Class Actions Still in Action

by Steve Larson
Stoll Berne

Although recent U.S. Supreme Court opinions appear to have created roadblocks for class actions, under the right circumstances, class actions are still a viable way to challenge widespread corporate wrongdoing.

One line of cases began with *Dukes v. Walmart*, 131 S.Ct. 2541 (2011), which reversed a trial court's ruling certifying a class of 1.5 million female employees who alleged that the corporation's policies allowed for widespread sex discrimination. Many suggested that *Dukes* raised the bar for class certification, but its holding has been largely confined to disparate impact cases.

In addition, the U.S. Supreme Court's invitation to trial courts to consider the merits of a case at class certification has actually helped plaintiffs. Prior to *Dukes*, corporations were often able to bifurcate discovery and avoid producing documents relating to the merits until much later in the case. Now, plaintiffs are able to get such production in time to assist at the class certification stage. Many of the other class action decisions recently issued by the U.S. Supreme Court are similarly limited to the type of case at issue. For example, the holding in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), concerns the use of regression analyses in antitrust cases, and does not have much application to other areas of law.

Opinions on the enforceability of arbitration clauses and class action waivers are more problematic. *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and *American Express v. Italian Colors*, 133 S. Ct. 2304 (2013), upheld mandatory arbitration clauses in adhesion contracts on the grounds that any law rendering them unenforceable is preempted by the Federal Arbitration Act (FAA). It is doubtful that congress ever intended the FAA to coerce the arbitration of consumer disputes, and these decisions may not be the last word. State and federal courts are now looking more closely at the issue of consumer consent. See e.g., *Nguyen v. Barnes & Noble, Inc.*, 673 F.3d 1171 (9th Cir. 2014).

The Arbitration Fairness Act, pending in Congress, would undo *Concepcion* and *American Express* entirely. And on December 12, 2013, the Consumer Financial Protection Bureau issued a preliminary study finding that mandatory arbitration deprives consumers of the right to effectively resolve disputes they have with corporations. Those findings could lead to consumer-friendly rulemaking. In the interim, it may be difficult to bring claims subject to arbitration as class actions, barring unique circumstances.

Although class action claimants now face more obstacles, we have found that trial courts recognize that some cases are best resolved through the class action procedure, and they continue to certify class actions and approve class settlements. For example, the Oregon federal district court recently certified a class action we filed on behalf of people diagnosed with autism who were members of an ERISA health benefit plan issued in Oregon by Providence Health Plan. *A.F. et al. v. Providence Health Plan*, 3:13-cv-00776- SI (D. Or.). We also settled a class action recently on behalf of health care providers for $11.3 million. In *Chehalem Physical Therapy v. Coventry*, 3:09-cv-00320-HU (D. Or.), our clients alleged that a Preferred Provider Organization improperly calculated deductions for reimbursement of healthcare services. The court certified an injunctive class, and the case settled shortly before trial. In *Arnett v. Bank of America*, 3:11-cv-1372-SI (D. Or.), we represented consumers alleging that the "force-placed" flood insurance the servicer required them to purchase was a scheme to benefit the servicer. After certification, the case settled for $31 million.

These cases show that, used with care, the class action remains an effective mechanism for obtaining relief for large groups of consumers.

Steve Larson is a shareholder with Stoll Berne. He spearheads the firm's class action litigation practice.