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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17% were suits brought by consumers against businesses (including fraud and antitrust suits).[2] These suits make up over three quarters of all federal court class actions; the remaining quarter consists of suits against government actors, insignificant suits against businesses under the Fair Debt Collection Practices Act, and a smattering of others. Although I do not know for certain, I suspect the picture would look much the same among state court class actions. As Myriam Gilles explained in a prescient article a few years ago,[3] all of these people can be asked to consent to arbitration agreements in one way or another: employees can be asked to sign them when they are hired, consumers can consent to them when they purchase products, and shareholders can consent to them when they purchase shares (either by notice from brokers or by corporate charters[4] that require it). It is true that there are some contexts in which federal law prohibits pre-dispute arbitration,[5] but these contexts are few and they are not very significant. It is also true that few corporations have taken advantage of pre-dispute arbitration with respect to shareholders, but this is not for lack of interest; it is because the SEC and securities exchanges have done their best to prevent companies from doing so.[6] But I am not sure how much longer the SEC and the exchanges will be able to keep this up: most commentators seem to believe that there is nothing in federal law that says shareholder securities fraud claims cannot be arbitrated, and, indeed, the Supreme Court has held that claims brought under the very same provisions of the securities laws can be arbitrated when brought against brokers.[7]

Second, after *Concepcion*, it is difficult to see how anything in state law can stop businesses from pressing all these plaintiffs into class action waivers. Although some commentators have argued that it might be possible to distinguish *Concepcion* from other cases on the particulars of California's unconscionability doctrine or on the particulars of AT&T's arbitration agreement (which was quite generous to claimants), I do not see it. Nothing in Justice Scalia's opinion in any way turned on either of these points. Rather, the Court's reasoning was simply that, unless a class action waiver could be included in an arbitration agreement, businesses would flee arbitration, and this would frustrate the purposes of the FAA.[8] As such, it is hard to see how any state law that forbids class action waivers would not be preempted under *Concepcion* for the very same reasons.

Third, to the extent, then, that there is anything that can stop businesses from pressing all these plaintiffs into class action waivers, it will have to be found somewhere in federal law, but it is hard to find anything there that might do it. For one thing, any federal law would have to trump another federal law: the FAA. The FAA, after all, is an explicit command from Congress that arbitration agreements should be enforced (including, after *Concepcion*, arbitration agreements containing class action waivers). In order to trump this explicit command from Congress, I would think one would have to find a conflicting command from Congress somewhere else in the U.S. Code and then invoke one of the canons on how to interpret statutes that are irreconcilable with one another (such as the canon that says that the specific statute trumps the general one, or the canon that says the more recent statute trumps the older one). But finding such a conflicting command is quite difficult. None of the federal statutes creating causes of action that give rise to class actions grant plaintiffs access to Rule 23-style, opt-out class actions. (There are a few of such statutes that grant plaintiffs access to opt-in style collective actions,[9] but these are a different—and less threatening—beast.) Rule 23, of course, grants access to Rule 23-style, opt-out class actions, but federal statutes like the FAA trump federal rules like Rule 23. The only federal statute that I have found that *might* grant plaintiffs access to Rule 23-style class actions is the infamous Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. One section of this legislation empowers the Consumer Financial Protection Bureau to impose conditions on the use of pre-dispute arbitration in consumer financial products.[10] It is *possible* that the Bureau will promulgate regulations prohibiting class action waivers in arbitration agreements. If it does, then the Bureau might preserve some—but only some, and a small some at that—of the class actions against businesses that could be threatened by *Concepcion*.

Some commentators believe that, even if there is no federal statute that grants plaintiffs access to class actions, federal common law might do so instead. Indeed, there is something—gleaned from bits of Supreme Court language—that lower courts call a "federal common law" of "the enforceability of arbitration agreements."[11] This federal common law is sometimes invoked to invalidate provisions in arbitration agreements that would make

it difficult to vindicate federal rights. Although it is certainly possible that this federal common law might save class actions for some small-stakes federal claims (because plaintiffs in these cases would not be able to vindicate federal rights without them), I would not bet on it. Federal common law is not much in vogue these days at the Supreme Court. If given the opportunity, I suspect the textualist, separation-of-powers majority on the Court will understand its arbitration precedents not to create a body of federal common law as some lower courts have, but, rather, to express the principles of interpreting irreconcilable statutes that I described above. As Justice Thomas put it for this wing of the Court in the most recent of these precedents, *14 Penn Plaza v. Pyett*[12]:

> We cannot rely on [a] judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text. [C]ongress is fully equipped to identify any category of claims as to which agreements to arbitrate will be held unenforceable. Until Congress amends the ADEA . . ., there is no reason to color the lens through which the arbitration clause is read . . . .[13]

Of course, Congress could prevent all of this from happening by amending the FAA or enacting some other legislation that would preserve access to class actions despite arbitration agreements otherwise. Legislation of this sort has been pending in Congress for some time. But it has not been acted upon, and, until it is, I have to wonder whether the Supreme Court has just handed the business community its biggest victory in a very long time.

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Endnotes

1 131 S. Ct. 1740 (2011).

2 *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 818 (2010).

3 *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373 (2005).

4 *Cf.* A.C. Pritchard, Stoneridge Investment Partners v. Scientific-Atlanta: *The Political Economy of Securities Class Action Reform*, 2007-2008 Cato Supreme Court Review 217 (suggesting that "shareholders change the damage measure in Rule 10b-5 securities fraud class actions" by waiving the fraud-on-the-market "presumption of reliance in the corporation's articles of incorporation").

5 *See, e.g.*, 15 U.S.C. § 1226.

6 *See* Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J. L. & Pub. Pol'y 607 (2010).

7 *See id.*; Pritchard, *supra* note 4. *But see* Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, 2009 Colum. Bus. L. Rev. 802 (2009) (attempting to distinguish the shareholder-broker cases from the shareholder-corporation cases).

8 *See* AT&T Mobility v. Concepcion, 131 S. Ct 1740, 1752 n.8 (2011) ("The point is that in class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive. It is not reasonably deniable that requiring consumer disputes to be arbitrated on a class-wide basis will have a substantial deterrent effect on incentives to arbitrate.").

9 *See, e.g.*, 42 U.S.C. § 216.

10 *See* 12 U.S.C. § 5518.

11 D'Antuono v. Service Road Corp., 2011 WL 2175932 (D. Conn. 2011) ("[F]ederal courts have . . . developed a federal common law regarding the enforceability of arbitration agreements, purportedly under the auspices of the FAA." (citing *In re* American Express Merchants' Litigation, 634 F.3d 187 (2011))).

12 129 S. Ct. 1456 (2009).

13 *Id.* at 1472.