Journal of Dispute Resolution

Volume 2014 | Issue 1 Article 9

2014

Head of the Class: Oxford Health Plans and the Uncertain Future of Class Arbitrability Determinations

Kevin Sack

Head of the Class: *Oxford Health Plans* and the Uncertain Future of Class Arbitrability Determinations

Oxford Health Plans LLC v. Sutter[1]

I. INTRODUCTION

Arbitration clauses allow contracting parties to resolve their contractual disputes without being subjected to lengthy and expensive judicial processes. Arbitrators are authorized to interpret contractual arbitration agreements to determine which issues the parties agreed to arbitrate.[2] However, contract arbitration provisions are often silent as to the availability of class action procedures. *Oxford Health Plans LLC v. Sutter* held that, when parties expressly agree to allow an arbitrator to interpret whether their agreement allows class action arbitration, the arbitrator does not exceed his authority in doing so, regardless of interpretive error.[3] This note first discusses how the United States Supreme Court resolved a circuit split by distinguishing *Stolt-Nielsen*[4] in *Oxford Health Plans*. Second, this note discusses a question that the Court raised, but left unanswered: whether an arbitrator or a court should be presumptively responsible for interpreting whether an arbitration agreement allows for class arbitration.[5]

II. FACTS AND HOLDING

Plaintiff, pediatrician John Sutter ("Sutter"), contracted with Oxford Health Plans ("Oxford"), a health insurance company, to provide medical care to Oxford's customers at a set rate.[6] A dispute arose when Sutter and other New Jersey physicians, under similar contracts, alleged that Oxford failed to pay for their medical services, violating their agreements and New Jersey law.[7] Sutter sought to certify a class action suit against Oxford in the New Jersey Superior Court.[8] However, Sutter's agreement with Oxford contained an arbitration provision, which provided that:

> 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. . .[9]

---

1. Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013).
2. *Id.* at 2069.
3. *Id.* at 2068.
4. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010).
5. *Oxford Health Plans*, 133 S. Ct. at 2069 n.2.
6. *Id.* at 2067.
7. *Id.*
8. *Id.*
9. *Id.*

Relying on this provision, Oxford filed a motion under the Federal Arbitration Act ("FAA")[10] to compel arbitration,[11] which the court granted.[12]

In arbitration, Sutter and Oxford agreed that the arbitrator should interpret whether their agreement allowed for class action arbitration.[13] The arbitrator examined the arbitration clause to determine the intent of the agreement.[14] Ultimately, the arbitrator concluded that the clause prohibited the parties from bringing any "civil action" in state court, but also authorized those same "civil actions" to be pursued in arbitration.[15] Because the arbitrator determined that a class action was a "civil action" intended in the agreement, he determined that the plaintiffs could utilize class procedures permitted by the arbitration agreement.[16]

Following this determination, Oxford filed a motion in federal district court asking the court to vacate the decision under the FAA[17] because the arbitrator acted beyond his power in authorizing the class action.[18] The district court denied the motion, and the Third Circuit Court of Appeals affirmed, upholding the arbitrator's finding that class action arbitration was proper.[19] The case was then sent back to the arbitrator to continue the authorized class arbitration.[20]

Oxford, in arbitration following its failed motion and appeal, requested that the arbitrator re-visit his decision in light of the United States Supreme Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[21] The arbitrator found that the *Stolt-Nielsen* decision was not relevant to Oxford's dispute because, unlike the parties in *Stolt-Nielsen*, Sutter and Oxford had contractually agreed to the terms of the arbitration agreement, which the arbitrator found to authorize class action arbitration.[22] When Oxford disputed the rights established by the arbitration agreement, the arbitrator concluded that his task was to interpret the text of the arbitration clause.[23] Finding that the language in the clause unambiguously indicated the parties' intent to permit class arbitration, the arbitrator concluded that he performed his authorized task of contract interpretation within the scope of his power.[24]

---

10. 9 U.S.C. §§ 1-14 (2002).

11. *Id.* at § 2.

12. *Oxford Health Plans*, 133 S. Ct. at 2067.

13. *Id.* at 2065.

14. *Id.* at 2067.

15. *Id.* The arbitrator determined that the clause, which barred all "civil actions" in state court, also sent that same "universal class of disputes" to arbitration. *Id.*

16. *Id.* The arbitrator found that the intent of the clause was to permit everything in arbitration that was barred in state court, and because a class action was among the "civil actions" that could have been brought in court, the arbitrator held that the clause permitted a class action in arbitration. *Id.*

17. 9 U.S.C. at § 10(a)(4) (2002). The statute authorizes a federal district court to vacate an arbitration award when arbitrators "exceeded their power" such that "a mutual, final, and definite award upon the subject matter submitted was not made." *Id.*

18. *Oxford Health Plans*, 133 S. Ct. at 2067.

19. *Id.*

20. *Id.*

21. *Id.* In *Stolt-Nielsen*, the Court vacated an arbitration panel's award of class arbitration, finding that a party can only be made to submit to class action arbitration if there is a contractual basis showing that the party agreed to allow such arbitration. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010).

22. *Oxford Health Plans*, 133 S. Ct. at 2067. By contrast, in *Stolt-Nielsen*, the parties had specifically stipulated that their contract included no provisions regarding class arbitration. *Stolt-Nielsen*, 559 U.S. at 669.

23. *Oxford Health Plans*, 133 S. Ct. at 2067.

24. *Id.* at 2067-68.

