(Some) Current Issues in Class Actions

Deutsch-Amerikanische Juristen-Vereinigung e.V.
German-American Lawyers' Association

Hon. Jon S. Tigar
United States District Court for the Northern District of California

Class Action Overview

- **Rule 23** of the Federal Rules of Civil Procedure
- Allows **small claims** to be aggregated and **litigated together** if court grants motion to **certify a class**.
- "The class action is an ingenious device for economizing on the expense of litigation and enabling small claims to be litigated. The two points are closely related. If every small claim had to be litigated separately, **the vindication of small claims would be rare**. The fixed costs of litigation make it impossible." Thorogood v. Sears, Roebuck & Co., 547 F.3d 742, 744 (7th Cir. 2008).

Class Action Overview

The court will only **certify a class** if the case meets the requirements of **Rule 23(a)**:

- **Numerosity** (“the class is so numerous that joinder of all members is impracticable”)
- **Commonality** (“there are questions of law or fact common to the class”)
- **Typicality** (“the claims or defenses of the representative parties are typical of the claims or defenses of the class) and
- **Adequacy** (“the representative parties will fairly and adequately protect the interests of the class”)

Class Action Overview

- And at least one of the requirements of Rule 23(b) is met:
- separate actions would create a risk of **inconsistent outcomes** OR
- the party opposing the class has acted on grounds that apply generally to the class such that classwide **injunctive relief** is appropriate OR
- "questions of law or fact common to class members **predominate** over any questions affecting only individual members, and . . . a class action is **superior** to other available methods for fairly and efficiently adjudicating the controversy.

Class Action Overview

- Implicit requirement of **ascertainability**

- "[A] class must be defined clearly and . . . membership [must] be defined by objective criteria rather than by, for example, a class member's state of mind." Mullins v. Direct Digital, LLC, 795 F.3d 654, 657 (7th Cir. 2015)

- A class is sufficiently defined and ascertainable if it is "administratively feasible for the court to determine whether a particular individual is a member." O'Connor v. Boeing N. Am., Inc., 184 F.R.D. 311, 319 (C.D. Cal. 1998)

Class Certification Is Not A Ruling on the Merits

- "Rule 23 grants courts **no license to engage in free-ranging merits inquiries** at the certification stage. Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1194–95 (2013)

- In other words, the **strength** of the plaintiffs' claim is not at issue.

Class Certification Is Often The Most Important Decision In The Case

- If the claim is not certified, it will not make economic sense for the plaintiff to continue to litigate
- If the claim is certified, the litigation risk will often make settlement the only viable course of action for defendant

Class Actions Are An Important Part of the American Litigation Landscape

- “Reliable estimates of the frequency of class actions are elusive.” (RAND Institute)

- Last year, at least 1672 class actions were filed in the federal courts, and it is likely that a greater number were filed in state courts.

Recent Developments: Damages Models

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

- Plaintiffs alleged that Comcast entered into "clustering transactions" that violated the antitrust laws
- Plaintiffs had four different damages theories
- Plaintiffs' economics expert based damages on all four theories
- The district court rejected three of Plaintiffs' damages theories
- Held: Plaintiffs' failure to isolate damages resulting only from the single accepted theory of classwide impact precluded certification. Plaintiffs' expert's economic model improperly measured damages stemming from alternative liability theories and related antitrust injuries that were no longer in the case.

Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013)

- Comcast dissent: "[T]he opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3). In particular, the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable on a class-wide basis."
- Federal circuit courts of appeal have generally interpreted Comcast narrowly to stand for just two propositions: (1) when moving for class certification under Rule 23(b)(3), the plaintiffs' model for determining class-wide damages must measure damages that result from the class's asserted theory of injury; and (2) individualized damages do not automatically defeat Rule 23(b)(3) certification.
- Comcast not a "game-changer."

Roach v. T.L. Cannon Corp., (2d Cir. 2015)

- Workers in restaurant chain sued for unpaid overtime and other wages. Defendants opposed certification on the grounds that no damages model captured each class member's injuries. District court denied certification, finding that need to evaluate individual damages meant common issues did not predominate.

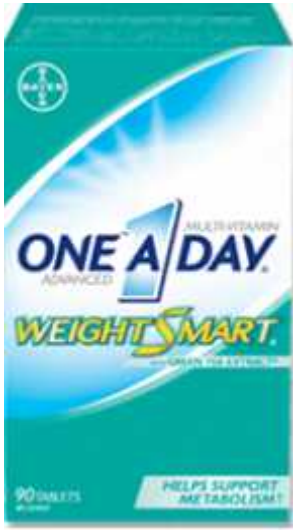
- The Second Circuit reversed. The court held that the need to individually assess damages is only a "factor" in deciding whether issues susceptible to generalized proof outweigh individual issues "when certifying the case as a whole."

