

■ Critical Decision Points in the Life of a Typical Class-Action Case

BY KATHERINE B. BANDY AND BRADLEY C. WEBER

Like most lawsuits, no two class-action cases are ever exactly alike. There are, however, a number of critical issues and decision points that are commonly found in class-action litigation. This article identifies a few of the recurring issues that typically arise in class-action cases and provides a general analysis of the factors that a lawyer should consider in addressing them.

Should I File My Case as a Class Action?

Before a case is even filed, the plaintiffs' counsel needs to carefully consider some preliminary issues in deciding whether to file the case as a class action or an individual lawsuit. The initial

issue that should always be considered is whether a class is likely to be certified by the district court and subsequently affirmed on appeal. Consideration of this issue should take into account a number of factors, including the claims that will be asserted in the case and the court in which it will be filed.

An analysis of the plaintiffs' claims and their necessary elements is extremely important in deciding whether to bring a case as a class action. Federal Rule of Civil Procedure 23 contains a number of requirements that must be met before a court can properly certify a class. Many of these requirements are tied to the claims in the case and the evidence that is necessary to prove them. For example, one of the requirements for class certification under Rule 23(b)(3) is that questions of law or fact common to class members must predominate over any questions affecting only individual members. If the claims in a case have necessary elements requiring individual proof, such

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■ The Availability of Class-Action Arbitrations under the Federal Arbitration Act

BY LINDA L. MORKAN

On December 9, 2009, the U.S. Supreme Court heard a lively oral argument in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*¹ *Stolt-Nielsen* promises to decide whether a "class-action arbitration" can be held under the Federal Arbitration Act when the parties' arbitration agreement doesn't explicitly address the availability of such a unique procedure. This issue was nominally taken up by the Court in 2003's *Green Tree Financial Corp v. Bazzle*,² but the Court wasn't able to reach a majority decision, instead issuing a plurality opinion remanding the case to the arbitrator for a factual determination as to whether the agreement prohibited or permitted class arbitrations.³ Hopefully, the Court will issue a decision in *Stolt-Nielsen* that answers the vexing question once and for all, but it will need to get past a thorny threshold question in order to do so.

The Underlying Proceedings

AnimalFeeds International Corp. filed a class action against four major maritime shipping companies (collectively "Stolt-Nielsen"), alleging price fixing. After the action was consolidated with similar pending actions, Stolt-Nielsen sought to compel arbitration based on its standard form contracts.⁴ Although the district court denied that motion, the Second Circuit reversed and remanded, holding that the antitrust claims were arbitrable.⁵

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Letter from the Chairs

The Committee on Commercial and Business Litigation has an expansive and diverse membership. The specific practice areas of litigators falling under the commercial and business umbrella are varied and often appear to have little in common. However, one unifying interest for this group is in the trends and developments in class-action practices and law. The authors of the articles included in this issue provide thoughtful commentary on the current status of class actions in the United States. They address recent developments in the law, as well as practical trends in class-action use. As class-action claims are alive and well across the broad range of specialties encompassed by the Commercial and Business Committee, this issue offers information of core value to the committee's diverse membership.

In addition to the good work of committee members reflected in the articles included in this newsletter, committee members have been hard at work with a number of additional projects. The committee sponsored a meeting, substantive seminar, networking luncheon, and committee leadership dinner at the

Section Annual Conference in New York in April. Plans now are underway for a committee meeting and dinner at the ABA Annual Meeting in San Francisco, August 5–8. Please check the committee webpage, www.abanet.org/litigation/committees/commercial, for details and make plans to join us for these events.

While visiting the committee's webpage, please review the case notes and meeting news, as updates are posted frequently. We encourage all interested committee members to find a way to get involved in the committee activities. In addition to reviewing the information related to opportunities on the webpage, feel free to contact any of the subcommittee chairs (listed on the webpage) or the committee chairs (listed below) if you would like to volunteer. We hope to hear from you!

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Letter from the Editor

This issue of *Commercial & Business Litigation* focuses on class actions. It contains articles on the impact of the Class Action Fairness Act (CAFA) after five years, key issues that arise in the context of removal under CAFA, the effect of the Supreme Court's decision in *Twombly* on pleading requirements for class action, and the critical decision points in a class action. This issue examines the *Stolt-Nielson* case, which presents the issue of the availability of class-action arbitration under the Federal Arbitration Act and was just deaded by the Supreme Court. This issue also features an article analyzing two recent circuit decisions on the enforceability of class-action waivers in arbitration agreements. Finally, this issue contains an article written by the president-elect of the Texas Young Lawyers Association (TYLA) on becoming the "go-to" lawyer within a firm on class-action issues.

We invite you to send comments on this issue or volunteer to contribute articles to future issues of *Commercial & Business Litigation* by contacting Angelo A. Stio III at stioa@pepperlaw.com. Upcoming newsletter themes and the submission dates for articles are as follows:

SUMMER 2010: Intellectual Property Litigation

Submission Deadline: June 1, 2010

FALL 2010: Construction Litigation

Submission Deadline: September 1, 2010

A standard article is roughly 1,500 words, with all citations in the form of endnotes. The articles should be written in MS Word format and may be submitted by email. You will be notified shortly after your submission if your article was selected for publication.

Thank you for your interest in ABA and the Committee on Commercial & Business Litigation.

Celeste Coco-Ewing

Maria-Vittoria "Giugi" Carminati

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Section of Litigation

Who's In and Who's Out: Two Basic, Unsettled CAFA Issues after the First Five Years

BY SCOTT T. SCHUTTE AND GABRIEL A. CROWSON

When the Class Action Fairness Act (CAFA) was enacted in February 2005, questions abounded on both the plaintiff and defense sides of the bar as to what impact it would have on class-action litigation. Remarkably, two issues that were *not* on the radar screen back then are hot-topic issues today. The first deals with the circumstances under which a case filed pre-CAFA could become removable, and the second deals with the circumstances under which a case that qualified for CAFA removal could be subject to remand to state court based on subsequent events in federal court.

Litigants Continue to Debate CAFA's "Commencement" Language

As most class-action practitioners are aware, CAFA only applies to class actions "commenced" on or after February 17, 2005. Pre-CAFA suits, however, can sometimes be removed under CAFA, if certain events happen in the case, such that a new action is "commenced." Given that five years have passed since CAFA's enactment, one would think that most pre-CAFA class actions would have naturally run their course and thus not be subject to CAFA. A few recent circuit court decisions, however, show that the commencement issue continues to be litigated.

For example, just in the last year, both the Seventh Circuit and Fifth Circuit have issued decisions squarely addressing certain "commencement" issues: *In re Safeco Insurance Co. of America*,¹ *Marshall v. H&R Block Tax Services*,² and *Admiral Insurance Co. v. Abshire*.³

Safeco involved a class action filed in Illinois state court, just seven days before CAFA became law. The plaintiff claimed that Safeco had used a computerized billing system to underpay claims under car insurance policies in breach of the insurance contracts. After four years of litigation, the state court granted the plaintiff's motion for class certification and certified a 14-state class composed of consumers with Safeco insurance policies. Shortly after the class certification order, Safeco removed the case to federal court, arguing that the certification order commenced a new case for purposes of CAFA because it added new claims that did not relate back to the original complaint, citing *Knudsen v. Liberty Mutual Insurance Co. (Knudsen II)*.⁴ According to Safeco, the definition certified in the state court's certification order expanded Safeco's liability from what was alleged in the original complaint.

The district court granted the plaintiff's motion for remand, but the Seventh Circuit granted Safeco's request for a discretionary appeal. The court noted that there was no

dispute that CAFA's minimal diversity jurisdictional requirements were satisfied, namely \$5 million in controversy, at least 100 putative class members, and minimal diversity of citizenship. The determinative issue was whether CAFA was even applicable to the case, given that the plaintiff's original suit was filed before CAFA became law. To that end, the court confirmed that events occurring after the filing of a complaint can commence a new action under CAFA, such as the addition of a new party, a new claim for relief, or some other event that courts would treat as independent for limitations purposes. Applying this general rule, the court concluded that the class definition didn't add any new claims against Safeco, primarily because the claims were related to the main transaction that was the subject of the suit, namely the computerized billing system. And the court found that the original complaint put Safeco on notice that it would be liable for the adjustment of claims handled by that billing system, irrespective of which affiliate wrote the policies. The court thus affirmed the district court's decision to remand the case back to state court.