Again, Oxford filed a motion in federal district court, pursuant to section 10(a)(4) of the FAA,[25] to vacate the arbitrator's decision authorizing class arbitration, relying on *Stolt-Nielsen*.[26] The district court denied the motion, and the Third Circuit affirmed.[27] The Third Circuit emphasized that the scope of judicial review under section 10(a)(4) is very limited.[28] As long as the arbitrator makes a good faith attempt to interpret a contract provision, his decision cannot be vacated, even for serious errors of law or fact.[29]

Oxford appealed to the United States Supreme Court, which granted certiorari.[30] Affirming the decisions of the lower courts, the Supreme Court upheld the arbitrator's determination that class action arbitration was proper.[31] Distinguishing *Stolt-Nielsen*, the Court found that the arbitrator had interpreted the contract at issue, as Sutter and Oxford had authorized him to do, which warranted his finding that the arbitration provision allowed for class arbitration.[32] In contrast, the arbitrators in *Stolt-Nielsen* were not authorized to interpret the contract, as the parties had stipulated that their agreement was silent as to class arbitration.[33] Thus, in *Stolt-Nielsen*, the arbitrators exceeded their authority by imposing class action procedures.[34] The *Oxford* Court held that arbitrators only "exceed their powers"[35] under section 10(a)(4), and thus their decisions can only be overturned, when they act outside the authority granted to them by the parties.[36]

III. LEGAL BACKGROUND

United States courts favor a national policy granting autonomy to arbitral decisions, such that they are binding and free from judicial review.[37] Only under very unusual circumstances will a court be authorized to set aside an arbitrator's decision.[38] This limited authority, granted under the FAA, delineates the precise circumstances under which a court can review and vacate an arbitral award.[39] One such circumstance is when arbitrators have "exceeded their powers."[40]

---

25. 9 U.S.C. § 10(a)(4) (2002).
26. *Oxford Health Plans*, 133 S. Ct. at 2068.
27. *Id.*
28. Sutter v. Oxford Health Plans LLC, 675 F.3d 215, 219-20 (3d Cir. 2012).
29. *Id.* The Court of Appeals found that because the arbitrator attempted to extract the parties' intent from the arbitration clause and articulated his reasoning in so doing, Oxford's motion under § 10(a)(4) could not prevail under this standard. *Id.* at 223-24.
30. *Oxford Health Plans*, 133 S. Ct. at 2068.
31. *Id.*
32. *Id.* at 2069.
33. *Stolt-Nielsen*, 559 U.S. at 668-69.
34. *Oxford Health Plans,* 133 S. Ct. at 2070.
35. 9 U.S.C. § 10(a)(4) (2002).
36. *Oxford Health Plans,* 133 S. Ct. at 2068.
37. *See* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 588 (2008).
38. *See generally* First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 942 (1995).
39. 9 U.S.C. § 10 (2014). These exceptions include awards garnered by "corruption, fraud, or undue means"; arbitrator "partiality or corruption"; prejudicial misconduct by the arbitrator; and when arbitrators exceed their power. *Id.* The United States Supreme Court found this statute, in addition to 9 U.S.C. § 11, to be the exclusive grounds on which a court could vacate or modify an arbitration award. *Hall St. Assocs.*, 552 U.S. at 577.
40. 9 U.S.C. at § 10(a)(4) (2002).

After an arbitrator has made an award or determination, a party can ask a court to vacate the arbitral award by filing a section 10(a)(4) motion.[41] However, when contracting parties agree to have an arbitrator construe their contract in the event of a future contract dispute, and the arbitrator's actions fall within that scope, courts may not question the arbitrator's interpretation.[42] It is only when an arbitrator acts outside his authority, issuing an award based on his own notions of justice rather than on the contractual terms, that a court may find that an arbitrator exceeded his powers and vacate his decision under section 10(a)(4).[43]

A. Arbitrators Exceeding Their Powers under FAA § 10(a)(4)

It is rare for a court to find that an arbitrator exceeded his powers under section 10(a)(4) of the FAA. However, arbitral decisions have been vacated under section 10(a)(4) in a few cases. In *First Options of Chicago, Inc. v. Kaplan*, the United States Supreme Court held that, absent "clear and unmistakabl[e]" evidence, parties cannot be assumed to have consented to arbitrate the issue of arbitrability.[44] In *First Options*, the Kaplans had entered into an agreement with First Options, regarding the "workout" of the Kaplans' debt on their business, MK Investments, Inc. ("MKI").[45] When the Kaplans failed to make a payment to First Options, First Options took control of MKI, liquidated its assets, and sought to have the conflict arbitrated.[46] While First Options and MKI had signed the arbitration provision in the contract, the Kaplans had never signed the document containing the provision that authorized arbitration of their dispute with First Options.[47] The Kaplans argued that the payment issue should not be arbitrable.[48] The arbitrators determined that it was within their powers to decide arbitrability for all three parties, and found the case to be arbitrable.[49] This decision was upheld in federal district court, but the Third Circuit Court of Appeals overturned the arbitrators' determination.[50]

The United States Supreme Court found that there was no clear evidence that the Kaplans had agreed to have the issue of arbitrability determined by arbitrators.[51] Because they had not signed the document containing the arbitration agreement, the Kaplans had not consented to arbitration. As such, the arbitrators were not authorized to determine the arbitrability of their dispute with First Options.[52] Accordingly, the Court affirmed the Third Circuit ruling that the arbitra-

41. *Id.*

42. United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960). *See also* United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37-38 (1987); E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000).

43. *E. Associated Coal*, 531 U.S. at 62.

44. 514 U.S. 938, 944.

45. *Id.* at 940.

46. *Id.*

47. *Id.* There were four documents detailing the "workout" agreement, but the Kaplans had not signed the one that contained the arbitration provision. *Id.*

48. *Id.*

49. *Id.* The District Court, in making the arbitrability determination, seemed to accept First Options' argument that Mr. Kaplan was "an associated person of a member, or…he was MKI's alter ego." Kaplan v. First Options of Chi., Inc., 19 F.3d 1503, 1508 (3d Cir. 1994).

50. *First Options*, 514 U.S. at 941.

51. *Id.* at 946.

