Be Careful What You Ask For: Recent Precedent on Reviewing Arbitration Awards and the Standard Applicable to Motions to Compel Arbitration

by Maureen Coghlan

Arbitration continues to be a favored forum for companies seeking to cap costs and expedite results. Businesses typically view arbitration as a more private and flexible means of resolving a dispute. Recently, the United States Supreme Court and the United States Court of Appeals for the Third Circuit issued separate opinions that should guide companies and the attorneys who represent them when drafting and litigating arbitration agreements.

Oxford Health Plans, LLC v. Sutter[1]

In *Oxford Health Plans, LLC v. Sutter*, the United States Supreme Court addressed a circuit split as to whether Section 10(a)(4) of the Federal Arbitration Act (FAA)[2] permits a court to vacate an arbitrator's decision that an arbitration agreement provides for class arbitration. The Court unanimously answered no—if the parties requested the arbitrator to decide whether their arbitration agreement permits class arbitration. In so holding the Court rejected the argument that Section 10(a)(4) of the FAA, which directs courts to set aside an award "where the arbitrator[] exceeded [his or her] powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made," required the lower courts to set aside the arbitrator's decision. The Court reasoned that, because the parties submitted the question of whether their agreement permitted class arbitration to the arbitrator, they got what they bargained for when the arbitrator issued his opinion—even if the Court would have decided the matter differently. In other words, "the arbitrator did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings."[3]

Did the Arbitrator Exceed His Powers?

Pediatrician John Sutter entered into a contract to provide medical care to members of Oxford Health Plans, LLC. Sutter alleged that Oxford failed to make prompt and full payments and sued on behalf of himself and a proposed class of New Jersey doctors under contract with Oxford. Oxford moved to compel arbitration based on the following contract clause:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.[4]

Relying on this language, the state court agreed with Oxford and referred the matter to arbitration.

The parties then made a decision that subsequent reviewing courts would view as dispositive: They agreed that the arbitrator should decide whether their contract authorized class arbitration. When the arbitrator decided that the above clause did authorize class arbitration, Oxford filed a motion to vacate in federal court, arguing that the arbitrator exceeded his power. The district court denied the motion, a decision the Third Circuit Court of Appeals affirmed. Based on the delegation of authority to the arbitrator to decide whether the parties' contract authorized class arbitration, the Supreme Court also refused to vacate the arbitrator's decision, which he had clearly based on the parties' contract language. Despite suggestion by the Court that it disagreed with the arbitrator's reading of the contract, Justice Elena Kagan summed it up thusly: "[t]he arbitrator's construction holds, however good, bad, or ugly."[5]

Misinterpreting a Contract is Not the Same as Abandoning the Interpretive Role

The Court was careful to distinguish *Oxford Health* from *Stolt-Nielsen, S.A. v. AnimalFeeds International Corporation*,[6] a decision handed down by the Court while the *Oxford Health* arbitration was proceeding. In *Stolt-Nielsen*, the Court held that "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."[7] Unlike the *Oxford Health* case, the parties in *Stolt-Nielsen* stipulated they never reached any agreement on whether class arbitration was permissible. Therefore, the Court vacated the arbitration panel's decision permitting class arbitration given that it could not possibly have been rooted in the text of the parties' agreement when the parties *themselves* said there was no agreement to permit class arbitration. In the Court's view, the arbitration panel in *Stolt-Nielsen* exceeded its authority not by misconstruing the parties' agreement but because the panel had abandoned its role of interpreting that agreement when it imposed a procedure that was not required by the parties' contract. The arbitration decision in *Stolt-Nielsen* could not stand because "it lacked *any* contractual basis for ordering class procedures, not because it lacked…a 'sufficient one.'"[8]

Should Courts Decide Whether an Arbitration Agreement Permits Class Arbitration?

Justice Samuel Alito issued a concurring opinion in *Oxford Health*, seemingly with the intent of providing his answer to a question left unaddressed after *Oxford Health* and *Stolt-Nielsen*: whether the availability of class arbitration is a "question of arbitrability" that should be decided by courts, not arbitrators.[9] Justice Alito had serious concerns regarding whether the arbitrator's ultimate decision in *Oxford Health* could bind the absent class members. He questioned, "[w]ith no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute."[10] Nor did Justice Alito view opt-out notices for absent class members as curing the problem, given that arbitration is a matter of contract between the parties and that "an offeree's silence does not normally modify the terms of the contract."[11] Rather, Justice Alito would appear to require class members to opt-in to the class arbitration proceeding. However, equally concerning to Justice Alito was the idea that absent class members could decide whether to claim a class benefit without being bound to accept an unfavorable judgment.[12] He suggested these types of difficulties illustrate why courts should typically decide whether class arbitration is available, explaining he only joined the majority opinion because Oxford agreed to present the question of whether the parties' contract authorized class arbitration to the arbitrator.

