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No Magic Words Are Needed To Signal Class-Arbitration Intent, Court Says

By David Gialanella

A federal appeals court sharpened the pencil Tuesday on a 2010 U.S. Supreme Court ruling that requires evidence of a contractual basis in order for class arbitration to be enforceable.

That ruling "did not establish a bright-line rule that class arbitration is allowed only under an arbitration agreement that incants 'class arbitration' or otherwise expressly provides for aggregate procedures," a three-judge panel of the U.S. Court of Appeals for the Third Circuit said in a precedential decision.

The case, *Sutter v. Oxford Health Plans*, 11-1773, is one in a series of class disputes lodged by doctors and dentists aimed at reforming insurers' claims-processing practices.

Oxford's 1998 primary care physician agreement contained an arbitration clause but made no express mention of class arbitration.

In 2002, Dr. John Ivan Sutter filed a putative class action in New Jersey Superior Court against Oxford and other carriers, claiming they improperly denied claims, underpaid and were slow to reimburse them for medical services rendered. Over Sutter's objections, the court granted Oxford's motion to compel arbitration.

The parties disputed whether they intended to authorize class arbitration in the agreement. In 2003, arbitrator William Barrett determined that the arbitration clause permits class arbitration, pointing to the provision's breadth.

The phrase "civil action concerning any dispute" would include class actions, and the provision sends "all such disputes" to arbitration, meaning that class disputes also must be arbitrated, he said, adding that a "carve-out" would be necessary to negate that interpretation.

Barrett issued a partial final class determination award in March 2005. Oxford challenged the award before U.S. District Judge Joseph Greenaway Jr. in New Jersey, invoking diversity jurisdiction, and later at the Third Circuit, but failed at both levels. The matter then proceeded to discovery as class arbitration.

In the meantime, the Supreme Court issued *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), holding that an arbitration panel that ordered class arbitration exceeded its power under the Federal Arbitration Act. The agreement was silent on class arbitration, which may not be inferred from the mere fact of the parties' agreement to arbitrate, the Court said.

In light of *Stolt-Nielsen*, Oxford urged Barrett for reconsideration of the award, but he reaffirmed his reading and distinguished *Stolt-Nielsen*.

After U.S. District Judge Garrett Brown Jr. confirmed the award, Oxford again appealed, leading to Tuesday's ruling.

Circuit Judges Julio Fuentes and Michael Chagares, along with Chief Judge Donald Pogue of the U.S. Court of International Trade, sitting by designation, found Oxford's position that the clause is silent on class arbitration "seems to suggest that an arbitration provision is 'silent' whenever the words 'class arbitration' are not written into the text of the arbitration clause."

That reading would "effectively impose on all contracting parties an obligation to use the words 'class arbitration' to signal their intention" and "cabin the freedom of contracting parties … to structure their arbitration provision as they see fit," Fuentes wrote.

The judges brushed off Oxford's arguments that Sutter effectively stipulated, in early filings to the Superior Court, that the parties did not intend to agree to class arbitration. Sutter's litigation position was neither uniform nor probative of the meaning of Oxford's clause. And Oxford's claims that Barrett's interpretation of the parties' intent was mere pretext for imposing his policy preferences "are simply dressed-up arguments that the arbitrator interpreted its agreement erroneously," Fuentes wrote.

Stolt-Nielsen did not prohibit Barrett from relying on the clause's breadth to determine that class arbitration was authorized, the court said, adding that he "did not impermissibly infer the parties' intent to authorize class arbitration from their failure to preclude it."

Plaintiffs lawyer Eric Katz of Mazie Slater Katz & Freeman in Roseland calls it a "very important" and "very common-sense, logical decision."

No drafter would see fit to include express reference to class arbitration in an arbitration clause, meaning the inquiry can't be as simple as scanning for the exact phrase, Katz says.

"It's their clause — they created it," he says. "It's always going to be an issue of contract interpretation."

"We're going to pick up where we left off [in expert discovery], and hopefully this arbitration will be done within the year," Katz adds.

P. Christine Deruelle of Weil, Gotshal & Manges in Miami, who argued Oxford's case, did not return a call.

Oxford also is represented by Marc De Leeuw of Sullivan & Cromwell in New York and Adam Saravay of McCarter & English in Newark.

Similar disputes over insurers' billing practices are pending or have been resolved. A settlement in *Sutter v. Horizon Blue Cross Blue Shield of New Jersey*, ESX-L-385-02, was approved in 2010, after nine medical groups unsuccessfully challenged the deal because it provided only equitable, not monetary, relief. The Appellate Division heard arguments on March 21 on the objectors' challenge to the fee award.

Another suit over billing practices, brought by dentists, *Kirsch v. Delta Dental of New Jersey Inc.*, 07-cv-186, settled as of Feb. 8. One class member appealed the settlement, challenging the fee award. Katz, who represents the plaintiffs, filed motions to invalidate the objection as untimely or alternatively to compel the objector to pay a $25,000 appeal bond. U.S. District Judge Stanley Chesler is scheduled to rule on the motions next month. Two related suits, *Kirsch v. Horizon* I, ESX-L-4216-05, and *Kirsch v. Horizon* II, ESX-L-109-08, are in discovery. ■