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This Week's Feature

What to Tell Your Clients About the Supreme Court's New Class Action Decisions

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The 2010–2011 Term of the United States Supreme Court was a blockbuster for class action law. The Court released four major decisions in cases whose names are now familiar: *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011); *Erica P. John Fund v. Halliburton*, 131 S. Ct. 2179 (2011); and *Smith v. Bayer*, 131 S. Ct. 2368 (2011). The holdings of the cases may be less familiar, however. This article will help you explain the holdings of these cases. If your clients are corporations, this article will also help you describe how each class action decision may or may not affect their pending litigation and, more important, their business.

A. Enforcing class action waivers in consumer arbitration contracts

The holding of *AT&T Mobility v. Concepcion* is that the Federal Arbitration Act preempts the state courts' inconsistent application of state unconscionability rules. 131 S. Ct. at 1746–48.

As a practical matter, this means that consumer contracts with arbitration clauses that prohibit class actions are enforceable, provided they are as generous as AT&T's arbitration agreement. AT&T set out to draft a pre-dispute arbitration agreement that resolved many of the (un)fairness objections raised with respect to consumer arbitration. The result is an especially generous arbitration provision. While AT&T's arbitration provision takes away a consumers right to bring a class action in arbitration, it gives the consumer much more. Among the highlights: easy on-line forms for consumers to initiate dispute and arbitration; arbitration costs paid by the company; arbitration in the customer's home county; customer choice on whether arbitration is in person, by phone, or on papers; option for small claims court in lieu of arbitration; no attorneys' fees for the company; and with an arbitration award higher than the last offer, the company pays penalties plus twice the customer's attorneys' fees. *Id.* at 1744. On the way to enforcing AT&T's arbitration agreement, the Supreme Court observed that "the times in which consumer contracts were anything other than adhesive are long past." *Id.* at 1750.

Businesses who are in privity of contract with their clients may want to consider adopting an arbitration provision that precludes class arbitration. (businesses who are not in privity with their customer, like pharmaceutical companies, will not be able to take advantage of *AT&T Mobility's* central holding.) While arbitration has drawbacks such as inconsistent results and the general inability to appeal bad outcomes, arbitration is highly effective at preventing class actions. But the only way to ensure enforcement of class-waiver arbitration provisions under *AT&T Mobility* is to adopt

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provisions as generous as AT&T's. If your client is not willing to be so generous, then *AT&T Mobility* may provide little help.

As for future issues anticipated in *AT&T Mobility*, the Supreme Court hinted that the procedural due process protections which apply in class actions also apply to class arbitration proceedings. "For a class action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, and opportunity to be heard, and a right to opt out of the class. At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration." *Id*. at 1751 (dicta). Presumably, this is a matter for the court to decide after the arbitration has concluded. *See id*. ("And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.") (dicta). Whether this means other due process protections (like the limits on punitive damages) also apply to arbitration proceedings is yet to be seen.

B. Rule 23(a) and threshold issues for class certification

The central holding in *Wal-Mart v. Dukes* is that a class action cannot be certified unless the plaintiffs can provide significant proof that each class member's claim can be resolved in "one stroke" by litigating an issue they all share. 131 S. Ct. at , 2551. In other words, the plaintiffs must have suffered the "same injury" such that proof of a common contention will determine the "validity" of the class's claims as a whole. *Id.* The Court also raised the burden of proof for a class action to get past the procedural threshold. Class action plaintiffs now bear the burden of "proving" with "significant proof" that there are common issues of law or fact. *Id.* at 2551–53.

As a practical matter, this means that plaintiffs cannot merely assert superficially common questions that the class wants answered, such as "Did the defendant violate federal employment laws?" or "Is the defendant's product defective?" The Court observed that any competent counsel can craft a class action complaint to raise "common questions." *Id.* What matters, the Court held, "is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal quote and cite omitted). *Wal-Mart*'s stiffer standard should end the certification of sprawling claims loosely aggregated against a single defendant. Instead, class counsel must *prove*, not simply assert, that the claim of each and every class member is tightly tied to that of every other member based on identical facts or legal elements susceptible of common proof. This higher standard of proof could raise the price of litigating class actions, however. Classwide discovery in advance of a motion for class certification is now imperative, so your clients can expect the plaintiffs' pre-certification discovery to be much broader, escalating the litigation costs.

What future issues can we expect to arise from *Wal-Mart*? The Supreme Court flagged but did not decide the issue of expert testimony at the class certification stage. *See id*. at 2554 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class action proceedings. We doubt that is so...."). That issue is currently presented in a petition for certiorari in *Zurn Pex v. Cox*, No. 11-740 (scheduled for a conference later in 2012). In addition, because *Wal-Mart* makes it more difficult to certify a class, it may also make it more difficult to settle class actions. *See Sullivan v. DB Investments*, 2011 WL 6367740 (3d Cir. 2011) (*en banc*) (refusing to decertify settlement class based on *Wal-Mart*), *cert. petition expected in 2012.*

C. Rule 23(b) and certification based upon the relief sought

1. Rule 23(b)(2) and injunctive class actions

The second (and unanimous) holding of *Wal-Mart* is that individualized claims for money damages cannot be certified under Rule 23(b)(2), the provision that permits class actions for "final injunctive relief or corresponding declaratory relief." 131 S. Ct. at 2557–58.

