Supreme Court: "Good, Bad or Ugly," Arbitrator's Class Action Ruling Upheld

Insights
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On June 10, 2013 a unanimous decision of the U.S. Supreme Court clarified the standard of review federal courts will use when reviewing an arbitrator's decision about whether parties contemplated class arbitration when they entered into a broadly worded mandatory-arbitration provision. Though the case involved an arbitration provision outside the employment context, this decision has implications for employers using mandatory arbitration agreements in employment contracts and other agreements with employees.

Based on the Court's holding in this case, which essentially eliminates federal court review of an arbitrator's decision regarding whether an arbitration clause permits class arbitration, employers should reevaluate their current mandatory arbitration language to ensure that the company's intent is explicit. *Oxford Health Plans LLC v. Sutter.*

Background
In this case, Oxford Health Plans included a mandatory arbitration clause in its Primary Care Physician Agreement governing the reimbursement of medical fees to doctors under the system. The arbitration clause provided that:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

In 2002, Dr. John Sutter filed a class action lawsuit against Oxford, alleging that the company engaged in a practice of improperly denying, underpaying, and delaying reimbursement of physicians' claims for the provision of medical services. Oxford successfully argued that this dispute should be decided by an arbitrator, rather than a state court.

The arbitrator's first task was to determine whether the arbitration clause in the agreement allowed for class arbitration. Despite the fact that the arbitration clause did not explicitly say so, the arbitrator found that the broad language contained in the agreement included all conceivable court actions, including class actions.

Oxford challenged the arbitrator's decision in federal court, arguing that the arbitrator exceeded the

scope of his authority by allowing class arbitration. While the parties were litigating this issue, the Supreme Court issued two important decisions.

Supreme Court's Prior Arbitration Decision

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp*, the Court clarified that parties must explicitly agree to class arbitration and held 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." But in *Stolt-Nielsen*, unlike *Oxford Health Plans*, the parties stipulated that they did *not* contemplate class arbitration. The Court correctly noted that arbitration "is a matter of consent, not coercion."

One year later, in *AT&T Mobility v. Concepcion*, the Court recognized that companies generally would not benefit from class arbitration and noted that "the differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."

Supreme Court's Clarified Standard

Despite the Supreme Court's decisions holding that parties must agree to class action arbitration, the U.S. Court of Appeals for the 3rd Circuit upheld the arbitrator's decision that the arbitration clause drafted by Oxford permitted class arbitration. Oxford petitioned the Supreme Court, arguing that 1) the 3rd Circuit used an improper legal standard to review the arbitrator's decision; and 2) the arbitrator exceeded the scope of his authority by deciding that the arbitration agreement allowed for class arbitration.

In this case, a unanimous Supreme Court affirmed the 3th Circuit's decision, holding that the federal court's review of an arbitrator's decision is extremely limited – the federal court may only review "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." According to the Court, the arbitrator's decision regarding whether the parties contemplated class arbitration, however "good, bad, or ugly," is binding on the federal court, so long as the arbitrator was "arguably construing" the contract.

The Court indicated that there is still an open question as to whether the availability of class arbitration is a "question of arbitrability," meaning whether the federal courts should decide this issue, rather than the arbitrator. The Court found, however, that Oxford waived this argument by asking the arbitrator to decide whether the contract permitted class arbitration. Justices Alito and Thomas concurred in the unanimous decision, but indicated that had Oxford not waived the issue of arbitrability, they would have found that the contract did not authorize the arbitrator to decide whether to conduct class arbitration.

What This Decision Means For Employers

The arbitration agreement in this case was drafted in 1998 at a time when class action arbitration was not a widely-used practice and therefore was not specifically considered. Today, employees often pursue class arbitration for a variety of employment-related claims including wage and hour

often pursue class arbitration for a variety of employment-related claims including wage and hour issues. Therefore, many employers have adjusted by drafting mandatory arbitration provisions to explicitly exclude class arbitration and avoid any uncertainty.

If your company's mandatory arbitration agreement does not address class actions or class arbitration, you should consider revising your agreement to explicitly prohibit employees from bringing such actions in either forum. Allowing an arbitrator to decide whether your agreement encompasses class arbitration, especially under the Supreme Court's clarified standard providing limited or no judicial review, is not advisable.

But drafting such agreements can be tricky. The National Labor Relations Board has found that class waivers in arbitration agreements may violate Section 7 of the National Labor Relations Act because employees have a substantive right to litigate employment disputes collectively.

Although federal courts have been reluctant to adopt the NLRB's reasoning, you should carefully review your mandatory arbitration agreement to ensure that your company's interest in avoiding class action litigation is protected, while also minimizing the risk that the agreement will be found unlawful by the Board.

For more information contact your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.