52. *Id.*

tors, in taking on the issue of arbitrability, exceeded their powers under section 10(a)(4).[53]

A more recent example of section 10(a)(4) vacatur is *Horton Automatics v. Industrial Division of Communications Workers of America*.[54] In *Horton*, a local labor union formed a collective bargaining agreement with Horton Automatics, which included an arbitration provision.[55] This provision limited arbitrator authority, in employee discipline cases, to determining whether the rule violated was reasonable, and whether the employee actually violated the rule.[56] Horton discovered that its employee, Ruben de la Garza, had operated certain machinery incorrectly for eighteen months.[57] Because Horton had a rule against safety violations capable of causing serious injury, de la Garza was fired.[58]

Upon submission of the dispute to arbitration, the arbitrator determined that the rule against serious safety violations was reasonable and that de la Garza's activity violated this rule.[59] However, the arbitrator went on to find that Horton had not applied this particular rule consistently to similarly situated employees[60] and overturned de la Garza's discharge.[61]

The District Court for the Southern District of Texas and the Fifth Circuit Court of Appeals disagreed.[62] Both courts found that the arbitrator, in acting beyond the inquiries expressly authorized by the collective bargaining agreement, exceeded his authority.[63] Had the arbitrator ended his inquiry after determining that the rule was reasonable and had indeed been violated, de la Garza's termination would have been upheld.[64] Thus, both courts found that the arbitrator exceeded his powers by making a determination based on an unauthorized inquiry, given his limited authority.[65]

B. The Issue of Arbitrability

The "issue of arbitrability" is the threshold determination as to whether parties agreed to arbitrate the particular matter in dispute.[66] The United States Supreme Court has established a two-prong analysis to determine arbitrability. Under this analysis, courts first determine whether the arbitration agreement authorizes a court or an arbitrator to make the arbitrability determination, and second, whether the arbitration agreement authorizes arbitration of the specific issue in

53. *Id.* at 947, 949.
54. Horton Automatics v. Indus. Div. of Commc'ns Workers of Am., No. 12-40676, 2013 WL 59204 (5th Cir. Jan. 4, 2013).
55. *Id.* at *254.
56. *Id.*
57. *Id.* at *255.
58. *Id.*
59. *Id.*
60. *Horton*, 2013 WL 59204, at *255. Horton was not first given a warning, whereas other employees engaged in similarly serious safety violations had been given warnings on their first violations. *Id.*
61. *Id.*
62. *Id.* at *254.
63. *Id.* at *257.
64. *Id.* at *256.
65. *Id.* at *257.
66. AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986).

dispute.[67] Because arbitrability is a "gateway" issue, it must be decided before a case can validly proceed to arbitration.[68]

The Supreme Court has established a number of rules governing the issue of arbitrability. In *AT&T Technologies, Inc. v. Communications Workers of America*, the Court clarified the presumption that the issue of arbitrability belongs to the courts, absent "clear[] and unmistakabl[e]" evidence to the contrary.[69] However, if such evidence exists, the question of arbitrability could be delegated to an arbitrator.[70] The Court reaffirmed this rule in *Howsam v. Dean Witter Reynolds, Inc.*, holding that when an agreement is unclear as to the issue of arbitrability, the courts should determine whether arbitration is proper.[71] The Supreme Court also distinguished "substantive" and "procedural" arbitrability in *John Wiley & Sons, Inc. v. Livingston*.[72] "Substantive" questions, such as whether the parties agreed to submit to arbitration, are left to courts to decide.[73] "Procedural" questions, regarding the arbitration procedures authorized by the parties' agreement, are to be left to the arbitrator.[74] Finally, in *First Options*, the Supreme Court ruled that the arbitrability issue need not be raised before arbitration, but can be challenged after an arbitral award is made.[75]

C. Arbitrator Authority to Determine Class Arbitration

In 2003, the United States Supreme Court, in a plurality opinion, proposed to expand the scope of topics generally subject to an arbitrator's interpretation to include whether an arbitration agreement authorized class action arbitration.[76] In *Green Tree Financial Corp. v. Bazzle*, the Court held that when contracting parties agree to an arbitration provision and the provision is silent as to class procedures, the arbitrator, and not a court, must interpret the arbitration provision to determine if the parties intended to authorize use of class procedures.[77] The American Arbitration Association ("AAA") subsequently amended its class arbitration rules to reflect this holding.[78] However, as noted in *Stolt-Nielsen*, the *Bazzle* opinion was a plurality opinion and, therefore, not authoritative.[79]

The authority of an arbitrator to decide the class arbitration issue was challenged again, in 2010, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[80] The case involved an antitrust claim against Stolt-Nielsen, a commercial shipping corporation, for price fixing.[81] AnimalFeeds, a marine and animal byproducts

67. *First Options*, 514 U.S. at 944-45.
68. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002).
69. *AT&T Techs.*, 475 U.S. at 649.
70. *Id.*
71. *Howsam*, 537 U.S. at 84.
72. 376 U.S. 543 (1964).
73. *Id.* at 558.
74. *Id.* at 557.
75. *First Options*, 514 U.S. at 946-47.
76. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).
77. *Id.* at 453.
78. *Stolt-Nielsen*, 559 U.S. at 662.
79. *Id.* at 679.
80. *Id.* at 662.
81. *Id.* at 667. Stolt-Nielsen operated overseas shipping vessels; AnimalFeeds and others contracted with Stolt-Nielsen to use compartments on the vessels to ship their products. *Id.* at 666.

producer, brought the case as a class action suit.[82] Pursuant to the arbitration clause in the contract, the case was removed to arbitration.[83] The parties selected a panel of arbitrators and specifically stipulated that their agreement was silent regarding the availability of class arbitration.[84] However, the panel, relying on the Supreme Court's decision in *Bazzle*, found that it could rightfully make a determination on class arbitration from the contract's language.[85] The panel determined that the language of the contract permitted class arbitration.[86]

