Oxford Health Plans LLC v. Sutter?SCOTUS Reaffirms FAA Section 10(a)(4) Manifest Disregard of the Agreement Outcome Review Standard and Elaborates on Its Scope: Part II.C

Part II.C

Does Oxford Portend Judicial Reconsideration of

Whether Class-Arbitration Consent is a Question of Arbitrability?

In *Stolt-Nielsen* and *Oxford* the parties voluntarily submitted the class-arbitration-consent question to arbitrators because a four-Justice plurality ruled in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), that the class-arbitration-consent issue was not a question of arbitrability for the court to decide. While ?courts assume that the parties intended courts, not arbitrators? to decide certain ?gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy,? the Court found that the issue did not fall into ?this narrow exception.? 539 U.S. at 452 (citations omitted). According to the Court, ?the relevant question . . . is what kind of arbitration proceeding the parties agreed to:?

That question does not concern a state statute or judicial procedures. It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.

539 U.S. at 452-53 (citations omitted).

Bazzle was well received by the lower courts, and even though it was only a plurality opinion, many courts, parties and practitioners apparently thought that the arbitrability of consent-to-class-arbitration was a foregone conclusion after *Bazzle* even though the plurality's rationale was endorsed by only four justices ? a hat-tip to Associate Justice Stephen G. Breyer's clearly and persuasively written plurality opinion. Some also apparently thought that Associate Justice John Paul Stevens' concurring opinion was, for all intents and purposes, an endorsement of the plurality's rationale, and that accordingly, *Bazzle* established precedent binding on the lower courts.

In 2003, prompted in part by *Bazzle*, the American Arbitration Association promulgated its Supplementary Rules for Class Arbitrations, Rule 3 of which directs the arbitrator or panel to ?determine as a threshold matter, in a reasoned, partial, final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class. . . .? AAA Supplementary Rules, Rule 3. The ?Clause Construction? awards in *Stolt-Nielsen* and *Oxford* were made under Rule 3 of the AAA Supplementary Rules.

In light of *Bazzle* and the AAA Supplementary Rules, class-arbitration-consent-related disputes in cases where the relevant arbitration agreements did not expressly prohibit class arbitration ? e.g., cases not involving class-arbitration waivers ? were generally submitted to arbitration, usually pursuant to the AAA Supplementary Rules. Most of the class-arbitration-related litigation concerned challenges to class arbitration waivers, rather than the arbitrability of class-arbitration-consent-related issues.

But *Stolt-Nielsen* explained that *Bazzle* did not establish binding precedent on any issue?including class-arbitration-consent arbitrability?because it "did not yield a majority decision. . . ." See Stolt-*Nielsen*, 130 S. Ct. at 1772. The Court said that ?[u]nfortunately the opinions in *Bazzle* appear to have baffled the parties in this case at the time of the arbitration proceeding[,]? because ?[f]or one thing, the parties appear to have believed that the judgment in *Bazzle* requires an arbitrator, not a court, to decide whether a contract permits class arbitration.? *Stolt-Nielsen*, 130 S. Ct. at 1772 (citation omitted). The Court did ?not revisit that [allocation of decision-making power] question [in *Stolt-Nielsen*] because the parties' supplemental agreement expressly assigned this issue to the arbitration panel, and no party argues that this assignment was impermissible.? *Id.*

The Court underscored that same point in *Oxford*, noting that it ?would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called ?question of arbitrability,'? an issue ?*Stolt-Nielsen* made clear that [the Supreme Court] has not yet decided. . . .? *Oxford*, Slip op. at 4 n.2. But *Oxford* gave the Court ?no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures.? *Id.* Oxford submitted the issue to

arbitration ?not once but twice?and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability.? *Id*.

Associate Justice Samuel A. Alito's concurring opinion ? joined by Associate Justice Clarence Thomas ? elaborated further on the point. Justice Alito said, ?Today's result follows directly from petitioner's concession and the narrow judicial review that federal law allows in arbitration cases.? Slip op. at 1 (Alito, J., concurring) (?Concurring op.?) (citation omitted). Were the Court ?reviewing the arbitrator's interpretation of the contract *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.? Concurring op. at 1 (quoting *Stolt-Nielsen*, 559 U.S. at 685).

Justice Alito observed that, in the absence of a party concession that an arbitrator should decide the consent-to-class-arbitration issue, the possibility that third party putative class members will not be bound by an arbitrator's decision concerning class arbitration consent is something that ?should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide.? Concurring op. at 2-3. Justice Alito explained that ?class arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the ?benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one[.]'? Concurring op. at 2 (quoting *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 546-547 (1974)).

Fed. R. Civ. P. 23's ?opt out? notice requirement solves that problem in the litigation context by deeming absent class members who do not opt out upon notice to be bound by the result of the class action litigation. But in the arbitration context, sending opt out notices to absent class members does not cure the problem because arbitration is a matter of contract and ?an offeree's silence does not normally modify the terms of a contract[.]? Concurring op. at 2 (quoting 1 Restatement (Second) of Contracts §69(1) (1979)). Thus, ?at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used.? Concurring op. at 2 (emphasis in original).

