Recent Developments In Class Action Litigation: *Dukes*, *Comcast*, *Glazer* and Beyond

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INCREASED SUPREME COURT SCRUTINY OF CLASS CERTIFICATION

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- The number of class action petitions to the Supreme Court has increased
- The Court has accepted a number of these petitions and strengthened class certification standards

INCREASED SUPREME COURT SCRUTINY OF CLASS CERTIFICATION

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- Recent Supreme Court rulings have strengthened class certification requirements
  - *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)
    - Reversed Ninth Circuit *en banc* certification of class of 1.5 million female Wal-Mart employees alleging discrimination
    - Trial court must conduct a "rigorous analysis" of Rule 23 requirements – which "[f]requently . . . [will] entail some overlap with the merits of the plaintiff's underlying claim"
    - Rule 23(a)(2): showing of classwide proof must be available regarding common questions (5-4 decision)
    - Claims for monetary relief generally may not be certified under Rule 23(b)(2) (unanimous decision)
    - No "trial by formula" – "a class cannot be certified on the premise that [defendant] will not be entitled to litigate its statutory defenses to individual claims" (unanimous decision)

INCREASED SUPREME COURT SCRUTINY OF CLASS CERTIFICATION

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- Recent Supreme Court rulings have strengthened class certification requirements
  - *Comcast Corp v. Behrend*, 133 S. Ct. 1426 (2013) (5-4 decision)
    - Reversed class certification because plaintiffs did not present a classwide theory of damages that matched the theory of liability accepted by the district court
    - Reiterated "rigorous analysis" requirement and made clear that it also "govern[s] Rule 23(b)"
    - Proposed class failed: "Questions of individual damages calculations will inevitably overwhelm questions common to the class."
    - Rejected idea that "any method of measurement is acceptable [at class certification stage] so long as it can be applied classwide, no matter how arbitrary the measurements may be"

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INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- Even though the Supreme Court has toughened standards, class actions fraught with individualized issues still get certified
- The Sixth, Seventh and Ninth Circuits have issued class certification decisions in recent years that erode the requirements of Rule 23

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- *Whirlpool Corp. v. Glazer*, 678 F.3d 409 (6th Cir. 2012)
  - Affirmed class certification of consumers alleging mold in washing machines
  - ***97 percent*** of class members had never complained about any problem with their washers
  - "Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate"
  - Supreme Court vacated and remanded in light of *Comcast*

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- On remand, the Sixth Circuit gave short shrift to *Comcast*
- Claimed *Glazer* was "different" from *Comcast*
  - *Comcast* concerned individualized damages issues
  - *Glazer* only certified liability for class treatment
- But *Glazer* involved individualized issues with respect to *injury*
  - Analogous to *Comcast* because most class members were not injured
  - Class device used to expand potential recovery beyond any valid liability theory
- Sixth Circuit downplayed injury problem based on "premium price" theory

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- *Fifth Third Bancorp v. Arlington Video Prods.*, 2013 U.S. LEXIS 5481 (Oct. 7, 2013)
  - Plaintiffs alleged bank failed to inform them of certain service fees
  - District court found class overbroad because many proposed class members had personal and treasury management bank accounts that were subject to different legal requirements and fees from the named plaintiff's corporate account
  - Court of Appeals reversed, instructing district court to limit class to account holders with facts and legal theories similar to named plaintiff's
  - Defendants sought Supreme Court review, arguing that plaintiffs have burden of defining proper class and that Sixth Circuit ignored insurmountable predominance problems, such as varying methods of fee disclosures
  - Supreme Court GVR'd in light of *Comcast*

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- The Seventh Circuit was once among the best places to defend a class action
  - *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002)
  - *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006)
  - *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008)

