Strafford

Presenting a live 90-minute webinar with interactive Q&A

Litigation Tactics to Defeat Class Certification: Leveraging Pleadings, Evidence and Settlement Mechanisms

TUESDAY, SEPTEMBER 25, 2018

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Robert J. Herrington, Co-Chair of GT's National Class Actions Defense Practice, **Greenberg Traurig**, Los Angeles

Geoffrey M. Wyatt, Counsel, **Skadden Arps Slate Meagher & Flom**, Washington, D.C.

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-866-869-6667** and enter your PIN when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the ^ symbol next to “Conference Materials” in the middle of the left-hand column on your screen.
- Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today's program.
- Double click on the PDF and a separate page will open.
- Print the slides by clicking on the printer icon.

Defeating Class Certification
New Trends and Rulings

9/25/2018

Presented By Geoffrey M. Wyatt and Robert J. Herrington
geoffrey.wyatt@skadden.com
herringtonr@gtlaw.com

DEFEATING CLASS CERTIFICATION

1 **Pleadings and Motions to Strike**

2 **Discovery**

3 **Class Certification Motion**

4 **Appeals and Settlements**

1 PLEADINGS AND MOTIONS TO STRIKE

- **Removing Class Actions Filed In State Court**
  - Putative class actions brought in state court, under state law, are usually removable under the Class Action Fairness Act, 28 U.S.C. §§ 1332, 1453, 1711-1715.
  - CAFA provides a federal court jurisdiction over class actions with:
    - Minimal Diversity (i.e., at least one plaintiff and one defendant are from different states)
    - A class of 100 or more plaintiffs
    - More than $5 million in controversy
  - Subject to two exceptions
    - The federal court ***must*** decline to exercise jurisdiction if 2/3 of class members and the "primary defendants" are citizens of the forum state.
    - The federal court ***can*** decline to exercise jurisdiction if 1/3 of the class members and the primary defendants are citizens of the forum state.

DEFEATING CLASS CERTIFICATION

- CAFA (continued)
  - Some courts have rejected efforts to plead around the local controversy exception by suing on behalf of a single-state class when the alleged conduct sued on took place nationwide. *See*, *e.g.*, *Winn v. Mondelez, Int'l*, No. 17-cv-02524-HSG, 2018 WL 3151774 (N.D. Cal. June 28, 2018) (retaining jurisdiction over a case brought on behalf of California purchasers of cookies; the controversy was not "truly local" because the same cookies were sold nationwide).

DEFEATING CLASS CERTIFICATION

- CAFA (continued)
  - The process for proving the citizenship of putative class relevant members – something relevant to both exceptions – has caused a recent circuit split.
    - Some courts will look to residence when domicile and citizenship cannot be proven. *See Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016) (recognizing a "rebuttable presumption that a person's residence is his [or her] domicile" and thus his or her state of citizenship)
    - Others expressly refuse to do so. *Nichols v. Chesapeake Operating, LLC*, 718 F. App'x 736, *cert. petition docketed*, 18-168 (10th Cir. 2018) (rejecting that presumption); *Hargett v. RevClaims, L.L.C.*, 854 F.3d 962 (8th Cir. 2017) (same).

- **Moving to strike class allegations: Personal jurisdiction**
  - *Bristol-Myers Squibb Co. v. Superior Ct.*, 137 S. Ct. 1773 (2017)
    - In ***mass torts actions in state court*** personal jurisdiction must be established as to every plaintiff and out-of-state plaintiffs cannot manufacture personal jurisdiction merely by joining with in-state plaintiffs.
    - The Supreme Court leaves two questions open:
      - Does the decision apply in federal court? *Id.* at 1784
      - Does the decision apply to class actions such that each putative class member must demonstrate personal jurisdiction over their claims?
    - Because it is a pure issue of law, and because personal jurisdiction objections can be deemed waived if a defendant does not assert them at the outset of litigation, a personal jurisdiction argument under *Bristol-Myers* should be able to be made in a motion to strike class allegations rather than deferred until the class certification stage.

