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The Most Noteworthy Class Action Developments Of 2017

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The year 2017 has seen significant developments in the field of class action litigation. Even as the impact of the U.S. Supreme Court's Spokeo decision regarding standing continued to work its way through the courts, the Supreme Court created new ripples this year with its Bristol-Myers Squibb decision on personal jurisdiction. Meanwhile, the courts of appeals continued to make strides on subject matters including ascertainability, standing to pursue injunctive relief and mootness. The legislative branch also played an important role in this area: this year, Congress blocked an agency's attempt to restrict consumer arbitration provisions and is currently considering legislation that would alter the class action landscape. This article highlights the year's most noteworthy developments in class action litigation.

Standing Based on Alleged Statutory Violations After Spokeo

In its 2016 decision in Spokeo Inc. v. Robins, the Supreme Court held that a plaintiff asserting claims under the Fair Credit Reporting Act was required to allege a particularized and concrete injury in order to satisfy the Article III standing requirement. Most significantly, the court ruled that "Article III standing requires a concrete injury even in the context of a statutory violation," clarifying that a violation of a statutory right, by itself, does not necessarily confer standing.[1] The court remanded to the Ninth Circuit, which in August held that the plaintiff had sufficiently alleged a concrete injury to support standing.[2]

The Supreme Court's decision in Spokeo has resulted in numerous standing-based challenges in class actions across the country and hundreds of decisions regarding Article III standing under various federal statutes. While lower courts have reached differing conclusions, some broad trends have emerged. Notably, most lower courts have found that plaintiffs in Telephone Consumer Protection Act and Fair Debt Collection Practices Act cases adequately alleged standing, while plaintiffs in Fair and Accurate Credit Transactions Act cases did not. In FCRA cases — the statute involved in Spokeo — lower courts have found sufficient harm for standing only about half the time. Trends are also emerging within particular districts and circuits. And, in addition to rulings on motions to dismiss, courts are also increasingly grappling with the impact of

Spokeo at the class certification stage.[3]

Personal Jurisdiction Over Nonresident Class Members

On June 19, 2017, in Bristol-Myers Squibb Co. v. Superior Court of California, the Supreme Court established limitations on personal jurisdiction over nonresident plaintiffs in a mass action.[4] Hundreds of plaintiffs — only some of whom were California residents — filed suit against Bristol-Myers in California state court, alleging claims based on the company's drug Plavix. Bristol-Myers, however, was incorporated in Delaware and headquartered in New York. The court held that California courts lacked specific jurisdiction over the nonresident plaintiffs' claims unrelated to Bristol-Myers' contacts with California.

Although Bristol-Myers did not involve a class action, the decision could have significant implications for class action litigation. Most significantly, the court's holding suggests that plaintiffs cannot simply "forum shop" in nationwide or multistate class actions; rather, they must bring suit where the defendant is "at home" for purposes of general jurisdiction, or must limit the class definition to residents of the state where the suit is filed.

In the past few months since the Bristol-Myers ruling, lower courts have already begun to consider at the pleadings stage whether the case affects personal jurisdiction determinations in class actions. So far, courts have reached different conclusions. Some have found that, as a mass tort case, it simply does not apply to class actions.[5] Other courts have found Bristol-Myers relevant to class action personal jurisdiction determinations.[6]

Ascertainability Requirement for Class Certification

Although "ascertainability" is not one of the enumerated requirements for class certification under Federal Rule of Civil Procedure 23, courts generally agree that a class can only be certified if the proposed class is defined by reference to objective criteria. Courts, however, have differed as to whether the plaintiff must go the further step of proving that some "administratively feasible" method of determining class membership exists.

The Third Circuit has provided the leading voice in support of the view that administrative feasibility is required for class certification, reasoning that the requirement protects defendants' due process rights to challenge individuals' alleged membership in the class.[7] Notably, in 2017, the Third Circuit held that in certain circumstances, sworn affidavits from plaintiffs can satisfy the ascertainability requirement, suggesting that the court may be softening its stance.[8]

Moreover, earlier this year, the Ninth Circuit joined the Sixth, Seventh and Eighth Circuits in declining to adopt an administrative feasibility requirement.[9] Subsequently, the Second Circuit reversed course and similarly ruled that administrative feasibility is not a requirement for class certification.[10]

The Supreme Court has not addressed this circuit split, but many court observers expect that to change in the near future. In addition, as discussed below, legislation is pending that could effectively impose a heightened ascertainability requirement in federal class actions.

