CLASS ACTION WATCH

A Publication of the Federalist Society's Litigation Practice Group and its Class Actions Subcommittee

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ABA LENDS SUPPORT TO CLASS ACTION JURISDICTION REFORM

At its mid-year meeting in February, the American Bar Association ("ABA") passed a resolution lending qualified support to current legislative efforts to expand federal jurisdiction over class actions. Many experts in the field have suggested in the popular press that the ABA's action improves the prospect for such reforms in the current Congress (the "Class Action Fairness Act of 2003" has now been introduced in both the House and Senate), while complicating the task of those who flatly oppose any legislation action whatsoever, including most of the trial lawyers.

An ABA press release, distributed at the conclusion of the mid-year meeting, seemed to offer categorical support. "The delegates from across the country," the release noted, " . . . supported federal laws expanding federal court jurisdiction over class action litigation." The actual resolution was somewhat more tepid, however, reflecting the tug-of-war between the trial lawyers and plaintiffs' class action bar and other bar elements that played out in the meetings of the ABA Task Force on Class Action Legislation that produced the recommendation. While the resolution states that "the [ABA] believes that some concerns over class action practice could be addressed with federal legislation providing for expanded federal court jurisdiction," it also counsels that "[a]ny expansion should preserve a balance between legitimate state-court interests and federal-court jurisdictional benefits." The resolution then goes on to urge legislators addressing proposals for an expanded federal court role to "consider such factors as aggregate amount in controversy, number of plaintiffs in the alleged class, percentage

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DUPLICATIVE CLASS ACTION LITIGATION: FOLLOW-UP TO THE FEDERALIST SOCIETY SURVEY

In the last issue of *Class Action Watch*, we presented a preliminary analysis of the extent to which putative class claims at stake in proceedings consolidated by the Judicial Panel on Multidistrict Litigation are also being prosecuted in parallel state court actions. The results of this analysis tended to confirm the views of certain legal scholars that the incidence of parallel state and federal class actions is substantial.

We update this analysis in this issue of *Class Action Watch*, examining a number of the multidistrict proceedings to see whether parallel class claims in federal and state courts are producing divergent outcomes on class certification questions. While, in many instances, the federal multidistrict court and state courts addressing the same class claims have reached similar decisions on class certification, in just as many others the federal multidistrict court and state courts have moved in opposite directions.[1]

One familiar scenario is illustrated by the large number of federal and state class actions stemming from incidents with Firestone tires on Ford Explorers and other vehicles. Multiple nationwide class actions commenced against Firestone and Ford (or against one of the companies alone) were either filed in federal court or removed, and thus were ultimately included in *In re Bridgestone/Firestone Products Liability Litigation*. Several class actions alleging purported statewide classes against one or both of the companies remained (and currently remain) outside the multidistrict proceeding, having been remanded to state court before the transfer process could be completed. These latter class actions were not pursued with any urgency by the plaintiffs' lawyers for as long as the multidistrict court was entertaining the possibility of certifying nationwide classes of owners or users of the affected tires and vehicles. But when

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From The Editors

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Dear Reader:

We are pleased to present the Summer 2003 issue of *Class Action Watch*. This issue examines a number of recent developments and new trends in class action litigation. Our last issue featured articles describing duplicative class actions – that is, two or more class actions filed on behalf of the same class (or overlapping classes) that present claims arising out of the same set of operative facts. A number of legal scholars believe this trend threatens to undermine the very goals of fairness and efficiency that class actions were intended to serve. To investigate this trend, *Class Action Watch* surveyed Fortune 500 companies to inquire whether they had been affected by duplicative class action filings. Our analysis examines these companies' experiences by reporting the incidence, magnitude, and source of duplicative class actions filed against them. A second survey focused on class actions that have come to the attention of the Judicial Panel on Multidistrict Litigation. *Class Action Watch* studied a variety of sources of information—MDL Panel docket entries respecting actions removed from state court and proposed for consolidation but later remanded, newspaper reports of state court filings, and reports of counsel involved in the MDL proceedings themselves—to determine the extent to which federal court class action defendants are encountering competing state court class actions as well. We included our preliminary results in the Winter 2002 issue, and continue analysis in this issue.

Other topics taken up within these pages include the ABA's support of class action jurisdiction reform and the Supreme Court's consideration of two class action arbitration questions: enforcement of arbitration provisions by third parties, and "unconscionability" and classwide arbitration. Additionally, this issue discusses the "Big Fat" class action litigation that has sprung up against such roadside favorites as McDonalds, Wendy's and Kentucky Fried Chicken, and also reports on a recent decision of the Vermont Supreme Court calling the enforceability of state court class settlements into serious question.

We remain committed to providing such information concerning the changing nature of class action litigation and reporting recent developments in the field. We hope this material will prove helpful to litigators, judges, and those involved in legislative debates over the future of class actions. We also hope that this issue will prompt others to try to collect and disseminate additional data concerning the changing nature of class actions. We encourage any comments or suggestions you may have to improve the publication so that future issues can provide even more useful information.

