The Changing Landscape of Consumer Class Action Practice

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The Changing Landscape of Consumer Class Action Practice—Emerging Litigation Opportunities, Defense Tactics and Ethical Concerns

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Disclaimer

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Preface - Outline of Lecture

I. Overview of Class Action Process
II. Review of Rule 23, Federal Rules of Civil Procedure
III. Defense of Class Actions
IV. Review of Certification and Settlement Process Issues
V. Federal Class Action Legislation
VI. Recent Case Law Developments
VII. Review of Emerging Litigation Opportunities
PART I: The New and Improved Defense Practice: Different Weapons and Tactics

A. Prologue~ What the Media says about class actions

- “Welcome to the new world of assembly-line litigation. Suing Corporate America is a big business. While there are no authoritative data, a conservative estimate of total annual plaintiff-lawyer income, based on information culled from the Internal Revenue Service, ATLA, and industry consultants, is at least $25 billion. Add the value of the judgments they win for victims and corporate-defense expenditures, and the sum goes much higher. Tillinghast-Towers Perrin, a management consultant with a specialty in insurance issues, estimates that the overall annual cost of the American tort system, including payments to injured people, legal fees, and administrative expenses, was at least $105 billion in 1999. That was about 2% of gross domestic product—twice as much as in most industrial countries.”

Businessweek, “The Litigation Machine”

What some Courts have said...

- Put in the simplest terms possible, these attorneys are being greedy. They have insisted on excessive compensation at the expense of their own clients. They have worked for fees so huge that it is difficult to evaluate the amount of effort they spent and the amount of risk they took. They have violated the terms and the intent of the settlement agreement in this case, to which they are bound, and they have probably violated the rules of ethics as well.

In re Sulzer Hip Prosthesis and Knee Replacement Systems Litigation

Case No. 1:03-md-01597

3/2/2012
Popular iconography often depicts lawyers as sharks who can scent from vast distances money oozing from the pockets of wounded defendants. Sharks are often accompanied by remoras—smaller fish which attach themselves with their suction-cup heads to the shark’s hide. Remoras do not take part in a “kill,” but they scrounge the small scraps of flesh torn loose by their colleague predators. The present claim resembles that of a remora; the defendant is wounded and vulnerable to smaller bites.

Hutchison v. Wells
719 F. Supp. 1435 (S.D. Ind. 1990)

B. Attack on Standing—“picking off the plaintiff”

The courts have been generally split on the issue of whether an unaccepted offer of judgment under Rule 68, Fed. R. Civ. Pro., or even a tender can moot a class.

Seen with increasing regularity in FDCPA and FLSA cases

Despite SCOTUS’ Directive

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) ["The notion that defendant may short-circuit a class action by paying off the class representatives ... deserves short shrift. By the very act of filing a class action, the class representatives assume responsibilities to members of the class. They may not terminate their duties by taking satisfaction; a cease fire may not be pressed upon them by paying their claims. The court itself has special responsibilities to ensure that dismissal does not prejudice putative members."]
Another Smart Court

- "Nor do we agree with the lender's argument that its unaccepted settlement offer for the full amount of plaintiff's claim, a practice which is known as "picking off" a class representative, made this case moot. Neither Florida nor the federal courts sanction that practice. Allstate Indem. Co. v. De La Rosa, 800 So.2d 245 (Fla. 3d DCA 2001); Weiss v. Retail Collections, 385 F.3d 337 (3d Cir. 2004); Jackson v. Southern Auto Finance 988 So.2d 721 (Fla.App. 4 Dist., 2008).

Timing is everything....

- "Unique mootness issues arise in the class action context due to the representative nature of class actions, including whether mootness of the class representative's claim during the pendency of a class action mandates dismissal of the entire suit. Resolution of this issue often depends on the stage to which the litigation has progressed when the class representative's claim becomes moot, for example: after class certification is granted; after class certification is denied; after filing a motion for class certification, but before a ruling on the motion for class certification; or before the filing of a motion for certification. Frascogna v. Security Check, LLC 2009 WL 57102 (S.D.Miss. 2009).

More on timing...

- The Court finds that where no class has been certified, and there is not at least a pending motion for certification that has been filed with the Court, there is no basis for a class action to go forward when the underlying lead plaintiff's claim has been mooted via an offer of judgment. Lomas v. Medical Billing, L.L.C. 2008 WL 4056789 (D.Utah, 2008).
A Race to File For Cert.

