

## The Expert's Corner

### SUPREME COURT ROUND-UP – PART I

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This past Term, the Supreme Court decided a series of class action cases, several of which – the *Wal-Mart* case and the *AT&T* case, in particular – may have significant ramifications for class action practice. Generally speaking, the defense bar had a good year: in *Wal-Mart*, class certification was reversed and the standard for the “commonality” prong of certification arguably tightened; while in *AT&T*, the Court upheld a forced arbitration clause prohibiting class action suits.

In this month’s column, I discuss these two cases. In my next column, I will discuss two other class action cases – *Smith v. Bayer Corp.* and *Erica P. John Fund, Inc. v. Halliburton Co.* – that received less media attention than *Wal-Mart* and *AT&T*, but that are interesting cases nonetheless; these later two decisions are also more plaintiff-friendly than *Wal-Mart* and *AT&T*. The next column will also report on two new Supreme Court decisions about personal jurisdiction, both of which have ramifications for class action practice.

#### *Wal-Mart v. Dukes:* No Commonality in Nationwide Sex Discrimination Case

In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (U.S. June 20, 2011), the Court ruled that a putative nationwide class of female employees could not maintain

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a class action against Wal-Mart, the nation’s largest retailer. The Court held that the plaintiffs had failed to articulate a question of law or fact common to the class *and* that the class could not be certified pursuant to Rule 23(b)(2) because of the class’s substantial claims for monetary relief.

The plaintiffs, seeking to represent a class of 1.5 million current and former female Wal-Mart employees, brought suit against the retailer, alleging that its policy of delegating discretion in pay and promotions to local store managers led to sex discrimination in violation of Title VII. The class sought injunctive and declaratory relief, as well as back pay and punitive damages. The federal district court for the Northern District of California certified the class. The Ninth Circuit substantially affirmed, noting that the class met the requirements of 23(a) and could be certified under 23(b)(2) because the class’s claims for back pay did not predominate over its claims for injunctive and declaratory relief.

The Supreme Court reversed the lower courts’ certification of the class on both grounds: first (by a 5-4 vote) the Court held that the commonality requirement was not met; second (by a 9-0 vote) the Court held that, as the class sought significant monetary relief, certification under Rule 23(b)(2) was inappropriate. As to commonality, the Court re-affirmed that “for purposes of Rule 23(a)(2) even a single [common] question will do.”<sup>1</sup> However, the Court defined “common question” with more specificity than it had in prior decisions, while reiterating that the common question should be a “central” one, writing that:

Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not

<sup>1</sup> *Wal-Mart Stores, Inc. v. Dukes*, 10-277, 2011 WL 2437013 at \*11 (U.S. June 20, 2011) (citations omitted).

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mean merely that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.<sup>2</sup>

The Court then held that this requirement had not been met in the instant case because the plaintiffs could not point to a general policy or practice of discrimination that was common to the entire class. The majority found that the plaintiffs' statistical evidence of sex-based differences in pay and promotions, anecdotal evidence of intentional discrimination, and assertion that a "corporate culture" infected the discretion given to local managers were insufficient to prove that the class had suffered a common discriminatory practice. Without any other legal or factual question common to the class, the Court ruled that 23(a)(2) was not met.

The Court also held that the putative class action could not be certified under 23(b)(2), rejecting the accepted wisdom that 23(b)(2) suits could be maintained so long as monetary damages did not "predominate." The Court held that the presence of individual monetary damages undermined the "unitary class" conceptualization of a (b)(2) class and thus triggered the requirements of predominance, superiority, notice, and opt-out embodied in Rule 23(b)(3). While the Court did not decide whether suits claiming injunctive

relief and *incidental* monetary damages due the whole class might be successfully maintained under 23(b)(2), it did hold that the *substantial* and individual claims for back pay present in the *Wal-Mart* case precluded certification under 23(b)(2).

Justice Ginsburg, in an opinion joined by the Court's three other more liberal Justices (Breyer, Sotomayor, and Kagan), concurred that the case should not have been certified under Rule 23(b)(2). However, the Ginsburg four dissented on the commonality point, arguing that the Court had incorrectly infused its discussion of commonality with elements from the 23(b)(3) predominance analysis, and that, absent such infusion, the plaintiffs' allegations would have easily met the commonality standard as conventionally applied. Justice Ginsburg's opinion thus makes clear that class counsel's effort to end-run the predominance

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requirement of Rule 23(b)(3) by filing the case as a Rule 23(b)(2) case – to which the predominance requirement does not apply – pushed the Court's majority to raise the commonality bar where it might otherwise have simply disposed of the case on predominance grounds.

