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Class Action Attys React To High Court's Arbitration Ruling

Law360, New York (June 10, 2013, 10:57 PM ET) -- The U.S. Supreme Court ruled Monday that courts can't second-guess an arbitrator's interpretation of a contract, backing an arbitrator's ruling that a doctor's pursuit of class arbitration against insurer Oxford Health Plans LLC was permitted under the language of a reimbursement agreement. Here, attorneys tell Law360 why the unanimous ruling is significant.

D. Matthew Allen, Carlton Fields
"The decision expands the scope of class actions in arbitration. In Stolt-Nielsen [SA v. AnimalFeeds International Corp.], the court had ruled that an arbitrator may not order a class arbitration when the parties' contract is silent on the point. Here, the contract seemed to be silent, but the Supreme Court refused to overturn an arbitrator's questionable ruling that language authorizing a 'civil action' in arbitration also authorized a class action. The lesson continues to be for companies to include clear prohibitions of class arbitrations in their contracts. Otherwise, as the court noted, the 'potential for those mistakes is the price of agreeing to arbitration.'"

David M. Eisenberg, Baker Sterchi Cowden & Rice LLC
"The Supreme Court has issued its much-awaited decision in Oxford Health Plans LLC v. Sutter, but has done so on the narrowest of grounds. Unanimously, the court upheld an arbitrator's ruling that a pediatrician could pursue classwide claims in arbitration on behalf of himself and other physicians, alleging improper reimbursements to Oxford's network doctors. But crucially, both parties here had agreed that the arbitrator should decide whether their contract authorized class arbitration, which is precisely what the arbitrator did. Hence, his decision was binding, 'regardless of a court's view of its (de)merits.' The court observed that had Oxford instead argued below that the availability of class arbitration was a so-called 'question of arbitrability,' the issue would presumptively have been for the courts to decide. Future defendants will assuredly govern their conduct accordingly. The court held this case distinguishable from its earlier decision in Stolt-Nielsen, in which the arbitrators had exceeded their powers by ruling in favor of class arbitration based not on the parties' arbitration agreement, but on the arbitrators' own view of underlying public policy concerns."

Rob Friedman, Littler Mendelson PC
"This case is more about standard of review of a decision made by an arbitrator than it is about class actions. The court made a point to state that the opinion does not 'reflect any agreement with the arbitrator's contract interpretation.' And the impact to class arbitrations is limited to agreements that do not expressly address class actions. Many businesses already include express class action waivers in their arbitration agreements, and this decision should encourage more businesses to review their current arbitration policies to ensure that they include express class waivers."

Andra Barmash Greene, Irell & Manella LLP
“Oxford restricts a court’s ability to review an arbitrator’s decision interpreting whether arbitration agreements permit class arbitration when that question is delegated to the arbitrator. If a party disagrees with an arbitrator’s ruling on the issue, it will have little recourse. Moreover, the decision includes language that plaintiffs will argue potentially limits Stolt-Nielsen to situations where the parties stipulated that they had not reached agreement on class arbitration. Expect plaintiffs seeking class arbitration to be encouraged by Oxford and renew their efforts to have arbitrators construe arbitration agreements to encompass class actions.”

Lawrence T. Gresser, Cohen & Gresser LLP
"The critical question in Oxford v. Sutter — whether, after Stolt-Nielsen, ... the class action procedure is available in arbitration — was answered in the affirmative, for this case only, because Oxford conceded that they had asked the arbitrator to resolve the issue (twice), and the arbitrator’s decision was therefore entitled to the highest degree of deference. But it is clear from both the majority opinion and the concurrence that the court would face a different issue — and might reach a different result — in a future case where the parties do not make this concession. Stay tuned."

