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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EDITOR

The Federalist Society publishes *Class Action Watch* to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

Piecing Together the Puzzle of Mexican Class Actions

by William J. Crampton & Silvia Kim

After several years of debate, a long-awaited class action bill in Mexico became law. On August 31, 2011, the bill, which had passed the Federal Congress in April, was published in the Official Gazette. The law will become effective on March 1, 2012. As in other civil law jurisdictions, the procedures for class actions under this law do not necessarily resemble the procedures used in the U.S. or common law countries. For example, the majority of cases will not likely be filed by private class representatives. Such a claim is allowed, but standing is also granted to the Federal Consumer Protection Agency, Federal Environmental Protection Agency, National Commission for the Protection and Defense of Users of Financial Services, Federal Antitrust Authority, civil not-for-profit associations whose purpose is to protect the collective rights and interests at stake, and the federal attorney general. In addition, the law provides for either opt-in or opt-out claims, depending on the nature of the claim. If the claim seeks to protect the interests of society as a whole, the class will be opt-out. If the claim seeks recovery for an identifiable group of individuals, the class will be opt-in. The period for opting, however, will extend eighteen months *after* the judgment on common claims.

This law was the product of extensive debate, dating back to at least 2008, among many different sectors—academia, practitioners, consumer associations, NGOs, and the business community, among others. Each wanted to promote what they perceived to be the class action procedure. These initiatives were fueled by numerous articles, seminars, conferences, and press reports describing what many perceived to be a clear case of Mexico lagging behind other Latin American and European nations that already have some form of class or collective action.

One factor complicating the class action debate in Mexico was the question of whether a constitutional amendment would be necessary to allow for class actions. The Mexican Congress, scholars, practitioners, and many other stakeholders debated that question intensely between 2008 and 2010. One side of the debate, relying on circuit court precedent, argued that a constitutional amendment was unnecessary because the constitutional right to access to justice encompasses not only individual justice, but to collective justice as well. The other side, also relying on circuit court precedent, countered that the list of rights enumerated in the Constitution, which does not include collective justice, is exhaustive, and may not be the subject of expansive interpretations.

Those opposed to a constitutional amendment had a point. After all, even without express constitutional recognition, Mexico had already seen class actions. In 1994, the Consumer Protection Law was enacted giving standing to the Federal Consumer Protection Agency (Profeco) to file class actions on behalf of groups of consumers,[1] although actual claims were few and far between. On the other hand, a constitutional amendment would shut the doors to any future controversy on the issue. In the end, the Mexican Congress passed an amendment to article 17 of the Constitution establishing the availability of class actions in Mexico. It became effective with its publication in the Official Gazette on July 29, 2010.[2] The relevant language of the amendment reads:

> *The Federal Congress shall issue laws regulating class actions. Such laws will determine the fields of application, the judicial procedures, and the damage redress mechanisms. Federal judges will have exclusive jurisdiction on these procedures and mechanisms.*[3]

Significantly, the constitutional amendment required that a federal procedure class action law be enacted within one year of the amendment's effective date.[4] Thus, while it may not have been necessary to enact a federal class action law, the constitutional amendment probably did provide the final push necessary to get a bill through Congress.

At the start of congressional sessions on February 1,

2011, two proposals appeared to be leading the debate, one originating in the House of Representatives and the other in the Senate. The House bill was introduced in July 2010 by Representative Javier Corral Jurado, of the PAN party, the currently governing party.[5] It would have given standing to file class actions to a number of public officials and entities, including the President of the Nation, the Attorney General's Office, municipalities, and public prosecutors, civil and consumer associations, as well as any single individual in Mexico (art. 7). It had no class certification or admissibility rules. Under this bill, a defendant would have been given ten days to answer a complaint, which would have been followed by a short evidentiary phase. The judge would then decide the case on the merits within ninety days (arts. 25 and 26). In addition, the proposal expressly rejected the *loser pays rule*—traditionally applicable in Mexico as well as in most civil law jurisdictions—proposing instead that the defendants be bound to pay the plaintiffs' attorney's fees and expenses if they lose the case, while the plaintiffs would do so only if it is proven that they brought the action in bad faith (arts. 47-49).[6]

The Senate bill was introduced by Senator Murillo Karam of the PRI, the largest party in the House of Representatives.[7] Senator Murillo had been involved in a previous attempt to draft a class action law in 2008, when he headed a Senate Task Force charged with drafting a bill. The Task Force did not complete the task, however, because it failed to reach a consensus. But Senator Murillo came out of the task force as the "champion" of class actions in the Senate, which gave his 2010 proposal significant credibility.

