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Supreme Court Weighs in Again on Class Arbitration In *Oxford Health Plans* and *Italian Colors*

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Last month, the U.S. Supreme Court issued two decisions on class arbitrations. In *Oxford Health Plans LLC v. Sutter*,[1] a health care case handed down June 10, the court unanimously held that an arbitrator does not exceed his powers under the Federal Arbitration Act when he decides whether a contract authorizes class arbitration, and where the parties agreed beforehand that the arbitrator should decide the issue. Given the limited review of arbitrators' decisions under § 10(a)(4) of the FAA, the court refused to vacate the arbitrator's decision to allow class arbitration, even though the arbitration agreement was silent on the issue.

On June 20, in *American Express Co. v. Italian Colors Restaurant*,[2] an antitrust case, the court held in a 5-3 decision (Justice Sonia M. Sotomayor was recused) that class arbitration waivers—provisions in an agreement where the parties waive the right to pursue class arbitration—are enforceable under the FAA, even if the cost of individual arbitration greatly exceeds the potential recovery. As a result, Italian Colors and other merchants must pursue their antitrust claims against American Express in individual arbitrations or not at all.

Though one of these opinions allows a class arbitration to proceed while the other mandates individual arbitrations, the decisions, read together, provide guidance for companies that wish to avoid class arbitration.

[1] 2013 BL 151235 (U.S., No. 12-135, June 10, 2013), available at http://op.bna.com/class.nsf/r?Open=jkas-98jkc2.

[2] 2013 BL 163177 (U.S., No. 12-133, June 20, 2013), available at http://op.bna.com/class.nsf/r?Open=jkas-98ukst.

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Oxford Health Plans LLC v. Sutter

Background

In 1998, Ivan Sutter, a New Jersey doctor, signed a contract with Oxford Health Plans that gave Sutter preferred access to Oxford's members in exchange for treating those members at prescribed rates.[3] The contract required the parties to arbitrate any disputes, but "[n]either the arbitration clause nor any other provision of the agreement makes express reference to class arbitration." [4] In 2002, Sutter filed suit, accusing Oxford of "improperly denying, underpaying, and delaying reimbursement of physicians' claims for the provision of medical services." [5] The trial court granted Oxford's motion to compel arbitration, and the parties "agreed

[3] *See Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 217 (3d Cir. 2012).

[4] *Id.*

[5] *Id.*

that the arbitrator should decide whether their contract authorized class arbitration.'' [6]

The arbitrator ruled that the contract authorized class arbitration.[7] Oxford challenged that ruling in court but lost in the district court and on appeal. While the arbitration was proceeding, the Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,[8] which vacated an arbitration panel's decision to allow class arbitration on the basis 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.'' Citing *Stolt-Nielsen*, Oxford asked the arbitrator to reconsider his earlier ruling to allow class arbitration.[9] The arbitrator reiterated that class arbitration was available, and Oxford again sought judicial review.[10] Both the trial court and the Third Circuit again affirmed the arbitrator's decision.[11]

The Supreme Court's Decision

The Supreme Court decided *Oxford* on narrow grounds. Instead of clarifying what constitutes ''a contractual basis for concluding that the part[ies] *agreed* to'' class arbitration, as required by *Stolt-Nielsen*, the court stressed that the parties had agreed to let the arbitrator determine the scope of the arbitration agreement. Thus, the ''sole question'' before the court was ''whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.'' [12] The court likely would have approached the case differently had Oxford objected below that the question of class arbitration was not one of contract interpretation but of arbitrability.[13] But, once the parties agree to entrust a decision to an arbitrator, a court ''may vacate an arbitrator's decision only in very unusual circumstances'' and '' '[i]t is not enough to show that the arbitrator committed an error—or even a serious error.' '' [14] ''Because the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de) merits.'' [15]

Citing *Stolt-Nielsen*, Oxford had argued that the arbitrator exceeded his authority by interpreting an arbitration agreement to authorize class arbitration where there was no basis for concluding the parties had agreed to such a procedure. The court rejected that approach, explaining that *Stolt-Nielsen* ''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.'' [16] The court refused to consider Oxford's construction of the arbitration agreement ''because, and only because, [that argument] is not properly addressed to a court.'' [17]

