

Class Action Practice Today

AN OVERVIEW

By William B. Rubenstein



Class action law is in flux, but that's nothing new. For the past 40 years, class action law has been a battle between two competing trends: expansion (in the number and types of cases and in the amount of settlement awards) and contraction (resulting from legislation and court decisions aimed at limiting the class suit's seemingly perpetual growth).

The late 1980s and early 1990s were characterized by the development of the mass tort field, with class sizes and settlement values never seen before. The Supreme Court's decisions in *Amchem*¹ and *Ortiz*² reined these in to some extent, while Congress, during the same period, attempted to slow the increase of securities class actions with its enactment of the Private Securities Litigation Reform Act of 1995 (PSLRA) and the Securities Litigation Uniform Standards Act of 1998 (SLUSA). Both sets of developments have had significant effects: Nationwide mass tort cases are far less prevalent than they were a decade ago,³ and securities class action filings are significantly down, even in an era marked by widespread securities fraud allegations.⁴

At the same time, class action practice appears to be as vigorous as ever. Entrepreneurial plaintiffs' attorneys have turned their attention to different areas—to lucrative consumer cases, for example, and since the Wal-Mart certification, increasingly to the employment field. They have also begun pushing the envelope of internationalizing class action practice. Again, defense attorneys and their corporate allies have fought these developments, with their most recent accomplishment being Congress's

enactment of the Class Action Fairness Act of 2005 (CAFA) (see sidebar on page 5); the act aims to curtail easy state court certification and cheap coupon settlements in consumer cases.

The best means for taking a snapshot of the current state of class action practice is to look at the key contraction and expansion areas and the trends they portend for the future of class action practice.

Areas of Contraction

CAFA. The legislative history of CAFA reads like an indictment of class action practice—particularly coupon settlements—implying that CAFA will shut down such practices. But the law turns out to be relatively mild, simply expanding federal subject-matter jurisdiction and sharpening some procedures for settlement oversight, including requiring that public regulatory officials be notified of such settlements and be given an opportunity to speak to their fairness. To date, case law under the act primarily has concerned procedural issues such as its effective date, burdens of proof, and appeal deadlines.⁵ That said, it does appear that defense lawyers are taking advantage of its provisions to remove many consumer cases to federal court, and a few judges have begun to remark that the law is intended to ensure tougher oversight of coupon settlements.⁶ Also interesting, in a recent nationwide settlement of a class action against Sharper Image concerning marketing of its Ionic Breeze product, 27 state attorneys general filed an objection to the settlement terms, which were subsequently amended by the parties to be more favorable to the class.⁷ If these

developments continue, CAFA would begin to have a greater impact on curtailing interstate consumer practice generally and coupon settlements in particular.

The IPO Decertification. The Second Circuit Court of Appeals vacated class certification in six cases designed to test the viability of more than 300 class actions alleging that underwriters, issuers, and individual corporate officers conspired to manipulate the initial public offerings market during the dot-com boom of the 1990s.⁸ Judge Jon O. Newman's decision for the panel acknowledges that Second Circuit law did not provide clear guidance as to the procedural standards for class certification in the circuit. Reading that earlier case law, the trial court had essentially concluded that the plaintiffs need only make "some showing" that the certification requirements were met and that the court should be wary of looking at the merits too rigorously at the certification stage. In reversing, the Second Circuit held that a district judge may certify a class only after "making determinations that each of the Rule 23 requirements has been met," resolving factual disputes to do so, and undertaking this resolution even of issues that overlap with merits determinations. Applying this standard, the court decertified the class, an outcome that could jeopardize a \$1 billion settlement agreement and force thousands of potential class members to pursue claims individually. Beyond the cases in question, the decision is likely to make class certification in the Second Circuit more difficult in future cases and could be persuasive to other circuits reconsidering their own approach.

Pruning the Edges

A series of cases about issues in class actions—though not about class action law itself—will, nonetheless, have significant impacts on class action practice.

Pleading. The Supreme Court threw out two large class action lawsuits this past term on pleading grounds. In *Twombly*,⁹ plaintiffs alleged that regional telecommunication companies had conspired not to compete with one another and had engaged in concerted conduct designed to discourage potential entrants. The Second Circuit permitted the class action to proceed. In a 7-2 decision, the High Court reversed, holding that a complaint under the Sherman Act must allege “some factual context suggesting agreement,” and finding that the complaint in this case did not sufficiently do so. In *Tellabs*,¹⁰ the Court interpreted a portion of the PSLRA that requires plaintiffs to “state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind.”¹¹ In an 8-1 decision, Justice Ruth Bader Ginsburg, writing for the majority, stated that the key aspect of deciding whether an inference of scienter is “strong” is that it must be compared with other inferences that can be drawn from the facts: “A complaint will survive,” the Court held, “only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any competing inference one could draw from the facts alleged.” Applying this standard, the Court upheld the trial court’s pleading-based dismissal.

