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Commercial Litigation

July 2013

# **More Relief for Business:** U.S. Supreme Court Continues to Restrict Far-Reaching Claims

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Over the last few years, U.S. Supreme Court decisions have limited the ability of class action plaintiffs to assert the sort of far-reaching claims that often force businesses to settle rather than fully defend. *AT&T v. Concepcion* upheld class action waivers in arbitration agreements. *Wal-Mart v. Dukes* adopted a narrow interpretation of the "commonality" requirement in Federal Rule of Civil Procedure 23 (a).

In the term that just ended, the Court decided five class action cases, more than in any recent term. These decisions -- *Comcast Corp. v. Behrend*, *Standard Fire Insurance Co. v. Knowles*, Amgen *Inc. v. Connecticut Retirement Plans & Trust Funds*, *Oxford Health Plans LLC v. Sutter*, and *American Express Co. v. Italian Colors Restaurant* – continued, for the most part, the Court's trend of making it harder for plaintiffs to have a case certified as a class action. While class litigation is by no means dead, the Court's plain message to lower courts is to look harder at class certification motions and only certify class actions where Rule 23's requirements are clearly met.

Below, we discuss this term's class action decisions and examine their likely impact on class litigation going forward.

## *Comcast Corp. v. Behrend*

In *Comcast*, cable television subscribers filed a class-action antitrust suit against Comcast, alleging that the company had unlawfully swapped territory with other cable companies to gain market power and raise prices. The plaintiffs sought to certify a class of more than two million current and former Comcast subscribers under Rule 23(b)(3), which allows certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." To meet this predominance requirement, plaintiffs had to show that: (1) the existence of individual injury resulting from the alleged antitrust violation was "capable of proof at trial through evidence that [was] common to the class rather than individual to its members," and (2) the damages resulting from that injury were measurable "on a class-wide basis" through use of a "common methodology."

Plaintiffs advanced four damages theories, one of which was based on an "over-building" theory. The district court rejected three of the four damages theories and limited certification to the over-building theory. To prove damages from the alleged over-building, plaintiffs relied on a regression model comparing actual cable prices in the area with hypothetical prices that would have prevailed "but for" Comcast's allegedly anticompetitive activities. In granting class certification, the District Court held that the damages resulting from Comcast's allegedly anticompetitive conduct could be calculated on a class-wide basis. The Third Circuit affirmed but did not consider Comcast's arguments that the regression model failed to support the plaintiffs' damages theory.

The Supreme Court reversed and held that the class action was improperly certified under Rule 23(b)(3) because plaintiffs' regression model did not establish that damages were capable of measurement on a class-wide basis. The Court began its analysis by reiterating that under *Wal-Mart Stores, Inc. v. Dukes*, the district court was required to undertake a "rigorous analysis" of whether the predominance requirement of Rule 23(b)(3) had been satisfied. In doing so, the Court decided that plaintiffs' regression model failed to show that their damages could be proved on a class-wide basis, because the model measured damages assuming that *all* of the plaintiffs' four theories of antitrust impact applied, even though the district court had rejected three of them. The Court stated that "[i]n light of the model's inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class." The Court therefore concluded that "[q]uestions of individual damages calculations will inevitably overwhelm questions common to the class," and that class certification was improperly granted.

## Take-Away from *Comcast Corp. v. Behrend*

Although the Court's holding in *Comcast* was narrow—in order for class plaintiffs to have a class certified, their damages theory must be consistent with and limited to plaintiffs' liability theory--the Court reaffirmed *Wal-Mart v. Dukes*' holding that courts must conduct a "*rigorous analysis*" to ensure that the requirements of Rule 23 have been satisfied, even if doing so requires consideration of the merits of the plaintiffs' claims. In light of *Comcast*, the Supreme Court has already vacated and remanded two class action

cases heard in this last term.[1] *Comcast* will likely apply to all class actions—not just antitrust cases--regardless of the nature of the substantive claims.