The court did *not* hold that an arbitration agreement silent with respect to class arbitration implicitly authorizes class arbitration. But it made clear that federal courts will not step in to review decisions that the parties agreed an arbitrator should make: ''In sum, Oxford chose arbitration, and it must now live with that choice. . . . The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court.'' [18] In the court's words, ''[t]he arbitrator's construction holds, however good, bad, or ugly.'' [19]

The 'Question of Arbitrability' and Justice Alito's Concurrence

The *Oxford* court noted, ''[w]e would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called 'question of arbitrability,' '' because such matters ''are presumptively for courts to decide.'' [20] Because questions of arbitrability are entrusted to courts and not to arbitrators, courts need not defer to the arbitrator's ruling on such issues, and ''[a] court may [] review an arbitrator's determination of such a matter *de novo* absent clear and unmistakable evidence that the parties wanted an arbitrator to resolve the dispute'' (internal quotation marks omitted).[21] Whether the availability of class arbitration is a question of arbitrability remains effectively unresolved by the court,[22] and federal circuit courts have resolved the question differently.

Justice Samuel A. Alito Jr. (who authored *Stolt-Nielsen*) provided a short concurrence in *Oxford* making clear that he thinks the arbitrator erred: ''If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred 'an implicit agreement to authorize class-action arbitration from the fact of the parties' agreement to arbitrate.' '' [23]

He went on to explain why allowing an arbitrator to determine whether an agreement authorizes class arbitration ''should give courts pause'' in those cases where the issue is litigated.[24] His concern was that ''an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination.'' [25] In cases like *Oxford*, where the arbitration agreement, properly read, does not authorize class arbitration but the arbitrator entrusted with contract interpretation decides class arbitration is proper, the unnamed class members could gain an unfair advantage, Justice Alito posits. If the named claimant prevails in class arbitration, the absent class members can accept the arbitration award. But if the defendant wins, the absent class members can attack the arbitration award and insist that they cannot be bound by the award because they never agreed to allow the arbitrator to interpret the arbitration agreement. Thus, according to Justice Alito, absent class members would gain a proce-

[6] *Oxford*, 2013 BL 151235, at *2.
[7] *Id.*
[8] 559 U.S. 662 (2010).
[9] *Oxford*, 2013 BL 151235, at *3.
[10] *Id.*
[11] *Id.*
[12] *Id.* at *4.
[13] *See id.*, n.2.
[14] *Id.* at *3 (quoting *Stolt-Nielsen*, 559 U.S. at 671).
[15] *Id.* at *3-4 (internal quotation marks omitted).
[16] *Id.* at *4.
[17] *Id.* at *5.
[18] *Id.* at *6.
[19] *Id.*
[20] *Id.* at *4 n.2.
[21] *Id.*
[22] *See id.* (citing *Stolt-Nielsen*, 559 U.S. at 680).
[23] *See id.* at *6 (Alito, J., concurring) (quoting *Stolt-Nielsen*, 559 U.S. at 685).
[24] *Id.* at *7.
[25] *Id.*

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dural advantage not available to them if a court were to decide whether class arbitration is allowed. Treating class arbitration as a question of arbitrability, to be decided by a court rather than an arbitrator, may alleviate this concern.

American Express Co. v. Italian Colors Restaurant

Background

Italian Colors Restaurant and other merchants that accept American Express cards filed a class action against American Express asserting federal antitrust claims. The merchants' contract with American Express requires all disputes between the parties to be resolved in arbitration.[26] It also states that ''[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.'' [27] American Express moved to dismiss the case in favor of arbitration and sought an order compelling each plaintiff to arbitrate individually.[28] The district court granted American Express's motion.[29]

The U.S. Court of Appeals for the Second Circuit held that the trial court should not have ordered arbitration. Relying on a declaration from the plaintiffs about the substantial expense required to prove their antitrust claims, the appellate court found the class arbitration waiver unenforceable because individual arbitrations would impose costs on each merchant that far exceeded their potential recoveries.[30] The Second Circuit subsequently held that neither *Stolt-Nielsen*, which it regarded as having nothing to say about circumstances in which a class arbitration waiver might be unenforceable, nor *AT&T Mobility LLC v. Concepcion*,[31] which it regarded as holding only that the FAA preempts *state law* barring enforcement of class arbitration waivers, applied to this case.[32]

