# Law360's Weekly Verdict: Legal Lions & Lambs

By **Andrew Strickler** 0 Comments Share us on:

Law360, New York (June 13, 2013, 7:28 PM ET) -- The big cats gathered in Washington, D.C., this week, where the U.S. Supreme Court laid down a series of important decisions on human DNA patents, sentencing guidelines, and judicial involvement in plea agreements. Among this week's legal lambs are lawyers for generic-drug makers who succumbed to a nine-figure settlement, and a handful of budget-minded firms that cut loose some colleagues.

**Legal Lions**

Attorney **Eric Katz** of **Mazie Slater Katz & Freeman LLC** got a unanimous high-five from U.S. Supreme Court, which backed the **decision-making authority of arbitrators** whether their interpretation of contracts is "good, bad or ugly." In a 9-0 opinion, the court said that because both **Oxford Health Plans LLC** and Katz's client, Dr. John Sutter, had bargained for the arbitrator's construction of an insurance agreement, the arbitrator's choice to interpret the contract to allow class proceedings must stand.

The criminal defense bar found the high court less in sync but still walked away with a big win, courtesy of attorneys from **Paul Hasting LLP.** In a case brought by a convicted bad-check writer, the court said in a 5-4 ruling that it's unconstitutional to **retroactively apply sentencing guidelines** that are more severe than those in place at the time of the offense. Defense lawyers predicted the ruling would affect a large number of the U.S. Sentencing Commission's recommendations, particularly in cases that involve long statutes of limitation. The petitioner was represented by **Stephen Kinnaird, Katherine Murray, Candice Castenada** and **Amy Jensen** of **Paul Hastings.**

Patent infringement defense attorneys also got a boost when the U.S. Patent and Trademark Office invalidated a **Versata Software Inc.** patent and handed a victory to lawyers for challenger **SAP America Inc.** The **first-ever patent challenge decision** under the America Invents Act is expected to allay fears that the office would hesitate to strike down patents it previously issued. The alleged infringement on a product pricing patent had previously resulted in $391 million in damages in the Federal Circuit against SAP. The company was represented by **Erika Arner** of **Finnegan Henderson Farabow Garrett & Dunner LLP** and **J. Steven Baughman** of **Ropes & Gray LLP.**

In another win for the IP bar, lawyers with **WilmerHale** helped create a **new line of defense** for patent owners by securing a Federal Circuit ruling that a statement on **Monsanto Co.'s** website barred a group of farmers from filing suit to challenge the validity of Monsanto's seed patents. The ruling nixed a lawsuit by a group of farmers attempting to invalidate 23 patents associated with the company's genetically modified Roundup Ready seeds. Monsanto is represented by **Seth Waxman, Paul Wolfson, Todd Zubler, Gregory Lantier, Carolyn Chachkin** and **Rachel Weiner** of **WilmerHale.**

Our final legal lions are counsel for **BP PLC** and **Statoil ASA,** who sank oil tycoon Jack Grynberg's claims that they violated federal racketeering law by paying a bribe to the government of Kazakhstan. The Fifth Circuit **upheld an arbitration dismissal,** and backed a Texas federal court's ruling that Grynberg didn't suffer injury and couldn't litigate his claims that the firms' $175 million Kazakh payment constituted a bribe. BP PLC is represented by **Sullivan & Cromwell LLP** and **Andrews Kurth LLP.** Statoil is represented by **Emmet Marvin & Martin LLP.**

**Legal Lambs**

Despite some solid victories this week, the patent defense bar suffered a major blow when the U.S. Supreme Court ruled that **human genes can't be patented.** In a ruling with heavy implications for the life sciences industry, the high court struck down patents held by **Myriad Genetics Inc.** on DNA associated with an increased risk of breast cancer, saying Myriad merely discovered the genes' location and sequences and they couldn't be considered Myriad's invention. Plaintiffs were represented by **Christopher Hansen, Sandra Park, Steven Shapiro** and **Lenora Lapidus** of the **American Civil Liberties Union** and **Daniel Ravicher** and **Sabrina Hassan** of the **Public Patent Foundation.** Myriad was represented by **Gregory Castanias, Brian Poissant, Laura Coruzzi, Jennifer Swize, Israel Sasha Mayergoyz** and **Dennis Murashko** of **Jones Day,** and in-house counsel **Richard Marsh, Benjamin Jackson** and **Matthew Gordon.**

The white collar defense bar also took a hit in the U.S. Supreme Court when the justices overturned a controversial Eleventh Circuit decision regarding a judge's involvement in plea deals. The high court ruling that a defendant's guilty plea **should not be automatically tossed** when a judge participates in plea talks reversed the lower court's decision that "automatic vacatur" was required whenever Rule 11 was violated, regardless of whether the violation was prejudicial. The defendant was represented by **E. Joshua Rosenkranz, Robert Loeb, Robert Yablon, Mary Kelly Persyn** and **David Spencer** of **Orrick Herrington & Sutcliffe LLP** and **J. Pete Theodocion** of **J. Pete Theodocion PC.**

Attorneys for generic-drug makers **Teva Pharmaceutical Industries Ltd.** and **Sun Pharmaceutical Industries Ltd. swallowed a bitter pill** in the form of a $2.15 billion settlement with **Pfizer Inc.,** ending nearly a decade of litigation over acid-reflux drug Protonix. Teva will pay Pfizer and licensing partner Takeda Pharmaceutical Co. $1.6 billion and Sun will pay them $550 million, putting to rest Pfizer's long-running claim that their launch of generic versions of Protonix violated its patent for the drug. Sun was represented by **Katten Muchin Rosenman LLP, Podvey Meanor Catenacci Hildner Cocoziello & Chattman PC.** Teva was represented by **Goodwin Procter LLP** and **Lite DePalma Greenberg LLC.**

Job jitters were a problem at a handful of BigLaw firms in recent days. Late last week, **Orrick Herrington & Sutcliffe LLP's** new chairman said he'd **eliminated at least two executive positions** and cut or transferred nearly three dozen staff members as part of a "streamlining" strategy. And just 15 months after **Curtis Mallet-Prevost Colt & Mosle LLP** opened an office in Kuwait, the firm decided to **shutter the outpost,** as Dentons partners considered taking the same step in the Persian Gulf nation. The vice chairman of **Epstein Becker Green** also announced a closure, saying its 14-attorney Atlanta office **won't survive the year.**

Our final legal lamb is **Scott Saidel,** a Florida attorney who represented the wife of convicted Ponzi schemer Scott Rothstein. He was **disbarred in Arizona** after pleading guilty to charges that he helped Rothstein's wife hide a stash of jewelry from federal investigators. Rothstein's wife, Kimberly, has also **pled guilty to conspiracy charges** that

she hid more than $1 million in jewels bought with proceeds from her husband's $1.2 billion scheme. Saidel represented himself.

