Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

High Court Isn't Keen On Class Actions, Latest Term Shows

By **Abigail Rubenstein**

Law360, New York (June 21, 2013, 8:36 PM ET) -- The U.S. Supreme Court took up several cases this term exploring the boundaries of class actions and the enforceability of arbitration contracts, issuing major decisions that will shape future class proceedings.

Taken together, these decisions show that the majority of justices believe class actions should be the exception and not the rule, lawyers told Law360. The rulings also demonstrate that the court is committed to upholding the Federal Arbitration Act by enforcing agreements to arbitrate on their own terms, attorneys say.

"At least five of the justices on the court have indicated pretty clearly that they are not going to expand the availability of class claims and that they are going to make access to class litigation ... more difficult," Richard Alfred of Seyfarth Shaw LLP said.

Here are the six cases from the court's term that will govern the scope of class proceedings from now on:

Comcast v. Behrend

In this case the high court decertified a class of 2 million cable television subscribers bringing antitrust claims against Comcast Corp., finding that under the damage models presented by the plaintiffs, questions of individual damage calculations would inevitably overwhelm questions common to the class.

In a 5-4 decision, the court ruled that the Third Circuit had ignored key precedents like the 2011 Wal-Mart v. Dukes decision when it held that questions about expert testimony on which the plaintiffs relied to calculate the alleged damages in the case were merits issues that didn't belong in the class certification process.

Building on Dukes, which disbanded a massive class in a sex bias suit and made it tougher for plaintiffs to prove commonality, the Comcast ruling further raised the bar for obtaining class certification by showing that the issue of how damages can be calculated for class members cannot be put off until after the certification stage, lawyers say.

“Comcast is a logical and reasonable extension of Dukes because it extends the important principle that where individualized proof is required for the class members' claims, class certification is not appropriate,” Alfred said. “As you look at Dukes, followed by Comcast what you're seeing is a restriction on the availability of class claims where individual proof is required for the class members either on liability or, as is the case in Comcast, on damages.”

The impact of the Comcast decision is expected to be far-reaching, and the Supreme Court seemed to confirm that its weight should be felt outside the antitrust arena by vacating class certification in a wage-and-hour suit against RBS Citizens NA and a consumer class action over alleged defects in Whirlpool Corp.'s washing machines and remanding the cases for further consideration in light of Comcast.

Comcast is represented by Miguel A. Estrada, Mark A. Perry and Scott P. Martin of Gibson Dunn & Crutcher LLP, by Sheron Korpus of Kasowitz Benson Torres & Friedman LLP, and by Darryl J. May of Ballard Spahr LLP.

The respondents are represented by Barry Barnett of Susman Godfrey LLP.

The case is Comcast Corp. et al. v. Caroline Behrend et al., case number 11-864, in the U.S. Supreme Court.

American Express v. Italian Colors Restaurant

The Supreme Court ruled in a 5-3 decision on June 20 that the Federal Arbitration Act does not allow courts to invalidate an arbitration agreement containing a class arbitration waiver simply because it would cost plaintiffs more to arbitrate their claim than they could possibly recover, overturning the Second Circuit's ruling that the credit card giant's arbitration agreement could not be enforced against merchants pursuing antitrust claims.

The justices held that the court-created notion that plaintiffs are entitled to "effective vindication" would only block a contract stopping plaintiffs from pursuing federal claims altogether but would not invalidate an agreement that made pursuing a claim too expensive to be worth the effort.

The decision created a high hurdle for plaintiffs looking to block the enforcement of class waivers, lawyers say.

“The court is inclined to enforce class action waivers,” Marc Bernstein of Paul Hastings LLP said. “The decision makes it clear that other than if there is a specific waiver of a substantive right under a statute, as opposed to a procedural issue, the court feels that under the FAA arbitration agreements should be enforced, including those with class action waivers.”

