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High Court Erred In Dukes, Concepcion, Janus: Senators

By **Leigh Kamping-Carder**

Law360, New York (June 29, 2011) -- Democratic senators on Wednesday criticized a trio of recent U.S. Supreme Court rulings, saying they privileged corporations and would bar individuals from accessing the justice system.

"You get the unfortunate feeling that many of the justices view plaintiffs as a mere nuisance to corporations," Sen. Patrick Leahy, D.-Vt., said at a U.S. Senate Judiciary Committee hearing. "I believe that the ability of Americans to band together to hold corporations accountable ... has been seriously undermined by the Supreme Court."

Leahy, the committee chair, convened the hearing to examine three decisions — AT&T v. Concepcion, Janus Capital v. First Derivative Traders and Wal-Mart v. Dukes — that he said highlighted the pro-business leanings of the majority of the justices.

Though the cases arise from different circumstances and legal areas, in each one a 5-4 majority sided with corporate defendants and issued rulings that erected barriers for plaintiffs to bring class actions.

In Dukes, the court vacated a class of an estimated 1 1/2 million female employees of Wal-Mart Stores Inc. who accused the retailer of condoning discriminatory pay and promotions practices. The Janus opinion effectively barred private aiding-and-abetting actions against parties that help prepare securities prospectuses. And in Concepcion, the court found that a California law banning class action waivers in arbitration contracts was preempted by federal law.

Some Senate Democrats are now questioning whether the Supreme Court has given corporations carte blanche to commit fraud and discrimination while blocking individuals from bringing their claims before a jury.

"Every American who hears the word 'jury' and has the phrase 'runaway jury' jump in their mind, every American who hears the word 'lawsuit' and has the phrase 'frivolous lawsuit' jump in their mind, has been the successful subject of indoctrination," Sen. Sheldon Whitehouse, D.-R.I., said at the hearing.

Mayer Brown LLP partner Andrew J. Pincus defended the high court's decisions.

Pincus, who pulled in the win for AT&T, said the Supreme Court was simply applying long-held legal principles to curb unusual applications of the law, and it would be impossible to predict the reach of the decisions.

Observers might be retroactively ascribing larger importance to cases won by corporations, he said, noting that in the last term, plaintiffs and defendants each won nine cases involving private plaintiffs seeking damages from businesses.

“In looking at the court's cases, it's important to look at the whole range," he said. “Of course it's possible to have a vigorous policy debate regarding the best way to resolve these issues, but the policy debate is separate."

Melissa Hart, a University of Colorado Law School professor who focuses on discrimination, argued that together the decisions “reflect tremendous skepticism, I think it's fair to call it hostility, to class action resolution of disputes by the Supreme Court.”

The rulings demonstrate a “troubling” trend of the high court interpreting procedural rules to make it more difficult for plaintiffs to present the substance of their claims to judges and juries, Hart said.

Pincus also came under fire from Sen. Al Franken, D.-Minn., who criticized a letter the attorney wrote to the New York Times defending AT&T's arbitration program. Franken, who has introduced a bill to ban mandatory arbitration clauses in consumer contracts, demanded to know how long it would have taken consumers to get a refund for the $30 sales tax charge at issue in the Concepcion case.

“Now they've devised a scheme to prevent people from suing,” Franken said. “No one's going to spend time getting $30 back. The only way to do it is through a class action suit. What this decision does is incentivize corporations like AT&T to rip people off $30 at a time.”

In recent years, Congress has moved to undo other high court decisions perceived as benefiting corporations at the expense of individuals, but lawmakers have met with mixed success.

The Lilly Ledbetter Fair Pay Act, enacted in January 2009, overturned the decision in Ledbetter v. Goodyear Tire & Rubber Co. by easing the statute of limitations on workers' pay discrimination claims. But Democratic Senators failed to strike down Citizens United vs. Federal Election Commission, the 2010 decision that removed limits on corporate and union political campaign spending.

Witnesses at the hearing also included Betty Dukes, a named plaintiff in the Wal-Mart case; Robert Alt, a senior legal fellow at the Heritage Foundation; and James D. Cox, a Duke University School of Law professor.

--Editing by John Williams.