Do Federal Class Actions Compete Against Overlapping State Class Actions in a Race to the Courthouse?

Continued Results of a Study of Recent Multidistrict Proceedings

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the Seventh Circuit Court of Appeals vacated the multidistrict judge's order certifying the requested nationwide classes, the long-dormant state court actions sprung to life, with the plaintiffs in many courts filing – or renewing – requests for the certification of statewide classes of tire or vehicle users or purchasers. As of the time of this writing, class certification has been granted on claims against Ford and Firestone in two of these state actions – one in Greenville County, South Carolina,[2] *Parham v. Bridgestone/Firestone, Inc.*, C.A. No. 2000-CP-23-4487 (Order Dated December 23, 2001), and another in St. Clair County, Illinois, *Rowan v. Ford Motor Co., et al.*, No. 01-L-11 (Order Dated July 2, 2002). Significantly, in vacating the multidistrict certification order, the Seventh Circuit observed that it viewed the litigation as "not manageable as a class action even on a statewide basis." *See In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (2002), *cert. denied*, 71 U.S.L.W. 3283 (Jan. 13, 2003).[3]

The managed care class action litigation, *In re Managed Care Litigation*, involving claims by both health plan subscribers and the physicians who provide services to them against the nation's largest managed health care insurers, exemplifies another common sequence. In this proceeding, briefing before the multidistrict court on the subscribers' and the providers' separate requests for class treatment was complete in late 2000, but the multidistrict court did not rule on the requests until September 2002 – nearly two years later.[4] In the meantime, state courts addressing class actions against some of the multidistrict defendants on the same claims moved ahead of the multidistrict court by granting certification. One such court was the Madison County Circuit Court in Southern Illinois; in the spring of 2001, it certified a nationwide class of health care providers against CIGNA Corporation and related companies on claims that CIGNA's health insurance subsidiaries underpaid providers for services delivered to CIGNA's members. *See Kaiser v. CIGNA Corp.*, No. 00-L-480 (Cir. Ct. Madison County) (Order Dated March 29, 2001). Another was a state court in Connecticut, which certified a statewide class of physicians against Anthem, Inc., on claims that certain of Anthem's claim and utilization management policies brought economic injury to the providers serving Anthem's health plan members. *Collins v. Anthem Health Plans, Inc.*, No. CV9901561985, 2001 WL 951376 (Conn. Super. Ct. July 19, 2001), *appeal pending*.[5] While the multidistrict court ultimately certified classes of providers against all of the managed care defendants in a September 2002 order, that order was recently accepted by the Eleventh Circuit Court of Appeals for interlocutory review under Fed. R. Civ. P. 23(f). *See Aetna, Inc., v. Klay*, No. 02-16333-C (11th Cir.) (Order Dated Nov. 21, 2002).

The state courts addressing class claims included in *In re United Parcel Service, Inc., Excess Value Insurance Coverage Litigation*, MDL No. 1339, similarly got out in front of the MDL court in certifying claims for class treatment. As was the case with *In re Managed Care Litig.*, a state court in Southern Illinois was first to the table with a certification order. The case in question, *Triad Industries, Inc. v. United Parcel Service,, Inc.*, had been removed to the U.S. District Court for the Southern District of Illinois, and was the subject of a conditional transfer order that, if finalized, would have combined the case with the MDL proceeding. On the eve of the MDL panel hearing in which any objections to transfer would have been resolved, the case was transferred to a newly appointed federal judge within the Southern District (Judge Michael Reagan), and Judge Reagan remanded the action to the Madison County Circuit Court. *Triad Industries Inc. v. UPS, Inc.*, C.A. No. 3:00-619-1 (S.D. Ill.) (Order Dated Nov. 17, 2000). Once the action was back in state court, the plaintiffs quickly moved for certification of a nationwide class. Barely four months after remand, the Madison County Court granted the requested nationwide class certification. *See Triad Industries, Inc.*, No. 00-L-600 (Order Dated May 15, 2001). At the time, the class certification issue in the MDL proceeding had not yet been briefed.

Given that an order certifying a class – whether in state or federal court – dramatically raises the stakes for the defendant, defendants facing class certification orders often choose to settle rather place a sizable chunk of their assets on the line