Stolt-Nielsen appealed this arbitral decision to the District Court for the Southern District of New York, claiming the arbitrators exceeded their powers under section 10(a)(4) of the FAA.[87] The district court agreed and vacated the award, finding that the arbitrators disregarded the law by failing to conduct a choice-of-law analysis as required by the arbitration agreement.[88] AnimalFeeds then appealed to the Second Circuit Court of Appeals, which reversed the district court's decision.[89]

On Stolt-Nielsen's appeal to the United States Supreme Court, the Court reversed the Second Circuit's decision, vacating the arbitrators' class arbitration determination.[90] The Court explained that the *Bazzle* holding only authorized an arbitrator to determine the permissibility of class procedures when the parties had authorized the arbitrator to make such a finding.[91] Because Stolt-Nielsen and AnimalFeeds had stipulated that their agreement was silent as to class procedures, the panel was not authorized to make a finding on class arbitration.[92] Thus, the arbitrators exceeded their powers under section 10(a)(4) when they imposed their own views on the parties by allowing class arbitration.[93] As such, Stolt-Nielsen could not be made to submit to class arbitration.[94]

The Court clarified its *Bazzle* opinion in *Stolt-Nielsen* by clearly defining arbitrators' and courts' roles in deciding whether an agreement authorizes class arbitration.[95] The Court explained that, when parties enter into an arbitration agreement, they presumably authorize an arbitrator to adopt the procedures necessary to effectuate their intent.[96] However, an arbitrator may not find an implicit agreement to authorize class arbitration based solely on an arbitration provision

---

82. *Id.* at 667. AnimalFeed's claim was consolidated with similar claims by others who contracted with Stolt-Nielsen. *Id.* at 668.

83. *Id.*

84. *Id.* AnimalFeed's attorney made it clear that "silent" did not simply mean there was no express language in the contract about class procedures, but that it meant the parties did not reach any agreement at all regarding class arbitration. *Id.* at 669.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* The district court believed such an analysis would show that maritime law required the contract to be construed in light of custom and usage. *Id.* at 670.

89. *Id.* The Court of Appeals found that Stolt-Nielsen presented no evidence that federal maritime law was, in custom and usage, against class arbitration, and that New York had no rules preventing class arbitration. *Id.*

90. *Id.* at 687.

91. *Id.* at 680.

92. *Id.* at 684.

93. *Id.* at 676-77, 687.

94. *Id.*

95. *Id.* at 685-87.

96. *Id.* at 684-85.

that is silent on the issue.[97] Absent language expressly authorizing class arbitration,[98] it is not the province of the arbitrator to allow class procedures.[99]

D. Differences in Bilateral and Class Arbitration

In *Stolt-Nielsen*, the Court noted that "fundamental changes" occur in the shift from bilateral to class-wide arbitration.[100] An arbitrator, who initially is selected to review a single dispute upon a single agreement, becomes responsible for the resolution of numerous disputes.[101] The shift also costs parties the privacy and confidentiality that come with bilateral arbitration by opening the dispute to a large class.[102] Whereas an arbitrator in a bilateral arbitration only purports to bind the parties to a single arbitration agreement, a class arbitrator adjudicates absent parties' rights as well.[103] Finally, the financial stakes of arbitration increase greatly when multiple class members become involved.[104]

The Court recognized that, in the absence of class arbitration, the monetary costs of numerous bilateral arbitrations may be much greater.[105] In *American Express Company v. Italian Colors Restaurant*, the Court held that the "probatively high cost" of pursuing bilateral arbitration of an antitrust claim was not a permissible basis, under the FAA, to overturn an express waiver of class procedures in the arbitration agreement.[106] Even though antitrust claims are expensive to arbitrate, both for discovery costs and for the time and costs required of courts and arbitrators, class procedures are not essential to pursue such claims.[107]

E. Circuit Split on Court Review of Class Arbitration Awards

After *Stolt-Nielsen*, certain federal circuits split over the authority of courts to vacate an arbitrator's finding that an arbitration agreement authorized class arbitration under section 10(a)(4) of the FAA.[108] The split concerned whether a district court could overturn an arbitrator's ruling if the court found it to be without sufficient contractual basis.[109]

Generally, courts agreed that the FAA did authorize the vacatur of an arbitrator's decision, even if the result of a serious error in contractual interpretation.[110]

---

97. *Id.* at 685. The Court found that class arbitration changes the nature of the arbitration because it cannot be presumed that absent class members consent to class arbitration simply by agreeing to a general arbitration provision. *Id.*

98. For example, the stipulation by the *Stolt-Nielsen* parties that the contract was silent as to class procedures. *Id.* at 669.

99. *Id.* at 687.

100. *Id.* at 686.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310-11 (2013).

106. *Id.* at 2306.

107. *Id.* at 2309-10.

108. *Compare Sutter*, 675 F.3d 215 (case below the instant case) (vacatur not proper), *and* Jock v. Sterling Jewelers, Inc., 646 F.3d 113 (2d Cir. 2011) (same), *with* Reed v. Fla. Metro. Univ., Inc., 681 F.3d 630 (5th Cir. 2012) (vacatur proper).

109. *See supra* note 94.

110. *See Sutter*, 675 F.3d at 220; *Jock*, 646 F.3d at 122.