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- But then came a handful of cases endorsing "issues class actions" where a single issue is certified for class treatment, while other individual issues are left for follow-on proceedings
  - *Pella Corp. v. Saltzman*, 606 F.3d 391 (7th Cir. 2010)
    - Even though individual issues predominated, the court allowed certification based on one "common issue": "whether the windows suffer from a single, inherent design defect leading to wood rot"
  - *McReynolds v. Merrill Lynch*, 672 F.3d 482 (7th Cir. 2012)
    - Allowing issues class on whether defendant's employment practices had a disparate impact on African-American financial advisors

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- Most recent Seventh Circuit case embracing issues classes is *Butler v. Sears, Roebuck and Co.*, 702 F.3d 359 (7th Cir. 2012)
  - Another front-load washing machine class action
  - "Predominance is a question of efficiency"
  - According to Judge Posner, if Sears thinks the machines are not defective, it can win on classwide basis
  - Cannot be reconciled with *Thorogood*, where Posner rejected a dryer class action because:
    - Consumers may have purchased dryers for reasons unrelated to propensity to cause or prevent rust stains
    - The risks of "costly error" inherent in allowing one jury to decide liability as to all were too great
    - It appeared that the rust problem did not affect most class members

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- Supreme Court remanded *Butler* in light of *Comcast*
- Seventh Circuit reaffirmed its prior ruling notwithstanding *Comcast*
  - *Comcast* does not affect the prior ruling because the case could proceed as an issues class; "[t]here is a single, central, common issue of liability: whether the Sears washing machine was defective," that could be resolved on a classwide basis
  - All other, noncommon issues, including both injury and damages, could be resolved separately in individual trials
    - *See Butler v. Sears Roebuck & Co.,* Nos. 11-8029, 12-8030, 2013 WL 4478200 (7th Cir. Aug. 22, 2013)
- This ruling cannot be reconciled with *Comcast*
  - *Butler* creates the risk that the certified class will be much broader than the actual number of injured individuals – exactly the over-inclusiveness rejected by *Comcast*
  - If issues classes could solve the problem, the Supreme Court would have said so – indeed, the dissent suggested this approach

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- Issues classes pose serious threats for defendants but they are also risky for plaintiffs
  - Issues classes are not fair to defendants
    - Plaintiffs don't have to prove injury and causation
    - "Issues" verdict would put tremendous pressure on defendant
    - Issues classes are in tension with Seventh Amendment
      - "[T]he risk that a second jury would have to reconsider the liability issues decided by the first jury is too substantial to certify [an] issues class." *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008)
  - On the other hand, plaintiffs' counsel may not want to invest in trials where there is no automatic payout, even if they win
    - Unclear that consumers will be motivated to show up for phase two damages trials in consumer matters with little money at stake

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- *Wolin v. Jaguar Land Rover North America LLC*, 617 F.3d 1168 (9th Cir. 2010)
  - Reversed denial of class certification in case where most class members had not experienced the alleged problem of premature tire wear
  - "[P]roof of the manifestation of a defect is not a prerequisite to class certification"
- Federal courts sometimes cite *Wolin* in certifying overbroad class actions
  - *Neale v. Volvo Cars of N. Am., LLC*, 2013 U.S. Dist. LEXIS 43235, at *14 (D.N.J. Mar. 26, 2013) (certifying classes of uninjured car purchasers and relying on *Wolin*; "a class need not be limited to consumers who have actually experienced the defect" at issue)
  - *Tait v. BSH Home Appliances Corp.*, 2012 U.S. Dist. LEXIS 183649, at *32 (C.D. Cal. Dec. 20, 2012) (certifying classes of purchasers, many of whom experienced no problems with their washing machines; "as Wolin . . . make[s] clear… [p]laintiffs need not prove that every product ***actually*** developed th[e] undesirable condition")