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at trial. The pressure to settle is particularly strong in state court, where opportunities for interlocutory review of improvident class rulings are generally less certain than in federal court. (Since 1998, Fed. R. Civ. P. 23(f) has expressly permitted petitions for review of class orders before trial.) It is not surprising, then, that following the class certification orders entered by state courts in Southern Illinois on claims at issue in *In re Managed Care Litigation* and *In re United Parcel Service, Inc., Excess Value Insurance Coverage Litigation*, the defendants involved in those proceedings negotiated class-based settlements with the state court plaintiffs. *Kaiser v. CIGNA Corp.* produced a nationwide class settlement of all fee-for-service health care providers' claims against CIGNA's insurance subsidiaries,[6] while *Triad Industries, Inc. v. United Parcel Service, Inc.* resulted in a statewide class settlement. *See Triad Industries v. United Parcel Service, Inc.*, No. 00-L-600 (Preliminary Approval Order Dated July 24, 2001). Ironically, these settlements came immediately ahead of a major change in the Illinois Supreme Court rules that could ease the pressure on defendants who have been the subject of class certification orders – the promulgation of Illinois Supreme Court Rule 307(a)(8), allowing petitions for interlocutory review of orders denying or granting class certification.[7] At the time the underlying class certification orders were entered by the Illinois state courts in these cases, of course, there was no express vehicle for interlocutory review of class orders, and, indeed, no clear precedent for such review on an extraordinary basis.

To be sure, a review of state court activity relating to the *Class Action Watch* sample of MDL proceedings reveals that state and federal courts are not always at odds on class certification questions. The MDL court overseeing MDL No. 1348, *In re Rezulin Products Liability Litigation*, recently denied certification of a nationwide product liability class and a nationwide medical monitoring subclass on claims that the use of Rezulin, a diabetes drug, was associated with liver failure. *In re Rezulin Prods. Liab. Litig.*, MDL No. 1348 (S.D.N.Y.) (Order Dated Sept. 12, 2002). This followed the denial by two separate state courts of similar classes. *See In re West Virginia Rezulin Litig.*, No. 00-C-1180-H (W. Va. Cir. Ct., Raleigh County) (Order Dated Dec. 5, 2001) (denying certification of medical monitoring class); *In re Rezulin Litig.*, J.C.C.P. 4122, No. BC 227414 (Sup. Ct., Los Angeles County) (Order Dated January 15, 2002) (same). Similarly, the MDL court managing MDL No. 1355, *In re Propulsid Products Liability Litigation*, denied certification of a proposed nationwide medical monitoring class on June 4, 2002, following the lead of a New Jersey state court which had denied certification of proposed nationwide medical monitoring and economic loss classes two months earlier. *See Cartiglia v. Johnson & Johnson Co.*, C.A. No. Mid-L-2754-01 (N.J. Sup. Ct., Middlesex County) (Order Dated April 24, 2002).[8]

But such identical class rulings between state and federal courts overseeing parallel class petitions do not constitute a pattern. Often, the state and federal courts presiding over the same or overlapping class claims are reaching different outcomes on the central procedural question in the case – whether any class should be certified. Often, it is a state court that has found class treatment appropriate, while the federal court has denied class treatment under the rigorous prerequisites of Fed. R. Civ. P. 23, creating enormous settlement pressures for the defendants. These trends will certainly receive attention in Congress, which will be addressing class action removal reforms in the coming months. Legislation that passed the House during the last Congress – which would have provided for removal of minimally diverse class actions (*i.e.*, actions in which any one class member and any one defendant are from different states), where more than $2 million was at stake for the putative class members – was recently reintroduced in both the House and Senate, and committee action on both measures is expected shortly. (*See* related article in this issue concerning the ABA's endorsement of class action removal reform.)

Please find footnotes on page 11.

Despite Federal Court Dismissal Order, Threat of "Big Fat" Class Actions Persists

While a federal court order dismissing a purported class action against McDonald's Corporation initially heartened many in the tort reform community, other plaintiffs have indicated that the decision will not deter them from continuing to pursue class litigation against "Big Fat" – the nickname given to the fast-food industry by attorneys who previously had targeted "Big Tobacco." On January 22, 2003, the U.S. District Court for the Southern District of New York entered an important order dismissing a purported class action filed by consumers against fast-food industry leader McDonald's Corporation. The plaintiffs in *Pelman v. McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003), alleged that, by selling food that is high in cholesterol, fat, salt, and sugar, and by selling large portions of food, McDonald's contributed to obesity and other health problems experienced by its customers. According to the plaintiffs, McDonald's advertising – including advertisements directed at minors, advertisements stating that "McDonald's can be a part of any balanced diet and lifestyle," and even advertisements simply stating "McChicken Everyday!" – amounted to a scheme to deceive consumers in violation of state consumer protection and other laws.

Pelman originally was filed in state court, and was removed to federal court by McDonald's based on the alleged existence of diversity jurisdiction. The plaintiffs moved to remand the case to state court on the ground that, because they had joined local New York McDonald's franchisees and a New York affiliate of McDonald's Corporation, complete diversity of citizenship did not exist between plaintiffs and defendants. McDonald's argued that these non-diverse defendants had been fraudulently joined for no other reason than to destroy diversity, and that they should be disregarded in the court's jurisdictional inquiry. Given that fraudulent joinder arguments are often largely disregarded by district courts in remanding cases to state court,[1] the decision of the district court in *Pelman* to conduct a thorough analysis and thereby accept jurisdiction over the case is itself noteworthy. The district court first concluded that the local New York franchisee defendants were fraudulently joined because the plaintiffs could not establish that they "ate primarily at the particular outlet[s]" joined as defendants. The district court further reasoned that McDonald's New York corporate affiliate was not alleged to have produced the allegedly deceptive advertising, and was not alleged to play any role distinct from McDonald's itself in distributing the fast-food products that were alleged to be unreasonably dangerous. The district court thus denied the plaintiffs' motion to remand.

