Skadden

Dukes, *Comcast*, *Glazer* and Beyond: The Latest Developments in Class Action Law

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On October 10, Skadden held a seminar and webinar titled "*Dukes*, *Comcast*, *Glazer* and Beyond: The Latest Developments in Class Action Law." Firm partners provided an in-depth review of class action developments and trends. Topics covered were the Supreme Court's increased scrutiny of class certification, inconsistent certification rulings among federal courts of appeal, courts' tighter analysis of antitrust class actions, the growing focus on ascertainability, state courts' influence on certification, the popularity of *cy pres* awards and why they are controversial, class action filing trends in California federal and state courts, and federal courts' jurisdiction under the Class Action Fairness Act.

Increased Supreme Court Scrutiny of Class Certification

John Beisner

Recently, the Supreme Court has weighed in on class certification requirements under Federal Rule of Civil Procedure 23 and strengthened them. Both *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend* are prime examples of the Court's efforts to clarify that Rule 23 should be rigorously applied. Beisner noted that the Court appears to have specifically selected *Dukes* and *Comcast* to lay out the rules for certifying Rule 23(b)(2) and (b)(3) class actions, respectively.

Inconsistent Rulings Among Federal Courts of Appeal

John Beisner

Even though the Supreme Court has toughened class certification standards, certain federal circuits have pushed back against these defense-friendly rulings. The Sixth, Seventh and Ninth Circuits have issued class certification decisions in recent years that erode the requirements of Rule 23. There is noticeable disagreement between Justice Antonin Scalia's position in *Dukes* and *Comcast* and positions taken by particular judges in the Sixth and Seventh Circuits. For example, in *Whirlpool Corp. v. Glazer*, 678 F.3d 409 (6th Cir. 2012), Judge Jane Stranch affirmed class certification of consumers alleging mold in front-load washing machines even though 97 percent of class members had never complained about any problem with their washers. The Supreme Court vacated and remanded in light of *Comcast*, but on remand, the Sixth Circuit gave short shrift to *Comcast* and claimed that *Glazer* was different from *Comcast* because *Comcast* was about individualized damages, which was not an issue in *Glazer*.

More recently, in *Fifth Third Bancorp v. Arlington Video Products*, 515 F. App'x 426 (6th Cir. 2013), the Sixth Circuit reversed the denial of certification where the plaintiffs alleged that the defendant bank failed to inform them of certain service

fees. The district court had found that the class was overbroad because some proposed class members' accounts were subject to different disclosure requirements and fees. The Sixth Circuit instructed the district court to limit the class to those account holders with facts and legal theories similar to the named plaintiff's. The Supreme Court granted certiorari, vacated the decision and remanded in light of *Comcast*. No. 13-7, 2013 U.S. LEXIS 5481 (Oct. 7, 2013)

The Seventh Circuit was once the best place to defend a consumer class action. *See, e.g., In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002); *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006); *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008). However, the Seventh Circuit — and Judge Richard Posner in particular — has recently endorsed "issues class actions" where a single issue is certified for class treatment, while other individual issues are left for follow-on proceedings. Judge Posner has taken this approach in several decisions he has authored, including another front-load washing machine case, *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012). Issues classes pose serious threats for defendants and are risky for plaintiffs.

- Issues classes are not fair to defendants; they allow plaintiffs to carve out one common question that is difficult to defend against.
- Issues classes are in tension with the Seventh Amendment's reexamination clause.
- Issues classes do not really solve anything. Even if the class obtains a common verdict that a product was defective, for example, the class members still need to individually prove the other elements of their claims in order to recover money. Who will want to go to court and do that? Plaintiffs' counsel may not want to invest in trials where there is no automatic payout, even if they win.

The Ninth Circuit also has embraced overbroad classes, most notably in *Wolin v. Jaguar Land Rover North America LLC*, 617 F.3d 1168 (9th Cir. 2010), in which that court reversed the denial of class certification in a case where most class members had not experienced the alleged problem of premature tire wear. Notably, *Wolin* is inconsistent with the Fifth Circuit's approach in *In re Deepwater Horizon*, No. 13-30315, 2013 U.S. App. LEXIS 20188 (5th Cir. Oct. 2, 2013), a recent case holding that a class of people who are not injured cannot be certified, even for settlement purposes. Thus, at least in the Fifth Circuit, classes cannot encompass members who are uninjured and therefore lack legitimate claims.

Appellate courts are not only in disagreement on fundamental class certification issues, but appellate review has grown more rare. Rule 23(f) was adopted in 1998 to reduce settlement pressure on class action defendants. Skadden conducted a study of appellate courts' decisions and found that less than 25 percent of Rule 23(f) petitions filed between October 2006 and May 2013 were granted. This is a decrease from earlier figures, which showed that 36 percent of petitions filed between 1998 and September 2006 were granted.

