Class Action

EXECUTIVE SUMMARY

The number of class action cases has grown significantly in the past decade, with filings increasing by 81 percent in state courts between 2000 and 2005, according to the Judicial Council of California. Decisions resulting from these cases are beginning to provide guidance on various aspects of class action procedure and conduct. In April, for example, an en banc panel of the Ninth Circuit issued its decision in the *Dukes v. Walmart* employment discrimination case affirming that a class action can only be certified after a "rigorous analysis" that could require trial courts to make factual determinations based on the underlying merits of the case. Practitioners are also grappling with what appears to be conflicting class certification determinations in the California Supreme Court opinion in *In re: Tobacco II* and the Second District Court of Appeal holding in *Cohen v. DirecTV.*

Our panel of experts discusses the impacts of these decisions, as well as legal issues related to restitution, class standing, and reliance. They are Jeff Scott of Greenberg Traurig; Brian Kabateck of Kabateck Brown Kellner; Brad Seiling of Manatt, Phelps & Phillips; and Steven A. Ellis of Sidley Austin. The roundtable was moderated by *California Lawyer* and reported by Laurie Schmidt of Barkley Court Reporters.

MODERATOR: How has the Ninth Circuit decision in *Dukes v. Wal-Mart* affected class actions?

ELLIS: *Dukes v. Wal-Mart Stores, Inc.* (603 F.3d 571 (9th Cir. 2010) (en banc)), involved a number of issues that are important to class action litigation, including whether district courts, in determining whether to certify a class, can look at the merits of the dispute and resolve disputed factual issues. The other important issue that the court addressed is the dividing line between Rules 23(b)(2) class actions, which are primarily for injunctive relief, and Rule 23(b)(3) class actions, which are primarily for monetary relief. The court weighed in on an existing circuit split regarding where the line is drawn between Rule 23(b)(2) and (b)(3) class actions when plaintiffs are seeking both injunctive and monetary relief. It's an important decision that will be argued about, cited, and relied upon.

KABATECK: I have seen a trend where judges are looking beyond whether the case should be certified to whether the merits of the case are sufficient to sustain the underlying theory. But the *Dukes* court seems to say that while they expect trial courts to conduct a "rigorous analysis" to ensure that Rule 23 of the Federal Rules of Civil Procedure requirements has been satisfied, they don't expect certification to be based on a full-blown trial on the merits.

SEILING: *Dukes* is not the last word; it will likely go up to the U.S. Supreme Court. On the merits issue, the courts are all over the map as to whether merits should be considered or not. There is California case law that says that certification is a procedural question, and merits shouldn't be considered. That's really a legal fiction; it's impossible for a court to look at a motion for class certification and not address the merits of the claim to some extent. No one wants to have a class action proceed on a claim that goes nowhere.

SCOTT: I don't see how you can get into a class certification analysis without figuring out what the plaintiffs ultimately are going to be required to prove in order to win their case. That doesn't mean they have to actually prove the case, but you have to look at the elements of the claims. Where I see this language being misused is when we start to look at class representatives' standing because Prop. 64 case law makes it clear that the individual plaintiffs must have standing, but it provides little guidance on how you establish standing without getting into the merits and deciding, for example, what may be considered material information.

ELLIS: Rule 23, the *Dukes* rule, or whatever rule we end up with after Supreme Court review, is supposed to apply to all class actions. But courts may apply Rule 23 differently, depending on the underlying substantive issues being litigated. For example, in antitrust class actions, there has recently been a move toward the full development of expert testimony and cross-examination of experts prior to class certification. That may be very different from what courts expect in employment or consumer class actions. And so, once we have the rules set as to what a "rigorous analysis" should be, we'll then have a new round of arguments regarding what that rigorous analysis should be in different class action contexts.

SEILING: A difficulty of creating rigid rules for class certification is that it is such a fundamentally fact-specific analysis. From the defense side, class certification is completely different than everything else we do. When we're filing a motion to dismiss or a motion for summary judgment, we're trying to keep everything as narrow as possible. When we oppose class certification, we're making every argument to explain to the court that this is a complicated question. In some senses, defendants are in a better position without any rigid rules because it allows us to make flexible arguments.

SCOTT: Still, there needs to be more guidance about the evidentiary issues. Courts need to know how deeply they should look at the evidence to decide if an element has been met.

