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Narrow Supreme Court Ruling Upholds Arbitrator's Decision that Parties' Agreement Permits Class Arbitration

By Rob Friedman

In *Oxford Health Plans LLC v. Sutter*, the United States Supreme Court was asked to determine “whether an arbitrator exceeds his powers under the Federal Arbitration Act by determining that parties affirmatively ‘agreed to authorize class arbitration’ . . . based solely on their use of broad contractual language precluding litigation and requiring arbitration of any dispute arising under their contract.” The Supreme Court, in a unanimous decision, left undisturbed the arbitrator’s ruling permitting class proceedings in arbitration based on the very narrow judicial review allowed under Section 10(a)(4) of the Federal Arbitration Act (“FAA”).

Respondent John Sutter, a physician, entered into a contract with Oxford Health that required him to provide medical care to Oxford insured patients at an agreed upon rate. Sutter subsequently sued Oxford in a class action lawsuit alleging that Oxford had not made proper payments under the contract. Sutter’s contract with Oxford contained an arbitration clause,¹ and Oxford moved in New Jersey state court to compel arbitration of Sutter’s claims. The arbitration clause did not address class actions—that is, it did not expressly authorize or prohibit class actions. To be clear, the arbitration clause did not contain a class action waiver, which has become more common in arbitration agreements following the Supreme Court’s decision validating such waivers in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct 1740 (2010). The state court granted Oxford’s motion. Significantly, the parties to the dispute agreed that the arbitrator would decide if the arbitration provision allowed for class proceedings.

Based on the broad language of the arbitration provision requiring that “all disputes” be resolved in arbitration, the arbitrator reasoned that the intent of the arbitration provision was to vest in the arbitration process everything that could have been brought in court—including class actions. Thus, the arbitrator ruled that Sutter could maintain his class action lawsuit in arbitration.

¹ The arbitration clause stated:

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

Oxford moved to vacate the opinion in federal district court under Section 10(a)(4) of the FAA, which authorizes a court to vacate an arbitrator's decision when an arbitrator exceeds his or her power under the arbitration contract. The district court denied Oxford's motion. Oxford subsequently appealed the decision to the U.S. Court of Appeals for the Third Circuit, which affirmed the district court's opinion upholding the arbitrator's decision.

During the pendency of the arbitration, the Supreme Court decided *Stolt-Nielsen S.A. v. Animal Feeds Intl.*, 130 S.Ct. 1758 (2010), holding that a panel of arbitrators exceeded its authority under the FAA by requiring class arbitration when the parties had not authorized class arbitration. The *Stolt-Nielsen* decision noted that the arbitration panel imposed its own policy instead of interpreting the arbitration contract. Significantly, in *Stolt-Nielsen* the parties stipulated that the arbitration provision was "silent" as to class actions. Thus, the Supreme Court did not decide "what contractual basis may support a finding that the parties agreed to authorize class-action arbitration." *Id.* at 1766. Significantly as well, the parties in *Stolt-Nielsen* stipulated that they had not reached agreement on the class arbitration issue, thus precluding any interpretation of the agreement that it affirmatively permitted class arbitration. *Id.* at 1776, n. 10.

Following the Supreme Court's decision in *Stolt-Nielsen*, Oxford asked the arbitrator to reconsider. The arbitrator held that *Stolt-Nielsen* was inapplicable because unlike the arbitration provision in that case—which the parties stipulated to be "silent" regarding class actions—the arbitration provision in *Oxford* authorized class arbitration based on the arbitrator's interpretation of the agreement. Oxford's efforts to vacate the arbitrator's new decision were unsuccessful before the district court and Third Circuit, and this appeal ensued.

The Supreme Court affirmed the opinion of the Third Circuit and held that the arbitrator's decision under Section 10(a)(4) of the FAA could not be disturbed unless the arbitrator "strayed from his delegated task of interpreting a contract" and imposed his own policy choice. Here, the Supreme Court determined that its only task was to determine whether the arbitrator "even arguably interpreted the parties' contract, not whether he got its meaning right or wrong." And, the Supreme Court held that the arbitrator satisfied his obligation by considering the language of the arbitration contract.

Writing for the unanimous Court, Justice Kagan stated: "All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes under §10(a)(4)." In its ruling, the Court was careful to note that the opinion should not be taken to reflect any agreement with the arbitrator's contract interpretation or any disagreement with Oxford's reading of the contract. However, the Court based its ruling on the language of Section 10 of the FAA and well-settled interpretation of the FAA that permits only very narrow review of an arbitrator's award and allows courts to vacate arbitral awards only in "very unusual circumstances."

Significantly, in footnote 2 of the *Oxford* opinion, the Court reiterated that it would have faced a different issue if *Oxford* had argued to the courts below that the availability of class arbitration is a gateway "question of arbitrability" for the Court—not the arbitrator—to decide in the first instance. Instead, the parties agreed that the arbitrator should decide this issue, subjecting the determination to a very narrow standard of review instead of the *de novo* review that would have otherwise been applied by a court. "Indeed, Oxford submitted that issue to the arbitrator not once, but twice—and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability." Although the Supreme Court did not decide whether the availability of class arbitration is presumptively a decision for the court or arbitrator, it reiterated that this issue is undecided, and implied that it may be a decision for the courts. This footnote will almost certainly signal greater requests by businesses to have the court—not the arbitrator—decide this potential gateway issue of arbitrability, and will likely lead to new and perhaps inconsistent rulings by the courts.

Oxford is a narrow opinion that has more to do with the limited standard of review under the FAA than with class arbitration. However, this case points out the perils of leaving the issue of class arbitration unaddressed in an employer's arbitration agreement and then allowing the arbitrator to decide the issue. So long as the arbitrator purports to interpret the agreement, the interpretation will not be disturbed. As Justice Kagan notes, the potential for mistakes by an arbitrator "is the price of agreeing to arbitration." Arbitration is generally simpler and more efficient than court litigation and never-ending appeals are limited. However, as Justice Kagan pointed out, the "arbitrator's [award] holds, however good, bad, or ugly."

Remember that this case deals with an arbitration agreement that did not expressly address class arbitration and was not, unlike *Stolt-Nielsen*, subject to a stipulation of the parties that no agreement was reached on the class arbitration issue. Instead, in *Oxford* the parties agreed to allow the arbitrator to decide whether the agreement permitted class arbitration. All of this left the door open for the arbitrator to interpret the agreement, for better or worse, subject only to limited judicial review.

Though narrow, the ruling is important because it should encourage employers to include express class action waivers in their arbitration agreements instead of leaving the interpretation of the agreements to the discretion of an arbitrator or, for that matter, a court. Already, more and more businesses incorporate express class action waivers in their arbitration agreements that prohibit class arbitration and leave no doubt as to the intent of the parties on this issue. Businesses that do not already utilize express class action waivers in arbitration should seriously consider doing so.

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