DEFEATING CLASS CERTIFICATION

- *Bristol-Myers* in the lower courts
  - Though one or two district courts have suggested to the contrary in dicta, the great bulk have held that *Bristol-Myers* applies in federal court, at least in diversity cases.
    - Fed. R. Civ. P. 4(k)(1) (personal jurisdiction of a federal court coextensive with personal jurisdiction of forum state court)
    - *Brown v. Lockheed Martin Corp.*, 814 F. 3d 619, 624 (2d Cir. 2016) (quoting *Arrowsmith v. United Press Int'l*, 320 F.2d 219 (2d Cir. 1963) (en banc)) ("The amenability of a foreign corporation to suit in a federal court in a diversity action is determined in accordance with the law of the state where the court sits . . . .")
    - *Muir v. Nature's Bounty (DE), Inc.*, No. 15 C 9835, 2018 WL 3647115, at *4 (N.D. Ill. Aug. 1, 2018) (Because "[t]he Federal Rules of Civil Procedure require federal courts sitting in diversity to apply the personal jurisdiction law of the states in which they sit . . . . *Bristol-Myers* imposes an *indirect* bar on the federal courts' exercise of pendent personal jurisdiction . . . .")

DEFEATING CLASS CERTIFICATION

- *Bristol-Myers* and class actions
  - The much more divisive question is whether *Bristol-Myers* applies to non-named class members in class actions.
  - No appellate court has confronted the question and the district courts have split.
    - A majority of courts have held that *Bristol-Myers* does not require the court to have personal jurisdiction over non-named class members.
      - These courts generally conclude that absent class members are not real parties in interests and that Rule 23 provides certain protections absent in the mass tort context.
      - These courts sometimes also note that a nationwide class action was approved in *Phillips Petroleum Co. v. Shutts*, but that case is inapposite because defendants did not raise a personal jurisdiction challenge; rather, absent class members had raised one. 472 U.S. 797 (1985).

DEFEATING CLASS CERTIFICATION

- Illustrative cases – *Bristol-Myers* ***does not*** apply to absent class members
  - *Al Haj v. Pfizer, Inc.*, 17 C 6739, 2018 WL 3707561 (N.D. Ill. Aug. 3, 2018)
  - *Molock v. Whole Foods Mkt., Inc.*, 297 F. Supp. 3d 114 (D.D.C. 2018)
  - *Sanchez v. Launch Tech Workforce Sols.*, 297 F. Supp. 3d 1360 (N.D. Ga. 2018)
  - *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 09-2047, 2017 WL 5971622 (E.D. La. Nov. 3, 2017)
  - *Fitzhenry-Russell v. Doctor Pepper Snapple Grp. Inc.*, No. 17-cv-00564 NC, 2017 WL 4224723 (N.D. Cal. Sept. 22, 2017)

DEFEATING CLASS CERTIFICATION

- *Bristol-Myers* and class actions (cont'd)
  - A significant number of courts, however, hold that that *Bristol-Myers* does require personal jurisdiction over non-named class members.
    - These courts typically reason that due process concerns should be equally applicable in class litigation and that to impose less stringent requirements in the class context might "abridge, enlarge, or modify [a] substantive right" in violation of the Rules Enabling Act.
    - This approach is also more in keeping with the reasoning of *Bristol-Myers*, which talked about the reasons for the limitations imposed by personal jurisdiction doctrine: i.e., limitations on state power, and burdens on defendants from defending in the wrong forum

DEFEATING CLASS CERTIFICATION

- Illustrative cases – *Bristol-Myers* ***does*** apply to absent class members
  - *Chavez v. Church & Dwight Co.*, 17 C 1948, 2018 WL 2238191 (N.D. Ill. May 16, 2018)
  - *Practice Mgmt.Support Servs., Inc. v. Cirque du Soliel, Inc.*, 301 F. Supp. 3d 840 (N.D. Ill. 2018)
  - *DeBernardis v. NBTY, Inc.*, 2018 WL 461228 (N.D. Ill. Jan 18, 2018)
  - *McDonnell v. Nature's Way Prods., LLC*, No. 16 C 5011, 2017 WL 4864910 (N.D. Ill. Oct. 26, 2017).

DEFEATING CLASS CERTIFICATION

- *Bristol-Myers* and class actions – Takeaways
  - Defendants should raise a *Bristol-Myers* challenge at the motion to strike stage, but should be aware that the court may or may not accept it.
  - If successful, defendants can dismiss the claims of putative class members without a connection to the forum state.
  - The upshot is that defendants could avoid nationwide class actions outside of those jurisdictions in which they are subject to general personal jurisdiction – usually just their state of incorporation and principal place of business.
  - By the same token, note that plaintiffs can moot this by filing in the defendant's home forum, at least in cases involving only one defendant (or multiple defendants with the same state of incorporation or principal place of business)

