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Supreme Court Decisions Swing in Defendants' Favor in Class Actions

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The Supreme Court's last two terms have not been kind to plaintiffs seeking to pursue class actions. In a series of decisions, the Court reversed three federal circuit court decisions that had favored the plaintiff's position and, in the process, struck three critical blows against class actions. The first two decisions each addressed the availability of class arbitration, including under state unconscionability analysis, when the parties' contract is either silent on the point or expressly disavows class arbitrations. *Stolt-Nielsen, S.A. v. Animal-Feeds International Corp.*, 130 S. Ct. 1758 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The third addressed the "commonality" required for class certification, the use of experts at the class certification stage, and whether the "predominance" certification requirement can be avoided if individual damages are only "incidental" to claims for injunctive or declaratory relief. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). As a result of these decisions, companies are now armed with the ability to structure their customer relationships so as to avoid class actions in most instances, and even where class actions remain possible, to place new and potentially costly hurdles in the certification path. **The First Blow: *Stolt-Nielsen*** In *Stolt-Nielsen*, plaintiffs brought an antitrust claim based on alleged price fixing. After the district court ordered the parties to arbitration pursuant to the provision in their contract, the arbitration panel had to decide as a threshold matter whether that provision – which was silent with respect to class arbitration – could be interpreted to permit class arbitration (a so-called "clause construction award"). The panel concluded that it could because there was no evidence of intent to preclude class arbitration and such arbitration it had been allowed under a wide variety of arbitration clauses and in many different settings. On appeal, the district court reversed that award because the arbitrators had not considered custom and usage in the industry, but the Second Circuit disagreed, and upheld the award because the arbitration record provided no evidence of a custom and usage that would have precluded class arbitration. The Supreme Court took a different tact, looking instead to the basic precept of the Federal Arbitration Act ("FAA") that arbitration "is a matter of consent, not coercion" and, therefore, in construing arbitration clauses, courts and arbitrators must "give effect to

the contractual rights and expectations of the parties." 130 S. Ct. at 1773. As a result, the Court reasoned, in the absence of affirmative evidence of the parties' intent to allow class arbitration, the arbitrators could only find that class arbitration was permitted by imposing their own "policy choice" rather than considering whether there was "a contractual basis for concluding that the part[ies'] agreed to do so." *Id*. at 1775. Thus, the Court held that silence by itself was insufficient to support the possibility of class arbitration – and, by implication, also found that a provision explicitly rejecting class arbitration could not lightly be set aside. **The Second Blow: *Concepcion*** Left unresolved by *Stolt-Nielsen* was whether, as a number of courts had previously held, an arbitration provision that — silently or explicitly — precluded class arbitrations could be found unconscionable under state law. In its next term, the Supreme Court took on that very issue. In *Concepcion*, the plaintiffs' contract with their cellular service company provided for arbitration of all claims. However, it expressly limited the nature of the arbitration providing that the claims could only be brought by the complainant in his or her "'individual capacity and not as a plaintiff or class member in an purported class or representative proceeding,'" and that the arbitrator could not "'consolidate more than one person's claims [or] preside over any form of a representative or class proceeding.'" 131 S. Ct. at 1744. The District Court and then the Ninth Circuit, each applying California law, found the provision unconscionable because it disallowed class actions and a bilateral arbitration had not been shown by AT&T to be an adequate substitute for the deterrent effect posed by class actions. The Supreme Court disagreed again noting, as it had stated in *Stolt-Nielsen*, that the FAA's principle purpose is to have private arbitration agreements "enforced according to their terms," and thereby "to allow for efficient, streamlined procedures tailored to the type of dispute." *Id*. at 1748-49. To allow California's application of unconscionability law, in effect, to allow consumers to demand class arbitrations notwithstanding the contractual language, would be contrary to this purpose even if class arbitration were thought to be desirable for reasons such as the ability to prosecute small-dollar claims or the preclusion of class arbitration were contained in a contract of adhesion. *Id*. at 1750-53. Thus, California's unconscionability law that had, in effect, eliminated arbitration provisions that barred class arbitrations was itself pre-empted by the FAA. **What's Left of Consumer Class Actions?** With its *Stolt-Nielsen* and *Concepcion* decisions, the Supreme Court has left little — if anything — open to plaintiffs wishing to pursue a class action when they have agreed, explicitly or implicitly, and even through an adhesion contract, to arbitrate their individual claims. What may still be left for argument? First, there are some pre-*Stolt-Nielsen* federal court decisions holding that when a provision barring class arbitration would effectively prevent the vindication of rights under federal statutes (e.g., when the damages are slight and the complexity and attendant cost of prosecution high, such as in some antitrust cases), the provision violates the FAA. The continuing validity of those decisions has yet to be tested in the context of *Stolt-Nielsen* and *Concepcion*. Second, since *Stolt-Nielsen* and *Concepcion* each rests on the FAA which does not generally apply to state court cases, it may be possible for a state court, applying its state arbitration statute, to come to a different conclusion regarding when class arbitration is permitted. But setting these possibilities aside, it seems likely that in most — if not all — instances, a company that structures its consumer contracts both to require individual arbitration of any dispute and either to say nothing about class arbitrations

