Trends in Class Action Litigation

Class action litigation affects nearly all industries and arises in numerous areas of law. These actions are costly and complex to prosecute and defend, and generate substantial case law in the federal courts. Practical Law asked Jonathan Cooperman and Jaclyn Metzinger of Kelley Drye & Warren LLP to weigh in on the current legal landscape and key considerations for counsel litigating class actions.

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How are lower courts implementing the relatively recent class certification standards articulated by the US Supreme Court in *Wal-mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*?

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court held that a "rigorous analysis" must be applied to the commonality requirement for class certification under Federal Rule of Civil Procedure (FRCP) 23(a)(2). This means not only that common questions must exist, but that the class action also must have the capacity "to generate common answers apt to drive the resolution of the litigation." (*131 S. Ct. 2541, 2551 (2011)*.) The decision in *Comcast Corp. v. Behrend* extended this rationale to the predominance requirement of FRCP 23(b)(3). Specifically, the Supreme Court held that plaintiffs must show a common, class-wide method of calculating damages that is tied to their theory of liability. (*133 S. Ct. 1426, 1432-33 (2013)*.)

The lower courts have taken the Supreme Court's direction to heart, giving class action defendants new and important tools for defeating class certification. The lower courts are looking at certification motions much more closely than before, and class action plaintiffs are being held to a much greater burden in establishing all of the elements of FRCP 23.

For example, shortly after the Supreme Court decided *Dukes*, the US District Court for the Eastern District of New York denied certification in *Haynes v. Planet Automall, Inc.*, a class action alleging deceptive acts and practices in connection with dealer-assisted automobile financing. Among other things, the court found that commonality was defeated because the plaintiff failed to prove that the allegedly fraudulent representations were uniformly made to the entire class. Since the dealer's liability would turn on the facts of each plaintiff's purchase, the court held that the action could not be decided on class-wide proof. (*276 F.R.D. 65, 79-80 (E.D.N.Y. 2011)*.)

In another example, *Astiana v. Ben & Jerry's Homemade, Inc.*, the plaintiff alleged she paid a premium for Ben & Jerry's "all natural" ice cream flavors when, in fact, one ingredient was processed with a non-natural, man-made ingredient. The US District Court for the Northern District of California denied class certification for failure to establish predominance because the plaintiff did not show that there was a class-wide method of awarding relief consistent with her theory of liability.

In particular, the court found that the plaintiff did not offer any expert testimony that the market price of the "all natural" ice cream was higher than ice cream without that designation. Therefore, any damages model based on the allegedly higher price paid for the "all natural" ice cream was not tied to the plaintiff's theory of liability. The court also ruled that damages would vary from plaintiff to plaintiff because the product was sold at different prices in different stores and because each plaintiff's award would be based on how many packages of ice cream were purchased. These individualized damages calculations precluded certification under *Comcast*. (*No. 10-4387, 2014 WL 60097, at *12-13 (N.D. Cal. Jan. 7, 2014).*)

Search Class Action Certification: Case Tracker for summaries of federal decisions on certification motions following *Comcast*, along with links to associated Practical Law Legal Updates and other related resources.

Are there specific industries or types of claims that plaintiffs are increasingly targeting in class actions?

Few industries are immune to class action litigation. As a result of the tightening of standards for securities class actions under the Private Securities Litigation Reform Act, many plaintiff class action firms are focusing on other areas. The most common types of other class actions that we see involve:

- Consumer products.
- Labor and employment.
- Mass torts.
- Antitrust.
- Insurance.

We also are noticing trends in the types of claims being asserted. In the labor and employment field, for example, wage and hour litigation has taken off in the last couple of years. Additionally, there has been a huge upsurge in consumer fraud and false advertising class actions across many industries, and the number of privacy and data breach class actions being filed is on the rise.

Search Defending Wage and Hour Collective Actions, Navigating Deceptive Advertising Consumer Class Actions and Key Issues in Consumer Data Breach Litigation (or see page 48 in this issue) for more on the issues raised in these types of cases.

Are parties now seeking more discovery before briefing class certification motions?

Plaintiffs always try to obtain discovery early on in a litigation, and class actions are no exception. Class action discovery is often bifurcated, starting with discovery limited to the viability of class certification and, if the class is certified, moving on to merits-based discovery.

However, this limited discovery in the beginning stages is not always bad for defendants. If a defendant can convince the judge to limit the scope and substance of certification discovery, the record may contain the evidence that a defendant needs to oppose certification early on in the litigation. A good strategy might be to include in a motion to dismiss an argument that the allegations in the complaint cannot support a class action. Even if the argument is unsuccessful, it at least focuses the court on the key issues and often narrows discovery.