Punitive Damages. The tobacco industry won two key victories in class action cases, convincing the high courts in Florida¹² and Illinois¹³ to reverse \$145 billion and \$10.1 billion judgments, respectively, against cigarette companies. The Florida Supreme Court did uphold the trial court’s finding that smoking causes numerous health conditions; however, the Florida Supreme Court overturned the lower court’s \$145 billion punitive damages award as excessive, awarding only \$12.7 million in compen-

satory damages for two named plaintiffs. The Illinois Supreme Court likewise reversed a \$10.1 billion lower-court verdict finding that Phillip Morris fraudulently misstated the amount of tar and nicotine in its light cigarettes. The court did not rule on the size of the damages specifically, but rather held that because the labeling of the cigarettes complied with certain consent orders of the Federal Trade Commission, it fell into exemption provisions in state consumer protection laws and could not be challenged under them.

Preemption. Two recent Supreme Court cases short-circuited class action lawsuits on the grounds that the underlying substantive claims were barred. In *Credit Suisse*,¹⁴ the Court sided with a New York federal trial court, which had dismissed an antitrust class action filed by 60 investors alleging that 10 investment banks acted as underwriters to manipulate the IPO market. The Court, fearing inconsistent results across antitrust courts, said that federal antitrust laws are inapplicable because the Securities and Exchange Commission actively enforces rules and regulations prohibiting market manipulation. In *Dabit*,¹⁵ the Court held that a class of former Merrill Lynch brokers could not maintain a suit based on Oklahoma state law against the company for breaching its fiduciary duty by disseminating misleading research because SLUSA preempts state-law claims. Similarly, the California Supreme Court tossed out a statewide class action challenging tobacco advertising to minors under state law as preempted by federal law.¹⁶

Arbitration

Class action defendants are increasingly turning to contract principles to foreclose the possibility of aggregate litigation. Arbitrators are then faced with the issue of whether to proceed using the class action form and, if so, how to combine the public notions of class action practice with the private concept of alternative dispute resolution. The most recent development

KEY ELEMENTS OF CAFA

The Class Action Fairness Act of 2005 changed class action practice in three principal ways:

- It changed the rules for federal diversity jurisdiction and removal, enabling most large class action cases to be filed in or removed to federal court.
- It transformed the procedures for settling all class actions in federal courts.
- It restricted the practice of coupon settlements and limited the manner in which attorney fees can be provided in coupon cases.

(For more on CAFA, see article by Allan Kanner and M. Ryan Casey on page 12.)

was a non-event: The U.S. Supreme Court denied certiorari in a case in which the New Jersey Supreme Court had held that a provision in a consumer contract prohibiting consumer participation in class-wide arbitration was unenforceable because the provision was unconscionable.¹⁷ Although courts seem concerned about class action waivers, and occasionally even express concern about forced arbitration, the practice is on a rise that seems inexorable. It is likely that during the coming years, class action arbitration will grow as a means of resolving large disputes and its underlying processes will become more clearly defined.

Areas of Expansion

Big Settlements. After reading the contraction news, one might think that class action cases had ground to a halt. But, in fact, settlements for astonishing sums of money continue to dot the landscape. Settlements for billions of dollars are no longer unheard of, and those for hundreds of millions of dollars have become somewhat routine. (See sidebar on page 6.)

Record Certifications. Alongside the critical decertification decisions mentioned above stand two record certifica-

tions. The first is a *tour de force*: Brooklyn federal district court Judge Jack Weinstein's 366-page decision certifying a nationwide class of tens of millions of smokers who allege Racketeer Influenced Corrupt Organization Act claims against tobacco companies for their representations that "light" cigarettes were a healthy alternative to conventional cigarettes.¹⁸ The class certification portion of the decision, comprising more than 30 pages of the Federal Reporter, is a "must read" for any class action attorney.

Within five months of Judge Weinstein's decision, the Ninth Circuit affirmed the nationwide certification of a class of 1.6 million female Wal-Mart employees alleging gender discrimination and seeking more than \$10 billion in damages.¹⁹ Plaintiffs' attorneys contend that this is the largest civil rights class action in U.S. history. Class action claims against Wal-Mart appear to be developing as a field of their own,²⁰ and Judge Weinstein's certification of the tobacco advertising case could open a whole new avenue of smokers' litigation.

