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Did You Hear The One About Class Actions, Arbitrations?

Court rulings have long-term implications for employment cases

By DANIEL A. SCHWARTZ

For attorneys who represent employees in class actions, the first half of 2011 must seem like a bad joke.

In just a few months, the U.S. Supreme Court issued its latest pronouncements indicating that the age of the mega-class action may be over. Those cases, together with a Connecticut case that follows the Court's lead, signal that arbitrations are the rising wave of the future.

AT&T Mobility v. Concepcion isn't an employment law case. But it opened the door wide for the use of arbitration agreements. In that case, a couple brought an action in federal court alleging that AT&T had engaged in false advertising and fraud by charging sales tax on supposedly "free" cell phones. It was later consolidated with a proposed class action. AT&T argued that the individuals were required to go through arbitration because the company's contract with them contained an arbitration clause with a class action waiver.

In a 5-4 ruling, the Supreme Court said that California's rule – which prohibited the use of one-sided class action waivers – "interferes with arbitration" and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," including the faster resolution of disputes. Arbitration agreements may be invalidated under the Federal Arbitration Act by "generally applicable contract defenses," such as fraud, duress, or unconscionability, but not by "defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue."

The majority opinion written by Justice Antonin Scalia focused on the need and the ability of parties to use arbitration to create "efficient, streamlined procedures tailored to the type of dispute." Class arbitration – in the majority's view – undermines many arbitration benefits. The majority also found arbitration to be "poorly suited to the higher stakes of class litigation," particularly because of the lack of appellate review.

Strip Clubs

A few weeks after *AT&T Mobility* was decided, a federal court in Connecticut took that holding and applied it to strip club performers.

In *D'Antuono v. Service Road Corp.*, the "exotic dancers" (as the Court called them) alleged that they were misclassified as independent contractors instead of employees.

Ultimately, the central issue in this case was whether the agreement to arbitrate between the exotic dancer (as a "tenant" of the club) and the strip club (as "landlord") was enforceable. The Court said that it was. In doing so, the Court forced the plaintiffs to arbitrate their FLSA claims and remove the specter of a collective action, finding that the plaintiffs gave up that right in their case.

The Court noted that the U.S. Supreme Court's decision changed the landscape of claims regarding the enforceability of arbitration clauses. "It would be hard to dispute that *AT&T Mobility* and other recent United States Supreme Court decisions represent a shift in federal law regarding the enforceability of arbitration agreements," the Court said. The Court said that *AT&T Mobility* appears at odds with the reasoning of various cases at the Court of Appeals — and may justify a different result than before.


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The Court concluded that it could find nothing in Connecticut state law that would render the agreement "unconscionable" and therefore unenforceable, even though it contained collective action and class action waivers and cost- and fee-shifting provisions.

The Court said that even if state law held the agreement to be unconscionable, "it would be incumbent upon this Court to consider the United States Supreme Court's preemption analysis in *AT&T Mobility*." In such an instance, the Court said, "such a state law rule, if it existed, might well be preempted by the FAA."

Importantly, the court noted: "This court reads the *AT&T Mobility* decision as cast-

Daniel A. Schwartz is a member of the Labor & Employment Department at Pullman & Comley LLC and publisher of the Connecticut Employment Law Blog, www.ctemploymentlawblog.com.

ing significant doubt on virtually any "device [or] formula" which might be a vehicle for "judicial hostility toward arbitration."

For those employers and attorneys who are looking to enforce similar provisions, the Court's analysis is invaluable and suggests that *AT&T Mobility* may invalidate even federal principles regarding arbitration limits, too.

The Court, however, did recognize that this issue is still far from settled. In June, the Court allowed the dancers to take an expedited appeal to the Second Circuit, noting that there is a "great deal of uncertainty" in this area.

No Glue

Then, last month, the U.S. Supreme Court released its *Wal-Mart Stores Inc. v. Dukes* decision. When viewed in the context of *AT&T Mobility*, it represents another sign that the current court is disfavoring large employment class actions.

The Court said that the plaintiffs – who brought suit on behalf of more than 1 million female current and former workers – failed to provide proof of a common companywide policy of discrimination. What's needed, the court said, is "some glue holding the alleged reasons" for "literally millions of employment decisions." The absence of "commonality" – a required element for class actions – was fatal to such claims.

But the court went on. In his opinion, Justice Scalia said it was unacceptable to allow these types of lawsuits to proceed when monetary awards would be based on a broad formula per plaintiff, without having an individual assessment of how much each plaintiff had suffered.

In practical terms, the long-term impact of the decision is that it is the death knell for the mega-class action (the one that covers an entire company) without a very specific and tangible practice or policy that the plaintiffs can point to.

What types of things are we talking about? Well, it would be unlikely, but suppose a company had a mandatory retirement age of 60, but without a legitimate basis for doing so. In essence, it was a company-wide practice of discriminating against older workers. That type of class action will probably survive as would smaller class actions (storewide) that focus on a particular aspect.

All of these decisions suggest a few things.

First, the U.S. Supreme Court has a strong preference for seeing that arbitration procedures and agreements be given some support. A well-drafted, and somewhat balanced, agreement to arbitrate – that provides employees with an opportunity to be heard by a neutral third party – is now much more likely to withstand a lawsuit without some tangible proof of fraud and the like.

Second, the Court appears tired of the mega-class actions that try to avoid arbitration procedures. Thus, it is certainly useful for companies to have their employees agree at the outset that disputes will be handled through arbitration and that they will not bring a class action.

Third, the Court appears tired of the mega-class actions in general. Perhaps recognizing the economic pressures that a company will face in defending them – as well as the judicial resources necessary to hear such a matter – the Court put the brakes on them. Time will tell if the lower courts adopt this message and deny more requests to certify a class based on these cases.

It is premature to announce the death of wage and hour class actions. But the cases suggest a different future for those types of claims and other claims seeking class-wide relief.

It is not premature to announce that arbitrations are alive and well, however. If there was ever a time for employment lawyers and their clients to study and understand this alternative dispute mechanism, now is it. ■