- Though Corporate Receivables made an offer of judgment on Sweet's individual claim, she possessed class action claims that had yet to be litigated. Sweet filed a motion for class certification prior to the expiration of Corporate Receivables' offer of judgment. Though Corporate Receivables asserts that its offer moots Sweet's action, this is not the case. A defendant's offer satisfying the plaintiff's claim does not moot the plaintiff's action "so long as a motion for class certification has been made and not ruled on." 


Sweet v. Corporate Receivables, Inc. 2008 WL 2953572 (E.D.Wis., 2008).

Standing’s ugly face

- In its recent decision in Damasco v. Clearwire Corporation, 2011 U.S. App. LEXIS 23093 (7th Cir. Nov. 18, 2011), plaintiff filed a class action complaint against for violation of the Telephone Consumer Protection Act (TCPA), alleging that Clearwire had sent unsolicited text messages to him and more than 1,000 others.

  The 7th U.S. Circuit Court of Appeals affirmed that a class representative cannot continue with class claims after receiving an offer of full relief.

Combating the Pick-off

- File a cautionary or preliminary motion for class certification at the time of service of complaint.
- Request leave to supplement after discovery
- Have back-up class reps...lots of them.
Example of fun and games

- Med1 also contends that we should strike the Motion for Class Certification because it lacks good faith. Med1 argues that Plaintiff filed its motion prematurely only to avoid the risk that Med1 would file a Rule 68 Offer of Judgment, which might render class certification moot. See White v. Humana Health Plan, No. 06 C 5546, 2007 WL 1297130, at *6-7 (N.D.Ill. May 2, 2007). Plaintiff's filing may have been a strategic move. However, that is not a reason for striking its motion. This is particularly the case given that Plaintiff could have filed the motion for certification up to ten days after the filing of an Offer of Judgment and still avoided mootness. See W. Ry. Devices Corp. v. Lusida Rubber Prods. Inc., No. 06 C 0052, 2006 WL 1697119, at *2-3 (N.D.Ill. June 13, 2006)(demonstrating the uniform consensus in the Northern District of Illinois that "filing a motion to certify a class during the ten day period after a defendant makes an offer of judgment prevents mootness of a plaintiff's claim.")


The Infinite Pick-off Ploy

- Taken to its absurd logical conclusion, the policy urged by defendant would clearly hamper the sound administration of justice. By forcing a plaintiff to make a class certification motion before the record for such a motion is complete — indeed before an Answer is filed — would result in sweeping changes to accepted norms of civil litigation. Schaake v. Risk Management Alternatives Inc., 203 F.R.D. 108, 112 (S.D.N.Y. 2001).
- As stated by another court, "it would also create an absurd situation in which plaintiffs' attorneys would need an endless supply of willing class representatives to file complaints identical to the class action complaints that would be dismissed as defendants buy off named representatives one by one." Jancik v. Cavalry Portfolio Services, LLC, 2007 WL 15540504 (D. Minn. 2007).

B. Attack on Standing- “Changing the rules”

- Another tactic of creating mootness is to eliminate the subject matter of the lawsuit by altering the relationship of the parties.
- Best examples involve class actions involving unlawful charges, rates, denial of coverage etc.
“Oops.. We are sorry Defense”

- Credit card holder’s proposed class action against bank based on bank’s imposition of finance charge on balance transfer to card, which had 0% annual percentage rate, was not moot, although card holder’s individual claim was mooted before card holder filed motion for class certification when disputed finance charge was reversed. There was serious question as to whether dispute was capable of repetition but evading review, and card holder did not have reasonable opportunity to file motion for class certification, given that bank filed motion to stay class wide discovery and filed summary judgment motion when case had been pending for less than three months.

Hoban v. Natl. City Bank
2004 WL 2910543
(Ohio App. 8 Dist., 2004).

Other examples of “oops we are sorry defense”


More Opps...

- Chinchilla v. Star Cas. Ins. Co., 833 So. 2d 804 (Fla. 3rd DCA 2002) and Ramon v. Aries Ins. Co., 769 So. 2d 1053 (Fla. 3rd DCA 2000) — cases involving instances where the putative class representative had received full payment after a “billing error was discovered.”
Profound Thought 2

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Profound Thought of The Day

- "AIG is what happens when short bald managers see Brad Pitt in the mirror."

