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TRIAL BRIEFS

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All that snow: *Barber v. G.J. Partners, Inc.*

By Hon. Daniel T. Gillespie and Rachel Fugett

About this shoveling thing. There are only two ways to look at it. : One: It's going to snow again later, so why bother? And two: It's all going to melt eventually, so why bother? – Rick Horowitz[1]

Conventional wisdom asserts that if one does not shovel, he is not liable if someone trips on his sidewalk. If he does shovel and someone trips, he may be liable. Ergo, why shovel? Many of our neighbors seem to be so worried about that, that they seldom shovel. Either that, or they are just lazy.

In any event, "slip and fall" injuries occurring after someone shovels have resulted in a lively area of tort litigation.

Premise liability for a fall with injuries after the snow was shoveled was at the heart of the case of *Barber v. G.J. Partners, Inc.*[2] After a snowstorm in Danville, defendant, G.J. Partners, Inc., plowed and salted the parking lot of their BP gas station, pursuant to the store's normal protocol for wintry conditions.

Once the snow was plowed, the gas station's employees applied salt to the two large metal plates located near the entrance of the convenience store in the customer's parking lot. The plates allowed access to the gauges beneath the parking lot. They were approximately 45 inches in diameter and about one-half inch below the surface of the parking lot. Since the metal plates were not level with the ground, the snowplows would pack the plates with snow making them particularly slick and slippery.

Shortly after the premises of the gas station

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National policy favoring class arbitration reaffirmed

By Mark Rouleau, Rockford

Since the Supreme Court decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,* 559 U.S. 662, 130 S. Ct. 1758 1767, 176 L. Ed. 2d 605, many courts and parties have been left wondering if arbitration on a class-wide basis could ever be sustained. Recently the Supreme Court answered this question, preserving arbitration on a class basis.

In *Oxford Health Plans LLC v. Sutter*, 569 U.S. _____, 133 S. Ct. 2064, 186 L.Ed.2d 113 (2013), the United States Supreme Court "reaffirmed the national policy favoring arbitration in relation to class arbitration."[1] Upon consideration of the arbitration clause, the arbitrator decided that the contract, though silent as to the specific possibility of class arbitration, "on its face … expresse[d] the parties' intent that class arbitration can be maintained." *Id.*, 133 S. Ct. at 2067.

"[T]he arbitrator focused on the text of the arbitration clause" (slip op. at 2), applying principles of contract interpretation "he concluded that 'on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained.'" (Slip op. at 2.)

The Supreme Court explained that in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp., supra*, the parties "had entered into an unusual stipulation that they had never reached an agreement on class arbitration." (*Oxford Health Plans LLC, v. Sutter,* slip op at 6.)

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ability if one did not shovel. The *Barber* case declares that one need not worry as long as one does a reasonably careful job shoveling and salting. ■

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1. Deseret News, Mar. 1, 1993
2. 2012 IL App (4th) 110992, 362 Ill. Dec. 931, 974 N.E.2d 452 (4th Dist. 2012).
3. 2012 IL App (4th) 110992, at ¶ 10 (4th Dist. 2012).
4. 1 Ill.2d 133, 136-37, 115 N.E.2d 288, 290 (1953).
5. 2012 IL App (4th) 110992, at ¶ 25.
6. 2012 IL App (4th) 110992, at ¶ 26.

National policy favoring class arbitration reaffirmed

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The Court, further quoting *Stolt-Nielsen,* stated:

> ("Th[e] stipulation left no room for an inquiry regarding the parties' intent"). Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement.
>
> (Slip op at 6.)

In *Oxford Health Plans* the Court concluded:

> The contrast with this case is stark. In *Stolt-Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But §10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.

The Court found that because the parties "bargained for the arbitrator's construction of their agreement," that "an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." *Id*. at ____, 133 S. Ct. at 2068 (quoting *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist*. 17, 531 U.S. 57, 62, 121 S. Ct. 462, 466, 148 L. Ed. 2d 354 (2000)).

Thus, "the sole question" a court should ask under the exacting standards of §10(a)(4) "is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id*. at ____, 133 S. Ct. at 2068. *See*, *S. Commc'n Servs., Inc. v. Thomas* (11th Cir., 2013) (confirming arbitrators award construing the arbitration clause to allow class arbitration and in certifying a class). *See also*, *Wolf v. Sprenger + Lang, PLLC,* 11–CV–1206, 11–CV–1208 (DC, July 11, 2013); *St. Mary's Med. Ctr. v. Int'l Union of Operating Eng'rs, Local 70*, 11-1641 (D. Minn., June 26, 2013); and *White v. Valero Refining New Orleans, LLC*, 11-1014 (E.D. La., June 19, 2013).

More broadly the recent decision in *Oxford Health Plans LLC v. Sutter* expresses the very limited basis of judicial review of arbitration decisions under the Federal Arbitration Act, preventing the court from substituting its view of the proper interpretation of an arbitration agreement for that of the arbitrators. This case essentially holds that, by agreeing to arbitration, the parties have bargained for an arbitrator's decision without regard to whether he "performed that task poorly" where the court should not act as a secondary or appellate review of the award.

The Court emphatically found that, under 9 USC §10(a)(4), a court has no business overruling an arbitrator because the court's interpretation of the contract is different from the arbitrators.

In light of the strong decisional authority upholding class action waivers in arbitration contracts (*AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 179 L. Ed. 2d 742 (2011)), we should expect to see more class action waiver clauses in the standard boiler-plate contracts of adhesion used in many consumer transactions. ■

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1. *S. Commc'n Servs., Inc. v. Thomas*, __ F.3d __, 2013 WL 3481467, slip. op. at 10 (11th Cir., July 12, 2013).