Internationalization. Class action practice is expanding outward in three directions. First, cross-border class actions are increasingly pursued in U.S. courts, sweeping in plaintiffs from other countries to actions brought and tried or settled here. Second, class action law is developing in foreign countries, particularly Canada, drawing American litigators, and increasingly American litigants, into actions resolved in foreign jurisdictions. Third, American lawyers are increasingly bringing class actions against foreign defendants in American courts. In short, class action law is undergoing globalization much like the rest of the U.S. economy.

Medical Monitoring. Two state supreme courts came to opposite conclusions regarding recoverability of medical monitoring costs for latent diseases after exposure to toxins. The Missouri Supreme Court held that the costs of medical monitoring are compensable damages, certifying a class of children exposed to lead emissions by a smelter

MEGA-SETTLEMENT ROUNDUP

Recent settlements of more than \$100 million demonstrate the stakes involved in large class action cases:

- **Tyco:** Tyco agreed to pay \$2.975 billion—the largest securities fraud settlement in history—to resolve a class action lawsuit by shareholders arising out of ex-CEO Dennis Kozlowski's alleged accounting fraud.
- **Microsoft:** Microsoft settled a series of statewide class actions alleging antitrust violations, including one in California in which the company agreed to pay up to \$1.1 billion (primarily in coupons) to 14 million consumers.
- **Freddie Mac:** Freddie Mac paid \$410 million back to individual investors and pension funds to settle claims arising out of its 2003 accounting errors and subsequent stock collapse.
- **Credit Card Currency Conversion Cases:** Visa, Mastercard, and Diner's Club agreed to pay \$336 million to settle consolidated class actions alleging that the companies and member banks conspired to fix fees charged for currency conversion when cardholders made purchases overseas.
- **Hurricane Katrina:** Murphy Oil agreed to pay \$330 million to a group of Louisiana residents to settle a class action alleging damages caused by leakage from a storage tank during Hurricane Katrina that polluted acres of land.
- **Williams Securities Litigation:** Williams Companies, Inc., agreed to pay \$290 million to its shareholders to settle claims that it misstated earnings and manipulated its accounting statements, one of the largest securities class actions in history.
- **Rent-A-Center:** The company agreed to pay \$109 million to settle a New Jersey class action alleging effective interest rates exceeding those permitted by state law.
- **AOL LLC:** AOL agreed to pay the California State Teachers' Retirement System \$105 million to settle claims that it overstated revenue by recording Internet advertising proceeds incorrectly.
- **ERISA Litigation:** AOL Time Warner paid \$100 million to settle ERISA litigation brought against it by its 401(k) plan participants.

operator.²¹ Recovery for medical monitoring, the court ruled, is not predicated on the existence of current physical injury. However, the Mississippi Supreme Court determined that Mississippi law does not recognize a medical monitoring cause of action absent a showing of physical injury, answering a certified question from the Fifth Circuit Court of Appeals that led to the dismissal of a class action brought by workers against a distributor of beryllium products.²² It is interesting to note that the Missouri Supreme Court allowed its case to proceed in part because there was no state law

prohibiting recovery for medical monitoring; Mississippi disallowed recovery for medical monitoring because there was no state law authorizing it.

Conclusion

Class action law is, and will likely continue to be, a central, exciting, fascinating, and challenging practice area for many litigators in the United States. Most large law firms now have links on their websites extolling the virtues of their complex litigation practice, while new plaintiffs' firms emerge daily. Class action law itself embodies a remarkable, unique achievement of the American legal

CLASS ACTION WILDCARD THE DEMISE OF THE MILBERG WEISS FIRM

The lurking big news in class action law concerns what will happen to the Milberg Weiss firm and its West Coast spin-off, Lerach Coughlin, in light of the U.S. Attorney's prosecution of the firm's practices. Milberg Weiss had long been the largest class action law firm in the United States, indeed one of very few to pursue class action lawsuits in a relatively large firm setting (200 lawyers). With Mel Weiss leading the firm's East Coast practice and Bill Lerach leading its West Coast practice, the firm dominated securities class actions in particular for the past several decades. In May 2006, the U.S. attorney in Los Angeles indicted the firm and two named partners, David Bershak and Steve Schulman, on charges of mail fraud, racketeering, and bribery.