Addressing the merits, the district court framed the issue as follows: "This opinion is guided by the principle that legal consequences should not attach to the consumption of hamburgers and other fast food far unless consumers are unaware of the dangers of eating such food." The district court then found that the statements attacked by the plaintiffs – "McChicken Everyday!" and the like – were mere puffery that is not actionable under consumer protection law, and that the alleged omissions (such as a failure to include specific nutrition labelling on each food item) were not actually alleged to be deceptive, in light of the fact that the relevant information – that too much fast food may not be healthful – was not solely in McDonald's possession. The district court concluded on the same note with which it began:

> As long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer. It is only when that free choice becomes but a chimera – for instance, by the masking of information necessary to make the choice, such as the knowledge that eating McDonald's with a certain frequency would irrefragably cause harm – that manufacturers should be held accountable. Plaintiffs have failed to allege in the Complaint that their decisions to eat at McDonald's several times a week were anything but a choice freely made and which now may not be pinned on McDonald's.[2]

Significant though the dismissal order in *Pelman* is, it has not ended the "Big Fat" class actions by any means. For one thing, *Pelman* was dismissed without prejudice, leaving the plaintiffs free to refile an amended complaint that cured the pleading defects identified in the court's dismissal order. Moreover, other plaintiffs – notably Caesar Barber, who has famously sued not only McDonald's, but also Burger King, Kentucky Fried Chicken, and Wendy's, alleging that a group of fierce competitors share collective responsibility for his health problems – continue to press their own separate class actions. And in an effort to remake "Big Fat" litigation in the image of earlier tobacco lawsuits, some lawyers are developing evidence allegedly showing that fast food has addictive properties that diminish the ability of consumers to choose whether or not to consume it.[3] In short, while the reasoning of *Pelman*'s dismissal order is significant for a host of reasons, the "Big Fat" class actions are likely to linger for some time to come.

Please find footnotes on page 11.

Analysis

SUPREME COURT CONSIDERING TWO KEY CLASS ACTION ARBITRATION QUESTIONS

Reflecting increased attention to arbitration in an era of crowded judicial dockets and judicial personnel shortages, the Supreme Court has granted writs of certiorari to review two major decisions in which lower courts refused to enforce contractual arbitration agreements in the class-action context: *Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002), *cert. granted*, 123 S. Ct. 817 (2003), and *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002), *cert. granted sub nom. Pacificare Health Sys. v. Book*, 123 S. Ct. 409 (2002). The necessity of Supreme Court review in the arbitration context is nothing new. Several times in the last decade (most recently in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) and *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000)), the Court has reviewed and reversed lower courts that refused to enforce contractual arbitration clauses. In these cases, the Supreme Court has emphasized Congress's preference for dispute resolution through arbitration, and has held that open-ended concepts such as "unconscionability" cannot lightly be invoked as a basis for ignoring contractual arbitration requirements. Despite the Supreme Court's track record requiring enforcement of arbitration agreements in a wide variety of circumstances, lower federal and state courts have continued to view arbitration skeptically, particularly where arbitration provisions do not permit class action-like proceedings – thus prompting further Supreme Court intervention in the area.

"Unconscionability" And Classwide Arbitration

Across an array of industries, companies are increasingly turning to arbitration as a preferable means of dispute resolution, since arbitration generally is considered by business to be a faster and less expensive means of addressing customer grievances than litigation. Class action plaintiffs' attorneys, however, have regarded arbitration as an impediment to class certification, particularly in view of the majority rule that classwide arbitration is impermissible unless the arbitration provision specifically states otherwise. *See, e.g., Champ v. Siegel Trading Co.*, 55 F.3d 269, 271 (7th Cir. 1995) ("absent a provision in the parties' arbitration agreement providing for class treatment of disputes, a district court has no authority to certify class arbitration."). Accordingly, class action plaintiffs have sought to craft arguments that would preclude enforcement of arbitration provisions in class actions. The argument that has gained the most traction is that arbitration provisions that either expressly prohibit classwide arbitration or are silent on the point are "unconscionable" under state law and are therefore unenforceable.

