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High Court's Oxford Ruling May Devastate Class Arbitration

By **Stewart Bishop**

Law360, New York (March 22, 2013, 8:41 PM ET) -- With the U.S. Supreme Court set to hear oral arguments on Monday in Oxford Health Plans LLC's appeal of a ruling forcing it into class arbitration with doctors challenging its reimbursement practices, attorneys say a reversal could spell the end for classwide arbitration if an employer hasn't specifically agreed to it.

Oxford is challenging the Third Circuit's April ruling that an arbitrator can send parties to class arbitration even if their contracts don't explicitly authorize it. The decision upheld a ruling that forced Oxford to arbitrate on a class basis with as many as 20,000 physicians who accused the insurer of improperly denying, underpaying and delaying reimbursement of claims.

While the case doesn't fall under the umbrella of employment law, many attorneys believe if the high court overturns the Third Circuit's decision, employers will no longer face the threat of class arbitration unless they have expressly consented to such a proceeding, which is unlikely.

Taking into account the high court's rulings in AT&T Mobility LLC v. Concepcion and Stolt-Nielsen SA v. AnimalFeeds International Corp., "if the Supreme Court overturns this case, it will be very difficult to bring a class arbitration or a class action unless you have an existing agreement that allows it," Robert Cocchia of McKenna Long & Aldridge LLP said.

The Stolt-Nielsen decision held that imposing class arbitration on parties that haven't agreed to it conflicts with the Federal Arbitration Act. The Concepcion ruling — issued exactly a year after Stolt-Nielsen — said the FAA trumped a California rule banning arbitration clauses containing class action waivers.

In Oxford, the Third Circuit found that the broad arbitration clause in a primary-care physician agreement did not need to explicitly mention class arbitration for it to be signed off on, ruling that the contract provided enough evidence of an intent to arbitrate on a classwide basis that explicit authorization was not required.

Anne Yuengert of Bradley Arant Boult Cummings LLP also said a ruling for Oxford would make class arbitration a less likely outcome in most cases.

"I think if they side with Oxford, unless your arbitration agreement specifically talks about class arbitration, you won't be able to pursue it," Yuengert said.

Given that the same majority that issued the Stolt-Nielsen ruling is still on the Supreme Court, Thomas A. Linthorst of Morgan Lewis & Bockius LLP said he believes it's unlikely the Supreme Court will issue a ruling that will be limited to the narrow facts at issue.

"My guess is that the same majority in Stolt-Nielsen will expand on that ruling to provide guidance on whether an arbitration agreement that doesn't stipulate for class arbitration can ever be found to allow it," Linthorst said.

McKenna said given the court's ruling on Concepcion, he expects the high court to overturn the Third Circuit's ruling in Oxford.

"I would be surprised if the Supreme Court doesn't see through the arbitrator's analysis and overturn the ruling," McKenna said. "If it doesn't, it will leave a lot of confusion."

However, Paul Lancaster Adams, the managing shareholder of Ogletree Deakins Nash Smoak & Stewart PC's Philadelphia office, said although he expects the high court will provide employers with guidance in drafting arbitration provisions in employment agreements, he doesn't think it will overturn the Third Circuit's decision.

"Looking at the Third Circuit's opinion, the court was describing an arbitration clause that is much broader than the usual clause," Adams said. "I really don't think it will be ruled out of bounds."

Adams said that employers need to take a close look at the language in their arbitration agreements and make adjustments accordingly if they want to avoid class proceedings.

"If it doesn't say class action and you don't want a class action or class arbitration, then you might be in trouble," Adams said.

Regardless of how the Supreme Court decides this case, Yuengert said employers are likely to increase their use of class waiver provisions in arbitration agreements to avoid the potential for the increased cost of class arbitration.

"Even under the Third Circuit's reasoning, if you have a waiver provision, you've waived your class rights," Yuengert said. "The important thing to remember is that employers enter into arbitration agreements because they're looking for cost savings. Class arbitration really undermines that for employers."

Linthorst also said that whichever way the Supreme Court rules, class waivers are the way to go.

"In this post-Stolt and Concepcion world, you don't leave it to chance," Linhorst said. "You put language rejecting class arbitration in the agreement."

What would be ideal for employers, McKenna says, would be if the high court will hand down a ruling that says unless it is specifically allowed for in an arbitration agreement, one can't compel class arbitration, noting that while a company could be subject to numerous individual claims in arbitration, its chances for resolving a case quickly and for less cost are better than in a class proceeding.

"Those cases aren't driven by attorneys seeking as large fees as possible like in a class proceeding," McKenna said. "And in some cases, the class representative may have a strong claim, but that may not be true of the individual class members. You can get rid of a large majority of employees who don't have a similar claim."

--Additional reporting by Ben James and Abigail Rubenstein. Editing by Sarah Golin and Katherine Rautenberg.