Class Action Watch

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Did the Supreme Court Just Kill the Class Action?

by Brian T. Fitzpatrick

Although it received lower billing than some of the Term's other decisions, I suspect the most important decision of last Term (if not the last many Terms) may prove to be *AT&T Mobility v. Concepcion*.[1] The case involved a consumer fraud class action that was filed in federal court by the Concepcions. The Concepcions alleged that they had been promised free cellular phones if they signed a service agreement with AT&T, but that AT&T nonetheless charged them sales taxes on their phones. AT&T moved to dismiss the suit and compel arbitration because the service contract the Concepcions signed agreed to arbitrate any disputes. The Concepcions argued that the agreement was unconscionable because it waived their ability to join a class action. By a 5-4 vote along ideological lines, the Supreme Court held, in an opinion written by Justice Scalia, that the Federal Arbitration Act ("FAA") preempted California's unconscionability law and that the class action waiver was therefore enforceable.

I do not wish to talk here about the legal analysis that led the Court to its decision, but, instead, about the decision's potential ramifications. I think these ramifications could prove to be enormous. Although many commentators have warned that the decision could lead to the end of consumer class actions, this may not even be the half of it: it is possible the decision could lead to the end of class actions against businesses across most—*if not all*—of their activities. I say this for three reasons.

First, the only class actions businesses face these days are brought by people whom businesses can press to consent to arbitration agreements, including, now, arbitration agreements with class action waivers. This is the case because, as a consequence of decisions by the Supreme Court in the 1990s that made it very difficult to certify tort cases as class actions, the only people who bring class actions against businesses are people with whom the businesses are in a transactional relationship: consumers, employees, and shareholders. This is what I showed in an empirical study I published last year: of all class settlements in federal court, 37% were suits brought by shareholders against businesses, 23% were suits brought by employees against businesses (including labor, employment, and benefits suits), and

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Overtime Exemption Litigation Targets the Pharmaceutical Industry

by Brent D. Knight & Michelle G. Marks

In the last several years, pharmaceutical companies have been targeted by the plaintiffs' bar for their overtime classification of pharmaceutical sales representatives. Dozens of plaintiffs have filed suit under the Fair Labor Standards Act[1] (FLSA) and state laws alleging that pharmaceutical sales representatives are misclassified as exempt from overtime pay requirements and are owed overtime compensation for all hours worked over forty in a workweek and, in some states (like California), over eight in a workday. Nearly all major pharmaceutical companies have

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been targeted in these actions, including industry giants such as Johnson & Johnson, Pfizer, GlaxoSmithKline, and Novartis Pharmaceuticals.

The pharmaceutical industry is not the first to be targeted by plaintiffs' lawyers on an industry-wide level under the FLSA—mortgage loan companies, retail establishments, and manufacturing companies are among its predecessors in this regard. But the recent proliferation of cases filed against the pharmaceutical industry, and the Department of Labor's increasingly active involvement in this litigation, presents unique issues and poses interesting questions for the pharmaceutical industry.

A. An Aggressive Plaintiffs' Bar Targets the Pharmaceutical Industry

Most people are familiar with the jobs of pharmaceutical sales representatives. While specific duties vary somewhat from employee to employee and company to company, generally, sales representatives are the primary point of contact between pharmaceutical companies and the physicians who prescribe their products. Sales representatives typically are in the field five days per week, calling on physicians with the goal of persuading them of the benefits of the products they sell, thereby increasing their employers' prescription sales volume and market share vis-à-vis competitors. Sales representatives use a variety of techniques to accomplish these goals, including leaving samples of products with physicians; using sales aids, glossies, or "reprints" to describe the efficacy of their products; and taking advantage of their sales skills to gain access to the physician and identify the physician's concerns and patient needs.

The Food and Drug Administration (FDA) regulates the manner in which sales representatives perform their jobs. Most obviously, because prescriptions are required for most drugs they sell, sales representatives normally cannot actually transfer title to their product directly to customers, relying instead on physicians to write prescriptions and on patients to fill them. In addition, the FDA regulates the marketing of pharmaceutical products; thus, sales representatives must stay "on label" in their discussions with physicians, promoting their drugs only for FDA-approved uses. In order to ensure that they stay "on label," most companies require sales representatives to use only company-drafted, pre-approved sales aids in their physician calls.

