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

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or your regular Skadden contact.

John Beisner
Washington, D.C. / 202.371.7410
John.Beisner@skadden.com

Lisa Gilford
Los Angeles / 213.687.5130
Lisa.Gilford@skadden.com

Raoul Kennedy
Palo Alto / 650.470.4550
Raoul.Kennedy@skadden.com

Karen Hoffman Lent
New York / 212.735.3276
Karen.Lent@skadden.com

300 South Grand Avenue
Los Angeles, CA 90071

On March 12, Skadden held a seminar and concurrent webinar titled "*Dukes, Comcast, Glazer* and Beyond: The Latest Developments in Class Action Law," where firm partners provided an in-depth review of class action developments and trends. The presentation covered a number of typical subjects, including the Supreme Court's increased scrutiny of class certification; inconsistent certification rulings among federal courts of appeal; the rarity of appellate review; courts' tighter analysis of antitrust class actions; the growing focus on ascertainability; class action trends in California state and federal courts; the popularity of *cy pres* awards and why they are controversial; and recent decisions under the Class Action Fairness Act.

Increased Supreme Court Scrutiny of Class Certification

John Beisner

The number of class action-related *certiorari* petitions to the Supreme Court has increased, and the Court has accepted a number of these petitions and strengthened class certification standards. 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 seem to 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), the Sixth Circuit affirmed certification of a class of consumers alleging mold in front-load washing machines, even though 97 percent of class members had never complained to the defendant 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*. The Supreme Court has declined to undertake a second review.

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 has recently endorsed some usages of "issues classes" under which 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, because they allow plaintiffs to carve out one common question that is difficult to defend against. They also are in tension with the Seventh Amendment's reexamination clause. But issues classes are risky for plaintiffs too. This is so because 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 in some instances, 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.

Post *Comcast*, courts also are scrutinizing purported class-wide proof. *See, e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) ("[W]e are unwilling to presume that *Basic* announced a rule requiring precertification proof of materiality"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013) ("It is now clear [] that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance — the rule commands it"). It remains to be seen whether the outcome in *Halliburton Co. v. Erica P. John Fund, Inc.* (argued March 5, 2014) will alter that conclusion.

Appellate courts not only are in disagreement over fundamental class certification issues, but the availability of appellate review for trial court class certification decisions has diminished. 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 probably feel they have clarified class certification standards.

Tighter Scrutiny of Antitrust Class Actions

Karen Hoffman Lent

The elements of an antitrust claim are: a violation, impact and damages. Common evidence regarding an alleged violation typically is 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

Lisa Gilford

Although not in the text of Rule 23, ascertainability has become a focus of many courts in deciding whether to certify a class, based on common sense and due process. Common sense suggests that to certify a class, there must be an objective, manageable way to identify who is in the class and who is not. Due process concerns plaintiffs because plaintiffs need to be able to identify class members to provide them notice and the ability to opt out of the class. Due process also concerns defendants because defendants should have an opportunity to test whether a person who self-certifies as a member of the class is actually part of the class definition.

Judge Anthony Scirica's ruling in *Carrera v. Bayer Corp.*, No. 12-2621, 2013 U.S. App. LEXIS 17479 (3d Cir. Aug. 21, 2013), denied certification of a proposed class action of vitamin purchasers on ascertainability grounds, essentially holding that courts cannot certify class actions in which there is no objective proof of purchase. The Third Circuit panel has decided to rehear this matter and is accepting briefing on the rehearing arguments.

However, some district courts have rejected ascertainability as a requirement because it is not found in the text of Rule 23. In *Thurston v. Bare Naked Inc.*, No. 11-02890, 2013 WL 5664985 (S.D. Cal. July 30, 2013) and *Astiana v. Kashi Co.*, No. 11-01967, 2013 WL 3943265 (S.D. Cal. July 30, 2013), Judge Marilyn L. Huff certified California classes of purchases of consumer products without purchase records, reasoning that there is no requirement that the identity of class members be known at the time of certification.

Class Action Trends in California State and Federal Courts

Lisa Gilford

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.

Recent cases have addressed whether all members of a class must have Article III standing. The district court in *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 475-480 (S.D. Cal. 2013), noted an arguable intra-circuit split between *Stearns v. Ticketmaster*, 655 F. 3d 1013 (9th Cir. 2011), in which the Ninth Circuit explained that only representative party standing matters, and *Mazza v. American Honda Motor Co.*, 666 F.3d 962 (9th Cir. 2012), in which the Ninth Circuit stated that no class may be certified that includes class members lacking Article III standing.

10 Good Things to Know About Defending a Case Under the Unfair Competition Law

Raoul Kennedy

1. The named plaintiff must have Article III standing. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 322 (2011) (Proposition 64 incorporates Article II of the U.S. Constitution).
2. No punitive damages.
3. No compensatory damages.
4. Only restorative restitution is available; the defendant cannot be required to disgorge all profits or other benefits received. This means that only ill-gotten monetary gains that the defendant received as a result of the unfair competition are recoverable. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1148-50 (2003).
5. The amount to be equitably restored must be calculable with precision. *Colgan v. Leatherman Tool Group*, 135 Cal. App. 4th 663, 696-700 (2006).
6. Injunctive relief can only be used to prevent future harm; it cannot be used to redress past harm retrospectively. *Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th 440, 464-65 (2005).
7. Injunctive relief cannot be used to prevent a breach of contract, except for specifically performable contracts. Cal. Code Civ. Proc. ¶ 3423(e).
8. Injunctive relief is only available to parties who need it. *Saavedra v. Eli Lily & Co.*, 2013 U.S. Dist. LEXIS 173055, *29-30 (C.D. Cal. 2013); *In Re Intel Laptop Battery Litig.*, 2011 U.S. Dist. LEXIS 144209, *8-9 (N.D. Cal. 2011). See also, *McNair v. Synapse Group, Inc.*, 672 F.3d 213, 225, n.15 (3d Cir. 2012).
9. No right to a jury trial. *Hodge v. Superior Court*, 145 Cal. App. 4th 278, 284-85 (2006).
10. In California state courts, the judge can bifurcate or sever specific issues, and under California law a judge's factual findings are binding on the jury in later phases of the same trial. Cal. Cod Civ. Proc. ¶¶ 598, 1048(b); *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, 47 Cal. App. 4th 464, 486-88 (1996).

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 embrace *cy pres* because it does not require them to identify class members. Although the Supreme Court denied *certiorari* in *Lane v. Facebook*, a case that had challenged a *cy pres*-based settlement, Chief Justice Roberts issued a "statement" suggesting that the Court should and would examine the use of *cy pres* in an appropriate future case.

Class Action Fairness Act (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. The courts of appeals are debating the extent to which CAFA's "mass action" provisions may be used to remove mass tort claims for which plaintiffs seek coordinated treatment in state courts. Also, some courts interpret the "home state" and "local controversy" exceptions more broadly than intended.