--Editing by John Quinn.

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# Justices Defer To Arbitrator On Oxford Class Arbitration

By **Abigail Rubenstein** 0 Comments Share us on:

Law360, New York (June 10, 2013, 1:52 PM ET) -- The U.S. Supreme Court on Monday unanimously affirmed an arbitrator's decision to allow class arbitration based on broad contractual language in a doctor's dispute with Oxford Health Plans LLC, saying that courts cannot second-guess an arbitrator's interpretation of a contract.

In an opinion penned by Justice Elena Kagan, the justices upheld a Third Circuit ruling that backed the arbitrator's decision, explaining that because both Oxford and John Sutter, the doctor who brought the claims, had bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its merits.

The sole question before the court in Oxford's challenge to the arbitrator's decision to permit class proceedings was whether the arbitrator — even arguably — interpreted the parties' contract, not whether he got its meaning right or wrong, and in this case the arbitrator was indeed interpreting the contract, the high court's decision said.

"In sum, Oxford chose arbitration, and it must now live with that choice," the opinion said. "Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration."

Sutter, a pediatrician, claims that Oxford failed to provide him and other New Jersey-based physicians with full and prompt payment, in violation of their agreements and various state laws. His contract with the insurer provided that any disputes arising under it would be decided by an arbitrator, as opposed to the courts, but never explicitly mentioned class proceedings.

The arbitrator overseeing the case concluded that the contract's mention of "any dispute," meant that class proceedings showed an intention to allow class proceedings even in the wake of the high court's ruling in Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.

In Stolt-Nielsen, which overturned an arbitrator's decision to permit class arbitration, the justices held 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 that the party agreed to do so.

However, the justices found that Oxford's case was different from Stolt-Nielsen because in that case the parties had stipulated that they had not reached an agreement regarding class arbitration, so the arbitrator did not construe the contract.

In Oxford's case, by contrast, the arbitrator interpreted the contract and found that there had been an agreement to arbitrate, the opinion said.

In order to overturn the decision, therefore, the court would have to find that the arbitrator had misapprehended the parties' intent when he made that interpretation, but Section 10 (a)(4) of the FAA bars a court from making that determination, the justices held.

The justices noted that they were not endorsing the arbitrator's interpretation of the contractual language or disagreeing with Oxford's contrary interpretation of it, but said instead that issue could not be properly put before a court.

Section 10(a)(4) permits a court to vacate an arbitrator's decision only when the arbitrator has strayed from his delegated task of interpreting a contract — not when he performed that task poorly, the justices said.

The arbitrator's decision to allow class arbitration against Oxford thus survives the "limited judicial review" Section 10(a)(4) allows, the opinion said.

"The arbitrator's construction holds, however good, bad or ugly," it said.

Sutter's attorney Eric D. Katz of Mazie Slater Katz & Freeman LLC hailed the decision as a victory for consumers and employees, who are often subject to arbitration agreements, saying that the court had reinforced the viability and availability of classwide arbitration.

He also said the decision went to the heart of arbitration's purpose.

"It underscores what arbitration is all about: It's about finality," Katz told Law360. "If the parties decide and contract to go into arbitration, they do so expecting to live and die by the arbitrator's decision and not to be able to run back and forth to court every time they don't like what arbitrator does."

A concurring opinion written by Justice Samuel Alito and joined by Justice Clarence Thomas stated that because Oxford had conceded that the arbitrator should decide whether class arbitration was allowed and only narrow judicial review of an arbitrator's contract interpretation is permitted the decision should stand even though they believed the interpretation to be erroneous. But it questioned whether absent class members should be bound by the arbitrator's ultimate resolution of the case, saying there was no reason to believe that they had submitted to the arbitrator's authority.

An attorney for Oxford was not immediately available for comment on Monday.

Oxford is represented in its bid for high court review 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 number 12-135, in the U.S. Supreme Court.

--Editing by Stephen Berg.

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# Berkeley Heights attorney wins case before U.S. Supreme Court

Eric D. Katz argues his first case before the U.S. Supreme Court. *(Todd Crespi)*



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on June 12, 2013 at 6:01 PM, updated June 12, 2013 at 6:03 PM



BERKELEY HEIGHTS (http://www.nj.com/berkeley-heights/) — Arguing his first case before the United States Supreme Court, a Berkeley Height lawyer won a unanimous 9-0 decision.

"It was another day at the office, with an added kicker as a bonus," Eric D. Katz said of the victory.

A trial attorney and a partner at Mazie Slater Katz and Freeman in Roseland, Katz has lived in Berkeley Heights for more than 20 years. His two children, Alexa, 20, and Josh, 15, went to Washington, D.C., to see him argue the case and, because no cameras of any type are permitted in the courtroom, he hired an artist Todd Crespi, to do a sketch of him at work.

Justice Elena Kagan delivered the unanimous opinion in the case, Sutter vs. Oxford, in which the court affirmed the decision of the Third Circuit Court of Appeals. The justices upheld the rights of physicians to arbitrate their claims of improper claims

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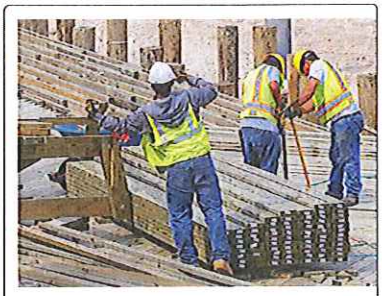


Eric D. Katz

processing against Oxford Health Plans, one of the largest health insurers in the country, on a class-wide basis. Justice Samuel A. Alito filed a concurring opinion joined by Justice Clarence Thomas.

Katz said the decision was important for "employees and consumers in this country, as well, of course, as physicians."

The decision means that people who sign contracts with companies that state in the event of a dispute with the company the person must go to arbitration, do not exclude the individual from filing for a class action arbitration.

Katz said he began working on the case in 2002, when he filed a lawsuit in Superior Court on behalf of his client, John Ivan Sutter, a pediatrician in Clifton, arguing that the arbitration provision in his client's contract with Oxford Health Plans was "invalid and against public policy." He said he also "argued if the arbitration clause was going to be enforced, the provision should be interpreted as allowing for a class action" arbitration.

Requiring someone to go to arbitration is a way to keep people with disputes out of court, especially small claims courts, Katz said. "Large corporations feel that you definitely have to hire a lawyer" to navigate the arbitration process including knowing where and when to file papers," Katz said. "In addition, they have to pay the arbitrator his fees ... What they are counting on, is you will say 'the heck with it. I'm not going to spend a zillion dollars to win $500 ... Businesses want you to give up."

**The "only way to address these issues is to allow class action, otherwise the big corporations win."**

By allowing a class action in arbitration, that means there is "one person who is like a representative of everyone who has had the same problem," Katz said.

