Oxford Health Plans v. Sutter – In Reaffirming the Deference to Be Given Arbitration Decisions, the US Supreme Court Has Paved the Way to Enforce Clear and Unambiguous Class Action Waivers and Bilateral Arbitration Contracts

The United States Supreme Court yesterday released a decision, *Oxford Health Plans LLC v. Sutter*, No. 12-135, critical to companies that wish to limit class actions by means of contractual waivers in consumer and business-to-business commercial contracts and employment agreements. The *Oxford Health Plans* decision underscores the importance of carefully drafting contractual arbitration clauses and class action waivers. It also serves as a cautionary tale for companies to pursue, in the first instance, a court proceeding to enforce bilateral arbitration.

Background

In *Oxford Health Plans*, a pediatrician, John Sutter, filed suit in New Jersey state court against Oxford Health Plans on behalf of himself and a proposed class of other New Jersey physicians. Sutter alleged that Oxford had failed to reimburse the physicians as promised in their contracts. After Oxford successfully forced the case to arbitration, the parties agreed that the arbitrator should decide whether the contract allowed for class arbitration. The arbitrator held that the contract's clause providing that "[n]o 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" allowed for class arbitration. The arbitrator reasoned that this clause mandated arbitration of "the same universal class of disputes" that it barred the parties from bringing "as civil actions" in court. Because a class action "is plainly one of the possible forms of civil action that could be brought in a court" absent the agreement, the arbitrator held that the contract, on its face, allowed for class arbitration.

Oxford sought to vacate the arbitrator's decision on the ground that the arbitrator "exceeded [his] powers" under §10(a)(4) of the Federal Arbitration Act (FAA), but the federal district court and the Court of Appeals for the Third Circuit both rejected Oxford's contentions. *See* 05–CV–2198, 2005 WL 6795061 (D.N.J., Oct. 31, 2005), *aff 'd*, 227 Fed. Appx. 135 (3d Cir. 2007). Oxford then asked the arbitrator to reconsider his earlier decision on class arbitration, after the Supreme Court decided *Stolt-Nielsen S.A. v AnimalFeeds International Corp.*, 559 U.S. 662 (2010), which reversed class arbitration on the ground that the arbitrators had ignored the parties' agreement. The *Oxford* arbitrator held that *Stolt-Nielsen* did not affect his prior decision because the parties' contract had authorized class arbitration. The federal district court again refused to overturn the arbitrator, and the Third Circuit affirmed. 675 F.3d 215 (3d Cir. 2012). The Supreme Court granted *certiorari*, noting a split between the Second and Third Circuits and the Fifth Circuit as to whether, under the authority of the FAA's §10(a)(4), a court may vacate an arbitrator's purportedly erroneous decision to allow class arbitration. Compare *Jock v. Sterling Jewelers,*

Inc., 646 F. 3d 113 (2d Cir. 2011) (court may not overturn arbitrator), with *Reed v. Florida Metropolitan Univ., Inc.*, 681 F. 3d 630 (5th Cir. 2012) (vacating arbitrator's erroneous finding that contract permitted class arbitration).

Yesterday's Supreme Court Decision

The Supreme Court unanimously affirmed in an opinion delivered by Justice Kagan, holding that vacatur is not proper under the highly deferential standard of review of an arbitrator's decision under § 10(a)(4) of the FAA. To set aside the arbitrator's decision, "[i]t is not enough...to show that the [arbitrator] committed an error—or even a serious error." *Oxford*, Slip Op. at 4 (quoting *Stolt-Nielsen*, 559 U. S. at 671). So long as the arbitrator is "even arguably construing or applying the contract," the arbitrator's decision must stand, whether "good, bad, or ugly." *Id.*, Slip Op. at 4, 8. The Court distinguished *Stolt-Nielsen* in that the Court "overturned the arbitral decision there because it lacked any contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a 'sufficient' one." *Id*. at 6. In *Stolt-Nielsen*, the Court explained, the parties "had entered into an unusual stipulation that they had never reached an agreement on class arbitration," whereas no such stipulation controlled the arbitrator's resolution of the parties' contract dispute in *Oxford*. *Id*., Slip Op. at 6.

The Court identified one alternative path potentially open to litigants in Oxford's position – the party resisting class arbitration could argue that "the availability of class arbitration is a so-called 'question of arbitrability.'" Questions of arbitrability 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," and they are "presumptively for courts to decide." *Oxford Health Plans*, Slip Op. at 5 n. 2. The Court in *Stolt-Nielsen* emphasized that whether the availability of class arbitration is a question of arbitrability remains an open question. 559 U.S., at 680. But Oxford had waived this argument by submitting the class arbitration issue to the arbitrator twice, including once after *Stolt-Nielsen* was decided.

Concurring, Justice Alito, joined by Justice Thomas, was hesitant to have courts refer this gateway issue to the arbitrator. Justice Alito also expressed serious doubts regarding whether a class arbitration award could ever be enforceable against absent class members who have not affirmatively opted-in to the action, underscoring the risk such proceedings present for businesses – absent class members potentially would not be bound by an unfavorable class award, while being able to avail themselves of a favorable one.

Lessons From *Oxford Health Plans*

Two lessons emerge from this case. *First*, companies that want to avoid class actions should ensure that their agreements include an express class action waiver, in order to avoid unpredictable and potentially costly class arbitration (or court) proceedings. The agreement should expressly waive the parties' right to commence or participate in any representative, class, collective, consolidated or aggregate proceeding, and affirmatively require resolution of all disputes in a bilateral arbitration on a purely individual basis.

Second, the party resisting class arbitration should, if at all possible, raise the question in court as a gateway issue, prior to arbitration, in an action to compel bilateral arbitration or to stay a purported class arbitration. The lesson of *Oxford* is that, if the parties have submitted the question of their contractual intent regarding class arbitration to the arbitrator, the arbitrator's determination on that point would be

subject to layers of deference, making it impossible to subsequently overturn even a clearly erroneous ruling. For now, this gateway approach in court finds encouragement in Justice Alito's opinion, although lower federal courts have been split on whether the availability of class arbitration is a "question of arbitrability." *Compare, e.g.*, *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 231-232 (3d Cir. 2012) (question for the arbitrator); *Guida v. Home Sav. of Am.*, 793 F. Supp. 2d 611, 616 (E.D.N.Y. 2011) (same); with *Corrigan v. Domestic Linen Supply Co., Inc.*, No. 12 C 0575, 2012 WL 2977262, at *4 (N.D. Ill. July 20, 2012) (question for court); and *Reed Elsevier, Inc. v. Crockett*, No. 3:10-cv-248, 2012 WL 604305, at *8 (S.D. Ohio Feb. 24, 2012) (same).

For more information or inquiries regarding class action waivers and bilateral arbitration agreements, please contact Litigation Partner and Chair of Kaye Scholer's Alternative Dispute Resolution Practice, Jay W. Waks, or Litigation Associate Noah B. Peters, who assisted in preparing this alert.

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