Traditionally, pharmaceutical companies have classified sales representatives as exempt from federal and state overtime requirements. Relying on "white collar" overtime exemptions such as the outside sales and administrative exemptions, companies have determined that they are not required to pay overtime to sales representatives because they meet the indicia of these exemptions—for instance, consistent with the outside sales exemption, they serve as the primary sales agent for their employers with the physicians who write prescriptions for their products,[2] and, consistent with the administrative exemption, they exercise "discretion and independent judgment" in managing their sales territory and in their interactions with physicians.[3]

In the last several years, however, plaintiffs' lawyers have seized upon FDA-mandated restrictions to challenge these classification decisions. In particular, plaintiffs' lawyers argue that sales representatives' inability to transfer title disqualifies them from the outside sales exemption because they do not actually "sell" product. They likewise argue that sales representatives do not qualify for the administrative exemption because requirements that they stay on-label and use only company-approved sales aids significantly limit their discretion and independent judgment in performing their jobs. Since 2006, plaintiffs' lawyers have filed nearly 100 collective and class action lawsuits under the FLSA and state laws in dozens of courts throughout the country asserting these theories to challenge the overtime classification of pharmaceutical sales representatives.

Many courts have been resistant to these arguments, reasoning that employees' job duties should be evaluated in the context of the industry in which they work and recognizing that, even within the limitations of FDA regulations, sales representatives have significant ability to develop sales strategy and shape their sales calls to best persuade physicians to prescribe their products. For example, beginning in 2007, the Central District of California granted summary judgment to employers in at least six separate California state law cases on the grounds that pharmaceutical sales representatives qualified for California's outside sales exemption.[4]Among the factors relied upon in these decisions were sales representatives' lack of day-to-day direct supervision from management, prior sales experience, opportunities for incentive

compensation based on sales or market share growth, and their employers' expectation that they seek affirmative commitments from physicians to write prescriptions for their products.

Results were decidedly more mixed in cases brought under the FLSA, although the weight of authority favored employers. Some courts, such as the Southern District of Texas, the Southern District of New York and the Southern District of Indiana, held that pharmaceutical sales representatives qualified for both the outside sales and administrative exemptions.[5] Other courts found that they qualified only for the administrative exemption[6] or the outside sales exemption.[7] In the District of Connecticut, however, two different courts held that, as a matter of law, Boehringer Ingelheim's and Schering Plough's sales representatives did not qualify for the outside sales exemption because they did not consummate sales.[8]

B. Department of Labor Impact

In October 2009, the Secretary of Labor filed a brief as amicus curiae in the Second Circuit Court of Appeals' review of *In re Novartis Wage and Hour Litigation*. In her amicus brief, the Secretary argued for reversal of the trial court's grant of summary judgment to Novartis, agreeing with plaintiffs that, while Novartis' sales representatives may bear some indicia of sales people, they did not meet the requirements for the outside sales exemption because they did not actually sell or take orders for drugs, and instead only provided information to physicians. The Secretary also argued that Novartis' representatives did not qualify for the administrative exemption based on, among other things, her assertion that they were not permitted to deviate from company-approved scripts when calling on doctors. On July 6, 2010, the Second Circuit Court of Appeals vacated the trial court's decision, finding the Secretary's amicus brief was entitled to controlling deference under *Auer v. Robbins*,[9] and accordingly finding that Novartis' sales representatives did not qualify for the FLSA's outside sales or administrative exemptions.[10]

