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Mass Tort and Consumer Class Action Outlook: A Mixed Landscape for Defendants in 2014

CONTRIBUTING PARTNERS

John H. Beisner / Washington, D.C.

Jessica D. Miller / Washington, D.C.

Recent decisions by the U.S. Supreme Court have improved the landscape for defendants seeking to fend off mass tort and consumer class actions. In *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), the Supreme Court tightened the requirements for predominance; in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), it derailed one of the most common tactics used by plaintiffs' attorneys to evade federal jurisdiction under the Class Action Fairness Act (CAFA); and in *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), the Court breathed new life into preemption. These rulings have equipped defendants with additional tools to fight large-scale, aggregate litigation, but early signs suggest that certain lower courts may take a narrow view of some of these rulings.

- ***Comcast* and the future of product-based class actions.** The future of product-based consumer class actions will turn in large part on the resolution of two washing-machine class actions that are now before the Supreme Court for the second time. In *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013) and *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), the plaintiffs have alleged that the defendants manufactured front-load washing machines with a design defect that makes them prone to accumulate mold. The U.S. Courts of Appeal for the Sixth and Seventh Circuits previously held that these cases could proceed on a classwide zproblems with their washers. Both cases were appealed to the Supreme Court, which vacated and remanded the decisions in light of its *Comcast* ruling. The Sixth and Seventh Circuits have since issued new rulings, finding that the cases were properly certified notwithstanding *Comcast*. The two courts of appeal essentially read *Comcast* as a very narrow decision that does not affect cases where the zdamages. The defendants thought the Supreme Court meant something more and petitioned for *certiorari* a second time. If the Court grants review and confirms that *Comcast* forecloses class proposals seeking to compensate class members whose products have not malfunctioned, the result could be a major blow for overbroad product-based class actions. If the Supreme Court allows the Sixth and Seventh Circuit rulings to stand, however, product manufacturers should expect more class actions in 2014.
- **Preemption making a comeback.** Recent preemption rulings in favor of pharmaceutical manufacturers likely will lead to more aggressive defense strategies at the outset of litigation. In *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), the Supreme Court held that design-defect claims against generic drug companies are preempted by federal law, marking a decisive victory for generic pharmaceutical defendants. Another recent favorable preemption ruling was *In re Fosamax (Alendronate Sodium) Products Liability Litigation (Glynn v. Merck)*, 2013 U.S. Dist. LEXIS 90425 (D.N.J. June 27, 2013). There, the district court found failure-to-warn claims preempted where Merck presented evidence that the FDA would have rejected a stronger warning of the sort proposed by the plaintiff. Expect defendants to try extending these rulings in 2014; in fact, some pharmaceutical companies already have begun to argue that Bartlett should not be limited to generic manufacturers.
- **Ascertainability has its day.** In 2013, federal courts continued to take the requirement of ascertainability more seriously, requiring plaintiffs to prove at the class certification stage that class membership can be determined practicably and definitively.

Most notably, in *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013), the U.S. Court of Appeals for the Third Circuit held that a class of purchasers of Bayer's One-A-Day WeightSmart multivitamin was not ascertainable because "extensive and individualized fact-finding or mini-trials" would be required to determine who purchased the specific multivitamins at issue. *Carrera*, 727 F.3d at 305 (internal quotation marks omitted). The case, and several others that preceded it, are significant wins for manufacturers of low-value consumer products, particularly disposable items for which consumers do not tend to keep receipts. The plaintiff in *Carrera* filed a petition for rehearing before the Third Circuit, supported by several amici, effectively arguing that the decision was the death knell of small-value consumer class actions in the Third Circuit. It remains to be seen whether the Third Circuit will narrow its *Carrera* ruling, but either way, expect defendants to push harder on ascertainability in 2014, regardless of the circuit.