Standing for Injunctive Relief in False Advertising Cases

For years, district courts have split on the question of whether a plaintiff who has filed a lawsuit alleging

false advertising has standing to seek an injunction preventing the company from continuing to make the allegedly false or misleading statements. Many courts have held that such plaintiffs lack standing to seek an injunction because, by virtue of filing suit, they have admitted they are aware of the deceptive advertisement and thus are not likely to be misled in the future. For example, in McNair v. Synapse Group Inc., the Third Circuit held that because the named plaintiffs did not allege that they were likely to purchase the defendant's services in the future, they lacked standing for injunctive relief.[11]

In October 2017, the Ninth Circuit reached the opposite holding, resolving a long-running split among district courts in that circuit. In Davidson v. Kimberly-Clark Corp., the court held that although the plaintiff believed that Kimberly-Clark had falsely claimed its wipes were flushable prior to the lawsuit, she might want to purchase flushable wipes in the future, and her inability to rely on Kimberly-Clark's future representations therefore constituted a threat of injury sufficient for standing.[12]

Following Davidson, several district courts in the Ninth Circuit have dismissed complaints that insufficiently allege the plaintiff's desire to purchase the defendant's products in the future, but have permitted leave to amend.[13] It remains to be seen whether Davidson will influence courts outside the Ninth Circuit.

Mooting Class Actions Through Offers of Settlement

In Campbell-Ewald Co. v. Gomez, the U.S. Supreme Court held that, prior to certification of a class, an unaccepted offer of judgment in full satisfaction of the named plaintiff's claims does not moot the case.[14] However, the court expressly left open the possibility that the result may be different where a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff and the district court then enters judgment for the plaintiff in that amount.

Since Gomez, defendants have unsuccessfully attempted to defeat class actions by following the Supreme Court's suggestion. In Chen v. Allstate Insurance Co., the Ninth Circuit held that depositing funds into an escrow account payable to the plaintiff, followed by entry of judgment for the plaintiff, was ineffective to moot the case.[15] The Seventh Circuit reached a similar conclusion in Fulton Dental LLC v. Bisco Inc., holding that payment of full compensation into the court's registry under Rule 67 did not moot the case.[16]

More recently, several lower courts have similarly rejected attempts by defendants to moot claims. For example, in Stromberg v. Ocwen Loan Servicing LLC, the court held that, as in Gomez and Chen, a defendant may not moot a claim by tendering a check to the plaintiff.[17] Likewise, in Luman v. NAC Marketing Co., the court rejected the defendant's attempt to moot the case by depositing money directly into the plaintiff's accounts because the payment did not afford the plaintiff with the complete relief they sought — injunctive relief, attorney's fees and litigation costs.[18]

Legislative Activity Impacting Class Actions

Banks and credit card companies may continue to enforce consumer arbitration clauses, based on Congress's Oct. 24, 2017, vote to nullify a Consumer Financial Protection Bureau rule announced earlier this year. The CFPB rule, which sought to ban mandatory arbitration agreements in the consumer financial products sector, was widely criticized as being anti-consumer, anti-business and promoting frivolous litigation. Many correctly predicted that Congress would vote to nullify the rule before it went into effect, which Congress did by the narrow margin of 51 to 50 votes, with Vice President Mike Pence breaking a 50-50 tie. This action by Congress not only kills the new CFPB rule, but also prohibits the CFPB

from attempting to enact any similar rule in the future.

Additionally, the proposed Fairness in Class Action Litigation Act of 2017, which passed the House in March and is currently pending in the Senate, seeks to make significant changes to class actions in federal court, many of which would favor defendants. Substantively, the statute would require plaintiffs to establish that all putative class members suffered the same "type and scope" of injury and a feasible method of distribution in order to obtain class certification.[19] As already mentioned, many courts have rejected an administrative feasibility requirement, which would be overridden by the passage of the act.

The act would also make several procedural changes, including an automatic discovery stay during certain motion practice, requiring distributed attorneys' fees to be proportional to actual class recovery, and an automatic right of all parties to appeal certification. While these changes are generally friendly for defendants, the automatic right to appeal would also benefit plaintiffs in situations where class certification is denied. In addition, the act would require new disclosures, such as sending data to Congress regarding class action settlements, disclosing any third-party funding, and more in-depth examination of class counsel conflicts of interests.

It is unclear if the Senate will act on the pending legislation. The Senate declined to take action on similar legislation in 2016 (H.R. 1927), but that may have been motivated in part by then-President Barack Obama's threat to veto the legislation if it passed. Because the current administration has not threatened to veto the act, and given Congress' rejection of the CFPB rule previously discussed, there may be a higher likelihood that the legislation will pass this time around.

Conclusion

In the next year, district and circuit courts will continue to grapple with the Supreme Court's Spokeo decision not only at the pleadings stage, but also at class certification, summary judgment, and perhaps even during (or after) trial. We also anticipate that lower courts will be faced with numerous jurisdictional challenges from defendants around the country based on the Bristol-Myers decision. Next year promises to deliver significant developments on these and the other topics discussed in this article.

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[1] 136 S. Ct. 1540 (2016) (emphasis added).

