

Don't sound death knell for class actions just yet

by Dolan Media Newswires

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WASHINGTON — When the U.S. Supreme Court handed down its ruling in AT&T Mobility v. Concepcion, some predicted that the decision allowing the phone carrier to bar class proceedings in its consumer arbitration contracts would bring an end to consumer class actions altogether.

The justices sided with the business in that case, and soon after they also denied class certification to more than a million current and former employees claiming job bias in Wal-Mart Stores v. Dukes.

But don't don black for the class action funeral just yet.

"I'm not sure I will endorse the doom and gloom predictions," said Robert Alt, deputy director of the Center for Legal and Judicial Studies at the Washington-based Heritage Foundation. "I think meritorious classes will be able to go forward."

Even those disappointed by the rulings say the multi-plaintiff proceedings will indeed live on. They will just look very different now.

The class action "is not dead, but it certainly was injured by the Court this year," said Suzette Malveaux, professor at the Columbus Law School at Catholic University and author of a casebook on class actions.

More class litigation will likely follow as lower courts try to flesh out the new requirement set out by Justice Antonin Scalia in Dukes: the "glue" standard, said Carter Phillips, managing partner of the Washington office of Sidley Austin.

"That is a tough formulation to try to figure out," Phillips said.

Deadly cases, or limited to their facts?

Critics of the recent rulings say that even if class actions are not dead, they have been severely wounded.

"It was devastating to employees who are trying to pursue class actions against companies that large," Malveaux said of the Dukes decision.

But defenders and critics of the rulings said that in both cases the justices focused sharply on the facts presented, and that could mean a lesser impact on cases outside of the consumer fraud and employment contexts.

"(The Dukes ruling) does really seem to be tailored to the facts" of the case, or at least "to employment claims in general," Malveaux said. "But it will be harder" for worker discrimination claims to be certified as a class, she added.

Andrew Pincus, a partner in the Washington office of Mayer Brown, said that Concepcion also is "limited to its facts." And one of the biggest facts in the company's favor was an arbitration agreement that seemed to go out of its way to provide consumers with a fair remedy.

"It was an extremely consumer-friendly" arbitration agreement, Pincus said during a review of the Court's term hosted by the National Chamber Litigation Center. AT&T was "looking for a system that was fair, but that didn't have the transactional costs that litigation has."

He noted that the costs of defending large class actions, particularly with the proliferation of e-discovery, are skyrocketing for defendants.

But Peter Keisler, a partner in the Washington office of Sidley Austin, said that plaintiffs' attorneys also bear huge costs that are not covered if they lose.

"These cases do involve a lot of up-front money by attorneys," Keisler said during a Supreme Court review hosted by the Washington Legal Foundation. Cases like the Wal-Mart class action "are determined by intricate analysis of massive amounts of data. That is an enormous effort for which there is no payoff until the end of the day. It's a high risk type situation if you are a (plaintiffs') attorney."

Smaller, stickier classes

For the plaintiffs in *Dukes*, the size of the purported class – roughly 1.5 million – was its downfall. The court held that the plaintiffs' evidence didn't demonstrate enough "glue" to hold the claims of gender-based discrimination together in a single action.



That still leaves a lot of room

for plaintiffs alleging similar claims, Pincus said.

"We just don't know how (smaller class claims) are going to be interpreted," Pincus said. "Wal-Mart is, I believe, the extreme example because of the size of the class and the ... large number of decision makers involved. There is real question as to how it's going to be played out going forward."

Patricia Ann Millett, who heads Akin Gump's Supreme Court practice in Washington, said the facts in *Dukes* are very hard to apply widely.

"The Wal-Mart case was essentially a poster child for a bad class action," Millett said. "When you have things that are that far off the spectrum," it's hard to tell "what will happen in other cases."

Going forward, plaintiffs' attorneys will almost certainly be less ambitious than those in *Dukes*, seeking to certify smaller classes and sub-classes involving claimants with more similar claims, or more "glue," as the court put it. But some say that could still work to undermine one purpose of class actions: seeking systemic reform, particularly when the defendant is a conglomerate such as Wal-Mart.

"After this suit was filed in 2001, Wal-Mart starting changing its policies," said Melissa Hart, associate professor and director of the Byron White Center for the Study of American Constitutional Law at the University of Colorado Law School in Boulder, Colo. "That is one of the good consequences of class action litigation that you lose when you prevent employees from bringing these types of suits."

Those denied class status also lose an important litigation tool, Hart said.

"(Class proceedings) really open up discovery to plaintiffs so they can really see the decisions" companies make in hiring and promotions, Hart said. "In an individual case, that type of discovery would not be available."

But Richard Samp, WLF's chief legal counsel, said class actions are often used as tools to bully corporations into settling.

"The decision to certify a class is often outcome determinative" as to whether a company will seek to settle, Samp said. Companies, fearing the litigation costs involved in defending class

actions, almost uniformly settle once a class has been certified.

"The plaintiffs' (lawyers) have been bending the rules ... in a manner not contemplated by Rule 23," Samp said. "There is at least a hint in the (cases) that the Court thought that the plaintiffs had never really intended to try the case, but were using class certification as a way to force a settlement."

Evan Tager, a partner in the Washington office of Mayer Brown, said that class actions are not always the best way for aggrieved consumers or employees to seek redress anyway, and that the Supreme Court recognizes that.

"Class actions principally benefit the lawyers, not the class members," Tager said. For example, most consumer class actions settle for pennies on the dollar and, as a result, only a tiny fraction of class members bother even to submit a claim. While the amounts at stake in employment class actions may be higher, Wal-Mart doesn't constitute a major change in law."

The court merely rejected an over-expansive reading of Rule 23 certification rules, and required that class members have sufficient commonality to proceed. Meritorious class claims will be able to meet those standards, he said.

"Although that holding should prevent the certification of cases in which proof of the named plaintiffs' claims won't necessarily establish liability to absent class members, it should have no impact whatever on the kinds of class actions that the drafters of Rule 23 contemplated," Tager said.

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