In the case of Sutter, "he basically stands in the shoes of 20,000 doctors (in New Jersey) with the same problem." He said Sutter suffered an annual loss of about $1,000 a year over 10 years, which really didn't warrant the cost of a lawsuit, but 20,000 doctors suffering the same loss, $20 million over 10 years, more than warranted the class action arbitration.

What makes this case so important, Katz said, is the number of agreements out there "that have arbitration agreements with prohibition of class actions." So, for instance, if issues of racial or sexual discrimination come up, "if you were not permitted to go into arbitration as a class, they would need each person to step up to the forefront to file for arbitration. Now, as long as one person is willing to step up that person will address every person's situation." Katz said.

He added that some businesses have already started adding "no class action" clauses in their agreements and is sure more will do so in the future.

Still, there are actions that have been on hold waiting for this decision. "Those cases should benefit greatly from this decision," Katz said.

The decision caused a lot of chatter on the Internet, he said. "Forbes talked about how the business world was disappointed about the decision, while others wrote about how class actions are alive and well."

In the long run, Katz said he believes that the "only way to address these issues is to allow class action, otherwise the big corporations win."

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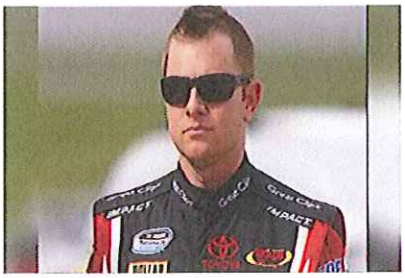

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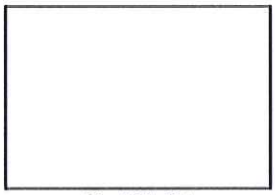

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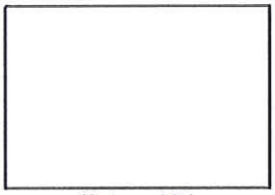

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**Editor's Note :** On Thursday, June 13, we expect opinions in argued cases. We will begin live blogging shortly before 10 a.m.

Steve Vladeck *Guest*
Posted Mon, June 10th, 2013 2:05 pm

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# Opinion analysis: Tentatively reopening the (back) door to class arbitration

For the past three years, numerous courts and commentators have understood the Supreme Court's 2010 decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* as all but sounding the death knell for class-wide – as opposed to individual – arbitration. After all, *Stolt-Nielsen* held that the Federal Arbitration Act bars class arbitration unless parties have specifically agreed to allow it, and virtually no arbitration agreements include express class-arbitration authorizations. But as Monday's unanimous decision in *Oxford Health Plans, LLC v. Sutter* makes clear, reports of the demise of class-wide arbitration may have been greatly exaggerated.

Instead, reiterating the deference due to arbitrators when it comes to their interpretation of arbitration agreements, the Court affirmed without dissent an arbitrator's interpretation of an arbitration agreement as authorizing class-wide arbitration despite the absence of *any* clear language to that effect. In the process, Justice Kagan's opinion for the Court may thereby have provided a roadmap for arbitrators going forward on how to frame decisions on class arbitrability to vitiate *Stolt-Nielsen*'s force – albeit with one potentially significant caveat.

I

As we noted in our argument preview, *Oxford Health* required the Court to clarify a point that it had been able to sidestep in *Stolt-Nielsen*: Although the 2010 decision had held – controversially – that parties must "affirmatively agree" to class-wide arbitration, the parties to that case had stipulated for purposes of litigation that no such agreement existed. Thus, although *Stolt-Nielsen* articulated a potentially critical principle to govern the availability of class-wide arbitration, it expressly reserved "what contractual basis *may* support a finding that the parties agreed to authorize class-action arbitration." Justice Alito's opinion for the *Stolt-Nielsen* majority thereby left unresolved whether the parties' consent to class-wide arbitration had to be express, or whether it could be inferred from the four corners of the arbitration agreement and/or parol evidence.

This distinction is critical because of the deference ordinarily due to an arbitrator's interpretation of arbitral agreements. Under the relevant provision of the Federal Arbitration Act, courts may vacate arbitral awards only "where the arbitrators exceeded their powers"—a standard far more deferential than *de novo* review. Whereas *Stolt-Nielsen* had stressed that "an arbitrator lacks the power to order class arbitration unless there is a contractual basis for concluding that the parties agreed to that procedure," the Third Circuit had nevertheless held in *Oxford Health* that an arbitrator's finding of a contractual (as opposed to extra-contractual) basis for so concluding is still entitled to deference under the FAA, thereby leaving intact an arbitrator's interpretation of vague and ambiguous contractual language as supporting class arbitration – and joining a five-way circuit split in the process.

II

The Supreme Court affirmed. As Justice Kagan explained, under the FAA, "the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Distinguishing *Stolt-Nielsen*, the Court emphasized that it "overturned the arbitral decision there because it lacked *any* contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a 'sufficient' one." Put another way, "in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role."

Here, by contrast, the arbitrator clearly *had* purported to interpret the contract – however incorrectly. And "[s]o long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes under § 10(a)(4). . . . The arbitrator's construction holds, however good, bad, or ugly." Perhaps surprisingly, given the tenor of the oral argument, Justice Kagan's opinion provides little in the way of clarification of what it means for an arbitrator to be "arguably construing" the arbitration agreement. Indeed, it may well be that it is enough merely for an arbitrator to *say* that his finding of consent to class-wide arbitration is based upon the arbitral agreement – even if the supporting analysis is utterly unconvincing, if not implausible, on its face. If so, then *Oxford Health* converts *Stolt-Nielsen* into little more than an opinion-drafting guide for arbitrators.

At the same time, and much like *Stolt-Nielsen*, *Oxford Health* reserved a potentially critical question in a footnote. As Justice Kagan explained for the Court in footnote 2, the standard of review might very well be different if the party challenging the arbitrator's decision claimed that it was on a "question of arbitrability," as opposed to a matter clearly within the arbitrator's purview – since questions of arbitrability are typically reviewed de novo. Because Oxford had not challenged the arbitrability of the propriety of class-wide arbitration (indeed, Oxford twice submitted

that issue to the arbitrator), the Court in this case did not need to reach whether that standard should have applied instead. (Such a concession also led Justice Alito to concur, even though, as he explained in a separate opinion joined by Justice Thomas, he does not believe that unnamed class members could otherwise have been bound by class arbitral awards when they did not *individually* consent to class-wide proceedings.)

Thus, footnote 2 might suggest, as Tom noted earlier, that "the case is unlikely to have much if any broader significance." But just how large a caveat this is remains to be seen. After all, it's not immediately clear how the question at the heart of today's decision – whether the parties consented to class-wide arbitration – comfortably fits within the Court's understanding of "questions of arbitrability." Whether the parties agreed to class-wide arbitration does not go to the validity of the underlying arbitration agreement or to whether a particular controversy is covered by an arbitration clause; rather, it goes to the *procedures* by which a matter that has necessarily been submitted to arbitration will be resolved.