The Supreme Court's Decision

The majority in *Italian Colors* held that the FAA requires courts to enforce arbitration agreements by the terms the parties adopted, ''unless the FAA's mandate has been overridden by a contrary congressional command.'' [33] The majority found no such contrary command in the antitrust laws, which ''do not guarantee an affordable procedural path to the vindication of every claim.'' [34] To the contrary, the court held that Congress's decision to allow treble damages for successful antitrust plaintiffs serves as both a departure from the default rules for litigation and as an indication that Congress did not intend any further departure to advantage antitrust plaintiffs.[35] Nor did the court find grounds for overruling the FAA in congressional approval of procedural rules for class action litigation, which does not ''establish an entitlement to class proceedings for the vindication of statutory rights.'' [36] Noting that the class action mechanism remains '' 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties,' '' [37] the court concluded that plaintiffs have no implicit entitlement to utilize those procedures.[38]

Because it did not find ''a contrary congressional command,'' the court applied the FAA principle and held that the class arbitration waiver contained in the parties' agreement should be enforced by its terms. The majority rejected the merchants' argument that enforcing the class arbitration waiver in this case would ''prevent the 'effective vindication' of a statutory right'' because the merchants ''have no economic incentive to pursue their antitrust claims individually in arbitration.'' [39] The court asserted that the supposed ''effective vindication'' exception to the general rule that the FAA requires courts to enforce parties' arbitration agreements cannot reach arbitration agreements that do not constitute a ''prospective waiver of a party's *right to pursue* [federal] statutory remedies.'' [40] That exception, which could only apply to a case asserting a federal statutory right and which the Supreme Court has never found occasion to apply, was held inapplicable because ''[t]he class arbitration waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' rights to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.'' [41] And, the Supreme Court noted, ''the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.'' [42]

Lessons from *Oxford* and *Italian Colors*

First, businesses that prefer to arbitrate disputes but do not want to engage in class arbitration should continue to include class arbitration waivers in their contracts. The Supreme Court has now twice held that such waivers are valid and enforceable, because ''the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.'' [43]

Second, companies seeking to avoid class arbitration where the agreement is silent on class arbitration should not accede that the arbitrator has authority to decide whether class arbitration is available. Such a concession could be made in the course of litigating or arbitrating the case,[44] or could be read into an arbitration agreement that provides issues of the scope and in-

[26] *See Italian Colors*, 2013 BL 163177, at *2.

[27] *Id.* (quoting *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 209 (2d Cir. 2012)).

[28] *See id.*

[29] *See id.*

[30] *See id.* (citing *In re Am. Express Merchs.' Litig.*, 554 F.3d 300, 315-16 (2d Cir. 2009)).

[31] 131 S. Ct. 1740 (2011).

[32] *See In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 193 (2d Cir. 2011), *adhered to on rehr'g*, 667 F.3d 204, 213-14 (2d Cir. 2012).

[33] *Italian Colors*, 2013 BL 163177, at *3 (internal quotation marks omitted).

[34] *Id.*

[35] *See id.*

[36] *Id.* at *3-4.

[37] *Id.* at *4 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

[38] *See id.*

[39] *Id.* at *4.

[40] *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)).

[41] *Id.* at *5.

[42] *Id.*

[43] *Italian Colors*, 2013 BL 163177, at *6 n.5 (citing *Concepcion*).

[44] *See, e.g.*, *Oxford*, 2013 BL 151235 at *4 n.2.

terpretation of the arbitration agreement itself, including arbitrability of the dispute, shall be referred to the arbitrator,[45] Instead, companies seeking to avoid class arbitration should insist that the issue is one of arbitrability to be decided by a court.[46]

Finally, companies choosing to employ agreements requiring arbitration and prohibiting class claims of any nature should review those agreements to ensure they are as clear and unambiguous as possible. The *Oxford* decision exemplifies how a company that prefers to arbitrate only on an individual basis can be ill-served by an arbitration agreement that is silent with respect to class arbitration, even after *Stolt-Nielsen*. And the *Lowry* decision shows how language intended to promote arbitration of claims against a company—but providing that the scope and interpretation of the arbitration agreement are themselves subjects of arbitration—can be interpreted by a court to complicate, and possibly to evade, enforcement of a class arbitration waiver. Companies should strive to be clear and express as to all terms and to leave no ambiguity with regard to who will decide questions of the arbitration agreement's scope and interpretation.

[45] *See, e.g.*, *Lowry v. JPMorgan Chase Bank*, No. 12-4222, 2013 BL 156073, at *2 (6th Cir. June 11, 2013).

[46] *See Oxford*, 2013 BL at *6-7 (Alito, J., concurring).

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