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Class Actions in the U.S. – An Introduction

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September 27, 2012

Introduction to U.S. Class Actions

- Overview - Federal Rule of Civil Procedure 23
  - Requirements of numerosity, commonality, typicality, and adequacy of representation
  - Types of class actions
  - Notice to class members
- Proof required for class certification
- Special issues in toxic torts class actions
  - Individual vs. common issues
  - Medical monitoring
- Class settlements

Introduction to U.S. Class Actions (Cont'd)

- Issues regarding class counsel
  - Appointment of counsel to represent the class
  - Attorneys' fees
- Class action management issues
  - Multiple class actions and coordination of related actions
  - Claims processing
  - Communications from class members

U.S. Courts and Class Actions -- Overview

- U.S. federal government has a national court system
  - Federal trial courts in every state
  - Two tiers of appellate courts (Circuit courts and Supreme Court)
- Each of 50 states has its own court system
  - Each state system has its own procedural law
  - States make substantive law in all areas where federal law does not govern
  - There is substantial variation in substantive and procedural law throughout the U.S.

U.S. State Court Class Actions

- Each of the 50 states has some form of class action.
  - State courts can adjudicate claims of non-resident class members, subject to Constitutional due process limitations. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).
- Typically, a putative class action plaintiff has a choice of multiple U.S. forums.
- Differences in substantive laws, standards of proof, and statutes of limitations mean that putative class claims that would be barred in some jurisdictions may be adjudicated in others.

U.S. Courts and Class Actions

- The vast majority of state class action rules or statutes are modeled on Federal Rule of Civil Procedure 23.
- The 2005 Class Action Fairness Act expanded federal court jurisdiction over class actions.
  - Parties have broader rights to file class action claims in, or remove them to, U.S. federal courts.
- So, while states' class action jurisprudence is highly relevant in U.S. class action litigation, this overview will focus on U.S. **federal** class action procedures and requirements.

U.S. Class Actions: Rule 23

- Federal Rule of Civil Procedure 23 authorizes certification of class actions.
- 1966 Amendments to Rule 23 established modern class action procedure.
- The class action is a limited exception to the usual rule that litigation is conducted by and on behalf of individual named parties only.
  - The legal interests of absent parties will be determined with finality in a class action.
  - Accordingly, the determination of whether a putative class action meets the requirements for class certification requires a judicial determination after rigorous analysis.

U.S. Class Actions - Overview

- In over 40 years of U.S. class action litigation under the modern class action rule, the clear trend has been away from treating class action rules as mere pleading requirements.
  - Requirements for class action certification receive "rigorous analysis."
  - Extended evidentiary hearings now are the norm.
- While class certification can be modified or a class decertified, initial class certification itself is a game-changer.
  - Class actions are complex, costly, and lengthy.
  - Class certification greatly enhances the settlement value of plaintiffs' case.

U.S. Class Actions: Certification Effectively Determines "Liability"

- Realities of class litigation are that aggregation of claims into a single class action "creates insurmountable pressure on defendants to settle."
  - *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir 1996).
- The overwhelming majority of cases certified as class actions are resolved by settlement rather than trial.
  - 2005 and 2008 Federal Judicial Center studies: Class certification was followed by settlement in 90% to 100% of sampled cases.
- Defendants seeking business certainty will pay off class plaintiffs to avoid intolerable risk.
  - See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

Typical U.S. Class Actions

- Employment: Employees claim employer engaged in systematic discrimination or violated applicable labor laws (e.g., unpaid overtime)
- Consumer Rights: Consumers claim injury from alleged systematic practices of financial institution, insurer, or other company (e.g., late fees on bills, pricing on insurance, blast faxes)
- Civil Rights: Plaintiffs often seek injunctive relief (e.g., school segregation, prisoners' rights, voting rights)
- Securities: Investors claim injuries from alleged improper conduct (e.g., misstating earnings or misrepresenting risks)
- Product Liability/Mass Torts/Environmental: Plaintiffs' claims may include personal injuries (possibly including need for medical monitoring), property damage, and/or economic loss

Rule 23(a): Prerequisites for a Class Action

- "One or more members of a class may sue or be sued as representative parties on behalf of all members only if
  - (1) the class is so numerous that joinder of all members in impracticable;
  - (2) there are questions of law or fact common to the class;
  - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
  - (4) the representative parties will fairly and adequately protect the interests of the class."

Rule 23(a) Prerequisites for a Class Action

- Accordingly, the four prerequisites to any class action are:
  - Numerosity
  - Commonality
  - Typicality
  - Adequacy
- These four requirements ensure that class claims are limited to the claims of the named ("representative") plaintiffs.

Rule 23(a) Commonality

- A 2011 U.S. Supreme Court decision clarified that Rule 23(a)'s requirements do not set forth mere pleading standards.
- *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).
  - "A party seeking class certification must affirmatively demonstrate his compliance with the Rule—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 2551.
  - The trial court must apply "rigorous analysis" to determine if the prerequisites of Rule 23(a) have been satisfied.

Wal-Mart v. Dukes (Cont'd)

- Determining whether a class may be certified may well involve touching aspects of the *merits*.
  - Claims must depend on a common contention.
  - Moreover, that common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each of on the claims in one stroke." 131 S. Ct. at 2551.
- To establish that a common question exists, plaintiffs must provide "significant proof" of conduct required to satisfy commonality requirement and to permit certification of plaintiff class.