Pulaski & Middleman, LLC v. Google, Inc., (9th Cir. 2015)

- Internet advertisers claimed that Google misled them by failing to disclose that Google placed their ads on parked domains and error pages, and that they would have paid less if they had known the truth. Plaintiffs sought restitution of some portion of the money they had paid to Google.
- The district court denied certification because differences between injuries to advertisers, and the fact that some advertisers suffered no injury, meant there would a high degree of individualized proof and common issues did not predominate.
- The Ninth Circuit reversed. It held that individualized damages (or restitution) calculations alone cannot defeat Rule2(b)(3)'s predominance element.

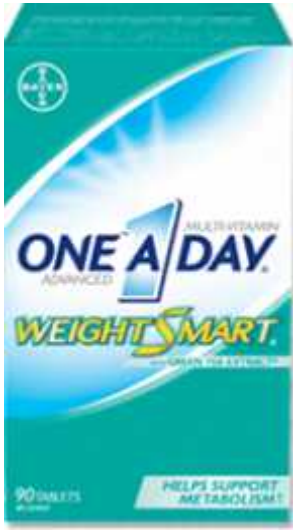
Recent Developments: Ascertainability

Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013)



- Class action filed over Bayer One-A-Day WeightSmart supplements
- Purchasers unlikely to keep receipts
- Bayer has no purchase records because does not sell to consumers
- Bayer challenged **ascertainability**.
- "[I]f class members cannot be ascertained from a defendant's records, there must be a reliable, administratively feasible alternative."

Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013)



- Ascertaining class membership “by potential class members’ say so” not sufficient.
- Self-identification insufficient because “defendant must be able to challenge class membership.”
- Risk that consumers will fabricate affidavits.
- Certification DENIED.

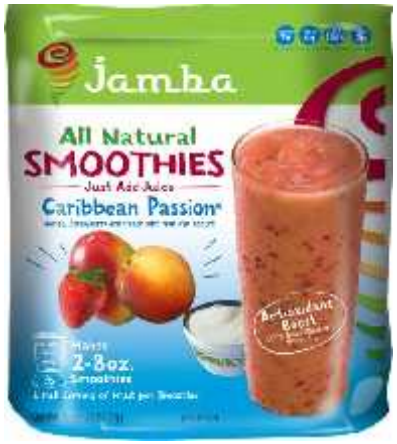
Mullins v. Direct Digital, LLC
795 F.3d 654 (7th Cir. 2015)

- Plaintiff sued Direct Digital over Instaflex Joint Support
- Defendant opposed certification, citing Carrerra
- Seventh Circuit allowed self-identification, rejected Carrerra

Mullins v. Direct Digital, LLC (Seventh Circuit)

- Carrera "raised the bar"
- Carrera rule would bar class actions "where class treatment is often most needed": **low-cost goods or services**, where consumers are **unlikely to have receipt**
- Defendants' due process rights still protected because they can challenge evidence

Ascertainability



- Circuit split: Supreme Court declined certiorari in Mullins
- Ninth Circuit rule forthcoming in Briseno v. ConAgra Foods Inc. and Brazil v. Dole Food Company, Inc.
- Lilly v. Jamba Juice Co., 308 F.R.D. 231 (N.D. Cal. 2014)

Recent Developments: Data Breach Cases

Data Breach Cases

- Increasing number of class action involve data breaches
- Cases show litigation risks for any company that stores sensitive personal consumer data, including insurance companies, healthcare providers, credit card issuers, and many retailers.
- Class numbers frequently number in the millions
- Courts previously dismissed data breach cases for lack of injury because harm was too speculative. But that is now changing.

Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015)

- In 2013, hackers stole the credit card numbers of approximately 350,000 Neiman Marcus customers. The data from 9,200 individuals' credit cards was subsequently used fraudulently.

- Plaintiffs filed a class action against Neiman Marcus on many theories: negligence, breach of implied contract, unjust enrichment, unfair and deceptive business practices, invasion of privacy, and violation of multiple state data breach laws.

- Neiman Marcus moved to dismiss for lack of standing because plaintiffs could not show "concrete injury" and any harm was too speculative.

Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015)

- The Seventh Circuit ruled that the case could go forward. Some plaintiffs suffered **concrete injury now**, including (1) lost time and money resolving the fraudulent charges and (2) lost time and money protecting themselves against future identity theft. Remijas v. Neiman Marcus Grp., LLC, 794 F.3d 688 (7th Cir. 2015).

