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Class Action Trends in the Wake of 'Wal-Mart' and 'Comcast'

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The U.S. Supreme Court dealt with issues of class action certification in two separate cases earlier this decade, *Wal-Mart Stores v. Dukes*[1] and *Comcast v. Behrend*.[2]The decisions left open certain questions, one of which the Supreme Court is due to address again in the case of *Tyson Foods v. Bouaphakeo*.[3]There are other issues that are still open, including the level of scrutiny to be given to settlement classes and to expert opinions rendered in connection with class certification.

Settlement Classes

Since the 1997 Supreme Court decision in *Amchem Products v. Windsor*,[4] it has been crystal clear that class action settlements must meet all of the requirements of Rule 23 except for one—manageability. In *Amchem*, the court was faced with the proposed settlement of claims brought against asbestos manufacturers. While certain named plaintiffs alleged they had already suffered physical injury, others did not allege physical injury, claiming that they had been exposed but had not yet manifested any signs of asbestosis or other complications from asbestos exposure. The U.S. Court of Appeals for the Third Circuit had vacated the district court's conditional certification, holding that individual issues predominated over common issues. It also found that there were significant intraclass conflicts of interest, and thus the class representatives were not adequate. The Third Circuit also rejected the district court's findings of typicality and superiority. The Supreme Court affirmed, cautioning that the requirements of Rule 23 of the Federal Rules of Civil Procedure, which were "designed to protect absentees by blocking unwarranted or overbroad class definitions … demand undiluted, even heightened, attention."[5] The court held that the only difference between settlement classes and litigation classes is the need to demonstrate manageability when the court is faced with a litigation class. Recent decisions in three circuit courts—the Second, Third and Fifth—have confirmed the vitality of the *Amchem*rule. In the case of *Sullivan v. DB Invs., 667 F.3d 273, 302-03 (3d Cir. N.J. 2011)* (en banc), cert. denied, 132 S. Ct. 1876 (2012), the circuit court reminded that the "concern for manageability that is a central tenet in the certification of a litigation class is removed from the equation." In that case, the court rejected the objectors' concerns and held that "in the settlement context, variations in state antitrust, consumer protection and unjust enrichment laws did not present "the types of insuperable obstacles" that could render class litigation unmanageable." Thus, even where certain class members might not have cognizable antitrust claims, the Court upheld the certification of the class for settlement purposes. The Second Circuit wrestled with the same issue in the case of *In re Am. Int'l Group Secs. Litig.*, 689 F.3d 229 (2d Cir. 2012). In vacating the district court's denial of certification of a securities class that could not satisfy the fraud on the market presumption, the Circuit Court held that "a settlement class need not show that the fraud-on-the-market presumption applied to its claims in order to satisfy the predominance requirement," of which manageability is one of the criteria. Similarly, the Fifth Circuit most recently held that, even the possibility that certain absent class members had not suffered injury would not prevent certification of a settlement class, and predominance requirement did not mandate a formula for classwide measurement of damages. *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. La. 2014).

'Daubert' and Class Certification

One hotbed issue is the need for expert analysis at the time of class certification, and the level of scrutiny to be applied to such expert opinions, e.g., the applicability of the reliability standard set forth in *Daubert v. Merrell Dow Pharms.*[6] Under *Daubert*, the party offering an expert witness must establish by a preponderance of the evidence the qualifications of the expert and the expert opinion's compliance with Federal Rule of Evidence 702. This issue was not directly addressed in either *Wal-Mart*or *Comcast*. (Indeed, the Supreme Court found that Comcast had "forfeited any objection to the admission of [the expert's] model at the certification stage," despite the fact that was the question on which the court granted review.[7]) Justice Antonin Scalia said, in response to the district court's conclusion that "*Daubert* did not apply to expert testimony at the certification stage of class-action proceedings," "[w]e doubt this is so."[8] Following this dicta from *Wal-Mart*, as strengthened by the holding in *Comcast*, at least four circuits have required class certification expert opinions that pass some form of *Daubert* analysis. The Third and Seventh Circuits have required full *Daubert* analysis, while the Eighth and Ninth Circuits have required a more limited *Daubert* analysis.

The Seventh Circuit addressed this issue in *Am. Honda Motor Co. v. Allen*,[9] a case where motorcycle purchasers sued a motorcycle manufacturer, alleging that a certain motorcycle had a design defect that prevented the adequate dampening of "wobble" (side-to-side oscillation) of the front steering assembly. The U.S. District Court for the Northern District of Illinois granted the plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. 23(b)(3), despite its expression of reservations about the reliability of the testimony of plaintiff's expert. The Circuit Court ruled that a full *Daubert* analysis must be undertaken, and the district court had to conclusively rule on any challenge to the prior to ruling on a class certification motion. In 2012, after *Wal-Mart* had been decided, the Seventh Circuit reiterated this position in the case of *Messner v. Northshore Univ. HealthSystem*.[10] The Circuit Court quoted its prior opinion in *Honda*, emphasizing that "when an expert's report or testimony is 'critical to class certification,' we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification."

