CLASS ACTIONS IN THE DOCK

Trends and Developments in Class Certification and Class Action Practice

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CLASS ACTION LITIGATION
(With a special focus on Securities Litigation)

• A Quick Census
• Statutes of Repose
• Follow-on Class Actions
• Securities Class Actions in State Court
• Attorney’s Fees and Fee Sharing Agreements
• Settlement Classes
• Cy Pres Settlements
A Quick Census

1. 2018 was a near record year for securities class actions; 403 securities class actions were filed in 2018, as opposed to 412 in 2017. But even this lower 403 figure was still 209% above the 1997 - 2016 annual number of filings (193). Two major differences also stand out:

A. Alleged Losses: In 2018, the alleged losses were far higher than in the past. Here are two measures:

<table>
<thead>
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<th>2017 (1st Half)</th>
<th>2018 (1st Half)</th>
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<tbody>
<tr>
<td>Maximum Dollar Loss</td>
<td>$291 billion</td>
<td>$643 billion</td>
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<tr>
<td>Total Disclosure Loss</td>
<td>$59 billion</td>
<td>$157 billion</td>
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Based on this latter measure, the first half of 2018’s losses exceeded all of 2017 (which saw a $137 billion total disclosure loss).

B. Event-Driven Litigation. The content and character of such litigation has also changed. In the past, securities litigation usually focused on financial disclosure (earnings, revenues, liabilities, projections, etc.). Now, it is increasingly focusing on unexpected events: a Boeing-built plane crashes; J&J’s talcum powder is alleged to cause cancer; Arconic’s aluminum cladding allegedly causes a high-rise fire in London killing many -- and suddenly a class action is filed on the behalf of investors, not tort victims. These suits are now common, but their legal viability remains relatively untested. A new group of plaintiff’s firms also brings these cases.

2. Overall Impact: If the current rate of filing continues, it will mean that 8 - 9% of all listed U.S. companies will have been sued in 2018. This could produce political pushback (including increased pressure on the SEC to accept mandatory arbitration clauses in corporate charters). Still, the Delaware Chancery Court has just ruled last month that a corporate charter provision mandating a specific forum selection is invalid and unenforceable in the context of securities fraud suits because these suits are not a matter of internal corporate governance. See Sciabacucchi v. Saltzberg, 2018 Del. Ch. LEXIS 578 (December 19, 2018). This decision seemingly applies as well to mandatory arbitration provisions applicable to securities litigation.
Statutes of Repose

1. In CalPERS v. ANZ Securities, Inc., 137 S.Ct. 2012 (2017), the Supreme Court resolved a Circuit split and held that a class action does not toll a “statute of repose”. Statutes often have a dual limitations period (“one year from discovery but in no event more than three years from the occurrence”), and the latter period is the “statute of repose”

2. Over forty years ago in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), the Court ruled that the filing of the class action tolled the statute of limitations (so that if the statute was one year and the class action were filed after nine months, three months would always remain in which an individual could sue after the class action was dismissed). Under the Securities Act of 1933, there are one and three year periods, and, after ANZ Securities, only the former period is tolled by the filing of the class action.

3. In this case growing out of the Lehman failure, CalPERS attempted to opt out and file an individual action after three years. Held: It waited too long.

4. The practical consequence for many institutional investors in securities class actions is that they will need to file a parallel individual action before the statute of repose expires (either 3 years under the 1933 Act or 5 years under the 1934 Act), as the class action will often not be resolved by these points.
Statutes of Repose (continued)

5. The new rule will impose special obligation on class counsel. In dissent, Justice Ginsburg noted that it is “incumbent on class counsel to notify class members about the consequences of failing to file a timely protective claim.” This could be costly if class counsel must notify the entire class.

6. Defendants may also have a new incentive to delay settlement until after the statute of repose runs, as class members cannot opt out after that point (unless they had earlier filed an individual action). Today, a majority of large institutional investors often do opt out.

7. In Pasternack v. Shrader, 863 F. 3d 162 (2d Cir. 2017), the Second Circuit permitted class counsel to amend its class action claims, where it filed the amended complaint within the statute of repose (even though the court did not rule until afterwards). A likely implication here is that plaintiffs could not have amended to add class allegations afterwards. This may also require that a class certification motion be made before the statute of repose runs (but Pasternack notes that the defendant was on notice, and defendants will typically know from the outset that plaintiff has filed a class action). Amendments seeking to turn an individual action into a class action seem also likely to be barred after the “repose” period runs and, as next discussed, possibly after the shorter “limitations” period.
Follow-on Class Actions

1. In China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018), a near unanimous Supreme Court held that a class action does not toll the statute of limitations for putative class members who seek to bring a subsequent class action after the statute of limitation had expired. The facts are instructive as this was the third attempt at class certification in this case.

