Skadden

2020 Class Action Outlook

Partners

John H. Beisner / Washington, D.C.

Jessica D. Miller / Washington, D.C.

Counsel

Jordan M. Schwartz / Washington, D.C.

Several pending rulings at the circuit court level have the potential to significantly influence class action law in 2020. Of greatest note, the U.S. Court of Appeals for the Sixth Circuit may determine the future of "negotiation" class actions, and pending decisions in the U.S. Courts of Appeals for the Seventh and D.C. Circuits will address nationwide class actions in the wake of the U.S. Supreme Court's ruling in *Bristol-Myers Squibb Co. v. Superior Court of California* (*BMS*). Additionally, district court developments in deceptive labeling consumer fraud class actions make certain types of claims in this area more likely.

"Negotiation" class actions. The Sixth Circuit recently granted a petition in *In re: National Prescription Opiate Litigation* to appeal the certification of an unprecedented "negotiation" class action. The negotiation approach was first detailed in a June 2019 paper titled "The Negotiation Class: A Cooperative Approach to Class Actions Involving Large Stakeholders" authored by Duke University School of Law professor Francis McGovern and Harvard Law School professor William Rubenstein. Under this framework, putative class members generate a "negotiating bloc" before settlement discussions with the defendant and are then bound to any settlement decision by a supermajority vote of the class, creating what the authors believe to be a simplified negotiation process. Plaintiffs favor negotiation classes because they create more pressure on defendants to settle and strengthen the bargaining power of individual plaintiffs.

The defense bar, by contrast, disfavors negotiation classes and has argued that they violate Federal Rule of Civil Procedure 23 and the Rules Enabling Act. Rule 23 on its face clearly contemplates certification of classes as a litigation tool for "suing" another party, not as a negotiation mechanism. Moreover, judicially expanding the class action device to achieve policy goals — *i.e.*, global settlements of controversies — would effectively transform Rule 23, which is intended to be merely procedural, into a private attorney general statute. This would contravene the Rules Enabling Act, which states that federal procedural rules cannot be used to substantively change the law because they are simply promulgated by judges — they are not enacted into law by Congress. The Sixth Circuit is likely to address these and other thorny issues in its much-anticipated ruling, the outcome of which could determine whether this burgeoning concept spreads to other courts.

Nationwide class actions in the wake of *BMS*. Panels of the Seventh and D.C. Circuits are poised to decide whether federal courts can exercise personal jurisdiction over nonresident defendants, even where unnamed putative class members base their claims solely on events that occurred outside the forum jurisdiction. In *Molock v. Whole Foods Market Group, Inc.*, a federal judge in the U.S. District Court for the District of Columbia refused to dismiss nationwide class allegations asserted on behalf of out-of-state grocery store employees for alleged violations of state common and statutory law. In *Mussat v. IQVIA, Inc.*, a federal judge in Illinois struck a class definition encompassing out-of-state class members allegedly injured by junk faxes under the Telephone Consumer Protection Act. Both cases aim to resolve a question left open by the landmark ruling in *BMS*, in which the Supreme Court held that state courts (including

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Four Times Square
New York, NY 10036
212.735.3000

those presiding over sprawling mass tort proceedings) cannot exercise personal jurisdiction over out-of-state defendants when the plaintiffs' claims arise outside the forum state. In the wake of that decision, district courts have struggled to determine whether the holding in *BMS* applies to unnamed, absent class members. The district court in *Molock* held that the claims of unnamed, out-of-state class members were not barred by *BMS*, while the district court in *Mussat* reached the opposite conclusion.

Based on the tenor of oral argument, it appears that both the Seventh and D.C. Circuits will hold that *BMS* does not apply to absent class members. Such a ruling will undermine the Supreme Court's reasoning in *BMS* because personal jurisdiction principles should apply with at least equal force to nationwide class actions. After all, each class member, named or unnamed, must bring his or her claims in a court that has personal jurisdiction over the defendant. Decisions in both cases are likely to be rendered in the first half of 2020, potentially setting the stage for Supreme Court intervention regarding a critical issue implicating personal jurisdiction and class action principles.

Deceptive labeling class actions. If the past year is any indication, the volume of false labeling class actions seems likely to rise in 2020. In these putative class actions, a plaintiff or handful of plaintiffs allege that a beverage, food, medication or other consumer product is deceptively labeled — for example, it allegedly misrepresents the product as "all natural." These cases have become increasingly attractive to plaintiffs' lawyers because they tend to survive motions to dismiss (and are harder to defeat at class certification than other consumer fraud lawsuits). As a result, defendants often feel pressured to settle, even if the claims are substantively meritless. With respect to class certification in particular, plaintiffs' lawyers have successfully argued that cases involving a single allegedly deceptive label involve fewer individualized questions than traditional consumer fraud class actions, which typically have varying representations and disparate consumer experiences. Plaintiffs' lawyers also have touted these cases as prime candidates for so-called "issues" class certification, in which a single purportedly common issue (*e.g.*, whether the label is deceptive) is certified, leaving remaining individualized questions of causation and injury to separate follow-on proceedings. While some courts have recognized that these purportedly simple cases are in fact fraught with highly individualized questions (*e.g.*, whether consumers interpreted the statement the same way and whether it affected purchasing decisions differently), these low-investment class actions remain appealing to plaintiffs' lawyers, and we likely will see many more in 2020.