As would be expected, plaintiffs have aggressively pushed the amicus brief as the authoritative statement of the Department of Labor (DOL) on the exempt status of pharmaceutical sales representatives, and there has been a great deal of motion practice devoted to the question of whether the DOL brief constitutes a considered interpretation of DOL regulations or a litigation position that runs contrary to past DOL statements. In the Northern District of Illinois, a court held that the amicus brief was entitled to *Auer* deference as the DOL's interpretation of its own regulations and granted summary judgment to FLSA collective action plaintiffs on both the outside sales and administrative exemptions.[11] Similarly, in the Southern District of Texas, a court granted a motion to reconsider and reversed its grant of summary judgment to the employer based on the Second Circuit's decision in *Novartis*.[12] In contrast, on a motion for reconsideration of its grant of summary judgment to Eli Lilly, the Southern District of Indiana refused to defer to the DOL.[13] Meanwhile, on February 2, 2010, the Third Circuit Court of Appeals affirmed summary judgment for Johnson & Johnson on the administrative exemption, never mentioning the amicus brief despite plaintiffs' counsel's insistence that it was entitled to controlling deference.[14]

The most recent major decision occurred on February 14, 2011 when a unanimous Ninth Circuit panel affirmed summary judgment for GlaxoSmithKline finding that a plaintiff sales representative qualified for the FLSA's outside sales exemption.[15] As in the Second Circuit, the Secretary filed an amicus brief in support of the plaintiff, but, unlike the Second Circuit, the Ninth Circuit refused to grant deference, noting that the DOL had acquiesced in the sales practices of the pharmaceutical industry for over seventy years and finding the DOL's litigation position both plainly erroneous and inconsistent with its own regulations and practices.

The split between the Second, Third, and Ninth Circuits clearly leaves pharmaceutical companies in limbo as to what exemption, if any, applies to pharmaceutical sales representatives, as well as to what deference should be granted to the DOL's amicus filings. What's more, other appellate courts are likely to have their say in the near future. Both *Schaefer-LaRose v. Eli Lilly & Co.* and *Jirak v. Abbott Laboratories* are on appeal to the Seventh Circuit, with consolidated argument likely to be held this year. Auxilium Pharmaceuticals has appealed the summary judgment decision in *Harris* to the Fifth Circuit. Boehringer Ingelheim, which had summary judgment granted against it in a single-plaintiff case in the Southern District of Florida,[16] recently had its motion for interlocutory appeal to the Eleventh Circuit denied.[17] One might expect in this environment that the Supreme Court would take an interest in these cases, but on February 28, 2011 it denied Novartis' petition for certiorari in *In re Novartis Wage and Hour Litigation*. More recently, on August 12, 2011, plaintiffs in *Christopher v. SmithKline Beecham Corporation* filed their petition with the Supreme Court.

C. Impact on Pharmaceutical Industry

All this leaves an uncertain state of affairs for pharmaceutical companies. It appears that the DOL under President Obama's administration will continue filing amicus briefs in appeals of wage-and-hour decisions, and, combined with the Supreme Court's denial of certiorari in *In re Novartis*, these actions have further emboldened plaintiffs' counsel, leading to additional lawsuits under both the FLSA and state law.

Indeed, the relative ease with which plaintiffs can obtain conditional collective action certification in FLSA lawsuits allows them access to contact information for potentially thousands of current and former pharmaceutical sales representatives, any number of whom could become class representatives in state law actions. While attorneys for pharmaceutical companies have suggested that the ethics of using the FLSA notice mechanism as a recruiting tool for state law actions is questionable and likely to be the subject of motion practice in the near future, plaintiffs' counsel have not been reticent in this regard. In many cases, state law class actions are more lucrative than FLSA collective actions because they use Fed. R. Civ. P. 23 "opt-out" mechanisms instead of the FLSA's affirmative "opt-in" requirement. Notably, the opt-in rate for pharmaceutical collective actions under the FLSA has been low—typically in the range of 4-6%,[18] —making opt-out class action procedures more attractive to plaintiffs' counsel. We can expect to see more state law class actions in the future, especially in states that look to the FLSA for guidance in interpreting their wage and hour laws.

Among the dilemmas for pharmaceutical companies facing exemption litigation is the fact that the litigation is extremely unpopular among current employees. Indeed; typically fewer than 10% of those who join these cases are actively employed by the company they sue.[19] This is to be expected because some of the most attractive qualities of the job are directly related to its exempt status—flexible schedules, the lack of direct supervision, and no requirement to track hours. Any change in these aspects of the job could negatively impact the quality of workforces in the industry. Pharmaceutical companies therefore must engage in a delicate balancing act between the wants and needs of employees essential to driving demand for their products and the current state of the law, and do so in an environment where the law is very much in flux and outcomes seem driven more by differences in legal interpretation than in facts.