In *Marshall*, the original complaint had been filed in Madison County Circuit Court in January 2002—a full three years before CAFA reared its head. In August 2003, the state court certified a defendant class and a nearly nationwide class of H&R Block customers. Several years later, in November 2006 (after CAFA), H&R Block moved to decertify the defendant class and the nationwide plaintiff class. The briefing on the motion to decertify was completed in April 2008 and a hearing held in June 2008 (litigation moves quite slowly in Madison County). The state court agreed with H&R Block that the defendant class should be decertified and also that the number of states for the plaintiffs class should be reduced.

H&R Block—the company that asked for the decertification order—then removed to federal court, claiming that the order commenced a new case under CAFA because the only defendant left in the case was now jointly and severally liable for the liability of all the entities that had previously been covered by the defendant class. The district court thought that this was quite a novel commencement argument and granted the plaintiffs' remand motion, but the Seventh Circuit disagreed. The court held that the change in liability didn't relate back to the original complaint and thus commenced a new case under CAFA. According to the court, it was of no moment that the change in liability was the result of something that the defendants had requested. It also didn't matter to the court that there was no formal amendment to the complaint.

The *Abshire* decision issued by the Fifth Circuit involved a suit that had been pending in Louisiana state court for 17 years before the named plaintiffs filed a ninth amended complaint that added class allegations for the first time in the litigation's history. The proposed class included plaintiffs who had at various times filed claims against the defendants. Taking a somewhat restrictive view of prior Fifth Circuit precedent on the commencement issue, the court held that the addition of class allegations did not commence a new suit for purposes of CAFA jurisdiction.

The lesson from *Marshall*, *Safeco*, and *Abshire* is that litigants need to remain on the lookout for CAFA removal possibilities, even for those class actions that were filed before CAFA and still remain pending. In addition, defense lawyers shouldn't cavalierly rule out removal just because the triggering event was something that the defendant caused.

Can the Denial of Class Certification Cause a Court to Lose CAFA Jurisdiction?

Imagine that a defendant successfully removes a putative class-action suit to federal court under CAFA's minimal diversity jurisdiction rules. The trial court denies the plaintiffs' motion to remand, and the parties engage in class certification discovery and briefing. The defendant scores another victory when the district court denies the plaintiffs' motion for class certification. At this point, things are looking pretty good for the defendant, who's thinking that the case is effectively over. Then the district court, however, says "not so fast, my friend," and rules that the denial of class certification eliminated jurisdiction under CAFA and remands the case to state court. This situation was recently before the Seventh Circuit in *Cunningham Charter Corp. v. Learjet, Inc.*⁵

In that case, *Cunningham Charter* sued *Learjet* in Illinois state court, asserting breach of warranty claims, on behalf of itself and all buyers of *Learjets* who had received the same warranty. Not wanting to litigate in state court, *Learjet* removed to federal court under CAFA. Once the case was in federal court, *Cunningham Charter* filed a Rule 23 motion for class certification, which was denied by the district court. The court then ruled that the denial meant that there was no longer CAFA jurisdiction and remanded the suit back to state court. *Learjet* filed a petition for appeal to the Seventh Circuit.

In reversing the district court's remand ruling, the Seventh Circuit held that federal jurisdiction under CAFA doesn't depend on class certification. In doing so, the court noted that CAFA applies "to any class action [within the act's scope] before or after the entry of a class certification order," and that there is no requirement in CAFA that a class action be certified before the case can be removed.⁶ According to the court, the better interpretation of this language is that jurisdiction doesn't hinge on class certification. The court further held that such an interpretation was also a vindication of the general principle that once jurisdiction has been properly

invoked, it's not lost by subsequent developments in the suit. As the court so eloquently put it, a case "should not be shunted between court systems; litigation is not ping-pong."⁷

The *Cunningham* court noted that its decision was consistent with the Eleventh Circuit's decision in *Vega v. T-Mobile USA, Inc.*⁸ *Vega* also held, albeit in a footnote, that once a court has jurisdiction under CAFA, subsequent events (such as the denial of class certification) generally don't divest the court of jurisdiction.

The Seventh Circuit in *Cunningham* did note the existence of a seemingly contrary decision by the First Circuit in *In re TJX Companies Retail Security Breach Litigation*.⁹ In that case, *AmeriFirst Bank* filed a putative class-action suit against *TJX* in federal court in Massachusetts, asserting a variety of state tort and contract claims. The district court dismissed several of the counts from the complaint and sustained certain other claims. The court then denied the plaintiffs' request for class-action status and invited briefing on whether the denial of class status would defeat CAFA subject matter jurisdiction.¹⁰ Soon thereafter, the district court transferred the case to Massachusetts

state court, apparently on the grounds that there was no longer CAFA jurisdiction. The First Circuit issued a detailed opinion that primarily addressed the district court's dismissal of certain claims from the complaint, but the court also discussed briefly the district court's decision to transfer the case to state court. Although the First Circuit vacated the district court's transfer order, the court didn't offer any meaningful analysis as to why the transfer order was vacated. The court did appear to be concerned that the district court had suggested that the transferee court could revisit the district court's prior dismissal rulings, which was likely not permissible under *res judicata* principles.

Given the absence of any material discussion by the First Circuit as to whether the denial of class certification can oust CAFA jurisdiction, there doesn't yet appear to be a mature circuit split on this topic.¹¹ Instead, the Seventh Circuit remains the only circuit court to squarely address this issue, holding that once there is CAFA jurisdiction, subsequent events (such as the denial of class certification) cannot eliminate that jurisdiction.

Litigants need to remain on the lookout for CAFA removal possibilities, even for those class actions that were filed before CAFA and still remain pending.

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The Unremarkable Effect of *Bell Atlantic Corp. v. Twombly* on Pleading Class-Action Complaints

BY DANIEL R. KARON

When it comes to pleading class-action complaints, no case in recent memory has caused plaintiffs' class-action lawyers more hand wringing than *Bell Atlantic Corp. v. Twombly*.¹ But while some pundits insist that *Twombly* heightened Federal Rule 8's civil pleading standard, *Twombly* is only remarkable for its unremarkability. *Twombly* actually did nothing to change Rule 8's standard, and it's had little effect on pleading class-action complaints.

Understanding *Twombly*

Twombly involved a class-action lawsuit brought by telephone and Internet customers against four incumbent local-exchange carriers (ILECs) who control over 90 percent of the U.S. telephone and Internet market.² The plaintiffs alleged that the ILECs made it nearly impossible for the competing local-exchange carriers (CLECs) to enter the ILECs' local service markets. The plaintiffs alleged that the defendants' refusal to compete as CLECs in each other's territories constituted parallel conduct and that competition would have occurred had defendants not conspired to avoid it.³

The district court read the plaintiffs' complaint to allege merely conscious parallelism and dismissed it for failure to state a claim under Section 1 of the Sherman Act. The court

believed that "Plaintiffs ha[d] not alleged facts that suggest[ed] that refraining from competing in other territories as CLECs was contrary to defendants' apparent economic interests, and consequently ha[d] not raised an inference that their actions were the result of a conspiracy."⁴

But the Second Circuit reversed, concluding that the district court had applied an unfairly restrictive pleading standard.⁵ Rightly observing that no heightened pleading standard applies in antitrust cases, the Second Circuit believed that plaintiffs' allegations of solely conscious parallelism did not present "a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts [that required] dismissal."⁶ Rather, the court expressed that an antitrust claimant "must allege only the existence of a conspiracy and a sufficient supporting factual predicate on which that allegation is based,"⁷ adding that "pleading of facts indicating

parallel conduct by the defendants can suffice to state a plausible claim of conspiracy."⁸

The Supreme Court granted certiorari "to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."⁹ Justice Souter, for the majority, began by invoking *Conley v. Gibson*,¹⁰ where the court instructed that Rule 8(a)(2) not only requires a "short and plain statement of the claim showing that the pleader is entitled to relief," but the statement must also "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."¹¹ These "grounds," explained the court, require more than "mere labels and conclusions";¹² they "must be enough to raise a right to relief above the speculative level."¹³