While the Supreme Court has rejected unconscionability as a basis for voiding arbitration provisions in the past, it has not yet specifically rejected the question whether the absence of a classwide remedy in arbitration renders an arbitration provision unenforceable. Because of this precedential loophole, lower courts have felt free to nullify arbitration provisions that either prohibit or do not specifically permit classwide arbitration. On January 7, 2003, a panel of the California Court of Appeal handed down decisions in two companion cases voiding arbitration provisions on unconscionability grounds for just this reason. The facts of these two cases – *Mandel v. Household Bank (Nevada), N.A.*, 105 Cal. App. 4th 75 (Cal. Ct. App. – 4th Dist. 2003), and *Shea v. Household Bank (SB), N.A.*, 105 Cal. App. 4th 85 (Cal. Ct. App. – 4th Dist. 2003) – are substantially identical. In *Mandel*, the plaintiff had opened a credit card account with Household Bank, the terms of which were subject to amendment. After many years, Household notified the plaintiff that it was amending the contract to require that "any claim, dispute or controversy" be resolved through binding arbitration. The arbitration agreement further provided that "[n]o class actions or joinder or consolidation of any Claim with the claim of any other person are permitted in arbitration without written consent of [plaintiff] and [defendant]." The plaintiff had not voiced any objection to this amendment, but did subsequently disregard the arbitration provision and brought suit against Household in state court for allegedly improperly charging cardholders "overlimit fees and/or other penalties." In light of the arbitration clause, Household petitioned the trial court to stay the proceedings and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq* ("FAA"). The trial court denied Household's petition, and the state Court of Appeal affirmed. In affirming the trial court's decision, the appellate court was not troubled by the fact that the arbitration provision had been unilaterally added to the cardholder agreement by Household; indeed, the court specifically held that "California public policy does not preclude amendment to the contract." Instead, the court rested its decision entirely on the proposition that an arbitration agreement that does not permit classwide arbitration at the plaintiff's sole option is unconscionable and void under California law.

Although California state courts have been at the forefront of the "unconscionability" movement, frequently refusing to enforce arbitration provisions that do not permit classwide arbitration, there is disagreement even within the California court system about the wisdom of that approach. Just a week after *Mandel* and *Shea* were decided, a different California Court of Appeal handed down a directly contrary decision. In *Discover Bank v. Superior Court*, 105 Cal. App. 4th 326 (Cal. Ct. App. – 2d Dist. 2003), an appellate panel held that "where a valid arbitration agreement governed by the FAA prohibits classwide arbitration, section 2 of the [FAA] preempts a state court from applying state substantive law to strike the class action waiver from the agreement." *Discover Bank* involved a plaintiff who had opened a credit card account with Discover Bank, the terms of which were expressly made subject to amendment. As in *Mandel* and *Shea*, after several years Discovery Bank amended the contract to add an arbitration provision that excluded classwide arbitration. Discover Bank moved the state trial court to compel arbitration of the plaintiff's claim on an individual basis. The trial court initially granted this motion. However, following this decision, the California Court of Appeal issued a decision in *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094 (Cal. Ct. App. – 4th Dist. 2002), in which the identical class action waiver in the same Discover Bank cardholder agreement was declared unconscionable and invalid under California law. Taking notice of this decision, the trial court granted the plaintiff's motion for reconsideration and left open the possibility of classwide arbitration. On appeal, the California Court of Appeal reversed. The appellate court openly disagreed with the *Szetela* decision and declared the arbitration agreement enforceable in its entirety, holding that the FCC preempts any contrary conclusion that would be dictated by state unconscionability doctrine.

Adding to the confusion over unconscionability is an overlay of federal court precedent, in which federal courts authoritatively interpret the preemptive force of the FAA but make "*Erie* guesses" about state contract doctrine as it applies to arbitration agreements. In this regard, the most important recent federal decision is *Ting v. AT&T*, 319 F.3d 1126 (2003), in which the U.S. Court of Appeals for the Ninth Circuit voided an arbitration provision that did not permit classwide arbitration. In *Ting*, the plaintiffs sought to avoid arbitration on two grounds: that AT&T's arbitration provision violated the California Consumer Legal Remedies Act ("CLRA"), which purports to invalidate any agreement involving a consumer that would eliminate the consumer's right to pursue relief in a class action; and that the arbitration provision was unconscionable because it did not permit a classwide remedy. The Ninth Circuit rejected the plaintiffs argument under the CLRA, reasoning that because the CLRA applies only to a narrow category of consumer disputes, it is not a "law of general applicability" and therefore is preempted by the FAA. But the Ninth Circuit nonetheless invalidated the arbitration clause on unconscionability grounds, holding that because large corporations are not likely to bring class actions against consumers, a waiver of the right to pursue classwide relief benefits only one party to the agreement and is therefore "manifest[ly] one-sided" and void as unconscionable. In reaching this result, the Ninth Circuit – purporting to interpret California state substantive law – stated that "[w]e disagree with the California Court of Appeal's recent analysis in *Discover Bank v. Superior Court* . . . ."