Of course, footnote 2 may portend an expansion of the Court's jurisprudence with regard to "questions of arbitrability," but that, too, would be a surprising development, given the trend in the Court's jurisprudence to shift ever more decision making *into* arbitration. If nothing else, *Oxford Health* drives home the consequences of that trend – that, even when arbitrators misinterpret arbitration agreements on issues as important as whether the parties consented to class-wide arbitration, there won't necessarily be anything courts can do to fix it.

**In Plain English**:

When parties agree to submit a particular dispute to arbitration, as opposed to litigation before a state or federal court, one party can represent a large class of similarly situated claimants in the dispute – rather than having each potential claimant bring his claim in a separate, individual arbitration proceeding – only if the parties have also specifically agreed to that scenario. But when an arbitrator makes a decision about whether the parties had or had not specifically agreed to class-wide arbitration based on the text of the underlying contract, courts cannot overturn that decision even if it is wrong.

Posted in *Oxford Health Plans LLC v. Sutter*, Featured, Merits Cases

**Recommended Citation:** Steve Vladeck, *Opinion analysis: Tentatively reopening the (back) door to class arbitration*, SCOTUSblog (Jun. 10, 2013, 2:05 PM), http://www.scotusblog.com/2013/06/opinion-analysis-tentatively-reopening-the-back-door-to-class-arbitration/

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June 11, 2013

# U.S. Supreme Court Sides with Physicians in Arbitration Dispute with Health Insurer

**For immediate release:**
**June 11, 2013**

*AMA and MSNJ support the contractual rights of physicians*

**Washington, D.C. -** The American Medical Association (AMA) and the Medical Society of New Jersey (MSNJ) heralded yesterday's decision by the U.S. Supreme Court allowing individual physicians to come together as a group to fight the unfair business practices of large health insurance companies.

"This important ruling allows thousands of physicians to use class arbitration against a health insurer that has underpaid them for more than a decade," said AMA President Jeremy A. Lazarus, M.D. "Without this broad-scale arbitration, physicians would have no practical means of challenging a health insurer's unfair payment practices."

"It is a sad commentary that it took a decade for Dr. Sutter and other New Jersey physicians to exercise the dispute mechanism allowed by their contracts," said MSNJ General Counsel Melinda Martinson. "A timely class-arbitration would have allowed them to have their payment disputes resolved more expeditiously and cost-effectively. The decision is welcome news to physicians in New Jersey and all who are concerned with reducing the cost of medicine in this country."

The decision in *Sutter v. Oxford Health Plans* concludes a dispute dating back to September 2003 when New Jersey pediatrician John Sutter, M.D., alleged that Oxford Health Plans had systematically bundled, down coded and delayed payments for his services and those of 20,000 other physicians in its network. Oxford Health Plans had challenged legal decisions supporting class arbitration of the dispute and appealed the case to the U.S. Supreme Court.

The Litigation Center of the AMA and State Medical Societies and the Medical Society of New Jersey (MSNJ) filed a friend-of-the-court brief urging the high court not to limit physicians' ability to fight insurer disputes as a group. The AMA-led brief noted that health insurers like Oxford know that arbitrating disputes with individual physicians works to their advantage by allowing contract violations and underpayments to persist and leaving physicians with no effective means to challenge unfair business practices.

The high court's ruling in favor of physicians gives a boost to the medical profession's efforts to address unfair corporate policies of large health insurers that are bad for patients and physicians.

###

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# Arbitration Means Never Having To Say You're Sorry

Gene Connors, Contributor

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**By Steven B. Katz**

Monday's U.S. Supreme Court decision in *Oxford Health Pl*
*Sutter*— prophesied as the second coming of *Stolt-Nielsen S.*
*Int'l Corp.*, 559 U.S. 662 (2010)—was to be the Supreme Co
holding that class relief cannot be imposed if an arbitration
not expressly permit class relief. Employers salivating to hea
*Health* that their arbitration agreements are class-action-pr
bitterly disappointed. A (rare) unanimous Court resolved th
simpler principle: when you ask for arbitration, that's exactly what you get. If, after the fact, you don't like what you asked for, tough.

In *Oxford Health*, a pediatrician filed a class action suit against a health insurer to collect fees allegedly owed to physicians for services. The insurer asked the trial court to send the case to arbitration, which it did. The insurer then agreed with the physician that the arbitrator could decide whether the arbitration agreement—which was silent on the question—permitted class arbitration. When the arbitrator decided that it did permit class arbitration, the insurer challenged the decision in court, arguing that the arbitrator "exceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act, because the arbitrator's decision was wrong under *Stolt-Nielsen*.

Justice Kagan, for the unanimous Court, held that the issue was not whether the arbitrator made the right decision, but whether the parties got what they asked for—a decision by an arbitrator. Because the parties asked the arbitrator to decide whether the agreement's silence permitted class arbitration, the arbitrator's decision "must stand, regardless of the court's views of its (de)merits." (That's right—the Court wrote "(de)merits"—we didn't add the "de.") Because "the arbitrator did what the parties had asked," the arbitrator's decision stands, right or wrong.

Justice Kagan noted that the Court "would face a different issue" had the insurer argued that the availability of class arbitration was a "question of

arbitrability" that must be decided by the courts in the absence of "clear[] and unmistakable[]" evidence that the parties wanted the arbitrator to decide the question. *Stolt-Nielsen* did not settle this question, and *Oxford Health* presented no opportunity to do so.

The big lesson? To repeat, when you ask for arbitration, you get what you asked for. Don't expect the courts to intervene to save you if the arbitrator gets it wrong. The implicit bargain in arbitration is a much faster process and decision in exchange for a greater risk of error and very few grounds for appeal. You pay your money, and you take your chances.

Employers who consider that bargain worthwhile need to take two steps to avoid being on the wrong side of a class arbitration award: First, if the intent is to bar class relief in arbitration, say so. Clearly and unmistakably. Don't rely on silence to do that work for you. Second, make the availability of class relief a "question of arbitrability" for the courts, instead of the arbitrator, to decide, and state that, too. That way, if a court gets it wrong, you have recourse in and from courts.

Remember, if you love employee arbitration, keep in mind that love means never having to say you're sorry—especially if you are the arbitrator, and especially if you are wrong.

