Mass Tort and Consumer Class Action Outlook: Opportunities and Challenges

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Contributing Partners

John H. Beisner
Washington, D.C.

Jessica D. Miller
Washington, D.C.

Associate

Jordan M. Schwartz
Washington, D.C.

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

In 2016, the U.S. Supreme Court is expected to hand down several decisions addressing overbroad or "no-injury" class actions, and a number of important issues are percolating in the lower courts as well. Below are some issues that are likely to be at the forefront of class action practice in the coming year.

The future of overbroad or no-injury class actions could turn on the resolution of two cases before the Supreme Court this year.

The Future of Overbroad Class Actions. The future of overbroad or no-injury class actions could turn on the resolution of two cases before the Supreme Court. The first is *Spokeo Inc. v. Robins*, 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 not suffered any concrete harm apart from alleging a bare violation of a federal statute. The second case is *Tyson Foods, Inc. v. Bouaphakeo*, a wage-and-hour class action that, according to the petition for *certiorari*, involves the question "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 several justices suggested at oral argument that the Court might not address the overly broad certification issue — the Court's ultimate decision still could have significant implications for no-injury class actions. (See "2015-16 Supreme Court Update.")

Ascertainability Law Remains in Flux. Defendants in 2015 were dealt a setback in their bid to strengthen the law governing ascertainability in consumer class actions outside the U.S. Court of Appeals for the Third Circuit. Most recently, in *Mullins v. Direct Digital, LLC*, the U.S. Court of Appeals for the Seventh Circuit expressly parted ways with the Third Circuit's landmark 2013 decision in *Carrera v. Bayer Corp.*, which had recognized a defendant's due process right to challenge class membership at the class certification stage. The Seventh Circuit disagreed with what it described as a "heightened" ascertainability requirement that would serve as a death knell for consumer fraud class actions involving products of so little cost that no consumer would bother to keep a receipt. The *Mullins* decision highlights a deep circuit split on the parameters of the implied requirement of ascertainability, offering the Supreme Court a prime opportunity to weigh in on this important issue. While it remains to be seen whether the Supreme Court will take up the *Mullins* case and resolve the divide, ascertainability will continue to make its way through the federal appellate courts. Notably, the U.S. Court of Appeals for the Ninth Circuit, which has previously strived to avoid the question, likely will be the next circuit court to offer its views on ascertainability in *Jones v. ConAgra Foods Inc.* A decision is expected in early 2016.

No Changes to Issues Certification Provision. After studying issues classes in 2015, the Rule 23 Subcommittee of the federal Judicial Conference Advisory Committee on Civil Rules recently decided against pursuing changes to the provision governing issues classes (Rule 23(c)(4)) that many believed would encourage more frequent use of that device. This is a positive development for defendants given that the subcommittee had considered a proposal under which class treatment of certain issues would have been permitted whenever there are any common questions capable of resolution on a class-wide basis — even if the predominance requirement of Rule 23(b)(3) was not met as

to other issues. Such a proposal would have effectively codified the trend by the Sixth and Seventh circuits of employing Rule 23(c)(4) as a means to facilitate class certification in cases where individualized issues would otherwise predominate. The subcommittee decision all but guarantees that issues classes will remain a hotly debated issue in 2016.

Multidistrict Litigation Abuses. Congress enacted the multidistrict litigation (MDL) statute years ago so that overlapping cases could be centralized before a single judge for coordinated pretrial proceedings, generating much-needed efficiencies for parties and courts. However, rather than use this mechanism to efficiently resolve cases and conserve resources, plaintiffs' attorneys increasingly are using MDLs to warehouse meritless claims in the hope that the sheer number of cases will pressure defendants into settlements. One way to weed out baseless claims is by expanding the use of plaintiff fact sheets and *Lone Pine* orders that would require plaintiffs to satisfy a minimum evidentiary threshold at the outset of litigation, before the parties proceed to expensive and burdensome discovery. While fact sheets and *Lone Pine* orders have become increasingly popular in MDL proceedings, they often are imposed as requirements late in the litigation. With growing awareness that MDL proceedings are becoming magnets for meritless suits, in 2016, MDL courts may start using these tools earlier in litigation to maximize their value and impose serious sanctions for failure to comply with them, including the dismissal of cases.

Cy Pres. In 2015, plaintiffs continued to test the limits of *cy pres*, the practice of distributing class funds to third-party charities instead of the allegedly aggrieved class members. Federal appellate courts have continued to be somewhat skeptical of *cy pres*, including the U.S. Court of Appeals for the Eighth Circuit, which recently vacated a district court's order distributing residual funds to a third-party legal services organization after two rounds of direct distribution to class members. The Court of Appeals recognized that *cy pres* distributions "have been controversial in the courts of appeals," but stated that district courts are "ignoring and resisting circuit *cy pres* concerns and rulings in class action cases." Indeed, the practice is on the rise, as demonstrated by a comparison of the number of reported decisions approving/denying class settlements with *cy pres* components in 2009 and 2014. Thus, it is not surprising that the Rule 23 Subcommittee decided to look into the issue. However, after studying it throughout 2015, the subcommittee recently decided not to add a Rule 23 provision governing *cy pres*. As a result, the battle over *cy pres* — and whether it effectuates the interests of absent class members — will continue to play out in federal courts.

Third-Party Litigation Funding. Several noteworthy developments in the third-party litigation funding (TPLF) arena took place in 2015, including the announcement by Senate Judiciary Committee Chairman Chuck Grassley, R-Iowa, and Sen. John Cornyn, R-Texas, chairman of the Judiciary Committee's Subcommittee on the Constitution, of an investigation into TPLF usage and practices. According to a press release Sen. Grassley issued on August 27, 2015, the two senators are "examining the impact third party litigation financing is having on civil litigation in the United States." To that end, the senators sent letters to Burford Capital, Bentham IMF and Juridica Investments Ltd., three of the largest TPLF funders, requesting information regarding their TPLF activities in the United States. Another development over the past year has been TPLF's expansion into the mass tort arena, as illustrated in a breach-of-contract complaint recently filed in Texas state court against the plaintiffs' law firm AkinMears. The suit was brought by a former employee of the law firm, who was hired to secure third-party litigation funding for television ads and the direct purchase of transvaginal-mesh mass tort lawsuits from other plaintiffs' lawyers. This lawsuit is worthy of close attention because it may provide new information about the ways in which TPLF is being used to fund and expand mass tort litigation.