Law360

January 17, 2014

The Class Action Hurricane: Where Is The Storm Heading?

by Michael J. Mueller and Emily Burkhardt Vicente

The waves of class action litigation continue to lash against the shores of American business. As the new year begins, it is worth taking stock of recent developments on this front, and what those developments portend for 2014 and beyond. Based on some recent case rulings, case filings and cases under consideration at the U.S. Supreme Court, it is possible to make some forecasts as to the direction and intensity of the class action storm.

Background: A Few Sunny Days for Defendants

In 2011, the Supreme Court, in *Wal-Mart Stores Inc. v. Dukes*,[1] construed the Rule 23(a)(2) commonality requirement in a manner that took some wind out of class plaintiffs' sails. The Supreme Court reminded litigants that Rule 23 is not a mere pleading standard; plaintiffs must prove they can satisfy each element of Rule 23 before a class should be certified, even if those considerations overlap with the merits.[2]

The court also observed that "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury'," meaning that all of their claims must depend upon a common contention that can be resolved "in one stroke."[3] The court noted in a footnote — as if the proposition were obvious — that if the class members must prove a point (e.g., the efficient market hypothesis in a securities class action) in order to obtain Rule 23(b)(3) certification, they "surely have to prove [it] *again* at trial in order to make out their case on the merits."[4] Although *Dukes* involved a nationwide class of female employees asserting claims under title VII, the case has been applied to many types of class actions.[5]

In March 2013, the Supreme Court cited *Dukes* in a different context. In *Comcast Corp. v. Behrend*,[6] the Supreme Court reversed certification of a class of cable television subscribers, holding that the Third Circuit had erred in refusing to decide at the class certification stage whether the plaintiffs' proposed damages model could show damages on a class-wide basis. The plaintiffs had pleaded four theories of antitrust impact, but their damages model failed to attribute damages from the only remaining theory of injury. The court, citing *Dukes*, disagreed with the Third Circuit's conclusion that this analysis should be postponed until the merits determination.[7] The court echoed its observation in *Dukes* that class plaintiffs have consistent burdens both at the certification stage *and* at trial: "at the class certification stage (*as at trial*), any model supporting a 'plaintiffs' damages case must be consistent with its liability case ...'"[8]

Also in March 2013, the Supreme Court issued an important decision interpreting the Class Action Fairness Act.[9] In 2005, Congress enacted CAFA to place limits on certain perceived abuses of class action litigation, including efforts by plaintiffs' lawyers to file and keep their cases in friendly state courts. Generally speaking, Congress decided that suits involving minimal diversity, 100 or more plaintiffs and more than $5 million in controversy, should be litigated in federal court. One trick developed by plaintiffs' counsel was to avoid this trigger for federal jurisdiction by pleading or stipulating that they would not seek to recover more than $5 million

in damages. In *Standard Fire Ins Co. v. Knowles*,[10] the Supreme Court held that plaintiffs may not avoid removal jurisdiction in this manner.

Last Year's Weather: Continued Rain, With Localized Downpours

Despite the Supreme Court's recent decisions, the class action storm has not abated. According to a search on Monitor Suite, there were 5,791 class and mass actions filed in federal district courts in 2013.

What types of cases were filed as class actions last year? Wage-hour class and collective actions — Fair Labor Standards Act claims often coupled with parallel Rule 23 claims based on state wage laws — far outnumbered every other type of class action. In 2013, there were 1,907 such wage-hour cases filed, representing 26.7 percent of all class actions. That is more than two-and-a-half times as many cases as the next category, which is all other uncategorized federal statutory actions combined, which accounted for 741 cases (10.4 percent).

The remaining major categories of class actions filed in 2013 were: 568 consumer credit cases (7.9 percent); 470 cases involving debit and credit cardholder agreements (6.6 percent); 366 mass tort cases (5.1 percent); 313 commercial law and contracts cases (4.4 percent); 231 securities cases (3.2 percent); and 228 antitrust and trade regulation cases (3.2 percent). The above categories accounted for more than three-quarters of all federal class filings last year, with other practice areas accounting for the remaining quarter.

