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Debunking Class Certification Myths

Law360, New York (January 06, 2012, 5:46 PM ET) -- Two oft-repeated refrains from plaintiffs in class actions are that a court's class certification decision should be "undertaken with no consideration of the merits" (an actual quote from a current case) and that any doubts should be resolved in favor of certifying a class. Recent case law shows that both statements are inconsistent with the requirements for a class action under Federal Rule of Civil Procedure 23.

The Merits Are Not Off Limits

As support for avoiding the merits, plaintiffs frequently cite to the United States Supreme Court decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), where the court stated, "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."

The court went on to explain that "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." Id. at 178.

It is true that courts should not decide whether to certify a class based solely on their view of the ultimate merits of the case. That is different than saying that a court should avoid any consideration of the merits, even when they overlap with the class certification decision.

The Supreme Court held in Wal-Mart Stores Inc. v. Dukes, 131 S. Ct. 2541 (2011), that "[a] party seeking class certification must affirmatively demonstrate his compliance with the Rule [23] — that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Id. at 2251.

The court went on to explain that any suggestion in Eisen that the merits were wholly off limits at the class certification stage was "the purest dictum," id. at 2252 n.6, and that, where proof of meeting Rule 23's requirements overlap with the merits, the court must make findings that Rule 23's requirements are met, id.

That is consistent with a long line of courts of appeals' decisions that have made clear that, while the court does not decide the merits at the certification stage, the court must consider the merits (both claims and defenses) and how much they impact the certification decision.

In fact, as is often the case, "[t]he preliminary inquiry at the class certification stage may require the court to resolve disputes going to the factual setting of the case, and such disputes may overlap the merits of the case." Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005); see also, e.g., Rodney v. Nw. Airlines Inc., 146 F. App'x 783, 785 (6th Cir. 2005) (the court is allowed to look beyond the pleadings on a class certification motion as it relates to the certification issue).

The United States Supreme Court also reiterated this year, however, that when there is no overlap of the merits and determinations of whether Rule 23's requirements are satisfied, then the merits should be avoided at the class certification stage. See Erica P. John Fund Inc. v. Halliburton Co., 131 S. Ct. 2179 (2011).

In that case, the district court, following Fifth Circuit precedent, had refused to certify the proposed securities class action because the plaintiffs had failed to prove loss causation at the class certification stage — in other words, requiring "a plaintiff to show that a misrepresentation that affected the integrity of the market price also caused a subsequent economic loss." Id. at 2186.

The Supreme Court reversed, holding that a showing of loss causation is not required at the certification stage, id., but did so based on what is required to create a presumption of reliance in securities cases.

Standard of Proof

Unlike the specific securities issue addressed in Erica P. John Fund, frequently there is overlap of the merits and Rule 23's requirements. As noted above, this necessitates a delving into the merits in order to make a "finding" that Rule 23's requirements are met. In these circumstances, plaintiffs assert that doubts should be resolved in favor of certification.

A number of courts of appeals have addressed this issue recently and uniformly held that it is the plaintiff's burden to demonstrate, based on "rigorous analysis" of the record, that the proposed class satisfies all of the requirements of Fed. R. Civ. P. 23(a) and at least one of the requirements of Rule 23(b). See In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008); Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006) (discussing the rigorous analysis required in determining whether to certify a class).

As the Fifth Circuit has explained, "[t]he plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification." Unger v. Amedisys Inc., 401 F.3d 316, 321 (5th Cir. 2005).

This requirement of a "finding" has generated a good deal of discussion lately and, in the view of at least the Second, Third and Fifth Circuits, requires a plaintiff to demonstrate that Rule 23's requirements are satisfied by meeting a "preponderance of the evidence" standard.

See Hydrogen Peroxide Antitrust Litig., 552 F.3d at 307; Teamsters Local 445 v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008); Alaska Elec. Pension Fund v. Flowserve Corp., 572 F.3d 221, 229 (5th Cir. 2009); see also In re HealthSouth Corp. Sec. Litig., 257 F.R.D. 260, 272 (N.D. Ala. 2009) ("[T]he preponderance of the evidence standard seems to be gaining momentum."); Hancock v. Chi. Title Ins. Co., 263 F.R.D. 383, 387 (N.D. Tex. 2009).

The Tenth Circuit has, similarly, adopted a requirement that a plaintiff meet a "strict burden of proof" that the requirements of Rule 23 are satisfied. Quinn v. Nationwide Ins. Co., 281 F. App'x 771, 775 (10th Cir. 2008).

Clearly, the preponderance of the evidence standard does not mean that a plaintiff must demonstrate he or she will prevail on the merits at the class certification stage. In considering a motion for class certification, the preponderance of the evidence standard only applies to the determination of whether Rule 23's elements are met.

As the Third Circuit explained in an antitrust case, "[p]laintiff's burden at the class certification stage is not to prove the element of antitrust impact ... [but] to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 311-12.

Conclusion

What does all of this mean for class action practice? It certainly means that, unlike in baseball, the tie does not go to the runner — or, in this instance, the plaintiff. Plaintiffs do have a burden to prove that Rule 23's requirements are met and they likely need to show that by a preponderance of the evidence standard.

The burden of proof also means that related issues, such as district court findings related to expert testimony about whether Rule 23's requirements are met, will need to be resolved at the class certification stage by the court.

See, e.g., In re Hydrogen Peroxide Antitrust Litig., 552 F.3d at 324 (holding that while it may be "unnecessary to consider certain expert opinion with respect to a certification requirement …" the trial court "may not decline to resolve a genuine legal or factual dispute because of a concern for an overlap with the merits"); Am. Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010) (requiring resolution of challenge to expert competence be resolved at class certification stage).

This burden, however, is not a death knell for class actions. It simply means that plaintiffs need to be prepared to show how their case presents, among other things, common questions and how they can be resolved on a class basis. For example, plaintiffs would be well served to discuss in their class action papers exactly how they propose to try their case as a class action or how any individualized issues would be addressed.

Simply put, courts have made it clear that sweeping class allegations are not enough. Plaintiffs must be prepared to carry their burden and prove, even if that means some overlap with the merits, that Rule 23's requirements are satisfied.

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