Litigation Brief

by William Frank Carroll

Class Actions—The Battles Continue

The U.S. Supreme Court has during its most recent two terms devoted a disproportionate amount of resources to matters involving class action litigation. The 10 cases already considered or still to be considered by the Court during this period evidence an unusual but not unprecedented contest between the inventiveness of lower courts and the determination of the High Court. The 2012 Term promises to continue to provide further examples of this contest.

The 2011 Term

During 2011, the Supreme Court decided four cases involving class action-related issues. Although not all were of equal significance, each of the cases is important in delineating the parameters of class action litigation.

One of the most important of those decisions was *AT&T Mobility Ltd. Liability Co. v. Concepcion*.[1] The Supreme Court held that a provision in a consumer contract requiring arbitration under the Federal Arbitration Act (FAA) and waiving the right to pursue class action relief prevailed over assertions that enforcement violated state public policy or prevented the consumer from enforcing his claim because of costs.

In the second major decision, *Wal-Mart Stores, Inc. v. Dukes*,[2] the Court considered the propriety of certifying a 1.5-million-member class of current or former female Wal-Mart employees who asserted gender discrimination in pay and promotions. The lower courts certified an injunctive relief class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, although monetary damages were also sought, on the ground that the damage request did not "predominate" over the request for injunctive relief. The Supreme Court found that the predominance requirement was not met absent proof that there was a general Wal-Mart policy of discrimination and that there was a common answer to the question of whether any particular class member was the subject of discrimination. The Court further noted that class actions under Rule 23(b)(2) can be certified only when the monetary relief is "incidental" to injunctive relief.

In the third case, *Smith v. Bayer Corp.*,[3] the Supreme Court considered the issue of whether a federal court, which has denied class certification, can enjoin a state court from proceeding to certify the same class in a subsequent proceeding. Reversing the trial court injunction, the Court found that (1) the standards for certifying classes in federal and state court differed such that the issues were not the same and (2) the plaintiff in the second case, although a member of the uncertified federal class, was not a party to the prior litigation.

The final case for the 2011 Term was *Erica P. John Fund v. Halliburton Co.*[4] In this case, the Court considered the question of whether a class action plaintiff had to establish loss causation at the class certification stage in a suit alleging securities violations under Rule 10b-5. The Court crafted a narrow ruling that loss causation did not have to be proven at class certification; however, the Court did not decide a number of other issues relating to the burden of proof at such stage that a class action securities plaintiff must meet.

The 2012 Term

One could have expected that the Supreme Court might take a respite from class action litigation cases in the 2012 term. To the contrary, 2012 promises to be an even more class action laden docket than 2011. To date, the Supreme Court has granted certiorari in six cases raising a plethora of class action-related issues—many of which were left open in the four 2011 decisions discussed previously.

1. Daubert and Class Certification

In *Comcast Corp. v. Behrend*,[5] the Supreme Court granted certiorari to consider the question of whether "a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."[6] Comcast was sued by customers alleging Sherman Act violations. One of the elements plaintiffs had to establish was that damages were "capable of proof at trial through evidence that is common to the class rather than individual to its members."[7] The plaintiffs relied on the expert opinion of Dr. James McClave, who submitted a model calculating damages

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allegedly suffered by the class. The lower courts approved the class certification, concluding that a common methodology to measure damages was provided and that the validity of the model was not even an issue at the certification stage. A dissenting judge argued that the model did not comport with any of the causation theories and noted that even Dr. McClave admitted that the model could not attribute damages to any particular theory.

Comcast sought certiorari on the ground that the holding conflicted with *Dukes*.[8] *Dukes*, according to Comcast, held that Rule 23 is more than a pleading standard and requires a plaintiff to prove that the requirements of Rule 23 are actually satisfied. This requires meeting the standard for expert testimony established by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[9] Plaintiffs countered that such evaluation is a matter for the merits phase of the litigation. The Supreme Court in *Dukes* did not specifically address this question, although it suggested that the *Daubert* standard would apply. This case will provide the Supreme Court an opportunity to clarify the role of *Daubert* at the class certification stage.

