

Trends

Supreme Court

Dust Settling After Dynamite SCOTUS Term; *Concepcion* and *Wal-Mart* Effects Debated

Two resounding wins in the U.S. Supreme Court for the class action defense bar do not necessarily spell the end of class actions, panelists from both sides of the aisle agreed during a panel Oct. 14 at the American Bar Association's 15th Annual National Institute on Class Actions.

The panelists provided an update on the status of litigation following the decisions in *AT&T Mobility LLC v. Concepcion* and *Wal-Mart Stores Inc. v. DuKes*, as well as predictions about how courts may interpret these touchstone decisions.

In its 5-4 decision earlier this year in *Concepcion*, 131 S. Ct. 1740 (2011) (12 CLASS 362, 5/13/11), the Supreme Court held the Federal Arbitration Act (FAA) 9 U.S.C. § 1, et seq., preempted a California state law that rendered most class action waivers in consumer contracts unconscionable and so unenforceable.

The decision has been hailed by business, which prefers the speed and efficiency of bilateral arbitration for resolving claims arising from consumer and employment contracts. But consumer advocates suggest the decision closes the door on many small-dollar consumer claims and allows corporations to perpetrate frauds unchecked.

What Went Wrong for Plaintiffs? Panelist F. Paul Bland, senior attorney at Public Justice who has litigated many cases involving class action waivers in arbitration agreements, said if he could have changed anything about the presentation of the case, he would have preferred to see a different case go before the Supreme Court.

"What went wrong with this case [at the Supreme Court] was that it was the single worst imaginable vehicle for this issue to come up," Bland said.

If the case had come from the California Supreme Court, rather than the Ninth Circuit, then the plaintiffs would have won, Bland said. Justice Clarence Thomas has said on repeated occasions that Section 2 of the FAA does not apply in state court, Bland said. Thomas's view, coupled with the four votes in the dissent to *Concepcion*, would have meant a holding of no preemption, he said.

"My take on Justice Thomas is that he is not the most flexible guy. I think that he's got the flexibility of a potato chip and I think he is going to stick to that rule," Bland said.

Secondly, Bland said in *Concepcion*, the plaintiffs had no evidence whatsoever the arbitration agreement at issue was unconscionable. He would have preferred to see the *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248 (W.D. Wash. 2009), case go to the court.

In that case, there was overwhelming proof that despite the bells and whistles in AT&T's arbitration agreement only an infinitesimal number of arbitration claims could go forward on an individual basis, Bland said. "Without a class action, AT&T basically had a get-out-of-jail-free card," he said.

Will Vindication of Rights Theory Gain Traction? Bland said he thought an argument still existed that *Concepcion* does not apply in state court. But he said the more important outcome will be whether *Concepcion* essentially overturned—without saying so—the line of U.S. Supreme Court cases that says arbitration clauses are only enforceable when people can effectively vindicate their statutory rights.

Under this "vindication of rights" theory, Bland said, class action bans in arbitration agreements should not be enforced in the limited subset of cases where plaintiffs' lawyers have hard evidence that it would be too costly to pursue an individual action, and, therefore, a class action is the only mechanism that would allow plaintiffs to effectively vindicate their statutory rights.

"There are courts that are saying that *Concepcion* overturns all these Supreme Court cases. We are going to argue that it would be better to harmonize *Concepcion* with these cases. I sort of think that Justice [Antonin] Scalia can say things that he thinks and if he meant to overturn these cases, I am sure that he could have happily typed those words in," Bland said.

Bland did acknowledge however that plaintiffs had yet to win a case on the vindication of rights theory.

In fact, the U.S. Court of Appeals for the Eleventh Circuit in *Cruz v. Cingular Wireless LLC*, 648 F.3d 1205 (11th Cir. 2011) (12 CLASS 776, 8/26/11) had recently rejected the theory—even when the plaintiffs had proven only a very small number of consumers had vindicated their right to pursue a claim through arbitration.

"[The Eleventh Circuit] said we don't care. They said *Concepcion* is like the end of time. It's like the asteroid striking the earth, and the dinosaurs are all dead," Bland said.

Panelist Andrew J. Pincus, a partner at Mayer Brown in Washington, D.C., who argued the *Concepcion* case for AT&T before the Supreme Court, said as a legal matter, the "effective vindication" cases are all federal causes of action because they involve federal statutory rights.

"The inquiry is: Did Congress preclude the application of the FAA to those causes of action? Some courts have said that we might find that those claims are not arbitrable if they cannot be vindicated. This was argued recently, and we shall see what the courts decide," Pincus said.

Pincus said that creating a factual record in every single case showing whether claims can be pursued individually in a cost-effective manner would be a very time-consuming and difficult undertaking. "I think

that's why lower courts are saying we are not going to do that."

Second Circuit Case to Watch. This issue has been raised in the Second Circuit in *In re American Express Merchants' Litigation*, No. 06-1871 (12 CLASS 198, 3/11/11), where, Bland said, plaintiffs have shown that pursuing their antitrust claims in arbitration on an individual basis would cost \$500,000 each. Because of that high cost, the plaintiffs likely could not pursue their statutory rights and so the arbitration clause should be held unenforceable, the plaintiffs have argued. The Second Circuit has asked for briefing in light of *Concepcion* and has yet to rule.