Search Class Actions: Class Certification Discovery for more on class certification discovery from each party's perspective and issues related to the timing of discovery.

The Class Action Fairness Act (CAFA) was meant to expand federal jurisdiction over class actions. Are plaintiffs using certain tactics to avoid federal jurisdiction and nonetheless filing these cases in state courts?

Yes, plaintiffs continue to try to circumvent federal jurisdiction. Soon after CAFA was enacted, named plaintiffs started stipulating in the complaint that they were seeking less than $5 million in damages to avoid the CAFA jurisdictional limit. The Supreme Court rejected this tactic in *Standard Fire Insurance Co. v. Knowles*, which held that a named plaintiff cannot bind the class to a damages cap prior to class certification (*133 S. Ct. 1345, 1349-50 (2013)*).

Plaintiffs also have started filing single-state class actions with copycat actions in multiple states around the county.

Some plaintiffs, however, are beginning to recognize that removal is inevitable and therefore are choosing to file either in federal courts within "certification-friendly" circuits (such as the Third and Ninth Circuits) or in federal courts within a state that has favorable substantive law in an attempt to have that law applied to the entire class.

Search Class Action Fairness Act of 2005 (CAFA): Overview and CAFA Jurisdiction Comparison Chart for more on CAFA's requirements, removal under CAFA and certain enumerated exceptions to federal jurisdiction.

How can companies prevent this type of forum shopping?

In contract cases, there are several things companies can do to preempt forum shopping. Choice of law clauses ensure the application of favorable law and avoid or minimize costly litigation on choice of law issues. When including a choice of law clause, companies should consider both the substance of the applicable industry-specific laws as well as any relevant procedural rules, such as limitations on class actions and the availability of heightened damages or attorneys' fees.

However, companies should be aware of the impact a choice of law clause may have on class certification. The application of multiple

states' laws is often an important tool in defeating commonality and predominance (see, for example, *Maloney v. Microsoft Corp., No. 09-2047, 2011 WL 5864064, at *10 (D.N.J. Nov. 21, 2011)* (denying class certification in light of the court's determination that the laws of all 50 states should apply to the plaintiffs' consumer fraud claims)), and the application of one state's law pursuant to a choice of law clause may preclude this argument.

Companies can also include a choice of forum clause in the contract to ensure a favorable jurisdiction and venue.

Search Choice of Law and Choice of Forum: Key Issues for more on the issues companies should consider when drafting these clauses in their commercial contracts.

Further, many companies include an arbitration clause in the contract. Arbitration clauses can help defendants avoid litigation altogether and ensure a favorable arbitral tribunal. The most effective clauses address:

- The specific issues and types of claims to be arbitrated.
- Where the arbitration will take place.
- The applicable procedures.
- Any limitations on the arbitration.

Companies are starting to push the boundaries of arbitration clauses and will likely continue in that direction. For example, General Mills, Inc. recently attempted to bind its consumers to arbitration if they joined its Facebook page or downloaded coupons from its website. However, the company rescinded the policy almost immediately based on consumers' reactions.

Search US Arbitration Toolkit for a collection of resources to assist counsel with drafting alternative dispute resolution clauses and agreements.

There are other actions a company can take to oppose plaintiff forum shopping once a litigation has been filed. For example, we expect to see more challenges to personal jurisdiction in the near future. The Supreme Court recently has been very active in this area and has strengthened the requirements for establishing personal jurisdiction, especially general jurisdiction over corporate defendants (see *Daimler AG v. Bauman, 134 S. Ct. 746, 760-61 (2014)* (the "at home" test generally will be met only if the corporation is incorporated or has its principal place of business in the forum state)).

Additionally, a defendant can move to transfer venue in an appropriate case. In a putative nationwide class action, the named plaintiff's choice of forum may not be given as much deference as in a single plaintiff case. Accordingly, the motion centers on the location of the evidence and documents, which often allows a defendant to transfer the case to its home forum. Further, if a defendant is faced with multiple copycat actions around the country, it can move to consolidate those actions in a single (hopefully favorable) jurisdiction.

How are the federal courts addressing class arbitration provisions?

In response to a company's inclusion of an arbitration provision in a consumer contract, many plaintiffs are trying to arbitrate their claims on a class-wide basis. The Supreme Court has recently weighed in on this issue, holding that a party cannot be compelled to participate in class arbitration unless it has consented to do so. (See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684-87 (2010)*; see also *Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309-12 (2013)* (enforcing an arbitration clause's prohibition on class arbitration); *AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750-53 (2011)* (striking down a California judicial rule barring class action waivers in arbitration clauses).)

