

## Big term for class actions

By Marcia Coyle  
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In the 2005 Class Action Fairness Act, Congress, heeding the pleas of the business lobby, altered the class action landscape by shifting much of that litigation from state courts to federal courts. Now business hopes the U.S. Supreme Court will take the next step.

With the Court's agreement to answer class action questions in the Wal-Mart sex discrimination litigation last week and the AT&T cell phone arbitration lawsuit, "It could be a big term," said Brian Fitzpatrick of Vanderbilt University Law School and a former clerk to Justice Antonin Scalia.

Class action litigator Archis Parasharami, partner in Mayer Brown, added, "At least in my mind, there's no question the Supreme Court's docket demonstrates a greater interest in class actions than at any other time in the last decade."

In addition to the Wal-Mart and AT&T cases, the justices this term also will decide a class action-related issue in *Smith v. Bayer Corp.*, in which a federal court enjoined a state court class action from proceeding against the drug company.

And in the wings, a petition has been filed by the nation's major tobacco companies challenging, on due process grounds, the use of the class action device by Louisiana courts to deal with smoking cessation claims involving more than 500,000 class members.

"The Court's increased interest in this area potentially reflects a recognition that class actions involve extraordinarily complex issues of law," said Parasharami. "I think the Court knows the bar hadn't heard from it for some time until last term. The last major decisions that I can think of in the class certification arena were from late 90s, and a lot has changed since then in class action practice."

One factor spurring the Court's increased interest, he added, may be the 2005 Class Action Fairness Act. "In the last five years, the number of class actions in federal courts has increased significantly," he noted.

### PERCEPTION OF BIAS

If the justices rule against the Wal-Mart women and the AT&T consumers on the class action issues in those two cases, their decisions likely will feed a widespread perception that the Supreme Court is dedicated to protecting corporate interests and giving corporations what they want, said Arthur Bryant, executive director of Public Justice.

"More than any single decision, *Citizens United [v. FEC]* created this perception, but it's not the only one," he said, explaining that recent rulings on federal preemption of tort claims involving medical devices, on mandatory arbitration and other areas add to the sense that "in area after area, the Supreme Court is changing the rules to basically preclude or limit lawsuits against corporations."

Bryant said he does not believe the Court has a corporate agenda. "Maybe companies are overreaching," he said, referring to the class action cases. "I don't think they'll succeed, but the real possibility that they

could be truly frightening."

That possibility is not frightening at all, say business groups supporting the class action challenges.

"The court has not frequently stepped into the area of when it is exactly appropriate to certify [a class action], but every time it has, it has been very skeptical of overly ambitious certifications," said Richard Samp of the Washington Legal Foundation.

Overly ambitious may also describe the Wal-Mart certification of a class of 1.5 million past and present female workers, he said. "My general impression is Wal-Mart will win this case quite handily, and the Court will say you can't certify a class when there really isn't a realistic plan that can be drawn up to actually try the case," said Samp.

He sees the tobacco petition — *Philip Morris v. Scott* — as a companion case in some ways to the Wal-Mart case.

"The Wal-Mart case obviously will affect federal class actions," he explained. "I see the Philip Morris case as potentially drawing some strict lines about how far state courts can go and still comply with due process. At the end of the day, those rules will never be as tight as Federal Rule [of Civil Procedure] 23, because the Supreme Court realizes states have broader leeway to run their affairs. I suspect if the Court grants review, it will probably overturn the class certification there, but it will set a floor that is reasonably low."

The Wal-Mart case — [Wal-Mart Stores v. Dukes](#) — asks the justices two questions: whether it was proper to certify a class seeking back pay — monetary relief — under Federal Rule of Civil Procedure 23(b)(2), a rule limited to injunctive or declaratory relief, and whether certification under Rule 23(b)(2) was consistent with the requirements of Rule 23(a).

In [AT&T Mobility v. Concepcion](#), the justices will decide whether the Federal Arbitration Act precludes states from refusing to enforce class action bans within arbitration agreements. (Mayer Brown represents AT&T.)

"If the Court does what AT&T wants it to do, it could end up eliminating most of the class action docket in this country," said Vanderbilt's Fitzpatrick. The Supreme Court in the 1990s made it difficult to certify personal-injury class actions, he explained, so virtually all class actions today occur between parties who are in transactional relationships with one another: shareholders and corporations, consumers and merchants, employees and employers.

## **A SHRINKING DOCKET?**

Those relationships represent about 70%-75% of the class action docket, he said. Add in employment relationships and that's another 10%. "All of those cases could disappear."

**Public Justice's Bryant** agreed, explaining, "It is potentially more important than *Wal-Mart*. It goes to the very core of what class actions were created to do in terms of damages litigation. That is to make sure there is a remedy when companies cheat large numbers of people out of small amounts of money. That's the prototypical damages class action. There's no other way justice can be done in those circumstances."

But arguments in the high court did not go well for AT&T, most observers agree. If the company prevails, experts predicted, it would be on very narrow grounds.

## **SKEPTICAL JUSTICES**

Fitzpatrick, who recently published an empirical study of every federal class action settlement from 2006 to 2007, said there is "broad skepticism" on the Roberts Courts of class actions and plaintiffs' lawyers. The best examples, he added, were the 2007 ruling in [Bell Atlantic v. Twombly](#), an antitrust class action which raised the bar for pleading antitrust conspiracy claims, and last year's [Ashcroft v. Iqbal](#), which applied the new pleading standards to all civil actions.

In many cases, he said, the Court's conservatives rule in ways that make it harder for class action plaintiffs to bring their cases. And, "Among the liberal justices, there is some ambivalence about the class action device because you have all these people who don't participate, but they're bound by everything that goes on," he added. "There are these very traditional, everyone-entitled-to-his-day-in-court justices, who are very reluctant to extinguish an individual's right to sue unless the class action device looks very strong in terms of how it treats class members."

Mayer Brown's Parasharami said he doesn't believe any of the justices has a "knee-jerk type of reaction against class actions." He pointed to last term's decision in [Shady Grove Orthopedics Associates v. Allstate Insurance Co.](#), in which Justice Antonin Scalia wrote an opinion whose impact likely means that federal courts will entertain certain state-law class actions that could not have been brought in state courts.

There are "many, many issues" in class action litigation creating conflicts among the lower courts, said Parasharami, adding that the first question in the Wal-Mart case is a good example of a conflict that has been percolating for some time.

"Certainly from the defense bar side, but also from the bar as a whole, we welcome guidance from the Supreme Court on these issues which have promoted uncertainty among the lower courts," he said.

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