Matt Taibbi, "The Truth About the Bailout," Rolling Stone Magazine, April 2, 2009

C. Discovery Shenanigans

- In class actions, delay and obstruction of discovery is the norm.
- Benefits to Class Defendants include
  1. Opportunity to pick off plaintiff
  2. Eliminate ability to prepare for cert.
  3. Eliminate ability to defend a MSJ on merits
Basic Rule of Thumb

- Trial court has considerable discretion in determining whether and to what extent discovery in class actions is permissible. 5 Moore’s Federal Practice Section 23.85
- Review re class discovery is abuse of discretion. *Heerwagen v. Clear Channel*, 435 F. 3rd 219 (2nd Cir. 2006)

First Defense Discovery Tactic - No right to class discovery until resolution of motion to dismiss

Rule 26(c), Federal Rules of Civil Procedure, provides in pertinent part:

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending … [t]he court may for good cause issue an order to protect a party or a person from annoyance, embarrassment.

*(emphasis added)*

Rule 26(c), Fed.R. Civ.P.

- Class Defendants forget the “good cause” part.

Strong showing required

- The party seeking to delay discovery until resolution of a dispositive motion must make a strong showing to meet the requirements of Rule 26(c). *Dixon v. Chicago Allied Warehouses*, Inc., 1993 WL62450 (N.D.Ill.1993); *Hovermale v. School Board of Hillsborough County*, 1283 F.R.D. 287, 289 (N.D.Fla. 1989).
- As such, courts generally have disfavored motions to stay discovery pending disposition of a motion to dismiss. See, e.g., *Digital Equipment Corp. v. Curry Enterprises*, 142 F.R.D. 154 (D.Mass.1991); *Coca-Cola Bottling Company of Lehigh Valley v. Grol*, 1993 WL1339509* (E.D.Pa.1993) [“Had the drafters of the Federal Rules of Civil Procedure wanted an automatic stay of discovery pending a motion to dismiss they could have so provided.”]
Second Defense Discovery Tactic - Bifurcation
- Defendants will argue for a bifurcation of certification issues (e.g., numerosity, commonality, typicality and such) from merits.
- Practice allows for:
  1. Ability of Class Defendant to file an early MSJ without the necessary discovery to defeat application.
  2. Hiding discovery by labeling it merits related

Merits and Cert. Discovery Are Intertwined
- On the subject of bifurcation, the foremost treatise on the subject, *Manual for Complex Litigation*, offers the following:
  - Courts have recognized that information about the nature of the claims on the merits and the proof that they require is important to deciding certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes.

Third Defense Discovery Tactic: Claim of Undue Burden
- In class actions, Class Defendants will balk at providing information relevant to cert. based on varying arguments of burden (cost & time).
- The larger the class the more compelling the argument.
The “Sampling Solution”

- To avoid the argument, propose that a sampling of a percentage of the putative class records be made (5%, 10% etc).
- Production at Defendant’s place of business.
- Use paralegals and possibly a statistician.

Fourth Defense Tactic—“Confidentiality”

- Class Defendants will argue that the requested cert. discovery is confidential on behalf of themselves and the class.
- Most of the arguments on behalf of the Class are based on some warped notion of Gramm-Leach-Bliley Act (“GLBA”).

GLBA Arguments Are A Sign of Weak (or Dishonest Minds)

- The GLBA prohibits financial institutions from releasing “nonpublic personal information” of its customers.
- GLBA does not apply because:
  - GLBA creates an exception for the release of non-public information in the possession of a bank to comply with “Federal, State, or local laws, rules, and other applicable legal requirements,” and to respond to judicial process. See 15 U.S.C. 6802(c)(10).


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**Unusual Judicial Displeasure re Confidentiality**

This Court is generally disinclined to allow sealed filings, both for the public policy reasons stated above, and the administrative burden and potential confusion that such filings cause. The Court therefore declines to adopt the order proposed by the parties, by which a wide range of material could be designated “confidential” and then be filed under seal “conditionally” with the Court, until the Court ordered otherwise.