## *Standard Fire Insurance Co. v. Knowles*

In *Standard Fire Insurance Co. v. Knowles*, an insured brought a class action against his insurer in state court, claiming that the insurer had breached its homeowner's insurance contracts by failing to pay general contractor fees for repairs. The plaintiff stipulated that he would not seek damages for the class in excess of $5 million in the aggregate. Relying on the Class Action Fairness Act (CAFA), the insurer removed the case to federal court. The plaintiff moved to remand, arguing that the district court lacked jurisdiction because the "sum or value" of the amount in controversy was below the required $5 million threshold. The district court, relying on the stipulation, remanded the action to state court.

The Supreme Court reversed. It held 9-0 that a pre-certification stipulation that the class representative will not seek damages for the class that exceed $5 million does not prevent removal of the case under CAFA. Although the Court recognized that stipulations are binding, it noted that the stipulation the insured offered "did not speak for those he purport[ed] to represent," *i.e.* absent class members. Because the insured's pre-certification stipulation did not bind anyone but himself, he did not effectively reduce the value of the putative class members' claims. A stipulation "can tie [the insured's] hands, but it does not resolve the amount-in-controversy question in light of his inability to bind the rest of the class."

## Take-Away from *Standard Fire Insurance Co. v. Knowles*

This decision helps businesses by making it easier for class actions filed in state court to be removed to federal court, where district judges refuse to certify classes more often than state court judges. The gambit of plaintiffs stipulating that the class' damages will not exceed $5 million is no longer available, so more cases filed in state court will end up in federal court under CAFA.

## *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*

In *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, plaintiff sued Amgen on behalf of a class of shareholders, alleging that Amgen's misrepresentations and misleading omissions regarding the safety, efficacy, and marketing of two of its flagship drugs violated federal securities laws. Plaintiff invoked the "fraud-on-the-market"[2] presumption when it sought class-action certification under Rule 23. Amgen opposed certification, arguing that a plaintiff must prove as part of the Rule 23 analysis that the misrepresentations and omissions were material as to each investor,[3] and asking the court to consider Amgen's rebuttal evidence on the issue of whether the totality of information in the marketplace made the alleged misrepresentations and omissions unimportant. The district court certified a class of all investors who purchased Amgen stock between the date of the first alleged misrepresentation and the date of

[1] See Whirlpool v. Glazer, 678 F.3d 409 (6th Cir. 2012) (a products liability case); Ross v. RBS Citizens, N.A., 667 F.3d 900 (7th Cir. 2012) (a wage and hour case).

[2] See Whirlpool v. Glazer, 678 F.3d 409 (6th Cir. 2012) (a products liability case); Ross v. RBS Citizens, N.A., 667 F.3d 900 (7th Cir. 2012) (a wage and hour case).

[3] Materiality is an element of Rule 10b-5 cause of action, as well as an essential predicate of the fraud-on-the-market theory. *Id.* at 1195.

the last alleged corrective disclosure, and the Ninth Circuit affirmed.

The Supreme Court held 6-3 that the issue of materiality should be determined when the case is decided on the merits, not during class certification.[4] For class certification under Rule 23(b)(3), the members of the class must only show that common questions predominate over questions affecting solely individual members of the class. Proof of materiality is not needed under 23(b)(3) because (1) the question of materiality is an objective one that can be proved through evidence common to the class, and (2) there is no risk that a failure of proof on the common question of materiality will result in individual questions predominating. Amgen was also prohibited from introducing rebuttal evidence to prevent certification, because even a definitive rebuttal of materiality would not undermine the "predominance of questions common to the class."

## Take-Away from *Amgen*

The *Amgen* decision is important because it settled a circuit split. Plaintiffs alleging §10(b) securities fraud do not need to establish the materiality of a defendant's alleged fraudulent statements and omissions in order to obtain class certification. This allows plaintiffs to advance their class actions more easily; it gives plaintiffs leverage as the issue of materiality will not be litigated until after a class is certified. To this extent, *Amgen* runs counter to the pro-business trend of most Supreme Court class action decisions. *Amgen* signals that while the Supreme Court looks at class actions with a skeptical eye, the Court is leaving the door open to class actions in securities actions and other statutory actions in which liability issues can be proved or disproved using evidence that is common to the class as a whole.