2. Thus, under certain circumstances, an individual class member can opt out and sue (before the statute of repose has expired), but this same individual cannot opt out and assert a class action after the initial statutory period has expired.

3. China Agritech may compel an early filing of a class action “soon after the commencement of the first class action seeking class certification.” This may cut back on Smith v. Bayer Corp., 564 U.S. 299 (2011), which permitted putative class members to file in the wake of the dismissal of an earlier class action so long as the first action had not been certified.

4. Possibly, the court hearing the second putative class could use a lengthy delay in its filing (after the first class) to dismiss the action based on either superiority or adequacy of representation.

1. “Rule 23 evinces a preference for preclusion of untimely successive class actions by instructing that class certification should be resolved early on.”
SLUSA and Federal Securities Class Actions in State Court

1. In the Securities Litigation Uniform Standards Act ("SLUSA"), Congress authorized defendants to remove securities class action, which were filed under state law, to federal court.

2. However, the Securities Act of 1933 uniquely provides for concurrent jurisdiction in state and federal court.

3. The Circuits had divided with courts in the First, Seventh, Ninth and Eleventh Circuits upholding Securities Act class action filings in state court. (No action may be filed in state court under the Securities Exchange Act of 1934, which provides for exclusively federal jurisdiction).

4. In Cyan, Inc. v. Beaver County Employees Retirement Fund, 138 S Ct. 1061 (2018), the Court unanimously held that actions filed under the Securities Act of 1933 may continue to be filed in state court, finding that SLUSA did not strip state courts of jurisdiction. To date, securities class action filings under Section 11 of the Securities Exchange Act of 1933 are now common in California state courts, but virtually unknown in New York state courts. Why?
1. Can a plaintiff’s law firm strike a deal with a politically-connected lawyer (who does not participate in the action) that it will split its fees on an 80/20 basis in all class actions in which this law firm represents a lead plaintiff to which the lawyer/finder introduced it?

2. This is the issue in *Arkansas Teacher Ret. Sys. v. State St. Bank and Trust Company*, 2018 U.S. Dist. LEXIS 111409 (D. Mass. 2018). There, a Special Master (who was a retired federal district judge) found that the Labaton Sucharow firm had represented the Arkansas Teacher Ret. Sys. in some nine class actions based on an agreement with a Texas attorney who did not participate in any of these litigations and had paid this attorney $4.1 million just in the *State Street* case.

3. The Special Master retained NYU legal ethics expert Stephen Gillers, who opined that the Labaton firm had violated Massachusetts ethics rules and Rule 11 by failing to disclose this arrangement to the Court, the client, the class or co-counsel in the case. Ultimately, after the Labaton firm’s effort to disqualify the judge failed and its motion for mandamus was dismissed, the dispute may have been resolved with the Labaton firm adopting some prophylactic measures and repaying some of its fees to the class and co-counsel. Still, the federal court in Boston (Senior District Judge Mark Wolf) has not yet signed off.
1. Under the settlement, the Special Master did not find that any Federal Rule of Civil Procedure had been violated (although he may have pulled his punch to encourage a settlement). If approved by the court, Labaton gains a bar order under which class members cannot sue it.

2. In other jurisdictions, the fee specific sharing agreement in this case would likely violate state ethics rules and possibly Rule 11.

3. An investigation also continues in Arkansas where the critical question is whether the “finder” made payments (or “bribes”) to local officials to arrange the retention of Labaton by the Arkansas pension fund.

4. **Bottom Line:** Once, sometime in the past, law firms retained “in house” plaintiffs that they used over and over. Now, it may be that some passive pension funds are used in a similar manner. Labaton estimated in its filing with the federal court (at the court’s insistence) that it had made similar referral fee payments to lawyers who had introduced them to a possible lead plaintiff in roughly one third of its pending securities class actions.
1. Under *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), both litigation classes and settlement classes are required to meet the same standards for class certification, subject to a seemingly modest exception that manageability need not be shown in the case of a settlement class.

2. Recently, that modest exception has grown and begun to eclipse the predominance standard (at least when the parties wish to settle).