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**D. The New & Growing Firefight-Burden of Proof for Class Certification**
Dimensions of Problem- “The Rigorous Analysis as a Burden of Proof” Argument

- The old and dusty case of *General Telephone Co. of Southwest Florida v. Falcon*, 457 US 147 (1982) is being used even more frequently as the basis for denying class cert.: 
- “[a] class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” Id. at 161

Vega as Defense Template

- A district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class. See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir.1996); see also *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1216 n. 37 (11th Cir.2003) (noting a trial court's "independent obligation (under Rule 23(c)(1)) to decide whether an action was properly brought as a class action"). Although the trial court should not determine the merits of the plaintiffs’ claim at the class certification stage, the trial court can and should consider the merits of the case to the degree necessary to determine whether the requirements of Rule 23 will be satisfied.

Read that case carefully...

- Lip-service re review merits and cert.
- Discussion of abuse of discretion standard of review
- Discussion of proof to satisfy Rule 23
- Review of standard of review—abuse of discretion
Review of “Abuse of Discretion”
- district court abuses its discretion:
  1. if it applies an incorrect legal standard,
  2. follows improper procedures in making the determination, or
  3. makes findings of fact that are clearly erroneous.
- district court may also abuse its discretion by applying the law in an unreasonable or incorrect manner.
- an abuse of discretion occurs if the district court imposes some harm, disadvantage, or restriction upon someone that is unnecessarily broad or does not result in any offsetting gain to anyone else or society at large.

What the #$%^ is the burden of proof?
- Is it:
  1. “rigorous analysis”
  2. “preponderance of evidence”
  3. “substantial evidence”
  4. Something else

Rigorous Analysis as Vague Concept
- Defense counsel push the idea that the Supreme Court created some sort of burden of proof standard.
- What is the level or nature of proof?
Sobering Application in Vega

- T-mobile agreed that the number of retail sales associates employed by T-Mobile between the years 2002 and 2006 was “in the thousands.”
- No specific evidence of number of sales associates in Florida

The Reversal On Numerosity

- “Yes, T-Mobile is a large company, with many retail outlets, and, as such, it might be tempting to assume that the number of retail sales associates the company employed in Florida during the relevant period can overcome the generally low hurdle presented by Rule 23. However, a plaintiff still bears the burden of establishing every element of Rule 23... and a district court’s factual findings must find support in the evidence before it. In this case, the district court’s inference of numerosity for a Florida-only class without the aid of a shred of Florida-only evidence was an exercise in sheer speculation.”

Standard Should Be Lower than The Defense Bar Would Like

- A Class cert hearing is in every sense a preliminary hearing- “not a heavy burden.”
Evidence of Erosion of Standard (or Landslide)

- Factual determinations supporting Rule 23 findings must be made by a *preponderance* of the evidence.
- Overlap into merits expected
- The court's obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking or by a party opposing class cert.

*In re Hydrogen Peroxide Antitrust Litigation, 552 F. 3rd 305 (3rd Cir. 2008)*

PART III- Developments in Class Action Ethics

A. Accepting Pick-offs as an Ethical Violation

- In the recent decision of *Masztal v. City of Miami, So.2d 2007 WL 2254591 (Fla. 3rd DCA 2007)*, the Third District Court of Appeal provided a sobering analysis of the fiduciary obligations of a class representative and counsel. In *Masztal*, a property owners group brought a class action against the City of Miami challenging a proposed fire-rescue assessment and seeking a refund for all those who had paid the assessment. Despite the litigation of a class action claim over a period of six years, the class representatives agreed to settle the dispute for seven million dollars without class relief under circumstances wherein the individual claims of the property owners were settled to provide a "significant windfall." *Id.* at *3."
That is going to leave a mark...

- Scathing remark that “it defies any bounds of ethical decency to view class counsel's actions as anything but a flagrant breach of fiduciary duty.” Id. at *6

B. Duties to Provide Notice to Class

- Rule 23(c)(2) requires “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” When a potential class member’s address is known or is readily available with reasonable effort, individual notice by mail is required. *Eisen v. Carlyle & Jacquelyn*, 417 U.S. 156, 173 (1974).

Lost in the Mail

- What happens if the settlement administrator reports significant undelivered notice?- profound problem with certain class demographics.
- Rule 23 does not require the parties to exhaust every conceivable method of identifying and providing notice to the individual class members. *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir.1985)
Ditto for Claim Forms (which is a function of notice as well)

- “the fact that very few Class Members made a claim should not deter the Court from approving the settlement.” Bellows v. NCO Financial Systems, Inc., 2008 WL 5458986 (S.D. Cal. 2008);

A good deal for the Class Defendant...

