JONES DAY

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SUPREME COURT WEIGHS IN AGAIN ON CLASS ARBITRATION IN *OXFORD HEALTH PLANS* AND *ITALIAN COLORS*

In the past two weeks, the Supreme Court announced two major class arbitration decisions.

In *Oxford Health Plans LLC v. Sutter,* handed down on June 10, the Court unanimously held that an arbitrator does not exceed his powers under the Federal Arbitration Act when he decides, with the parties' agreement, whether a contract authorizes class arbitration. 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*, a majority of the Court held that a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act, even where the costs of individual arbitration would exceed the potential recovery should the claimant prevail. As a result, Italian Colors and other merchants can pursue their antitrust claims in individual arbitrations or not at all.

Although 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.

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 his providing services to those members at prescribed rates. *See Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 217 (3d Cir. 2012). 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." *Id.* In 2002, Sutter filed suit, accusing Oxford of "improperly denying, underpaying, and delaying reimbursement of physicians' claims for the provision of medical services." *Id.* The trial court granted Oxford's motion to compel arbitration, and the parties "agreed that the arbitrator should decide whether their contract authorized class arbitration." *Oxford Health Plans LLC v. Sutter*, No. 12-135, slip op. at 2 (U.S. June 10, 2013).

The arbitrator ruled that the contract authorized class arbitration. *Id.* Oxford challenged that ruling in court but lost, both in the district court and on appeal. While the arbitration was proceeding, the Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684 (2010), 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. *Oxford*, slip op. at 3. The arbitrator reiterated that class arbitration was available, and Oxford again sought judicial review. *Id.* Both the trial court and the Third Circuit again affirmed the arbitrator's decision. *Id.*

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 both Oxford and Sutter had agreed to allow the arbitrator to 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." *Id*. at 5. 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. *See id.*, n.2. 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.'" *Id.* at 4 (quoting *Stolt-Nielsen*, 559 U.S. at 671). "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." *Id.* (internal quotation marks omitted).

Oxford had argued that, under *Stolt-Nielsen*, the arbitrator exceeded his authority by interpreting an arbitration agreement to authorize class arbitration where there was no evidence, in the agreement or otherwise, that the parties had agreed to such a procedure. The *Oxford* 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." *Id.* at 6. The Court refused to consider Oxford's argument about what the arbitration agreement, properly construed, means "because, and only because, [that argument] is not properly addressed to a court." *Id.* at 8.

The Court did *not* hold that an arbitration agreement silent with respect to class arbitration implicitly authorizes class-wide proceedings. 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." *Id.* at 8-9. In the Court's words, "[t]he arbitrator's construction holds, however good, bad, or ugly." *Id.* at 8.

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." *Id.* at 5 n.2. 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." *Id.*

(internal quotation marks omitted). Whether the availability of class arbitration is a question of arbitrability remains effectively unresolved by the Court, *see id.* (citing *Stolt-Nielsen*, 559 U.S. at 680), and circuit courts have approached the question in different ways.

Justice Alito (who authored *Stolt-Nielsen*) provided a short concurrence in which he makes 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.'" *See Oxford*, slip op. at 1 (Alito, J., concurring). (quoting *Stolt-Nielsen*, 559 U.S. at 685).

Justice Alito goes 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. *Id.* at 2. His concern is 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." *Id.* This raises the possibility of post-arbitration collateral attacks by absent class members, who can "unfairly claim the benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Id.* In other words, in cases like *Oxford*, where the arbitration agreement, properly read, does not authorize class arbitration but the arbitrator is entrusted with contract interpretation and says that class arbitration is proper, unnamed class members gain an unfair advantage. If the result of class arbitration is positive, they can accept the arbitration award. But if the defendant wins, the absent class members can attack the arbitration award and insist that, because they never agreed to allow the arbitrator to interpret the arbitration agreement, they should have another opportunity to litigate the agreement's meaning and to arbitrate individually. Thus, absent class members would gain a procedural advantage that would not be available to them either in court or in class arbitration based on a court's interpretation of the arbitration agreement. 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. *See American Express Co. v. Italian Colors Restaurant*, No. 12-133, slip op. at 1 (U.S. June 20, 2013). It also states that "[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis." *Id.* (quoting *In re Am. Express Merchs.' Litig.*, 667 F.3d 204, 209 (2d Cir. 2012)). American Express moved to dismiss the case in favor of arbitration and specifically sought an order compelling each plaintiff to arbitrate individually. *See id.* at 2. The district court granted American Express's motion. *See id.*

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. *See id.* (citing *In re Am. Express Merchs.' Litig.*, 554 F.3d 300, 315-16 (2d Cir. 2009)). The Second Circuit subsequently held that neither *Stolt-Nielsen* nor *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the FAA preempts state laws barring enforcement of class arbitration waivers, applied to this case. *See In re Am. Express Merchs.' Litig.*, 634 F.3d 187 (2d Cir. 2011), *adhered to on rehr'g*, 667 F.3d 204 (2d Cir. 2012).

The Supreme Court's Decision. Unlike the narrow opinion in *Oxford*, the majority opinion in *Italian Colors* is broad. It holds 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." *Italian Colors*, slip op. at 4 (internal quotation marks omitted). The majority finds no such contrary command in the antitrust laws, which "do not guarantee an affordable procedural path to the vindication of every claim," or 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." *Id.* at 4-5.

Nor does the majority accept 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." *Id.* at 5. The Court asserts that the "effective vindication" exception to enforcement of arbitration agreements under the FAA is about preventing "prospective waiver of a party's right to pursue statutory remedies." *Id.* at 6 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985)). That exception does not apply here, 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." *Id.* at 7. And, the Court notes, "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." *Id.*

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 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." *Italian Colors,* slip op. at 9 n.5 (citing *Concepcion*).

Second, companies seeking to avoid class arbitration where the agreement is silent on class arbitration should not agree that the arbitrator has authority to decide whether class arbitration is available. Instead, they should insist that the issue is one of arbitrability to be decided by a court. Justice Alito's concurrence in *Oxford* provides guidance on the issue. *See Oxford*, slip op. at 1 (Alito, J., concurring).

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