- **Moving to strike class allegations: Variations in state law**
  - Variations in state law should provide a basis to strike nationwide or multistate class allegations. The arguments are based on pure issues of law, and there is no reason to wait until the class certification.
    - Despite early indications of judicial receptivity to such arguments, the recent trend has been to deny motions to strike based on state law variations, typically unnecessarily deferring decision.
      - *Sos v. State Farm Mut. Auto. Ins. Co.,* No. 617CV890ORL40KRS, 2018 WL 1866097 (M.D. Fla. Mar. 12, 2018) ("The court declines to engage in . . . an analysis [of variations in state law] at [the motion to strike] of the litigation.")
    - Still, courts will sometimes grant such motions, and defendants should make them.
      - *Walters v. Vitamin Shoppe Industries, Inc.*, No. 3:14-cv-1173-PK, 2018 WL 2424132 (D. Or. May 8, 2018), *report and recommendation adopted*, 2018 WL 2418544 (D. Or. May 29, 2018) ("[V]ariations in state law present[] legal issues that may be resolved without discovery.")

DEFEATING CLASS CERTIFICATION

- **Motions to compel arbitration or to enforce class-action waivers**
  - In many cases – especially consumer and labor class actions – the case will be covered by an arbitration clause (which may also prohibit class arbitration).
  - Supreme Court made clear in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), that both such clauses are enforceable in the class-action context.
  - In *Epic Systems Corp. v. Lewis* the Supreme Court held 5-4 that arbitration clauses in employment agreements are enforceable and are not contrary to the National Labor Relations Act, 138 S. Ct. 1612 (2018).
  - This is a pleading-stage motion and the arguments can be deemed waived if you proceed to litigation.
    - But note that it can also be a class-certification stage issue if the named plaintiff is not subject to one of these agreements but other putative class members are.
    - Another option: *Tan v. Grubhub, Inc.*, No. 15-CV-05128-JSC, 2016 WL 4721439, at *2 (N.D. Cal. July 19, 2016) (granting motion for an order denying certification where putative class covered individuals who agreed to arbitrate and plaintiff opted out).

2 DISCOVERY

DEFEATING CLASS CERTIFICATION

- Stay of discovery pending motion to dismiss
  - Impact of Rule 26(f) conference
  - More likely where motion to dismiss goes to all claims and where court views motion as strong
  - *In re Broiler Chicken Grower Litig.*, No. 6:17-CV-00033-RJS, 2017 WL 3841912, at *3 (E.D. Okla. Sept. 1, 2017) (discussing factors)
- Bifurcating discovery: class v. merits
  - Courts increasingly more hesitant to establish a formal bifurcation because it often is unclear what discovery is relevant to class certification, but not the merits
  - Be careful what you wish for: if discovery is not provided on an issue, does that mean it is irrelevant to class certification?
  - *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604, 612–13 (8th Cir. 2011) (explaining that it "was after all Zurn which sought bifurcated discovery which resulted in a limited record at the class certification stage, preventing the kind of full and conclusive *Daubert* inquiry Zurn later requested.")
- Precertification access to class list

DEFEATING CLASS CERTIFICATION

- Offensive discovery:
  - Defendants should always take discovery of the named plaintiffs
- Frequently this can reveal information that can be used to support a motion for summary judgment. For example:
  - By demonstrating that the named plaintiff purchased the relevant product outside of the statute of limitations period;
  - In false advertising cases, by revealing that the allegedly misleading advertisement had nothing to do with the purchase.
  - *Doe v. SuccessfulMatch.com*, 70 F. Supp. 3d 1066, 1082 (N.D. Cal. 2014) ("If Plaintiffs purchased or continued to purchase Defendant's services after discovering Defendant's allegedly fraudulent conduct, then Plaintiffs may have no claim under either the UCL or the CLRA").
- It also frequently reveals information that can be used to oppose class certification. For example, it might demonstrate the difficulty of proving causation and reliance on a class-wide basis.

DEFEATING CLASS CERTIFICATION

- Defendants should consider seeking discovery from non-named class members as well.
  - Informal communications with absent class members are generally permitted. *See* *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981).
  - Because informal communications with absent class members are protected by the First Amendment, they will only be restricted upon a showing of particularized abuses.
  - Declarations from putative class members may help defeat certification
  - *Caution*:
    - Potential for conflicts of interest
    - Current employees who are putative class members (wage and hour context)
    - Declarations and drafts may be discoverable (no attorney client privilege)