For example, in *Jock v. Sterling Jewelers, Inc.*, the Second Circuit found that a district court's decision to vacate an arbitrator's award of class arbitration was improper.[111] The court distinguished *Stolt-Nielsen* in that the *Stolt-Nielsen* parties stipulated as to contractual silence on the issue of class arbitration, whereas the *Jock* parties made no stipulation and allowed the arbitrator to decide class arbitrability.[112] In *Jock*, the parties had granted the arbitrator the authority to interpret their agreement in lieu of court proceedings.[113] Thus, even though the district court found that the arbitrator made an error of law, the arbitrator's interpretation did not exceed her authority under section 10(b)(4), and could not be vacated.[114] This analysis was also endorsed by the First Circuit.[115]

However, in *Reed v. Florida Metropolitan University, Inc.*, the Fifth Circuit construed *Stolt-Nielsen* as granting a district court the authority to overturn an arbitrator's class arbitration ruling for interpretive error when the court found no sufficient contractual basis for the decision.[116] This created a sufficiency standard under which a court, reviewing an arbitrator's grant of class arbitration, could determine that the arbitrator exceeded his powers under section 10(a)(4) if the arbitrator's contractual interpretation had insufficient contractual basis.[117] Essentially, if a court found the arbitrator improperly interpreted a contract as allowing class arbitration, the court could overturn that arbitrator's interpretive error.[118]

Thus, following *Stolt-Nielsen*, courts have adopted different standards by which to determine the enforceability of arbitrators' contractual interpretations. The general rule, after *Stolt-Nielsen*, was that a court could not vacate an arbitrator's class arbitration decision for interpretive error, regardless of the contractual basis for the arbitrator's interpretation, if the arbitrator was acting within the authority granted by the parties.[119] The Fifth Circuit's analysis, however, allowed courts to vacate an arbitrator's interpretation regarding class arbitration if it found that the arbitrator's interpretation lacked a sufficient contractual basis.[120]

IV. INSTANT DECISION

In *Oxford Health Plans LLC v. Sutter*, the United States Supreme Court affirmed the Third Circuit, and denied Oxford's motion to vacate the arbitrator's finding that class arbitration was proper.[121] The Court determined that the parties' arbitration agreement authorized the arbitrator to analyze the contract terms to interpret their intent,[122] and reiterated that courts have no authority to judge the

111. *Jock*, 646 F.3d at 122, 127.
112. *Id.* at 120, 123.
113. *Id.* at 116-17.
114. *Id.* at 123.
115. *See* Fantastic Sams Franchise Corp. v. FSRO Ass'n Ltd., 683 F.3d 18, 22 (1st Cir. 2012) (endorsing the analyses of *Jock* and *Sutter*).
116. *Reed*, 681 F.3d at 636.
117. *Id.* at 642.
118. *Id.* at 636.
119. *See Sutter*, 675 F.3d at 220; *Jock*, 646 F.3d at 122.
120. *Reed*, 681 F.3d at 642.
121. *Oxford Health Plans*, 133 S. Ct. at 2071.
122. *Id.* at 2069. ". . .the arbitrator did what the parties had asked: 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' under 9 U.S.C. at § 10(a)(4)." *Id.*

substance of an arbitrator's contract interpretation when the arbitrator was authorized to perform the task.[123]

Finding that the arbitrator did not exceed his powers under section 10(a)(4), the Court noted that seeking relief under this provision places a significant burden of proof on the moving party.[124] The Court explained that it was not enough to show that the arbitrator committed an error,[125] regardless of the substance of his decision, because the parties had agreed to authorize an arbitrator to decide the issue.[126] Only if the arbitrator acted outside of the scope of authority granted to him by the parties could the court vacate his decision.[127]

Analyzing the arbitrator's first ruling that class arbitration was authorized,[128] the Supreme Court found that the parties had agreed that the arbitrator should interpret their contract to decide if it authorized class action arbitration.[129] The arbitrator, acting under the parties' grant of authority, analyzed the arbitration clause and found that it allowed for class action arbitration.[130] When Oxford raised the issue again on remand from the district court, in light of *Stolt-Nielsen*, the arbitrator reiterated that his decision was based solely on his interpretation of the contract language, which revealed the parties' intent.[131] After reviewing his prior analysis, the arbitrator again concluded that the agreement allowed for class arbitration.[132] By twice identifying the scope of his authority as encompassing "contract interpretation," and each time performing this task, the arbitrator did not exceed his authority under section 10(a)(4).[133]

The Court also emphasized the limited role of judicial review concerning the substance of arbitrators' decisions.[134] Identifying the purpose of arbitration as a straightforward means for parties to quickly resolve disputes,[135] the Court noted that a court may review the substance of an arbitrator's finding only under the uncommon circumstances presented in section 10 of the FAA.[136]

In refusing to overturn the arbitrator's decision that class action arbitration was proper, the Court carefully distinguished *Oxford Health Plans* from *Stolt-Nielsen*.[137] The Court observed that, in the instant case, unlike in *Stolt-Nielsen*, the

123. *Oxford Health Plans*, 133 S. Ct. at 2070-71 ("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.") (citing *United Steelworkers*, 363 U.S. at 599.).

124. *Oxford Health Plans*, 133 S. Ct. at 2068.

125. *Id.* (citing *Stolt-Nielsen*, 559 U.S. at 671).

126. *Oxford Health Plans*, 133 S. Ct. at 2068 (citing *E. Associated Health Corp.*, 531 U.S. at 62) ("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").

127. *Oxford Health Plans*, 133 S. Ct. at 2068.

128. *Id.* at 2069.

129. *Id.*

130. *Id.* The Court emphasized that the correctness of the arbitrator's interpretation has no bearing on the fact that he acted within the scope of his authority.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 2068, 2070.

135. *Id.* at 2068 (citing *Hall St. Assocs.*, 552 U.S. at 588).

136. *Oxford Health Plans*, 133 S. Ct. at 2068 (citing *First Options*, 514 U.S. at 942). The Court emphasized this point to address a contrary precedent in the Fifth Circuit. *See Reed*, 681 F.3d 630. *See supra* note 39 for a discussion of such uncommon circumstances.

