AMERICAN ARBITRATION ASSOCIATION
Commercial & Class Action Arbitration Tribunal

In the Matter of the Arbitration between

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

PARTIAL FINAL CLASS DETERMINATION AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated October 25, 2002, contained in a Primary Care Physician Agreement (the "Agreement") between Claimant Dr. Sutter and Respondent Oxford Health Plans, Inc. ("Oxford"), and having been duly sworn, and having duly heard the proofs and allegations of the parties, and for the reasons set forth below, do hereby make this PARTIAL/FINAL AWARD pursuant to Rule 5 of the Supplementary Rules for Class Arbitrations of the American Arbitration Association (the "Rules") as follows:

The Proposed Class

Dr. Sutter proposes to define the class in this arbitration as follows:

> All individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine), regardless of specialty, who provided services to any person who is a subscriber of, or is insured by, Oxford Health Plans, Inc. ("Oxford") in the class period of December 11, 1996 through the present.[1]

Prior Proceedings

Dr. Sutter originally began this case as a part of a larger class action case in the Superior Court of Essex County, New Jersey in April, 2002. Dr. Sutter, a physician, was seeking from Oxford damages and other

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[1] Dr. Sutter filed his class-wide arbitration demand on December 11, 2002. New Jersey's contract statute of limitations is six (6) years. See N.J.S.A. § 2A:14-1.

relief arising out of allegations that, under the Agreement, Oxford failed to pay claims and reduced payment on claims as a result of Oxford's improper claims processing tactics.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the underlying contract between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Dr. Sutter also applied to the Superior Court for an order certifying the case as a class action and determining the class. This motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including, but not limited to, the determination of class certification, be resolved by the arbitrator.

By agreement of the parties, this case was stayed until the determination of the United States Supreme Court in *Green Tree Financial Corp. et al. v. Bazzle et al*, which was then pending, could be analyzed.

Thereafter, and before the Rules became effective, the parties briefed and I determined that the arbitration clause in the Agreement allowed for class actions (Memorandum and Order of September 23, 2003, a copy of which is attached to and incorporated into this award as Appendix A).

The parties agreed in 2004 that the Rules would govern the future proceedings in this case, including the class determination matters decided in this award.

After extensive discovery, the class determination issues were briefed and I heard the parties in oral argument at a docketed hearing on October 29, 2004. Based on all of the foregoing, my determination of the class issues is as follows.

Discussion

Before dealing with the specific findings required by Rule 4, it is necessary to address two legal issues raised by Oxford. These are first, whether or not the determination of the United States Court of Appeals for the 11th Circuit in *Klay et al v. Humana, Inc.*, et al (382 F.3d 1241, 11th Circuit, Fla., 2004, cert. den. 125 S Ct 877, 2005) decided September 1, 2004 determines the outcome of this case. Dr. Sutter brought a court proceeding, originally filed against Oxford, Horizon Blue Cross Blue Shield of New Jersey, United Healthcare, HealthNet and CIGNA that was severed as to each defendant, and the actions against United Healthcare, HealthNet and CIGNA were transferred to the Federal Court for the Southern District of Florida. There, under a ruling of the Multi-District Panel, all of these similar class actions of physicians against Health Maintenance Organizations ("HMOs") were being heard. Oxford argues that principles of collateral estoppel flowing from the *Klay* case bar Dr. Sutter from obtaining class certification in this arbitration.

The effect of the *Klay* Decision

Oxford argues that *Klay* is directly applicable to this case. It says that the purported classes alleged that defendants, HMOs, agreed to pay physicians under their respective contracts and that the defendants systematically delayed, denied and diminished the agreed payments. This end was accomplished by the same general means Dr. Sutter asserts here: automated systems worked down-coding and grouping or bundling, ignored modifiers that would increase fees payable and processed claims in a way that resulted in payment times that exceed by many times what was provided by the respective contracts and applicable state standards.

Even assuming that the legal issues, essentially breach of contract, were common to the purported classes, the Eleventh Circuit held that class certification of these contract claims was improper and reversed that part of the decision of the Southern District of Florida.

The *Klay* case is new, carefully reasoned and from a very important court. It requires the arbitrator to analyze it with the greatest care, as it is a plain determination of law connected to issues to be

decided here. It cannot be disregarded. Mindful of this principle, I have read and re-read the *Klay* opinion. After careful consideration, I cannot agree with Oxford that it applies to this case as a controlling precedent.

The reason is not far to seek. The *Klay* court was confronted with a multi-district consolidation of hundreds of class actions against as many as seven different HMOs. The opening words of the opinion speak volumes: "This is a case of almost all doctors vs. almost all major health maintenance organizations."

In analyzing the breach of contract claims under state law, the court said "this case involves the actions of many defendants over a significant period of time and that each defendant throughout this period utilized many different forms of contracts." It further noted, "this is not a situation in which all plaintiffs signed the same form contract." It also noted, "another crucial reason why the plaintiffs cannot establish predominance of class-wide facts on their breach of contract claims is that, although each of the defendants allegedly breached their contracts in the same general ways, they did so through a variety of specific means that are not subject to generalized proof for a large number of physicians."

On the breach of the prompt-pay claims, the Eleventh Circuit said "the most immediate problem with certifying a nationwide class for this issue is that only 32 states have prompt-pay statutes at all, and of those, only five states expressly provide a cause of action."