Guidotti v. Legal Helpers Debt Resolution, L.L.C.[13]

For its part, the Third Circuit recently issued a precedential opinion that emphasized the underlying theme in *Oxford Health*—that arbitration is a matter of consent—and clarified the standard courts should apply when determining whether an agreement to arbitrate exists. In *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, the Third Circuit acknowledged its precedents were less than clear regarding what standard a court should apply when evaluating a motion to compel arbitration. The Court directed that the Rule 12(b)(6) standard applies when it is apparent from the face of the complaint, or the documents relied upon in the complaint, that a party's claims are subject to an enforceable arbitration clause. By contrast, a Rule 56 standard applies where: 1) the complaint or any supporting documents cited in the complaint call the clause's enforceability into question, or 2) where the plaintiff responds with additional facts that call the enforceability of the arbitration clause into question.

Did Guidotti Agree to Arbitrate?

Dawn Guidotti entered into a contract with several parties to settle her consumer debts and filed a putative class action when no settlement materialized. Guidotti alleged the defendants promised to settle her consumer debts and convinced her to open a special bank account into which she would automatically deposit a monthly payment. She claimed fees were deducted from this account, but no settlement was achieved on her behalf.

After Guidotti filed suit, several defendants filed two separate motions to compel arbitration, while the remaining defendants either filed motions to stay or sought to join the motions to stay. Citing the attorney retainer agreement (ARA), which Guidotti signed, and which included an arbitration clause requiring any dispute to be submitted to binding arbitration, the district court ordered Guidotti's claims against certain defendants to proceed to arbitration. The district court

concluded, however, that Guidotti was not required to arbitrate her claims against other defendants. The court reasoned that because Guidotti did not receive the account agreement that contained the arbitration clause relevant to those claims at the time she signed the special purpose account agreement (SPAA), despite the fact that the SPAA referred to the account agreement, she had not consented to arbitrate her claims. The Third Circuit reversed and remanded, concluding that the district court should have applied a summary judgment standard and permitted limited discovery to determine whether Guidotti was aware of the arbitration clause in the account agreement when she signed the SPAA.

The Standard for Evaluating Motions to Compel Arbitration

In *Guidotti*, the Third Circuit directed courts deciding whether a party must arbitrate pursuant to a valid arbitration agreement to apply either the Rule 12(b)(6) standard applicable to a motion to dismiss or the Rule 56 standard applicable to a motion for summary judgment. When it is clear from a complaint, or documents relied on in a complaint, that an agreement to arbitrate exists, then the motion to dismiss standard should apply.[14]

The Rule 12(b)(6) standard is inappropriate, however, when: 1) a complaint fails "to establish on its face that the parties agreed to arbitrate,"[15] or 2) when "the opposing party has come forth with reliable evidence that is more than a 'naked assertion…that it did not intend to be bound' by the arbitration agreement, even though on the face of the pleadings it appears that it did."[16] Courts presented with this first scenario must deny a motion to compel "pending further development of the factual record."[17] Courts presented with this second scenario, which "will come into play when the complaint and incorporated documents facially establish arbitrability but the non-movant has come forward with enough evidence in response to the motion to compel arbitration to place the question in issue" should apply the Rule 56 standard.[18] Both scenarios require the court to conduct a factual inquiry into whether there was a valid agreement to arbitrate and permit limited discovery on this issue. Courts can then consider a renewed motion to compel arbitration and either grant the motion or "proceed summarily to a trial regarding 'the making of the arbitration agreement or the failure, neglect, or refusal to perform the same,' as Section 4 of the FAA envisions."[19]

Limited Discovery to See Whether Guidotti Agreed to Arbitrate

The Third Circuit noted that Guidotti presented more than a "naked assertion" that she was not aware of the arbitration clause in the account agreement and pointed to the fact that all the relevant documents had a "DocuSign header" except for the account agreement. This fact led the circuit court to conclude that Guidotti had come forward with enough evidence to trigger the summary judgment standard. In the Third Circuit's view, however, Guidotti did not establish that there was no agreement to arbitrate her claims such that she was entitled to summary judgment in her favor. Rather, a genuine issue of material fact existed regarding whether Guidotti was aware of the arbitration clause and had agreed to arbitrate. Therefore, the circuit court directed the district court to permit limited discovery to resolve this question.

In sum, clear evidence of consent should prevent a party seeking to avoid its obligation to arbitrate from coming forward with facts that would trigger the Rule 56 standard and potentially drive up litigation costs and delay resolution of the dispute. Counsel should also carefully consider how to frame the question presented to the arbitrator for resolution. When parties agree to present an issue to an arbitrator, so long as the arbitrator exercises the authority delegated by the parties and decides the matter presented, courts are unlikely to vacate the arbitrator's decision, however good, bad or ugly.

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Endnotes

1. 133 S. Ct. 2064, 186 L. Ed. 2d 113, 2013 U.S. LEXIS 4358 (2013).
2. 9 U.S.C. § 1 *et seq.*
3. *Id.* at 2069.
4. *Id.* at 2067.