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Recent Developments

Supreme Court Refuses to Overturn Arbitrator's Decision Providing for Class Arbitration

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Yesterday,[1] in *Oxford Health Plans LLC* v. *Sutter*, the Supreme Court ruled that when "parties agreed that the arbitrator should decide whether their contract authorized class arbitration," the "arbitrator's construction holds, however good, bad or ugly."

In this case, a physician (Sutter) filed a putative state-court class action against a health insurance company (Oxford) alleging that the insurer had failed to make full and prompt payments to doctors with whom it had contracted. The contracts between the parties contained an arbitration clause, but that clause was silent as to both the availability of class arbitration and who decides issues of arbitrability. Oxford moved to compel arbitration and the parties agreed the arbitrator should decide whether the arbitration clause authorized class arbitration. The arbitrator then interpreted the arbitration clause to manifest an intent to permit class arbitration. Oxford moved to vacate that decision, arguing that the arbitrator exceeded his powers, but the District Court denied the motion and the Court of Appeals affirmed.

The Supreme Court affirmed and distinguished its earlier decision in *Stolt-Nielsen* (memo), which had held that an "arbitrator may employ class procedures only if the parties have authorized them" and had denied class arbitration because the parties had not so agreed. In contrast to *Oxford*, the arbitrators in *Stolt-Nielsen* "lacked *any* contractual basis for ordering class procedures" (emphasis in original), as the parties in that case had entered into an "unusual stipulation" stating that they had never agreed on the availability of class arbitration. Thus, those arbitrators did not "construe" the parties' agreement at all, even wrongly. In *Oxford*, however, the parties agreed that the arbitrator should decide whether the arbitration agreement authorized class arbitration, and the arbitrator did so construe it. Vacatur thus was not available as the arbitrator performed the delegated task, even if he did so poorly.

Following *Oxford*, parties resisting class arbitration may avoid the situation presented in that case by refusing to agree that the arbitrator may decide the issue of class arbitrability. They should also be cognizant of Justice Alito's concurring opinion, which highlights the potential unfairness of an erroneous class arbitration determination. That opinion noted that where an arbitral panel has made an "erroneous" determination that class arbitration should proceed, absent class members may not be bound absent further action on their part to "opt-in." Defendants thus risk asymmetry: if they lose on the merits, they may do so on a class-wide basis, but if they win on the merits, they may only be able to bind the class representatives and class members who opted-in to the arbitration. This consideration should militate in favor of courts, not arbitrators, deciding class arbitrability.

Finally, in light of *Oxford*, parties seeking to avoid class arbitration should craft arbitration agreements to negate class arbitration and to allocate to the courts the determination of the permissibility of class arbitration.

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[1] This memo was originally released June 11, 2013.

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