Dr. Sutter's case seems to me to be on an entirely different footing from the immense problems faced by the Eleventh Circuit. In this case there is only one state law involved, that of New Jersey. There is only one HMO involved, Oxford. It is alleged that the contracts the physicians who would make up the class signed are essentially identical.

Of significant importance, Dr. Sutter alleges that Oxford systematically processed claims, using various computer programs, in a way to disadvantage the doctors in breach of their contracts. Dr. Sutter alleges that Oxford processed these claims as submitted, without requiring other back-up material. The gist of his claim is that the forms submitted were somehow treated by the system in a way that caused

disadvantage to the doctors. This claim would presumably have to be established by expert testimony about the automated systems Oxford employed. That it is a difficult problem of proof is apparent. It is also obvious that it would be virtually impossible for any individual doctor to afford the voluminous expert testimony that would be required if these cases proceeded individually. The Eleventh Circuit itself noted in the portion of the *Klay* opinion which affirmed class-action treatment with respect to certain alleged Federal RICO allegations, that Federal Rule 23 governing class actions has as a dominant idea the vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." I believe that this factor figures importantly in the current case.

For these reasons, I find that the *Klay* opinion, despite its erudition, is not applicable to the specific facts of this case.

Dr. Sutter argues that whatever *Klay* may mean, this arbitration was brought under and is governed by the laws of the State of New Jersey. Dr. Sutter argues that New Jersey courts have repeatedly certified physician class actions involving virtually identical claims to those asserted by Dr. Sutter. He cites *Zakheim v. Amerihealth* and *Malloy v. Amerihealth* and most importantly, his own case, *Sutter v. Horizon.* (I attach no significance to the Appellate Division's refusal to hear an appeal from the Superior Court.) These cases plainly show that New Jersey Courts would most probably certify a class in this case. Oxford's attempt to distinguish the AAA Rules from the New Jersey class action rules is not persuasive.

Collateral Estoppel

Even if the *Klay* decision is not controlling precedent here, and as noted above I do not believe that it is, Oxford asserts that Dr. Sutter cannot have a class action on the breach of contract claims because his participation in the *Klay* case binds him by collateral estoppel. I disagree.

Collateral Estoppel is an equitable doctrine that prevents a party from re-litigating in a new forum and issue that he has litigated unsuccessfully in a previous case or forum. Before it can be successfully invoked as a defense, it must be shown that Dr. Sutter had a full and fair opportunity to have the question of his New Jersey contract claims heard and decided.

Dr. Sutter argues that under New Jersey law, which is applicable to this case, collateral estoppel "should not be rigidly applied if the party sought to be precluded 'did not have an adequate opportunity or incentive to obtain a full and fair adjudication of the initial action.'" Barker v. Brinegar, 346 N.J. Super. 558, 566 (App. Div. 2002) (citing Restatement (Second) of Judgments). "Ultimately, the court must employ a discretionary weighing of economy against fairness." Konieczny v. Micciche, 305 N.J. Super. 375, 385 (App. Div. 1997) (citation omitted). "[C]ollateral estoppel is an equitable doctrine and need not be applied 'if there are sufficient countervailing interests,' or if it would not be fair to do so." Matter of Estate of Dawson, 136 N.J. 1, 23 (1994).

Dr. Sutter's cases were sent to Florida as "tag-along" cases under the Federal Multi-District Rules. I do not think it can be denied that his case was a very small fish in a very large pond. He asserted credibly that his opportunity to influence the arguments of the lead plaintiffs before the 11th Circuit was precisely zero. Under these circumstances, I doubt that the 11th Circuit knew that Dr. Sutter's case even existed. While he may be bound in those specific cases against other HMOs, there has been no showing here that the claims the classes he purported to represent against other HMOs are identical to the claims he asserts against Oxford here.

Since I have some equitable discretion under New Jersey law not to apply collateral estoppel, I think it best to use that discretion to determine that this is not an appropriate case for collateral estoppel.

I have concluded for the foregoing reasons that the *Klay* opinion is not controlling here and that collateral estoppel from *Klay* does not bar Dr. Sutter. I proceed to consider whether or not this case meets the requirements of Rule 4 of the Rules of the American Arbitration Association.

Commonality

The overarching issue Dr. Sutter presents in this case is whether or not there is something in the various automated systems Oxford employs to process the hundreds of thousands of claims it receives that systematically reduces the payments providers ought to receive.

Oxford argues that when physicians sign up with Oxford, they naturally expect to be paid somewhat less than they would for similar services if they billed patients directly. In return, they are offered a larger pool of patients and accordingly find the arrangement beneficial. This argument misses the point of Dr. Sutter's basic claim. It is not that the payments received are lower on an absolute basis; rather, he says the system produces lower payments because it is cheating him and is designed and/or operated in a dishonest way. This, if true, would constitute a breach of contract.

It is not reasonable to suppose that Oxford's vast system operates solely to cause disadvantage to Dr. Sutter. Nor is it reasonable to suppose that only pediatricians are singled out for the alleged abuse. Accordingly, it seems to me that the basic issue in this case, whether or not the system is honest, is a classic case for class action treatment.

The analysis of the system and its operations is plainly a question for experts, and I expect that expert testimony would constitute the bulk of the proof presented. As noted above, this analysis, because of the size and complexity of the Oxford operation, is bound to be complicated and very expensive. It would be out of the question for Dr. Sutter or any other individual physician to be able to afford experts of the kind and quality that would be able to detect and explain the improper conduct Oxford is allegedly engaging in. These experts would also have to testify in a way that would allow the Claimant to carry the burden of proof on this issue.