137. *Oxford Health Plans*, 133 S. Ct. at 2069.

parties did not make any stipulation as to class procedures, but instead agreed that the arbitrator should look to their contract to determine their intent on the matter.[138] The arbitrators in *Stolt-Nielsen* did not identify any contractual provision that authorized class procedures, whereas the arbitrator in the instant case twice specified the provision found to authorize class action arbitration, and he detailed his analysis of the arbitration provision.[139] Because the panel in *Stolt-Nielsen* acted beyond the scope of its task, contract interpretation, and imposed its own policy decision regarding class arbitration procedures, section 10(a)(4) authorized the Court to overturn the decision.[140] In the instant case, however, the arbitrator's finding was within the scope of his authority, so the Court was barred from vacating his decision.[141] The Court concluded by acknowledging that the parties, in contracting for arbitration, agreed to be bound by the authorized decisions made by the arbitrator.[142]

However, the Court specifically noted that it did not decide whether the determination of class action arbitration should generally be left to arbitrators' contractual interpretation or whether it should be a "gateway" issue to be decided by a court.[143] Although acknowledging that arbitrability, in general, was a gateway matter for a court to decide,[144] the Court found *Oxford*'s procedural posture unsuitable to make such a general decision on class procedures.[145]

In his concurring opinion, joined by Justice Thomas, Justice Alito raised concerns about the procedural protections for absent class members affected by the arbitrator's decision to allow class action procedures.[146] While the concurrence agreed that the Court should not vacate the arbitrator's decision, it noted that the language of Sutter and Oxford's agreement plainly did not authorize class procedures.[147] The concurring justices suggested that the absent class members most likely did not intend to agree to class arbitration, so it was not clear whether they would be bound by the outcome of such arbitration.[148] Because arbitration is a matter of consent,[149] and because the absent members did not submit their disputes to arbitration with this arbitrator, his interpretation about class procedures could not bind the absent members without their authority to make that determination.[150] The concurring opinion noted that even a distribution of opt-out notices to poten-

---

138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 2071.
143. *Id.* at 2072 n.2.
144. *Id.* (citing *Bazzle*, 539 U.S. at 452).
145. *Id.* In this case, because the parties explicitly agreed that the arbitrator should make the determination about class arbitration, it was within this arbitrator's authority to do so. *Id.* However, had the parties not agreed to such an arbitrator determination, the issue of whether a court or arbitrator should have decided on class procedures would have been left unanswered, and thus the case would have been properly postured for the Court to decide the issue of class arbitrability. *Id.* Although the Court's plurality opinion in *Bazzle* found such a determination to be the province of the arbitrator, that holding is not controlling precedent. *See supra* notes 76-79 and accompanying text.
146. *Id.* at 2071.
147. *Id.*
148. *Id.*
149. *See* Volt Info. Scis., Inc. v. Bd. of Trs. Of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).
150. *Oxford Health Plans*, 133 S. Ct. at 2071.

tial class members would not remedy the issue.[151] Silence does not alter the contractual terms, so the arbitrator would still need the express authorization of the absent members to interpret the arbitration clause as it pertained to them.[152] Alito argued that this issue could create a situation in which absent members could claim the benefit of a favorable judgment, and avoid an unfavorable outcome, through collateral attack.[153]

V. COMMENT

In *Oxford*, the United States Supreme Court explicitly addressed the circuit split that arose between several circuits, including the Second Circuit in the *Jock* case,[154] and the Fifth Circuit in the *Reed* case. In finding that an arbitrator's authorized contract interpretation is not subject to vacatur for interpretive error, the Supreme Court effectively abrogated the sufficiency standard created by the Fifth Circuit and harmonized the standard for all circuits.[155] Thus, when parties agree to allow contractual interpretation to determine whether class arbitration is proper, they can now be assured that an arbitrator's interpretation regarding class arbitration will be upheld in any jurisdiction. The court emphasized party autonomy to determine which issues should be within the interpretive powers of the arbitrator, including class arbitration.[156]

The *Oxford* holding sets the stage for another issue: whether class arbitration should generally be determined by arbitral interpretation or by a court as a gateway matter of arbitrability.[157] It is unclear, absent parties' express agreement regarding arbitral contractual interpretation, whether class arbitration decisions are the province of arbitrators or the courts. Because the Supreme Court rightfully declined to decide this issue in *Oxford*,[158] it is only a matter of time before the Court confronts this issue in a case with the correct procedural posture.[159] The Court's express discussion of this issue[160] strongly suggests that the Court is pre-

151. *Id.*

152. *Id.* In Alito's words, "an offeree's silence does not normally modify the terms of a contract." *Id.* Because silence by the absent class members is not sufficient to alter an arbitration clause to make it applicable to them, they theoretically should have to give express authorization for an arbitrator to include them as parties to the arbitration clause in question.

153. *Id.* at 2072.

154. *See also Sutter*, 675 F.3d at 220; *Fantastic Sams*, 683 F.3d at 22 (endorsing the *Jock* and *Sutter* approach).

155. *Id.* at 2070. *See also Concepcion*, 131 S. Ct. at 1752 (". . . review under [9 U.S.C.] § 10 focuses on misconduct rather than mistake.")

156. *Oxford Health Plans*, 133 S. Ct. at 2071.

157. *Id.* at 2072 n.2.

158. *See supra* note 145.

159. Indeed, since the Supreme Court decided *Oxford* in June 2013, one federal circuit court and two district courts have ruled in differing ways on this issue, with two courts favoring judicial courts as the presumptive entity to determine class arbitrability and one court favoring arbitrators. *Compare* Reed Elsevier, Inc. *ex rel.* LexisNexis Div. v. Crockett, 734 F.3d 594 (6th Cir. 2013), *and* Chassen v. Fidelity Nat'l Fin., Inc., No. 09-291 (PGS)(DEA), 2014 WL 202763 (D. N.J. Jan. 17, 2014) (favoring courts), *with* Lee v. JPMorgan Chase & Co., No. SACV 13–511 JLS (JPRx), 2013 WL 6068601 (C.D. Cal. Nov. 14, 2013) (favoring arbitrators). This circuit split on class arbitrability creates a likelihood that the Supreme Court will soon rule on the issue to resolve the disagreement among the circuits.