The issues in *Mandel*, *Shea*, *Discover Bank*, and *Ting* are similar to the issues raised in *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349 (S.C. 2002), *cert. granted*, 123 S. Ct. 817 (2003). In *Bazzle*, the plaintiffs sued Green Tree Financial in state court alleging violations of the South Carolina Consumer Protection Code in connection with Green Tree's consumer installment contracts. Gree Tree moved to stay the matter and to compel arbitration pursuant to an arbitration clause that, while not entirely clear as to the permissibility of classwide arbitration, did use language indicating that arbitration would be limited to a single claimant. Despite Green Tree's argument that classwide arbitration is foreclosed both under the terms of arbitration agreement and under the Federal Arbitration Act, classwide arbitration went forward. In reviewing the permissibility of classwide arbitration, the Supreme Court of South Carolina noted that "[t]he United States Supreme Court has not addressed this issue and the precedent set by the federal circuit courts is not binding on this Court." The court then surveyed various approaches to the question of classwide arbitration, and adopted what it called the "California approach": that classwide arbitration may be ordered even if not contemplated in the terms of the arbitration agreement, if it would serve "efficiency" and "equity."

While Supreme Court decisions granted certiorari are not in themselves an indication of the Court's likely ruling on the merits, history suggests that *Bazzle* is a strong candidate for reversal. In virtually every major arbitration case the Supreme Court has accepted where a lower court has refused to enforce an arbitration provision on any ground, the Supreme Court has reversed. This was the case in both *Circuit City Stores* and *Green Tree*, as well as in

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Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996), and *Southland Corp. v. Keating*, 465 U.S. 1 (1984), among others. While a reversal in *Bazzle* would seem to make results like *Mandel*, *Shea*, and *Ting* all but impossible, the very fact that those cases were decided as they were notwithstanding an already strong body of Supreme Court precedent makes it difficult to predict the future of class action arbitration issues in the lower courts. One thing is certain: the Supreme Court has been carefully policing the arbitration arena over the last several years, and has consistently ruled in favor of enforcing arbitration clauses.

Enforcement of Arbitration Provisions in Class Actions by Third Parties – and the Validity of Limitations on Remedies

The Supreme Court's other class-action arbitration case this Term is *Pacificare Health Sys., Inc. v. Book*, No. 02-215. *Pacificare* is an outgrowth of *In re Managed Care Litigation*, the national managed care multidistrict proceeding launched with great fanfare in 1999 by a group of prominent class-action plaintiffs' attorneys. While the district court in *In re Managed Care* declined to certify a class of managed care subscribers, litigation brought by health care providers – including Dr. Book, one of the named parties in *Pacificare* – is proceeding. During motion practice on the "Provider Track" of *In re Managed Care*, a group of defendants sought to compel arbitration on the ground that at least some of the named plaintiffs were parties to arbitration agreements with at least some of the defendants. While the district court ordered certain claims to be arbitrated, it rejected the defendants' contention that, under *MS Dealer Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999), defendants not themselves party to arbitration agreements could nonetheless subject to mandatory arbitration those claims brought against them by plaintiffs who were party to arbitration agreements with their co-defendants. *See In re Managed Care Litig.*, 132 F. Supp. 2d 989, 995 (S.D. Fla. 2000). The district court also held that even those defendants who had otherwise enforceable arbitration agreements with the plaintiffs could not subject to arbitration those claims alleging that such defendants aided and abetted or conspired with defendants that were not party to arbitration – effectively ruling that plaintiffs in a multidefendant action can escape arbitration simply by alleging collective action that included at least one defendant without an enforceable arbitration agreement. Finally, the district court held that the plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") were not subject to arbitration, based on the conclusion that the relevant arbitration provisions' prohibition on recovery of multiple damages is inconsistent with the treble-damages provision of RICO, and therefore unenforceable.

The Supreme Court granted certiorari to address the last question: whether a district court must compel arbitration of RICO claims when the arbitration agreement limits the availability of a multiple-damages remedy. The Court issued an 8-0 ruling (in which Justice Thomas did not participate) that reversed the decision denying arbitration, but left significant questions unresolved. Rather than directly deciding whether an arbitration agreement may limit the recovery of multiple damages available under a federal statute, the Court expressed doubt about whether the arbitration agreements at issue actually included such limiting provisions, and concluded that that predicate question -- whether the agreement should be interpreted as including such limitations -- was itself subject to arbitration. The Court appeared to acknowledge that its ruling might lead to post-arbitration litigation once the arbitrator resolves the preliminary question of contract interpretation, but nonetheless held that a court should not intervene until that point. Said the Court:

> In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. As in *Vimar* [*Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995)], the proper course is to compel arbitration.

The case --which attracted amicus participation by groups as diverse as the Washington Legal Foundation, the National Association of Manufacturers, Trial Lawyers for Public Justice, and Public Citizen --was argued on February 24, 2003 and decided on April 7, 2003.