2. Proof of Materiality at Certification

In *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*,[10] involving class certification in a Rule 10b-5 securities fraud case, the issue presented is whether materiality must be shown at the class certification stage. To obtain class certification in such a case, Rule 23(b)(3) requires the plaintiff to show that the element of reliance is common to the members of the class. In *Basic v. Levinson*,[11] the Supreme Court held that the fraud-on-the-market presumption can be used to show reliance. The fraud-on-the-market presumption holds that the market price of a security traded in an efficient market reflects all information known to the public about the security, and thus a purchaser of the security presumably relied on the truthfulness of that information in deciding to purchase the security. A defendant can rebut the presumption with the "truth-on-the-market" defense by showing that "despite [the defendant's] allegedly fraudulent attempt to manipulate market price, the truth credibly entered the market and dissipated the effects of the misstatements."[12]

The district court certified the class, finding that reliance was common to the class using the fraud-on-the-market presumption. Further, the court held that the plaintiff was not required to prove that the alleged misrepresentations were material at the certification stage. The court also held that rebuttal of the presumption was an issue for trial and therefore Amgen could not raise its truth-on-the-market defense in opposition to certification. The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that plaintiffs' claims "stand or fall together" on the materiality issue, meeting the critical inquiry for Rule 23.[13]

The first issue for the Supreme Court will be whether materiality of the alleged fraud-on- the-market must be proven before a class can be certified, and the second issue is whether the defendant is allowed to present evidence of a truth-on-the-market rebuttal at the certification stage.

Amgen argued that *Basic* requires proof of materiality at the class certification stage and noted that three other circuits agreed with that position.[14] Amgen also argued that it must be given the opportunity to rebut the presumption of fraud-on-the-market and demonstrate that the alleged misrepresentations were not material. This case will allow the Supreme Court to further expound, following *Halliburton*, upon the requirements of proof in a Rule 10b-5 case at the certification stage.

3. Offer of Judgment and Mootness

In *Genesis HealthCare Corp. v. Symczyk*,[15] the Supreme Court granted certiorari to consider whether a class action under the Fair Labor Standards Act (FLSA) becomes moot when, before moving for certification and before any other plaintiff opts into the suit, the putative class representative receives a Rule 68 offer of judgment that fully resolves all claims. The plaintiff alleged that her employer deducted meal breaks from the pay of some employees whether or not the employees performed compensable work during those breaks. Genesis served Symczyk with a Rule 68 offer of judgment that fully resolved her claims. Symczyk did not respond and Genesis moved to dismiss for lack of subject matter jurisdiction. The district court dismissed ,concluding that the Rule 68 offer and her rejection mooted her claims.

The U.S. Court of Appeals for the Third Circuit reversed and remanded noting that traditional mootness principles do not "fit neatly within the representative action paradigm."[16] The court relying on its prior precedent held that under Rule 23, "where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint."[17] Genesis argued in its application for certiorari that such an approach violated the mandate of Article III of the U.S. Constitution that federal courts may only hear actual cases or controversies. This case should provide the Court the opportunity to resolve the tension between the jurisdictional mootness issue created by a Rule 68 offer of judgment and the policy issues underlying Rule 23.

4. CAFA and Damage Stipulations

In *Standard Fire Insurance Co. v. Knowles*,[18] the plaintiff filed a putative class action in state court against Standard Fire Insurance Company alleging that Standard's underpayment on damage to real property claims breached his homeowner's insurance policy. Plaintiff executed a stipulation that no individual class member's claim would exceed $75,000 inclusive of costs and attorneys fees and that the total recovery would not exceed $5 million inclusive of costs and attorneys fees, thus coming under the Class Action Fairness Act (CAFA) of 2005 amount in controversy threshold for removal. Standard removed to federal court, asserting that Knowles' stipulation was insufficient to defeat removal. Standard emphasized that Knowles' counsel had not signed a stipulation stating that he would refuse fees that would cause the total recovery to exceed the jurisdictional threshold. Standard further argued that Knowles did not have the authority to place a binding limit on other class members' recovery. Knowles moved to remand.