Applying these standards, the court held that properly pleading such a complaint requires including enough factual allegations to suggest that defendants even made an illegal agreement,¹⁴ adding that this plausibility (or believability) requirement at the pleadings "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasoned expectation that discovery will reveal evidence of an illegal agreement . . . even if it strikes a savvy judge that actual proof of those facts is improbable"¹⁵ Accordingly, the court ruled that the plaintiffs' mere allegations of conscious parallelism coupled with a bare allegation of conspiracy as the grounds upon which the plaintiffs' class-action, antitrust complaint rested were insufficient to suggest conspiracy with any believability.¹⁶

In so holding, the court stressed that it didn't intend to upset its historical interpretation and application of Rule 8. "The need at the pleading stage," the court stressed, "for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"¹⁷ The court added that a literal reading of *Conley* would allow a court to sustain a complaint based on "wholly conclusory statement[s]."¹⁸ Accordingly, the court retired *Conley*'s "no set of facts" language, describing it as an "incomplete, negative gloss on an accepted pleading standard: once a claim has been adequately stated, it may be supported by showing any set of facts consistent with the allegations in the complaint."¹⁹ The court instead portrayed *Conley* as "describ[ing] the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."²⁰

Because the court believed nothing contained in the plaintiffs' complaint plausibly, realistically, or believably suggested

The court never intended to raise Rule 8's longstanding requirements.

a conspiracy,²¹ it reversed the Second Circuit's order sustaining plaintiffs' complaint,²² but again stressed that it didn't intend to raise Rule 8's historical notice-pleading standard. "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."²³

Twombly Did Nothing to Change Rule 8's Historical Pleading Standard

At bottom, the *Twombly* court instructed that a complaint's factual allegations must make some practical sense. This believability requirement has always been implicit in and an integral part of Rule 8, and the court merely further articulated what has always been the case. Indeed, even the Second Circuit, when sustaining the plaintiffs' complaint, observed that the complaint must "include conspiracy among the realm of plausible possibilities,"²⁴ believing, like the court, that this plausibility consideration did not raise plaintiffs' pleading requirement. That the court's opinion as to whether the allegations in the plaintiffs' complaint constituted the requisite short and plain statement differed from the Second Circuit's opinion should not be taken to suggest that the court invoked an elevated pleading standard.

To suppress any confusion, less than two weeks after *Twombly* the court repeated that Rule 8(a)(2)'s simple "short and plain statement" requirement provides central guidance for federal courts. In *Erickson v. Pardus*,²⁵ a prisoner filed a *pro se* § 1983 action alleging that prison medical officials had diagnosed him as requiring treatment for hepatitis C but had discontinued his treatment because they suspected he had taken illicit drugs.²⁶ Although the prisoner's complaint alleged that the defendants' conduct had violated his Eighth Amendment rights, the Tenth Circuit affirmed the district court's dismissal order, explaining he had made "only conclusory allegations to the effect that he ha[d] suffered a cognizable independent harm. . . ."²⁷

This dismissal visibly troubled the court. "The holding," the court explained, "departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review."²⁸ The court ruled that the lower courts had erred by concluding that the prisoner's allegations of a cognizable independent harm were "too conclusory,"²⁹ and in doing so invoked *Twombly* and its reiteration of Rule 8(a)(2)'s core pleading requirement.³⁰ The court even highlighted Rule 8(f)'s mandate that "[a]ll pleadings shall be construed as to do substantial justice" and concluded that "[t]he case cannot . . . be dismissed on the ground that petitioner's allegations of harm are too conclusory to put these matters in issue."³¹

So, if not to rework Rule 8's pleading standard, why, then, did the court even accept *Twombly*? It did so to address lower

courts' continued misapplication of this standard. Lower courts have historically heightened this standard, which was the court's reason for considering *Conley*, as well as *Leatherman Tarrant County Narcotics Intelligence & Coordination Unit*³² and *Swierkiewicz v. Sorema, N.A.*³³ Like the atmosphere that preceded these famous cases, the *Twombly* court seemed no less mindful that "federal courts [were] continu[ing] to require heightened pleading in a variety of contexts."³⁴

Given this defiant environment, the court unsurprisingly reinserted itself into the pleading-standard fray, but the reason the court saw fit to dismiss this time rather than sustain the plaintiffs' complaint didn't concern Rule 8 and its accompanying standard, but rather the *allegations* in the plaintiffs' complaint. After reaffirming Rule 8's standard, the court described its belief that the *Twombly* plaintiffs had failed to plead facts sufficient to satisfy this enduring standard. As the court expressed repeatedly (and reiterated in *Erickson*), it never intended to raise Rule 8's longstanding requirements. While the court's similar reaffirmations in *Conley*, *Leatherman*, and *Swierkiewicz* resulted—on the facts of those cases—in orders sustaining the plaintiffs' complaints because those complaints were properly pleaded according to the prevailing and still-current standard, the *Twombly* plaintiffs' complaint, when considered against this same standard, simply did not.

What Does All This Mean When Pleading Class-Action Complaints?

Twombly doesn't mean all that much when it comes to pleading class-action complaints. Rule 8 has always required believability when pleading a complaint. As Justice Souter even more recently explained in *Ashcroft v. Iqbal*,³⁵ where the believability of a complaint's allegations are suspect, such as where the plaintiff alleges "claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel,"³⁶ the complaint continues—as always—to fall short of satisfying Rule 8's liberal standard. As the court earlier observed of complex litigation in *Poller v. Columbia Broadcasting Systems, Inc.*,³⁷ "motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."³⁸ Accordingly, class-action plaintiffs must investigate the facts painstakingly and describe these facts thoughtfully to ensure that the facts believably trigger the elements of the plaintiffs' legal theories. If class-action plaintiffs continue to investigate and sue their cases in this manner, they can expect courts to deny defendants' motions to dismiss, not in spite of *Twombly*, but because of it.

Conclusion

On account of *Twombly*, plaintiffs who plead reasoned, believable, fact-based complaints, as Rule 8 has always required, can reasonably expect courts to sustain them. *Twombly* merely describes the court's latest foray into preventing lower courts from wrongly enhancing Rule 8's pleading standard in the

manner that many commentators, ironically, believe the court itself did. As such, life and litigation march on after *Twombly*, with the court's renewed instruction to apply Rule 8 in its liberal and intended manner.

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Endnotes

1. 550 U.S. 554 (2007).
2. *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 550 U.S. 554 (2007).
3. *Id.* at 178.
4. *Id.* at 188.
5. *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 119 (2d Cir. 2005), *rev'd*, 550 U.S. 554 (2007).
6. *Id.* at 109.
7. *Id.* at 114.
8. *Id.*
9. *Twombly*, 550 U.S. at 553.
10. 355 U.S. 41 (1957).
11. *Id.* at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47).
12. *Id.*
13. *Id.*
14. *Id.* at 556.
15. *Id.*
16. *Id.* at 556–57.
17. *Id.*
18. *Id.* at 561.
19. *Id.* at 563.
20. *Id.*
21. *Id.* 566.
22. *Id.* at 570.
23. *Id.*
24. *Twombly*, 425 F.3d at 111–12.
25. 551 U.S. 89 (2007).
26. *Id.* at 91.
27. *Id.* at 93 (internal quotations omitted).
28. *Id.* at 90.
29. *Id.* at 93.
30. *Id.* at 93–94.
31. *Id.* at 94 (internal quotations omitted).
32. 507 U.S. 163 (1993).
33. 534 U.S. 506 (2002).
34. Comment, *A Phoenix from the Ashes? Heightened Pleading Requirements in Disparate Impact Cases*, 36 Seton Hall L. Rev. 1043 (2006).
35. *Ashcroft v. Iqbal*, U.S., 129 S. Ct. 1937 (2009).
36. *Id.* at 1959 (Souter, J., dissenting).
37. 368 U.S. 464 (1962).
38. *Id.* at 473.

Who's In and Who's Out

(Continued from page 5)

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Endnotes

1. 2009 WL 3380355 (7th Cir. Oct. 22, 2009).
2. 564 F.3d 826 (7th Cir. 2009).
3. 574 F.3d 267 (5th Cir. 2009).
4. 435 F.3d 755 (7th Cir. 2006).
5. F.3d, 2010 WL 199627 (7th Cir. Jan. 22, 2010).
6. *Id.* at *1.
7. *Id.* at *3.
8. 564 F.3d 1256 (11th Cir. 2009).
9. 564 F.3d 489 (1st Cir. 2009).
10. *See In re TJX Cas. Retail Sec. Breach Litig.*, 246 F.R.D. 389 (D. Mass. 2007).
11. The Ninth Circuit recently passed on an opportunity to comment on this issue in *United Steel, Paper & Forestry v. ConocoPhillips Co.*, 2010 WL 22701 (9th Cir. Jan. 6, 2010). In that case, after the defendants removed the class action to federal court under CAFA, the district court denied the plaintiffs' motion for class certification. The district court then found that there was no longer CAFA jurisdiction and remanded to state court. Both sides appealed. The Ninth Circuit held that the district court abused its discretion in denying class certification and thus did not address whether the denial of class certification could eliminate CAFA jurisdiction.