The Eighth Circuit Court of Appeals had previously held that a more limited *Daubert* analysis was required, in the case of *Cox v. Zurn Pex (In re Zurn Pex Plumbing Prods. Liab. Litig.)*.[11] In *Zurn*, the district court certified a class of homeowners who alleged that brass fittings used in the defendant manufacturers' systems were inherently defective, denying defendants' *Daubert* motion to strike the expert witness report. On appeal, the Circuit Court noted that it was defendants who had sought to bifurcate class certification discovery, leading to the limited record available at that stage of proceedings, and held that the inherently preliminary nature of pretrial evidentiary and class certification rulings did not require an exhaustive and conclusive *Daubert* analysis. Similarly, the Ninth Circuit held in 2011 that "in its analysis of Costco's motions to strike [expert testimony at the class certification stage], the district court correctly applied the evidentiary standard set forth in *Daubert*").[12] The Third Circuit Court of Appeals weighed in on the issue in the 2012 case of *In re Blood Reagents Antitrust Litig.*[13] when it considered the case of direct purchasers of traditional blood reagents, products used to test blood compatibility between donors and recipients, who claimed that two companies violated federal antitrust law by conspiring to fix traditional blood reagent prices. Judge Anthony Joseph Scirica opined that the implications of *Comcast* require that, in light of the Supreme Court's decision in *Comcast*, a court must resolve any*Daubert* challenges to expert testimony offered to demonstrate conformity with Rule 23. Accordingly, the Circuit Court vacated the grant of class certification and remanded for further proceedings. The recent case of *In re Wellbutrin XL Antitrust Litig.*[14]demonstrates the depressing reality that class plaintiffs now face. That case involved the alleged illegal agreements between the manufacturers of the antidepressant drug Wellbutrin XL and the generic drug companies to delay the entry of generic versions of Wellbutrin into the market. In that case, the court applied a rigorous *Daubert* analysis to the expert opinions proffered in opposition to a motion to decertify the class, and then decertified the class. This case involves a second hotbed issue that the Supreme Court has now agreed to take head on—the standards to be used in determining whether class members are identifiable.

Are Class Members Identifiable?

*Walmart*and *Comcast* left the future of the ascertainability standard undecided. After multiple decisions, the Third Circuit just concluded that, at the certification stage, "ascertainability only requires the plaintiff to show that class members can be identified." The Circuit Court reached this conclusion in the case of *Byrd v. Aaron's Inc.*,[15] in which it clarified and adhered to its prior holdings in *Carrera v. Bayer*,[16] *Hayes v. Wal-Mart*

Stores[17] and *Marcus v. BMW of North America*.[18] The Eleventh Circuit took a similar approach in the recently decided case of *Karhu v. Vital Pharms.*[19] In *Karhu*, the Circuit Court held that plaintiffs have to prove that they will be able to determine who purchased the products and were members of the class before class certification can be granted. That case dealt with the false advertising claims of purchasers of a dietary supplement. The Circuit Court found that the purchaser's proposal to use the advertiser's "sales data" did not explain how the data would aid class-member identification, and the district court acted within its discretion by rejecting self-identification via affidavit. The denial of class certification was upheld, and the court explained that "a plaintiff cannot establish ascertainability simply by asserting that class members can be identified using the defendant's records; the plaintiff must also establish that the records are in fact useful for identification purposes, and that identification will be administratively feasible."[20] The Seventh Circuit Court of Appeals issued a recent decision that sets up a split among the Circuits on the issue of heightened ascertainability. In the case of *Mullins v. Direct Digital*,[21] the Circuit Court affirmed the certification of a class of consumers alleging fraud in the marketing of a dietary supplement, after rejecting the use of a heightened standard of ascertainability. This split could be addressed by the Supreme Court when it decides the case of *Tyson Foods v. Bouaphakeo*.[22]

One thing seems clear from recent developments—plaintiffs face stricter standards and higher costs of experts when attempting to certify a class.

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Endnotes

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[1] 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011).

[2] 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013).

[3] 2015 U.S. LEXIS 3860 (June 8, 2015) (writ of certiorari granted).

[4] 521 U.S. 591 (1997).

[5] 521 U.S. at 620.

[6] 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[7] 133 S. Ct. at 1436.

[8] *Wal-Mart*, 131 S. Ct. at 2553-54.

[9] 600 F.3d 813 (7th Cir. Ill. 2010).

[10] 669 F.3d 802, 812 (7th Cir. 2012).

[11] 644 F.3d 604 (8th Cir. Minn. 2011).

[12] *Ellis v. Costco Wholesale*, 657 F.3d 970, 982 (9th Cir. 2011).

[13] 783 F.3d 183 (3d Cir. Pa. 2015).

[14] 2015 U.S. Dist. LEXIS 84444 (E.D. Pa. June 30, 2015).

[15] 784 F.3d 154 (3d Cir. 2015).

[16] 727 F.3d 300 (3d Cir. 2013).

[17] 725 F.3d 349 (3d Cir. 2013).

[18] 687 F.3d 583 (3d Cir. 2012).

[19] 2015 U.S. App. LEXIS 9576 (11th Cir. Fla. June 9, 2015).

[20] *Karhu*, 2015 U.S. App. LEXIS 9576, *6-7.

[21] 2015 U.S. App. LEXIS 13071 (7th Cir. Ill. July 28, 2015).

[22] 2015 U.S. LEXIS 3860 (U.S., June 8, 2015) (writ of certiorari granted).