DEFEATING CLASS CERTIFICATION

- Absent class member discovery (cont'd)
  - Formal discovery – i.e. interrogatories, requests for documents, or depositions, are much more difficult to obtain from absent class members.
  - Will likely require showing:
    - That the motive is not to deter participation;
    - That the information cannot be obtained in another way;
    - That the discovery relates to class-wide issues;
    - That the discovery poses a limited burden on absent class members. *See Arrendondo v. Delano Farms Co.*, No. 1:09-cv-01247 MJS, 2014 U.S. Dist. LEXIS 145562, at *11-12 (E.D. Cal. Oct. 10, 2014)(collecting cases).
    - *Indergit v. Rite Aid Corp.*, No. 08CIV9361, 2015 WL 7736533, at *2 (S.D.N.Y. Nov. 30, 2015), *objections overruled*, No. 08-CV-9361, 2016 WL 236248 (S.D.N.Y. Jan. 20, 2016) (allowing absent class member depositions regarding job duties in misclassification case).

DEFEATING CLASS CERTIFICATION

- Early motion for summary judgment
  - Generally allowed for defendant; generally not allowed for plaintiff.
    - *But see Thomas v. UBS AG*, 706 F.3d 846, 849 (7th Cir. 2013) ("Normally the issue of certification should be resolved first, because if a class is certified this sets the stage for a settlement and if certification is denied the suit is likely to be abandoned, as the stakes of the named plaintiffs usually are too small to justify the expense of suit, though that may not be true in this case.")
    - One-way intervention rule
      - *Gooch v. Life Inv'rs Ins. Co. of Am.*, 672 F.3d 402, 432–33 (6th Cir. 2012) ("The rule against one-way intervention prevents potential plaintiffs from awaiting merits rulings in a class action before deciding whether to intervene in that class action"; but rule may not apply to Rule 23(b)(2) certification).

DEFEATING CLASS CERTIFICATION

- Early motion for summary judgment (cont'd)
- Benefits of early MSJ
  - May end individual plaintiffs' claims
  - May highlight differences in plaintiffs of individualized nature of key issues
  - May defeat key claims or narrow scope of proposed class
- Downsides of early MSJ
  - Not binding on putative class
  - May need to defend new claims, potentially in another forum
  - May lose summary judgment and increase settlement value

3 CLASS CERTIFICATION STAGE

DEFEATING CLASS CERTIFICATION

- *Bristol-Myers* revisited
  - The defendant should renew any personal jurisdiction arguments under *Bristol-Myers* that may have been previously made in a motion to strike.
  - Even though there is no reason that the issue cannot be addressed at the class certifications stage, some courts will defer the issue anyway. *See Chernus v. Logitech, Inc.*, No. 17-673(FLW), 2018 WL 1981481, at *7-8 (D.N.J. April 27, 2018).
- Variations in state law revisited
  - As noted earlier, this is an issue that can and should be decided at the motion to strike stage, but courts will often put off decision.
  - This is fertile ground for opposing a nationwide class, even if the court has declined to reach the issue at the class certification stage.
    - *Casa Orland Apartments Ltd. v. Fed. Nat. Mortg. Ass'n*, 624 F.3d 185 (5th Cir. 2010) (affirming denial of class certification and noting that "[w]hile the basic principles of fiduciary law may be the same throughout the country, the nuances vary, and those nuances affect the outcome of claims")
    - *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (grating mandamus to reverse class certification because "[t]he law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause" differ among the states in "important" ways).

DEFEATING CLASS CERTIFICATION

- Factual variations revealed in discovery
  - Some putative class members may have received defective goods while others received goods that functioned as intended. *See*, *e.g.*, *Gonzalez v. Corning*, 885 F.3d 186 (3d Cir. 2018) (rejecting effort to certify class by "equat[ing] the existence of a defect with the mere possibility that one might exist").
  - Some putative class members may have been exposed to a purported misrepresentation while others we not. *See*, *e.g.*, *Persic v. Ashley Furniture Indus., Inc.*, No. 8:16-cv-3255-T-17MAP, 2018 WL 3391359 (M.D. Fla. June 27, 2018) (denying certification because "each proposed class member's sales experience was unique").
  - A purported representation might be material to some putative class members and not to others. *See*, *e.g.*, *In re Seagate Tech. LLC*, --- F.R.D. ---, 2018 WL 3306192 (N.D. Cal. July 5, 2018) (denying certification in part because only five of eight plaintiffs alleged reliance on alleged misrepresentations, suggesting that materiality was not a classwide issue).