The decline should not be surprising because many more class actions are in federal court due to the Class Action Fairness Act (CAFA), and appellate courts feel they have clarified class certification standards.

Tighter Scrutiny of Antitrust Class Actions

Karen Lent

The elements of an antitrust claim are: a violation, impact and damages. Common evidence regarding an alleged violation is typically offered, but historically, antitrust plaintiffs have successfully relied on presumptions to show common evidence of impact and damages — *e.g.,* the so-called "*Bogosian* shortcut," based on a Third Circuit decision holding that in

price-fixing cases, there is an assumption that everyone is impacted. However, the Third Circuit's 2009 decision in *In re Hydrogen Peroxide Antitrust Litigation* adopted a rigorous standard for analyzing common proof of antitrust injury or "impact." And *Comcast* has further stiffened certification requirements, particularly with respect to damages. Over the next few years, we expect fewer courts to put off hard issues like impact and damages, more *Daubert* motions at the class certification stage and fewer certifications of antitrust classes generally.

Growing Focus on Ascertainability

Jessica Miller

Recent federal decisions make clear that ascertainability precludes certification where there is no objective, manageable way to identify class members. This used to be seen as an overly aggressive requirement since ascertainability is not an explicit requirement of Rule 23. Courts are finally listening, however, and the argument has gained serious traction. Ascertainability is important because it brings out the key problem with how plaintiffs approach class actions. Plaintiffs have historically treated class actions as a public policy tool — *i.e.*, the defendant did something wrong, so should hand over money. But in our legal system, a plaintiff must be injured to be compensated. Ascertainability precludes certification unless there is a feasible way to determine who was injured and deserves compensation. Judge Anthony Scirica's ruling in *Carrera v. Bayer Corp.*, No. 12-2621, 2013 U.S. App. LEXIS 17479 (3d Cir. Aug. 21, 2013), denying certification of a proposed class action of vitamin purchasers on ascertainability grounds is seen by plaintiffs' lawyers as a major blow to small-value consumer class actions because it essentially holds that courts cannot certify class actions in which there is no objective proof of purchase.

State Court Influence on Certification Continues

Darrel Hieber

Substantive state court rulings can also contribute to certification of class actions. The most obvious example is California's Unfair Competition Law (UCL) and related consumer laws. The effort to curtail UCL consumer class actions by enacting Proposition 64 was largely blunted by the California Supreme Court's ruling in *In re Tobacco II Cases*, 46 Cal. 4th 298, 324-26 (2009), that under the UCL, Proposition 64's "injury in fact" and causation requirements apply only to named plaintiffs, and not individual putative class members. California federal and state court class certification decisions post-Proposition 64 and *Tobacco II* continue to be a mixed-bag as to whether the "likelihood to deceive" standard under the UCL, materiality, reliance and restitution can be litigated on a classwide basis.

Cy Pres Awards Gaining in Popularity — And Controversy

John Beisner

Cy pres is the practice of distributing unclaimed class funds to third-party charities. The practice has contributed to worthwhile organizations but provides little benefit to class members. *Cy pres* awards count toward total "class" recovery and therefore inflate fees for class counsel. Class counsel love *cy pres* because it does not require them to identify class members. The Center for Class Action Fairness recently filed a petition for certiorari before the Supreme Court challenging the *cy pres* settlement in *Lane v. Facebook*.

If not in *Facebook*, this issue will get to the Supreme Court one day, because *cy pres* cases effectively suggest that plaintiffs' lawyers can be private attorneys general, enforcing the law and punishing defendants, even if there is no real damage and no identifiable class.

Class Action Filing Trends in California Federal and State Courts

Darrel Hieber

Based on our analysis, class action filings in California federal courts surged in 2011 and then dropped in 2012, but are on trend to approach 2011 levels this year. Labor cases, primarily wage-and-hour cases, account for half of all class actions filed in California state and federal courts over the last four months; consumer practices have remained consistent, making up 31 percent of all class action cases.

CAFA Matures

John Beisner

Standard Fire Insurance Co. v. Knowles, 133 S. Ct. 1345 (2013), was a big win for defendants. The decision held that named plaintiffs cannot stipulate to damages under $5 million, but was broadly seen as a message from the Supreme Court that federal court jurisdiction over class actions under CAFA should be interpreted generously. However, some problems remain. Plaintiffs can artificially slice up class actions and mass actions into multiple cases seeking less than $5 million. Also, some courts interpret the "home state" and "local controversy" exceptions more broadly than intended.