This fact alone makes the right of each individual to bring his or her own arbitration essentially valueless, because he or she could not afford to develop the proof that would be needed.

Dr. Sutter has standing to raise the basic question. It follows that the class ought initially to be that of all providers, and not be limited to pediatricians. If at trial, no nefarious scheme is found, then the case will end. If, on the other hand, Dr. Sutter is correct in his assertion, and a scheme is found that disadvantages providers in breach of their contractual expectations, then the issue of sub-classes for additional liability and remedy phases of this case could be considered. That, I think, is a bridge best crossed when and if we come to it, and I am making no determination with respect to sub-classes at this point. This approach is essentially a bifurcation of this case, addressing first the fundamental liability issue.

Because I think that bifurcation is a suitable approach to the obvious complexities of this case, I do not think the result in *Sutter v. Horizon* is controlling here. In that case, the court found that the bundling and down coding claims of the different specialties of providers was too complicated for a class action. I am temporarily avoiding that complexity; when and if we reach it, it may well be that separate arbitrations will have to be considered. However, the members of the class will at least start with the major issue determined, which is bound to simplify and expedite the further proceedings, whatever form they may take. I think that difference is enough to avoid collateral estoppel as well. Moreover, as noted above, I have equitable power not to apply collateral estoppel. Since bifurcation was not apparently an option offered in the *Horizon* case, I think Dr. Sutter should be allowed to proceed.

Class Certification

Rule 4(a) provides:

> The arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described.

Rule 4 specifies the findings I must make, and on the basis of the preceding analysis I do so as follows:

(1) The class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

It appears that this factor is not seriously disputed. The purported class consists of some 16,000 members. Joining separate arbitrations for each would be far less efficient than deciding the central issues on a class basis.

(2) There are questions of law or fact common to the class;

As noted above, the basic factual issue in this case is whether or not Oxford engaged in a scheme to deprive the doctors of what it should have been paying them under their contracts. It seems clear to me that if there was such a scheme, it would have been applied across the board. I am making no determination at this time that there ever was or could have been such a scheme. However, the very complex proof needed to make the factual determination seems to me to be common to all members of the class.

(3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;

If Oxford indeed had such a scheme, I find that it would be illogical and extremely peculiar if it had chosen to apply it only to pediatricians. Thus, whether or not a scheme existed can be litigated by a pediatrician as well as by a surgeon. How the scheme, if there was one, affected each specialty may differ in kind and amount. That question, if we ever reach it, may require creation of sub-classes. It is premature

to attempt to create such classes at this time when it has not been established that Oxford did anything at all that would be actionable.

(4) The representative parties fairly and adequately protect the interests of the class;

(5) Counsel selected to represent the class will fairly and adequately protect the interests of the class;

There is no dispute that Dr. Sutter and his counsel are competent to represent the class, as I am now defining it. When and if sub-classes are called for, this matter will be revisited.

(6) Each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.

All the agreements Oxford had with health care providers had arbitration clauses the same as or substantially the same as that found in Dr. Sutter's contract.

However, since May 2003, Oxford has added a provision to the standard arbitration clause specifically excluding the signing physician from class action arbitration. Dr. Sutter argues that the addition to the clause represents a contract of adhesion and is unenforceable.

I think that question is better resolved in the New Jersey courts. On its face, the clause prohibits class arbitration. Whether or not it is unenforceable under New Jersey law seems beyond my powers in making a class determination. Accordingly, I am excluding from the class for this arbitration all those persons whose contracts contain a prohibition on class arbitrations.

The second group is that of physicians with no contract with Oxford, who seek reimbursement when an Oxford insured goes "out of plan." Dr. Sutter notes that the New Jersey Prompt Pay statute contains an arbitration provision, which he argues, ought to allow them to satisfy the requirements of an arbitration clause. Oxford notes, however, correctly in my view, that the statute allows for arbitration only after a step by step dispute resolution process has been followed. I have no power to simply wipe out that

process and put those claims directly into arbitration. Accordingly, I am not including those physicians in the class here certified.

Except for the foregoing, the class proposed by Dr. Sutter meets the requirements of Rule 4(a).

I turn to the additional requirements of Rule 4(b), which provides that if Rule 4(a) has been satisfied, I must also find:

> **That the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class arbitration is superior to other available methods for the fair and efficient adjudication of the controversy.**

The Rule instructs me to consider the following matters:

(1) The interest of members of the class in individually controlling the prosecution or defense of separate arbitrations;

The question of whether or not Oxford employed a scheme predominates all others. There would be no particular reason why any individual would wish to employ experts to examine and testify about these complex issues, even if it were economically feasible to do so, which as indicated above is plainly not the case.

(2) The extent and nature of any other proceedings concerning the controversy already commenced by or against members of the class;

The record does not show that there are any other proceedings.

(3) The desirability or undesirability of concentrating the determination of the claims in a single arbitral forum;

It is desirable to have the existence or not of the scheme determined in one forum. If it is found that such a scheme was practiced, then how it affected various members of the class will have to be dealt with. If all of these contracts were breached, then a remedy will be found. Procedures could be sub-classes within this arbitration, separate arbitrations or some combination thereof. I think that determination of the basic question will be sufficiently difficult that I am not addressing those issues at

this time. If the Claimant cannot carry the burden of proof that there was a scheme, then these issues may never have to be addressed.

(4) The difficulties likely to be encountered in the management of a class arbitration.