This is the bill that eventually became law. But the ultimate law bears little resemblance to the original Murillo bill introduced in September 2010. In its original form, Senator Murillo's 2010 bill provided that class actions would only be available for matters related to consumer and environmental protection, antitrust activities, and financial services (art. 578). In addition, all class actions would be structured as opt-out models, allowing class members to opt-out at any time prior to the issuance of the final decision in the case (art. 594). Standing to bring the action was given to the Federal Consumer and Environment Protection Agencies, the National Commission for the Protection of Users of Financial

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Supreme Court Narrowly Interprets the Relitigation Exception of the Anti-Injunction Act

by J.B. Tarter

In *Smith v. Bayer Corp.*,[1] the Supreme Court unanimously held that a federal district court could not enjoin a state court from considering whether to certify a class action.[2] The Court applied two of its precedents in the non-class action setting to invalidate an injunction issued pursuant to the "relitigation exception" of the Anti-Injunction Act.[3]

Smith concerned litigation arising out of Bayer's cholesterol-lowering drug Baycol. After Baycol was pulled from the market in 2001, numerous suits were filed around the country in both state and federal courts. The federal cases were consolidated for pretrial purposes in the District of Minnesota pursuant to 28 U.S.C. § 1407.

In 2001, George McCollins filed suit in West Virginia state court against Bayer. One month after McCollins filed suit, Keith Smith, along with another plaintiff, filed suit against Bayer in a different West Virginia state court.[4] Both suits alleged that Bayer's sales of Baycol violated West Virginia consumer protection laws and sought to represent a class of all West Virginians who had purchased Baycol.

In 2002, Bayer removed McCollins's suit to federal court, and then the Judicial Panel on Multidistrict Litigation transferred the case to the District of Minnesota for coordinated pretrial proceedings. Bayer was unable to remove Smith's suit because Smith had sued non-diverse defendants along with Bayer.[5]

For the next six years, the two cases—the MDL in Minnesota and Smith's action in West Virginia state court—proceeded along separate tracks. The MDL Court reached the class certification question first. It denied McCollins's motion for certification of a class under Federal Rule of Civil Procedure 23 because the West Virginia claims would require proof of actual injury for each plaintiff: thus, individual issues of fact would predominate over common issues.[6] After denying class certification, the MDL Court dismissed McCollins's individual suit for failure to demonstrate actual injury.

After that dismissal, Bayer moved the MDL Court to issue an injunction prohibiting the West Virginia court from entertaining Smith's motion for class certification. Bayer argued that the injunction was necessary to prevent "relitigation" of the issue that the MDL Court had just decided—namely, that individual issues predominated under West Virginia law. Bayer

contended, and the district court agreed, that Smith was bound by the MDL Court's order because Smith was an unnamed member of the putative class. The district court granted the injunction, and the Eighth Circuit affirmed.[7]

The Eighth Circuit held that the injunction was appropriate because the questions of class certification were the same and Smith was an unnamed member of McCollins's proposed class. Smith sought review in the Supreme Court. Smith argued that the injunction was improper because the actions involved different questions and because he was not a party to the MDL Court proceedings. The Supreme Court agreed with Smith on both counts.

On the first question, the Supreme Court held that while both proposed classes sought to represent West Virginia purchasers of Baycol on claims of violations of West Virginia law, Smith's motion for class certification under the West Virginia Rules of Civil Procedure raised issues that were different from those decided by the MDL Court's denial of McCollins's motion for class certification under the Federal Rules. Although the text of West Virginia Rule of Civil Procedure 23 and Federal Rule of Civil Procedure 23 are substantially similar, the West Virginia Supreme Court has held that the state rule is not necessarily interpreted in a manner identical to the federal rule.[8] Thus, the Supreme Court concluded that the issue decided by the MDL Court was not identical to the issue sought to be enjoined from consideration in Smith's suit.

The Supreme Court held that the injunction violated the Anti-Injunction Act for a second, independent reason. For the relitigation exception of the Anti-Injunction Act to apply, the party in the second suit (in which a proceeding is sought to be enjoined) must have been a party in the first suit, subject to a "handful of discrete and limited exceptions."[9] This derives from the principle that every party deserves his or her day in court, and unless the party was present in the first proceeding, he or she had no ability to defend their interest. Smith qualified as an unnamed member of McCollins's proposed class (the class the MDL Court declined to certify). But, the Court held, that did not make him a party to the suit under the normal definition of who constitutes a party. And because the MDL Court specifically ruled there was no proper class under Rule 23, Smith did not qualify as a party under the exception to the rule that allows for claim preclusion to work against one who was a member of a properly conducted class action.