KABATECK: Class certification is an important step, but it is just one step, at least for the defense. We have seen many summary judgment motions granted post-certification lately. And it's possible to

ROUNDTABLE

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PARTICIPANTS

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BRIAN KABATECK is the managing partner of Los Angeles-based Kabateck Brown Kellner and a plaintiff-only mass torts and consumer class action attorney. He has won more than $1 billion for his clients in state and federal courts, bringing actions against Fortune 500 companies including Google and Eli Lilly, and the first-ever cases involving stolen bank accounts and unpaid insurance claims arising from the 1915 Armenian Genocide. He acts as lead counsel for the NAACP in suing leading American financial institutions for discriminatory mortgage lending practices. **bsk@kbklawyers.com**

BRAD SEILING is a partner in the Los Angeles office of Manatt, Phelps & Phillips and serves as co-chair of the firm's Class Action Practice Group. His practice focuses on defense of consumer class action lawsuits in state and federal courts at the trial and appellate level. He has defended class actions filed against clients in the banking, financial services, direct marketing, entertainment, advertising, electronic commerce, publishing, and insurance industries. Mr. Seiling also has significant trial experience in complex commercial litigation matters. **bseiling@manatt.com**

STEVEN A. ELLIS is a partner in Sidley Austin's Los Angeles office. He has extensive experience defending class actions brought against financial institutions, insurance companies, and other corporations in cases involving money transfers, credit card processing, and financial services. Many of these cases have involved allegations of consumer fraud, unfair business practices, breach of contract, and violations of federal and state statutes. Mr. Ellis is a graduate of the UC Berkeley Boalt Hall School of Law and clerked for D.C. Circuit Judge Douglas H. Ginsburg. **sellis@sidley.com**

move for decertification down the road.

ELLIS: That's right, but it can put enormous pressure on defendants. There is also a sense that if the judge has invested enough in the case to rule in favor of certifying the class, it could be harder to prevail on decertification or summary judgment.

SCOTT: When a class is certified, the named plaintiff is supposed to stand for all of the absent class members. What if there are questions as to whether or not he or she actually relied on a statement, and yet it's not reasonable to infer that all of the class members, on a uniform basis, would have relied on that statement or found it to be material? Then you may not be able to resolve it through summary judgment, which is why you need the rigorous analysis on class certification.

ELLIS: There's a tension that comes with the idea of a rigorous analysis. You really have to look at where you are in the case. The preference stated in Rule 23 is to make a class certification determination early in the case. But if the court does not decide the certification issue until there's been years of litigation, then you're less likely to get the trial court to decertify the class later on. With *Dukes*, the parties now also have to consider how the court looks at it, and how meaningful the rigorous analysis can or should be early or later in the case.

SEILING: There's a huge risk in making a summary judgment motion when the court has certified the class. So class certification isn't just a procedural motion, it often is the whole ballgame. The problem is that class cases are so across the board. The *Dukes* case says some interesting things about employment cases, but I primarily handle consumer cases, so I'm going to argue that *Dukes* involved different issues than the courts should be looking at in my cases.

KABATECK: We do need more guidance. The push-pull is that some courts preclude us from doing merits-based discovery even though the defense wants us to do a merits-based analysis for certification. So we have to agree to go full-bore with something that's related to merits, or not. And if you're going into fact issues, do you impanel a jury to decide that issue? Apart from that, we have a local rule here in the Central District of California that is untenable, where we have only 90 days to file a class certification motion.

SEILING: That rule is untenable, particularly if you want discovery about the merits. And I agree with Brian [Kabateck's] point. As defendants, we'll come in and say, "You're limited to certification discovery and that's all you can get." Then, when the certification motion comes in, our arguments are all about the merits. There is this distinction that people make between certification discovery and merits discovery, and it's a bright line that, to me, does not exist.

KABATECK: From a defense standpoint, isn't it better to give the plaintiffs as much discovery as they want? Then, when it's time for the class certification motion, if the plaintiffs say they're crossing over into merits, you can say, "We cooperated."

ELLIS: It's a lot harder to make that bifurcation argument with the *Dukes* rigorous analysis test. Although most defendants like the idea of bifurcation, *Dukes* may create more exposure to merits discovery. It'll be expensive. You may have to hire experts for a class certification even if the case doesn't have a lot of merit.

SCOTT: The rigorous analysis is not about proving the ultimate merits; it should be applied to prove it's fair for the class representatives to resolve the claims of absent class members. Defendants should be able to conduct absent class member discovery because the rigorous analysis that's most important to me is that which would show whether the class is homogeneous or not. You see courts now after the *Pioneer Electronics (USA), Inc. v. Superior Court* (40 Cal. 4th 360 (2007)) line of cases giving the plaintiffs access to class member information much more easily than in the past so that they can make that argument.

