the [arbitrator] committed an

error – or even serious error." Because the parties "bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits."

The Court cited several prior decisions (familiar to labor and employment lawyers) holding that courts are required to defer to an arbitrator when he or she purports to interpret the parties' agreement, even if a court might be inclined to conclude that the contractual interpretation was erroneous. Justice Kagan accorded similar deference to the arbitrator's award, concluding that the arbitrator's two decisions on the issue of class arbitration were "through and through, interpretations of the parties' agreement."

The Court next rejected Oxford's argument that *Stolt-Nielsen* required the Court to vacate the arbitrator's rulings. Relying on the unusual stipulation reached by the parties in that case, the Court explained that the arbitration panel in *Stolt-Nielsen* had "abandoned their interpretative role" in simply deciding, as a policy matter, that class arbitration proceedings were appropriate there. Justice Kagan saw *Oxford Health* as a "stark" contrast, and concluded that Section 10 authorizes a court to vacate an arbitrator's decision "only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly."

Justice Alito, joined by Justice Thomas, concurred, agreeing with the majority's initial observation that class arbitration is a matter of consent. Noting that there is no evidence that absent class members had consented to proceeding through a class arbitration, Justice Alito observed that "it is far from clear that [absent class members] will be bound by the arbitrator's ultimate resolution of this dispute." He noted that an opt-out notice procedure would not cure what he called a "fundamental flaw in the class arbitration proceeding in this case." The concurring opinion worried that, given this procedural posture, absent class members could be able to launch collateral attacks on the award in what can be called a "heads I win/tails you lose" litigation strategy.

Justice Alito also opined that he disagreed with the arbitrator's construction of the agreement, explaining: "[i]f we were reviewing the arbitrator's interpretation of the contract *de novo,* we would have little trouble concluding that he improperly inferred 'an implicit agreement to authorize class-action arbitration . . . from the facts of the parties' agreement to arbitrate." Nonetheless, Justice Alito concluded that Oxford's express agreement to submit the arbitrability question to the arbitrator precluded judicial review in this case.

Some Preliminary Observations

The Court's decision was plainly influenced by the parties' agreement to let the arbitrator decide the question of whether class proceedings were permissible. *Oxford Health* is thus best understood as a reaffirmation of the principle that parties are stuck with an arbitrator's interpretation of their agreement. Citing the Court's landmark decisions in the *Steelworkers Trilogy,* the Court concluded: "The arbitrator's construction holds however good, bad, or ugly."

Language in both the majority opinion and the concurrence suggested a widely-held view among the Justices that the arbitrator was wrong in interpreting the arbitration provision. Yet there was little sympathy on the Court for the argument that the arbitrator's decision *had* to be vacated in light of *Stolt Nielsen*. The Court's longstanding belief in judicial deferral to arbitration decisions plainly trumped the concern expressed in other recent cases about an overly-extensive use of class arbitration in the absence of an express agreement.

The Court noted that additional considerations would have been triggered had the case arisen in a different procedural posture: "We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions - which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy" - are presumptively for courts to decide." Case law in many different substantive legal issues confirms that this is often a complex question. Perhaps reflecting philosophical differences among the Justices, the Court's observation on this point, in footnote 2, sheds little light on how the Court is inclined to resolve this issue, if and when it is squarely presented.

The Court declined the invitation made by Oxford and some of its supporting *amici* to weigh in more broadly on the appropriate standard to be used in actions brought under Section 10 to vacate an arbitrator's award. Advocates had urged the Court to embrace some version of the "manifest disregard for the law" test. The Court may well have declined that invitation because of the difficulty in articulating a clear set of factors for that test, particularly in light of the struggle courts have had in interpreting the "public policy" exception in labor and employment law. *See, e.g., Paperworkers v. Misco, Inc.,* 484 U.S. 29 (1987).

Implications for Mandatory Arbitration of Employment Disputes

Oxford Health is a setback for employers who hoped the Court would extend *Stolt Nielsen* with a categorical ruling that a party's agreement to proceed in class arbitration cannot be implied from a general mandatory arbitration clause. Many employers will want to review their arbitration agreements in light of the Court's opinion. Companies now have more to think about as they consider either initial implementation of mandatory arbitration or revisions to existing policies. Examples include the question of obtaining valid consent from affected employees and how to design a mandatory arbitration procedure that is likely to withstand legal challenges based on substantive and procedural unconscionability theories.

There is little doubt that *Oxford Health* will increase the number of cases addressing the arbitrability question suggested in footnote 2 of the Court's opinion. Until that issue is resolved, some employers may wish to reconsider whether it is advisable to move to compel arbitration in employment law class actions, particularly in cases where the arbitration agreement at issue does not include a class action waiver. After all, the major takeaway from *Oxford Health* is that if you give that (or other important issues regarded as procedural and/or typically delegated to the arbitrator) issue to the arbitrator, you have very little chance at meaningful review. That is increasingly important, in light of the Supreme Court's decision last month in *Comcast v. Behrend,* in which the Court reemphasized the need for courts to conduct a rigorous review of whether class action treatment is appropriate in cases brought under Rule 23.

Employers will want to continue to monitor developments in this area. The Supreme Court is likely to decide *American Express v. Italian Colors* before the end of this year's Court Term. That case, and others involving application of mandatory arbitration in various employment law consequences (including ongoing litigation over whether, in light of the National Labor Relations Board's decision in *D.R. Horton,* class action waivers are permissible under the National Labor Relations Act, and cases involving the question of whether the "right" to a class action is a substantive right under the Fair Labor Standards Act and Title VII), will likely give employers considerably more guidance on these issues.

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