DEFEATING CLASS CERTIFICATION

- Some claims may be barred by the statute of limitations
  - This can be a predominance argument in some class actions, although affirmative defenses are sometimes given less weight
    - *See, e.g.*, *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006) (affirming denial of class certification where "individualized proof is patently required to litigate the defendants' statute of limitations defense"); *Royal Park Investments SA/NV v. U.S. Bank Nat'l Assn.*, --- F. Supp. ---, 2018 WL 4007285 (S.D.N.Y. Aug. 14, 2018) ("The second individualized inquiry that predominates over questions of liability relates to the applicable statutes of limitations . . . .").
  - Takes on special significance in circumstances involving a second putative class action after certification has been denied in the first
    - A motion for class certification has long tolled the running of the statute of limitations such that, if denied, members of the putative class may file ***individual*** suits after the limitations period has expired. *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).
    - But in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018) (9-0), the Supreme Court held unanimously that so-called *American Pipe* tolling does not permit a follow-on second ***class action*** after the limitations period has expired.

DEFEATING CLASS CERTIFICATION

- Attacking expert damages opinions as a way to derail class certification
  - The Supreme Court touched briefly on expert issues as they relate to class certification in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), but did not address *Daubert* directly.
    - The Court did not address whether the expert testimony supporting plaintiffs' damages theory was reliable.
    - But the Court did reaffirm that class certification requires a "rigorous analysis" that includes examination of expert opinions and concluded that it was erroneous to "refus[e] to entertain arguments against [the plaintiffs'] damages model that bore on the propriety of class certification simply because those arguments would also be pertinent to the merits determination."
    - The *Comcast* ruling clearly endorses an in-depth analysis of plaintiffs' class action theories at the class certification stage, including expert issues, thought it did not directly address how *Daubert* applies.

- **_Daubert_ and expert testimony at the class certification stage**
  - _Daubert_ motions are fast becoming a common feature of class certification
  - The Supreme Court has clearly endorses an in-depth analysis of plaintiffs' class action theories at the class certification stage, including expert issues, *see Comcast Corp. v. Behrend*, 569 U.S. 27(2013), but has not directly addressed *Daubert* issues at the class certification stage.
  - There is currently a split among federal courts regarding how to evaluate the reliability of an expert's testimony for purposes of class certification.
    - The 6th, 7th, and 11th Circuits have applied a fuller *Daubert* analysis. *See In re Carpenter Co.*, No. 14-0302, 2014 U.S. App. LEXIS 24707 (6th Cir. Sept. 29, 2014); *Am. Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010); *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin'l Corp.*, 762 F.3d 1248 (11th Cir. 2014).
    - Conversely, the Eighth and Ninth Circuits have endorsed a limited or "tailored" *Daubert* test. *See Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011); *Sali v. Corona Reg'l Med. Ctr.*, No. 15-56460, 2018 WL 2049680 (9th Cir. May 3, 2018).

DEFEATING CLASS CERTIFICATION

- Causation opinions: common methodological flaws
  - "*Comcast*" problem – Plaintiffs' expert testimony does not track/support theory of liability
    - Certiorari granted to address: "Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."
    - Plaintiffs originally alleged 4 theories of antitrust impact; district court rejected 3 out of 4
  - Class could not be certified because Plaintiffs' expert failed to differentiate among the damages attributable to different theories of antitrust impact, all but one of which had been rejected
  - Not a *Daubert* issue, but a relevance issue
    - Consensus that impact has been somewhat limited
      - Antitrust
      - Plaintiffs, on notice of issue, know to differentiate among damages attributable to various theories of liability.

DEFEATING CLASS CERTIFICATION

- Causation opinions: common methodological flaws
  - "*Comcast*" Problem (continued)
  - *Comcast* may provide a viable basis for attacking plaintiffs' experts in other, limited contexts
    - Food litigation - Misrepresentation claims
      - Challenged label claims, such as "all natural," likely mean different things to different purchasers.
      - Labeling claim at issue encompasses multiple product characteristics, of which only one or a few are allegedly inconsistent with the representation.
      - E.g., *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 693-94 (S.D. Fla. 2014)
  - Plaintiffs' experts have had considerable difficulty isolating the price impact solely attributable to the ingredient (e.g., GMO) or characteristic (e.g., presence/absence of a warning) that allegedly renders the defendant's representation inaccurate.
    - *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679 (S.D. Fla. 2014)
    - *Werderbaugh v. Blue Diamond Growers*, No. 12-CV-02724, 2014 WL 7148923 (N.D. Cal. Dec. 15, 2014)
    - *Brazil v. Dole Packaged Foods*, LLC, No. 12-cv-01831, 2014 WL 5794873 (N.D. Cal. Nov. 6, 2014) (denying *Daubert* motion as moot in light of ruling that damages analysis failed to satisfy *Comcast*)