or expressly to preclude them, will be successful in preventing a class action or class arbitration from going forward. **What Happens Outside Arbitration – The Third Blow: Wal-Mart** Even where class actions remain possible (e.g., where a company did not desire — or was unable — to require arbitration under its contracts), the Supreme Court in *Wal-Mart* has provided defendants with additional ammunition in the class certification fight. Prior to *Wal-Mart*, plaintiffs typically would seek to satisfy commonality by alleging a host of supposed common questions that mirrored the allegations of their complaint, and this generally would pass muster as courts indicated that so long as any single common question was satisfied, that was enough. As a result, the certification fight generally paid short shrift to commonality and, in damage class actions, focused on what were considered more difficult certification requirements, especially that common issues "predominate" over individual ones. Some plaintiffs went so far as to avoid even the predominance inquiry by characterizing the remedy they were seeking as being primarily for injunctive or declaratory relief (for which commonality — but not predominance — was thought to be required) and that their individual claim for damages was merely incidental to that relief. *Wal-Mart* has put an end to all that, beginning with raising commonality to new heights — and with different focus — as a certification standard. The Court stated that commonality had to:

> resolve an issue that is central to the validity of each one of the claims in one stroke. 'What matters to class certification … is not the raising of common 'questions' — even in droves — but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation ….'

131 S. Ct. 2551. Unlike the easy burden that previously existed, the Court now put an onus on plaintiffs affirmatively to demonstrate that commonality existed, and noted that, even if this entailed some overlap with the merits, "[t]hat cannot be helped." *Id.* Although the Court did not *require* that expert proof be introduced on the issue, the Court did not deem it irrelevant at the certification stage as some courts had done. Rather, the Court analyzed the expert evidence the plaintiff presented and found it wanting. *Id.* at 2553-56. In fact, contrary to the district court's conclusion, the Court strongly hinted that expert testimony — even at the class certification stage — should be subject to the admissibility standard typically used for expert trial testimony (the so-called *Daubert* analysis). . at 2553-54. Finally, the Court rejected the argument that no predominance analysis was required if individual damages were only incidental to a claim for an injunctive or declaratory relief. Rather, the court emphasized that, even in cases where injunctive or declaratory relief is the primary relief sought, certification of individual damage claims — whether or not characterized as incidental — necessarily would require a predominance inquiry. *Id.* at 2559-60. Taking the *Wal-Mart* decision as a whole, the Court significantly increased the hurdles a plaintiff must cross in seeking to certify a class. Proof — not mere pleading allegations — must now be presented to satisfy "commonality." To do so, they may need to provide expert testimony showing that the answers to common questions can be established through a classwide — and not individualized — stroke, and, if they decide to do so, that expert testimony likely will need to satisfy the *Daubert* test of admissibility. Defendants may wish to push plaintiffs to take this approach (and thus increase plaintiff's cost) by

introducing admissible expert testimony of their own. Finally, plaintiffs can no longer escape from the predominance inquiry by painting their claims as primarily for injunctive or declaratory relief and only incidentally for individual damages. Regardless of that characterization, the damage claims will be subject to the predominance inquiry. **Conclusion: Not a Knockout, But the Blows Have Been Significant** Although class actions continue to be a part of litigation, all told, the Supreme Court's last two terms have severely impacted the ability to bring a class action at all and, even if able to bring the action, then to certify the class. However, as helpful as those decisions have been to defendants, plaintiffs will continue to look for openings to fight back and litigation trends such as this do tend over time to swing back in the other direction. Defendants will need to be vigilant and aggressive to avoid inroads into what has been achieved.

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