

## Client Alert

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June 12, 2013

# Supreme Court Decision Highlights the Danger of Allowing an Arbitrator to Decide Whether Parties Agreed to Class Arbitration

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In *Oxford Health Plans LLC v. Sutter*, No. 12-135 (U.S. June 10, 2013), the Supreme Court unanimously held that where the parties to an arbitration agreement authorize the arbitrator to decide whether their agreement allows class arbitration, a court cannot disturb the arbitrator's decision to permit class arbitration as long as the arbitrator attempted to base his or her decision on an interpretation of the contract, regardless of how erroneous that interpretation may be. It is a narrow ruling because it rests on the parties' express agreement to allow the arbitrator, rather than a court, to decide whether the agreement permits class arbitration. The decision is a reminder to companies to ensure their arbitration agreements are clear and to consider the possible risks before conferring upon the arbitrator the power to decide whether class arbitration is permitted.

In *Sutter*, a doctor brought a class action against Oxford, a health insurance company, for allegedly failing to pay for medical care rendered to Oxford's members. The parties' contract provided that "[n]o 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." The state court granted Oxford's motion to compel arbitration and the parties agreed that the arbitrator, not the court, should decide whether their contract authorized class arbitration. The arbitrator concluded that the above-quoted language permitted class arbitration. A federal district court denied Oxford's subsequent motion to vacate the arbitrator's decision and the Third Circuit affirmed.

The Supreme Court affirmed the Third Circuit, finding dispositive the parties' agreement that the arbitrator should decide whether the contract approved class arbitration. The Court reasoned that in light of that concession, under section 10(a)(4) of the Federal Arbitration Act (FAA), "the sole question for [the Court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Because the arbitrator at least purported to interpret the parties' contract to conclude that the parties agreed to class arbitration, however erroneous his interpretation may have been, the Court could not set aside his decision.

Many were expecting the Supreme Court to decide (1) what contractual language is required to support a finding that the parties agreed to authorize class arbitration and (2) whether the availability of class arbitration is a "question of arbitrability," and therefore an issue for the court, rather than an arbitrator, to decide. Ultimately, the case did not create the opportunity to resolve either question because the parties specifically delegated the decision-making to the arbitrator and the FAA precluded the Court from second-guessing the arbitrator's interpretation of the contract.

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Although *Sutter* is a narrow ruling, it underscores that companies should think carefully before agreeing that an arbitrator, rather than a court, should decide whether a contract permits class arbitration. If a company delegates that power to the arbitrator and he or she gets it wrong, there is little to no recourse. To avoid the problem altogether, companies should make sure their arbitration agreements clearly state whether class arbitration is permitted. The clearer the language is, the less room there will be for an arbitrator or judge to apply his or her own potentially contrary interpretation. The concurring opinion in *Sutter*, which explains that absent class members may not be bound by an arbitrator's erroneous conclusion that they agreed to class arbitration, highlights the risks of failing to do so.

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