- **Presumption of reliance not gone … yet.** Some courts in 2013 continued to apply a "presumption" or "inference of reliance" in fraud and consumer fraud cases where the plaintiff alleges an omission or misrepresentation that would be deemed "material" by a reasonable consumer. *See, e.g., In re Motor Fuel Temperature Sales Practices Litigation*, 292 F.R.D. 652, at *670 (D. Kan. 2013). In practice, this concept has established reliance on behalf of all class members despite the inherently individualized nature of such an inquiry, with no real opportunity for rebuttal by defendants. In fact, defendants almost always are denied access to the individual class member discovery they would need to make such a defense. This is an area that may be ripe for scrutiny and reform in light of recent Supreme Court decisions in the class action arena, which have emphasized that defendants have a right to pursue individualized defenses in putative class litigation (*see Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011)*), and have questioned the logical underpinnings of presumptions of reliance (*see Amgen Inc. v. Connecticut Retirement Plans And Trust Funds*, 133 S. Ct. 1184, 1204 (2013) (Alito, J., concurring)). Thus far, at least one court has concluded that a defendant's right under Wal-Mart to present individualized defenses makes a presumption of reliance improper. *See O'Brien v. Hasbro*, No. BC438958, 2012 WL 6638112 (Cal. Super. Ct., L.A. Cty. Dec. 12, 2012). The Supreme Court is likely to provide further guidance on this issue in 2014 when it decides *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. cert. granted Nov. 15, 2013), which squarely presents the question whether defendants are entitled to present evidence to rebut a presumption of reliance in securities-fraud cases (see "US Supreme Court Cases to Watch in 2014").

> "Recent judicial decisions interpreting CAFA generally have made it easier for defendants to remove interstate class actions from state to federal court."

- **CAFA jurisprudence matures.** Recent judicial decisions interpreting CAFA generally have made it easier for defendants to remove interstate class actions from state to federal court. For example, in *Standard Fire*, the Supreme Court held that a named plaintiff may not avoid removal under CAFA by stipulating in his complaint that he is not seeking to recover more than $5 million on behalf of absent class members. In barring this tactic, the Court reiterated Congress' central intent behind passing CAFA, which was to expand federal jurisdiction over interstate class actions. The importance of *Standard Fire* recently was highlighted by the U.S. Court of Appeals for the Ninth Circuit in *Rodriguez v. AT&T Mobility Services LLC*, 728 F.3d 975 (9th Cir. 2013), which read *Standard Fire* as abrogating the stringent "legal certainty standard" for proving the amount-in-controversy requirement under CAFA. The *Standard Fire* and *Rodriguez* decisions likely will lead other federal courts to reject efforts by plaintiffs' lawyers to evade federal jurisdiction under CAFA. At the same time, however, there are pockets of federal judges in various circuits, who remain hostile to CAFA removals, and continue to remand cases that belong in federal court.

- ***Cy pres***. In 2013, plaintiffs continued to test the limits of *cy pres*, the practice of distributing class funds to third-party charities instead of delivering the money to aggrieved class members. Two courts of appeal rejected *cy pres* settlements on the ground that the attorneys' fees vastly outweighed any meaningful relief to the class members. See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013); *In re Dry Max Pampers Litig.*, 724 F.3d 713 (6th Cir. 2013). However, all eyes were on *Marek v. Lane*, the $9.5 million settlement of a privacy lawsuit approved by the U.S. Court of Appeals for the Ninth Circuit, $6.5 million of which was a *cy pres* award dedicated to establishing a new charity organization called the Digital Trust Foundation. The Supreme Court denied *certiorari* in the case, but Chief Justice John Roberts issued an unusual statement along with the denial, stating that the Court may "in a suitable case … need to clarify the limits on the use of" the *cy pres* practice. *See Marek v. Lane*, 571 U.S. – 134 S. Ct. 8 (2013) (statement by Roberts, C.J.) For the time being, however, *cy pres* is alive and well, and 2014 likely will include more settlements using this practice.