- In the recent case of Bellows v. NCO Financial Systems, the United States District Court for the Southern District of California granted final approval of a nationwide FDCPA class action. Under the terms of the settlement agreement, the debt collector was required to establish a settlement fund of Nine Hundred Fifty Thousand Dollars ($950,000.00), from which Class Members had the right to make a claim to receive a $70.00 settlement check. Id at *7. After publishing the notice in USA Today, only 29 claim forms were submitted to the settlement administrator. Id, at 4.

Potential Solutions

- Use cy pres or residual to pay for skip tracing etc.
- Obtain agreement with Class Defendant to provide declarations re “best practicable” notice.
Very, very good indeed!

Notwithstanding the small number of claim forms submitted by class members, the Court nonetheless granted final approval holding that "where a much smaller number of claims were made in the class action than expected, [i]n such circumstances, the settlement agreement should not lightly be set aside nearly because subsequent developments have indicated that the bargain is more beneficial to one side than to the other." Id. *8, quoting from Beecher v. Abel, 441 F.Supp. 426, 429 (S.D. N.Y. 1977).

C. Use of Class Action Guidelines

NACA maintains the comprehensive "Standards and Guidelines for Litigating and Settling Consumer Class Actions" 176 F.R.D. 375 (published in 1998, fully updated in 2006) in an effort to ensure that the occasional and limited misuse of the class action device does not lead to restrictions on the ability of this procedure to challenge abusive business practices. The paper addresses the propriety of class actions when individual recoveries are small, the questionability of coupon settlements, settlements when other class actions are on file, additional compensation to named plaintiffs, the scope of class member releases, cy pres awards, attorneys fees, and improved notice of settlement.

If you are the Class Rep.-To make you look like a good guy.
If you are an Objector-To make the other guy look bad.

V. Federal Class Action Legislation

A. Introduction to CAFA

- Enacted in 2005, to address perceived abuses in class actions, the Class Action Fairness Act ("CAFA"), dramatically expanded federal diversity for class actions.
- Why were federal courts looked as being part of the solution?
- As an example of the law of unintended consequences, consumer class actions are now available in states that had previously prohibited class actions (e.g., Virginia).

B. Jurisdiction Requirements
   1. Amount in Controversy

   The district courts shall have original jurisdiction of any class action in which the matter in controversy exceeds the sum or value of $5,000,000.
2. Citizenship

In addition to dollar floor, the CAFA proponent must establish that:
(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

3. Discretionary Decline of Jurisdiction

A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed.

4. Mandatory Decline of Jurisdiction

a. Local Class Rule

The district court shall decline jurisdiction when:
(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;
(II) at least 1 defendant is a defendant:
(aa) from whom significant relief is sought by members of the plaintiff class;
(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and
(cc) who is a citizen of the State in which the action was originally filed; and
(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and
(iv) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons.
b. Limited Diversity Rule

- District Court shall decline jurisdiction when two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

c. Small class exception

- **CAFA does not apply if** the number of members of all proposed plaintiff classes in the aggregate is less than 100.

C. Limitations on Attorney Fees

a) **Contingent fees in coupon settlements.**—If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are **redeemed**.
D. Geographic Discrimination Prohibition

The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

E. CAFA Notice

1. Timing

- Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official notice of the proposed settlement ...

2. Content

- a copy of the complaint and any materials filed with the complaint and any amended complaint;
- notice of any scheduled judicial hearing in the class action;
- any proposed or final notification to class members;
- any proposed or final class action settlement;
- any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;
- any final judgment or notice of dismissal;
- the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State’s appropriate State official.
3. Delay in Final Approval

An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection

4. Effect of CAFA Notice Non-compliance

A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the CAFA notice required has not been provided.

VI. Case Law Review
A. Attack on Attorney Fees
   1. Review of the Loadstar Analysis
   - The federal courts have long applied a "lodestar" approach to the determination of attorney’s fees in matters involving fee-shifting statutes such as the FDCPA. See, generally, Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (1973), appeal after remand, 540 F.2d 102 (1976).

   The Basic Math
   - The multiplication of the reasonable number of hours expended times the reasonable hourly rate is referred to as the "lodestar." Student Public Interest Research Group v. AT&T Bell Laboratories, 842 F.2d 1436, 1441 (3d Cir. 1988).