*Wal-Mart* is likely to introduce more litigation of the commonality prong in future certification decisions. At the same time, *Wal-Mart* is an exceptional case for several reasons. *First*, as just noted, because the plaintiffs sought certification under Rule 23(b)(2), there was no doctrinal requirement that common issues predominate over non-common issues as there would have been in a Rule 23(b)(3) money damage class suit. As a result, much of the work that would conventionally have been done by the predominance requirement in Rule 23(b)(3) was necessarily shifted onto the commonality

<sup>2</sup> *Wal-Mart Stores, Inc. v. Dukes*, 10-277, 2011 WL 2437013 at \*7 (U.S. June 20, 2011).

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prong of Rule 23(a)(2). Thus, in the more common Rule 23(b)(3) suits, courts may continue to find the commonality test easily met notwithstanding *Wal-Mart* and instead continue to sort out cases inappropriate for aggregate treatment using the stricter predominance analysis. *Second*, because the size and scope of the *Wal-Mart* class was exceptional – 1.5 million female workers throughout the United States, all challenging de-centralized decision-making by the nation's largest private employer – its “no commonality” ruling arose in a uniquely large, nationwide workplace. *Third*, *Wal-Mart* is an exceptional case because the plaintiffs attempted to prove commonality in what struck the Court's majority as a paradoxical fashion: they alleged that the common discriminatory policy was to delegate pay and promotion decisions to the discretion of thousands of different, localized, and arguably uncommon decision-makers. This approach is somewhat more complex than, say, the common contract, single product, shared hiring test, or unitary misrepresentation at issue in more run-of-the-mill class suits. Indeed, *fourth*, *Wal-Mart* is an employment discrimination precedent and employment discrimination class actions have long been a particular sub-set of commonality law. For these reasons, it is difficult to predict with certainty *Wal-Mart's* impact on general commonality standards going forward.

### ***AT&T:***

#### **Class Action Waivers Enforceable**

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Court held that the Federal Arbitration Act (“FAA”) preempted the application of California's common law unconscionability doctrine to waivers of class action arbitration, such that an arbitration agreement containing such a waiver should have been enforced even if California law would have deemed it to be unconscionable. The plaintiffs, consumers who had entered into a contract for wireless phone service with the defendant, AT&T, brought suit in federal

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court in the Southern District of California alleging fraud and false advertising. AT&T sought to compel arbitration pursuant to an arbitration agreement the plaintiffs had signed, but the District Court found the arbitration agreement unconscionable under California law because of its waiver of class actions. The Ninth Circuit affirmed.

A divided Supreme Court reversed, with Justice Scalia writing the majority decision for the Court's five more conservative Justices (Scalia, Thomas, Roberts, Alito, and Kennedy). The Court first acknowledged that the FAA does not preempt all state contract law; the FAA's “saving clause” normally permits arbitration agreements to be rendered unenforceable on any ground that would render any other contract unenforceable under state law – that is, so long as the state's law did not discriminate against arbitration but was generally applicable, it could be applied to arbitration clauses. However, the Court held that the particular contract doctrine at issue in *AT&T* – California's application of its unconscionability doctrine to waivers of class actions – was preempted by the FAA because it would conflict with the purposes of that statute.

Specifically, the Court noted that California's unconscionability doctrine would require the option of class action arbitration in any enforceable arbitration agreement, and that class action arbitration was inherently contrary to the FAA's purpose of enforcing arbitration agreements in order to streamline litigation.

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The Court asserted that class action arbitration sacrificed informality, a major advantage of arbitration, for more formal arbitration rules governing class action arbitration. And, the Court noted that class action arbitration rules, unlike the Federal Rules of Civil Procedure, were ill-suited to protecting defendants in class litigation because they did not provide the same appellate review opportunities. As a result, state law could not mandate the removal of class action arbitration waivers from otherwise valid arbitration agreements.

The Court's decision is surely wrong – as Justice Breyer's dissent (signed by Justices Ginsburg, Sotomayor, and Kagan) argued, California's unconscionability doctrine treated arbitration contracts no differently than other contracts, hence complying with the FAA. Moreover, as Justice Breyer noted, the Court created something of a straw man in arguing that the outcome below would have required class action arbitration and that such cumbersome arbitrations would run counter to the purposes of arbitration. Justice Breyer refuted that argument by contending that the proper comparison is not that between class action arbitration and individual arbitration, but rather between class action arbitration and judicial class actions – and that class action arbitration may well be more streamlined than judicial class actions. Moreover, class action arbitration is certainly more efficient than individual arbitration of huge numbers of identical claims.