It would indeed be a naïve arbitrator who did not recognize that, if a scheme is found and sub-classes have to be created, management of this case will be difficult. However, I do not see why the difficulties would be greater than or different from those that have been faced and overcome by the courts in New Jersey in similar cases. Should we reach that point, it may be that separate arbitration cases for each physician would be suitable, once the basic question of the scheme is established. Arbitration is a flexible tool and I am confident that when and if that point is reached, good management will handle the individual claims in a fair and expeditious manner. Since the alternative, denying the class, is essentially to deny these doctors any realistic possibility of redress, I believe that we should go ahead and do the best we can.

The parties have not shown me how any other device than a class action can deal with the fundamental issue in this case. I find that a class action is the only practical way that justice can be done in this situation.

Accordingly, I find that the requirements of Rule 4(b) have been satisfied.

On the basis of the foregoing my award is as follows:

PARTIAL/FINAL AWARD

Definition of the Class

For purposes of all further proceedings in this arbitration the class of Claimants is defined and certified as follows:

> All individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine), regardless of specialty, who provided medical services to any person who is a subscriber of, or is a member of a health plan administered by Oxford Health Plans, LLC. ("Oxford")

in the class period of December 11, 1996 through December 31, 2004* and who have signed with Oxford a New Jersey provider agreement containing an arbitration clause the same as or similar to that in Dr. Sutter's contract. Excluded from the class are any individual physicians and physician groups (including, but not limited to, medical doctors and doctors of osteopathic medicine) who have executed provider agreements with Oxford that contain a prohibition on class action arbitrations.

The Claim of the Class

The Class alleges that:

Oxford has uniformly processed the claims for reimbursement submitted by over 16,500 physicians -- regardless of the specialty of these doctors -- through the use of the same automated software that arbitrarily delays, denies, impedes and reduces compensation for the medical services these doctors provide to members of Oxford's insurance plans.

The centerpiece of this case are the common practices carried out by Oxford's computer system that has been responsible for depriving physicians of proper reimbursement.

This computer system has not processed claims in accordance with the terms of the provider agreements -- that is, based on the claims information submitted by the physician and his/her applicable fee reimbursement schedule.

Nor has Oxford's automated, uniform computer programs adjudicated claims in accordance with the requirements of New Jersey's statutory prompt pay laws.

Rather, Oxford's computer system, inter alia, has re-coded, manipulated, eliminated, bundled and downcoded claims submitted by physicians and has then processed these claims to achieve one common, class wide goal -- to save Oxford substantial amounts of money and to pay less to doctors in breach of the provider agreements and in violation of the prompt pay statutes.

This has been done in an across-the-board fashion, not based upon any individualized review of claims or medical records for the services provided, but by pre-programmed, arbitrary computer software that has not been based on standard medical or objective coding practices.

The foregoing has damaged the members of the class in amounts to be determined.

Class Representative and Counsel

Dr. Sutter and his counsel are found to be adequate representatives of, and capable of protecting, the interests of the class in this arbitration.

* Certification of a class of New Jersey physicians and physician groups who provided medical services through December 31, 2004, does not prohibit either party from recovering damages for bills submitted for medical services subsequent to December 31, 2004, as part of the final award in this class arbitration, nor does it prohibit either party from seeking such damages in another arbitration, subject to the limits imposed by the doctrines of res judicata and collateral estoppel.

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

Bifurcation for Further Proceedings

When and if it is determined that Oxford breached its agreements with the members of the class, the issue of sub-classes and suitable further proceedings will be considered, and no determination with respect to those matters is being made in this award.

Notice

Notice of this arbitration and the method for opting out of the arbitration shall be given to all members of the class in the Form of Notice attached to and made a part of this Award as Appendix B.

Stay

As required by the Rules, all proceedings in this arbitration are stayed for thirty days from the date of this award. If the parties proceed to the courts, this stay can be extended as appropriate, either by me or by the courts.

03/24/05
Date

William L.D. Barrett

I, William L.D. Barrett do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

3/24/05
Date

William L.D. Barrett

State of New York
County of New York

On this day, the above arbitrator came and appeared before me and confirmed to me that he is the individual described herein and acknowledged to me that he/she is the individual who executed the foregoing instrument.

Notary Public

DEBORAH A. REAGAN
Notary Public, State of New York
No. 01RE6095376
Qualified in Westchester County
Commission Expires July 7, 2007

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

APPENDIX A

AMERICAN ARBITRATION ASSOCIATION

John Ivan Sutter, M.D.,
on behalf of himself and
all others similarly situated,

Claimant

v.

Case No.
18 193 20593 02

Oxford Health Plans, Inc.,

Respondent

MEMORANDUM AND ORDER

Dr. Sutter asserts that this case can be maintained as a class action. Oxford seeks by motion to have the case declared not a class action.

Prior Proceedings

Dr. Sutter originally began this case as a part of a larger class action case in the Superior Court of Essex County, New Jersey in April 2002. Dr. Sutter, a physician, was seeking from Oxford damages and other relief arising out of allegations that, under a Primary Care Physician Agreement between Dr. Sutter and Oxford (the "Agreement"), Oxford failed to pay claims and reduced payment on claims as a result of Oxford's improper claims processing tactics.

Oxford moved in the Essex County Superior Court to stay Dr. Sutter's civil class action on the ground that the underlying contract between Dr. Sutter and Oxford required that Dr. Sutter's claims be submitted to arbitration. Oxford was successful in its application to the Court. By order dated October 25, 2002, the Court ordered that Dr. Sutter's Amended Complaint be dismissed and that the matters raised should properly be referred to arbitration in accordance with the Agreement.