"If the finding there is that you have to enforce the class action ban because the 1925 Congress [that enacted the FAA] thought that arbitration clauses are more important than any other law, including the anti-trust laws, than it is very hard to imagine any case where a class action ban could ever be eliminated," Bland said. "That case is about as extreme as they come."

If the Supreme Court were to uphold such a ruling, then "the arguments for congressional action would be overwhelming at that point," Bland said.

More Arbitration Filings Coming? Pincus also said that just because people have not filed many arbitration claims in the past does not mean it is not an effective vehicle and they will not do so in the future.

For example, he said, pre-*Concepcion*, plaintiffs lawyers were focused on filing class actions. Now that many of those suits are barred, going forward, those same lawyers might be willing to pursue more arbitration claims, especially when the arbitration agreements offer the potential for generous awards.

For example, he said, the AT&T arbitration agreement provides double fees and a bonus if AT&T stonewalls a claim, he said, and those incentives might spur more claims.

The Shakeout After Wal-Mart. The panel next discussed what impact the blockbuster decision in *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (12 CLASS 519, 6/24/11), will have on class certification decisions.

In *Wal-Mart*, the Supreme Court held 5-4 the proposed class of 1.5 million female Wal-Mart employees lacked commonality under Fed. R. Civ. P. 23(a) for their employment discrimination claims. The court also held 9-0 backpay was not available under Rule 23(b)(2).

Panelist Joseph M. Sellers, partner at Cohen Milstein Sellers & Toll PLLC in Washington, D.C., who argued the *Wal-Mart* case before the Supreme Court, said that some courts will find the Rule 23(a) portion of the *Wal-Mart* decision is specific to the unusual facts of that case.

But in one of the first circuit court of appeals decisions to come out, the U.S. Court of Appeals for the Ninth Circuit embraced the *Wal-Mart* decision. In *Ellis v. Costco Wholesale Corp.*, No. 07-15838 (9th Cir. Sept. 16, 2011) (12 CLASS 866, 9/23/11), the Ninth Circuit vacated class certification in a nationwide employment sex discrimination case. The appeals court found the district court did not analyze the commonality requirement correctly and erred in certifying a class seeking backpay under Rule 23(b)(2).

Panelist Mark A. Perry, partner at Gibson, Dunn & Crutcher LLP, said that in *Ellis* the Ninth Circuit took a strong and abrupt about-face. "They took the two-by-four to the head, and said we had it wrong before, and our class jurisprudence has changed," Perry said.

That's not going to happen in every case, Perry said. "The tendency is to find what distinguishes cases and to see where those holes lie," he said. "That's what we are going to see play out."

Daubert Analysis at Certification Stage? For example, the U.S. Court of Appeals for the Eighth Circuit held in *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011) (12 CLASS 629, 7/22/11), that a full inquiry under *Daubert v. Merrill Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), was not appropriate at the class certification stage. Sellers said.

The Eighth Circuit's decision flew in the face of *Wal-Mart*, where Justice Scalia said in dicta, "[T]he district court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so."

Perry noted a "fundamental weirdness" to the plaintiffs' resistance to applying *Daubert* at the certification stage since they will have to make the showing at trial. He sees it as "a blatant admission that no one ever intends to bring these cases to trial."

Sellers agreed with Perry that nothing in Federal Rule of Evidence 702 refers to application at a certain stage of litigation, but the rationale for *Daubert* is more compelling at the trial stage.

Sellers said the *Wal-Mart* decision is going to drive up the amount of discovery and litigation over experts.

"I think that the decision makes the difference between a merits trial and class certification smaller. We are edging closer and closer to merits adjudication at the class certification stage," he said.

Perry agreed that in general, *Wal-Mart* caps a trend that at the certification stage there is more demanded of plaintiffs—and defendants as well.

"The evidentiary record in the plaintiff's case was huge [in *Wal-Mart*]. If that wasn't enough, then what will be? This will have an effect on the expense side of the ledger," Perry said.

Defendant's Right to Affirmative Defenses. The panelists disagreed about what the decision portended for cases in which defendants may bring affirmative defenses.

Professor John C. Coffee Jr. of Columbia Law School in New York said in his presentation earlier in the day that after *Wal-Mart*, it is possible courts will find that affirmative defenses defeat class certification by tilting the balance so that individual issues predominate or by making the case unmanageable.

But Sellers said he thought this portion of the opinion would have limited application because the Supreme Court anchored the right to assert affirmative defenses in the language of Title VII of the 1964 Civil Rights Act. "There is a mention of due process, but there is no citation to due process," he said.

Perry said the court's approach in *Wal-Mart* was compelled by the Rules Enabling Act, which says that a class action cannot change substantive law.

If a defendant has an individualized defense under the substantive law, then it may not be dispensed with in a class action, Perry said. He said this rule may be difficult to administer at the district court level, which

