

Oxford Health v. Sutter: More Questions Than Answers About Class Arbitration

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The U.S. Supreme Court last week provided incomplete guidance on critical issues about the arbitration of class actions in *Oxford Health Plans LLC v. Sutter* (decided June 10, 2013). The issues remain unresolved, awaiting a future case that the Supreme Court appeared to invite.

The Supreme Court's Decision

The question in *Oxford Health* was whether a party to an arbitration agreement could bring a class arbitration. The arbitration agreement in that case (like many agreements) said nothing about class actions. Does such an agreement allow class litigation? And who makes that determination — a court, or the arbitrator?

The Supreme Court allowed the class arbitration to proceed. It did so, however, on narrow grounds. Both parties to the case had asked *the arbitrator* to decide whether the agreement permitted class litigation. The arbitrator ruled that the agreement did so. The defendant, Oxford Health, then sought to set aside the arbitrator's decision under section 10(a)(4) of the Federal Arbitration Act, 9 U.S.C. § 10(a)(4), contending that the arbitrator had "exceeded [his] powers." Lower courts upheld the arbitrator's determination.

The Supreme Court unanimously affirmed. "Under the FAA," the Court explained, "courts may vacate an arbitrator's decision 'only in very unusual circumstances.'" Citing prior decisions, the Court reiterated that "[i]t is not enough . . . to show that the [arbitrator] committed an error — or even a serious error." An arbitrator's decision that "'even arguably constru[es] or appl[ies] the contract' must stand, regardless of a court's view of its (de)merits."

Here, the Court continued, "the arbitrator did what the parties had asked: He considered their contract and decided whether it effected an agreement to permit class proceedings The arbitrator's construction holds, however good, bad, or ugly" it might be. The Supreme Court all but declared *this* arbitrator's decision ugly — but that Oxford Health had presented it to the court belatedly, and therefore in the wrong procedural posture to fix.

The most important part of the Court's decision is its footnote 2, which explained that "[w]e would face a different issue" if Oxford Health had made a different choice. What Oxford Health *should* have done, the Court explained, is argue at the outset that the availability of class arbitration is a matter for a *court* to decide in the first instance. Oxford Health, however, had invited the arbitrator to decide the issue, and the arbitrator then purported to divine what the parties had intended. The Supreme Court

therefore had no occasion to decide whether the rule of *Stolt-Nielsen v. AnimalFeeds Int'l, Inc.*, 559 U.S. 662 (2010) — that agreements silent on the issue of class arbitration cannot be construed to allow them — foreclosed a class arbitration here. The Court appeared to invite a future case in which the defendant presented the class-arbitration issue in a different procedural posture.

Oxford Health involved an issue of great significance, because many arbitration agreements say nothing one way or the other about class actions. The Supreme Court's decision, however, turned on a narrow question of waiver by reason of the agreement of the parties to that case. The Court saved for another day the broader issue about the possibility of class arbitration.

Practical Lessons from *Oxford Health*

Companies who have predispute arbitration agreements, or who are considering adopting them, should consider the following:

- In pending or future litigated matters, consider whether the company wants the court to decide whether the arbitration agreement permits class actions, or whether it wants the arbitrator to decide that issue.
- If the company concludes that it wants the court to decide the issue, argue (based on *Oxford Health's* footnote 2) that the (un)availability of class arbitration is a question for the court, not a matter of contract interpretation for an arbitrator.
- In working with counsel to design or revise a predispute arbitration agreement, consider whether to remain silent on class or collective actions, or instead to prohibit them expressly, as the defendant had done in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
- As part of that analysis, consider what drafting steps to take to deal with representative actions under statutes like the California Labor Code's Private Attorneys General Act of 2004.
- Take advantage of this opportunity to review with counsel all aspects of the company's arbitration agreements, to ensure that they comport with the latest developments of state and federal law.
- If changes are thought necessary, consider how to put them into effect. Should the changes cover only new hires? What techniques are available for binding incumbents? Counsel can assist in answering these questions on a privileged basis.

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