The decision in *Smith* is narrow and not surprising. The Supreme Court applied two of its precedents from the non-class action context to the class action context. On the first question, as to identity of issues, the Court relied heavily on *Chick Kam Choo v. Exxon Corp.*[10] In *Chick Kam Choo*, a federal district court in Texas dismissed a suit on *forum non conveniens* grounds and then issued an injunction preventing the plaintiff from pursuing her claims in Texas state court because it had already held that Texas was an inconvenient forum. The Fifth Circuit affirmed; the Supreme Court reversed. The Court held that because Texas state *forum non conveniens* law was not identical to its federal counterpart, the court's ruling that a federal court in Texas was an inconvenient forum was a separate issue from whether a Texas state court was an inconvenient forum under state law.[11] *Smith*'s first holding is simply an application of *Chick Kam Choo* to the class action context.

Smith's second holding can be viewed as a logical application of *Taylor v. Sturgell*.[12] *Taylor* concerned the doctrine of "virtual representation" for claim preclusion. Under general operation of law, claim preclusion operates only when the parties are the same in the two proceedings. Several circuits had created a concept of "virtual representation" that allowed a second party's suit to be foreclosed if there was sufficient identity with a first suit's parties.[13] The Supreme Court rejected this concept, holding that claim preclusion is proper only when there are identical parties in the two suits or if a few narrow, well-defined exceptions are met (such as the plaintiff in the second suit being the agent for the plaintiff in the first suit).

One of the exceptions is that all members of a class are considered parties of a "properly conducted class action."[14] Applying *Taylor* to the question in *Smith*, the Court concluded that because there was never a certified class, Smith was not a party to McCollins's suit, and thus the doctrine of claim preclusion did not apply.

Courts handling large class actions are understandably interested both in judicial economy and assisting the parties in reaching a final and complete resolution of their dispute. But *Smith* reinforces that unless a class is certified, non-parties (even non-parties alleging identical claims) are not bound by the MDL Court's rulings. Furthermore, the definition of what qualifies as an "identical question" is now more restrictive than ever.

Although *Smith* reversed the Eighth Circuit's affirmance of the injunction issued by the MDL Court, the actual effect of *Smith* on class action practice is likely

to be limited. As even the Court recognized, the concerns about serial federal and state court class action litigation have been minimized by expanded federal jurisdiction under the Class Action Fairness Act of 2005, which creates federal jurisdiction in sizeable class actions with minimal diversity of citizenship. As Bayer argued to the Court, if these suits had been filed after enactment of the Class Action Fairness Act, both suits would have been removable, and thus both Smith's and McCollins's motions for class certification would have been decided by the MDL Court. Furthermore, even if there had not been an MDL proceeding, once removed, Federal Rule of Civil Procedure 23 would have governed both suits; hence the identical question would have been raised. Even more fundamental, once the cases were removed, the Anti-Injunction Act would not be relevant to whether an injunction should issue, because the Anti-Injunction Act concerns only injunctions enjoining state court proceedings.

For class action practitioners, *Smith* counsels that the best way to avoid repetitive litigation is to try to procedurally combine suits before class certification is decided rather than waiting until one court declines class certification and then seeking an injunction. Since *Smith* was decided this year, several district courts have already cited *Smith* in declining to issue injunctions.[15]

In light of the Class Action Fairness Act, *Smith* may have the greatest impact in non-class action litigation. Rather than being a case about class actions, *Smith* is about how to interpret the Anti-Injunction Act. And the Court has instructed lower courts that the relitigation exception of the Anti-Injunction Act is to be construed very narrowly. For the exception to apply, it must be the exact same issue in both cases, and the parties in the second case must have been actual parties in the first case.

Smith is a reminder and clarification of the requirements that must be met before any injunction may issue under the relitigation exception of the Anti-Injunction Act. The two suits must involve the *same* parties, and the issue must be *identical*, not simply similar. While these are stringent requirements to satisfy, it is unsurprising to many Supreme Court observers. A strict interpretation of the exceptions of the Anti-Injunction Act defers to the mutual sovereignty of state and federal court systems and enforces the precept that federal interference in state courts should be minimal.

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Endnotes

1 131 S. Ct. 2368 (2011).

2 While the other Justices joined Justice Kagan's opinion in full, Justice Thomas joined only parts I and II-A of the opinion. Justice Thomas did not join the part of the opinion holding that Smith was not a party to McCollins's suit.

3 The Anti-Injunction Act provides: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

4 The Supreme Court noted that neither Smith nor McCollins knew about each other's suit. 131 S. Ct. at 2373.

5 As discussed *infra*, Smith's suit was filed before the operative dates of the Class Action Fairness Act of 2005, 119 Stat. 4.

6 McCollins's suit initially sought class certification under the West Virginia rules, but since the case was removed to federal court, it was converted to a request for certification under the federal rules because federal procedural rules apply once a case has been removed. *See* 131 S. Ct. at 2374 n.2.

7 *In re* Baycol Prods. Litig., 593 F.3d 716 (8th Cir. 2010).