Thereafter, Dr. Sutter applied to the Superior Court for an order certifying the case as a class action and determining the class. This motion was denied by order dated November 21, 2002. The Court ordered that all procedural issues including, but not limited to, the determination of class certification, be resolved by the arbitrator.

In March, 2003, having been appointed arbitrator in this case, I conferred with the parties about how to proceed.

It was noted at that time that the Supreme Court of the United States had granted certiorari in a case called *Green Tree Financial Corp. et al. v. Bazzle et al.* (Docket No. 02-634). That case involved issues that might control the determination of the class action issues in this arbitration. Oral argument in that case had been scheduled for April 23, 2003 and a decision by the Supreme Court was expected before early July. It appeared sensible to take no action on the class action issues in this arbitration until the determination of the *Green Tree* case had been received and analyzed. Accordingly, in Procedural Order No. 1, all proceedings in this arbitration were stayed until further order of the arbitrator.

On June 23, 2003 the Supreme Court rendered a decision in the *Green Tree* case. Pursuant to the agreement of the parties, each provided me with a letter outlining their respective views about the meaning of the *Green Tree* case for this arbitration. At a conference with the parties it was agreed that under the *Green Tree* case, I must determine whether the parties' Agreement allows for class action arbitration. As outlined in procedural Order No. 2, Oxford moved for a determination that this arbitration cannot be maintained as a class action. The parties provided extensive briefs on this issue. The motion is determined as provided in this memorandum and order.

Discussion

It is axiomatic that questions of Arbitrability begin with an analysis of the parties' agreement. This is particularly true since the *Green Tree* case. It was widely supposed that the Supreme Court would rule, as some lower Federal Courts had, that the Federal Arbitration Act does not allow class actions in arbitration unless the parties have specifically agreed to class action arbitration. It can be noted that

neither in the *Green Tree* case nor in this case does the arbitration clause contain any such express mention of class action arbitrations.

While commentators will no doubt spend much ink and learning on the several opinions the divided Supreme Court issued, one thing seems clear to me at least: a blanket prohibition on arbitration class actions without specific authorization in the arbitration clause was firmly rejected. The argument to that effect by the Petitioner and the *amici* persuaded only three Justices. It can be argued that all of the remaining six, explicitly or implicitly, believed that class action arbitration without specific authorization is not impossible, but is rather a question of construction of the parties' agreement. In any event, whatever else *Green Tree* stands for, it means that whether a class action in arbitration is possible turns on the interpretation of the parties' agreement and that such interpretation is to be made by the arbitrator. I therefore commence analysis of this case with the premise that a class action arbitration is a possible outcome and that it is for me, as arbitrator, to make that determination.

I further note that in this case the prior determination of the Superior Court of Essex County admits the possibility that class action arbitration is available in this case. It could be argued that under the *Green Tree* case, the Court did exactly the right thing, that is it sent the case to arbitration with the specific statement that "all procedural issues including, but not limited to, the determination of class certification, shall be resolved by the arbitrator." The Court may have thought that it had already determined that a class action was available, with only the procedural issues, such as determination of the actual class, left for the arbitrator. The parties in this case have agreed that I should proceed to make the determination, which I do in this memorandum, *de novo*.

The Arbitration Clause

To begin the analysis at the beginning, we turn first to the arbitration clause in the Agreement. It provides in part:

> 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.

This clause is much broader even than the usual broad arbitration clause. The introductory phrase, "No civil action concerning any dispute arising under this agreement shall be instituted before any court," is unique in my experience and seems to be drafted to be as broad as can be. "No civil action" must mean no civil action of any kind whatsoever. The clause prohibits civil actions in law, equity, admiralty or even probate. No such action shall be instituted in "any court." Any court includes any Federal or State Court, any foreign court or the Court at the Hague. Taken together, this phrase has the effect of prohibiting any conceivable court action concerning any dispute under the Agreement. It would not be possible to draft a broader or more encompassing clause.

Having prohibited all conceivably possible civil actions, the clause takes this universal and unlimited class of prohibited civil actions and says, "and all such disputes shall be submitted to final and binding arbitration . . ."

This means that the clause sends to arbitration "all such disputes," which, apart from the prohibition, could have been brought in the form of any conceivable civil action. Since there can be no dispute in any court without a civil action of some sort, the disputes that the clause sends to arbitration are the same universal class of disputes the clause prohibits as civil actions before any court. It follows that the intent of the clause, read as a whole, is to vest in the arbitration process everything that is prohibited from the court process.

A class action is plainly one of the possible forms of civil action that could be brought in a court concerning a dispute arising under this Agreement. In fact, a class action in court is just what Dr. Sutter commenced in the first place.

Therefore, because all that is prohibited by the first part of the clause is vested in arbitration by its second part, I find that the arbitration clause must have been intended to authorize class actions in arbitration. Indeed, to avoid a finding that such was the parties' intention, it would be necessary for there

to be an express exception for class actions in the prohibition. Such a carve-out cannot be inferred absent some clear manifestation of such intent. Similarly, that class actions in court are absolutely prohibited by the first part of the clause but are at the same time not allowed under the second part would mean that class actions are not possible in any forum. In my view, that reading cannot be inferred in the absence of a clear expression that such a bizarre result was intended.

Accordingly, I find that, on its face, the arbitration clause in the Agreement expresses the parties' intent that class action arbitration can be maintained.