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Class-Action Waivers in Arbitration Agreements: The Evolving Case Law

BY JEREMY GILMAN

From the recent proliferation of consumer class actions has emerged an evolving body of case law addressing this issue: Are class-action waivers in consumer contracts containing arbitration clauses enforceable? If they are, then a plaintiff's putative class action will either be dismissed or stayed pending arbitration. If not, then the putative class action may proceed, and the arbitration clause may be deemed a nullity.

Many variations of the underlying fact pattern are possible, but most cases share certain recurring themes. Consider these two recent cases involving DirecTV, Inc., one from the Northern District of Ohio and one from the Northern District of Georgia, decided less than four months apart in 2009.

First, let's look at the Ohio case, decided July 13, 2009.¹ Two former DirecTV customers filed a putative class action against DirecTV, alleging violations of the Ohio Deceptive Trade Practices Act, the Ohio Consumer Sales Practices Act, and common-law claims. Specifically, the plaintiffs challenged an early cancellation fee DirecTV assessed against them. Their customer agreement with DirecTV contained a broad arbitration clause, as well as a class-action waiver, the latter providing as follows:

Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity . . . If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 is unenforceable.

DirecTV moved to dismiss the action pending arbitration and to compel arbitration. The plaintiffs responded by claiming that they never agreed to the customer agreement, that no viable contract existed, and that even if it did, the arbitration clause was unenforceable under Ohio law because it was both substantively and procedurally unconscionable.

Now shift to Georgia.² The plaintiff brought a putative class action against DirecTV, claiming that it assessed excessive "tax" charges and lease fees. She brought claims for breach of contract, unjust enrichment, and accounting, injunctive, and declaratory relief. DirecTV moved to compel arbitration, citing what was largely the same arbitration clause and class-action waiver as in the Ohio case.

The Northern District of Ohio granted DirecTV's motion, found the class-action waiver not unconscionable, and enforced the arbitration clause.

The Northern District of Georgia denied DirecTV's motion, found the class-action waiver unconscionable, and

nullified the arbitration clause.

Why the diverging opinions?

In the Northern District of Ohio, the plaintiffs' claim that they didn't read the arbitration was unavailing. As for whether that clause was unconscionable, the court noted that "[t]o demonstrate that an arbitration clause is unenforceable, the party asserting unconscionability must prove that the clause is both substantively and procedurally unconscionable under Ohio law." Was it?

As for procedural unconscionability, the court looked to the following factors: (1) was the "arbitration clause . . . presented on a 'take-it-or-leave-it basis'"; (2) was there "a disparity in bargaining power . . . between the parties"; (3) was "the arbitration clause . . . hidden in small print within the document"; and (4) could "one of the parties . . . unilaterally modify the agreement?"

The court found that the arbitration clause was not procedurally unconscionable, noting, among other factors, that under Ohio law, preprinted sales contracts containing arbitration clauses are not necessarily unenforceable, and that adhesion contracts are not per se unconscionable. The court also noted that "satellite television services are not a necessity" and that DirecTV "is not the only provider of those services." Also, mere imbalance in bargaining power will not, by itself, render a contract unenforceable. Instead, there must be evidence that the imbalance coerced or defrauded the "weaker" party into signing the arbitration clause, and the court found no such evidence. As for the type-size of the arbitration clause, it was prominent—not hidden—in the contract. DirecTV's unilateral ability to modify the customer agreement also didn't render the arbitration clause procedurally unconscionable: The plaintiffs could have canceled the contract if dissatisfied with any modification.

As for substantive unconscionability, the court framed the issue like this: Was the contract "commercially reasonable" under Ohio law? The plaintiffs argued that the class-action waiver would "frustrate the remedial purposes of the" Ohio Consumer Sales Practices Act, but the court wasn't persuaded, finding that nothing within that statute precluded arbitration clauses in consumer sales contracts. Also, the arbitration clause did not contain a confidentiality provision, did not impose "prohibitive" arbitration costs on the plaintiffs, and did not seek to limit the recoverability of attorney fees, which were statutorily available to the plaintiffs if they prevailed in the proceeding. Perhaps most importantly, the court failed to find any cases under Ohio law "that stand for the proposition that a class action waiver alone establishes substantive unconscionability in an arbitration clause."

Having found the arbitration clause neither procedurally

nor substantively unconscionable, and that the plaintiffs' dispute fell within its scope, the court granted DirecTV's motion to dismiss and to compel arbitration.

About 15 weeks later, the Northern District of Georgia struck the arbitration clause in the plaintiff's customer agreement with DirecTV, finding the class-action waiver unconscionable under Georgia law. In so holding, the court employed a totality-of-the-circumstances test and found that the class-action waiver "effectively prevents the consumer from asserting statutory or common law claims against the entity with which he or she has a contract." Why? Because if the plaintiff, individually, were to succeed on her claim, she would "stand to recover a very small amount"—too small, relative to the attendant costs, to motivate plaintiffs and their attorneys to pursue these claims in arbitral settings. The net result, according to the court, was that the class-action waiver essentially divested both the plaintiff and the putative class members of any remedy.

Having found the class-action waiver unconscionable, the court found the entire arbitration clause unenforceable and denied DirecTV's motion to compel arbitration.

Two courts, same issue, opposite results. Not surprisingly, appellate courts have been addressing the issue. In *G.R. Homa v. American Express Co.*, the U.S. Court of Appeals for the Third Circuit engaged in a two-part analysis upon holding that a "class-arbitration waiver" in a contract between American Express Centurion Bank and its customers was unconscionable, and therefore unenforceable, under applicable law.³

First, it examined whether the Federal Arbitration Act barred courts from applying state law unconscionability principles to void a class-arbitration waiver, and held that it did not.

Then it engaged in a choice-of-law analysis, which proved to be dispositive in the case. The plaintiff—a New Jersey resident who filed suit in the District of New Jersey and sought certification of a class of New Jersey customers—claimed that New Jersey law applied notwithstanding the Utah choice-of-law provision of the plaintiff's credit card agreement, and that class-arbitration waiver ran afoul of New Jersey public policy in "small-sum cases." American Express, on the other hand, contended that Utah law—which permitted class-arbitration waivers in consumer credit agreements—applied.

The court found that New Jersey law applied because "New Jersey has a materially greater interest than Utah in the enforceability of a class-arbitration waiver that could operate to preclude a New Jersey consumer from relief under the [New Jersey Consumer Fraud Act]."

Having determined that New Jersey, and not Utah, law applied to the dispute, the court held that the class-action waiver was unconscionable, and therefore unenforceable, when "the claims at issue are of such a low value as effectively to preclude relief if decided individually." The court therefore reversed the district court's order compelling arbitration.

Another federal appellate court that has addressed this issue is the First Circuit, which, in *Skirchak v. Dynamics Research*

Corp., held that a class-action waiver of Fair Labor Standards Act claims in a company-imposed, dispute-resolution program was unconscionable under the circumstances of the case, and therefore unenforceable under Massachusetts law.⁴ In so holding, the First Circuit, like the Third Circuit in *Homa*, held that the Federal Arbitration Act did not preclude courts from applying state law unconscionability principles to invalidate arbitration agreements.⁵ The court based its unconscionability holding on a variety of factors specific to the case before it. It found, for example, that the class-action waiver had been "obscured" and lacked "prominence and clarity." An announcement regarding the defendant's new dispute-resolution program had been emailed to employees two days before Thanksgiving, with the program attached, and nothing in that five-line announcement indicated that the attachments modified "the employees' terms of employment or employment contract [or] restricted the employees' rights to a judicial forum [or] that they waived class actions." Additionally, "no response to the e-mail was required, nor were employees asked to acknowledge reading the documents." In short, a confluence of factors led the court to conclude that the class-action waiver in that case was unconscionable, and therefore unenforceable.