Oxford will likely encourage renewed interest in testing whether consent to class arbitration presents an issue of arbitrability for the courts to decide. At first blush it may appear that such an effort may be doomed to failure because many commercial arbitration agreements clearly and unmistakably delegate to the arbitrators the authority to decide questions of arbitrability. For example, the agreement in *Oxford* incorporated by reference the AAA Commercial Rules, Rule R-7(a) of which states: ?The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.?

But, as Justice Alito's concurring opinion observes, one reason that class-arbitration-consent may or should be a question of arbitrability is because arbitrators ? unlike judges ? cannot bind absent class members who have not consented to an arbitrator deciding whether their separate arbitration agreements authorize class arbitration. That the parties to the class construction arbitration proceeding may have clearly and unmistakably delegated to an arbitrator the authority to decide what might be a question of arbitrability does not solve that problem. Assuming no traditional state-law basis for binding nonsignatories applies, see Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1901-02 (2009), absent putative-class-member C cannot be bound by an arbitration agreement solely between A and B, irrespective of how clearly and unmistakably A and B agreed to submit questions of arbitrability to an arbitrator.

Whether or not there is likely to be much future litigation about the arbitrability of class-arbitration-consent questions remains to be seen. To borrow from insurance and reinsurance parlance, it is probably safe to assume that class-arbitration-related disputes have relatively short ?tails? in the sense that most would be expected to arise out of or relate to arbitration agreements of fairly recent vintage.

Recent arbitration agreements have presumably been drafted with the benefit not only of *Stolt-Nielsen*, but also *AT & T Mobility, L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011), and more recently, *American Express Co. v. Italian Colors Restaurant*, No. 12-133, slip op. (June 20, 2013). *Concepcion* greatly reduced the extent to which state-law unconscionability or public policy defenses could be used to defeat class-arbitration-waiver provisions, *Concepcion*, 131 S. Ct. at 1748, 1756, and *Italian Colors* rejected the

argument that a class-arbitration waiver is unenforceable under the FAA simply because ?plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.? Slip op. at 1, 7-9.

Prior to these decisions, class-arbitration waivers were routinely challenged and frequently not enforced, but beginning within the last couple of years, and certainly as of today, including a class-arbitration waiver in an arbitration agreement is a simpler and far more dependable way of managing class-arbitration risk than opting not to insist on such a waiver, arguing consent-to-class arbitration is a question of arbitrability and hoping that courts will refrain from manufacturing consent to class arbitration in the guise of contract interpretation. It stands to reason that class-arbitration-waiver-use frequency has likely increased now that the Supreme Court has removed some once-formidable obstacles to their enforcement.

Class-arbitration waivers all but foreclose disputes about consent to class arbitration, thus rendering academic for all intents and purposes the subsidiary question of who gets to decide those disputes. Even assuming a party were to insist that an arbitrator must decide whether the parties somehow consented to class arbitration despite their clear agreement to the contrary, the outcome of the arbitration would be preordained under Stolt-Nielsen, making it not worth pursuing.[1]

But the presumably short-tail nature of class-arbitration disputes, coupled with reccent Supreme Court rejection of two once-popular defenses to class waivers, does not necessarily mean that disputes will not arise concerning the arbitrability of consent-to-class-arbitration. There are undoubtedly arbitration agreements that do not contain class arbitration waivers under which disputes about class arbitration may arise or have arisen and have not yet been submitted to arbitration. And parties advocating bilateral-only arbitration would, in light of *Stolt-Nielsen* and *Oxford*, be remiss not to assert that class-arbitration-consent raises questions of arbitrability for the court to decide.

But whether the lower federal courts will be willing to eschew the somewhat entrenched notion that consent-to-class-arbitration does not present a question of arbitrability is far from clear. As we've touched upon in some of our prior posts, there are some persuasive reasons why we believe consent-to-class-arbitration presents a question of arbitrability, including ones related to the one raised by Justice Alito in his concurring opinion. The Supreme Court has signaled twice that the path for making those arguments is clear, and it will be interesting to see how well-trodden it becomes and where it ultimately will lead.

[1] An exception might arise if a party who agreed to a delegation clause clearly and unmistakably committing questions of arbitrability to the arbitrator argued that the class waiver was unconscionable and that the arbitrator had to decide that question. See Rent-A-Center West, Inc. v. Jackson, 130 S. Ct. 2772, 2775, 2779-81 (2010) (where a delegation clause in an arbitration agreement clearly and unmistakably provided that parties would submit arbitrability questions to arbitrator, under severability doctrine, unconscionability argument not directed specifically at delegation clause was for the arbitrator to decide). But even assuming the unconscionability question could be validly delegated to the arbitrators as between the two parties to the arbitration agreement, the concerns Justice Alito raised about absent class members would come into play if the party challenging the waiver were to argue that the arbitrator should proceed to decide whether the parties expressly consented to class arbitration in the event the waiver was deemed unconscionable.