4 APPEALS AND SETTLEMENTS

DEFEATING CLASS CERTIFICATION

- Appeals
  - Interlocutory appeal may be available to the side that loses a class certification motion.
  - Fed. R. Civ. P. 23(f) – "A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed . . . ."
  - Rule 23(f) was added to allow discretionary appeal in 1998.
  - But a court of appeals allowing appeal remains the exception rather than the rule. *See*, *e.g.*, *In re Delta Airlines*, 310 F.3d 953, 959 (2d Cir. 2003) ("[T]he Rule 23(f) appeal is never to be routine.")

DEFEATING CLASS CERTIFICATION

- Appeals (cont'd)
  - Over the years since the rule was added, the courts of appeals been willing to grant review at a declining rate – especially for defendants
    - From 1998 through 2006, 36% of 23(f) petitions were granted, including 22% of those petitions filed by plaintiffs and 45% of those petitions filed by defendants.
    - From 2006 through 2013, 23% of 23(g) petitions were granted including 25% of those field by defendants and 21% of those filed by plaintiffs
  - The Circuits vary significantly in their willingness to grant review.
    - For example, from 2006-2013, the Fifth Circuit granted 46% of 23(f) petitions, while the First Circuit granted just 8%.

DEFEATING CLASS CERTIFICATION

- Settlement
  - If class certification is granted (and not overturned on appeal) the case will often settle.
  - In many class actions – especially consumer class actions – each class member's stake in the settlement will likely be only a few dollars – too small to meaningfully distribute.
  - One way parties (and particularly plaintiffs) have proposed to distribute the settlement proceeds in such circumstances is through so-called *cy pres* distribution – distribution of money to non-party charities often only tangentially related to the issues in the case.

DEFEATING CLASS CERTIFICATION

- Settlement (cont'd)
  - The Supreme Court will review cy pres settlements in the upcoming term in *Frank v. Gaos*, No. 17-961 (known below as *In re Google Referrer Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017)).
  - In *Frank*, the district court and the Ninth Circuit approved a cy pres only settlement in which no class members received a dime and the defendant did not agree to change any behavior. Instead all the money was distributed to charities with a close relationship to class counsel or to the defendant or to both.
  - The petition for certiorari asks the Court to provide guidance on "when (if ever) *cy pres* remedies are permissible."

- *Frank v. Gaos* (cont'd)
  - Plaintiffs alleged that Google had violated the privacy of its users by divulging the search queries entered on its search engine.
  - Parties settled for an $8.5 million fund, with all money going to class counsel and six charities instead of the 129 million absent class members.
  - At least five of those charities were affiliated with either Google, class counsel or both.
  - The district court agreed with objectors that the settlement "doesn't pass the smell test"; however, it proceeded to approve the settlement because "the identity of potential cy pres recipients was a negotiated term included in the Settlement Agreement and therefore not chosen solely by" individuals with preexisting relationships to the charities. *In re Google Referrer Header Privacy Litig.*, 87 F. Supp. 3d 1122, 1138 (N.D. Cal. 2015).
  - The Ninth Circuit affirmed:
    - There was no obligation to distribute funds to the millions of class members because such the payments in such a distribution would be "*de minimis*."
    - The relationships between the *cy pres* recipients and Google and class counsel were not fatal to the adequacy and fairness of the class action settlement because there was a sufficient "nexus" between the subject matter of the litigation and the privacy-education missions of the organizations.

DEFEATING CLASS CERTIFICATION

- What will the Supreme Court do with *cy pres*?
  - The Supreme Court might adopt an approach that only allows *cy pres* where multiple attempts at direct distribution of money to class members have been made – and where such efforts result in an actual residue of class money.
  - The Supreme Court could alternatively find that the named plaintiffs, class counsel and the defendant have discretion to craft *cy pres* settlements without any concrete guidelines.
  - But there are some indications that the Supreme Court will set some limitations on *cy pres*.
    - In a prior case denying certiorari, Chief Justice Roberts declared that "[i]n a suitable case, this Court may need to clarify the limits on the use of" that practice. *Marek v. Lane*, 134 S. Ct. 8, 9 (2013).
    - The Chief Justice cited to a prominent law review article authored by Professor Martin Redish and other scholars theorizing that the practice is contrary to constitutional principles.