Where were those cases filed? The answer will not surprise anyone familiar with class action litigation. Five states accounted for over three-fifths of all federal class actions. The two most popular forums were in New York: There were 590 class actions filed in the Southern District (10.2 percent) and 573 in the Eastern District (9.9 percent). These were followed by the Central District of California with 508 cases (8.8 percent); the Southern District of Florida with 443 cases (7.6 percent); the Northern District of California with 396 cases (6.8 percent); the Northern District of Illinois with 319 cases (5.5 percent); the Middle District of Florida with 264 cases (4.6 percent); the Southern District of California with 254 cases (4.4 percent); and the District of New Jersey with 241 cases (4.2 percent). Other courts accounted for the remaining 38 percent of class actions.

The Weather Forecast for 2014

Like "storm chasers" who follow tornadoes, class plaintiffs' counsel tend to follow the latest and greatest storms. Thus, much of the forecast for the near future can safely be based on recent events. No prediction can be exhaustive, but some subjects for litigation seem apparent.

Prediction #1

Wage-hour litigation will continue to dominate the federal class action docket as it has for years. Those storm clouds do not appear likely to go away until every sizeable company in America has been sued for allegedly working its employees off-the-clock, for misclassifying managers as nonexempt hourly workers or for misclassifying employees as independent contractors.

Such cases are particularly attractive to plaintiffs' counsel because the FLSA requires payment of "a reasonable attorney's fee" to a prevailing plaintiff.[11] Given that many such cases take years to litigate, plaintiffs' counsel hope to generate a large lodestar in support of their fee petition, despite what may be a relatively small recovery for their clients.

Prediction #2

Plaintiffs' counsel will continue to file consumer fraud and privacy class actions. Some of these cases will be based on corporate data breaches that have filled the headlines in recent years. The courts have consistently held that plaintiffs lack standing and cannot state a claim based upon a mere "threat" or "likelihood" of identity theft. For those plaintiffs who allege they took special precautions or suffered actual identity theft, the question will be whether such specialized allegations can be addressed on a class wide basis.[12] Other cases will be privacy cases alleging the use of putative class members' data without their consent, such as the ones currently pending against Google Inc., LinkedIn Corp. and Yahoo Inc. These cases raise issues such as whether "click-to-agree screens" and other online policies constitute sufficient consent from users, and whether the users have been harmed.[13]

Prediction #3

In the consumer products sphere, plaintiffs' counsel will continue to pursue creative "no injury" and "economic injury-only" product class actions. In these cases, plaintiffs' attorneys invoke warranty theories, negligence theories or consumer protection statutes to sue on behalf of all purchasers or owners of a product (or multiple lines of products), whether or not each of those putative class members has yet witnessed a manifestation of a problem that is claimed to have been experienced so far by a relatively small number of consumers. The Supreme Court is currently considering three petitions for certiorari in front-load washing-machine cases that pose follow-up questions to the court's decision in *Comcast*. In two of the cases, one of the questions is whether a product liability class may be certified where it is undisputed that most members did not experience the alleged defect or harm.[14]

There is often a connection between private class actions and the enforcement agenda or legal interpretations of federal regulatory agencies. Class action attorneys tend to pounce on agency action, especially new regulations. Hence, the next three predictions:

Prediction #4

An increasingly popular type of class action targets food manufacturers or sellers for alleged mislabeling or fraudulent marketing as to weights and measures, ingredients or health or nutritional benefits. Perhaps the best-known food-related class actions of 2013 involved allegations that Subway's "footlong" sandwiches were actually less than 12 inches in length; such actions were filed in California, Illinois and New Jersey.[15] Beyond that, plaintiffs' attorneys have filed lawsuits claiming that consumers are deceived into believing that "evaporated cane juice" is something other than cane sugar, that "soy milk" is really cow's milk, that "natural" necessarily excludes corn syrup or citric acid or that "no added sugar" necessarily implies "low in calories."[16]

Unfortunately for food-related defendants, the U.S. Food and Drug Administration took action on Jan. 6, 2014, that will likely lead to more such class actions. The agency sent a letter to three federal judges presiding over class actions contesting whether the terms "natural" or "all natural" can be used to describe food that contains genetically modified ingredients.[17] The FDA will not presently decide who can use those terms, thus making it harder for such defendants to assert a preemption defense based on the contention that the agency has primary jurisdiction.

Prediction #5

Plaintiffs' attorneys have filed hundreds of suits in the last two years based on consumers who are already boiling with anger over unsolicited telephone marketing calls. They have filed these cases under the Telephone Consumer Protection Act.[18] The statute authorizes damages of $500 per violation — which plaintiffs' counsel interpret as $500 *per call* — with the possibility of treble damages for a "willful and knowing" violation.