Analysis

Recent Developments

Vermont Supreme Court Throws Out Alabama Class Action Settlement, Finding Violation of Due Process

The Vermont Supreme Court has refused to enforce a nationwide class action settlement approved by an Alabama trial court on the ground that the Alabama court lacked personal jurisdiction over Vermont class members. In *State of Vermont v. Homeside Lending, Inc.*, 2003 Vt. Lexis 18 (Feb. 21, 2003), the State of Vermont appealed a decision of a lower court granting summary judgment to two financial institutions that sought dismissal of a complaint attacking their mortgage servicing practices as res judicata under the Alabama settlement. The case challenged the two lenders' practice of allegedly requiring borrowers to maintain excessively high balances in their mortgage escrow accounts.

A similar case had been filed in the early 1990s by class action lawyers in Alabama. After several years of litigation and certification of a nationwide class of borrowers, the two lenders agreed to enter into a "global settlement" that was to resolve all similar claims of all borrowers in the United States, including Vermont. Attorneys' fees to the Alabama lawyers were to be paid directly out of the class members' escrow accounts. This settlement arrangement was approved by an Alabama state trial court, and the matter was dismissed.

The Vermont Supreme Court reversed a lower court's dismissal in favor of the lenders, holding that the Alabama court lacked personal jurisdiction over Vermont citizens and that the Alabama settlement violated the due process rights of Vermont citizens. The decision is expected to further call into question the viability of global class action settlements, an issue that was already hotly debated after the U.S. Supreme Court decisions in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

Massive Madison County, Illinois Judgment Raises Doubts About National Tobacco Settlement

The verdict is in in the first class action to go to trial in Madison County, Illinois since the national media noted the extraordinarily high number of class actions filed in the tiny Southern Illinois jurisdiction.[1] It is gigantic. Tobacco company Philip Morris USA was ordered to pay $10.1 billion to a class of consumers of its "light" cigarettes. A judge in Madison County gave the company 30 days to post a bond of $12 billion as a condition of filing an appeal.

The case – which reportedly is largely identical to overlapping class actions pending in 11 other states – involved allegations that Philip Morris misled consumers into believing that low-tar cigarettes advertised as "light" are safer than regular cigarettes. One immediate effect of the decision is to raise doubts about the company's ability to meet its payment obligations under the national tobacco settlement reached in the late 1990s with a group of state attorneys general.[2] Bond rating agencies immediately suggested that they might be forced to lower their ratings for Philip Morris's parent company Altria Group, which would increase the company's cost of funding the national tobacco settlement and other expenses.[3] One possible result of the Madison County class action judgment is a bankruptcy filing by Philip Morris, according to press accounts.[4]

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of the class who are citizens or residents in the forum state, whether the defendants are all residents of the forum state, standards for removal, and existence of overlapping classes or cases; and how the entire mix of all factors balance legitimate state-court interests and federal-court jurisdictional benefits." This is significant, since—as was reported in the February 2003 *ABA Watch*, many of these "factors" were surfaced in the Task Force proceedings by individuals working closely with the Association of Trial Lawyers of America ("ATLA").

More definitive is a later passage in the resolution urging that any legislative action be limited to jurisdictional reform, to wit, "the American Bar Association recommends that any legislation respecting class action practice be confined to the subject of the expansion of the jurisdiction of the federal courts and the appropriate limitations thereto." The object of this passage is a package of provisions—variously included in both the House and Senate versions of the class action reform legislation (H.R. 1115 and S. 274)[1] —that would require special scrutiny of "noncash" settlements, enhanced class member settlement notices, notification of appropriate regulatory authorities prior to finalization of any settlement, mandatory (as opposed to discretionary) review of class certification orders and concomitant stays of discovery pending review, and other procedures concerning class action administration in the federal courts. In lieu of legislation, the resolution expresses a strong preference for employing amendments to Rule 23, and for the processes of the Rules Enabling Act, to fine-tune these aspects of class action procedure. Because of this aspect of the resolution, it seems likely that ABA lobbyists will be authorized to speak with one voice in seeking to have those provisions stricken.

How the ABA lobbying arm will approach the jurisdictional aspects of the Class Action Fairness Act is somewhat less clear. The approved resolution cautions that "[n]ot every bill" can be considered "appropriate, because the [relevant] factors are interrelated and the key is to strike a reasonable balance as a whole." Accordingly, there is always the possibility that conflicting messages will be delivered to Capitol Hill decision makers. For instance, the House and Senate versions of the Class Action Fairness Act each provide federal jurisdiction for minimally diverse class actions involving matters in controversy exceeding $2 million in value, and provide a state court safe harbor only for actions in which "the substantial majority" of class members and the defendants are residents of the forum state and the claims are governed "primarily" by the forum state's laws. Do these provisions "strike a reasonable balance"? For some, undoubtedly not. The highly publicized ATLA suggestions that the jurisdictional amount threshold for removal be pegged, instead, at $25 million, and that state court jurisdiction be preserved over putative classes with but two-thirds or more of their membership situated in a single state, are certainly not inconsistent with the ABA resolution—although it at least several Task Force members have questioned whether those suggestions appropriately accommodate the competing considerations.