The decision cleared up any questions as to whether the logic of high court's landmark 2011 ruling in AT&T Mobility v. Concepcion — which held that the FAA preempts state laws that invalidate class waivers — also applied to cases brought under federal statutes.

“AmEx makes it clear that the court meant what it said in Concepcion,” said Mayer Brown LLP's Andy Pincus, who successfully argued Concepcion for AT&T. “It would be awfully strange for [the FAA] to mean one thing for state claims another for federal claims.”

Michael Kellogg of Kellogg Huber Hansen Todd Evans & Figel PLLC argued the case for AmEx.

Former Solicitor General Paul D. Clement of Bancroft PLLC argued the case for the plaintiffs.

The case is American Express Co. et al. v. Italian Colors Restaurant et al., case number 12-133, in the U.S. Supreme Court.

Oxford Health Plans v. Sutter

In this June 10 ruling, the justices unanimously affirmed an arbitrator's decision to allow class arbitration in a doctor's dispute with Oxford Health Plans LLC based on broad contractual language, saying courts cannot second-guess an arbitrator's interpretation of a contract.

The court stressed that it was not endorsing the substance of the arbitrator's opinion that the contract in question — which did not expressly discuss class actions or class arbitration — permitted class arbitration, but said that because the parties had bargained for the arbitrator's interpretation of the contract they had to accept his construction "however good, bad or ugly."

The decision cleared up some ambiguity surrounding the high court's 2010 decision in Stolt-Nielsen v. Animal Feeds International, which overturned an arbitrator's decision to permit class arbitration, holding that a party may not be compelled to submit to class arbitration when a contract is silent on the issue.

"Stolt-Neilsen was an interesting case because there was a stipulation that the contract didn't address this issue ... so after that there was this open question of 'gee, did Stolt-Neilsen's outcome depend on that or was it a more general rule about limiting the circumstances in which an arbitration agreement could be interpreted to permit class arbitration,'" Pincus said. "This case tells you that it is not a general rule, and that if the issue is put before arbitrator without that stipulation, it is going get the same extremely deferential review that arbitration decisions on other issues are entitled to under the FAA."

But Sutter also left its own open question, attorneys say.

Because the court found that the parties in the case had agreed to let the arbitrator decide the question, the justices did not consider the significant issue of whether a contract authorizes class procedures is a question of arbitrability reserved for the courts or a question for the arbitrator.

Oxford is represented in by in-house lawyers Matthew Shors and Brian Kemper of Oxford parent company UnitedHealth Group Inc., P. Christine Deruelle ofWeil Gotshal & Manges LLP, Adam N. Saravay of McCarter & English LLP and Seth P. Waxman, Edward C. DuMont, Paul R.Q. Wolfson, Joshua M. Salzman and Daniel T. Deacon of WilmerHale.

Sutter is represented by Eric D. Katz of Mazie Slater Katz & Freeman LLC.

The case is Oxford Health Plans LLC v. John Ivan Sutter M.D., case number 12-135, in the U.S. Supreme Court.

Standard Fire Insurance Co. v. Knowles

In a win for Standard Fire Insurance Co., the Supreme Court ruled March 19 that plaintiffs bringing class actions cannot escape federal jurisdiction under the Class Action Fairness Act by promising to seek less than $5 million in damages.

The CAFA provides federal district courts with jurisdiction to hear class actions where the putative class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million.

The high court held that a stipulation pegging damages at less than the threshold for CAFA removal could not stand because it could not be binding on absent class members prior to certification.

The decision was considered a win for defendants, who generally prefer to face class actions in federal court.

“This is a very important case, and in some ways it's a sleeper because it hasn't gotten a lot of attention but the principle holding the court makes in the case can be applied to other issues beyond the facts presented there,” Alfred said. “The holding of the court in Knowles restricts plaintiffs counsel from a number of the strategies that they have used to keep cases in state court rather than have them successfully removed to federal court.”