[2] Robins v. Spokeo Inc., 867 F.3d 1108 (9th Cir. 2017). The Ninth Circuit reasoned that the FCRA

violations alleged by Robins were elevated by Congress to be "concrete, de facto injuries" that were "legally cognizable," and that the informational injury was concrete because "even seemingly flattering inaccuracies can hurt an individual's employment prospects." Id. at 1112, 1117.

[3] For example, in Sandoval v. Pharmacare US Inc., the district court considered the open issue in the Ninth Circuit as to whether absent class members must have standing after Spokeo, and denied class certification "to the extent that [the plaintiff class] raise[d] claims and theories they do not have standing to raise." No. 15-cv-0738-H, 2016 WL 3554919, at *8 (S.D. Cal. 2016).

[4] 137 S. Ct. 1773 (2017). In a mass action, each plaintiff is a named party in the suit, while in a class action, the named plaintiff is a representative who sues on behalf of him or herself as well as similarly situated absent class members.

[5] For example, in Fitzhenry-Russell v. Dr. Pepper Snapple Group Inc., the court reasoned that mass actions differ from class actions because all plaintiffs are named in a mass action, while in a class action the named plaintiffs represent the unnamed members. No. 17-CV-00564 NC, 2017 WL 4224723, at *4-5 (N.D. Cal. Sept. 22, 2017). The court found that distinction meaningful and therefore declined to extend the reasoning in Bristol-Myers to the putative class action before it.

[6] The court in In re Dental Supplies Antitrust Litigation found Bristol-Myers informative to the determination of personal jurisdiction in a putative class action. No. 16CIV696BMCGRB, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017). The court rejected the plaintiffs' argument that Bristol-Myers was inapplicable to class actions, calling it "an attempt to side-step the due process holdings in Bristol-Myers." Id.

[7] Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013) (holding that in order to show that a class is ascertainable, plaintiffs need to present a proposed method for identifying the class, and show that the identification method is economical and administratively feasible). In addition to the Third Circuit, the Fourth and Eleventh Circuits have similarly held that a showing of administrative feasibility is required for certification. See EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014); Karhu v. Vital Pharmaceuticals Inc., 621 F. App'x 945, 947-48 (11th Cir. 2015) (unpublished). While the First Circuit has not required proof of administrative feasibility for class certification, it has acknowledged that plaintiffs must establish feasibility during the liability phase of the case. In re Nexium Antitrust Litigation, 777 F.3d 9 (1st Cir. 2015).

[8] City Select Auto Sales Inc. v. BMW Bank of North America Inc., 867 F.3d 434 (3rd Cir. 2017).

[9] Briseno v. ConAgra Foods, Inc., 844 F.3d 1121 (9th Cir. 2017); see Rikos v. Procter & Gamble Co., 799 F.3d 497 (6th Cir. 2015); Mullins v. Direct Digital LLC, 795 F.3d 654 (7th Cir. 2015); Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc., 821 F.3d 992 (8th Cir. 2016).

[10] In re Petrobras Securities, 862 F.3d 250 (2d Cir. 2017). In Brecher v. Republic of Argentina, the Second Circuit made comments suggesting that administrative feasibility was part of the ascertainability requirement. 806 F.3d 22, 24-25 (2d Cir. 2015) ("A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."). In Petrobras, the court "clarified" that Brecher did not create an administrative feasibility requirement.

[11] 672 F.3d 213 (3d Cir. 2012).

[12] 873 F.3d 1103 (9th Cir. 2017). The court also reasoned that a contrary holding would "effectively gut[]" California's consumer protection laws.

[13] See, e.g., Gasser v. Kiss My Face LLC, No. 17-cv-01675-JSC, 2017 WL 4773426, at *4 (N.D. Cal. Oct. 23, 2017) (granting motion to dismiss claim for injunctive relief because pleadings did not meet standing requirements for injunction under Davidson, but granting plaintiffs leave to amend); Zemola v. Carrington Tea Co. LLC, No. 17cv760-MMA, 2017 WL 4922974, at *5, 8 (S.D. Cal. Oct. 30, 2017) (granting motion to dismiss plaintiffs' claim for injunctive relief, holding that under the standard set forth in Davidson, plaintiffs did not sufficiently allege standing because they did not allege that they desire to purchase the defendant's allegedly mislabeled products in the future, but also granting plaintiffs leave to amend).

[14] 136 S. Ct. 663 (2016).

[15] 819 F.3d 1136 (9th Cir. 2016).

[16] 860 F.3d 541 (7th Cir. 2017).

[17] No. 15-CV-04719-JST, 2017 WL 2686540, at *8 (N.D. Cal. June 22, 2017).

[18] No. 2:13-CV-00656-KJM-AC, 2017 WL 3394117, at *3 (E.D. Cal. Aug. 8, 2017).

[19] The act would also require that plaintiffs in multidistrict litigation proceedings must each satisfy a preliminary evidentiary burden.