The gist of the suit is that the firm paid named plaintiffs kickbacks to serve in that capacity; it is likely the firm will suffer as much for not disclosing those payments (and hence misrepresenting to courts how plaintiffs were compensated) as for the practice itself. Regardless, the indictment has decimated the firm, with half of its partners leaving and with some courts holding that the firm can no longer serve as a lead counsel in securities class actions.²³ Most recently, even Bill Lerach, who seemed beyond the reach of the case that had targeted the New York partners, also appears to be swept up in the investigation; he has retired from practice. The interesting question for class action law is what will happen in the wake of the Milberg Weiss collapse. Most of the firm's attorneys will escape prosecution and find comfortable homes at other firms. Less clear at this point is the fate of Milberg Weiss itself and the targeted partners; whether any firm will grow up in Milberg Weiss's wake to so dominate class action practice in the future; and what effect, if any, the firm's demise will have on class action practice generally.

system—the capacity to redress aggregate harms that are often too small to be addressed individually, through the use of private, entrepreneurial lawyers. At the same time, class action law can be a site of abuse, and it requires constant monitoring by courts, public officials, and the bar. The law does, and always will, reflect these competing tendencies. Stay tuned.

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ENDNOTES

1. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).
2. Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999).
3. The era of asbestos, silicone breast implants, and Fen-Phen has given way to an era of Paxil (Blain v. Smithkline Beecham Corp., 240 F.R.D. 179 (E.D. Pa. 2007)) and Vioxx (Merck, fighting each case, has yet to pay out for any; see Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Cases*, N.Y. TIMES, Aug. 21, 2007, at A1).
4. See <http://securities.stanford.edu/index.html>.
5. A full summary of the case law under CAFA can be found at my website, www.classactionprofessor.com.
6. See, e.g., Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 654 (7th Cir. 2006) (noting that although the case was not brought under CAFA, the statute requires heightened judicial scrutiny of coupon-based settlements).
7. See Julie Kay, *Sharper Image Claims Reimbursing Customers Will Cause Bankruptcy*, DAILY BUSINESS REVIEW (Aug. 16, 2007), available at <http://www.law.com/jsp/article.jsp?id=1187168525423>. Disclosure: I serve as an expert consultant to defendant's counsel in this matter.
8. *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006).
9. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).
10. Tellabs v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007).
11. 15 U.S.C. § 78u-4(b)(2) (emphasis supplied).
12. Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006).
13. Price v. Phillip Morris, Inc., 848 N.E.2d 1 (Ill. 2005).
14. Credit Suisse Sec. (USA) LLC v. Billing, 127 S. Ct. 2383 (2007).
15. Merrill Lynch v. Dabit, 547 U.S. 71 (2006).
16. *In re Tobacco Cases II*, 163 P.3d 106 (Cal. 2007).
17. Muhammad v. County Bank of Rehoboth Beach, Del., 912 A.2d 88 (N.J. 2006), cert. denied, 127 S. Ct. 2032 (2007).
18. Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992 (E.D.N.Y. 2006).
19. Dukes v. Wal-Mart, Inc., 474 F.3d 1214 (9th Cir. 2007).
20. *In Iliadis v. Wal-Mart Stores, Inc.*, 191 A.2d 710 (N.J. 2007), the New Jersey Supreme Court certified a class of 80,000 current and former Wal-Mart employees suing the company for allegedly forcing plaintiffs to skip breaks and work off the clock. In Pennsylvania, a jury awarded a class of plaintiffs \$78 million for similar claims. *Braun v. Wal-Mart Stores, Inc.* (Pa. C.P. Ct. 2005) (unreported). A Missouri appeals court certified a class to pursue nearly identical claims. *Hale v. Wal-Mart Stores, Inc.* (Mo. Ct. App. 2007) (unreported). However, the day before the Missouri decision, a state trial court in New York found that a similar group of plaintiffs did not constitute a class because the requirements of predominance, typicality, and adequate representation were not met. *Alix v. Wal-Mart Stores, Inc.*, 838 N.Y.S.2d 885 (Sup. Ct. 2007). In addition, a subsequent Maryland state trial court decision denied certification in an overtime class action for Maryland Wal-Mart employees. *Cutler v. Wal-Mart Stores, Inc.*, No. 1376 (Md. Ct. Spec. App. June 29, 2007) (unpublished).
21. Meyer *ex rel.* Coplin v. Fluor Corp., 220 S.W.3d 712 (Mo. 2007).
22. Paz v. Brush Engineered Materials, Inc., 949 So. 2d 1 (Miss. 2007).
23. See, e.g., *In re Medtronic, Inc., Implantable Defibrillator Prod. Liab. Litig.*, 434 F. Supp. 2d 729 (Minn. 2006).