## *Oxford Health Plans LLC v. Sutter*

On June 10, 2013, the Supreme Court unanimously upheld an arbitrator's ruling that a contract requiring arbitration of "any dispute" constituted an agreement to class-wide arbitration. In *Oxford Health Plans LLC v. Sutter*, Sutter, a physician sued Oxford, a health insurer, in state court, asserting contract claims on behalf of himself and a proposed class of other physicians under contract with Oxford. Relying on a provision in the parties' agreement which provided that "all…disputes shall be submitted to final and binding arbitration…", Oxford moved to compel arbitration. The state court granted Oxford's motion and referred the case to arbitration. The parties then agreed that the arbitrator should decide whether their contract authorized class arbitration, and the arbitrator decided that it did. Because the issue turned on "construction of the parties' agreement," the arbitrator focused on the text of the arbitration clause and determined that "on its face, the arbitration clause…expresses the parties' intent that class arbitration be maintained." Oxford filed a motion in federal court to vacate the arbitrator's ruling, claiming that the arbitrator had exceeded his powers under Section 10(a)(4) of the Federal Arbitration Act ("FAA"). The district court denied the motion, and the Third Circuit court affirmed.

While the arbitration was pending, the Supreme Court held in *Stolt-Nielsen* that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party

[4] *Id.* at 1191. The Court noted that merit questions should only be considered to the extent that they are relevant to determining whether the Rule 23 prerequisites for class certification are met. *Id.* at 1195.

*agreed* to do so." In light of *Stolt-Nielsen*, Oxford asked the arbitrator to reconsider his decision on class arbitration. The arbitrator reaffirmed his decision, finding that *Stolt-Nielsen* had no effect because the parties in that case had stipulated that they never reached an agreement on class-wide arbitration, whereas Oxford and Sutter had disputed whether their contract contemplated class arbitration and had agreed to allow the arbitrator to interpret it. Once again, the district court and the Third Circuit upheld the arbitrator's decision. The Supreme Court granted certiorari to determine whether the arbitrator had exceeded his powers when it had decided that the parties' contract authorized class-wide arbitration.

The Supreme Court unanimously upheld the arbitrator's decision that the contract between Sutter and Oxford authorized class-wide arbitration. The Court found that Oxford and Sutter "bargained for the arbitrator's construction of their agreement" by twice submitting to the arbitrator—and twice allowing the arbitrator to determine—whether their contract contemplated class arbitration. Because the arbitrator based his decision on the text and scope of the parties' arbitration provision, the Court held that the arbitrator had "arguably construed" the contract and therefore had not exceeded his powers under the FAA. In contrast, the arbitrator in *Stolt-Nielsen* had abandoned his interpretative role by authorizing class-wide arbitration based on public policy concerns, and not on the language of the agreement. The court indicated that it "would face a different issue" had Oxford argued that the availability of class arbitration under the contract was a "question of arbitrability," an issue that is presumptively for courts to decide and that was left open by the Court in *Stolt-Nielsen*.

## Take-Away from *Oxford Health Plans LLC v. Sutter*

The Court's decision in *Oxford* clarified that arbitration is a viable option for plaintiffs bringing class claims, if the plaintiffs are willing to proceed in an arbitration forum instead of court. Plaintiffs can now argue that arbitrators may lawfully construe arbitration provisions that are specifically silent on class proceedings to authorize class arbitration, especially if the arbitration clause covers "all disputes" and does not exclude class or mass proceedings. Businesses should review their arbitration agreements to ensure that they explicitly address the availability (or unavailability) of class-wide arbitrations.

## *American Express Co. v. Italian Colors Restaurant*

The final class action decision of the term was *American Express Co. v. Italian Colors Restaurant*. In *American Express*, the Court held that a contractual waiver of class arbitration is enforceable under the Federal Arbitration Act ("FAA") even if the cost of proving an individual claim in arbitration exceeds the potential recovery, thus making it highly unlikely that any person would bring an individual action. In other words, even if denying class certification will leave a plaintiff without an effective remedy, that is not a valid reason to deny certification.