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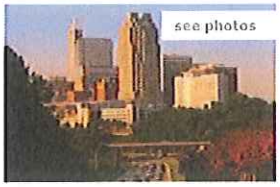


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THE CALIFORNIA EMPLOYMENT LAW BLOG

WRITTEN BY MEDIATOR AND ATTORNEY STEVEN G. PEARL

TUESDAY, JUNE 11, 2013

# Oxford Health Plans LLC v. Sutter: SCOTUS Issues Decision on Arbitrator's Power to Order Class Arbitration

In *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010), the Supreme Court held that an arbitrator "may employ class procedures only if the parties have authorized them." The Supreme Court yesterday released its decision in *Oxford Health Plans LLC v. Sutter*, ___ U.S. ___ (6/10/13), in which it considered whether an arbitrator exceeded his authority by finding that the parties' agreement authorized class arbitration, even though it did not mention class arbitration. Justice Kagan wrote the opinion for a unanimous Court.

John Sutter filed a putative class action in state court against Oxford Health Plans, alleging that it failed to make full payment to him and other physicians, in violation of their agreements and state law. The court granted Oxford's motion to compel arbitration, relying on the following clause in their contract:

> 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.

The parties agreed that the arbitrator should decide whether the contract authorized class arbitration, and he determined that it did. He reasoned that the arbitration clause sent to arbitration "the same universal class of disputes" that it barred the parties from bringing "as civil actions" in court, including class claims.

Oxford moved in federal court to vacate the arbitrator's decision on the ground that he had "exceeded [his] powers" under §10(a)(4) of the FAA. The District Court denied the motion, and the Third Circuit Court of Appeals affirmed.

Oxford asked the arbitrator to reconsider his decision on class arbitration after the Supreme Court issued *Stolt-Nielsen*. He issued a new opinion holding that *Stolt-Nielsen* had no effect. Unlike in *Stolt-Nielsen*, the arbitrator explained, the parties here disputed the meaning of their contract; he had therefore been required "to construe the arbitration clause in the ordinary way to glean the parties' intent," and had "found that the arbitration clause unambiguously evinced an intention to allow class arbitration."

Oxford made a renewed motion in district court to vacate the arbitrator's decision under the FAA. The district court again denied the motion, and the Third Circuit again affirmed. The Supreme Court granted certiorari to address a circuit split on whether §10(a)(4) allows a court to vacate an arbitral award in similar circumstances. It held unanimously that it does not.

The Court focused on the limited scope of review allowed in such circumstances. A party arguing that an arbitrator has "exceeded his powers" bears a heavy burden:

> "It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits... [T]he sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

Slip op. at 4-5 (citations omitted).

The Court then held that the arbitrator had twice done what the parties requested and what the law required. "He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not 'exceed[ ] [his] powers.'" Slip op. at 6.

The Court distinguished *Stolt-Nielsen* on grounds that the parties there had entered into an "unusual stipulation that they had never reached an agreement on class arbitration." Given that stipulation, the arbitrators in *Stolt-Nielsen* could not have concluded that the parties' agreement authorized class arbitration. "So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role." Slip op. at 6-7.

The Court then addressed Oxford's argument that the arbitrator had

California Wage and Hour Law and Litigation (California Education of the Bar)

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STEVEN G. PEARL
ENCINO, CALIFORNIA

Steven G. Pearl is a SuperLawyer mediator and attorney in Los Angeles, California. He is a co-author of California Wage and Hour Law and Litigation (Continuing Education of the Bar) and Employee Rights

misinterpreted the arbitration agreement:

> We reject this argument because, and only because, it is not properly addressed to a court. Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under §10(a)(4).

Slip op. at 8.

In his concurring opinion, Justice Alito, joined by Justice Thomas, points out that the Court's opinion "follows directly from petitioner's concession and the narrow judicial review that federal law allows in arbitration cases." He goes on to state that if the Court were reviewing the arbitrator's decision *de novo*, "we would have little trouble concluding that he improperly inferred '[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate.'" Slip op. at 1.

I have to admit that I am surprised by the result here. I thought that the Court would extend *Stolt-Nielsen* and invalidate the arbitrator's decision to allow class arbitration. And I certainly did not think that an opinion affirming the arbitrator's decision would be a unanimous one. All very interesting.

The opinion is available here.



POSTED BY STEVEN G. PEARL AT 8:00 AM



LABELS: ARBITRATION, CLASS ACTION

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# Supreme Court defers in class arbitration

6/11/2013 COMMENTS (0)

By Carlyn Kolker

(Reuters) - After several years of Supreme Court decisions favorable to defendants, plaintiffs' lawyers got a glimmer of good news from a decision on Monday in a ruling about class actions in an arbitration context.

In Sutter v. Oxford, the Supreme Court affirmed an arbitrator's ruling that allowed class arbitration of doctors' disputes with an insurer. The case concerned John Sutter, a pediatrician in New Jersey who had claimed that Oxford underpaid him and other doctors.

While the case concerned an insurance dispute, the topic has particular resonance for employment lawyers because many employment agreements specify that disputes must be arbitrated.

In a unanimous decision written by Justice Elena Kagan, the court ruled that it would defer to an arbitrator's decision that allowed classwide arbitration of the dispute, because Oxford itself had agreed to allow the arbitrator to determine whether the contract permitted class arbitration.

"The sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong," Kagan wrote.

Defendants had hoped for a broad ruling eviscerating the class action mechanism in an arbitration context. The justices, during oral argument, seemed sympathetic to Oxford, and thus Monday's decision for the plaintiffs was a surprise.

The Chamber of Commerce, the Equal Employment Advisory Council and the Voice of the Defense Bar all filed amicus briefs citing concerns that class arbitrations could wipe out the very benefits of arbitration.

"The financial and other benefits that the parties derive from employment arbitration are likely to disappear altogether if they are forced to submit to complex, class-based arbitration even where the underlying agreement does not provide for class arbitration procedures," the Equal Employment Advisory Council, a group of about 300 large employers, wrote in its brief.

NO CLASS ARBITRATION

"(Defendants) were hoping the court would decide the arbitrability of class claims," said Marcia McCormick, a professor at St. Louis University School of Law.

But the decision, said McCormick, is a "very very narrow ruling" that focused specifically on the contract at issue.

She noted that class arbitrations are not common in a consumer or employment context, as they are difficult to mount.

While acknowledging that the ruling was narrow, Max Folkenflik, a plaintiffs' lawyer, said, "It has a number of aspects which would likely give defendants great pause."

He said, "For most defendants, they really dislike the class arbitration in the extreme."

The Sutter decision could spur more employees to accept arbitration in the possibility that they could press a group action, he said.

"This case may suggest, if you get referred to arbitration, the next step may be to allow yourself to arbitrate, and get class procedures or their equivalents," he said.

Attorneys who represent employers still say they have a powerful weapon to ensure that they avoid class arbitration: fixing any employment agreements to clarify that they don't allow class arbitrations.

"I think that the issue addressed in this decision is one that has a limited shelf life because what we now know

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is that there are ways to draft arbitration clauses to avoid this issue," said Robert Whitman, an attorney with Seyfarth Shaw, which represents employers.

