## October 2011: Class Action Update

**Class-Less Actions:** Depending on which side of the class action divide you are on, 2011 has been either a very good year or a disaster. In April, and again in June, the United States Supreme Court issued decidedly pro-business decisions, cutting back on the availability of class actions to address large-scale consumer and employment practices.

In the first of the decisions, *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), a 5-4 Court decided that contracts of adhesion with arbitration clauses containing class action waivers are enforceable. Prior to Concepcion, trial courts frequently struck down such clauses as unconscionable, recognizing that class actions are necessary to remedy wide-spread consumer frauds or unfair business practices, because individual claims are almost always too small to motivate or justify individual action. California, for example, followed the *Discover Bank* rule, which held that class action waivers were not enforceable if they served as exculpatory clauses, letting companies off the hook for large schemes to defraud. *Discover Bank v. Super. Court*, 36 Cal. 4th 148 (2005). In *Concepcion* the Court held that Discover Bank was preempted by the Federal Arbitration Act.

Although upholding the arbitration clause at issue, *Concepcion*, did not close the door entirely to challenges to arbitration provisions based on unconscionability or other contract-formation defenses, such as fraud and duress. And some courts continue to find arbitration clauses unconscionable. *See, e.g., Kanbar v. O'Melveny & Myers*, 2011 U.S. Dist. LEXIS 79447 (N.D. Cal. July 21, 2011)(finding a law firm's arbitration provision for employment disputes unconscionable because it was a one-sided, take-it-or-leave-it condition of employment, among other infirmities).

On the whole, lower courts are giving Concepcion an expansive reading, accepting the proposition that the threshold for unconscionability has been raised. *See, e.g., Bellows v. Midland Credit Mgmt., Inc.*, 2011 U.S. Dist. LEXIS 48237 (S.D. Cal. May 4, 2011); *Bernal v. Burnett,* 2011 U.S. Dist. LEXIS 59829 (D. Colo. June 6, 2011); *Day v. Persels & Assocs.*, 2011 U.S. Dist. LEXIS 49231 (M.D. Fla. May 8, 2011). And, even where an arbitration agreement contains unconscionable terms, some courts find that the objectionable provisions can be severed "blue pencilled," allowing the arbitration to proceed. See, e.g., the unpublished opinion from California's Fourth District Court of Appeal (Div. 3) in *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp.,* (June 29, 2011).

Notwithstanding the broad reading of *Concepcion*, companies that wish to benefit from it need to give careful consideration to the arbitration clauses in their adhesion contracts. The AT&T clause approved by the Court was unusually consumer-friendly. Among other things, AT&T agreed to pay all arbitration costs for non-frivolous claims, conduct the arbitration in the consumer's county of residence, and guarantee recovery of $7500 plus double attorneys' fees if the consumer obtained more in the arbitration than AT&T had offered beforehand. How consumer friendly an arbitration clause needs to be under *Concepcion* awaits further development.

Within days of the decision, Senator Al Franken and two colleagues announced their intention to circumvent *Concepcion* through legislation known as the Arbitration Fairness Act. The bill, first introduced in 2009, was re-introduced within weeks following the decision in *Concepcion*, but is unlikely to advance this term.

The Court's second class action blockbuster was *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2011), which decertified the largest employment discrimination class in history. The decision effectively closed the door to nationwide disparate-impact class actions and may have made it more difficult to certify other types of large class actions.

The plaintiffs' theory was that the nation's largest retailer had a strong corporate culture that permeated individual hiring and promotion decisions, thereby subjecting every female employee to a common discriminatory practice. The plaintiffs introduced statistical evidence of pay and promotion disparities and anecdotal evidence from 120 class members. An expert sociologist also opined that the corporate culture made it vulnerable to gender discrimination. The class was certified under Rule 23(b)(2), on the theory that the plaintiffs primarily sought injunctive relief and that their request for back pay awards was merely incidental.

A unanimous Court found that a (b)(2) class was not warranted because the individual back pay awards were not incidental relief and that it was not appropriate to try a random sample of cases, devise a formula, and extrapolate to the entire class. Instead, the case should have been brought as a (b)(3) class action, an approach plaintiffs clearly had avoided because of the more stringent requirements for predominance and superiority that such a large class likely could not meet.

In a second aspect of the decision, the Court, held 5-4 that the class did not meet the basic Rule 23(a) requirements for class certification because there was inadequate proof of commonality, which the Court defined not as the ability to raise myriad

common *questions*, but as the ability to generate common *answers*. The majority were unable to discern a glue binding the challenged employment decisions together, such as a single discriminatory practice. The majority's holding noted that the plaintiffs' expert could not say what percent of employment decisions were affected by the strong corporate culture. The Court also concluded that anecdotes from the 120 class members did not represent a large enough percentage of the class to support commonality.

Because commonality was previously viewed as a relatively easy bar for plaintiffs to surmount, the Court's discussion of commonality surely will change the way class certification motions are opposed and decided.

As the U.S. appears to be restricting the use of class actions, other nations continue to adopt them. Most recently, Mexico passed legislation permitting class actions in consumer, environmental, and antitrust actions. The legislation provides a very speedy procedure – five days to submit arguments against class treatment after the case is filed, and two weeks thereafter for the court to decide the issue.