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Overbroad Class Actions: Here to Stay or Going Out of Style?

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A number of federal courts have been certifying overbroad, no-injury class actions, posing serious challenges to the fairness of our civil justice system. These class actions sometimes involve cases in which the named plaintiff sues over a product that allegedly has a potential to malfunction but has not actually malfunctioned or caused the consumer any problems. In other cases, the named plaintiff has experienced a problem, while some, most, or nearly all other owners of the same product have not encountered the same problem but are nevertheless included in the proposed class. Defendants have long argued that such class actions are illegitimate because the plaintiffs are essentially seeking a windfall—they want to recover damages for a risk that has not materialized and may never materialize over the life of a product. While some courts agreed that no-injury class actions are not viable, a significant number of other courts have reached the opposite conclusion. These disagreements are likely to persist in the near term, but there are a number of events on the horizon that could bear significantly on the issue.

Before diving into those developments, we begin with a brief background of the problem. Overbroad class actions are troubling at many dimensions. First, they threaten the due process rights of defendants who are forced to defend against hundreds of thousands of claims based on the unique experiences of a handful of people. Second, they undermine the proper administration of justice by creating a mechanism whereby absent class members can recover in a lawsuit, even though they would never recover if they brought a similar lawsuit as individuals. And, third, because most defendants cannot risk the economic threat of a massive lawsuit even if it is frivolous, these suits almost always settle. However, because the great majority of class members are perfectly satisfied with the product or service that is being challenged, there are almost no takers for these class action settlements, and the only people who benefit are the lawyers who brought them. *See* Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 7 (noting that class actions are "almost always resolved on a claims-made basis, and the actual amount of money delivered to class members in such cases almost always is a miniscule percentage of the stated value of settlement").

Some courts have sought to sidestep the problems posed by overbroad class actions by embracing so-called "issues" classes. Invoking Federal Rule of Civil Procedure 23(c)(4), these courts have certified the question of liability—for example, whether the product in question was defective—and left individualized damages questions for another day. That was the case in *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), and *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013), both of which involved allegations that the defendants

manufactured or sold front-load washing machines with a design defect that makes them prone to accumulate mold. The defendants in both cases had argued that certification was improper because the vast majority of consumers did not experience problems with their washers. The Sixth and Seventh Circuits concluded that class certification was nevertheless appropriate. According to these courts, the fact that not everyone in the class was injured was not a ground for denying class certification because damages could be resolved individually in subsequent proceedings after liability was resolved on a class-wide basis—an "issues class" approach to class certification.

There are myriad problems with the issues-class approach embraced by the Sixth and Seventh Circuits. For one thing, the issues-class approach is inherently unfair to defendants because it is much easier for plaintiffs to secure a class-wide verdict when the jury does not hear the actual facts of each product owner's experience. The issues-class approach also poses thorny problems under the Seventh Amendment, which bars a second jury from considering issues already decided by a prior jury in the same case. Moreover, the issues-class approach sanctions the use of a dubious procedure that no one actually wants to litigate, generating a great deal of inefficiency for the parties and the court. For plaintiffs, the promise of the class action device is significantly compromised because victory in the common phase does not generate any cash for their pockets; damages, if any, would be awarded only in follow-on proceedings, which would potentially have to be litigated on an individual basis and often for small sums of money that would never cover the costs of trying the case. Defendants likewise will often prefer to settle such matters because doing so is substantially more cost-effective than litigating a common phase and countless follow-on trials. These problems are magnified in cases, like the washing-machine cases, in which the claimed defect has manifested for only a small number of class members because few putative class members would have claims that could actually qualify for compensation. Some courts have recognized these problems and refused issues-class treatment as a shortcut around individualized issues. *See, e.g.*, *Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2014 WL 6815779, at *9 (N.D. Cal. Dec. 3, 2014). But many courts have failed to address them or, indeed, to engage in any meaningful analysis of how an issues-class proceeding would work if litigated to conclusion. (We have addressed these problems—with overbroad class actions generally and issues classes specifically—in greater detail in several issues of the *Class Action Chronicle*, a quarterly publication by our firm.)

While overbroad and "issues" class actions have become popular among certain federal courts, there are some potential judicial and legislative developments in the pipeline that might alter the landscape. In particular, the Supreme Court recently granted certiorari in *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146, a wage-and-hour class action that involves the question of "whether a class action may be certified . . . when the class contains hundreds of members who were not injured and have no legal right to any damages." Although there are other issues at play in this closely watched case—and it remains to be seen whether the Supreme Court will address the overbreadth issue—the Court's ultimate decision could have significant implications for no-injury class actions, including those involving allegedly defective consumer products.

Another potential development that could influence the direction of overbroad class actions is the Fairness in Class Action Litigation Act of 2015, H.R. 1927, 114th Cong. (2015) (FICALA). FICALA, which was recently reported out of the House Judiciary Committee**,** would limit class certification to those cases in which all of the class members claim to have suffered the same type of injury as the named plaintiff. The legislation requires the named plaintiff to come forward with evidence to satisfy this requirement. In addition, any order certifying a class action seeking money damages must include a determination that the requirement described above is satisfied. These elements of the legislation are specifically aimed at curbing the no-injury class actions.

A final possible development in the area of overbroad class actions concerns Article III standing—specifically, whether absent class members must have standing to be included in a class action. Federal precedents have long been muddled on the question of absent-class-member standing, and a series of recent decisions by the Fifth Circuit in the *Deepwater Horizon* litigation illustrates the persisting divide on the question among federal jurists. In one panel decision, Judge Clement opined that, under the requirements of Article III, classes cannot encompass members who are uninjured and therefore lack legitimate claims. A later panel in the same litigation apparently disagreed, concluding that "it is sufficient for standing purposes that the plaintiffs seek recovery for an economic harm that they *allege* they have suffered." *In re Deepwater Horizon*, 739 F.3d 790, 802–4 (5th Cir. 2014) (noting that Judge Clement's earlier opinion on standing had not been joined by any other judge and thus was not binding precedent). But this decision, too, provoked disagreement, this time from Judge Garza, who dissented to express his view that, "[a]bsent an actual causation requirement for all class members, Rule 23 is not being used to simply aggregate similar cases and controversies, but rather to impermissibly extend the judicial power of the United States" as to class members who could not trace their alleged injuries to the defendants' conduct. *Id.* at 821–22 (Garza, J., dissenting). Other federal circuits have also offered opinions on this issue, including most recently the Third Circuit, which "squarely h[eld] that unnamed, putative class members need not establish Article III standing," while at the same time acknowledging that the federal courts of appeals have not spoken with perfect clarity or agreement on the issue. *Neale v. Volvo Cars of N. Am., LLC*, No. 14-1540, 2015 U.S. App. LEXIS 12629, at *14, *24–26 (3d Cir. July 22, 2015).

The Supreme Court may soon weigh in on this issue when it decides *Spokeo Inc. v. Robins*, No. 13-1339, a case involving Article III standing under the Fair Credit Reporting Act. The specific question at issue in *Spokeo* is whether Congress can confer Article III standing on a plaintiff who has suffered no concrete harm apart from alleging a bare violation of a federal statute. Although the question presented is slightly narrower than the broader question of whether classes must be limited to absent class members with Article III standing, the Supreme Court's decision could still affect the trajectory of this debate.

In sum, overbroad class actions remain alive and well across a number of federal courts. However, upcoming decisions by the Supreme Court, as well as legislation pending before Congress, have the potential to significantly affect—and perhaps decide once and for all—the fate of these types of class actions.

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