The law continues to evolve. The Ninth Circuit, in *Chalk v. T-Mobile USA, Inc.*, found that an arbitration clause with a class-action waiver, while not procedurally unconscionable, was substantively unconscionable, and thereby invalidated the entire arbitration clause.⁶ And on January 4, 2010, the Eleventh Circuit certified questions to the Florida Supreme Court in an effort to resolve the issue of whether the district court correctly granted the defendant's motion to compel arbitration in light of an arbitration clause and class-action waiver contained in the plaintiff's wireless phone contract with Sprint Nextel Corp.⁷ More appellate activity in this area is certain to follow.

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Endnotes

1. *Stachurski v. DirecTV, Inc.*, 642 F. Supp. 2d 758 (N.D. Ohio 2009).
2. *Jones v. DirecTV, Inc.*, F. Supp. 2d, 2009 WL 3646197 (N.D. Ga., Oct. 29, 2009).
3. 558 F.3d 225 (3rd Cir. 2009).
4. 508 F.3d 49 (1st Cir. 2007).
5. In so holding, both courts cited *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).
6. 560 F.3d 1087 (9th Cir. 2009).
7. *Pendergast v. Sprint Nextel Corp.*, —F.3d—, 2010 WL 6745 (11th Cir. Jan. 4, 2010).

The Class Action Fairness Act of 2005 Turns Five: Some Birthday Thoughts

BY ANDREW M. JACOBS

On February 18, 2005, President Bush signed into law a bill aimed at remedying abuses in class-action litigation—the Class Action Fairness Act of 2005 (CAFA). It amended 28 U.S.C. § 1332 to confer upon the federal courts jurisdiction over putative class actions characterized by minimal diversity and brought on behalf of 100 or more plaintiffs in which the amount in controversy exceeds \$5 million, subject to an exception for matters in which two thirds of the plaintiffs are from the same state and sue a defendant in their home state. CAFA passed the Senate on a bipartisan 72–26 vote, and the House, likewise, 279–149. As CAFA reaches its fifth birthday, this is a fitting time to ask whether and to what extent the statute has fulfilled its promise, and how it has changed class-action litigation.

The Origins of, and Arguments over, CAFA

A brief review of CAFA's history and goals is helpful in understanding whether and to what extent it has changed class-action litigation in its first five years. CAFA was a reaction to perceived abuses, including in particular the filing of class actions in a number of famously plaintiff-friendly fora like Madison County, Illinois, in which classes were regularly and easily certified. Critics memorably termed these places “judicial hellholes” and “magic jurisdictions.”

Arguing for a legislative fix for these problems, CAFA proponents deplored sometime inefficiencies of the class action device. Senator Mitch McConnell (R-KY), for example, described one of his staffers as having received a 32-cent check that cost 37 cents to mail, in settlement of a matter in which class counsel received \$7 million.¹ CAFA advocates also argued that federal courts more closely scrutinized class allegations and concluded that federal courts were less likely to certify infirm claims. CAFA advocates maintained that federal courts were more skilled at determining multistate legal issues and were better resourced for the many challenges posed by class-action litigation.

By contrast, CAFA opponents, concerned with impeding ordinary citizens' access to the courts, charged that the act would close the doors of justice and argued that state courts were generally well suited to resolving class actions. Some opponents argued that the interplay between the state and federal court systems would create inefficient jurisdictional litigation. Others still contended that class actions would swamp federal courts.

Hellholes Freeze Over

As one CAFA supporter, Representative Keller, pointedly remarked in a floor debate over CAFA, whereas “The Bridges

of Madison County” was a love story, “the Judges of Madison County’ would be a horror flick.”² However, whether one calls them magic jurisdictions, magnet jurisdictions, or, most colorfully, hellholes, there is no dispute that Representative Keller’s horror movie is over, as CAFA has federalized the great bulk of class actions. Even staunch opponents of the plaintiffs’ class-action bar like the American Tort Reform Association (ATRA) concede that Madison County is no longer a judicial hellhole, having dropped Madison County from its annual ranking of said hellholes in 2007.³

There is relatively little dispute that there were abuses of the class action in some of the jurisdictions of which CAFA proponents complained. As Professor Richard Marcus has written, “Even the most vehement critics of CAFA concede that at least some of the examples its proponents paraded were embarrassments.”⁴ President

Obama, who voted for CAFA in one of his first Senate votes, said as much at the time, praising the class-action device while adding the counterpoint that “there is overwhelming evidence that there are abuses in the class action system that should be addressed.”⁵ The question seems not to be whether curtailing the extreme abuses was worthwhile—it was—but whether it created other unwelcome consequences.

Does Federalizing Class Action Mean the Doors to the Courthouse Are Closed?

CAFA's effects are not well examined at this early point, complicating attempt to look back at the first five years of the statute's operation. Yet the Federal Judicial Center (FJC) has conducted some studies that shed light on the critical question of whether CAFA has closed the doors of the courthouse to class-action litigants. Studying the rate at which class actions were filed in 88 federal district courts from the last six months of 2001 to the first six months of 2007, the FJC's Emery Lee and Thomas Willging found a massive increase in the number of class actions filed in federal court in the post-CAFA period.⁶ This appears to indicate that the mere fact of the federal forum is not a deterrent to proceeding with a class action. However, this observation awaits further analysis, in

CAFA advocates maintained that federal courts were more skilled at determining multistate legal issues.

particular, research comparing the aggregate number of filings among state and federal court, to determine whether CAFA may have reduced the total number of class-action filings. The continued viability of single-state class actions, especially in large states like California with a very sophisticated plaintiffs' class-action bar, however, means that the state-court class action remains an important part of our legal culture.

CAFA's bottom line is that the doors to the courthouse aren't closed; rather, the federal judiciary has been substituted in a huge number of class actions. As is true of most evaluations of CAFA, the question of whether that is good or bad depends on one's view of the competencies or aggregate institutional biases of the federal judiciary, particularly the portion of that judiciary before whom one litigates. I wouldn't presume to generalize as to the gentle reader's view, and thus proceed no further.

Forum Shopping

It's all well and fine to point out that the data are incomplete regarding whether CAFA has reduced overall class-action filings and to point out that the actions filed are largely displaced from the state into the federal system. But where in the federal system do they go? Has class-action forum shopping, one of the principal aims of CAFA, been eradicated? The answer is superficially no, but in a deeper sense, yes.

First, the "no" answer: One would expect that astute plaintiffs' counsel would attempt to file class actions in federal district courts within circuits whose case law makes district judges more likely to certify classes (and conversely, to avoid circuits with case law less friendly to certification.) Professor John Coffee of Columbia, a leading authority on the law of class action, has compiled data suggesting that this is so, as the Second, Third, and Ninth Circuits (those circuits with case law friendlier to class certification than some) experienced large increases in diversity filings in the post-CAFA period.⁷ Somewhat against the trend, the Fifth Circuit (with tougher law concerning certification than the other circuits) saw a greater number of class actions as well, although the FJC's Lee and Willging attribute that rise to one local factor: the mass of Hurricane Katrina litigation.⁸

As to whether forum selection as targeted by CAFA has been eliminated in a deeper sense, I would answer "yes." The question is not whether rational counsel presented with choices of forum chooses the friendlier. Of course they do. The deeper question is whether the difference among circuits is within the range of ordinary and expected variation among courts, such that the choice of filing is not in actuality, nor is it perceived as, gaming the system. Professor Coffee's data, while correct, suggests that CAFA has succeeded. Class actions, like any other market-driven decision, will flow where rationality takes them, but the variation in certification law among circuits is a necessary and healthy feature of the evolution of federal law, subject to the Supreme Court's oversight and correction.

A Burst of Jurisdictional Litigation

CAFA opponents also foresaw a wave of wasteful jurisdictional litigation. Whether this criticism was valid again depends upon one's view of CAFA in the first place. Courts from time to time inveigh against the particular uselessness of jurisdictional litigation; one Georgia federal court, writing in a pre-CAFA class-action opinion, called it the "most wasteful type of litigation."⁹ And yes, jurisdictional litigation has (predictably) followed the enactment of CAFA. Scott Schutte and Gabriel Crowson's related piece in this issue sets out some of the interesting eddies in that river. But "wasteful"? Litigation over which cases belong in federal court and which do not is what economists would call a transaction cost of changing some of the rules of the system. Whether that transaction cost is wasteful is largely a function of whether one favored CAFA in the first place. If not, then the jurisdictional litigation is, of course, more harmful than good. If, however, one agrees with Congress that the changes were needed, then the answer lies in the negative. Data from CAFA's early years suggests that plaintiffs' counsel are often acting to minimize the extent of jurisdictional litigation by filing first in federal court,¹⁰ rather than making defense counsel remove to federal court with an ensuing fight over venue.