Standard Fire is represented by Theodore Boutrous Jr. of Gibson Dunn & Crutcher LLP, and Wystan Ackerman of Robinson & Cole LLP.

Knowles is represented by David Frederick of Kellogg Huber Hansen Todd Evans & Figel PLLC and Jonathan Massey of Massey & Gail LLP

The case is The Standard Fire Insurance Co. v. Greg Knowles, case number 11-1450, in the U.S. Supreme Court.

Genesis Healthcare v. Symczyk

The high court's 5-4 ruling in favor of Genesis Healthcare Corp. on April 16 addressed the use of Rule 68 offers of judgment in wage-and-hour collective actions, one of the most frequently filed kinds of class litigation.

The court ruled that Genesis' offer of full relief to the named plaintiff mooted her putative collective action, giving the green light to employers to use so-called pick-off strategies in these types of cases. But due to peculiarities of the case, the justices didn't address the larger question of whether an unaccepted offer can moot a case, leaving the ultimate viability of these strategies up in the air.

With the court punting on the main issue in the case, attorneys say the portion of the Genesis decision that highlights the distinction between opt-in collective actions and opt-out class actions under Rule 23 may actually turn out to be the part of the ruling that affects future litigation strategy the most.

“The importance of Genesis is the part of the decision in which the court draws a much clearer line between class and collective actions than many lower courts have drawn themselves in the past,” Alfred said. “That distinction is important in the way collective actions will be litigated.”

Genesis is represented by Ronald J. Mann of Columbia Law School, James N. Boudreau of Greenberg Traurig LLP, Michele H. Malloy of Littler Mendelson PC, Christina M. Michael of Mitts Law LLC and Stephen A. Miller of Cozen O'Connor.

Symczyk is represented by Neal Katyal of Hogan Lovells, Gary F. Lynch of Carlson Lynch Ltd., Gerald D. Wells III of Faruqi & Faruqi LLP and Adina H. Rosenbaum of the Public Citizen Litigation Group.

The case is Genesis HealthCare Corp. et al. v. Laura Symczyk, case number 11-1059, in the U.S. Supreme Court.

Amgen Inc v. Connecticut Retirement Plans and Trust Funds

In a 6-3 ruling handed down Feb. 27, the justices broke from the their habit of making class certification more difficult to obtain and lowered the bar for bringing investor suits, ruling that plaintiffs in securities fraud suits do not have to prove that allegedly misleading statements are material to a case for class certification.

The court ruled in favor of plaintiff Connecticut Retirement Plans and Trust Funds, affirming a Ninth Circuit holding that plaintiffs in a securities fraud action need only plausibly allege — not prove — materiality in order to certify a class.

The ruling will mostly be of interest to those involved in securities litigation where the fraud-on-the-market theory remains controversial.

The case might have served as a useful counterpoint to plaintiffs lawyers looking to overcome the suggestion in Dukes that courts should be considering more of the merits at the class certification stage, but the subsequent Comcast ruling limited its utility in that regard, quickly confining the case to the securities area it grew out of, according to Thomas G. Rohback of Axinn Veltrop Harkrider LLP.

“It had the potential for being much broader, I think, but then Comcast came back,” Rohback said.

“Wal-Mart took things in one direction, then Amgen said there should not be freewheeling discovery and that we shouldn't get into a whole in-depth analysis and challenges to theories at the certification stage. But then Comcast came down and said no, there needs to be a rigorous analysis and if there is an expert theory that holds the case together, then there needs to be a rigorous analysis of the theory,” Rohback said.

The investors were represented at the high court by David C. Frederick of Kellogg Huber Hansen Todd Evans & Figel PLLC.

Amgen was represented by Seth Waxman of WilmerHale.

The case is Amgen Inc. et al. v. Connecticut Retirement Plans and Trust Funds, case number 11-1085, in the Supreme Court of the United States.

--Additional reporting by Melissa Lipman, Bibeka Shrestha and Max Stendahl. Editing by John Quinn and Richard McVay.