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Class Dismissed

Bay Area plaintiff firms are already adapting their practices to a post-*Concepcion*, post-*Dukes* world.

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With two major decisions last spring, the U.S. Supreme Court reset the law of class actions. Now Bay Area plaintiff firms are resetting their business plans.

Lower courts are still parsing *AT&T Mobility v. Concepcion* and *Dukes v. Walmart*, but firms that represent consumers and employees in class litigation are already retooling their practices in a variety of ways. Some are ratcheting back consumer class actions in favor of direct litigation on behalf of individuals or smaller groups. Others are gearing up for more business-to-business litigation on behalf of companies or government entities who believe they've been ripped off by big corporations. Some are exploring ways to make arbitration clauses — which were bolstered by *Concepcion* — work in their favor. And one of San Francisco's most prominent and successful plaintiff attorneys has let go the other two lawyers in his shop and decided to go it alone.

While class actions aren't completely out, plaintiffs' attorneys are being careful about taking on new ones, particularly when they involve contracts with arbitration clauses. "Our overall business objective is to branch into new directions in order to maintain the viability of the business," said Mill Valley attorney Mark Chavez, cofounder of the eight-attorney Chavez & Gertler, whose firm has done class action work for the past 30 years "We have diversified like everyone else. It's essential to survival."

James Wagstaffe of San Francisco's Kerr & Wagstaffe, whose firm handles both consumer and commercial litigation, said his firm will focus class actions more on California, while expecting individual and smaller cases to play a more prominent role over time. "While we're changing our model a bit, we're changing it to achieve the same purpose: to expose unfair business practices and make businesses accountable for those unfair practices," Wagstaffe said. "If it means we have to empty the bathtub one spoonful at a time, we'll do it."

THE DOUBLE BLOW

The Supreme Court's controversial April ruling in [AT&T Mobility v. Concepcion](#) was viewed as a death knell for class action litigation arising from contractual disputes. In a 5-4 decision, the court ruled that AT&T could compel individual arbitrations with putative class members who said they had been misled about pricing. Legal observers say one result is that nearly all consumer contracts will soon contain arbitration clauses with class action waivers — meaning suits for small alleged frauds on a large scale likely will no longer be cost-effective for any individual victim to prosecute. While a few lower courts have carved out exceptions to [Concepcion](#), it has nevertheless ended many pending class actions.

Two months after the court issued *Concepcion*, the high court delivered another blow to class actions, ruling 5-4 in *Dukes v. Wal-Mart* that plaintiffs had failed to prove a common companywide policy of discrimination as required under the Federal Rules of Civil Procedure. The court also was skeptical about plaintiffs' use of social science data to extrapolate information across the class. The decision led to the dismantling of a nationwide class of about 1.5 million female employees.

Chavez & Gertler, which specializes in consumer protection and employment wage-and-hour class actions, among other things, has already felt the impact. Federal district courts have denied class certification in two of the firm's nationwide mortgage discrimination class actions following the *Dukes* decision. In both cases, years of work were wiped out completely, Chavez said.

Chavez has no plans to downsize — or hire. "This is no time to grow," he said. Instead, Chavez & Gertler has diversified its caseload, with more emphasis on individual and group cases in wage-and-hour and Fair Credit Reporting Act issues. He says the firm will probably take on more personal injury work, as well, given co-founder Jonathan Gertler's experience in that area.

Chavez says he's not yet ready to morph into a commercial plaintiff's attorney representing business against business: "We're a little bit too wedded to the notion of representing consumers and individual employees," he said. "We're motivated by progressive ideals."

But his firm will no longer do cases with arbitration clauses, unless there's a strong basis for challenging the clause, and then only in the right venue. "If we're going to be fighting those issues we're going to have to fight them in places where we have the highest rate of success," Chavez said, adding that courts in San Francisco, Alameda County and Los Angeles are good venues because their judges are used to handling complex litigation and issue "decisions that are courageous in the face of a lot of authority that is going in the other direction."

The firm is also keeping more cases California-based and staying out of federal courts when possible, Chavez added.