8 *In re* W. Va. Rezulin Litig., 585 S.E.2d 52 (W. Va. 2003).

9 131 S. Ct. at 2379.

10 486 U.S. 140 (1988).

11 In a separate part of the *Chick Kam Choo* opinion, the Court held that a more limited injunction that concerned only a Texas state law claim that the federal court had actually decided would be proper. 486 U.S. at 150-51.

12 553 U.S. 880 (2008).

13 The actual articulation of "virtual representation" varied from circuit to circuit, and involved different variations of a multi-factor test. *See* 553 U.S. at 889-90.

14 553 U.S. at 894.

15 *See* Rhodes v. Advanced Prop. Mgmt. Inc., Civil No. 3:10-cv-826 (JCH), 2011 WL 3204597, at *1 (D. Conn. July 26, 2011); Fharmacy Records v. Nassar, No. 05-72126, 2011 WL 2847602, at *1 (E.D. Mich. July 18, 2011); *In re* Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig., No. MDL-1703, No. 05 C 4742, 2011 WL 2745772, at *1 (N.D. Ill. July 11, 2011); *see also* Thorogood v. Sears, Roebuck & Co., 2011 WL 768649, at *1 (U.S. June 27, 2011) (vacating and remanding case to Seventh Circuit to reconsider in light of *Smith*).

Overtime Exemption Litigation Targets the Pharmaceutical Industry

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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

final decision (art. 676 E). The proposal also provides that the parties must produce their evidence within a term of thirty days, and that the court must decide the case within ten days after the filing of closing arguments (art. 676 G). The final ruling would be binding on all the parties unless inadequate representation is proven or new evidence is discovered. In that case, a new class action based on the same facts may be filed within three years (art. 680).

A notable innovation of this proposal would be the introduction of punitive damages, which are currently foreign to Mexican law, as in most civil law countries (art. 677 B). This proposal will join a similar bill that has been pending in the Mexico City legislature since April 2009.[13] The question now is whether the Mexico City legislature will challenge the exclusivity of the federal law under the constitutional amendment by moving its own bill forward.

The Federal Congress in Mexico has now pieced together a class action model assembled with provisions intended to protect the interests of numerous stakeholders in the debate. It remains to be seen how class action cases will unfold in Mexico, and whether competing local class action models will challenge the exclusivity of the federal law.

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Endnotes

1 Gregory L. Fowler et al., *Class Actions in Latin America: A Report on Current Laws, Legislative Proposals and Initiatives*, 1:1 Latin Am. F. Newsl. (International Bar Association), Oct. 2008, at 72 ("It is important to mention that in the 15 years since the Consumer Protection Law was enacted, there have only been two group actions filed by the Consumer Protection Agency before the federal jurisdiction: The Air Madrid and the Lineas Aereas Azteca cases, both in 2007, with the exception of some isolated judicial precedents in consumer matters.").

2 *Id.*

3 *Id.*

4 Federal Constitution Amendment to article 17, published in the Mexican Official Gazette, July 29, 2010.

5 Decree which issues the regulatory law to article 17 of the Mexican Federal Constitution on collective actions. Representative Javier Corral Jurado of the PAN, July 2010.

6 *Id.*

7 The bill proposed a bundle of amendments to several pieces of legislation: the Federal Code of Civil Procedure, the Federal Civil Code, the Antitrust Law, the Consumer Protection Law, the Environmental Law, and the Law for the Protection of Users of Financial Services Law.

8 Bill which modifies and adds several articles to the Federal Code of Civil Procedures, Federal Civil Code, Federal Antitrust Law, Federal Consumer Protection Law, Federal Law of the Judicial Power, General Law on Ecological Equilibrium and Protection of the Environment, and Law for the Protection and Defense of Users of Financial Services, filed by Senator Jesus Murillo Karam, introduced in September 2010.

9 Bill filed by Senator Jesus Murillo Karam, approved by the Government and Legislative Studies Senate Committees, LXI Legislature, introduced December 2, 2010.

10 Federal Constitution of Mexico, article 124.

11 Alejandro Madrazo Lajous, Acciones colectivas: reforma engañabobos, El Universal, Apr. 27, 2010, *available at* http://www.eluniversal.com.mx/editoriales/48125.html.

12 Bill filed by Legislators of the V Legislature, which seeks to reform several articles of the Federal Civil Procedure Code, Federal Civil Code, and several federal laws, filed by Dep. Julio Cesar Moreno Rivera, introduced in January 2011.

13 Bill filed by Dep. Xiuh Guillermo Tenorio Antiga of the New Alliance Party before the IV Legislature of the Mexico City Congress, introduced in April 2009.

Did the Supreme Court Just Kill the Class Action?

Continued from cover

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.

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