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Potential New Life For Nationwide Class Actions?

Law360, New York (April 20, 2010) -- Prior to the enactment of the Class Action Fairness Act of 2005, forum shopping for class actions was not uncommon as certain state courts were considered "magnets" based on their record of certifying class actions. One significant motivation for passage of CAFA was a concern by some that these state courts were certifying nationwide class actions with little regard for due process rights, choice of law issues, and other fairness concerns addressed by the Federal Rules of Civil Procedure.

As stated in the Senate Report accompanying CAFA, "[a] principal purpose of the Class Action Fairness Act is to correct what former Acting Solicitor General Walter Dellinger has labeled a wave of 'false federalism[,]'" in which "state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to ... other states." S. Rep. No. 109-14, at 61 (2005).

CAFA therefore made it easier to remove class actions to federal courts which were viewed as less biased on class certification issues and more respectful of the due process rights and choice of law issues that arise in such cases. Federal courts have frequently refused to certify nationwide class actions outside of the settlement context.

As the filing of proposed nationwide class actions has shifted to federal courts, however, a small number of these courts are certifying nationwide consumer classes because they are willing, based on a choice of law analysis, to apply a single state's laws to each class members' claims. This current split in authority over application of one state's laws to a nationwide class may be part of some short-lived growing pains of the federal judiciary post-CAFA, or it may lead to a new breed of "magnet" courts.

In Phillips Petroleum Co. v. Shutts, the U.S. Supreme Court specified that the U.S. Constitution requires a separate choice of law determination for each plaintiff and for each claim in a proposed multi-state class action.[1] That is because each party has a due process right to the application of the correct substantive law to its claims or defenses.

In multistate class actions, choice of law issues play a prominent role when applying the "predominance" requirement of Federal Rule of Civil Procedure 23(b)(3)'s requirement: "that the questions of law or fact common to class members predominate over any questions affecting only individual members" before a damages class can be certified. The "predominance" inquiry often prevents certification of nationwide classes because the need to address variations in state laws often overwhelms common issues.

This predominance inquiry often begins with the choice of law analysis, required by Shutts. Federal courts must look to the forum state's choice of law rules in order to determine the controlling substantive law.[2]

While there are various approaches, states choice of law rules typically fall under two umbrellas: the Second Restatement's "most significant relationship test" or the "governmental interest test." Both tests begin with an

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analysis of whether the state laws at issue vary in material ways, a finding of no material variations typically halts the inquiry.

Take the example of state consumer protection laws. United States Courts of Appeals, and numerous districts courts, have routinely held there are material differences in state consumer protection laws that can be outcome determinative in the litigation and render proposed class actions uncertifiable. The consumer protection acts throughout the states have significant differences in their language, and many judicial decisions interpreting those statutes demonstrate that even somewhat similar statutory language is interpreted differently by different state courts.

The Third Circuit has noted "actual conflicts" among various states' "consumer protection laws."[3] The Fifth Circuit has recognized a "multitude of different standards and burdens of proof" for "consumer protection claims."[4] The Seventh Circuit noted "[s]tate consumer-protection laws vary considerable."[5] The Eighth Circuit has similarly acknowledged "different states have material variances between their consumer protection laws."[6] While there are a host of differences, courts have highlighted, among others, differences in knowledge and intent requirements, reliance and causation elements, and whether multiple or punitive damages are available and the standard for determining their availability.

These variations led many courts to refuse to certify nationwide class actions because the variations in state laws created predominance and manageability issues — and thus Rule 23(b)(3) was not satisfied.

Application of a single state's laws, however, avoids some of these problems and can increase the prospects for certification of a nationwide class action. Recently, a small number of United States District Courts have certified consumer protection cases because they are willing to apply one state's laws to a nationwide class. See, e.g., Mazza v. American Honda Motor Co.;[7] In Re Mercedes-Benz Tele Aid Contract Litigation.[8]

The Mazza decision was predicated on the defendant company's location in California and the court's focus on the issue of whether the alleged misrepresentations or decisionmaking "emanated" from that one state. However, the decision, and the somewhat similar reasoning in Mercedes-Benz, does not appear to pay due respect to the material, and outcome determinative, differences in the various state laws at issue.