"If I had an arbitration clause that was silent on class arbitration, I would remove the silence and replace it with an explicit waiver on class arbitrations," he said.

The case is Oxford Health Plans LLC v. Sutter, U.S. Supreme Court, No. 12-135.

For petitioner: Seth Waxman of Wilmer Cutler Pickering Hale & Dorr.

For respondent: Eric Katz of Mazie Slater Katz & Freeman.

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**CLASSWIDE ARBITRATION, ELENA KAGAN, OXFORD HEALTH PLANS LLC V. SUTTER, STOLT-NIELSEN, STOLT-NIELSEN S. A. V. ANIMALFEEDS INT'L CORP.**

# U.S. Supreme Court Unanimously Upholds Arbitrator's Finding of Agreement to Class Arbitration

*In Arbitrability, Arbitration, Class-wide Arbitration on* ***June 10, 2013*** *at* ***6:27 pm***

(http://commons.wikipedia.org/wiki/File:Supreme_Court.jpg)
U.S. Supreme Court building. (Photo credit: Wikipedia)

In a ruling today with implications for wage & hour class actions, the U.S. Supreme Court affirmed an arbitrator's interpretation of an arbitration clause to permit class proceedings. *Oxford Health Plans LLC v. Sutter* (http://class-law.com/2013/06/10/good-bad-or-ugly-u-s-supreme-court-upholds-arbitrators-interpretation-of-contract-as-providing-for-class-arbitration/), No. 12-135, 569 U.S. __ (June 10, 2013). The Court considered whether an arbitrator, who found that the parties' contract provided for class arbitration, "exceeded [his] powers" under §10(a)(4) of the Federal Arbitration Act, 9 U. S. C. §1 *et seq.* Delivering the unanimous opinion of the Court and citing *Stolt-Nielsen S. A. v. AnimalFeeds Int'l*

*Corp.*, 559 U. S. 662, 684 (2010), Justice Kagan concluded that the arbitrator's decision survives the limited judicial review §10(a)(4) allows. Slip Op. at 1-2.

The Court decided that Oxford must live with its choice of arbitral forum and the arbitrator's construction of the contract, "however good, bad, or ugly":

> *So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under §10(a)(4). Eastern Associated Coal, 531 U. S., at 62 (internal quotation marks omitted).* ***The potential for those mistakes is the price of agreeing to arbitration.*** *As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." Enterprise Wheel, 363 U. S. at 599.* ***The arbitrator's construction holds, however good, bad, or ugly.***

*Id.* at 8 (emphasis supplied).

> *In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under §10(a)(4), the question for a judge is not whether the arbitrator construed the parties'contract correctly, but whether he construed it at all.Because he did, and therefore did not "exceed his powers,"we cannot give Oxford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.*

*Id.* at 8-9.

By CHARLES H. JUNG (http://njfirm.com/charles-jung)



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# Waiting Continues for Big Decisions at the Supreme Court

By Marcia Coyle and Tony Mauro All Articles
The National Law Journal June 10, 2013



Supreme Court Justice Sonia Sotomayor

Photo: Diego M. Radzinschi / NLJ

The major televisions stations, amidst a labyrinth of cameras and wires, staked out their positions on Monday morning right below the steps of the U.S. Supreme Court plaza. Inside the building, the pressroom buzzed with visiting reporters and interns. Was something big about to happen?

To the disappointment of many court watchers, the justices did not release decisions in the 'big three" cases of the term: affirmative action, voting rights and same-sex marriage. But Thursday is another day and more decisions are expected.

The justices did resolve three of the outstanding 26 cases to be decided, ruling on issues as diverse as arbitration, sentencing and raisins — yes, raisins.

In the raisin case, the Obama Administration lost the second of three takings challenges before the justices this term, one with important implications for regulated parties challenging fines and other penalties for failing to comply with government mandates.

*Horne v. Department of Agriculture* involved a California raisin grower who charged that the Agricultural Marketing Agreement Act of 1937, which requires raisin handlers to turn over a percentage of their crop to the federal government, violated the Fifth Amendment's takings clause. After the grower, who was found to be a handler, refused to hand over the required percentage of his crop, the Agriculture department began proceedings that resulted in more than $650,000 in fines and penalties. The grower sought review in federal district court.

The issue before the justices was whether the grower was required to bring the takings claim in the U.S. Court of Federal Claims—as held by the U.S. Court of Appeals for the Ninth Circuit—seeking just compensation after complying with the order to turn over a percentage of his crop. The justices unanimously disagreed with the Ninth Circuit which had ruled that it lacked jurisdiction to hear the claim.

Under the 1937 law, Justice Clarence Thomas wrote, raisin handlers may challenge the content, applicability and enforcement of marketing orders. "We have held that 'any handler' subject to a marketing order must raise any challenges to the order, including constitutional challenges, in administrative proceedings," he explained. "Once the secretary issues a ruling, the federal district court where the 'handler is an inhabitant, or has his principal place of business' is 'vested with jurisdiction to review the ruling.'"



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Karen Harned, executive director of the National Federation of Independent Business' small business legal center, applauded the ruling, saying, "Obtaining compensation can be a costly and demoralizing process. There is no reason to multiply these burdens by forcing small-business owners to suffer through not one, but several rounds of litigation against the government before they can exercise their constitutional rights."

By a 5-4 vote, the court ruled in *Peugh v. United States* that the Constitution's Ex Post Facto Clause requires federal criminal defendants to be sentenced under guidelines in effect when the crime occurred – not higher guidelines in place at the time of sentencing. Convicted in 2010 of bank fraud in Illinois, Marvin Peugh was sentenced to 70 months in prison under guidelines that had been increased in 2009. On appeal, Peugh asserted that because the crimes were committed in 1999 and 2000, he should have been sentenced under 1999 guidelines – which for him would have meant only 30 to 37 months in prison. The U.S. Court of Appeals for the 7th Circuit upheld the sentence on the ground that sentencing guidelines are only advisory and as such don't have the effect of increasing punishment after the fact.

Writing for the majority, Justice Sonia Sotomayor rejected that argument, holding that even though the court in the 2005 ruling *United States v. Booker* made federal guidelines advisory, they are still the "lodestone of sentencing," and judges are required to use them as a starting point. As a result, she wrote, an increase in the sentencing guideline creates a "sufficient risk" of an increased sentence to trigger the Ex Post Facto Clause. Justice Clarence Thomas wrote a dissent, joined in part by Chief Justice John Roberts Jr. and justices Antonin Scalia and Samuel Alito Jr. Justice Anthony Kennedy voted with the majority except for one section in which Sotomayor reviewed the history of Ex Post Facto doctrine.