NEW PRACTICES, NEW STRATEGIES

At Schneider Wallace Cottrell Brayton Konecky, large consumer and employee class actions made up the lion's share of the practice two years ago. Schneider said the warning signal first came around the time the Ninth Circuit agreed to take *Dukes v. Walmart* en banc. It was clear the case would wind up at the Supreme Court, he said, and given that court's conservative makeup the outcome was not unfathomable. "That's when we said we need to diversify," Schneider said. "It was one of those times when we said we've got to figure out what's next and be prepared if this practice area goes away."

This past summer, Schneider Wallace launched a mass torts practice, opening a Texas office to focus on pharmaceutical injury cases. The firm still aims to take on bad corporate behavior on behalf of hundreds of people against one defendant. But given the uncertainty of certification, Schneider Wallace is getting cases ready as class actions while also preparing to file hundreds of individual actions as a backup plan. Schneider Wallace also opened a Phoenix office in late 2008 to handle business-to-business contingency fee litigation. The firm advocates for municipalities, governments, smaller businesses, and other entities that have been cheated by larger corporations, Schneider said.

Business-to-business and mass torts now make up about 40 percent of the case load at Schneider Wallace.

Even large arbitrations might not be out of the question. Schneider said he's scouting around for big ones where the equity is on his side. One example is [an East Coast case against UBS](#) over penalty interest rates on behalf of issuers of auction-rate securities. He said it turns out that when he selects an arbitration case carefully enough, the defendant might actually fight to stay in court — where a potentially large judgment remains subject to appellate review. That's what's happening in the UBS case, he said, with the bank asking for *en banc* review to reverse an appellate decision that said the case should go into arbitration. "When we figure out how to use arbitration to our advantage," Schneider noted, "they cry foul."

RECONFIGURING THE CLASS ACTION

Kerr & Wagstaffe's 14 San Francisco attorneys represent businesses, individuals and government entities in a wide range of plaintiffs' and defense-side litigation. Wagstaffe said he anticipates that the percentage of consumer class actions based on a contractual dispute the firm handles will drop from about 25 to about 15 percent over the next year as existing cases work their way through the system. *Concepcion*, especially, will have a short-term but significant impact on the plaintiffs' model, he said. "The plaintiffs' bar historically has been able through legislation and good work to find answers to efforts to reduce consumer litigation."

Wagstaffe, like others, says he sees more individual cases in his firm's future. For example, Kerr & Wagstaffe has litigated a lot of class actions against fitness companies. "Our idea is to reconfigure those kinds of cases into mass plaintiff cases where we represent a hundred people instead of a class," Wagstaffe said. "People will hear of those cases and come to us." Of course, managing those cases will be more challenging, what with having to sign fee contracts and conflict of interest waivers with each of the 100 individuals, and the increased reporting obligations that come with the territory. The biggest shift, Wagstaffe said, will be in the lesser leverage plaintiffs can bring to the settlement table.

Though his partners probably wouldn't want to hear him say it, Wagstaffe says he's prepared to make less money. "The reality is that doing cases one by one generates smaller fees than large class actions," he said.

SLIMMING THE PRACTICE

At least one San Francisco firm has downsized as a result. James Sturdevant, a former president of Consumer Attorneys of California who's been doing consumer class actions for more than 30 years, started 2011 with three attorneys. Now he says it's just him handling about 25 cases, most of them in co-counsel relationships with other firms.

Sturdevant said he cut both attorneys and some staff this year in part because of the impact the Supreme Court decisions will have on his practice. He realized "that some of the cases I brought in the past I would not be able to bring in the future." One of his cases has already taken a hit: A San Francisco Superior Court judge granted a motion to compel arbitration this fall in a case against Wells Fargo involving the bank's deposit program practices. He said the *Concepcion* precedent is being advanced in at least two other long-running cases of his. Over time, banks and everyone else will insert arbitration clauses prohibiting class-wide adjudication of disputes, he said.

Sturdevant, of The Sturdevant Law Firm, plans to continue working on between 20 and 25 other active consumer, employment and civil rights cases, including several mortgage foreclosure matters and wage-and-hour cases.

"I'm not ruling out expanding my practice," he said. "My hope is that the results from judicial decisions in the wake of *Concepcion* will send a wake-up call to Congress that the need for public accountability and public courts is more important than ever."



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