In addition, I note that, since Oxford successfully invoked the arbitration clause to prohibit a class action in court, it ought to be bound by judicial estoppel from arguing in this arbitration that the class action part of the case is not governed by the "and all such disputes [including the class action it has just successfully had stopped] shall be submitted to final and binding arbitration" clause.

Since I do not find that the clause is ambiguous, it is not necessary to pass on the *contra proferrentem* arguments.

The Agreement as a Whole

It remains to discuss Oxford's arguments that the agreement read as a whole limits the possible interpretation of the arbitration clause to eliminate class actions. While Oxford notes correctly that the Agreement must be viewed as a whole, I do not find persuasive its contentions that other provisions of the Agreement undermine what appears to be facially allowed by the arbitration clause.

Oxford notes, for example, that the parties to the agreement are only Dr. Sutter and Oxford. The contract repeatedly refers to those parties as Oxford, on the one hand, and the "Primary Care Physician," "his/her" or "he/she" on the other hand. Paragraph after paragraph, Oxford notes, the contract defines the duties and obligations of each party, without a single reference to any other physician or health care provider.

This argument is not persuasive. Every contract, except one that expressly refers to class arbitration, will necessarily deal only with the parties to the particular contract. It can be noted that similar

language in the contracts in the *Green Tree* case did not cause any of the lower courts, or the Supreme Court, to conclude as a matter of law that the parties thereby intended to preclude class arbitration. Indeed, the whole argument seems to me to be beside the point. In a class arbitration, the members of the class are not necessarily parties to the same contract; rather, they have similar or identical contracts with the same defendant that raise the same or similar issues. The references in the Agreement to individual parties, accordingly, have no bearing on whether this Agreement allows class arbitrations.

The ADR Clause in the Agreement

The Agreement contains, in addition to the arbitration clause discussed above, an ADR clause that allows for adjustment of certain disputes within a procedure maintained internally by Oxford. Oxford also argues that the ADR clause requires that, before Dr. Sutter may pursue arbitration, he must attempt to resolve his dispute through this ADR process.

Oxford notes that the ADR procedure is mandated by New Jersey law to provide a mechanism for providers to resolve

disputes on payment of claims arising from individual contracts. In 2001, Oxford updated its Provider Reference Manual to provide the mandated ADR process for the reviews and appeals set forth in these regulations.

Oxford argues that to allow class arbitration to dispense with this individual internal dispute resolution mechanism would subvert the entire statutory scheme. Interpreting the contract to provide for "class arbitration," Oxford argues, would be fundamentally inconsistent with New Jersey law and regulations.

Finally Oxford argues that the explicit terms of the contract permit arbitration only for physicians who have exhausted their disputes through this ADR grievance procedure. This language alone, it argues, precludes "class arbitration" on behalf of all New Jersey Oxford-affiliated physicians, many thousands of whom have never asserted a grievance, let alone exhausted this contractually mandated procedure.

I do not accept Oxford's arguments. With respect to the situation of Dr. Sutter himself, the parties' failure to raise this issue throughout the court proceedings prior to this arbitration indicates that they interpret the ADR clause as not being a condition precedent. Moreover, their failure to raise it as a bar it seems to me to amount to a waiver.

I interpret the reference at the end of the ADR clause that "Any complaint or grievance which at the end of [the ADR] process is not resolved . . . may be submitted to arbitration pursuant to [the arbitration clause] to mean just what it says. The ADR process is non-binding; it may or may not result in a resolution of a dispute. If it does not, the provider is free to pursue arbitration. I thus interpret the ADR procedure as an alternative, that the provider can pursue if he chooses, and his use of the ADR procedure does not preclude arbitration if he does not like the ADR result. It is not meant to be a condition precedent to arbitration. Similarly, the ADR clause is found at the end of the Agreement, unattached to the arbitration clause. Contracts that mandate ADR before arbitration typically structure the progression from negotiation to mediation to arbitration in a single clause.

Dr. Sutter's brief refers to the extensive discussion of the same ADR clause by the New Jersey court in connection with a class action against another insurer. Oxford notes correctly that that agreement in that case does not involve arbitration. Nevertheless, the court's analysis of the purpose and application of the ADR clause is consistent with the reading adopted here that this clause is essentially for the benefit of the provider and is not to be used as a condition precedent.

Accordingly, I find that the ADR clause has no current application to Dr. Sutter. As to other members of the class or classes the bearing the ADR clause may have will be one of the issues in administration of the class action. I am making no finding about the same at this point. That issue, as all others relating to the actual class action, are reserved to be decided in further appropriate proceedings.

Re: 18 193 20593 02
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VS
Oxford Health Plans, Inc.

Rules of the AAA

Finally, Oxford says that the reference in the arbitration clause to the rules of the American Arbitration Association negate class actions. I disagree. The current AAA rules are silent on the question of class actions. The procedures on

consolidation address issues different from those presented by class actions. Consolidations are imposed, by courts, and under special AAA procedures, for reasons unique to each case. These can include efficiency and the avoidance of inconsistent results. While consolidations are imposed, a class action always provides the class members the opportunity to opt out of the proceedings. I therefore conclude that the reference to AAA procedures in the Agreement is not inconsistent with maintaining this case as a class action.

Conclusion

For the foregoing reasons this case shall be maintained as a class action.

This determination does not in any way decide any of the issues relating to the class action itself, such as the definition of the class or classes, the form of notice to class members and similar matters. Nor does it reflect any views on the merits of the underlying case. It was originally agreed with the parties that consideration of all such matters would be deferred until it was first concluded that this case would or would not be maintained as a class action.