For the ABA itself, or at least, the House of Delegates approved resolution takes one category of arguments off the table—arguments that no legislation is required at all to address the explosion of state court class action litigation, and an increasing divergence in the willingness of state and federal courts to certify cases for class treatment. And the unambiguous press announcement by the ABA leadership that the ABA "support[s] federal laws expanding federal court jurisdiction over class action litigation"—coming on the heels of the ABA's mid-year meeting—is certainly consistent with that state of play. As the class action reform legislation is reintroduced, *Class Action Watch* will continue to monitor both the legislation's progress and the ABA's role in the legislative debate.

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Duplicative Class Actions

1. Class Action Watch would like to thank Ariana Estariel of the JPML Clerk's office in Washington, D.C., for her cooperation in providing access to the JPML's public docketing materials.

2. The South Carolina court's action in certifying a statewide class came before the Seventh Circuit Court of Appeals overturned the MDL court's nationwide class certification order, but after the MDL court had announced its intention to certify nationwide classes.

3. Ford and Firestone recently moved the district court to enjoin the state court class actions on the ground that the Seventh Circuit's conclusion that class litigation is "not manageable as a class action even on a statewide basis" collaterally estops class members from seeking class status elsewhere. The district court denied the requested relief, and Ford and Firestone have now taken an appeal of the denial of injunctive relief to the Seventh Circuit. Very recently, the Seventh Circuit granted an expedited hearing on the appeal.

4. In the actions involving health care providers, the Eleventh Circuit stayed the proceedings pending completion of an interlocutory appeal involving the partial denial of several motions by the managed care companies to compel arbitration. This stay was not lifted until mid-2002.

5. At the time the Connecticut court certified this statewide class, Anthem was not yet a defendant in the multidistrict proceeding. It has since been named as a defendant.

6. Immediately prior to the settlement announcement, the plaintiffs in *Kaiser* amended their complaint to state federal questions. Two days after the case was removed to federal court, the parties filed settlement papers and sought authority to distribute settlement class notice.

After the CIGNA settlement was announced, the plaintiffs in MDL No. 1334 obtained a preliminary injunction against CIGNA and "those acting in concert with" the company barring further prosecution or implementation of the settlement in the U.S. District Court for the Southern District of Illinois, to which the *Kaiser* case had been removed. *In re Managed Care Litig.*, MDL No. 1334 (S.D. Fla.) (Order Dated Dec. 13, 2002), *appeal pending*. Shortly thereafter, the Judicial Panel on Multidistrict Litigation ("JPML") issued an order requiring CIGNA and others to "show cause" why the *Kaiser* action should not be transferred to MDL No. 1334. After argument on that show-cause order on January 28, 2003, the JPML entered an order transferring the settled *Kaiser* action to MDL No. 1334.

7. The amendment to Illinois Supreme Court Rule 307 is effective on January 1, 2003. As originally issued, it provided for interlocutory review of class certification orders *of right*; it was later amended essentially to conform to Fed. R. Civ. P. 23(f).

8. The MDL court recently granted a motion to reconsider its denial of certification, *In re Propulsid Prods. Liab. Litig.*, MDL No. 1355 (Order Dated June 27, 2002), but has not yet announced a ruling on reconsideration.

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1. While a removing defendant need not show that the plaintiff had a specific intent to defraud in joining a particular defendant, the removing defendant is required to show that there is no possibility of recovery against the non-diverse defendant. Relying on this standard, courts frequently reject claims of fraudulent joinder (and therefore decline to exercise removal jurisdiction). *See, e.g., Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368 (11th Cir. 1998); *Briano v. Conseco Life Ins. Co.*, 126 F. Supp. 2d 1293 (C.D. Cal. 2000).

2. In addition to contesting the merits of the plaintiffs' claims, McDonald's had also attempted to argue that their claims were preempted by the Federal Nutritional Labeling and Education Act, 21 U.S.C. § 343(q). The district court rejected this argument.

3. *E.g.*, *Scientists Say Junk Food May Lead to Addiction*, London Daily Telegraph, Feb. 6, 2003, at B5.

Recent Developments

1. *See* Noam Neusner and Brian Brueggerman, *The Judges of Madison County*, U.S. News & World Report, Dec. 17, 2001, at 39.

2. *See* Myron Levin, *Tobacco Payments to States in Doubt*, Los Angeles Times, March 29, 2003, Business Section, at 1.

3. *See* Jonathan Fuerbringer, *Standard & Poor's Says It Might Lower Altria's Rating*, New York Times, March 29, 2003, at C4.

4. *See* Ameet Sachdev, *No Way, Firm Says of Bond of $12 Billion; Philip Morris Raises Prospect of Bankruptcy*, Chicago Tribune, March 25, 2003. at C1.

ABA

1. The House measure uniquely includes a provision making interlocutory review of class action orders mandatory, not discretionary, while the Senate version uniquely includes a provision requiring notification of federal and state regulatory officials prior to finalization of any class settlement.

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