While these decisions are helpful, many arbitration clauses do not address class arbitration and courts are split on the circumstances under which they find a party has given its consent. In *Stolt-Nielsen S.A.*, the arbitration clause was silent on class arbitration, but the Supreme Court found a lack of consent because the parties stipulated that they had never reached an agreement on class arbitration (*559 U.S. at 687*). By contrast, in *Oxford Health Plans, LLC v. Sutter*, the arbitration clause was similarly silent, but the Supreme Court upheld the arbitrator's finding that the parties had consented because the clause provided that all disputes between the parties would be submitted to arbitration (*133 S. Ct. 2064, 2069-70 (2013)*). It is therefore much safer to expressly allow or disallow class arbitration in the contract than to litigate the issue once a dispute has arisen.

Search Class Arbitration Waivers in the US: Case Tracker for summaries of court decisions on the enforceability of class arbitration waivers, along with links to associated Practical Law Legal Updates and other related resources.

Assuming a class action is properly filed, is there a way to dismiss the action early on in the litigation?

Yes, as with all litigation, class actions are subject to motions to dismiss and, in light of the *Dukes* and *Comcast* decisions, courts seem more willing to entertain these motions to either narrow the scope of the claims or dismiss the case outright.

Courts also have been more willing to entertain motions to strike class allegations, which are essentially preemptive motions for de-certification. In these motions, defendants typically argue that the complaint itself demonstrates that class certification is precluded as a matter of law. The more detailed the allegations in the complaint, the more ammunition defendants have to support a motion to strike.

There is a recent trend among plaintiffs' attorneys to include multiple named plaintiffs from different states in order to assert claims under multiple states' laws. This is very useful to defendants arguing a lack of predominance due to individualized factual issues among the named plaintiffs and the potential application of multiple states' laws which may have substantive differences (for

example, some states require privity for breach of express warranty claims while others do not). When these differences are present on the face of the complaint, companies have a greater likelihood of success on a motion to strike. (See, for example, *Sanders v. Johnson & Johnson, Inc., No. 03-2663, 2006 WL 1541033, at *5-6 (D.N.J. June 2, 2006)* (granting the defendants' motion to strike class action allegations and refusing certification because individual legal and factual questions would predominate over common ones given the breadth of the proposed class).)

Some courts recently have placed more emphasis on the ascertainability of a class at the class certification stage, although it is not a statutory prerequisite. How does this play out in the certification context?

The ascertainability doctrine requires that a named plaintiff demonstrate an administratively feasible method of identifying putative class members. If the class definition would require a series of mini-trials just to determine who is a member of the class, the court should deny certification.

For example, in *Carrera v. Bayer Corp.*, the US Court of Appeals for the Third Circuit vacated an order certifying a class of "all purchasers" in Florida of a certain multivitamin product. Because Bayer sold the vitamins to retailers who, in turn, sold to consumers, and those retailers did not have records identifying the purchasers, the class definition was found to be unascertainable. Moreover, the court held that it was unlikely that consumers would have retained proof of purchase for an item that cost less than $20. The court also refused to rely on unsupported affidavits of putative class members stating that they had purchased the product at issue. (*727 F.3d 300, 308-12 (3d Cir. 2013)*.)

By contrast, in *Bush v. Calloway Consolidated Group River City, Inc.*, the US District Court for the Middle District of Florida found that a proposed class was ascertainable in a data privacy class action alleging that the defendant's restaurants issued credit card receipts displaying the cards' expiration dates, which is prohibited under the Fair and Accurate Credit Transactions Act. The court found that the class members were ascertainable through presentment of either the credit card receipts in question or, if a class member was no longer in possession of the receipt, a credit card or bank statement showing a transaction during the relevant time period. (*No. 10-841, 2012 WL 1016871, at *4-6 (M.D. Fla. Mar. 26, 2012)*.)

Search The Implicit Ascertainability Requirement for Class Actions for more on the standards used to evaluate whether members of a proposed class can be easily ascertained using objective criteria.

Courts similarly have started to focus on the named plaintiffs' standing to assert the claims in a class action complaint. Class definitions covering "all purchasers" of a product often are struck down as overbroad because they include many individuals who did not suffer any injury and therefore have no standing to sue. (See, for example, *Hovsepian v. Apple, Inc., No. 08-5788, 2009 WL 5069144, at *6 (N.D. Cal. Dec. 17, 2009)* (finding the proposed class unascertainable because it included all iMac purchasers, even those who had experienced no problems with their computers).)

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Another trend is named plaintiffs asserting claims concerning an entire line of related products, even if they purchased only one product within the line. Courts are split on whether this is proper. (Compare *Toback v. GNC Holdings, Inc., No. 13-80526, 2013 WL 5206103, at *4-5 (S.D. Fla. Sept. 13, 2013)* (limiting the named plaintiff's claims to the products that he actually purchased) with *Cardenas v. NBTY, Inc., 870 F. Supp. 2d 984, 990-92 (E.D. Cal. 2012)* (allowing the named plaintiff to assert claims regarding products she did not purchase because the products shared similar ingredients and the defendant's allegedly deceptive representations involved the entire product line).)