A status conference will be scheduled promptly to address what further proceedings will be required.

It is so ordered.

/s/ W.L.D. Barrett

_____ September 23, 2003

W.L.D. Barrett, Arbitrator

Re: 18 193 20593 02
John Ivan Sutter, M.D.
VS
Oxford Health Plans, Inc.

APPENDIX B

AMERICAN ARBITRATION ASSOCIATION

JOHN IVAN SUTTER, M.D., P.A., on behalf of himself and all others similarly situated, Claimant, vs. OXFORD HEALTH PLANS, INC. Respondent.	AAA CASE NO. 18 193 20593 02 **NOTICE OF CLASS DETERMINATION**

This Notice May Affect Your Rights.

Please Read Carefully.

IF YOU ARE A PHYSICIAN OR PHYSICIAN GROUP WHO PROVIDED MEDICAL SERVICES TO ANY PERSON WHO IS A MEMBER OF A HEALTH PLAN ADMINISTERED BY OXFORD HEALTH PLANS LLC ("OXFORD") SINCE DECEMBER 11, 1996 AND YOU SIGNED A NEW JERSEY PARTICIPATING PROVIDER AGREEMENT WITH OXFORD CONTAINING AN ARBITRATION CLAUSE THAT DOES NOT PROHIBIT YOU FROM PARTICIPATING IN A CLASS ARBITRATION, PLEASE READ THIS NOTICE CAREFULLY. THIS CLASS ARBITRATION MAY AFFECT YOUR RIGHTS.

I. WHY SHOULD YOU READ THIS NOTICE?

Your rights may be affected by the class action arbitration known as Sutter v. Oxford Health Plans, Inc., Case No. 18 193 20593 02, now pending before the American Arbitration Association, referred to in this Notice as the "Class Arbitration." This Notice is to inform you of the arbitrator's decision to certify the arbitration as a class action, provide details on the nature of the claims asserted

against Oxford,[2] and advise you of your right to participate in or exclude yourself from the Class Arbitration.

II. THE NATURE OF THE ACTION

This arbitration was originally filed by a physician, John Ivan Sutter, M.D., P.A. Dr. Sutter is a pediatrician practicing medicine in Clifton, New Jersey. Dr. Sutter, on behalf of himself, and on behalf of all New Jersey individual physicians and physician groups who executed contracts with Oxford filed this Class Arbitration against Oxford asserting, among other causes of action, breach of contract and statutory violations of the New Jersey Prompt Payment Act and the HINT Act alleging Oxford's failure to timely and appropriately pay physicians for the medical services they rendered to Oxford plan members and insureds. More specifically, Dr. Sutter seeks damages, on behalf of himself, and on behalf of physician providers, claiming that, among other things, Oxford continuously and systematically: (1) fails to make prompt and timely payment of medical claims; (2) refuses to provide compensation for a particular medical procedure by improperly contending that this procedure is routinely included in another procedure performed on the same date of service -- known as "bundling" of claims; (3) unilaterally and retroactively reduces the amount of compensation paid for the medical services provided by changing the procedure code (CPT Code) to a procedure of lesser complexity -- known as "downcoding" of claims; and (4) refuses to pay the appropriate compensation in cases where additional medical services were required to treat more complex medical conditions or separate and unrelated conditions -- known as the refusal to recognize "modifiers."

Oxford denies Dr. Sutter's allegations, and contends that it has appropriately processed and reimbursed the claims of its member physicians as required under the terms and conditions of its contracts with physicians. Oxford further contends that it has overpaid certain physicians, and may pursue such overpayments as defenses, offsets and/or counterclaims in this Class Arbitration.

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[2] When the term "Oxford" is used herein, it shall mean Oxford Health Plans LLC, and all of the health plans it administers. "Oxford" does not include, and this notice does not relate to, UnitedHealth Group or any of the health plans it or its affiliates or subsidiaries administer, except for Oxford Health Plans LLC and health plans that entity administers.

Re: 18 193 20593 02
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VS
Oxford Health Plans, Inc.

A contested class certification hearing was held on October 29, 2004. Thereafter, the arbitrator certified a class of certain New Jersey individual physicians and physician groups who participate in the Oxford provider network and who rendered services to Oxford members and insureds, and appointed Dr. Sutter to represent the class, of which you may be a member.

III. WHAT RELIEF DOES THE CLASS SEEK?

Dr. Sutter is seeking compensatory damages and punitive damages on behalf of himself and other members of the class for medical services rendered (and supplies provided) which Dr. Sutter asserts that Oxford failed to pay timely or appropriately as a result of improper claims processing practices. Oxford denies Dr. Sutter's allegations and contends that its practices are fully consistent with the terms of the applicable provider agreements.

The arbitrator's class certification Order does not decide the merits of the claims of the class or Oxford's defenses, but rather only certifies this arbitration as a Class Arbitration. The arbitrator has not ruled on the merits of the claims asserted by the class or the denials and other defenses asserted by Oxford.

THERE IS NO ASSURANCE THAT AN AWARD WILL BE GRANTED TO DR. SUTTER AND THE CLASS OR, IF AN AWARD IS MADE, THAT IT WILL BE COLLECTED IN WHOLE OR IN PART.