This disputed view of the remedy, when combined with the Federal Communication Commission's new TCPA regulations, which went into effect on Oct. 16, 2013,[19] will likely draw more ships into the maelstrom of TCPA class action suits filed in the wake of the Supreme Court's January 2012 ruling in *Mims v. Arrow Financial* that recognized concurrent state and federal jurisdiction for such claims.[20]

Prediction #6

In June 2013, the Supreme Court confirmed in *American Express Co. v. Italian Colors Restaurant*[21] that an express class waiver in an arbitration agreement is enforceable under the Federal Arbitration Act, even when federal statutory claims are at issue and when the cost of arbitrating the claims on an individual basis would significantly exceed the potential recovery. To the extent that such arbitration clauses are widely adopted by businesses, this created hope for reducing the number of class actions.

However, the relatively new Consumer Financial Protection Board may put the brakes on efforts by companies to protect themselves through arbitration clauses. In mid-December, as mandated by Dodd-Frank Act § 1028(a), the CFPB released its "Arbitration Study Preliminary Results," a survey of predispute arbitration provisions relating to consumer financial products or services (e.g., credit cards, prepaid debit cards and checking accounts).[22] The study's tone implies that, after the study is submitted to Congress, the CFPB will exercise its authority to prohibit or limit such arbitration agreements. If so, such regulations would likely lead to more class action lawsuits.

The Supreme Court: Cloud Seeder or Storm Buster?

As noted above, the Supreme Court has decided several cases in the last few years that have offered some protections for class action defendants. There are two other cases in the Supreme Court this term that class action lawyers have been following to see if they will shift the direction or intensity of the storm.

First, state attorneys general often file *parens patriae* lawsuits as tag-alongs to private class

actions, seeking to recover for the state and citizens what private plaintiffs' counsel seek — or have already recovered — for their clients. On Nov. 6, 2013, the Supreme Court heard argument on whether these suits should proceed in federal court, instead of state court, on the ground that they are removable under CAFA as mass actions involving "100 or more persons."[23] On January 14, 2014, the court unanimously ruled that the state law antitrust and consumer protection suit did not constitute a mass action because Mississippi was the only named plaintiff; the court rejected the defendants' invitation to examine whether 100 or more unnamed purchasers are the real parties in interest.[24] Accordingly, the Supreme Court reversed, ruling that the case must be remanded to state court.

Second, the Supreme Court will hear argument on March 5, 2014, as to whether the presumption of class-wide reliance in securities class actions, derived from the fraud-on-the-market theory, should be abandoned or limited.[25] The case challenges the rule created by a four-justice majority in *Basic Inc. v. Levinson*.[26]

The petitioner's argument is based in part on skepticism of the theory expressed by economists, rejection of the theory by state courts and the lack of utility of the rule, including its tendency to force settlements without regard to merit. If the *Basic* rule is overruled, putative class members would each be required to prove that they actually relied on the defendant's misrepresentation(s), thus preventing a finding of predominance under Rule 23(b)(3).

Conclusion

The class action storm continues. Although the Supreme Court has given some hope to defendants that the storm will eventually abate, plaintiffs' counsel will continue to stir the waters in 2014 and beyond.

In a follow-up to this article, we will consider what plaintiffs who assert such claims are required to prove in order to establish their entitlement to classwide relief. We will also examine the increasing call by courts to require plaintiffs to explain *in advance*, through proposed trial plans, how they intend to meet their burden should they ever get to trial. If defendants hold out long enough, they may find that the plaintiffs' predictions for a devastating storm were overblown.

Michael J. Mueller *is a partner and co-head of Hunton & Williams' business litigation practice group in the firm's Washington, DC, office. Mueller's practice focuses on class actions and other complex civil litigation.* ***Emily Burkhardt Vicente*** *is a partner in Hunton & Williams' Los Angeles office where her practice focuses on the defense of class and complex employment and wage-hour actions.*

---

1 131 S. Ct. at 2541 (2011).

2 *Id.* at 2551-52.

3 *Id.* at 2551 (quoting *General Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 157 (1982)).

4 *Id.* at 2552 n.6 (emphasis in original).