The district court remanded, noting that a legally binding stipulation can bar removal to federal court under Eighth Circuit (U.S. Court of Appeals for the Eighth Circuit) precedent.[19] The court held that Knowles' stipulation was sufficient even without a stipulation from counsel given that Knowles agreed to limit recovery to less than $5 million including attorneys fees. Additionally, the court held that *Knowles* could decide what recovery to seek for the class and noted that class members could opt out and pursue their own remedies if they did not accept those agreed to by Knowles.

Standard asserted in its application for certiorari that the decision conflicted with *Smith* discussed previously. According to Standard, *Smith* held that until certification, the named plaintiff in a putative class action does not represent the putative class members and cannot bind them. Therefore, Standard argued, the stipulation was a nullity at the time of removal and not binding on the class members. This case presents a number of interesting questions. Although not specifically an issue, by implication this tactic raises a question as to whether a plaintiff who stipulates to damages less than those to which the class might be entitled, is an adequate class representative under Rule 23(a)(4).

5. Federal Statutory Rights/Expense Exception to Concepcion

In *Concepcion* the Supreme Court made it clear that the FAA is the law of the land and that state legislative or judicial exceptions to its application are highly suspect and to be narrowly construed. The U.S. Court of Appeals for the Second Circuit, in its third consideration of class certification, held that an arbitration clause in a credit card acceptance agreement was unenforceable in a suit for antitrust violations under the Sherman Act because pursuing individual actions would not be economically feasible.[20]

The Supreme Court granted certiorari in *American Express Co. v. Italian Colors Restaurant*,[21] to consider the issue of whether an arbitration clause containing a class action waiver can be enforced if it would be "economically irrational" for the plaintiff to proceed on an individual basis. The case raises the question of whether there is an enforcement of federal statutory rights/expense exception to the mandate of the FAA. This federal statutory rights/expense exception finds its genesis in dicta in the decision in *Green Tree Financial Corp.-Alabama v. Randolph*.[22] With the circumscription of the exceptions to mandatory arbitration in *Concepcion*, this case gives the Supreme Court the opportunity to close one of the few remaining avenues to avoid arbitration.

6. Class Action Arbitration

In *Stolt-Nielsen v. Animal Feeds International Corp.*,[23] the Supreme Court held that a party may not be compelled to submit a dispute to class arbitration unless it has agreed to do so. In *Sutter v. Oxford Health Plans, Ltd. Liability Co.*,[24] an arbitrator held that the parties had agreed to class arbitration. The arbitrator concluded that although class arbitration was not mentioned in the agreement, the fact that the agreement contained broad language authorizing arbitration of "any civil action," authorized class arbitration. The lower courts affirmed.[25]

The Supreme Court granted certiorari in *Oxford Health Plans Ltd. Liability Co. v. Sutter*,[26] to resolve the split between the Third Circuit's decision in *Oxford*,[27] and the U.S. Court of Appeals for the Fifth Circuit's decision in *Reed v. Florida Metropolitan University, Inc*.[28] Contrary to *Oxford*, the *Reed* court held that a court must carefully review the contractual basis supporting class arbitration to determine if in fact there was an agreement.[29] The *Reed* court further concluded that broadly worded arbitration clauses cannot alone be the basis for finding that the parties agreed to class arbitration. This case will provide the Supreme Court with the opportunity to further clarify the proof necessary to conclude that a party has agreed to class treatment of a dispute in an arbitration forum.

Conclusion

The decisions in *Concepcion* and *Dukes* have a significant and general impact on class action litigation, as do *Halliburton* and *Smith* in narrower areas. The Supreme Court's granting of certiorari in the six discussed cases may result in further revolutionizing class action litigation—and the 2012 term is still young. There is certainly the possibility that other class action-related matters percolating in the lower courts may find their way to the High Court in Washington, D.C., before the end of the 2012 Term. ⊙♦

