

December 12, 2012

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Once More into the Breach: The U.S. Supreme Court Takes Another Case Regarding Class-Wide Arbitration

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The United States Supreme Court recently announced that it will return to the trenches of arbitration jurisprudence. Specifically, the Court granted certiorari in *Oxford Health Plans LLC v. Sutter*, No. 12-135 (U.S.), to review whether arbitrators exceed their powers in contravention of the Federal Arbitration Act (“FAA”) by ordering class-wide arbitration based solely on broad contractual language “requiring arbitration of any dispute arising under the[] contract.”¹ The Court had left this question unresolved in its landmark decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. ---, 130 S. Ct. 1758 (2010).

In *Stolt-Nielsen*, the Supreme Court held that arbitrators and courts cannot impose class-wide arbitration where an arbitration agreement is silent on the issue because “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”² Because the *Stolt-Nielsen* parties had stipulated that their arbitration agreement was in fact “silent” on the issue of class-wide arbitration, the Court did not reach the question of what constitutes contractual “silence” effectively barring class-wide arbitration.³

The lower federal courts have taken divergent approaches to answering that question. For instance, in *Sutter v. Oxford Health Plans LLC*,⁴ the case the Supreme Court is to review, neither the arbitration agreement nor the overall contract between the parties made “express reference to class arbitration.”⁵ Nevertheless, the arbitrator interpreted the language requiring “any dispute arising under this Agreement” to be “submitted to final and binding arbitration” as including class actions.⁶ On appeal, the United States Court of Appeals for the Third Circuit affirmed because although “[a]n arbitrator may exceed his powers by ordering class arbitration without authorization” and “lacks the power to order class arbitration unless there is a contractual basis for concluding that the parties agreed to that procedure,” the arbitrator “articulate[d] a contractual basis for his decision to order class arbitration” and “relied upon the breadth of the arbitration agreement, [which reliance] *Stolt-Nielsen* does not proscribe.”⁷

In *Jock v. Sterling Jewelers Inc.*,⁸ the United States Court of Appeals for the Second Circuit reviewed an arbitration agreement that also did not expressly provide for or prohibit class-wide arbitration.⁹ Despite the fact that the agreement appeared silent on the issue, the arbitrator concluded that because the parties had not expressly prohibited class-wide arbitration, they had impliedly agreed to such procedures.¹⁰ On a motion to vacate the arbitrator’s decision, the federal district court concluded that under *Stolt-Nielsen*, the arbitrator went beyond her authority in creating a provision to which the parties had nowhere indicated their assent.¹¹ On appeal, however, the Second Circuit reversed, stating that (1) the district court had “substitut[ed] its interpretation of the agreement for that already undertaken by the arbitrator,” and (2) the arbitrator did not exceed her authority because there was “nothing in the agreement itself . . . that prohibits an arbitrator from determining whether the agreement contemplates class arbitration.”¹²

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Most recently, in *Reed v. Florida Metropolitan University, Inc.*,¹³ the United States Court of Appeals for the Fifth Circuit disagreed with the Second and Third Circuits, ruling that *Stolt-Nielsen* requires “courts to *ensure* that an arbitrator has a legal basis for his class arbitration determination, even while applying the appropriately deferential standard of review.”¹⁴ As in *Jock* and *Sutter*, the parties in *Reed* entered into an arbitration agreement that nowhere expressly provided for or prohibited class-wide arbitration.¹⁵ And just as in *Jock* and *Sutter*, “[t]he arbitrator determined that the parties implicitly agreed to class arbitration” because the agreement called for “any dispute” between the parties to be arbitrated and provided that “[a]ny remedy available from a court under the law shall be available in the arbitration.”¹⁶ After the district court affirmed the award as “a ‘reasonable interpretation of the contract,’” the Fifth Circuit reversed, reasoning that neither of these provisions “even remotely relates to or authorizes class arbitration,” such that “the arbitrator lacked a contractual basis upon which to conclude that the parties agreed to authorize class arbitration” and “exceeded his authority in ordering the parties to submit to a class arbitration proceeding.”¹⁷

The Fifth Circuit’s decision in *Reed* created the split of authority upon which the *Oxford Health* petitioners relied, in part, in arguing that the question presented in these three cases warranted Supreme Court review. Given the Supreme Court’s recent interest in issues regarding class-wide arbitration under the federal substantive law of arbitrability and its express reservation in *Stolt-Nielsen* of the issue presented in *Oxford Health*, it is not surprising that the Court granted the *Oxford Health* petition. Whether the Court will continue to apply its recent approach, in which it has expressed skepticism about the benefits of class arbitration and the extent to which such arbitration is available absent the parties’ agreement,¹⁸ remains to be seen. The case will likely be argued in late winter or early spring 2013, and a decision will issue by the end of the term in June 2013.

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¹ See Question Presented, <http://www.supremecourt.gov/qp/12-00135qp.pdf>. Under Section 10 of the FAA, a federal district court may vacate arbitration awards “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a)(4).

² 130 S. Ct. at 1775 (emphasis in original). For further discussion of the Court’s decision in *Stolt-Nielsen*, see the K&L Gates LLP client alert on that decision (<http://www.klgates.com/class-arbitration-waivers-silence-reigns-in-stolt-nielsen-but-the-courts-have-more-to-say-06-15-2010/>).

³ See 130 S. Ct. at 1776 n.10 (“We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was ‘no agreement’ on the issue of class-action arbitration.”).

⁴ 675 F.3d 215 (3d Cir. 2012).

⁵ 675 F.3d at 217.

⁶ See *id.* at 217-18 (emphasis added) (stating that arbitrator “observed that an express carve-out for class arbitration would be required to negate this reading of the clause”).

⁷ *Id.* at 220, 222-24 (“the arbitrator did not impermissibly infer the parties’ intent to authorize class arbitration from their failure to preclude it”).

⁸ 646 F.3d 113 (2d Cir. 2011).

⁹ 646 F.3d at 116-17.

¹⁰ See *id.* at 117 (noting that arbitrator applied doctrine of construing agreement strictly against its drafter, in this case the defendant seeking to compel individual arbitration).

¹¹ See *id.* at 118.

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¹² *See id.* at 122-25 (noting that § 10(a)(4) is “accorded the narrowest of readings” and requires court to determine “whether the arbitrators had the power, based on the parties’ submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue”).

¹³ 681 F.3d 630 (5th Cir. 2012).

¹⁴ 681 F.3d at 645-46 (emphasis added). The court reasoned that “[s]uch an analysis necessarily requires some consideration of the arbitrator’s award and rationale.” *Id.* (“[t]o the extent that the Second Circuit decided not to undertake an inquiry into the arbitrator’s reasoning, we must part ways”); *cf. id.* at 644 n.13 (“[w]e disagree with *Sutter* for essentially the reasons stated herein with respect to the Second Circuit’s *Jock* decision”).

¹⁵ *See id.* at 632-33.

¹⁶ *See id.* at 633, 641-42 (noting that arbitrator commented that defendant, as drafter of agreement, could have included class waiver provision).

¹⁷ *Id.* at 633, 642-44 (concluding that such provisions are the type of general terms to agree to arbitration which, under *Stolt-Nielsen*, cannot give rise to an inference that the parties agreed to classwide arbitration).

¹⁸ *See, e.g., Stolt-Nielsen*, 130 S. Ct. at 1775-76 (“the relative benefits of class-action arbitration are much less assured [than those of bilateral arbitration], giving reason to doubt the parties’ mutual consent to resolve disputes through class-wide arbitration”).