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Endnotes

1 29 U.S.C. § 201, *et seq.*

2 *See* 29 C.F.R. § 541.500(a),

3 *See* 29 C.F.R. § 541.200(a).

4 *See, e.g.*, Barnick v. Wyeth, 522 F. Supp. 2d, 1257 (C.D. Cal. 2007); D'Este v. Bayer Corp., No. 07-3206, slip op. (C.D. Cal. Oct. 9, 2007); Menes v. Roche Labs. Inc., No. 07-1444, 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008); Brody v. Astrazeneca Pharms., LP, No. 06-6862, 2008 U.S. Dist. LEXIS 107301 (C.D. Cal. June 11, 2010); Rivera v. Schering Corp., No. 08-1743, 2008 U.S. Dist. LEXIS 111105 (C.D. Cal. Aug. 14, 2008); Yacoubian v. Ortho-McNeil Pharm. Inc., No. 07-0127, 2009 U.S. Dist. LEXIS 27937 (C.D. Cal. Feb. 6, 2009).

5 *See, e.g.*, Harris v. Auxilium Pharms., Inc., 664 F.Supp.2d 711 (S.D. Tex. 2009), *vacated in part on reconsideration by* 2010 U.S. Dist. LEXIS 102730 (S.D. Tex. Sept. 28, 2010); *In re* Novartis Wage and Hour Litigation, 593 F. Supp. 2d 637 (S.D.N.Y. 2009), *vacated*, 611 F.3d 141 (2d Cir. 2010); Schaefer-LaRose v. Eli Lilly & Co., 663 F. Supp. 2d 674 (S.D. Ind. 2009).

6 *See, e.g.*, Smith v. Johnson & Johnson, No. 06-4787, 2008 U.S. Dist. LEXIS 104952 (D.N.J. Dec. 20, 2008), *aff'd*, 593 F.3d 280 (3d Cir. 2010); Jackson v. Alpharma, No. 07-3250, 2010 U.S. Dist. LEXIS 72435 (July 19, 2010).

7 *See, e.g.*, Yacoubian v. Ortho-McNeil Pharm. Inc., No. 07-0127, 2009 U.S. Dist. LEXIS 27937 (C.D. Cal. Feb. 6, 2009).

8 Ruggeri v. Boehringer Ingelheim, 585 F. Supp. 2d 254 (D.Conn. 2008); Kuzinski v. Schering Corp., 604 F. Supp. 2d 385 (D.Conn. 2009).

9 519 U.S. 452 (1997).

10 *In re* Novartis Wage and Hour Litigation, 611 F.3d 141 (2d Cir. 2010).

11 Jirak v. Abbott Labs., No. 07-3626, 2010 U.S. Dist. LEXIS 58804 (N.D. Ill. June 10, 2010).

12 Harris v. Auxilium Pharms., Inc., No. 07-cv-3938, 2010 U.S. Dist. LEXIS 102730 (S.D. Tex. Sept. 28, 2010).

13 Schaefer-LaRose v. Eli Lilly & Co., No. 07-1133, 2010 U.S. Dist. LEXIS 105736 (S.D. Ind. Sept. 29, 2010).

14 Smith v. Johnson & Johnson, 593 F.3d 280 (3d Cir. 2010).

15 Christopher v. SmithKline Beecham Corp., 635 F.3d 383 (9th Cir. 2011).

16 Palacios v. Boehringer Ingelheim Pharm., Inc., No. 10-22398-Civ-UU, 2011 U.S. Dist. LEXIS 77804 (S.D. Fla. July 11, 2011).

17 Palacios v. Boehringer Ingelheim Pharm., Inc., No. 10-22398-CIV-TORRES (11th Cir. Sept. 14, 2011). The case is now scheduled for trial in early 2012, so barring settlement, it may be in the Eleventh Circuit within the next year.