2. No More Premiums on Statutory Fee Shifting Classes
   - After plaintiffs successfully challenged Georgia’s foster-care system on constitutional grounds, they sought an award of attorney’s fees under 28 U.S.C. § 1988.
So far so good...

- The district court accepted their proposed hourly rate for their attorneys' services, reduced the amount they requested based on the time devoted, and calculated a "lodestar" amount based on those factors.
- The trial court increased this amount by 75 percent based on the delay in recovering the expenses that the attorneys had advanced during the litigation, the fact that they were not being paid on an ongoing basis during the case, the high degree of skill and dedication exhibited by the attorneys, and the extraordinary result that had been achieved.

The trial judge awarded the lawyers $6 million using the lodestar method of calculating legal fees — hours worked multiplied by the local hourly market rate for lawyers of comparable experience and skill.

- The judge then added an "enhancement" of $4.5 million for what he said was work of exceptionally high quality.

- 11th Circuit affirmed based on abuse of discretion standard.
No more “incentive pay”

- SCOTUS ruled on April 21, 2010, that trial courts may award fee enhancements above the “lodestar” amount to lawyers for superior performance, but only in "rare and well-documented circumstances."

SCOTUS Ivy Tower Analysis: “Cabining Discretion”

- The lodestar method produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.
- Second, the lodestar method is readily administrable, see Dague, 505 U.S., at 566, 112 S.Ct. 2638; see also Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 609, 121 S.Ct. 1835, 149 L.Ed.2d (2001); and unlike the “Johnson” approach, the lodestar calculation is “objective,” Hensley, supra, at 433, 103 S.Ct. and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results.

Perdue Rules

- First, a “reasonable” fee is a fee that is sufficient to induce a capable attorney to undertake the representation.
Second, the lodestar method yields a fee that is presumptively sufficient to achieve this objective.

Third, that enhancements may be awarded in “rare” and “exceptional” circumstances.

Fourth, “the lodestar figure includes most, if not all, of the relevant factors constituting a ‘reasonable’ attorney’s fee.”
Fifth, the burden of proving that an enhancement is necessary must be borne by the fee applicant.

Finally, a fee applicant seeking an enhancement must produce “specific evidence” that supports the award.

Hostility to Fee Shifting for Plaintiff’s Counsel

- Per ft 8, Justice Alito shows the real reason for the opinion: “approach would retain the $4.5 million enhancement here so that respondents’ attorneys would earn as much as the attorneys at some of the richest law firms in the country.”
- Fee shifting to allow for adequate representation, “not to provide ... a windfall.”
Spill-over into Other Statutory Class Actions

- *Jackson v. Estelle's Place, LLC* [2010 WL 3190697](0th Circuit 2010)- FLSA representative action.
- Court rejected notion by unhappy plaintiff’s counsel that Perdue decision *prohibited* downward reduction from loadstar

B. The Frontal Attack on Class Actions- SCOTUS Arbitration Decisions

1. Opening Round

- The first body blow by SCOTUS to class action practice in the context of forced arbitration was *Randolph v. Greentree*.
- General holding made consumer transactions subject to the Federal Arbitration Act ("FAA")
2. A Brief Respite

- QUERY: What were the facts of Bazzle?

Facts of Bazzle

- The Bazzle respondents and the Lackey and Buggs respondents separately entered into contracts with petitioner Green Tree Financial Corp. that were governed by South Carolina law and included an arbitration clause governed by the Federal Arbitration Act.
- Each set of respondents filed a state-court action, complaining that Green Tree’s failure to provide them with a form that would have told them of their right to name their own lawyers and insurance agents violated South Carolina law, and seeking damages.
- The Bazzles moved for class certification, and Green Tree sought to stay the court proceedings and compel arbitration.

After the court certified a class and compelled arbitration, Green Tree selected, with the Bazzles’ consent, an arbitrator who later awarded the class damages and attorney’s fees.

- **$9,200,000** in statutory damages in addition to attorney’s fees
Ha! Ha!

- The trial court confirmed the award.
- Green Tree appealed, claiming, among other things, that class arbitration was legally impermissible.