Filing first in federal court is in the plaintiffs' counsel's post-CAFA interest for two reasons. First, bigger (more than \$5 million) and more geographically diverse (two or more states) cases are federal under CAFA, and the plaintiffs' counsel has an incentive to plead these federal prerequisites, all things being equal. Second, whether trial or settlement is the plaintiff's goal, remand and removal litigation doesn't advance either goal. That the plaintiffs' counsel are in large numbers filing federally bodes well for minimizing the wasteful litigation that CAFA opponents feared. While there are examples of cases in which considerable time has been spent in removal and remand practice, I believe that as a general matter, the statistics showing the mass of federal-first filings show that the waste CAFA opponents feared has not materialized.

Conclusion

Five years into CAFA, there are some things we know. The former reality of "magnet" or "magic" state court jurisdictions into which putative class actions flowed is no more. The fear that CAFA would close the doors of the courthouse to the individual litigant seems either overstated or entirely incorrect. Federal court diversity filings are substantially up, especially within circuits perceived to have more favorable law concerning certification. The act has, predictably, spawned a significant amount of jurisdictional litigation. One's views of many of these points are likely driven by one's own commitments in litigation or one's views of the state versus federal systems. It's clear that this act, signed by President Bush and favored by President Obama, has changed class action, in ways we will come to understand better in the years to come.

Endnotes

1. See 151 Cong. Rec. S1076-01, 2005 WL 292034 (Feb. 8, 2005).
2. 151 Cong. Rec. H723-01, 2005 WL 387992 (Feb. 17, 2005) (statement of Rep. Keller).
3. Judicial Hellholes (2009), available at www.atra.org/reports/hellholes.
4. Richard Marcus, *Assessing CAFA's Stated Jurisdictional Policy*, U. Penn. L. Rev. 1805 (2008).
5. Cong. Rec. S1332-02, 2005 WL 350512, at *1333 (Feb. 14, 2005).

6. Emery G. Lee III and Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rights, Federal Judicial Center, April 2008, at 1–2.

7. John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years, 2002–2007*, 8 Class Action Litig. Report, S-787, S-819 (Oct. 26, 2007).

8. See Emery G. Lee III and Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 2008 U. Penn. L. Rev. 1723, 1761.

9. *Poore v. American-Amicable Life Ins. Co. of Texas*, 125 F. Supp. 2d 1378, 1380 (S.D. Ga. 2000) (citation omitted).

10. See Lee, *supra* note 8.



Critical Decision Points in the Life of a Typical Class-Action Case

(Continued from page 1)

as a plaintiff's knowledge, reliance, or individual damages, it's more likely that a court will deny class certification because common issues in the case will not predominate over individual issues.

Another important factor to consider in deciding whether to file a case as a class action is the court in which the case will be litigated. Most experienced class-action lawyers will tell you that the requirements for class certification under Rule 23 are not always applied in a uniform manner by the various federal district courts and appellate courts. A lawyer considering whether to file a class-action case in a particular court should review the case law from that jurisdiction, including the controlling circuit court, to see if it tends to favor or disfavor class certification in cases involving similar facts and claims.

Assuming that a case is appropriate for class certification because the requirements of Rule 23 are likely to be met, counsel should still consider whether the potential advantages of a class action outweigh the countervailing disadvantages and risks.

Advantages of a Class Action

Class actions have several advantages over individual lawsuits. Class actions can conserve the resources of the parties and the court by permitting multiple plaintiffs to litigate related claims more efficiently and economically than individual lawsuits. In addition, where a defendant has engaged in a pattern of systematic wrongdoing, a class action can provide a group remedy without the cost and delay of separate lawsuits and the associated risk of inconsistent judgments. Finally, lawyers in a

successful class action can usually collect their legal fees and expenses under either a statutory right of recovery or a "common fund recovery" theory.¹ This can be a substantial incentive for the plaintiffs' lawyers to bring the claims of multiple plaintiffs in a class action.

Disadvantages of a Class Action

On the other hand, filing a class action poses a number of burdens and risks on plaintiffs and their counsel. The costs and effort required to manage a large-scale class-action case can be enormous. These include things such as identifying class members, hiring experts, sending out class notices, and coordinating complex litigation with multiple parties and claims. And because class actions typically expose defendants to large damage awards or pervasive injunctive relief, they can also provoke aggressive tactics by the defendants, including massive discovery requests, motions and procedures to defeat certification, appeals to challenge adverse rulings, and other efforts aimed at making it as difficult and expensive as possible for the plaintiff to proceed to trial. Courts are usually unwilling to award interim attorney fees and costs to the plaintiffs. Thus, in most cases, the class-action lawyers must make significant cash advances just to prepare the case for the class certification hearing and eventual trial of the case.

The plaintiffs' counsel should also consider that a class-action complaint, once filed, makes the named plaintiffs and their attorneys fiduciaries for all members of the putative class, even before certification. This can result in conflict situations for counsel if the individual interests of the named plaintiffs are antagonistic to other members of the putative class. Class actions also tend to drag on and can be difficult to settle. They cannot be settled or dismissed without notice to the class and formal court approval. In addition, even if the class claims are successful, either by a settlement or at trial,

the attorney fees are always subject to court approval, and courts often reduce fee requests substantially.

Should I Retain a Legal Expert on the Requirements of Rule 23?

Once a class-action case has been filed, counsel for both the plaintiffs and the defendants should consider whether they need expert witnesses to help support or defeat the motion for class certification. Law professors, retired judges, and other legal scholars are often designated as experts by both plaintiffs and defendants to opine on whether the requirements of Rule 23, as applied to the facts in a particular case, have or have not been met. A well-known legal expert can be very influential in persuading a judge to grant or deny a motion for class certification. There are, however, costs and certain risks that should be considered before hiring a legal expert to testify at the class certification stage.

Federal Rule of Evidence 702 allows the court to consider the opinion testimony from an expert if the person's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . ." At the class certification stage in a case, the judge is the trier of fact who will determine whether the requirements of Rule 23 have been met. Many courts have excluded expert opinions that provide legal conclusions because such opinions don't relate to disputed factual issues

and they infringe on the trial judge's role to determine the law.² As stated by the Fifth Circuit in *Sales v. Carpenter*, an expert may not offer opinions that simply reiterate what "the lawyer can offer in argument."³ Thus, there is a significant risk that a legal expert who offers opinions on the applicability of Rule 23 to the facts in the case will not be considered by the court.

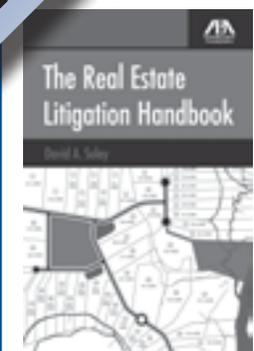
Law professors and other legal experts, such as retired judges, typically charge high fees if retained as expert witnesses. Counsel should carefully consider the benefits of having an expert on the requirements of Rule 23 and should weigh those benefits against the cost of hiring the expert and the risk that his or her opinions may be excluded by the trial judge.

What Scope of Discovery Should I Seek Prior to Class Certification?

Another issue that counsel needs to consider once a class-action case has been filed is the scope of discovery that should be sought prior to the class certification hearing. Discovery typically needed by the plaintiffs on the threshold issues of certification includes whether a defined class can be ascertained, the existence of other lawsuits, whether damages can be calculated using the defendants' own business records, and other factors bearing on certification. Defendants usually seek to depose the named plaintiffs and conduct discovery on issues such as whether the plaintiff would be an "adequate" class representative, the "typicality" of the plaintiff's claims, and

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other prerequisites for certification of the purported class.