3. A leading case is *In re American Int’l Group Inc. Securities Litigation*, 689 F.3d 229 (2d Cir. 2012) where the Second Circuit reversed a district court that had refused to approve a settlement class because the fraud-on-the-market doctrine could not be proven (thus making reliance a necessary element and seemingly an individual question). The Second Circuit panel said that this was essentially an issue of trial manageability (because, it said, predominance and manageability were closely related), and manageability was irrelevant to a settlement class.

4. This downsizing of the predominance requirement in a settlement class may make it possible to expand greatly the scope of the class, once a settlement is reached.
5. An example this year is *In re Petrobras Securities Litigation*, 2018 U.S. Sec. Litig. 105550 (S.D.N.Y. 2018). Because Petrobras’s bonds did not trade on the NYSE, this raised an issue of “domesticity” under *Morrison v. Nat’l Bank of Australia*, 561 U.S. 247 (2010), (which held that Rule 10b-5 reaches only domestic sales and purchases). As a result, the Second Circuit reversed class certification in the litigation class.

6. On remand, the parties settled for $3 billion, and the settlement included those bond purchasers who could not be shown to have purchased in the U.S. Objectors claimed that this both violated *Morrison* and that, even if these bondholders could be included in the class, there was a fundamental conflict between them and the “domestic” claimants that necessitated subclassing.

7. U.S.D.J. Jed Rakoff held that defendants were entitled to settle non-meritorious claims if they wished and that adequacy of representation had been established. After *Morrison*, “domesticity” no longer went to the existence of subject matter jurisdiction and so any legal defect in plaintiff’s case could be waived.

8. Hence, it today appears possible to settle foreign claims based on foreign law and held by purchasers who bought outside the United States, pursuant to the court’s supplemental jurisdiction.

9. How far then can settlement class be expanded beyond the original litigation class? The key limits are these:

   a) Article III standing (a real injury-in-fact);
   b) No “fundamental conflict” within the class that would preclude a finding of adequate representation; and
   c) To the extent the court’s supplemental jurisdiction is relied upon, the claims in the expanded class must have the same nucleus of operative facts as the claims in the original litigation class.
CY PRES AWARDS


• Question presented: Whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be “fair, reasonable, and adequate.”
Frank v. Gaos

- Google’s disclosure of consumer search terms to third parties
- $8.5 million fund, 25% to lawyers, 75% to research organizations
- $0 to class members
- Challenged by objectors
- 9th Circuit: upheld because distribution too costly (4¢ each)
- Surprise development: Solicitor General argues no standing under Spokeo v. Robins because no injury-in-fact.
- At oral argument, the Court focused more on whether there was a true “case and controversy” that gave the district court subject matter jurisdiction, and this suggests the decision will essentially apply Spokeo to these facts.
ARBITRATION


• Upholding arbitration clauses in face of a National Labor Relations Act challenge.

• Why?
  
  • Nothing in the NLRA explicitly requires that employees be permitted collective litigation
  
  • No allegation of fraud, duress or unconscionability

• To date, every challenge to the FAA has come out in favor of arbitration, but oral argument in this case suggested that it may uphold the challenge to arbitration based on special statutory language.
EVIDENTIARY STANDARD IN CLASS CERTIFICATION

• Must evidence submitted in support of a class certification motion be in admissible form?

• A number of circuits have said no, but experts must meet Daubert standard
  
  • In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015)
  • Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 812 (7th Cir. 2012)

• Courts disagree about Daubert rigor
  
  • E.g. Some Circuits say only need to show “reliability.” In re Zurn Pex Plumbing Prods. Liab. Litig. v. Cox, 644 F.3d 604 (8th Cir. 2011).

• The 9th Circuit held this summer that all evidence must be in admissible form
  
  • Sali v. Corona Reg'l Med. Ctr., 889 F.3d 623 (9th Cir. 2018)
PERSONAL JURISDICTION

- Did the BMS case affect national jurisdiction over absent class members where some are not subject to personal jurisdiction? That is, can a court treat a nonresident plaintiff’s claim as within the court’s jurisdiction so long as he or she is an absent class member?

- Most courts say that they can in the case of absent class members.
  - Because BMS only applies to a named plaintiff
  - Distinguishing the case – class actions weren’t at issue so Shutts still applies

- So far, the cases continue to hold that class actions may include nonresident class members, but the issue is likely to continue to be argued.
  - This could be the most ominous threat today to the future of class actions (if the Court takes it).