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LITIGATION PRACTICE LAW UPDATE

PRO-BUSINESS SUPREME COURT DECISIONS WILL AFFECT CLASS ACTIONS

By Paul J. Hershberg

The United States Supreme Court decided two cases in June of 2011 that may have lasting effects on class action litigation. In *Wal-Mart Stores, Inc. v. Dukes*, the Court rejected a proposed class action that would have included more than one million current and former female employees of the retail behemoth who alleged pervasive gender discrimination in wages and promotions. In the less heralded case of *AT&T Mobility, LLC v. Concepcion*, the Court upheld a contractual provision that prevented California consumers from pursuing claims as members of a class.

Lower federal courts and state courts will examine and distill the holdings of these cases over a period of years. Nevertheless, both decisions are likely to have practical consequences for employers and employees, and for consumers and businesses.

In *Wal-Mart*, plaintiffs alleged that Wal-Mart had created or permitted a corporate culture that gave way to an unfavorable environment for female employees. The Court unanimously concluded that it would be improper for a million and a half persons to seek monetary relief through a class action mechanism. The Court fractured along predictable lines as to whether expert sociological testimony about Wal-Mart's corporate culture -- and the alleged vulnerability of the company to pervasive gender bias – was sufficient proof to support a class claim. The majority found the proof unsatisfactory, especially because the putative class members conceded that Wal-Mart's individual personnel decisions all came from low-level managers, without direct involvement from centralized higher authority.

The *Wal-Mart* decision will generally (and correctly) be remembered as evidence of the pro-business ideology of the current Supreme Court, but the decision does not categorically insulate employers -- large or small -- from class action liability. The *Wal-Mart* majority opinion suggests that the class action mechanism would have been proper if the plaintiffs could have presented evidence that discriminatory hiring decisions stemmed from one decision maker, on a store level or a regional level. A smaller class would also have made any eventual litigation over economic damages to class members far less unwieldy. A predictable criticism of the *Wal-Mart* majority opinion is that it creates a strong incentive for large employers to decentralize employment and personnel decisions, and to leave these decisions to lower-level personnel. In either event, it is safe to say that *Wal-Mart's* primary effects will be on large companies, and not on small business.

The *AT&T Mobility, LLC v. Concepcion* decision made fewer headlines than the *Wal-Mart* decision, but its effects for small and medium-sized businesses are likely far greater. The proposed plaintiff class in *Concepcion* consisted of customers who had received "free" mobile phones from the large telephone conglomerate, but were charged sales tax on the retail value of the ostensibly "free" devices. The plaintiffs sued in California, alleging that the phone company had engaged in false advertising, and that the undisclosed tax violated California's unfair trade practices law.

AT&T's standard contract contained a mandatory dispute resolution provision. By signing on, a subscriber agreed to arbitrate all disputes, and to do so only as an individual, not as a class. Wisely, AT&T drafted the mandatory arbitration provision with a number of features that made it consumer-friendly. For instance, AT&T agreed to pay all costs associated with the arbitration of any claim that was not frivolous and additional bonus amounts in cases where it lost and the arbitrator awarded the consumer more money that AT&T offered prior to arbitration. This enabled AT&T to argue persuasively that the mandatory arbitration mechanism was more than a one-sided attempt to insulate the company from large-scale claims.

The consumer plaintiffs urged that the prohibition on membership in a class rendered mandatory arbitration provisions unconscionable and unenforceable, under California law. A California District Court agreed, and refused to compel arbitration. A divided Supreme Court disagreed and reversed, finding that the Federal Arbitration Act preempted California law, and that the liberal federal policy in favor of enforcing arbitration agreements trumped any state law impediments to mandatory arbitration.

In the near future, the *Concepcion* decision will drive many companies to modify their contracts, and to use class-waiver provisions as a mechanism to avoid catastrophic claims. Conversely, however, these agreements will likely not be enforceable if they present barriers to consumers, either in the form of bias or cost. For small and medium-sized business, the question of whether to include arbitration agreements will continue to involve a complex cost benefit analysis.

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