IV. AM I AFFECTED BY THIS CLASS ARBITRATION?

You are a member of the Class certified by the arbitrator if you were or are:

> An individual physician or physician group (including, but not limited to, a medical doctor or doctor of osteopathic medicine), regardless of specialty, who provided medical services to any person who is a member of a health plan administered by Oxford Health Plans LLC ("Oxford") in the class period of December 11, 1996 through December 31, 2004, and who signed with Oxford a New Jersey provider agreement containing an arbitration clause the same as or similar to that in a New Jersey participating provider agreement (providing that no civil action concerning any dispute arising under the 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) and which does not prohibit you from participating in a class arbitration.

V. THE ARBITRATOR, CLASS REPRESENTATIVE AND CLASS COUNSEL

The Arbitrator in this arbitration is **William L. D. Barrett, Esq.** Mr. Barrett graduated with a Bachelor's degree from Yale University in 1960, received his law degree from Harvard University in 1963, and has been a practicing lawyer since 1964. Mr. Barrett is currently a member of the law firm of Hollyer Brady Barrett & Hines LLP in New York, New York.

The Arbitrator appointed **John Ivan Sutter, M.D.** to act on behalf of the class. Dr. Sutter graduated with a Bachelor's degree from New York University in 1974, obtained his medical degree from Far Eastern University in 1978, and has been practicing medicine since 1979. Dr. Sutter is a board-certified pediatrician and maintains his medical practice in Clifton, New Jersey.

The Arbitrator also appointed Class Counsel to represent the interests of the class. The names of the attorneys and the firm designated to represent the Class are: **Eric D. Katz, Esq.** and **David A. Mazie, Esq.**, partners of the law firm of Nagel Rice & Mazie, LLP in Roseland, New Jersey. Mr. Katz received a Bachelor's degree from Polytechnic University in 1988 and a law degree in 1991 from Pace University, and has been practicing law since 1991; Mr. Mazie received a Bachelor's degree from Rutgers University in 1983 and a law degree from George Washington University in 1986, and has been practicing law since 1986. The Arbitrator determined that Class Counsel is experienced and could adequately represent Dr. Sutter and the class. If you have any questions regarding the type of litigation in which Class Counsel is involved, you may contact Class Counsel at the address and e-mail address listed below. You will not be charged for Class Counsel's services. Rather, if Class Counsel obtains a recovery for the Class, Class Counsel will apply to the arbitrator for payment of reasonable attorney's fees and costs to be deducted from the funds recovered before the net proceeds are distributed to Class members.

You have the right to hire your own attorney and enter an appearance through counsel if you so desire. If you do so, you will be responsible for paying the attorney's fee. You have the right not to participate, or to exclude yourself ("opt-out") from the Class. The procedures and deadlines for

excluding yourself from the Class are described in the next section of this Notice. You also have the right to seek the arbitrator's permission to intervene or appear in this Class Arbitration.

VI. DO I NEED TO DO ANYTHING NOW?

TO REMAIN IN THE CLASS: If you want to remain a member of the Class, YOU DO NOT HAVE TO DO ANYTHING AT THIS TIME. If Dr. Sutter is successful after an arbitration hearing on the merits or obtains a settlement, you may then be able to participate in any recovery obtained for the Class through additional proceedings or through a process to be administered by the arbitrator. If you remain part of the Class, you will be notified if there is any recovery and/or any procedures through which you may be required to participate to seek a recovery. ***As a Class member, you will be bound by all Orders of the arbitrator, including Orders which may be adverse to the class. Furthermore, as a Class member, any currently existing claims or causes of action as alleged in this Class Arbitration will be forever resolved by a final judgment in this case.***

Participating in this Class Arbitration will not terminate or affect any of your participating provider agreements with Oxford.

EXCLUDING YOURSELF FROM THE CLASS: If you want to be excluded from this Class, the Arbitrator will exclude you. To request exclusion, you must send a letter expressly stating that you wish to be excluded from the Class. This letter must be sent to the address listed below, and must be postmarked no later than _____:

[RECIPIENT/ADDRESS TO BE AGREED UPON BY THE PARTIES]

If you choose to exclude yourself from the Class, you will not be allowed to participate in any recovery that might be paid as a result of a hearing or settlement of this Class Arbitration. You will not be bound by any decision in this Class Arbitration favorable to Oxford; and you may present any claims you have against Oxford by filing your own arbitration, or you may seek to intervene in this Class Arbitration. Should you exclude yourself from the Class, you will not be bound by any of the Orders of the arbitrator.

VII. FURTHER PROCEEDINGS

As noted, Oxford denies the allegations and claims made by Dr. Sutter. The next stage of the arbitration will include discovery and other pre-hearing proceedings; an arbitration hearing of this matter has not yet been scheduled. Any class member may attend hearings in this Class Arbitration. You may communicate with Class Counsel if you have evidence you believe would be helpful to establish the Class claims, and you may be asked by the parties to provide information relevant to the arbitration. Any information or evidence you provide to Class Counsel may be subject to discovery by Oxford.

VIII. WHO CAN I CONTACT WITH QUESTIONS?

PLEASE DO NOT CALL THE AMERICAN ARBITRATION ASSOCIATION OR THE ARBITRATOR. If you have questions regarding this Notice or the Class Arbitration to which it refers, you can obtain information in one of two ways.

First, you may contact Class Counsel by written correspondence. To do so, you may send a letter to **Eric D. Katz at Nagel Rice & Mazie, LLP, 103 Eisenhower Parkway, Roseland, New Jersey 07068, or send an e-mail to ekatz@nrmlaw.com.**

Second, you may obtain information from the Class Arbitration Docket available on the American Arbitration Association's Web site (www.adr.org).