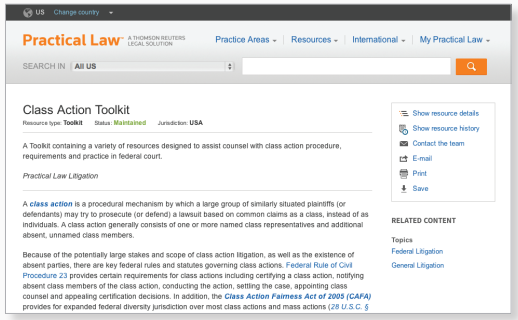
Have lower courts been scrutinizing class action settlement agreements more closely than in past years and, if so, what can practitioners do to ensure approval of a settlement agreement?

The courts absolutely have been examining settlements more carefully in recent years. FRCP 23(e) requires a judicial

Class Action Toolkit

The Class Action Toolkit available on practicallaw.com offers a collection of resources designed to assist counsel with class action procedure, requirements and practice in federal court, including:

- Class Actions: Overview
- Class Action Certification: Case Tracker
- Ethical and Privilege Issues in Class Action Communications
- Defending Wage and Hour Collective Actions
- Product Liability Class Actions
- Private Antitrust Actions
- CAFA Mass Actions: Will Courts Continue to Permit Plaintiffs to Game the System?
- How Defendants Can Use Class Certification to Their Advantage



determination that class action settlements are fair, reasonable and adequate. Courts meet this requirement by conducting a fairness hearing, which considers several factors, including:

- The strength of the plaintiffs' case.
- The risk, expense, complexity and duration of further litigation.
- The amount offered in settlement.
- The extent of discovery.
- The experience of counsel.
- The reaction of class members to the proposed settlement.

Most states also require judicial approval of class action settlements.

Coupon settlements in which the defendant provides a coupon for free or discounted products in lieu of a cash payment became very popular a few years ago. These settlements can be attractive to defendants because the coupons are often issued at very little cost. Plaintiffs' attorneys also favor coupon settlements because they are a quick path to resolution and often are coupled with a payment of attorneys' fees based on the presumed value of the coupons. However, the coupons usually provide little to no value to the class members themselves, who may not be willing to do business with the company again and may never actually use the coupon. These concerns have led to increased judicial scrutiny of coupon settlements and the enactment of specific sections in CAFA governing attorneys' fees in these cases (see *28 U.S.C. § 1712*).

However, there are certain provisions that can be included to make it more likely that a coupon settlement will be approved, such as:

- Unrestricted transferability.
- Lengthy expiration dates.
- Combining coupons with a cash payment.
- The continued issue of coupons until a certain dollar amount has been reached.

Cy pres distributions, where funds are distributed to a nonparty who is directed to use the funds for a charitable purpose, also are common. However, skepticism of *cy pres* distributions is on the rise. Some courts require that the nonparty recipient's interests reasonably approximate those of the class. For example, in *Dennis v. Kellogg Co.*, the US Court of Appeals for the Ninth Circuit rejected a $5.5 million *cy pres* distribution of Kellogg food items to unidentified charities that feed the indigent because there was no "driving nexus" between the charities and the false advertising claims in the case (*697 F.3d 858, 865-68 (9th Cir. 2012)*).

Similarly, a California judge recently suggested that he would likely reject an $8.5 million settlement proposed by Google in a class action alleging privacy breaches because the *cy pres* recipients, although engaged in privacy-related projects, were charities that Google already supports (see *In re Google Referrer Header Privacy Litig., No. 10-4809 (motion to approve settlement hr'g tr.) (N.D. Cal. Aug. 29, 2014)*).

Further, courts are increasing their scrutiny of the attorneys' fees portions of *cy pres* settlements. This is because the *cy pres* distribution increases the settlement fund and the corresponding attorneys' fees, without increasing the direct benefit to the class. (See, for example, *In re Baby Prods. Antitrust Litig., 708 F.3d 163, 173, 177-80 (3d Cir. 2013)* (noting that while it may be appropriate to include a *cy pres* award in the calculation of attorneys' fees, it is within the district court's discretion to decrease attorneys' fees where a portion of the settlement is distributed *cy pres*, especially if the foremost beneficiary of the settlement is counsel, not the class members).)

Search Settling Class Actions: Process and Procedure for more on the fairness hearing, *cy pres* provisions and other key issues to consider when settling a class action.