Care should be given in tailoring precertification discovery requests so that the information requested is relevant to the class allegations. Many courts have adopted the concept that precertification discovery should be limited to certification-related issues rather than broad merits-related issues.⁴ This concept is also discussed in the advisory committee's notes to the 2003 amendments to Rule 23.⁵ These limitations protect not only class-action defendants, but also putative class-action plaintiffs from abusive discovery. Plaintiffs also benefit by avoiding extensive and time-consuming discovery that can delay the court from deciding whether to certify the class. And while there may be a perceived advantage in forcing the other side into expensive precertification discovery, if a class is not certified, much of the discovery may be useless. The costs expended by both defendants and plaintiffs in producing and reviewing needless discovery may make it more difficult to settle the individual plaintiff's claims.

Should I Enter into a Class-Action Settlement?

In most class-action cases, the parties will at some point consider the possibility of a settlement. As with the settlement of any litigation, the settlement of a class action can provide the benefits of peace and predictability within a reasonable amount of time and avoid the costs and uncertainties of further litigation. A class settlement can also be of additional value to the defendant, because a final class-action judgment binds all persons belonging to the certified class who did not opt out, as explained below, so long as their interests were adequately represented.⁶

However, class-action settlements do pose certain disadvantages and risks, which should be considered by counsel for both the plaintiffs and the defendants. The 2003 changes to Rule 23 and the Class Action Fairness Act of 2005 (CAFA) make class-action settlements very visible and public. In actions subject to CAFA, a settling defendant must serve various federal and state officials with notice of the proposed settlement, and the settlement may not be approved by the court until 90 days after such notice is served.⁷ This special notice to government officials under CAFA is in addition to the notices that must be provided to class members under Rule 23. Because of this visibility, many people may examine the details of the class settlement and have an opportunity to criticize, object, and opt out of the class. If a significant number of class members opt out of the class, this can greatly diminish the value of the settlement for the defendant because "opt out" class members aren't bound by the final class action judgment and are free to bring their own separate actions.

Another risk is that the court won't approve the settlement agreement negotiated between the parties. For example, a court is likely to reject a class settlement if it feels that the plaintiffs' counsel was willing to accept a relatively small recovery for the class, such as coupons for future purchases, in exchange for a large attorney fee award.⁸ This is especially

true for classes certified for settlement early in the case, which are often scrutinized even more closely by the courts.⁹ A class sought solely for settlement purposes may also be rejected by the court if it doesn't pass muster under Rule 23, just as in the case of a disputed motion for class certification.

Conclusion

Every class action is unique, and each has its own challenges. In many instances, these challenges are related to the procedural requirements of Rule 23, CAFA, and the case law interpreting them. Though class actions can be complicated procedurally, it's imperative that counsel not lose sight of the big picture while analyzing the critical decision points in a class-action case.

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Endnotes

1. Under the "common fund" doctrine, a litigant or lawyer who recovers a common fund for the benefit of persons other than him- or herself or his or her client is entitled to a reasonable attorney fee from the fund as a whole. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

2. *See, e.g., Goodman v. Harris County*, 571 F.3d 388, 399 (5th Cir. 2009) ("[A]n expert may never render conclusions of law."); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (stating that at least eight circuit courts have held that the Federal Rules of Evidence prohibit a witness from testifying as to applicable principles of law); *Teague v. Deloitte, Haskins & Sells*, 35 F.3d 978, 993 fn. 21 (4th Cir. 1994) ("Expert testimony as to the proper interpretation of applicable domestic law is inadmissible.").

3. *Sales v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992).

4. *See, e.g., Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1570-71 (11th Cir. 1992); *Stewart v. Winter*, 669 F.2d 328, 331-32 (5th Cir. 1982).

5. The advisory committee's note explains: "[I]t is appropriate to conduct controlled discovery into the 'merits,' limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification decision without forcing an artificial and ultimately wasteful division between 'certification discovery' and 'merits discovery.'"

6. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 n.6 (9th Cir. 2000).

7. 28 U.S.C. § 1715(b) and (d).

8. *See Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 283 (7th Cir. 2002).

9. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

Becoming the Go-To Lawyer

BY JENNIFER EVANS-MORRIS

*I*t's a late night. The partner rubs her eyes and tries to think if there's some way around the problem she's facing. She vaguely remembers the issues, but she learned them so long ago that all she has are faint strings tugging at the back of her mind. Just then, she remembers seeing a note in the firm bulletin a few months back that might apply. She digs through her office, and sure enough, under a stack of pleadings tucked in the corner, she finds the bulletin. She scans the contents and finds the blurb she is looking for. After a quick read, she thinks to herself, "It's not what I'm looking for, but it's close. Who wrote this?" She glances at the associate's name and remembers one of her partners mentioning how skilled the associate had become at this one niche in the law. With a smile, she begins drafting an email. This young "go-to" lawyer may save her and her client a tremendous amount of time and effort. She relaxes in her chair, feeling a small amount of relief. One small hurdle may be solved. She leans forward and begins working on the next one.

Being a young lawyer has always been difficult, but the current economy has upped the ante for all of us. Young lawyers have even more pressure to distinguish themselves and

become experts in a specific field—all while learning their craft and attempting to develop business. Looking around at the more senior lawyers with established reputations both inside and outside of their firms can be overwhelming. It's easy to question whether you will ever achieve the type of knowledge base these veterans possess.

I'm frequently reminded of the phrase "she has forgotten more

than you will ever learn." And yet, young lawyers continue to be sought in law schools, continue to obtain jobs in the market, and continue to be entrusted with important legal work. So, what can you do to be viable in this economy? The answer is simple—become the Go-To Lawyer.

Becoming a Go-To Lawyer doesn't mean becoming a nationally renowned expert in the intricacies of securities or some other equally fascinating area of the law (although that would be nice at some point). Instead, a young lawyer can become an expert within a firm by becoming the person who knows the most about a certain topic, motion practice, or statute—no matter how mundane. In fact, this strategy is particularly successful in areas of the law that are more detailed or less interesting to other lawyers. For example, understanding choice of law or jurisdictional issues backwards

and forwards can make you a Go-To Lawyer for any number of cases. Being the person in your firm or circle of colleagues who is most familiar with a new statute or regulation, such as the American Recovery and Reinvestment Act of 2009, can make you a Go-To Lawyer. And, of course, knowing the quirks of class actions better than anyone can definitely make you a Go-To Lawyer.

So, what's the best way to become a Go-To lawyer? There are several steps you can take. First, become the expert by being right, every time. You can do this by seeking out others in the firm who have worked on your issue and consolidating their knowledge for your own use. You can also keep up to date with current law by reviewing the leading journals that address a particular topic and by following new cases on the topic. You should also attend relevant CLEs. Once you have the knowledge base, the next step in becoming a Go-To Lawyer should be developing and expanding your reputation, both inside and outside of the firm. You can start by sending case updates to members of your firm. You can volunteer to write a piece for your internal bulletin or client newsletters. Ideally, you should write an article about the topic. You might also seek opportunities to speak about the topic—either internally or at CLEs, where you can educate other young lawyers about the topic. Finally, once you become the expert and develop your reputation as someone with knowledge on a particular topic, be ready for calls for help. Be responsive and timely, and anticipate other relevant issues even if you're not asked about them.

This issue provides you with yet another opportunity to become a Go-To Lawyer. Ask most lawyers about class-action arbitrability waivers, and the accuracy of the answers may directly depend on how long the respondent has been out of law school. Many of us learned about class actions for the first time, in passing, in a procedural class. You can bet that's true for most of those with whom you work as well. Yet, our business clients deal with class-action issues on a daily basis. Becoming an expert on each or any of the issues surrounding class actions, their availability, and their effectiveness can make you not only the Go-To Lawyer in your firm, but also for your clients. For example, do you know when a class-action lawsuit is available under the Federal Arbitration Act (FAA)? Or the meaning of the Class Action Fairness Act (CAFA)? If so, then maybe you are the Go-To Lawyer for class actions in federal court. Of course, you have to be right (which takes some research time). I encourage you to take the time to read the articles in this issue carefully. Identify areas of putative class actions practice with which you are unfamiliar—and, more importantly, those with which your colleagues are unfamiliar—and educate yourself about them. Once you have the knowledge, distribute brief

Keep up to date with current law by reviewing the leading journals.

summaries of relevant cases on the topic or find opportunities to speak about the issue. Put the word out that you are comfortable with the topic, and before you know it, you'll be the Go-To Lawyer at your firm, and some young lawyer down the road might just look at you and wonder if it will ever be possible to obtain that same level of expertise.

There isn't a lot we can do to improve the economy or

change how it's affecting our careers. Becoming a Go-To Lawyer is something we can do now to ensure future success when that tired partner highlighted above is forced to make difficult decisions.

