

# Client Alert

June 2013

## Supreme Court Upholds Arbitrator's Ruling Authorizing Class-Wide Arbitration in *Oxford Health Plans LLC v. Sutter*, Case No. 12-135 (June 10, 2013)

The Supreme Court has unanimously upheld an arbitrator's ruling that a contract that required arbitration of "any dispute" constituted an agreement to class-wide arbitration. The Court's narrow ruling turns on the parties' express agreement to allow the arbitrator to decide whether their contract, which contained an arbitration provision but did not mention class proceedings, authorized class arbitration. However, the opinion has significant implications for companies desiring to avoid class arbitration—and class actions generally—through provisions in their consumer, business, and employment contracts.

### I. Background of the Case

In *Oxford Health Plans LLC v. Sutter*, John Sutter, a physician, brought claims in state court against Oxford Health Plans LLC, a health insurance provider, on behalf of himself and a putative class of New Jersey-based physicians who contracted with Oxford to provide medical services to Oxford's members. Sutter alleged that Oxford had failed to make full and prompt reimbursements to the physicians for the medical services that they provided, in violation of its contracts and various state laws.

The fee-for-services contract on which Sutter's suit against Oxford was based contained an arbitration provision that required "any dispute arising under this Agreement" to be submitted to final and binding arbitration, but that contained no mention of class proceedings. Upon motion by Oxford, the state court referred the case to arbitration.

Sutter and Oxford agreed at arbitration that the arbitrator should decide whether their arbitration provision contemplated class arbitration. Based on his analysis of the text, scope, and construction of the agreement, the arbitrator concluded that "on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained." Oxford filed a motion in federal court to vacate this ruling, claiming that the arbitrator had exceeded his powers under Section 10(a)(4) of the Federal Arbitration Act ("FAA"), but the district court and Third Circuit Court of Appeals upheld the arbitrator's decision that the contract authorized class arbitration.

While the arbitration was pending, the Supreme Court held in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662 (2010), that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." Oxford asked the arbitrator to reconsider his decision on class arbitration in light of *Stolt-Nielsen*. The arbitrator reaffirmed his decision, finding *Stolt-Nielsen* did not apply because the parties in that case had stipulated that they never reached an agreement on class arbitration, whereas Oxford and Sutter had disputed whether their contract contemplated class arbitration and had agreed to allow the arbitrator to interpret it. The district court and Third Circuit once again upheld the arbitrator's decision.

## II. The Supreme Court's Decision

On June 10, 2013, in an opinion authored by Justice Elena Kagan, a skeptical Supreme Court unanimously affirmed the arbitrator's decision that the contract between Oxford and Sutter authorized class-wide arbitration.

The Court held that, pursuant to the highly deferential standard of review set forth in Section 10(a)(4) of the FAA, a party is not entitled to court review or re-adjudication of an arbitral decision so long as the arbitrator is "even arguably construing or applying a contract." Such a decision must stand, the Court said, however "good, bad, or ugly" and regardless of "a court's view of its (de)merits" or the arbitrator's commission of grave error. The Court held that a court's authority to vacate an arbitral decision under the FAA turns on the "sole question" of "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."

Turning to the merits of Oxford's appeal, the Court found that Oxford and Sutter "bargained for the arbitrator's construction of their agreement" by twice submitting to the arbitrator—and twice allowing the arbitrator to determine—whether their contract contemplated class arbitration. Because the arbitrator based his decision on the text and scope of the parties' arbitration provision, the Court found that he had "arguably construed" the contract and therefore had not exceeded his powers under the FAA. Such facts, the Court noted, starkly contrasted with those of *Stolt-Nielsen*, in which the arbitrators "abandoned their interpretative role" by authorizing class arbitration based on public policy concerns, rather than on the language of the arbitration agreement.

In a lengthy footnote, the Court indicated that it "would face a different issue," implying that the Court might have reached a different outcome, had Oxford argued below that the availability of class arbitration under the contract was a "question of arbitrability," an issue that the Court left open in *Stolt-Nielsen*. The Court quoted its plurality opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), to the effect that questions of arbitrability—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 appropriate for courts to decide or review on a *de novo* basis.

A concurring opinion authored by Justice Samuel Alito and joined by Justice Clarence Thomas agreed that Oxford's concession to the arbitrator's judgment and the limited scope of judicial review under the FAA compelled the result reached by the Court. However, the concurrence questioned whether absent class members could be bound by rulings in the class arbitration, as they had never agreed to class arbitration, never submitted themselves to the arbitrator's authority, and never agreed to the procedures used in the class arbitration. The concurrence also suggested that, had the Court found it appropriate to review the arbitrator's decision *de novo*, it likely would have concluded that, like in *Stolt-Nielsen*, the arbitrator improperly inferred an agreement to class arbitration. Justice Alito pointed out that, in the absence of concessions like Oxford's, lower courts should be reluctant before concluding that the availability of class arbitration is a question for the arbitrator to decide.

## III. Implications for Arbitration Clauses and Litigation Strategy

Several important lessons can be gleaned from the Court's decision in *Oxford*:

1. Contrary to popular belief about the unavailability of class arbitration following the Court's decisions in *Stolt-Nielsen* and *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Court has clarified that arbitration remains a viable option for plaintiffs bringing class claims. Plaintiffs will argue that, under *Oxford*, arbitrators may lawfully construe arbitration provisions that

are silent on class actions to authorize class arbitration depending on the wording of the arbitration provision or the parties' stipulations.

2. Companies should ensure that their arbitration agreements address head-on the availability or not of class, collective, and representative arbitrations. In particular, companies should consider expressly precluding class arbitrations and requiring individual arbitration. Because some courts are still striking class-action waivers as unconscionable, companies should also consider providing that, if the waiver is stricken, then the entire arbitration clause is ineffective.
3. It was important in *Oxford* that the parties agreed that the question of whether class arbitration was permitted was a question of contract interpretation for the arbitrator rather than a question of arbitrability for a court. Lower courts are split on this question. *Oxford* demonstrates the need to preserve this argument both in litigation and perhaps even by mandating in the arbitration clause itself that the class issue is one of arbitrability for a court to decide.
4. *Oxford* reaffirms the breadth of an arbitrator's discretion to interpret contractual issues and the limited availability of review of an arbitrator's decision. Especially given the fact that arbitrators have significant financial incentives to go forward with class arbitration, *Oxford* provides further confirmation that, from a defense perspective, class arbitrations should be avoided. It is true that court proceedings are often more expensive than arbitration. But given the procedural protections offered by courts—especially federal courts—and the recent Supreme Court decisions emphasizing the difficulties plaintiffs face in obtaining class certification, see, e.g., *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011); *Comcast v. Behrens*, 133 S. Ct. 1426 (2013), federal court remains the preferred forum when class claims cannot be avoided.

*Oxford* left unanswered some important questions surrounding class arbitration and class-action waiver. However, the Court's commitment to developing the law in this area is evident, as it has decided three class-arbitration cases since 2010. The Court will resolve another case related to class-action waivers in the coming weeks (*American Express Co. v. Italian Colors Restaurant*, Case No. 12-133), and on June 10, 2013, the Court granted certiorari in *BG Group PLC v. Argentina*, Case No. 12-138, which concerns whether arbitrators or courts have the authority to determine whether prerequisites to arbitration have been satisfied.

Hunton & Williams' litigation team will stay apprised of all such developments, and has extensive experience advising clients on drafting arbitration clauses, litigating and arbitrating disputes that arise, and enforcing arbitral awards. If you need legal assistance in these areas, please contact us.

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