Monday's ruling will affect "every federal sentencing" in which guidelines have increased sentences since the crime was committed – which includes sentences for certain fraud and sex offenses, according to Stephen Kinnaird, co-chair of the appellate practice at Paul Hastings in D.C. Kinnaird represented Peugh pro bono through his work with the University of Pennsylvania Law School's Supreme Court Clinic, run by professor Stephanos Bibas. Kinnaird said Penn students gave him important help, developing statistics showing that actual sentences rise when guidelines rise.

In *Oxford Health Plans v. Sutter*, a unanimous court held that an arbitrator's interpretation of whether a contract authorized class arbitration prevails, "however good, bad, or ugly," where the parties agreed the arbitrator should make that decision. The arbitrator does not exceed his powers in those circumstances, according to the court.

"All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough," wrote Justice Elena Kagan for the court. "So long as the arbitrator was 'arguably construing' the contract —which this one was—a court may not correct his mistakes [under the Federal Arbitration Act]. The potential for those mistakes is the price of agreeing to arbitration."

Oxford had sought in federal court to vacate an arbitrator's decision that pediatrician John Sutter could bring a class action on behalf of himself and other New Jersey physicians alleging that Oxford had failed to make full and prompt payment to doctors who provide medical care to members of Oxford's network.

The court left unanswered a key question in this area, according Thomas Linthorst, partner in the labor and employment practice at **Morgan, Lewis & Bockius**:

whether a contract authorizes class procedures is a "question of arbitrability" reserved for the courts, or a question for the arbitrator. "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," he said.

Archis Parasharami, co-chair of **Mayer Brown**'s consumer litigation and class action practice, called the decision an "extremely narrow" one. "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," he explained. "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."

*Oxford* was one of two class action arbitration cases on the docket this term. Still undecided: *American Express Company v. Italian Colors Restaurant*.

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Monday, June 10, 2013

# U.S. Supreme Court: Arbitrator Had Power to Interpret Whether Arbitration Agreement Allowed Class Actions

The Supreme Court infrequently issues unanimous decisions in matters that concern employers and employees. So, it was a bit of a surprise to see Oxford Health Plans v. Sutter, the Court's 9-0 decision today. Then I noticed that the substantive claims are not employment law-related. Still, this opinion will affect class action arbitration, employment law and otherwise.

Sutter was a doctor. He and a class of doctors sued Oxford for failing to reimburse adequately under the insurance reimbursement contract. Oxford required Sutter to arbitrated his claim under this arbitration clause:

> 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.

Once in arbitration, the parties agreed to let the arbitrator decide whether the above language authorized classwide arbitration. The arbitrator held that it did. When the Supreme Court issued Stolt Nielsen v. AnimalFeeds (when arbitration agreement is silent regarding class action arbitration, the default is to hold individual arbitrations), Oxford asked the arbitrator again to exclude class claims. The arbitrator again refused.

So, for a second time Oxford moved to vacate that finding under the Federal Arbitration Act. The trial court, the court of appeals and the Supreme Court unanimously said, no can do:

> Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But [Federal Arbitration Act] §10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.

As in other cases, the Court's decision in part turned on the litigation strategy of one of the parties. Possibly to garner more votes, Justice Kagan was pretty negative about the arbitrator's decision. She suggested that a court might well have ruled a different way if Oxford had chosen to ask the district court to interpret the agreement instead of the arbitrator:

> We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions—which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"—are presumptively for courts to decide. Green Tree Financial Corp. v. Bazzle, 539 U. S. 444, 452 (2003) (plurality opinion). A court may therefore review an arbitrator's determination of such a matter de novo absent "clear[] and unmistakabl[e]" evidence that the parties wanted an arbitrator to resolve the dispute. AT&T Technologies, Inc. v. Communications Workers, 475 U. S. 643, 649 (1986). StoltNielsen made clear that this Court has not yet decided whether the availability of class arbitration is a question of arbitrability. See 559 U. S., at 680. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures. See Brief for Petitioner 38, n. 9 (conceding this point). Indeed, Oxford submitted that issue to the arbitrator not once, but twice—and the second time after StoltNielsen flagged that it might be a question of arbitrability.

So, lesson learned. If you think a court will follow Stolt-Nielsen more faithfully than an arbitrator, seek construction of your arbitration clause in court.

Bonus - the Court said this right up front: "Class arbitration is a matter of consent: An arbitrator
may employ class procedures only if the parties have authorized them." That does not bode well for those who would like the California Supreme Court to hold that class action waivers are illegal.

This case Oxford Health Plans LLC v. Sutter and the opinion is here.

Posted by Greg at 5:06 PM



Labels: Arbitration, FAA, stolt-nielsen

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# U.S. Supreme Court and Appellate Alert

10 June 2013

See note below about Hogan Lovells

## Supreme Court decision in *Oxford Health Plans LLC v. Sutter*

Today, the Supreme Court held that a court may not overturn an arbitrator's construction of an agreement to permit class arbitration—even if it is erroneous. In *Oxford Health Plans LLC v. Sutter*, a unanimous Supreme Court held that an arbitrator's decision to allow class arbitration cannot be overturned if it was based on the construction of the agreement between the parties. In so holding, the Supreme Court noted that even an arbitrator's interpretation that incorrectly assesses whether the parties intended to consent to class arbitration is not subject to judicial review. As Justice Kagan bluntly put it, "[ t ]he arbitrator's construction holds, however good, bad, or ugly."

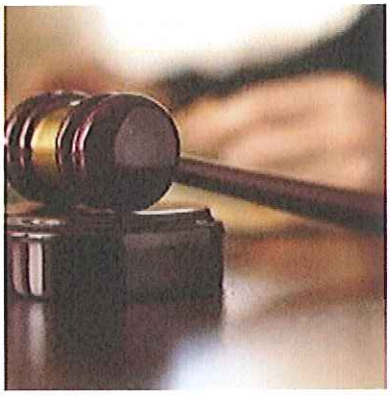
The Court's ruling also clarified the application of its 2010 opinion in *Stolt-Nielsen v. AnimalFeeds International*. In that case, the Supreme Court determined that a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. In today's opinion, the Court explained that the parties in *Stolt-Nielsen* had stipulated that they had not to come to an agreement on class arbitration. Thus, in finding that the agreement permitted arbitration, the arbitration panel in *Stolt-Nielsen* could not have been construing an agreement that concededly did not decide the issue. The parties in *Oxford Health*, in contrast, disagreed about whether their agreement permitted arbitration and asked the arbitrator to resolve that disagreement. The Court held that this is an arbitrator's function and not an abuse of power.

### Background

In April 2002, Sutter filed a breach of contract claim against Oxford Health Plans related to reimbursement rates paid by Oxford Health to physicians and other healthcare providers for primary services. After a New Jersey state court compelled arbitration, an arbitrator interpreted the agreement to permit class arbitration, relying on a broad arbitration clause:

"[ n ]o 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. . . ."