Practically speaking, this should stop the creative pleading of claims for money damages in "equitable" or "declaratory judgment" terms to achieve a certified class. This was a favorite pleading trick of the class action bar, especially in Title VII discrimination cases where backpay is considered equitable relief. The Supreme Court applied the plain language and held that Rule 23(b)(2) only applies to classwide claims for "injunctive relief or corresponding declaratory relief," not "equitable" relief or "incidental" money damages. *Id*. at 2560. The downside of this holding for the business work is that settlement on a no-opt-out basis is likely no longer an option when damage claims are at issue.

2. Rule 23(b)(3) and damages class actions

The Supreme Court also dealt with the more common type of class action governed by Rule 23(b)(3), the damages class action, last year. The holding in *Erica P. John Fund v. Halliburton* is that plaintiffs need not prove "loss causation" to obtain certification of a securities class action because loss causation is not an element of that particular cause of action. 131 S. Ct. at, 2184–85.

On the surface, *Erica P. John Fund* may seem plaintiff-friendly; however, it holds a deeper meaning for those who defend against damages class actions. In such cases, the plaintiffs must prove that common questions of law or fact "predominate" over individualized issues. FED. R. CIV. P. 23 (b)(3). The Supreme Court explained that this "predominance" (like the threshold issue of "commonality" dealt with in *Wal-Mart*) must relate to what the plaintiffs must prove to establish liability. "Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action," the Court held. *Id*. at 2184. This prevents plaintiffs from framing common questions at a high level of generality not tied to the concrete elements required by the claim at law.

Defenses on the other side of the "v" can also destroy predominance, as the Supreme Court held in *Wal-Mart*. If the defendant can show that it has individualized defenses to the claims of the class, this too can prevent class certification. "Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,'" the Supreme Court explained, "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." 131 S. Ct. at 2561. Thus, *Erica P. John Fund* and *Wal-Mart* provide a double-barreled defense to damages class actions. If individualized liability issues do not kill the motion for class certification, individualized defenses can be used to finish the job.

D. Independence of state law governing class actions in state court

The Supreme Court's holding in *Smith v. Bayer* is that federal courts cannot enjoin a state court from reconsidering certification of the same class previously rejected by a federal court. 131 S. Ct. at, 2373.

What does this mean in practice? First, whenever a federal court denies class certification, class counsel can Xerox the complaint, re-file it in state court with a different representative plaintiff, and obtain certification of the same class action rejected by the federal court. At a deeper level, *Smith* holds that state courts, even in those States with rules that mirror federal

Rule 23, are now free to disregard the federal courts' class action decisions. *See id*. at 2377 ("Federal and state courts, after all, can and do apply identically worded procedural provisions in widely varying ways. If a State's procedural provision tracks the language of a Federal Rule, but a state court interprets that provision in a manner federal courts have not, then the state court is using a different standard and thus deciding a different issue.").State class action law is thus independent of federal jurisprudence. The Supreme Court tried to soften the blow of its decision with a few observations. Many state class actions may now be removed to federal court under the Class Action Fairness Act; barring that, the state court might choose to follow a federal court's refusal to certify the exact same class under principles of *stare decisis* or "comity." *Id*. at 2381–82. But, the Court admitted, these observations provide "cold comfort" where CAFA does not apply. *Id.* at 2382. After *Smith*, the class action bar may shift the fight to the states. Unremovable, single-state, state law class actions may become the new forum for avoiding the strictures of federal class action law. It remains to be seen what Due Process limits there may be on the ability of states to stray from the federal model and still bind absent class members.

E. Is there a future for class actions?

Many have predicted that *AT&T Mobility* and *Wal-Mart* have doomed the class action. Doubtful. The Supreme Court decides only 70 cases per year. Very few of those decisions in the past decade have addressed class actions. The 2010–11 Term was unusual in that respect. We don't know yet whether the Supreme Court will continue to review the complex issues that arise in commercial class actions, issues that must first work their way through the lower courts. And for every lower court that faithfully applies the holdings in *Wal-Mart* or *AT&T Mobility*, there is always a foil. Compare *Jamie S. v. Milwaukee Pub. Schs*., — F.3d —, Nos. 09-2741 & 09-3274, 2012 WL 6367740 (7th Cir. Feb. 2, 2012) (following *Wal-Mart* and decertifying IDEA class action), with *McReynolds v. Merrill Lynch*, — F.3d —, No. 11-3639 (7th Cir. Feb. 24, 2012) (distinguishing *Wal-Mart* and reversing denial of 23(b)(2) class certification in Title VII lawsuit); *Gray v. Hearst Communs*., 444 Fed. Appx. 698 (4th Cir. 2011) (distinguishing *Wal-Mart* and affirming certification of class action alleging deceptive trade practices); compare *Cruz v. Cingular Wireless*, 648 F.3d 1205 (11th Cir. 2011) (following *AT&T Mobility* and upholding class waiver in arbitration agreement), with *In re Am. Express Merchants' Litig.*, — F. 3d —, No. 06-1871, 2012 WL 284518 (2d Cir. Feb. 1, 2012) (distinguishing *AT&T Mobility*— despite U.S. Supreme Court vacatur— and holding that class action waiver is not enforceable under the Federal Arbitration Act).

With only Rule 23(f)'s chance to petition for review of an erroneous class certification decision—that is, no right of appeal—most of the errors made will go uncorrected. The Supreme Court may have provided a few new weapons in the defense. But the class action battles will wage on.

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