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The Certified Class: A Thing of the Past?

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After two recent decisions from the Supreme Court of the United States, and one from the Superior Court of New Jersey, Appellate Division, many are left to wonder whether a certifiable class is a thing of the past. Whether by virtue of a reinforced requirement of commonality, or by contractual provisions forbidding plaintiffs not only from proceeding as a class but also simply consolidating their claims, the ability to certify a class has been limited. Although the cases involve different facets of class-action litigation, when read together, litigants attempting to certify cases as class actions are left with daunting obstacles to overcome.

Class-Action Waivers

In a 5-4 decision, the Supreme Court of the United States in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), paved the way for companies seeking to ensure efficient resolutions of disputes while attempting to avoid the potential for class action. The mechanism to do so: class-action waivers subsumed within contractual arbitration clauses.

The issue before the Supreme Court was whether an arbitration provision in cell phone contracts that provided for arbitration of all disputes, *but* prohibited arbitrations on a class-wide basis, was conscionable. The arbitration clause, however, contained favorable language that made the alternative resolution process quick and easy to use for customers and "likely to 'promp[t] full or . . . even excess payment to the customer *without* the need to arbitrate or litigate.'" The Court went as far as noting that customers who chose to litigate as members of a class would likely be worse off than those who litigated pursuant to the arbitration procedure.

Under the terms of the consumer agreements, AT&T moved to compel the plaintiffs to submit their claims, individually, to arbitration. The plaintiffs sought to avoid the arbitration and class-action waiver provision in their contracts, based on their claim that the provision was unconscionable and unenforceable on public policy grounds. Both the district court and the Ninth Circuit agreed, holding that the contractual provision was unconscionable and not pre-empted by the Federal Arbitration Act (FAA).

On review, the Supreme Court focused on whether the FAA pre-empted state laws that "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." First, the Court noted that it is the parties to a contract who, by exercising their own discretion, enter into a contract that provides for arbitration and "that parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes[.]" The Court then emphasized that the "principal purpose of the FAA is to 'ensure that private arbitration agreements are enforced according to their terms.'"

Against that backdrop, the Court weighed the delays, increased costs, risks and procedural complications that arise from class arbitrations. Based on those factors, the Court held that "arbitration is poorly suited to the higher stakes of class litigation." According to the Court, the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. Therefore, the Court determined that state laws that require the availability of class-wide arbitration stand as an obstacle to the purposes and objectives of the FAA.

As expected, in the first of many decisions likely to come, the New Jersey Appellate Division quickly found itself applying *Concepcion* to a case involving the enforceability of arbitration provisions contained in various form documents that a consumer signed in connection with her purchase of a new car from a New Jersey dealership.

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In *NAACP of Camden County East v. Foulke Mgmt. Corp.*, 2011 WL 3273896 (App. Div. Aug. 2, 2011), the dealership defendant, like the defendant in *Concepcion*, moved to dismiss the complaint and refer the dispute to arbitration pursuant to an arbitration clause in which the plaintiff agreed to waive class-action lawsuits and arbitrations, as well as agreeing to waive consolidated arbitration proceedings.

The Appellate Division, relying on *Concepcion*, upheld the trial court's ruling that the class-action waiver provisions should not be invalidated on public policy grounds. The Appellate Division, however, held that the arbitration provisions were too confusing, too vague and too inconsistent to be enforced, based on traditional jurisprudence governing the formation of a contract and its interpretation.

Commonality (2011 ed.)

In another 5-4 decision, the Supreme Court of the United States, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), gave some teeth to the commonality factor under Federal Rule of Civil Procedure 23(a), one of several factors a plaintiff seeking certification must satisfy and that reviewing courts must rigorously analyze. In doing so, the Court overturned certification of "one of the most expansive class actions ever," which consisted of more than 1.5 million current and former female Wal-Mart employees alleging gender discrimination, by requiring the plaintiffs to show that their alleged injury was grounded in a "common contention" that was "capable of class-wide resolution."

The plaintiffs moved to certify a class consisting of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart's challenged pay and management track promotions policies and practices." In addressing whether class certification was appropriate, the Court noted that the "crux of this case is commonality — the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" Rather than simply likening commonality to typicality as courts sometimes do, Justice Scalia aptly described the now reinforced commonality requirement:

> That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.'" For example: Do all of us plaintiffs indeed work for Wal-Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury."

The Court further emphasized that "[w]ithout some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."

The Court reasoned that Wal-Mart's "policy" of allowing discretion by local supervisors over employment matters is just the opposite of a company-wide employment practice that would provide the commonality needed for a class action; Wal-Mart's policy of vesting its local supervisors with discretion is, by its very nature, a "policy against having uniform employment practices." As a result, the Court held that the plaintiffs failed to provide convincing proof of a company-wide discriminatory policy and thus did not establish the existence of any common question. Because the plaintiffs had little in common but their gender and the lawsuit, the Court found that class certification was improperly granted.

The Future of Class-Action Litigation

Given those recent rulings, more and more companies should consider implementing arbitration provisions with class-action waivers into their form contractual agreements. As the Supreme Court envisioned, waiver provisions are likely to result in quicker and more efficient resolution of disputes and most importantly — the prevention of class actions. In doing so, however, companies should be cognizant that although courts cannot invalidate arbitration provisions on public policy grounds, they remain free to invoke traditional legal doctrines governing the formation and interpretation of contracts to analyze those provisions. Notably, courts may consider whether the provisions are appropriately placed in the text and whether they are stated with sufficient clarity and consistency to be reasonably understood by a consumer who is being charged with waiving the right to litigate a dispute in court.

In addition, based on the Court's infusion of clarity into what was an arguably amorphous commonality factor, plaintiffs seeking class certification must describe how they have suffered the same injury. Indeed, the commonality requirement is much more stringent; it now requires not just mere common questions, but questions of a nature that are "capable of class-wide resolution," the determination of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." Perhaps more importantly, it is no longer sufficient to presume that an entire proposed class encountered an identical experience based on nothing more than extrapolating the experiences of a sampling of people.

Although each case presents its own factual and legal variables, combined they signify a tip in the balance of the judicial scales in favor of class-action defendants. Plaintiffs, however, are not without recourse and must exercise vigilance in formulating strategies to attempt to circumvent the limitations set by the Court. ■