The analysis in Mazza and Mercedes-Benz raises serious questions of comity and due process. Moreover, a narrow focus on where a misrepresentation allegedly emanates from, or where a company's headquarters is located, ignores numerous other factors that typically play a role in choice of law analysis (for example, the place of the purchase, place of performance, place of the injury, the parties' expectations, etc.).

For example, does a consumer who purchases a product in Tennessee really expect that his or her rights to recovery will be governed by New Jersey's consumer protection laws, just because that is the home state of the manufacturer?

Perhaps the holdings in these cases are much more limited. In both Mazza and Mercedes-Benz, the courts suggested there was not adequate evidence of widespread representations actually being made to, and received by, consumers in other states — a factor that could have influenced the choice of law analysis. The court in Mercedes-Benz considered consumer protection and unjust enrichment claims arising from subscriptions to an analog telematics service that Mercedes-Benz marketed. The plaintiffs allege that Mercedes-Benz knew it would no longer be offering the service after a few years, but marketed the service anyway while failing to disclose the known upcoming termination date.

The court hinted that its choice of law analysis may be different if the case was about the purchase of the vehicle itself — as opposed to the subscription service — which would require an inquiry into the location of the

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representations about the vehicles more generally and which no doubt took place, and were viewed by consumers, all across the country.

The controversy surrounding these cases has not gone unnoticed. The Ninth Circuit granted interlocutory review of the Mazza case. Briefing is completed but the court has not yet set a date for oral argument. In the Mercedes-Benz case, the district court itself recently certified for interlocutory appeal questions related to whether its analysis of the choice of law issues was correct.

While it is too early to tell how the Ninth Circuit will resolve Mazza, in an earlier decision, Sullivan v. Oracle Corp.,[9] the Ninth Circuit held that a California consumer protection statute could not be the basis for a claim by employees of a California company who worked outside of California — but the California-based employees were permitted to pursue their claims. The Ninth Circuit later withdrew that opinion and certified the question for review by the California Supreme Court.[10]

The Third Circuit will have a chance to review Mercedes if it grants interlocutory review. At the end of March, however, the court addressed a similar choice of law issue in Cooper v. Samsung Electronics America, Inc.[11] The court held that an Arizona resident could not pursue a claim under New Jersey's Consumer Protection Act against Samsung, which is located in New Jersey where the alleged misrepresentations were made. Analyzing New Jersey's choice of law rules, the court held that under either New Jersey's former "governmental interest" test or its new "most significant relationship" test, there was a conflict between the two state's consumer protection acts and the law of the state of purchase must be applied.

* * *

If courts continue to certify nationwide classes under the varying consumer protection laws, expect to see a change in tactics for class action lawyers, who may once again focus on trying to certify nationwide classes as opposed to recent trends toward attempts to certify actions in select states on a statewide basis. Also expect a great deal of litigation on these issues.

In short, courts will need to address whether it is permissible for one state to dictate the substantive law in every other state based solely (or primarily) on the fact that one of the defendants is located in, or had key decision makers, in that state. The answer to that question could dramatically impact the outcome in many class actions.

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The opinions expressed are those of the authors and do not necessarily reflect the views of Portfolio Media, publisher of Law360.

[1] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985).

[2] Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941).

[3] Nafar v. Hollywood Tanning Sys., 2009 WL 2386666, at *4 (3d Cir. 2009).

[4] Spence v. Glock, GES.m.b.H., 227 F.3d 308, 313 n.8 (5th Cir. 2000).

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[5] In re Bridgestone/Firestone, 288 F.3d 1012, 1018 (7th Cir. 2002).

[6] In re St. Jude Med., Inc., 425 F.3d 1116, 1120 (8th Cir. 2005).

[7] Mazza v. American Honda Motor Co., 254 F.R.D. 610 (C.D. Cal. 2008).

[8] In Re Mercedes-Benz Tele Aid Contract Litigation, Civ. No. 07-2720, 2010 U.S. Dist. LEXIS 23624 (D. N.J. March 15, 2010).

[9] Sullivan v. Oracle Corp., 547 F.3d 1177 (9th Cir. 2008).

[10] Sullivan v. Oracle Corp., 557 F.3d 979 (9th Cir. 2009).

[11] Cooper v. Samsung Electronics America Inc., No. 08-4736 (3rd Cir. March 30, 2010).

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