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High Court Ruling Pushes Cos. To Tighten Arbitration Deals

By **Abigail Rubenstein**

Law360, New York (June 10, 2013, 10:26 PM ET) -- The U.S. Supreme Court's decision Monday to uphold an arbitrator's ruling that broad contractual language authorized class arbitration shows that companies looking to use contracts to ensure all claims are resolved through individual arbitration — rather than class actions — should make sure the language of those agreements is explicit, attorneys say.

In Monday's ruling, the justices unanimously affirmed an arbitrator's decision that a contract providing for the arbitration of any disputes arising under it constituted an agreement to permit class arbitration in a pediatrician's case accusing Oxford Health Plans LLC of failing to provide doctors full and prompt reimbursement for medical services. They concluded that because Oxford and the doctor had bargained for the arbitrator's construction of their agreement, any arbitral decision even arguably applying the contract should survive judicial review.

The high court has appeared hostile to class arbitration proceedings in other recent decisions, including Stolt-Nielsen v. Animal Feeds International Corp. and AT&T Mobility v. Concepcion. But in Oxford's case, the justices concluded that the parties had put a question of contract interpretation to the arbitrator and that since the arbitrator had done his job by answering it, his decision should stand.

"We're getting a little bit more of an education on whether or not we will be seeing, as some predicted, arbitration as the silver bullet that was going to kill class actions, and the answer may be: 'Not so fast,'" said Thomas G. Rohback of Axinn Veltrop & Harkrider LLP.

The justices did not endorse the substance of the arbitrator's interpretation of Oxford's contract with the physician, basing their ruling instead on the arbitrator's power to interpret the arbitration agreement once the parties had agreed he should decide whether their contract authorized class arbitration.

That leaves how another arbitrator or court might interpret similar contractual language up in the air. But lawyers say companies should at least expect that contracts not specifically including or excluding class arbitration will be up for interpretation in light of the high court's ruling — and that they may not like the interpretation they get.

"If the parties use broad, general language stating that all disputes arising under the agreement shall be decided by an arbitrator ... then whether such a clause includes or excludes class arbitrations will be left to the interpretation of the arbitrator," Jeffrey Crane of Edwards Wildman Palmer LLP said.

Companies that want to use arbitration agreements to bar class proceedings would be wise to address the issue explicitly, so that an arbitrator or court won't misapprehend their intentions, attorneys told Law360.

“Going forward, if you want to control the outcome, you are going to have to specifically include language in the contract that states this includes or doesn't include class arbitrations,” Crane said.

The Oxford decision clears up some ambiguity surrounding the high court's Stolt-Nielsen decision from several years ago. In that case, the Supreme Court overturned an arbitrator's decision to permit class arbitration, holding that a party may not be compelled under the Federal Arbitration Act to submit to class arbitration unless there is a contractual basis for concluding the party had agreed to do so.

Some interpreted this to mean that only an agreement that expressly provided for class arbitration as an option could be used to trigger a classwide proceeding.

But the Supreme Court's decision in the Oxford case distinguished it from Stolt-Nielsen. Whereas in Stolt-Nielsen, the parties had stipulated that they had not reached an agreement on the use of class procedures, in Oxford's case, the parties had agreed that the arbitrator should interpret whether the agreement allowed class proceedings, the ruling noted.

This means companies looking to escape class arbitration using an agreement that doesn't expressly preclude it won't be able to point to Stolt-Nielsen to end the discussion, attorneys say.

“[The Oxford decision] emphasizes that the fact that the agreement was 'silent' in Stolt-Nielsen was not a function of the agreement not addressing class actions directly, but of the parties' unusual stipulation that they had no agreement as to class arbitration,” said Tom Linthorst of Morgan Lewis & Bockius LLP.

Companies drafting new agreements can protect their interests better with explicit provisions than with silence, lawyers say.

But the decision may still offer some hope to companies with older agreements featuring broad language similar to that in Oxford's agreement, because the court took pains to note that it was not blessing the arbitrator's actual interpretation of the contract, just his ability to decide the issue.

A company looking to compel individual arbitration under a broad agreement could point to the high court's skepticism toward the arbitrator's take on the issue, according to Marc Bernstein of Paul Hastings LLP.

“One very important aspect of the decision is the repeated implication that the arbitrator's interpretation was wrong,” Bernstein said.

However, by backing the arbitrator anyway, the decision also highlights a feature of arbitration that attorneys say companies ought to consider thoroughly before deciding to enter into arbitration agreements in the first place: namely, that an arbitrator's decision is not easily overthrown.

All nine justices agreed that the arbitrator's decision to permit class proceedings against Oxford should be upheld, regardless of whether his interpretation of the contract was correct.

“The case afforded the entire court the opportunity to reaffirm the authority of the arbitrator,” Linthorst said.

But Linthorst warned that arbitration has its downside: Opportunities for judicial review are limited if the company ends up disappointed by the arbitrator's ruling.

“This stands as a cautionary tale that there are advantages and disadvantages to arbitration agreements, and each individual or company entering into them has to be mindful of those advantages and disadvantages," he said.

Oxford is represented by in-house lawyers Matthew Shors and Brian Kemper of Oxford parent company UnitedHealth Group Inc., P. Christine Deruelle of Weil Gotshal & Manges LLP, Adam N. Saravay of McCarter & English LLP, and Seth P. Waxman, Edward C. DuMont, Paul R.Q. Wolfson, Joshua M. Salzman and Daniel T. Deacon of WilmerHale.

Sutter is represented by Eric D. Katz of Mazie Slater Katz & Freeman LLC.

The case is Oxford Health Plans LLC v. John Ivan Sutter M.D., case No. 12-135, in the U.S. Supreme Court.

--Editing by Kat Laskowski and Chris Yates.