Jennifer Evans-Morris is president-elect of the Texas Young Lawyers Association (TYLA).



The Availability of Class-Action Arbitrations under the Federal Arbitration Act

(Continued from page 1)

The parties thereafter agreed to submit the question of class arbitrability in accordance with the AAA Supplementary Rules for Class Arbitration. Supplementary Rule 3 empowers an arbitrator to determine “whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.”⁶ Importantly, Stolt-Nielsen’s standard contracts did not explicitly address class arbitration.

AnimalFeeds argued that class arbitration was allowed because it was not specifically prohibited, citing authorities that held that the “default rule” should favor arbitration in light of silence on the issue. Stolt-Nielsen’s position, however, was that silence could never equal consent. Because arbitration is peculiarly a matter of mutual agreement, there must be explicit language or evidence that the parties intended to submit themselves to class arbitration. Without one or the other, the arbitrators were without authority to order such a proceeding.⁷

The arbitrators rejected Stolt-Nielsen’s arguments. Relying on the fact that every other arbitration award decided under Supplementary Rule 3 interpreted a silent contract as one permitting class arbitration, the arbitrators determined that the agreements at issue should be treated no differently.

Stolt-Nielsen filed a petition to vacate the arbitrators’ decision.⁸ The district court agreed with Stolt-Nielsen and vacated the arbitration award, holding that the arbitrators had manifestly disregarded the applicable law precluding class arbitrations. Although AnimalFeeds argued to the district court that the panel had rightly decided that the Supreme Court’s 2003 decision in *Bazzele* had resolved the issue, the district court disagreed, opining that all the *Bazzele* Court had done was order a remand in that particular case to see whether those particular parties had contemplated and (implicitly) agreed to submit to class arbitration.⁹

Alas, the pendulum had not yet finished swinging. On further appeal, the Second Circuit found error on the ground that the district court had improperly applied Second Circuit precedent regarding application of the “manifest disregard”

theory, and it had failed to give the panel’s award the deference that arbitral decisions are due.¹⁰

Thus, then, was the issue teed up for the Supreme Court.

Supreme Court Proceedings

The Supreme Court granted certiorari to decide “[w]hether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act.” This is the question that arguably eluded the Court in *Bazzele*, but was believed to be well positioned in *Stolt-Nielsen*, due to the universal agreement that the arbitration agreement was “silent” on the point. However, AnimalFeeds spent a large part of its brief arguing that, in fact, the Court should not take up the substantive question, because class arbitrability had been delegated to the arbitrators, and their decision was entitled to only superficial judicial review. Based on the questions raised at oral argument, AnimalFeeds’s threshold question of reviewability might have found fertile ground. If so, then the Court will likely never answer the certified question; instead, whether class arbitration is permissible in the face of contractual “silence” will be decided on a case-by-case basis. If not, the Court will finally get to tell us what it thinks of class arbitration.

Hurdling the Threshold Question of Reviewability

As we all know, arbitration is built for speed. That means that judicial review of questions that have been given over to arbitration is designed to be cursory, dedicated to a narrowly circumscribed punch list. Thus, it was no surprise that Stolt-Nielsen’s counsel had to immediately field a flurry of questions reframing the central issue into a *Bazzele*-like scenario. The questions went something like this: If the arbitrator is given the job of deciding whether class arbitrations are permissible under the parties’ agreement, and he’s found that they are (either because of an explicit agreement or an implicit one), then what right does a court have to second-guess that decision, given the great deference that arbitral awards deserve?¹¹ This is a significant hurdle to overcome, because if the decision of whether or not a class is authorized belongs to the arbitrator, then a party’s ability to gain judicial review of that decision—no matter how wrongly it might be decided—immediately shrinks from difficult to nigh impossible. In this

instance, *who* decides the question (arbitrator or court) may be the death knell for the answer to the question.

Does Silence Equal Consent?

If the Court gets over the threshold question, it likely means victory for Stolt-Nielsen. Its theory is that the arbitrators never had the right to determine the availability of class arbitration because the agreement didn't explicitly provide for it, the evidence didn't establish an implicit agreement to permit it, and—this is the key—in the event of no explicit or implicit agreement to allow class arbitrations, the “default” rule should be that there is no agreement to submit the issue to class arbitration. After all, the central purpose of the FAA is to ensure that parties' private agreements to arbitrate are enforced according to their terms. It would be wrong to force a party to participate in class-action arbitration if it had never consented to it. Indeed, it goes against the very core of the FAA. Arbitration “is a matter of consent, not coercion.”¹² But it's not a stretch to say that applying a default rule equating silence with consent satisfies that requirement. Permitting the arbitrator to decide whether the default rule is triggered will effectively oust the courts from ever deciding what the default rule should be and when it should be applied.

To further complicate matters, there are a number of policy considerations artfully outlined by both Stolt-Nielsen and AnimalFeeds as to why class arbitration should, or should not, be the default position. For example, class proceedings can involve exponentially greater exposure to liability than a single claim. When coupled with a potentially unreviewable arbitration decision, a company may find itself unwittingly involved in “bet the company” litigation. On the other hand, class arbitration, like a class action in court, avoids inefficiencies and potential inconsistencies in the resolution of multiple, separate disputes raising identical issues, and might permit wronged parties to recover in a situation where their damages are too slight to proceed with a costly arbitration on their own dime. But, the policy issues are relatively equally weighed in *Stolt-Nielsen* and are not likely to be the driving force behind the Court's ultimate resolution of the appeal. If they are, it will be *sub rosa*.

Conclusion

Stolt-Nielsen provides the Supreme Court with an excellent vehicle to, first, opine on the proper delegation of questions concerning arbitrability of disputes. Although this particular appeal concerns class arbitration, the Court's decision will affect arbitrators' ability to interpret less-than-clear arbitration agreements. Second, and more importantly, the Court will likely resolve the outstanding questions regarding availability of class arbitration under the FAA. The Court will either adopt a rule providing that explicit language or specific evidence must support the claim that a party has consented to such a procedure, or it will delegate the question to arbitrators

who will make that determination as a matter of fact rather than law, and on a case-by-case basis. Whichever way the Court decides, it should be a fascinating decision.

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Editors' note: At the time this newsletter went to print, the Supreme Court rendered its decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S.—, No. 08-1198. The Court, in a 5–3 decision with Justice Alito writing for the majority, held that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” *Id.* at 20 (emphasis in original). The parties' “mere silence on the issue of class-action arbitration” does not “constitute consent to resolve their disputes in class proceedings.” *Id.* at 23.

Endnotes

1. Docket No. 08-1198, decision below at 548 F.3d 85 (2d Cir. 2008). A transcript of the oral argument is available at http://www.scotuswiki.com/index.php?title=Stolt-Nielsen_S.A._%2C_et_al._v._AnimalFeeds_International_Corp.#Oral_Argument.
2. 539 U.S. 444 (2003).
3. Even so, the Supreme Court's remand order was interpreted by most to mean that the Court tacitly approved of the idea of class arbitrations, or it wouldn't have let the action proceed.
4. 548 F.3d at 88.
5. *Id.* at 88 & n. 1 (citing *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 183 (2d Cir. 2004)).
6. *Id.* (quoting Supp. Rules). Supplementary Rule 3 was designed to create a procedure to resolve the question whether a particular arbitration clause permits arbitration to proceed on behalf of or against a class. The amicus curiae brief submitted by the AAA in *Stolt-Nielsen* contains a wonderful explanation of this and the other new supplementary class procedures. See Brief of the AAA in Support of Neither Party, available at http://www.scotuswiki.com/index.php?title=Stolt-Nielsen_S.A._v._AnimalFeeds_International_Corp.#Amicus_Briefs.
7. 548 F.3d at 90.
8. *Id.*
9. See 435 F. Supp. 2d 382, 384 (S.D.N.Y. 2006).
10. *Id.*
11. Justice Breyer was especially perplexed by the idea that the “silence” of the contract was being touted as the basis on which the courts could intervene. To his way of thinking, many times a contract doesn't explicitly provide for something that the parties later dispute. Someone then needs to decide what the parties intended, in light of the document and any relevant parol evidence; the decision might be that the parties agreed to “X” despite the absence of explicit language or, to the contrary, that the parties did not agree to “X.” But the answer has to be one or the other—“silence” is not a third option.
12. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

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