In *American Express*, merchants brought a class action based on alleged violations of federal antitrust laws. The merchants argued that American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards. A clause in the parties' form agreements provided that "[t]here shall be no right or authority for

any Claims to be arbitrated on a class action basis." American Express moved to compel *individual* arbitration. The merchants argued that the cost of an expert analysis necessary to prove the antitrust claims would exceed the amount of recovery for an individual plaintiff, so no rational plaintiff would ever bring an arbitration, leaving the merchants without a practical remedy. After several years of litigation, including one "grant, vacate, and remand" order from the Supreme Court, the Second Circuit held that individual arbitration could not be compelled. The Supreme Court granted certiorari in 2012 to consider the question of "[w]hether the Federal Arbitration Act permits courts…to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim."

In a 5-4 decision, the Court reversed the Second Circuit's decision and held that the FAA *does not* permit courts to invalidate arbitration agreements simply because the cost of individual arbitration may be prohibitively high. The Court's majority opinion relied on three grounds: (1) there is no congressional command that trumps the FAA's mandate that arbitration agreements must be "rigorously enforced" according to their terms;[5] (2) the "effective vindication" exception doesn't guarantee class arbitration simply because an individual claim is expensive to prove;[6] and (3) to hold otherwise would defeat the prospect of quick resolution of claims in arbitration because courts and parties would have to preliminarily determine the cost of proving each element of the claims and the potential damages that could be recovered. The Court noted that the parties had agreed to arbitrate pursuant to the "usual rule" that litigation is conducted by and on behalf of the individual named parties only, and "it would be remarkable for a court to erase that expectation."

## Take-Away from *American Express Co v. Italian Colors Restaurant*

Some commentators have characterized the message from *American Express* as "too bad, so sad." The Court's decision means that if a party enters into an arbitration agreement that waives the right to class arbitration, a court cannot allow that party to avoid the agreement simply because individual arbitration is expensive or inconvenient. Absent a showing of contract defenses such as fraud, duress, or unconscionability, a court will enforce the arbitration agreement with a class arbitration waiver.

## A Case for Next Term

In May 2013, the Supreme Court granted certiorari in *Mississippi ex rel. Hood v. AU Optronics Corp.*. In *Hood,* the Court will have to determine whether a state's "parens patriae" action is removable as a "mass action" pursuant to CAFA when the state is the sole plaintiff and

[5] *Id.* at *4. The merchants had argued that requiring them to litigate their claims individually, as they contracted to do, would contravene the policies of the antitrust laws. *Id.* The Court, however, stated that the antitrust laws do not guarantee an affordable path to the vindication of every claim. *Id.*

[6] *Id.*at *5. The "effective vindication" exception allows courts to invalidate agreements that prevent a party's right to pursue statutory remedies. *Id.* The merchants asserted that enforcing the waiver of class arbitration bars effective vindication because they have no economic incentive to pursue their antitrust claims individually in arbitration. *Id.* The Court disagreed, and held that the class-action waiver limits arbitration to the two contracting parties, and it does not eliminate those parties' right to pursue their statutory remedy. *Id.*

the claims arise under state law.[7] The Fifth Circuit has held that such a case is removable, but the Fourth, Seventh, and Ninth Circuits have held that it is not.

## Conclusion

Three of the five Supreme Court decisions regarding class actions decided last term made it more difficult to successfully bring a class action. Plaintiffs must pass strict procedural hurdles and courts must perform a rigorous analysis to determine whether a class should be certified. In addition, the decisions confirm the notion that arbitration is a matter of contract and that the terms of arbitration agreements will be strictly enforced. Thus, companies wishing to avoid class arbitration should expressly include class arbitration waivers in their agreements.

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[7] D. Matthew Allen, *Breaking News: The Supreme Court Today Accepted Certiorari in Mississippi Ex. Rel. Hood v. AU Optronics Corp.*, JDSUPRA LAW NEWS (May 29, 2013), http://www.jdsupra.com/legalnews/breaking-news-the-supreme-court-today-a-20094/.

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