160. "[T]his Court has not yet decided whether the availability of class arbitration is a question of arbitrability. . . 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." *Oxford Health Plans*, 133 S. Ct. at 2072 n.2.

pared to make such a determination when the opportunity presents itself. It is possible that the court will rule in favor of making class arbitration a matter to be decided by courts rather than arbitrators,[161] which is the better result as it is supported by stronger policy concerns.

When the Court does decide whether class arbitration is a gateway matter or one of arbitral interpretation, it will likely balance the benefits and detriments of each approach. First, leaving the class arbitrability determination to arbitrators would reinforce the strong federal policy favoring arbitration.[162] Keeping the class procedure decision within the arbitrator's jurisdiction would also be consistent with one of arbitration's primary benefits, allowing parties to avoid long and costly judicial proceedings.[163] Finally, this approach would still allow for immediate judicial review if a party believed an arbitrator's contract interpretation was unauthorized.[164]

One rationale for delegating contract interpretation regarding the availability of class procedures to judicial determination is that arbitrators are often not experienced in class procedures[165] and may not be able to comply with class action notice requirements. As arbitrators are not required to have judicial experience,[166] arbitrators may not be fully aware of the impact that class procedures will have on a case, or the types of procedural protections normally available in judicial class actions.[167] Indeed, in its *Stolt-Nielsen* opinion, the Supreme Court commented on the complexity of class arbitrations,[168] which could be construed as the Court's concern about arbitrator competency to oversee class procedures.[169] Arbitrators also do not have the same resources available to them as do federal district courts. As a result, it would be difficult for arbitrators to ensure that proper notice is given to all absent class members, limiting the arbitrators' ability to ensure the procedural protections required of class actions.[170]

Allowing arbitrators to authorize and oversee class arbitrations raises several issues discussed in the *Oxford* concurrence, including the inability to provide notice to absent class members and the subsequent possibility of collateral attack by

161. *See* Sharon Reece, *Reece on Oxford Health Plans*, 2013 EMERGING ISSUES 7024, July 1, 2013, *available at* http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=prod19740377.

162. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1749 (2011) (stating "the FAA was designed to promote arbitration" and finding "[a] national policy favoring arbitration . . . and a liberal federal policy favoring arbitration agreements") (citations omitted).

163. *Id.* ("A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,' which objective would be 'frustrated' by requiring a dispute to be heard by an agency first") (citing *Hall St. Assocs.*, 552 U.S. at 357-58).

164. S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, AT&T, *and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 218 (2012).

165. *Id.* (highlighting "a concern about arbitrator competence in light of an assumption that arbitrators have little experience with class proceedings").

166. *See* Qualification Criteria for Admittance to the AAA National Roster of Arbitrators, AMERICAN ARBITRATION ASSOCIATION (2011), *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_003878.

167. *See* FED. R. CIV. P. 23(C)(2)-(3) (2006) (detailing notice and consent procedures for civil class action class members).

168. *Stolt-Nielsen*, 559 U.S. at 686.

169. *See* Strong, *supra* note 164, at 263.

170. *See* Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 322-23 (2004) (noting some circuits' findings that arbitrators' "orders are unreviewable prior to a final award and [arbitrators]. . .lack[] broad subpoena powers").

those members.[171] Without notice, members of the absent class would be given an unfair advantage: they could claim the benefit of a favorable outcome, but collaterally attack an unfavorable result, arguing they never consented to be bound by the arbitrator's decision.[172] This issue would also obviate the cost-saving and efficiency benefits of arbitration, as absent class members could bring new claims over the same issues.

The Federal Rules of Civil Procedure structure class notice as an "opt-out" system, under which class members are only excluded from the class if they affirmatively request to be excluded.[173] However, this opt-out system could be problematic in the arbitration setting, which relies on parties' affirmative exercise of their contractual rights.[174] Arbitration is a matter of consent.[175] When class members do not consent to participate in class arbitration but, rather, are bound by their lack of consent, or failure to "opt-out," class members may be deprived of their rights to procedural due process.[176] Additionally, non-consenting class members could argue that, by failing to obtain their consent, the arbitrator inherently acted beyond his authority, and any decision by the arbitrator should be vacated, under section 10(a)(4) of the FAA.[177] In both situations, absent class members are stripped of their autonomy to consent to arbitral and class procedures.

Conversely, judges' familiarity with class procedures and access to resources to enforce these procedural protections[178] are significant benefits that may put courts in the best position to make class arbitration decisions. As class action suits are becoming more common,[179] more judges are becoming experienced in administering class procedures. Courts are better situated to protect the procedural rights of absent class members by providing necessary notice and garnering requisite consent to proceed.[180] Ensuring that absent class members receive the required notice helps to prevent the collateral attacks that may be initiated by absent, non-consenting class members, and guarantees procedural fairness.[181] Additionally, courts are more likely to be predictable in their outcomes. Because arbitrators are granted broad authority to interpret parties' contracts and to fashion awards, their decisions are often unpredictable.[182] Courts have reliable outcomes based on precedent, so parties could better prepare and bargain for more express terms in their arbitration provisions regarding class arbitration.

The Supreme Court has also stated that the shift from two-party arbitration to class arbitration is "fundamental,"[183] noting such basic changes as the number of disputes to be resolved, the lack of privacy and confidentiality, the number of

171. *Oxford Health Plans*, 133 S. Ct. at 2072.
172. *Id.*
173. *See generally* FED. R. CIV. P. 23.
174. Kirk D. Knutson, *The Necessity of an "Opt-In" Approach to Class Arbitration*, 1 WM. MITCHELL J. L. & PRAC. 1 (2008).
175. *Volt Info. Scis., Inc.*, 489 U.S. at 479.
176. *See* Knutson, *supra* note 174. In arbitration, these rights include the fundamental procedural decisions of forum and arbitrator selection.
177. *Id.*
178. *See* Strong, *supra* note 164, at 216-17.
179. WILLIAM B. RUBENSTEIN, *Introduction to Empirical Overview*, *in* 1 NEWBERG ON CLASS ACTIONS § 1:17 (2013).
180. Buckner, *supra* note 170, at 322-23 (courts have broad subpoena powers, which arbitrators lack).
181. *See* Reece, *supra* note 161.
182. Alan S. Gutterman, *Remedies*, *in* 9 BUSINESS TRANSACTIONS SOLUTIONS § 48:183, notes (2013).
183. *Stolt-Nielsen*, 559 U.S. at 686.

parties purported to be bound by a decision, and the higher commercial stakes.[184] If this characterization of "fundamental" is comparable to a "substantive" issue of arbitrability under *John Wiley*,[185] then class arbitrability should be a gateway issue of arbitrability to be decided by the courts.

