Bloomberg BNA Class Action Litigation Report®

Certification

Judges Envision Full Record at Certification Following Recent *Behrend* Decision

By Jessie Kokrda Kamens

A 2013 Supreme Court antitrust ruling "is going to make a big difference" on when courts make class certification decisions—pushing those very significant rulings much further down the litigation pipeline, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York said June 7.

BNA Snapshot

Key Takeaway: Judges describe front-loading discovery and *Daubert* hearings before class certification in light of recent U.S. Supreme Court decisions.

Scheindlin was one of several judges who gave their perspectives at the ALI Forum on Class Actions and Aggregate Litigation in Philadelphia. The judges described how the U.S. Supreme Court's decisions in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (14 CLASS 411, 4/12/13), and *Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (12 CLASS 519, 6/24/11), have affected their management of class actions.

In *Dukes*, the Supreme Court raised the bar for plaintiffs seeking to prove Fed. R. Civ. P. 23(a)'s commonality requirement at class certification.

The *Behrend* majority held that Rule 23(b)(3)'s predominance requirement is even more demanding than Rule 23(a), and requires a rigorous analysis that will generally overlap with the merits of the plaintiff's underlying claim.

Scheindlin said that *Dukes* has not made much of an impact on her ability to certify classes, but she predicted *Behrend* would be a gamechanger.

"I think there is going to be a sea change in the certification effort. It is going to be later. The 'earliest practicable time' [from Rule 23] is now at the close of discovery. They can get rid of that phrase," she said.

Scheindlin said that a full record and a hearing under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), will be required at the certification stage.

She said she would not consider ordering bifurcated discovery, where the parties first provide discovery on certification issues, and later complete discovery on the merits issues.

"That's double delay, double expense," she said.

Judge Mark I. Bernstein of the Court of Common Pleas in Philadelphia said that he also had stopped allowing bifurcated discovery, and now he "lets it all in."

He said the key question at certification is whether the case can be tried to a jury. He asks the plaintiffs' counsel to provide jury verdict interrogatories. "Let me know which questions the jury can answer that are uniform throughout the whole class," he said.

Judge William F. Highberger of the Superior Court of California, County of Los Angeles, said that he had not seen a change in certification practice after *Dukes*. He said that judges in California state court do not hold hearings at the certification stage, but decide the issues based on the papers.

He said that California's labor laws are complex, and it is difficult for defendants to comply with them. Often, the defendants do not even contest certification, he said.

Rule Changes Foreshadowed SCOTUS Decisions

Judge Anthony J. Scirica of the U.S. Court of Appeals for the Third Circuit said that he was on the Rules Committee when it changed Rule 23 to require that courts make the certification decision "at an early practicable time."

The Rules Committee anticipated what the Supreme Court did in *Dukes*, he said.

He said committee members disagreed with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), which many courts understood as prohibiting them from considering the merits of the case at the certification stage. None of the members thought it made sense to do certification without looking at the claim, even if there was an overlap with the merits.

The Rules Committee wanted judges to have some time, take discovery, and not feel rushed to make the certification decision, Scirica said.

"We also did away with conditional certification for the same reason. This signals to the trial judge that you can take your time" to make the certification decision, he said.

Scirica said that the addition of Rule 23(f), which allows for interlocutory appellate review of the certification decision, "changed the game entirely."

"We are going to get more and more cases from the Supreme Court that we wouldn't have gotten without the interlocutory appeal," he said.

But Scheindlin, of the Southern District of New York, said that from the trial court's perspective Rule 23(f) is a "complete derailment" of a case. She said it can take two or three years for an appeal to be resolved, and she stops the case during that time.

"It's a gamestopper … It's a good thing for review of legal issues, but it's a bad thing for case management," she said.

Joinder, MDLs Possible Class Alternatives

Scheindlin, who has overseen high profile multidistrict litigation including suits over MTBE contamination, suggested that as the Supreme Court becomes less receptive to class actions, joinder is an alternative that may achieve the same result.

She described a securities class action she handled that was restyled so that there was joinder of 50 plaintiffs instead.

Scirica said that one of the most interesting areas of the law right now is multidistrict litigation practice, particularly for mass torts involving personal injury claims.

He said that cases plaintiffs do not want to bring as class actions "are piling into the MDL process." There, it is a "looser system, with much less supervision," he said.

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