INCONSISTENT RULINGS AMONG CIRCUIT COURTS OF APPEAL

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- *Wolin* is inconsistent with Fifth Circuit's approach in *In re Deepwater Horizon*, 2013 U.S. App. LEXIS 20188 (5th Cir. Oct. 2, 2013)
  - BP entered class settlement in 2012 agreeing to make payments to cover economic losses arising from the *Deepwater Horizon* oil spill
  - BP complained that the settlement administrator's methods for evaluating claims allowed uninjured class members to recover
  - Fifth Circuit ordered District Judge Barbier to evaluate legitimacy of claims and cease payments for claims that did not meet stricter standards
  - At least in the Fifth Circuit, classes cannot encompass members who are uninjured and therefore lack legitimate claims
    - "Unless a claimant can colorably assert a loss, it lacks standing"

APPELLATE REVIEW IS GETTING RARER

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- 23(f) was added to Rule 23 in 1998 to reduce settlement pressure on class action defendants
- Interlocutory review is far from a sure thing
  - 36% of petitions filed between 1998 and September 2006 granted
  - Less than 25% of petitions filed between October 2006 and May 2013 granted
- The decline should not be surprising
  - Many more class actions in federal court due to CAFA
  - Appellate courts have spoken on many class certification issues

APPELLATE REVIEW IS GETTING RARER

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- Some courts are better bets than others:

Circuit	Total Grant Rate	Defendant Grant Rate	Plaintiff Grant Rate
1	6.1%	8.3%	0.0%
2	22.4%	22.4%	22.5%
3	34.5%	36.4%	30.4%
4	20.0%	22.2%	0.0%
5	48.0%	72.7%	28.6%
6	27.0%	20.0%	41.7%
7	28.7%	37.3%	15.0%
8	15.2%	20.0%	6.3%
9	19.0%	14.2%	25.0%
10	18.2%	28.0%	5.3%
11	24.4%	35.7%	5.9%
DC	0.0%	0.0%	0.0%
Total	22.6%	24.0%	20.3%

APPELLATE REVIEW IS GETTING RARER

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- When Circuit Courts do accept interlocutory appeals, the results are generally good for defendants, though circuits vary
- Overall:
  - 67% of class certification grants are reversed
  - 60% of class certification denials are upheld

CLASS SETTLEMENT CONTROVERSIES

SETTLEMENT CLASS CERTIFICATION

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- Class certification prerequisites (except manageability element of Rule 23(b)(3)) apply to the certification of settlement classes as well.
  - *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)
  - *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999)
- So are those prerequisites applied with the same rigor to settlement classes as they are to litigation classes?

CY PRES AWARDS GAINING IN POPULARITY – AND CONTROVERSY

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- *Cy pres* is the practice of distributing unclaimed class funds to third-party charities
- The practice has contributed to worthwhile organizations but provides little benefit to class members
- *Cy pres* awards count toward total recovery and therefore inflate fees for class counsel
  - Class counsel prefer *cy pres* because it's easier than identifying class members

CY PRES AWARDS GAINING IN POPULARITY – AND CONTROVERSY

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- Recent *cy pres* examples
  - *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012)
    - Ninth Circuit approved a $9.5 million settlement of a privacy lawsuit
    - $3 million attorneys' fees, administrative costs and incentive payments to the class representatives
    - The remaining $6.5 million was a *cy pres* award to establish a new charity to create education programs about the protection of identity and personal information online
    - The Center for Class Action Fairness recently filed a petition for *certiorari* before the Supreme Court challenging the settlement

CY PRES AWARDS GAINING IN POPULARITY – AND CONTROVERSY

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- Recent *cy pres* examples
  - *Hughes v. Kore of Indiana Enterprise, Inc.*, 2013 U.S. App. LEXIS 18873 (7th Cir. Sept. 10, 2013)
    - Seventh Circuit reversed decertification of class, relying largely on notions of efficiency and the *cy pres* doctrine
    - The Court of Appeals recognized that few class members would "bother" submitting a claim to obtain a paltry few dollars
    - Thus, "[t]he best solution may be what is called . . . a '*cy pres*' decree"
    - "Payment of $10,000 to a charity whose mission coincided with, or at least overlapped, the interest of the class (such as a foundation concerned with consumer protection) would amplify the effect of the modest damages in protecting consumers"