Fred Hagans, Hagans Burdine Montgomery & Rustay PC
“This case, like Stolt-Nielsen, turns on the parties’ stipulation — here, an agreement that the arbitrator should decide whether the contract authorized class arbitration, as opposed to Stolt-Nielsen, where the parties agreed they had not reached an agreement on class arbitration. As such, this is a very limited opinion with little predictive impact. The court clearly signals the possibility, perhaps even the probability, that the Supreme Court will hold that arbitration clauses such as found in this case will not permit class arbitration absent express agreement. This case seems to demonstrate a clear hostility to class arbitration in the absence of express agreement — in the arbitration agreement or through stipulation — that the arbitrator will make the class determination. Arguably, a different result would have been reached if the defendant had argued from the outset that the agreement did not express an intent to permit class arbitration. This case illustrates the continuing tension between the Supreme Court’s affection for arbitration and its hostility to class actions, generally, and to class arbitrations specifically. It also signals a continued retreat from [Green Tree Financial Corporation v.] Bazzle."

Desmond Hogan, Hogan Lovells
"Today’s decision potentially increases the risks of class arbitration for defendants. As long as arbitrators’ decisions to permit class arbitration are even arguably based on the interpretation of an agreement, those decisions are not subject to searching judicial review. As a result, despite recent defense-side victories in Stolt-Nielsen and other recent Supreme Court cases, defendants face an increased likelihood of finding themselves in class arbitration with commercial stakes comparable to those of class-action litigation, yet without the protection of traditional judicial review. Yet the concerns expressed in the majority’s footnote and in the concurrence suggest that there will continue to be litigation about the availability of class arbitration. Going forward, defendants in cases presenting potential class-arbitration issues may do well to question whether they should concede that an arbitrator may pass on the question, or whether they might object on the ground that the availability of class arbitration poses a question of arbitrability warranting de novo review by a court."

William M. Jay, Goodwin Procter LLP
“The Supreme Court indicated that if a defendant sets up the argument in the right way, it might be able to get full court review of an arbitrator’s decision to allow class arbitration. But the defendant may need to preserve that argument at the very beginning, by asking the courts not to send questions of class arbitration to the arbitrator in the first place. That means litigation over what can be arbitrated before the arbitration even begins.”

Edith M. Kallas, WhatleyKallas LLP
“By way of background, our firm wrote the amicus brief filed by the American Medical Association and Medical Society of New Jersey in support of Dr. Sutter’s position. While many companies have forced physicians and others to arbitrate, when the arbitrators issue decisions that they do not like, they seek to vacate those decisions in court and try to argue that such decisions are subject to the same judiciary review as a trial court decision would be. As stated by the Supreme Court, 'Oxford chose arbitration, and it must now live with that choice.' The Supreme Court made clear that that its 2010 opinion in Stolt-Nielsen it did not alter the highly deferential standard that is to be applied by courts in their review of arbitral awards. This is a crucial development for class arbitration, as defendants across the country have argued for an expansive reading of Stolt-Nielsen in an effort to allow a far more searching inquiry into arbitrators' decisions allowing class certification.”

Alan S. Kaplinsky, Ballard Spahr LLP
“Oxford Health Plans v. Sutter should not have any widespread impact on class actions. The issue in Sutter — Does the agreement permit class arbitration? — arises infrequently because most arbitration agreements today contain express class action waivers. [Also,] whether a contract permits class arbitration necessarily varies with the contractual language — each case is unique. [And] in Sutter, the parties inexplicably agreed to let the arbitrator to decide the issue of class arbitration. In many, if not most, cases, at least one party will ask the court to decide that issue. Sutter indicated that might have changed the result.”

Matthew R. Korn, Fisher & Phillips LLP
“Although many employers have effectively addressed the problems associated with Oxford Health Plan’s arbitration clause by specifically prohibiting class arbitrations, the Supreme Court’s decision highlights the importance of regularly reviewing your company’s arbitration clauses to ensure the language explicitly states your company’s intentions. The need to review arbitration clauses is especially important today, when the National Labor Relations Board has taken the position that employees have a substantive right under Section 7 of the National Labor Relations Act to collectively arbitrate employment-related claims. Therefore, employers should carefully review arbitration clauses both to protect the company’s interests in potential future litigation and to evaluate the risk of an unfair labor practice finding by the board.”