18 *See, e.g.*, Schaefer-LaRose v. Eli Lilly, Case No. 07-CV-1133 (S.D. Ind. 2006) (4.59% opt-in rate); Engel v. EMD Sereno, Case. No. 07-CV-0117 (N.D. Cal. 2007) (4.3% opt-in rate).

19 *See, e.g.*, *Schaefer-LaRose*, Case No. 07-CV-1133 (S.D. Ind. 2006) (29 of 356 opt-ins are current employees).

Piecing Together the Puzzle of Mexican Class Actions

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Services, the Federal Antitrust Commission, the Federal Attorney General, civil associations with at least one year of establishment prior to the lawsuit, and a group of at least ten individual members of the class (art. 584).[8]

During the last quarter of 2010, and after intense debate and participation from different sectors, Senator Murillo's bill was significantly amended to introduce a number of safeguards intended to protect defendants' rights. Class actions were divided into three categories, following categories of rights found in the legal doctrine of civil law countries: the so-called *diffuse actions* to protect comprehensive rights that belong to society in general and not to any individual in particular, such as the right to a clean environment; *collective actions* to protect rights that belong to a group of persons linked by a legal relationship; and *homogeneous individual rights class actions* to protect a group linked by a contractual relationship (art. 581). The opt-out procedure was replaced with a mixed system under which class actions will be opt-out if they involve diffuse rights, and opt-in if they involve collective rights or individual homogeneous rights (art. 594). While some class action advocates oppose the opt-in procedure because it narrows the reach of class judgments, the fact that the time for opting extends well beyond the decision on the merits of the claim means class members will be able to wait for the outcome before deciding whether to join.

A clear certification phase with familiar criteria such as commonality, adequate representation, class definition, and superiority, was introduced, together with rules that provide for the parties' right to appeal the trial court's certification ruling (art. 588-589). In addition, the *loser pays rule* was adopted and attorney's fees would be subject to caps that aim at avoiding abuse (arts. 616-618).[9]

In late December 2010, the revised Murillo bill was approved unanimously in committee and, shortly thereafter, by the Senate's Plenary. The publication of the law in the Official Gazette was the final piece of the puzzle. With the law now enacted, consumer advocates can prepare to file claims when the law becomes effective in March 2012, and potential defendants can brace for the impact.

But, while we can expect to see federal class actions in Mexico next year, that may not be the end of the debate in Mexico. There remains a question as to whether a federal class action law will preempt state legislatures from passing their own local class action procedures. Mexico is a federation comprising thirty-one states and a Federal District, Mexico City. Under the Constitution, states have specific powers that are not delegated to the federal government.[10] While the constitutional amendment states that federal courts will have exclusive jurisdiction over class actions, some commentators have voiced the opinion that a federal class action law would not preempt state legislation that governs matters for which states have sole or concurrent jurisdiction under the Federal Constitution (i.e., right to health).[11] As a result, local initiatives have also been frequent in state legislatures, and new proposals are being introduced often.

The most recent proposal is a bill in the Federal District (Mexico City) introduced this year by Representative Julio Cesar Moreno Rivera, with broad support from legislators in different political parties.[12] The bill would amend the Civil Procedure Code of Mexico City to introduce a chapter on class actions. The bill expressly refers in its preamble to the federal preemption issue stating that the state legislature is not invading the jurisdiction of the Federal Congress because it is only proposing modifications to local legislation. Under this bill, class actions would be heard by state civil courts (art. 674). Standing would be given to public and private entities whose organizational purpose is related to the protection of collective rights, the Attorney General of the Federal District, and groups of at least fifteen individual class members (art. 675). For a class action to be admissible, there must be common issues of fact and law and adequate representation of the class (art. 676 A). The defendant would have fifteen days to file its answer (art. 676 B). Thereafter, the judge would rule on admissibility under article 676 A. It does not appear that the parties would have the right to oppose admissibility, and the ruling of the court is not subject to review (art. 676 C). Class actions would be opt-out, allowing class members to do so at any time before the court issues its