The Court's majority and dissent both assumed a potential litigation package consisting of individual arbitrations and class action arbitrations, but each therefore ignored another possible combination of procedural devices that could have applied had the class action waiver's unconscionability been affirmed: individual arbitrations for those who wanted them, coupled with the possibility of class action *lawsuits*. Such a combination would leave arbitration intact as a simplified procedure for those who desired it, while maintaining the important function of class action

aggregation – namely, overcoming the collective action problem that exists when many individuals have such small claims that none have sufficient incentive to pursue wrong-doing by a large defendant.

I authored an *amicus* brief for a group of law professors emphasizing this last point – that class actions serve important functions – and that a regime enabling only individual arbitration will sacrifice those goals. My brief reviewed the empirical evidence that few individuals ever pursue arbitration in small claims situations such as that at issue in *AT&T*; specifically:

although AT&T had nearly 70 million customers by the end of 2007, in the five years between January 1, 2003 and December 31, 2007 only 170 customers in the United States filed arbitrations against AT&T Mobility, AT&T Wireless, or Cingular Wireless. Between October 30, 2006 and December 31, 2007 – the period after AT&T implemented the arbitration clause at issue here with the \$7500 provision alleged to enable consumers to seek individual relief – only 10 customers filed for arbitration. This evidence demonstrates that few individuals file individual arbitrations.<sup>3</sup>

In this sense, the Court's decision makes for terrible policy in that it enables wrong-doers to insulate their actions from effective recourse by insisting upon arbitration and banning class actions. Put simply, no one is ever likely to sue under such a procedural regime. It is fair to predict that many large corporations will move to this combination of contract provisions in the wake of *AT&T*. Because most consumers do not read, much less

<sup>3</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), Brief of Civil Procedure and Complex Litigation Professors as *Amici Curiae* in Support of Respondents at 20 (citing Decl. of Bruce L. Simon in Support of Plaintiffs' Opposition to Defendants' Amended Motion to Compel Arbitration, *Coneff v. AT&T Corp. et al.*, No. 06-944 (W.D. Wash., filed Mar. 14, 2008) (reporting on data collected from American Arbitration Association website statistics); *Coneff v. AT&T Corp. et al.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (citing these figures as evidence that the arbitration provisions at issue here "are not having their intended effect").

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shop for, this fine print in their consumer contracts, the proliferation of such provisions may curtail a significant segment of consumer class actions in coming years.

There are several ways in which the harsh result in *AT&T* might be ameliorated. One is the possibility that some states' unconscionability doctrines might be so different from California's that they would withstand the Court's reasoning in *AT&T* and would not be preempted by the FAA. That outcome seems unlikely and would, in any case, re-enable class suits only in those few states. A second possibility is that public enforcement will fill the void that *AT&T* creates, though with the current state of the public fisc, that too seems unlikely. Moreover, such public enforcement is itself the subject of significant dispute – for example, Republicans in Congress have refused to confirm my colleague Elizabeth Warren's nomination to run the new federal consumer protection bureau, the Consumer Financial Protection Bureau, and seem intent on disrupting the effectuation of that new agency's mission. The only real change is likely to come with a change to the FAA itself, a change outlawing class action waivers or re-enabling the operation of state contract doctrine in this area. The Arbitration Fairness Act of 2011, H.R. 1020, would effectuate such a change by amending the FAA

to emphasize that it is meant to apply only to business-to-business disputes and hence to exempt from its reach employment, consumer, and franchise disputes. However, the current Congress is also highly unlikely to enact that bill into law.

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In sum, the two most significant class action decisions of the Supreme Court's 2010 Term provided important 5-4 victories for the defense bar, raising the "commonality" bar for class certification (*Wal-Mart v. Dukes*) and enabling the class action procedure to be waived by contract (*AT&T v. Concepcion*). While these cases may appear to be a rough draft of the class action procedure's obituary, my next column will discuss two small victories for the plaintiffs' bar emerging from the 2010 Term. Moreover, numerous efforts to constrain class actions in the past – ranging from the Private Litigation Securities Reform Act of 1995 (PSLRA) to the Class Action Fairness Act of 2005 (CAFA) – have proven less fatal than what was anticipated at their inception. Perhaps the dual blow the class action suffered this Term will similarly prove less debilitating as the plaintiffs' bar uses its legendary ingenuity to find ways around these cases.