ELLIS: The content of the rigorous analysis test may also depend on what the underlying claims are. The test may be very different in an employment discrimination case like *Dukes,* as opposed to an antitrust case, which may not be resolvable without looking at economic data, and bringing in experts.

KABATECK: What I took away from *Dukes* was that it doesn't have to be a perfect fit. During certification, the argument we constantly hear is that because the plaintiff bought a specific product from the defendant, which sells ten similar products, a class can only be certified for those who bought exactly the same product as the named plaintiffs. *Dukes* seems to say there is more leeway.

ELLIS: That may be specifically true with regard to employment discrimination suits. But that doesn't preclude defendants from saying, even if there is commonality in a general sense, that the common issues are not enough to satisfy the predominance requirement, which is at issue in Rule 23(b)(3) class actions, and which wasn't an issue in *Dukes.*

MODERATOR: What impacts or legal trends are you seeing as a result of the *In re: Tobacco II Cases*?

SCOTT: When assessing class standing, as a result of *Tobacco II* (46 Cal. 4th 298 (2009)), we've seen the courts look specifically at the class representatives, not the absent class members, which is really the key issue in the case. However, we've seen the lower and appellate courts struggle with what that means as it relates to other factors such as predominance.

And although defense lawyers are troubled by aspects of *Tobacco II,* plaintiffs lawyers are concerned about cases like *Cohen v. DirecTV* (178 Cal. App. 4th 966 (2010)). You do see a lot of the courts now struggling with how to establish that a class action is a superior method to manage the case, and whether the common issues will predominate over the individual issues. That analysis still has to be made and it still needs to be rigorous because if only the named plaintiff needs to show reliance, you need to feel comfortable that he or she is an adequate stand-in for the whole class.

"*Dukes* is not the last word; it will likely go up to the U.S. Supreme Court." ***—Brad Seiling***

SEILING: *Dukes* and *Tobacco II* are the two game-changing cases that weren't. *Tobacco II,* from the business community and defense bar's perspective, was going to be the stake through the heart of "frivolous" class action lawsuits. The state Supreme Court decided it on a very narrow issue—whether reliance was required, and if so, who had to show it. The court in *Tobacco II* expressly said it was not dealing with issues like commonality or predominance. Then a case like *Cohen* comes down and it looks exactly like *Tobacco II,* and the presumption is that it will be certified. But the *Cohen* court doesn't certify it because it's considering issues like predominance and commonality.

KABATECK: *Cohen* was probably correctly decided, but it has to be read on the facts. The trial court said that this is not the kind of widespread false advertising claim that would give rise to class certification because you can't say every person bought DirecTV because of one ad that was part of a widespread advertising campaign.

I had a false advertising case in front of the same trial judge who decided *Cohen,* and it was certified. It involved an advertising tagline claiming that a product did something that it didn't, and I argued that the claim was central to the campaign. So if it's a *de minimis* advertising element and it's part of a huge campaign, then that case is more difficult to certify. But the sky is not falling for plaintiffs. It's a narrow case.

SCOTT: Another piece of that case that struck me is related to restitution. The Court of Appeal said that while reliance of absent class members is no longer a requirement of *Tobacco II,* absent class members can't get restitution unless they show reliance or causation, which is a interesting issue when it comes to class certification. Because if you make that type of individual determination on restitution, and you can't use a formula for deciding damages, what have you really gained in certifying a class?

ELLIS: What is hotly contested at every level is the showing that must be made to entitle an absent class member to restitution. For example, someone was exposed to an ad in a false advertising case, but it wasn't a motivating factor in that consumer's decision to make a purchase. That's an issue that wasn't addressed in *Tobacco II,* but it continues to come up. The extremes are easier to deal with than the cases in between; a lot of cases in the middle involve a dispute about whether the ad was a factor in the consumer's decision to buy.

SCOTT: In *Tobacco II,* the Supreme Court could have made a distinction, along the lines of (b)(2)

and (b)(3) cases, between those where the predominant relief should be injunctive relief and those where there could be monetary relief. If something is deceptive and affects an appreciable number of consumers, then the practice should stop and the plaintiffs lawyers should get their fees. But it strikes me as going too far when the corporation must provide restitution to people who weren't injured because they didn't rely on that ad.

KABATECK: Let's use the *Kwikset* case (*Kwikset Corp. v. Superior Court* (2009) 171 Cal. App. 4th 645 (hearing granted June 10, 2009 as No. S171845)) as an example, where locks partially assembled in Mexico were mislabeled as having been "Made in the USA." It will perhaps eventually answer a lot of questions we have been discussing. But there is a difference between a product that's stamped "Made in the USA" and a product that's part of a massive advertising campaign. It's safe to say we all agree on injunctive relief in the clear-cut cases like *Kwikset*. The less clear-cut cases are those where a company has invested money in a particular advertising campaign and then the defendant says, "It's false and misleading, but you can't prove reliance."