The arbitrator ruled that although the arbitration clause did not expressly mention class arbitration, it was broad enough to support the conclusion that the parties agreed to have class arbitration. The arbitrator reached the same conclusion once more after the Supreme Court decided *Stolt-Nielsen*.



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Special thanks to Jim Clayton for his contribution to this alert.


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Oxford Health attempted to vacate the arbitrator's decisions in federal district court by claiming that he had "exceeded [ his ] powers" under Section 10(a)(4) of the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq. The district court denied Oxford Health's motion, and the Third Circuit affirmed because the arbitrator's interpretation of the agreement was not "totally irrational."

**The opinion**

The Supreme Court unanimously affirmed. The Court held that the arbitrator was not acting outside the scope of his contractually delegated authority. Instead, the arbitrator was simply performing his bargained-for obligation: resolving the parties' disagreement about the interpretation of their agreement.

In reaching today's holding, the Supreme Court relied on the limited scope of review prescribed by Section 10(a)(4). Under that section, the Court explained, the "sole question" for a reviewing court "is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." As a result, the Supreme Court was not required to and did not endorse the arbitrator's interpretation of the parties' agreement to permit class arbitration. This limited judicial inquiry, the Court held, is justified because it gives the parties what they bargained for: the arbitrator's construction of their agreement. Narrow judicial review also maintains arbitration's ability to resolve disputes quickly.

The Supreme Court also noted in a footnote that Oxford Health had not argued that the availability of class arbitration is a "question of arbitrability." Questions of arbitrability, including, for example, whether a valid agreement to arbitrate exists in the first place or whether an arbitration agreement applies to a certain type of controversy, are "presumptively for courts to decide." When that presumption attaches, judicial review of an arbitrator's determination of a question of arbitrability is de novo. But the Court had no occasion in this case to decide whether the availability of class arbitration is a "question of arbitrability" because Oxford Health had twice agreed to submit the question as a matter of contract interpretation to the arbitrator.

**The concurrence**

Justice Alito, writing for himself and Justice Thomas, concurred in the judgment. He emphasized that the majority's result rests on Oxford Health's concession that the arbitrator should decide the availability of class arbitration in this case and the narrow review of arbitrators' decisions prescribed by 10(a)(4). Justice Alito cautioned, however, that there is no reason to assume that absent class members would also agree that the arbitrator should decide the availability of class arbitration. As a result, according to Justice Alito, it is unlikely that absent class members could be bound by a decision that in turn depends on the arbitrator's erroneous interpretation of the agreement to permit class arbitration. Because arbitration is simply a matter of contract, the arbitrator had no power to modify the contract's terms without each and every offeree, or putative class member, consenting. Going forward, Justice Alito admonished courts to keep in mind this fundamental problem before entrusting arbitrators with questions on the availability of class arbitration.

**Practical implications of the decision**

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.

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OTHER VIEWS

# N.J. doctor's case bolsters class action suits

By ERIC D. KATZ

IN AN UNUSUAL unanimous decision, the U.S. Supreme Court earlier this month affirmed a lower court ruling that a Clifton pediatrician may proceed with his class action arbitration on behalf of 20,000 New Jersey physicians against a major health insurer.

Dr. John Sutter initially filed this class action 11 years ago in the Superior Court to fight Oxford Health Plans, now a part of United Healthcare, asserting unfair claims processing and other abusive business practices that have deprived some New Jersey physicians of an adequate cash flow to meet medical office overhead, which included salaries of nurses and payment for supplies.

Equally important, these improper claims payment practices have subjected all physicians to endless hassles when dealing with the health insurer in an effort to determine the payment status of their claims and how those claims were processed. The so-called "hassle factor" is far too common in today's age of HMOs, as so many patients are fully aware when they attempt to get answers to their own coverage and billing questions from their insurers.

Here, Sutter and thousands of other doctors and their staffs have had to endure this aggravation on a daily basis, when they would rather be providing quality care to their patients.

Sutter's dispute was originally filed as a class action lawsuit in 2002 in the Superior Court of New Jersey. When boiled down, a class action is a case brought by one or more representative plaintiffs on behalf of all others that are similarly injured or damaged.

Arbitration is an alternative forum to the courts for the resolution of disputes where the parties bring those quarrels to one or more persons called "arbitrators," by whose decision (or "award") they agree to be bound. Arbitration is a forum favored by corporate America for many reasons, in particular because it removes dispute resolution from the hands of everyday jurors and instead places the disposition of these disagreements with experienced lawyers or retired judges that corporations believe would be less likely to be swayed by the "emotional plight" of the victims.

> The Sutter decision levels the playing field, not only for doctors and other health care providers, but for everyday consumers and employees alike.

## Class action suits alive and well

The Sutter decision, however, levels the playing field, not only for doctors and other health care providers, but for everyday consumers and employees alike. It signifies that class actions are alive and well.

As a result of this decision, if the parties ask the arbitrator to decide whether their particular agreement authorizes class arbitration and the arbitrator finds that the language of the contract evinces such intent, then consumers and employees may join together and arbitrate such singular important matters as civil rights and discrimination issues.

The importance of being able to proceed as a class, as opposed to a one-on-one or bilateral arbitration, cannot be understated. It costs a lot of money to arbitrate, between paying a lawyer, the arbitrator's fees, expert costs and so on.

Particularly where the recovery per individual is not large, the only way in which a party may obtain relief is as part of a class. Put another way, without strength in numbers, many corporate evils may continue with impunity because most people simply don't have the financial resources, time or desire to engage in lengthy and often nerve-wracking litigation.

For these reasons individuals like Sutter must be commended. He has dedicated thousands of hours of his personal time over the last decade on the firing line as the face of this legal war – without being compensated – representing his fellow physicians and attempting to make managed care better for us all.

Our Supreme Court has recognized for almost two centuries that when parties agree to arbitrate their dispute, it is the arbitrator's decision that the parties bargained for. This is true even if the decision is arguably incorrect or a court would have decided the matter differently.

## Seeking a do-over

What the health insurance company attempted to do here because they lost before the arbitrator was to get a "do over" before the Supreme Court. The court, however, clearly recognized that this is not how arbitration works, hence a 9-0 resounding decision in Sutter's favor.

As Justice Elena Kagan succinctly stated in delivering the opinion of the court: It was Oxford that chose arbitration to begin with, and that wanted the arbitrator, and not the court, to interpret the parties' agreement. The arbitrator did exactly what the parties asked him to do. Oxford didn't like the result, but they don't get a "rerun" in court. It "must now live with that choice."

At least in this one instance, David can and did beat Goliath.

Eric D. Katz, a trial and class action attorney and a senior partner of the Roseland law firm of Mazie Slater Katz & Freeman, successfully argued this case in the Supreme Court.