Endnotes

[1]563 U.S.____, 131 S. Ct. 1740 (Apr. 27, 2011).
[2]564 U.S.____, 131 S. Ct. 2541 (June 20, 2011).
[3]564 U.S.____, 131 S. Ct. 2368 (June 16, 2011).
[4]563 U.S.____, 131 S. Ct. 856 (Jan. 7, 2011).
[5]564 U.S.____, 132 S. Ct. ____ (June 25, 2012) (No. 11-864).
[6]*Id*.
[7]*Behrend v. Comcast Corp*., 655 F.3d 182 (3d Cir. 2011).
[8]131 S. Ct. at 2541.
[9]509 U.S. 579 (1993).
[10]564 U.S.___, 132 S. Ct. 2742 (June 13, 2012).
[11]485 U.S. 224, 250 (1988).
[12]*Id*. at 248-49.
[13]660 F.3d 1170 (9th Cir. 2011).
[14]*See In re Salomon Analyst Metromedia Litig*., 544 F.3d 474, 481 (2d Cir. 2008); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 264 (5th Cir. 2007); *In re PolyMedica Corp. Sec. Litig*., 432 F.3d 1, 7 n.11 (1st Cir. 2005).

[15]564 U.S.___, 132 S. Ct. 2156 (Dec. 3, 2012).

[16]*Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 195 (3d Cir. 2011).

[17]*Weiss v. Regal Collections*, 385 F.2d 337, 348 (3d Cir. 2004).

[18]No. 11-1450, 2012 WL 2645080 (U.S. July 2, 2012).

[19]*Knowles v. Standard Fire Insurance Co.*, No. 4:11-CV-04044, 2011 WL 6013024 (W.D. Ark. Dec. 2, 2011), *leave to appeal denied*, No. 11-8030, 2012 WL 3828891 (8th Cir. Jan. 4, 2012).

[20]*In re American Express Merchants Litig.*, 681 F.3d 139 (2d Cir. 2012).

[21]No. 12-133, 2012 WL 3096737 (U.S. Nov. 9, 2012).

[22]531 U.S. 79 (2000).

[23]562 U.S.____, 130 S. Ct. 1758 (2010).

[24]675 F.3d 215 (3d Cir. 2012).

[25]*Id.*

[26]No. 12-135, 2012 WL_____ (U.S. Dec. 7, 2012).

[27]675 F.3d at 215. The Second Circuit had reached a similar result in *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 114 (2d Cir. 2011).

[28]681 F.3d 280 (5th Cir. 2012).

[29]*Id.* at 642-43, 646.

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The stand also permits me to rotate the iPad in landscape and portrait mode. The stand I chose is made by Mophie ($150). With the Bluetooth keyboard and the stand, it is like having a small desktop computer. The only difference is I do not have a mouse. Instead of using my finger, I purchased a stylus. There are actually two different styluses I like. One is called Bamboo ($25) and the other is called Hand ($29.99).

When I use the iPad while on the go, I find myself dictating with the microphone. This process is very quick and incredibly accurate. The microphone is located to the left of the space bar on the keyboard. It turns the dictation into text as I dictate. I understand I need to be connected to the Internet to do this. However, since I am either connected by Wi-Fi or through my data plan, this is not an issue.

Once I have more time with the iPad, I hope I will be able to write an article about its use to assist other lawyers. Who knows, I might even be able to get it published in *The Federal Lawyer* if I am lucky. ⊙

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507 N.E.2d 945 (Ill. App. Ct. 1987).

[17]29 C.F.R. § 778.114(a).

[18]*Id.* § 778.114(c).

[19]*Id.* § 778.114; *Urnikis-Negro v. American Family Property Servs.*, 616 F.3d 665, 681 (7th Cir. 2010), *cert. denied*, No. 10-745, 2011 WL 588987 (S. Ct. Feb. 22, 2011); *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1262-63 (10th Cir. 1999); *Ahle v. Veracity Research Co.*, 738 F. Supp. 2d 896, 918 (D. Minn. 2010); Letter from Joseph P. Mcauliffe, Director, Division of Minimum Wage and Hour Standards, Wage and Hour Opinion Letter, 1973 WL 335242 (Feb. 26, 1973); Letter from Maria Echaveste, Administrator, Wage and Hour Division Opinion Letter, 1996 WL 1005216 (July 15, 1996).

[20]29 U.S.C. § 216(b); *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989).

[21]29 U.S.C. § 216(b).

[22]*Id.*; *compare* Fed. R. Civ. P. Rule 23 *with* 29 U.S.C. § 216.

[23]*Hoffmann-La Roche*, 493 U.S. at 165.