- **Possiblity of future injury** was also sufficient: Neiman Marcus victims "should not have to wait until hackers commit identity theft or credit-card fraud in order to give the class standing, because there is an 'objectively reasonable likelihood' that such an injury will occur."

Other Courts Have Followed Remijas

- In re Anthem, Inc. Data Breach Litig., No. 15-MD-02617-LHK, 2016 WL 3029783 (N.D. Cal. May 27, 2016)
- Anthem is a health insurance provider. Its servers contain personal information regarding subscribers, including dates of birth, Social Security numbers, employment information, income data and individually-identifiable health information including medical history, diagnosis codes, and test records.
- In February 2015, Anthem announced that cyberattackers breached its servers and accessed patients' personal information.
- Court found injury to plaintiffs to be sufficient. Damages include loss of value of personal information, and consequential damages, such as credit monitoring.

Other Courts Have Followed Remijas

- Galaria v. Nationwide Mutual Insurance Co., No. 15-3386, 2016 WL 4728027 (6th Cir. Sept. 12, 2016)

- Nationwide is a financial-services company that maintains records containing sensitive personal information about its customers, including names, dates of birth, marital statuses, genders, occupations, employers, Social Security numbers, and driver's license numbers. In 2012, hackers broke into Nationwide's computer network and stole the personal information of 1.1 million persons.

Other Courts Have Followed Remijas

- Galaria v. Nationwide Mutual Insurance Co., No. 15-3386, 2016 WL 4728027 (6th Cir. Sept. 12, 2016)
- Plaintiffs alleged a substantial risk of future harm along with "reasonably incurred mitigation costs" that are "sufficient to establish a cognizable Article III injury at the pleading stage of the litigation."
- "Where Plaintiffs already know that they have lost control of their data, it would be unreasonable to expect Plaintiffs to wait for actual misuse – a fraudulent charge on a credit card, for example – before taking steps to ensure their own personal and financial security, particularly when Nationwide recommended taking these steps."

Recent Developments: Injury

Injury = Standing

- To bring a claim in federal court, the plaintiff must have "**standing**," which means the plaintiff must have suffered "**injury in fact**."
- The mere violation of a statutory right created by Congress is not always enough to constitute an "injury in fact."
- The injury must be both **concrete** and **particularized**.
- **Concrete** means the injury must "actually exist" and be "real," and not "abstract."

Spokeo v. Robins, 136 S. Ct. 1540 (2016)

- In Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016), Supreme Court considered what kind of injury is "concrete."
- Plaintiff's information appeared on Spokeo, an internet aggregator of personalized information.
- Plaintiff's information was inaccurate, but not defamatory – claimed higher income, greater level of education, different marital status.
- Robins sued Spokeo under FCRA for failure to ensure accuracy and making it hard to report inaccuracies. FCRA provides for statutory damages up to $1,000 for a willful violation.

Spokeo v. Robins, 136 S. Ct. 1540 (2016)

- Supreme Court held that **mere violation of a statutory right created by Congress is not always enough to constitute an "injury in fact."**

- Intangible injuries can be "concrete." Courts should look to both **history** and "the **judgment of Congress**" in determining whether an injury is concrete.

- Remanded to the Ninth Circuit to determine whether alleged injury was "concrete."

Spokeo v. Robins, 136 S. Ct. 1540 (2016)

- Spokeo has not created a **bright-line rule**.
- What has happened since?
- **Telephone Consumer Protection Act**: most courts have held that **violation of statute by itself causes injury**. Congress intended to curb all unsolicited telemarketing calls "that by their nature invade the privacy and disturb the solitude of their recipients."

Spokeo v. Robins, 136 S. Ct. 1540 (2016)

- Provision of **personal consumer information**: no injury. Hancock v. Urban Outfitters, Inc., 830 F.3d 511 (D.C.Cir. 2016) (zip codes).

- **Mortgage lenders/failure to present certificates of discharge**: no injury. Must be some effect on credit rating, ability to sell home, etc. Zia v. CitiMortgage, Inc., 2016 WL 5369316 (S.D. Fla. Sept. 26, 2016); Villanueva v. Wells Fargo Bank, N.A., 2016 WL 5220065 (S.D.N.Y. Sept. 14, 2016)

Other Issues

- Statistical damages models (Tyson Foods)
- Increased judicial oversight of settlements
  - Amount of compensation paid to class
  - Cy pres awards
  - Attorneys' fees awards

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