CY PRES AWARDS GAINING IN POPULARITY – AND CONTROVERSY

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- *Cy pres* – some courts are critical
  - *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013).
    - Third Circuit rejected settlement where attorneys received nearly five times the amount that actually ended up in the pockets of their supposed "clients"
    - Settlement would have given $14 million to the lawyers, $3 million to class members and $18.5 million to charities
    - The Third Circuit remanded, urging the parties to provide greater direct monetary compensation to the class

CY PRES AWARDS GAINING IN POPULARITY – AND CONTROVERSY

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- *Cy pres* – some courts are critical
  - *In re Dry Max Pampers Litig.*, 2013 U.S. App. LEXIS 15930, at *4 (6th Cir. Aug. 2, 2013).
    - Sixth Circuit recently rejected a *cy pres* settlement in which defendant agreed to refund up to one box of Pampers per household, but gave attorneys $2.73 million
    - Settlement also called for $300,000 to a pediatric resident training program and $100,000 to the American Academy of Pediatrics to fund a program "in the area of skin health"
    - "The relief that this settlement provides to unnamed class members is illusory. But one fact about this settlement is concrete and indisputable: $2.73 million is $2.73 million"

CAFA MATURES

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- *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345 (2013)
  - Big win for defendants – named plaintiffs cannot stipulate to damages under $5 million
  - "[A] plaintiff who files a proposed class action cannot legally bind members of the proposed class before the class is certified"
- Ninth Circuit has interpreted *Knowles* as abrogating "legal certainty" standard for proving amount in controversy under CAFA
  - "The rationale for imposing a heightened "legal certainty" standard is that the plaintiff "is the 'master of her complaint' and can plead to avoid federal jurisdiction," which "is clearly irreconcilable with *Standard Fire*"
    - *Rodriguez v. AT&T Mobility Services LLC*, 2013 U.S. App. LEXIS 17851 (9th Cir. Aug. 27, 2013)

CAFA MATURES

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- Some problems remain
  - Plaintiffs can artificially slice up class actions and mass actions into multiple cases seeking less than $5 million
    - *Romo v. Teva Pharms. USA, Inc.*, 2013 U.S. App. LEXIS 19527 (9th Cir. Sept. 24, 2013) – Ninth Circuit affirmed remand of 26 cases under "mass action" provision, finding that the plaintiffs' motion for coordination under California state law "did not constitute a proposal to be tried jointly under CAFA"
    - Judge Gould dissented in *Romo*, finding the Seventh Circuit's contrary ruling in *Abbott* "persuasive and relevant" because plaintiffs' "request for coordination or consolidation [] list[ed] certain goals that could only be accomplished through a joint trial"
      - *In re Abbott Labs., Inc.*, 698 F.3d 568 (7th Cir. 2012) (plaintiffs' motions to consolidate 10 Illinois state court cases involving anti-seizure drug Depakote were sufficient to create a mass action)
    - Judge Gould's dissent would support a petition for *certiorari*

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- Some problems remain
  - Some courts interpret the "home state" and "local controversy" exceptions more broadly than intended
    - *City of Lansing v. CVS Caremark Corp.*, No. 1:09-CV-778 (W.D. Mich. Dec. 1, 2009) (in-state defendants represented only small percentage of total relief sought by plaintiffs; court remanded anyway under local-controversy exception)
    - *Coleman v. Estes Express Lines, Inc.*, 631 F.3d 1010 (9th Cir. 2011) (in-state defendant likely had insufficient funds to satisfy a judgment against it, but court would not consider that evidence)
    - *Hirschbach v. NVE Bank*, 496 F. Supp. 2d 451 (D.N.J. 2007) (home-state exception applied even though it was unclear what percentage of class members were residents of the state where suit was filed)

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