Thomas Linthorst, Morgan Lewis & Bockius LLP
“The biggest question in this area remains unanswered by the court: [Is] whether the contract authorizes class procedures is a 'question of arbitrability' reserved for the courts, or a question for the arbitrator? In the absence of an answer to that question from the court, this decision makes clear that, if it is not a question of arbitrability, or if a party concedes that it is a question for the arbitrator, an arbitrator’s interpretation of the contract in answering that question controls ('however good, bad or ugly') and may not be disturbed by the court. It is only where 'the arbitrator strayed from his delegated task of interpreting a contract' that it may be overturned by a court. Until the 'question of arbitrability' issue is decided, this decision is likely to result in fewer defendants moving to compel class actions to arbitration where the arbitration agreement does not expressly preclude class actions.”

John F. Martin, Ogletree Deakins Nash Smoak & Stewart PC
“Oxford is a narrow ruling. The court did not decide 'the big issue' of whether the availability of class arbitration is a ‘question of arbitrability,’ i.e., a ‘certain gateway matter’ that courts get to decide. Companies that wish to avoid class arbitration in future cases should consider challenging the arbitrator’s authority to determine the availability of class arbitration. Under Oxford, if the parties consent to the arbitrator deciding the issue, then no matter how clear you think the clause may be, the parties will be bound by whatever he or she decides it says.”

Archis Parasharami, Mayer Brown LLP
"The court's decision in Oxford Health Plans v. Sutter is an extremely narrow one that is unlikely to have a significant impact going forward. Most arbitration clauses today do not suffer in silence — that is, they expressly preclude class arbitration — so businesses will not face the issue presented in Oxford. Any business that does make use of arbitration clauses that do not address class arbitration should consider revising its provisions to do so to remove any doubts. But even for such 'silent' arbitration clauses, Oxford leaves a great deal of room for businesses to argue that class arbitration is forbidden. The decision depends upon a concession that defendants are unlikely to make in the future; here, the court held, the defendant had conceded that an arbitrator should decide whether class arbitration is permissible. Future defendants will likely argue that courts should decide the question, and such decisions will not be subject to the same limited standard of review that is applied to arbitral awards."

Michael R. Pennington, Bradley Arant Boult Cummings LLP
"The Oxford Health decision demonstrates that relying on the mere silence of an arbitration clause as to class arbitration is dangerous business, and that the court's conclusion in Stolt-Neilsen that silence meant no class arbitration was more a product of the parties' unusual factual stipulations in that particular appeal than anything else. A clear and unambiguous affirmative waiver of class treatment is clearly safer than silence after Oxford Health. The question that remains to be answered is whether even that will always prove sufficient to prevent a rogue arbitrator from awarding class certification. So long as an arbitrator purports to be interpreting the language of the arbitration clause in arriving at a conclusion that class arbitration is authorized despite language apparently to the contrary, plaintiffs will argue that Oxford Health all but insulates the decision from review no matter how tortured the arbitrator's reasoning may be. Language requiring individual arbitration and precluding class treatment, but carving out the narrow issue of the interpretation and enforcement of the class waiver provision for decision by a court, may ultimately prove to be the safest course for those seeking to confine claims to individual arbitration. In fact, the court seems to drop this very hint in footnote 2 of the Oxford Health opinion."

John F. Querio and Felix Shafir, Horvitz & Levy LLP
"Today's decision will likely have only a limited impact on class actions generally. The parties in this case agreed that the arbitrator should decide whether the lawsuit could proceed as a class arbitration. The opinion signals that courts will respect that contractual arrangement, and leaves open the question of whether an arbitrator or a court must decide if class arbitration is appropriate where the parties have not agreed to refer that issue to the arbitrator."

Eric Weichmann, McCarter & English LLP
"This holding reaffirms two lessons for parties drafting arbitration agreements. First, class action arbitration will be allowed if the arbitration agreement can, in good faith, be interpreted by the arbitrator to allow class actions even if the agreement's language does not specify that process. If the language is broad enough so that an arbitrator can decide that the class action arbitration is appropriate the arbitration can proceed. Second, it is almost impossible to appeal an arbitrator's decision on the grounds he exceeded his authority by interpreting the agreement to allow such a procedure. Even a serious mistake by the arbitrator is not sufficient grounds as long as he made a good faith attempt to interpret the language of the clause. The arbitrator's decision will be set aside by a Court only in very unusual circumstances."

--Editing by Elizabeth Bowen.