SCOTUS Holding

- Class arbitration was not clearly precluded by commercial lending contract’s broad arbitration clause providing that “[a]ll disputes ... arising from or relating to this contract or the relationships which result ... shall be resolved by binding arbitration by one arbitrator selected by [lender] with consent of you;” thus, as long as lender selected arbitrator with consent of named plaintiff/borrower, Federal Arbitration Act (FAA) did not foreclose class arbitration, and question of whether class arbitration was permissible under clause was matter of contract interpretation under state law.

Response by Corporate America

- Class action waivers are now a common staple in form arbitration clauses.
- Consumers and employees have challenged these waivers, with varying results, on unconscionability grounds.
- More in a minute....
3. The Past is Prologue?

- 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.
- Essentially a reversal of *Bazzle*.

Facts of *Stolt-Nielsen*

- QUERY: what were the facts of Stolt-Nielson?
- Petitioner shipping companies serve much of the world market for parcel tankers-seagoing vessels with compartments that are separately chartered to customers, AnimalFeeds, who wished to ship liquids in small quantities.
- AnimalFeeds shipped its goods pursuant to a standard contract known in the maritime trade as a charter party.
- The shipping contract contained an arbitration clause.

No controversy as to arbitration

- AnimalFeeds brought a class action antitrust suit against petitioners for price fixing, and that suit was consolidated with similar suits brought by other charterers.
- The parties *agreed* that they must arbitrate their antitrust dispute.
- AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services.
Green-light to Class Arbitration Bans

- “From these principles, it follows 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. In this case, however, the arbitration panel imposed class arbitration even though the parties concurred that they had reached “no agreement” on that issue.”

- “The panel’s conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”

The Court’s holding on its face appears to limit class arbitration significantly unless the arbitration clause expressly authorizes class arbitration.

5. The Final Fight- Challenges Based on State-law Unconscionability
a. Overview

- Like other contracts, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.
- Many state and federal courts have invalidated contractual bans on, or waivers of, class arbitration because proceeding on an individual basis was not feasible in view of the high costs involved and the slim benefits achievable. See, e.g., In re American Express Merchants' Litigation, 554 F.3d 300, 315-316, 320 (2d Cir. 2009); Kristian v. Comcast Corp., 446 F.3d 25, 55, 59 (C.A. 1 2006); Discover Bank v. Superior Court, 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100, 1110 (2005); Leonard v. Terminix Int'l Co., LP, 854 So. 2d 529, 539 (Ala. 2002).

b. Removing Determination of Unconscionability From the Courts

- Traditionally, the determination of whether an agreement to arbitrate was for the courts and not the arbitrator to decide.
- QUERY: what were the facts and holding?
- The Supreme Court held that, under the Federal Arbitration Act, a district court may not decide a claim that an arbitration agreement is unconscionable when the agreement explicitly assigns that decision to an arbitrator.
By a vote of five to four, in a decision by Justice Scalia that relied principally on a 1967 decision called *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, the Court held that if the employee had raised a challenge that was specific to the second part alone—that is, to the agreement to arbitrate validity—then a court would have had to decide the challenge.

But because the employee’s grounds for unconscionability applied equally to the initial agreement to arbitrate all employment disputes, the general unconscionability question should be decided by an arbitrator.

The Lid Affixing to The Class Action Coffin?

- The Supreme Court was asked to consider whether the FAA exempts states from conditioning the enforcement of an arbitration agreement on the availability of class-wide arbitration when class-wide arbitration is not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.
- The Ninth Circuit below held that the class action waiver provision of AT&T’s arbitration agreement was unconscionable under California state law and, therefore, unenforceable. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009).

FACTS

- The cellular telephone contract between respondents (Concepciones) and petitioner (AT & T) provided for arbitration of all disputes, but did not permit classwide arbitration. After the Concepciones were charged sales tax on the retail value of phones provided free under their service contract, they sued AT & T in a California Federal District Court. Their suit was consolidated with a class action alleging, inter alia, that AT & T had engaged in false advertising and fraud by charging sales tax on “free” phones. The District Court denied AT & T’s motion to compel arbitration under the Concepcion contract. Relying on the California Supreme Court’s *Discover Bank* decision, it found the arbitration provision unconscionable because it eliminated classwide proceedings. The Ninth Circuit agreed that the provision was unconscionable under California law and held that the Federal Arbitration Act (FAA), which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” did not preempt its ruling.
The guaranteed minimum recovery was increased in 2009 to $10,000 (in footnote to opinion).

**Holding**

- Query: what was the holding?

- Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

**Pouring content into the holding**

- What was the rationale (if any) for the holding?
  1. Effect on Efficiency: “First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment”
2. Lack of Due Process Safe-guards: class arbitration requires procedural formality. “If procedures are too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class.”

3. Risk to Defendants- class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. “We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.”

Is this fair?

What are the implications?

QUERY: What did the dissent say?

“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? See, e.g., Carnegie v. Household Int’l, Inc., 376 F.3d 656, 651 (CA 7 2004) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30”).
C. A Bone to the Dogs
(or the Law of Unintended Consequences)

FIRST TINKERING WITH CAFA BY SCOTUS


Facts of *Shady Grove*

- Medical provider brought putative class action in federal court under CAFA against automobile insurer, alleging breach of contract, bad faith breach of contract, and violation of New York law in failing to pay statutory interest penalties on overdue payments of insurance benefits owed under no-fault automobile insurance policies.
- The United States District Court for the Eastern District of New York granted insurer’s motion to dismiss.
Holding- A mild consumer victory

- New York law prohibiting class actions in suits seeking penalties or statutory minimum damages conflicted with Federal Rule of Civil Procedure governing class actions, so that the New York law would be preempted to extent that it would not apply in federal court sitting in diversity
- QUERY: what is the practical effect?

Practical Effect- Open Season in States Without Class Action Devices

- As an example of the law of unintended consequences, consumer class actions are now available in states that had previously prohibited class actions.
- Such as New York, Michigan & Virginia.
- YES- Virginia!

D. “Too Big To Succeed”

Facts of Wal-Mart

- Largest civil rights class action ever.
- Involved claims on behalf of 1.6 female employees of Wal-Mart that Wal-Mart discriminated in employment.
- Wal-Mart had a corporate anti-discrimination policy.
- But evidence pointed to decentralized management system that allowed local managers supervised discretion re promotion and that statistical evidence showed women were not promoted or compensated the same as men.

In light of Wal-Mart’s size and geographic scope, “it is quite unbelievable that all managers would exercise their discretion in a common way without common direction.”
E. The Challenge to Statutory Damage Class Actions

- In June 2010, SCOTUS took certiorari jurisdiction from the 9th Circuit in First American v. Edwards to consider whether a homebuyer had standing to pursue a class action for statutory damages under RESPA in the absence of actual damages.
- Focus is on whether the "case or controversy" clause under Article III, Section 2 is satisfied if no injury-in-fact is alleged.

The Stakes

- QUERY: what is the potential impact of the SCOTUS ruling?
- Elimination of most statutory damage claims & private attorney general lawsuits.
- No effective means of enforcing most consumer laws.
- E.g., failure to provide TILA disclosures.

PART V- Class Action Practice Growth Areas
IV. Conclusion

A. Role Of Consumer Advocacy Organizations
- National Association of Consumer Advocates
- Public Justice
- Public Citizen
- National Consumer Law Center

B. Importance of Training
- NACA/NCLC conferences
- NCLC Litigation Conference/Class Action Symposium, Seattle, Washington, October, 2012
CERTIFICATION OF ATTENDANCE (FORM 2)

MCLE requirement pursuant to Paragraph 17, of Section IV, Part Six, Rules of the Supreme Court of Virginia and the MCLE Board Regulations.

INSTRUCTIONS

Certify Your Attendance Online at [https://member.vsb.org/vsbportal/](https://member.vsb.org/vsbportal/)

Complete this Certification. Retain for two years.

MCLE Compliance Deadline - October 31. MCLE Reporting Deadline - December 15.

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Course ID Number: VTZ050

Sponsor: Virginia Trial Lawyers Association

Course/Program Title: The Changing Landscape of Class Action Practice - 53rd Annual Convention

Live Interactive * CLE Credits (Ethics Credits): 1.0  (0.0)

Date Completed: ____________________________

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By my signature below I certify

___ I attended a total of ________________ (hrs/mins) of approved CLE, of which (______) (hrs/mins) were in approved Ethics.

Credit is awarded for actual time in attendance (0.5 hr. minimum) rounded to the nearest half hour. (Example: 1hr 15min = 1.5hr)

___ The sessions I am claiming had written instructional materials to cover the subject.

___ I participated in this program in a setting physically suitable to the course.

___ I was given the opportunity to participate in discussions with other attendees and/or the presenter.

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