[5] *See, e.g., Comcast v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (antitrust action); *RBS Citizens N.A. v. Ross*, 667 F.3d 900 (7th Cir. 2012), *vacated*, 133 S. Ct. 1722 (Apr. 1, 2013) (state-law overtime pay case); *Whirlpool Corp. v. Glazer*, 678 F.3d 409 (6th Cir. 2012), *vacated*, 133 S. Ct. 1722 (Apr. 1, 2013) (product liability case).

[6] 133 S. Ct. 1426 (2013).

[7] *Id.* at 1430.

[8] *Id.* at 1433 (emphasis added).

[9] Pub. L. 109-2, codified at 28 U.S.C. §§ 1332(d), 1453, and 1711–1715.

[10] 133 S. Ct. 1345 (2013).

[11] 29 U.S.C. § 216(b).

[12] *See, e.g.*, *Resnick v. AvMed, Inc.,* No. 1:10-cv-24513-JLK, 2011 WL 1303217 (S.D. Fla. Apr. 5, 2011) (dismissing complaint based on stolen laptop containing unencrypted medical and personal information for over 1 million persons because risk of future harm was not cognizable injury), *aff'd in part* and *rev'd in part*, 693 F.3d 1317 (11th Cir. 2012) (reinstating certain claims of two named plaintiffs who alleged that they had taken "extraordinary measures" to protect their data and had suffered actual identity theft).

[13] *See, e.g.*, *In re Google Inc. Gmail Litig.*, No. 13-MD-02430-LHK, 2013 WL 5423918 (N.D. Cal. Sept. 26, 2013).

[14] *See Sears, Roebuck and Co. v. Butler*, Supreme Court No. 13-340, petitioning from *Butler v. Sears, Roebuck and Co.,* 727 F.3d 796 (7th Cir. 2013); *Whirlpool Corp. v. Glazer*, No. 13-431, petitioning from *In re Whirlpool Corp. Front-Loading Washer Products Liability Litig.*, 722 F.3d 838 (6th Cir. 2013). The petitions were originally scheduled to be considered by the Supreme Court at its conference on January 10, 2014, and then were rescheduled for January 17, 2014. At the time of publication, the Court has not yet ruled on these petitions.

[15] *Springer v. Doctor's Assocs., Inc.,* No. 2:13-cv-00143-MCE-KJN (E.D. Cal.); *Gross v. Doctor's Assocs., Inc.*, No. 1:13-cv-00601 (N.D. Ill.); *Pendrak v. Subway Sandwich Shops, Inc.,* No. 3:13-cv-00918-FLW-DEA (D.N.J.).

[16] *See, e.g.*, *Gitson v. Trader Joe's Co.*, No. 13-CV-01333-WHO (N.D. Cal.) and *Morgan v. Wallaby Yogurt Co., Inc.,* No. 13-CV-00296-WHO (N.D. Cal.) ("evaporated cane juice," "no additives" and "milk" claims as to yogurt and soy milk products); *Bruton v. Gerber Prods. Co.,* No. 12-CV-02412-LHK (N.D. Cal.) (nutrient content claims, "natural" claims and sugar-related claims as to baby food products); *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 JSW (N.D. Cal.) (challenging claimed health benefits from omega-3 fatty acids in shelled walnuts); *Ries v. Arizona Beverages USA, LLC*, No. 10-01139 RS (N.D. Cal.) ("all natural" claims as to iced tea drinks containing high fructose corn syrup and citric acid).

[17] http://articles.law360.s3.amazonaws.com/0499000/499387/Letter.pdf .

[18] 47 U.S.C. § 227.

[19] In short, the new regulations require businesses to require "prior express written consent" before sending certain telemarketing communications to mobile phones or residential lines. *See* 47 C.F.R. §§ 64.1200(a)(2)-(3).

[20] 132 S. Ct. 740 (2012).

[21] 133 S. Ct. 2304 (2013).

[22] http://www.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

[23] *See Mississippi ex rel. Hood v. AU Optronics Corp.,* 701 F.3d 796 (5th Cir. 2012), *cert. granted*, 133 S. Ct. 2736 (2013) (Supreme Court No. 12-1036).

[24] __ S. Ct. __, No. 12-1036, slip opinion at 6-10.

[25] See *Erica P. John Fund, Inc. v. Halliburton*, 718 F.3d 423 (5th Cir. 2013), *cert. granted*, 134 S. Ct. 636 (2013) (Supreme Court No. 13-317).

[26] 485 U.S. 224 (1988).