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New US Supreme Court Ruling Restricts Challenges to Arbitrator Decisions Imposing Class Arbitration

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On June 10, 2013, the US Supreme Court issued a unanimous decision in Oxford Health Plans LLC v. Sutter, a potentially important ruling limiting the ability of arbitration defendants to challenge arbitration decisions imposing class arbitration. (WilmerHale represented the petitioner, Oxford Health Plans.) The Court held that an arbitrator's decision interpreting the parties' arbitration contract to allow class arbitration is shielded from subsequent challenge in court if the parties agreed to allow the arbitrator to determine in the first instance whether class arbitration is available, even if the arbitrator made a "grave error" in concluding, based on the arbitration agreement, that the parties authorized class arbitration. But the Court pointedly reserved the question whether, absent agreement otherwise, the availability of class arbitration is a "gateway" issue to be decided by courts rather than arbitrators, which suggests a path forward for future arbitration defendants who do not wish to risk being bound by an arbitrator's determination that the defendant consented to class arbitration.

Oxford Health Plans was a successor case to the Supreme Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* In *Stolt-Nielsen*, the Court vacated an arbitrator's decision imposing class arbitration and ruled that class arbitration cannot be imposed unless there is a contractual basis for

concluding that the parties affirmatively authorized such proceedings. After that decision, the courts of appeals divided over whether arbitral decisions imposing class arbitration purportedly based on a reading of the parties' arbitration agreement enjoyed the broad deference generally given to arbitration awards, or whether the courts retained greater authority to examine whether the parties had agreed to class arbitration.

In *Oxford Health Plans*, a pediatrician brought a putative class action against Oxford Health Plans in state court, and Oxford successfully moved to compel arbitration. The parties' arbitration agreement made no explicit reference to class arbitration, and (before *Stolt-Nielsen*) the parties agreed that the arbitrator should decide whether the arbitration agreement authorized class proceedings. The arbitrator analyzed the terms of the parties' agreement and concluded that it authorized class arbitration. After *Stolt-Nielsen*, Oxford asked for reconsideration, and the arbitrator reaffirmed his prior holding. Oxford then challenged the arbitrator's decision in federal court, arguing that the agreement provided no contractual basis for concluding that the parties authorized class arbitration. The Third Circuit rejected the challenge, concluding that because Oxford had agreed to allow the arbitrator to consider the question and the arbitrator had made a good-faith effort to construe the agreement, Oxford could not prevail merely by arguing that the arbitrator was wrong.

The Supreme Court affirmed, emphasizing the long line of precedent establishing that arbitration awards interpreting the terms of an agreement are virtually immune from challenge, and concluding that the normal deference given to arbitration awards is fully applicable to decisions imposing class arbitration. *Stolt-Nielsen*, the Court held, authorizes vacating awards imposing class arbitration "only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task

poorly." The Court took pains to note that it was rejecting Oxford's argument that the agreement did not authorize class arbitration "because, and only because, it is not properly addressed to a court," and that nothing in the opinion should be taken as an endorsement of the arbitrator's reasoning. Because Oxford had twice submitted the question to the arbitrator, though, and the arbitrator had "arguably" construed the agreement, "[t]he arbitrator's construction holds, however good, bad, or ugly."

Two notable aspects of the decision, however, suggest a path forward for future arbitration defendants. *First*, the Court's opinion took pains to note that the case would present "a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability'"—a class of important "gateway" issues that "are presumptively for courts to decide" in the first instance. The Court suggested that if, at the outset of the litigation, Oxford had asked a court to determine whether the agreement authorized class arbitration, the result might well have been different.

Second, Justice Alito authored a concurrence, joined by Justice Thomas, in which he expanded on this point. The concurrence began by emphasizing the rights of the absent class members who had not agreed to allow the arbitrator to (erroneously) construe the agreement as authorizing class arbitration. Because the absent class members had not consented to have the arbitrator determine the availability of class arbitration, "it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute." Justice Alito observed that, in such situation, absent class members might be able to collaterally attack an unfavorable judgment but claim the benefit from a favorable one. The concurrence concludes that "this possibility should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide."

In sum, *Oxford Health Plans* is a strong reaffirmation of the principle of broad deference to arbitrators' constructions of arbitration agreements, even on the question whether class proceedings are authorized. However, *Oxford Health Plans* does suggest that future arbitration defendants may be able to avoid the risk of having an arbitrator impose class arbitration by refusing to submit the question to the arbitrator and instead insisting on having a federal court address the matter as a "gateway" issue.

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