Skadden

Significant Rulings Expected for Ongoing Mass Tort, Consumer Class Action Issues

Contributing Partners

John H. Beisner / Washington, D.C.

Jessica D. Miller / Washington, D.C.

Associates

Kara E. Cheever / New York

Donald R. Munson / New York

Jordan M. Schwartz / Washington, D.C.

This article is from Skadden's *2019 Insights*.

Four Times Square
New York, NY 10036
212.735.3000

In 2019, significant developments are expected on issues that have been percolating in the mass tort and class action litigation arena for several years. The U.S. Supreme Court is expected to rule on cases relating to arbitration, *cy pres*, preemption and personal jurisdiction, and resolve such questions as whether a contract that is silent on class or collective arbitration still allows it.

On the litigation reform front, efforts to combat abuses in class action and multi-district litigation (MDL) practices may stall under the now Democrat-controlled House of Representatives, and the changes that had been implemented over the last couple of years may even be reversed.

Arbitration. A case currently before the Supreme Court, *Lamps Plus, Inc. v. Varela*, raises an issue that has greatly divided the lower courts for years: whether a contract that does not mention class or collective arbitration nevertheless authorizes it. The Court has decided numerous cases involving classwide arbitration issues in recent years, including in 2011 when it ruled in *AT&T Mobility LLC v. Concepcion* that the Federal Arbitration Act preempts state laws that condition the enforceability of arbitration clauses on the availability of classwide arbitration. Additionally, in May 2018, in *Epic Systems Corp. v Lewis*, the Court rejected the argument that class action arbitration waivers should not be enforced because they deny employees the opportunity to collectively litigate disputes in violation of their right to engage in "concerted activities" under the National Labor Relations Act. Even if the Court agrees with the U.S. Court of Appeals for the Ninth Circuit that the agreements involved in *Lamps Plus* can be construed as authorizing classwide arbitration under state contract law, that ruling may have limited practical implications given the growing prevalence of explicit class action waiver clauses in arbitration agreements, which the Court has repeatedly affirmed as enforceable.

Cy Pres. In 2013, the Supreme Court declined to take up a challenge to a class action settlement utilizing *cy pres* — the practice of distributing unclaimed class action funds to third-party charities. Although the Court denied the petition for *certiorari* in that case (*Marek v. Lane*), Chief Justice John Roberts issued an unusual statement stressing that *cy pres* is a "growing feature" of class action settlements and that "in a suitable case, this court may need to clarify the limits on the use of" that practice. In 2019, the Supreme Court is poised to do just that in *In re Google Referrer Header Privacy Litigation*, a case involving an $8.5 million settlement arising from alleged privacy violations by Google. Apart from attorneys' fees, the money in the settlement fund is to be distributed to six charities — five of which were the favored charities of Google, class counsel or both. The Ninth Circuit affirmed the class settlement, holding that it would not have been economically feasible to distribute any money to the millions of class members. While it is difficult to predict how the Supreme Court will rule, the questioning and statements from the justices at the October 2018 argument suggest that the Court might impose some limits on the *cy pres* doctrine. That said, the case may not reach the merits of the *cy pres* arguments because the Court ultimately may decide that the named plaintiff does not have standing.

Preemption. The Supreme Court is slated to clarify the standard set forth in the 2009 decision *Wyeth v. Levine* that pharmaceutical companies cannot

be sued for failure to warn when there is "clear evidence" the Food and Drug Administration (FDA) would have rejected the plaintiff's proposed warning. In *Merck Sharp & Dohme Corp. v. Albrecht*, the plaintiffs alleged that the Fosamax warning label should have included a notice about the risk of atypical femoral fractures. Merck countered that it tried to add language addressing the risk but was prevented from doing so by the FDA, which stated that the justification for such language was "inadequate." The district court granted summary judgment to Merck on these facts, finding that the failure-to-warn claims were preempted under *Levine* because the "clear evidence" standard demonstrated that the FDA would not — and did not — approve of the proposed label change. The U.S. Court of Appeals for the Third Circuit reversed, holding that Merck had not demonstrated that the FDA would have rejected a "properly worded" warning, which was a question for the jury. The Supreme Court not only granted *certiorari* but also invited the solicitor general to weigh in on the case; the solicitor general sided with Merck in arguing that preemption should be decided by a judge, not a jury. While a win for Merck (and, by extension, pharmaceutical companies across the country) is by no means a foregone conclusion, the Supreme Court's recent preemption jurisprudence suggests that the Third Circuit's ruling is in doubt.

Personal Jurisdiction. In its landmark 2017 ruling in *Bristol-Myers Squibb Co. v. Superior Court of California (BMS)*, the Supreme Court held that state courts presiding over nationwide mass tort actions lack personal jurisdiction over out-of-state defendants as to claims plaintiffs brought in a different state — even when those claims are substantially similar to those of in-state plaintiffs in the same proceeding. Since then, most courts have put an end to nationwide mass actions where plaintiffs have no connection to the forum state. However, a handful of state courts in Missouri and Pennsylvania have exercised jurisdiction over out-of-state manufacturers based on their use of entities in the forum state to help introduce a product into the stream of commerce. Another recurring issue in the wake of *BMS* is whether the Supreme Court's ruling applies to class actions and, if so, whether nationwide class actions can be brought against a defendant in a forum other than where the defendant is subject to general jurisdiction — *i.e.*, its principal place of business or state of incorporation. So far, federal district courts have been divided on this fundamental question, and it looks like the U.S. Court of Appeals for the District of Columbia Circuit will be the first federal circuit court to delve into the debate, after the district court certified for interlocutory appeal its prior ruling refusing to apply *BMS* to absent class members in *Molock v. Whole Foods Market, Inc.*

Litigation Reform Efforts. The past couple of years provided litigation reform advocates with a glimmer of hope that there would be changes to curtail what they viewed as abusive class action and MDL practices. Most notably, the House of Representatives passed the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (FICALA), which addressed a number of issues, including no-injury class actions, discovery practices and undisclosed third-party funding. The Senate ultimately declined to take up FICALA, and its fate is likely moribund with the end of the 115th Congress. And with Democrats now in control of the House, it is unlikely that reform packages like FICALA will see the light of day in 2019. Indeed, the House could even bring to the floor proposals that would make it easier to certify class actions or weaken prior reforms that have expanded federal jurisdiction over interstate class actions. As a result, the most likely avenue for legal reform in the upcoming year is the Advisory Committee on Civil Rules, an arm of the federal judiciary that is actively investigating alleged abuses in MDL proceedings and the prevalence of third-party litigation funding.

Click here for a full list of mass torts, insurance and consumer litigation-related articles authored by Skadden attorneys in the last year.