However, allowing courts to decide if arbitration agreements permit class arbitration also has substantial drawbacks. Designating class arbitration as a gateway matter best decided by courts contradicts the Supreme Court's strong preference for arbitration.[186] Granting courts jurisdiction over class arbitration decisions would detract from arbitral and party autonomy, foundational elements of arbitration.[187] Indeed, the parties in *Oxford* and *Stolt-Nielsen* exercised such autonomy by making their desires known about authorizing arbitrator interpretation of class procedures.[188] Parties bargain for the terms of their arbitration provisions to ensure that their disputes are resolved privately and without the expense and time required in judicial proceedings.[189]

The Supreme Court will ultimately have to decide whether the autonomy and efficiency that arbitration offers, and the national policy favoring arbitration, outweigh the procedural protections and experience with class actions afforded by court proceedings. Treating the class arbitration determination as a gateway issue to be decided by courts is the better approach. Absent class members' due process rights require special protections,[190] whether in judicial proceedings or the arbitral setting. When absent members of a class have not explicitly consented to class arbitration arbitrating on their behalf violates their procedural due process rights, making it unclear whether absent members will be bound by the outcome.[191] After *Oxford*, an arbitration provision that is silent regarding class arbitration can, in some instances, be interpreted to permit class arbitration. This ruling opens such decisions to due process claims and collateral attack.[192]

Although allocating the class arbitration decision to the courts would increase costs and time spent on court proceedings, this may be a sacrifice that is necessary to protect the due process rights of absent class members. Indeed, the United States Supreme Court was willing to justify higher costs and time commitments in the recent case, *Italian Colors*.[193] Additionally, by offering better procedural protections for absent class members, court proceedings may actually reduce costs in the long run by limiting the number of collateral attacks and preventing parties from relitigating the same issues.

The Supreme Court's use of strong language to express its dissatisfaction with the arbitrator's contractual interpretation in *Oxford* suggests that the Court

184. *Id.*

185. *John Wiley*, 376 U.S. at 556-58.

186. *Concepcion*, 131 S. Ct. at 1749.

187. *See* Strong, *supra* note 164, at 226.

188. *See Oxford*, 133 S. Ct. at 2064; *Stolt-Nielsen*, 599 U.S. at 668.

189. *See Concepcion*, 131 S. Ct. at 1749.

190. *See generally* Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545 (2012).

191. *Oxford Health Plans*, 133 S. Ct. at 2071.

192. Michael Hoenig, *U.S. Supreme Court Issues Incomplete Clarification on Class Arbitration*, N.Y. L.J. (June 17, 2013). *See also* Knutson, *supra* note 174.

193. *Italian Colors*, 133 S. Ct. at 2310-11. The Court refused to find any congressional intent in the antitrust statutes that would justify invalidating class arbitration waivers in the parties' contracts. Because class arbitration was disallowed by the waiver, each class member would have had to proceed with her claim alone, which would involve more individual costs and more time spent on proceedings.

may prefer for class arbitration determinations to be made by the courts.[194] The Court's language also implies that it does not view arbitrators as competent to fully comprehend and protect the procedural rights of absent class members. Given these reservations, and given the concurring Justices' opinions disfavoring class arbitration,[195] it seems likely that the Court will delegate the authority to make class arbitration determinations to the courts, treating class arbitration as a gateway matter of arbitrability. This appears to be the best way to protect party autonomy and efficiency. To disregard the substantial risks of allowing arbitrators to determine class arbitrability would be an even greater disservice to the rights and autonomy of absent class members.

VI. CONCLUSION

In *Oxford*, the Supreme Court held that parties may decide which issues that they wish to have resolved by an arbitrator by authorizing an arbitrator to engage in contract interpretation to interpret their intent.[196] This authority extends to the availability of class arbitration.[197] The *Oxford* decision distinguished *Stolt-Nielsen*, in which the arbitrators exceeded their authority by finding class arbitration proper after the parties had stipulated that their contract was silent on this issue.[198] The *Oxford* opinion also resolved the split created by the Fifth Circuit, which had argued that *Stolt-Nielsen* gave courts the power to vacate an arbitrator's decision regarding class arbitration where they found insufficient basis in the arbitrator's decision in the parties' contract.[199] However, the *Oxford* Court raised a new, unanswered question: whether the availability of class arbitration, in the absence of express agreement on the issue, should be determined by arbitrators or by courts.[200] Although there are strong arguments for both approaches, the stronger policy favors treating class arbitration as a gateway matter of arbitrability to be determined by courts. The Supreme Court's strong language in *Oxford* and willingness to justify the higher costs of individual litigation in *Italian Colors* suggest that the Court may soon increase judicial involvement in class arbitration decisions.

KEVIN SACK

194. *Oxford Health Plans*, 133 S. Ct. at 2070-71 ("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. . . The potential for those mistakes [of interpretation] is the price of agreeing to arbitration. . . The arbitrator's construction holds, however good, bad, or ugly.").
195. *Id.* at 2071-72.
196. *Id.* at 2068.
197. *Id.* at 2068.
198. *Id.* at 2070.
199. *Id.*
200. *Id.* at 2072 n.2.