SEILING: The question is: What is the harm? Are financial damages justifiable here? That's not to say that there isn't a claim. But is there another remedy? Frankly, in some cases, there might not be. It may be that the attorney general or a district attorney will have to take up the case because they have additional enforcement power to get a penalty in addition to the injunction. But restitution is not supposed to be a punitive remedy, it's supposed to give something back that was wrongfully taken.

KABATECK: The remedy in *Kwikset* should be that people return the product and get their money back, or they get the delta, which is determined by an expert.

SEILING: The important question is not whether the advertising is widespread. It's the nature of the claim: Does it relates to the functionality of what's being sold? A narrow campaign where you're misrepresenting the nature of the product and what it can do is worse than a broad campaign that included claims that really are not material.

SCOTT: Too many briefs and some opinions focus on whether it's a widespread advertising campaign or not. But no one's going to be injured on a class-wide basis by an immaterial misstatement in a widespread advertising campaign. A widespread advertising campaign does not equate with materiality.

MODERATOR: How can courts establish clearer guidelines about when materiality and reliance may be presumed or inferred?

KABATECK: The Ninth Circuit came down with a decision in *Yokoyama* (*Yokoyama v. Midland Nat'l Life Ins. Co.,* (9th Cir. 2010) 594 F.3d 1087), where it said that under consumer protection statutes, the analysis doesn't have to be made on a case-by-case basis, and could instead be based on a "reasonable person" standard. Under this standard, the court would look at materiality in terms of whether a reasonable person would have found, for example, that an ad was influential when consumers bought a product.

ELLIS: We buy products for many different reasons. Even if there is a misrepresentation in an advertisement, and a reasonable person would have viewed this as misleading and material, it may have had nothing to do with my decision to make a purchase.

The question about determining clearer guidelines on these issues assumes that there are circumstances in which materiality and reliance won't need to be proven through conventional means. Even if there are some situations in the law where that's appropriate, the defense bar is going to view those circumstances as being very limited. The question that has to be answered first is: What are the policy reasons that support a presumption or inference of materiality and reliance that are not otherwise required to be proven through conventional means? Once you get to circumstances under which materiality and reliance are going to be presumed or inferred, you're getting at the merits, where plaintiffs and defendants are always going to disagree.

SEILING: These are areas where we like having a degree of ambiguity so we can make arguments that some issues can't and shouldn't be presumed and inferred, where you really have to get into an individual question. The questions of reliance and materiality are always individual questions, so you can't establish commonality or predominance. That's the argument I've made three dozen times in the past two years.

SCOTT: There are some exceptions. A quantum of evidence has to be produced to suggest that it's reasonable to make a presumption of materiality or causation on a class-wide basis. What the California courts should speak more clearly to, which the federal courts have in the Lanham Act context, is the value of surveys. How else is a judge going to determine whether some aspect of advertising could be presumed to be material in a class-wide basis without having some objective evidence to support it?

KABATECK: Survey evidence is a possibility. But my fear is that the plaintiffs will have a survey, and the defense will rip it apart, and vice versa. Then the judge is going to say, "I am glad you both invested a lot of money to conduct the surveys. Let's move on." Why not impanel a jury on a factual finding, and ask them to apply the reasonable person standard?

We need more open discussions with the court about these issues. But we have seen a plethora of class action cases coming down in California recently, so those issues are going to get determined, or at least narrowed.

SEILING: We are starting to get more guidance. It may be because we have complex courts in California that are focusing on these issues. The complex courts are excellent, and one of the things that I am watching a bit nervously is how the state budget will impact them. But with trial judges providing long, well-reasoned opinions, it gives a court of appeal more to chew on, and allows the law to develop in a way that it hasn't before.

The whole concept of class actions has also become much more politicized in the past ten years. We have seen major legislative efforts and congressional initiatives, and the courts can't ignore that.

ELLIS: It does seem like there has been a bit of an explosion in class action litigation in the past decade, so it's natural that over time, we've seen more opinions from appellate courts. It just seems like it's a much different world, a much different profile of litigation.

KABATECK: And it's not to say that class actions haven't been an effective way of dealing with various issues. The (b)(2) class actions have been an effective vehicle for changing social policy. And it may also be efficient for defendants; instead of facing multiple lawsuits, they can deal with them in a class or mass tort setting. ■