Three Types of Class Actions: Rule 23(b)

- If all requirements of Rule 23(a) are satisfied, a class action may be maintained only if the class *also* satisfies the requirements for one of three types of class actions under Rule 23(b):
  - 23(b)(1): Seeking a mandatory class to prevent inconsistent rulings regarding defendants' required conduct (e.g., voter registration requirements), or for disbursements from a limited fund (e.g., insurance fund)
  - 23(b)(2): Seeking injunctive or declaratory relief for the entire class (e.g., school desegregation)
  - 23(b)(3): Seeking money damages

Rule 23(b)(1): Requirements for a Mandatory Class

- A class action under Rule 23(b)(1) may be maintained if Rule 23(a) is satisfied and if

  "(1) prosecuting separate actions by or against individual class members would create a risk of:

  (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

  (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interest of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests"

Rule 23(b)(2): Requirements for a Class Seeking Injunctive Relief

- A class action under Rule 23(b)(2) may be maintained if Rule 23(a) is satisfied and if

  "(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"

- *Wal-Mart* decision clarified requirements for Rule 23(b)(2) treatment
  - Relief requested must be indivisible
  - Monetary claims must be purely incidental to injunctive or declaratory relief—or may not be available at all under Rule 23(b)(2) certification

Rule 23(b)(3): Requirements for a Class Seeking Monetary Damages

- A class action under Rule 23(b)(3) may be maintained if Rule 23(a) is satisfied and if

  "(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

- *Predominance*, *superiority*, and *manageability* must be established in a class seeking monetary damages.
- Class members must be given *notice* and the opportunity to *opt out* of a Rule 23(b)(3) class.
  - See Rules 23(c)(2)(B), 23(c)(3)(B).

Rule 23(b)(3): Predominance

- Predominance focuses on comparison of common issues to individual issues.
  - Requires more than commonality, which is the Rule 23(a) prerequisite.
- Predominance hurdles may include
  - Variations in state law,
  - Proximate causation,
  - Individuated damages determinations, and/or
  - Requirements to show individual reliance in fraud cases.

Rule 23(b)(3): Predominance

- Evaluation of predominance will require the court to look past the pleadings.
  - "Going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law to make a meaningful determination of the certification issues." *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996).

Rule 23(b)(3): Superiority

- Rule 23 (b)(3) provides a non-exhaustive list of factors to be considered in determining whether a class action is "superior" to other avenues for adjudication:

(A) The class members' interests in individually controlling the prosecution or defense of separate actions;

(B) The extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) The likely difficulties in managing a class action.

Predominance, Superiority, and Manageability

- The court must examine how the class action would be tried to determine whether common issues will, in fact, predominate, and whether the trial(s) will be manageable.
- The burden is on the party seeking class certification to show how a class trial could be conducted and how common class-wide issues would predominate at that trial.

Issue Classes

- Rule 23(c)(4) provides, "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."
- There are unresolved questions regarding application of commonality and predominance requirements to putative issue classes.
- The 7th Amendment to the U.S. Constitution reserves the right of jury trial in civil actions and prohibits any court from re-examining factual determinations made by a jury.
  - This may prohibit issues classes where severed and non-severed claims would share factual issues, because a given factual issue may not be tried by successive juries.

Subclasses

- Rule 23(c)(5) provides, “When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.”
- Subclasses have been proposed to address choice-of-law issues (in cases in which the law of multiple states will apply).
  - But multiple subclasses may create manageability issues.

Class Certification

- The court should rule on class certification at "an early practicable time." Rule 23(c)(1)(A).
- The class certification order must define the class and the issues. Rule 23(c)(1)(B).
- A class certification order may be altered or amended before final judgment. Rule 23(c)(1)(c).
- A court of appeals may permit an appeal from an order granting or denying class certification. Rule 23(f).
  - The petition for permission to appeal must be filed within 14 days after the order is entered.
  - An appeal does not automatically stay proceedings in the trial court.

Class Notice—Rule 23(c)(2)

- For classes certified under Rule 23(b)(3), notice to class members is mandatory.
  - Best notice that is practicable under the circumstances
  - Individual notice to all members who can be identified through reasonable effort
  - Clear, plain, and concise statement of: Nature of action, definition of class, claims, right to appear through an attorney, right to opt-out and time and manner for opting out
- For classes certified under Rules 23(b)(1) or 23(b)(2), the court *may* require notice to class members.

Class Notice

- Notice to class members also is required:
  - When the parties propose a settlement or voluntary dismissal that would be binding on the class, Rule 23(e), and
  - When an attorney or party makes a claim for an attorney fee award, Rule 23(h)(1).
- Notice provides the structural assurance of fairness that permits representative plaintiffs to bind absent class members.
  - Communications to the class should be clear and comprehensible.

Burden of Proof for Class Certification

- The court must examine evidentiary submissions material to any class certification element
  - Must probe behind the pleadings
  - May involve examination of factual and legal issues going to the merits of the putative class claims
- Emerging standard is to require plaintiffs to show each Rule 23 element has been satisfied by a *preponderance of the evidence*

Expert Testimony and Class Certification

- Expert declarations and testimony often are necessary to support class certification.
- How should a court considering class certification evaluate expert testimony?
  - "We hold that when an expert's report or testimony is critical to class certification . . . a district court must conclusively rule on any challenge to the expert's qualifications or submission prior to ruling on a class certification motion." *American Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010).
  - "[T]he district court erred as a matter of law by not sufficiently evaluating and weighing conflicting expert testimony on class certification." *Sher v. Raytheon Co.*, 419 Fed. App'x 887, 891 (11th Cir. 2011).

Expert Testimony in U.S. Federal Courts

- *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993)
- Trial judge as gatekeeper must assure that expert testimony truly proceeds from scientific knowledge
  - Qualifications/expertise
  - Reliability
  - Relevance
  - Helpfulness to jury
- Federal Rule of Evidence 702
  - Expert witness may testify in the form of an opinion if the expert's specialized knowledge will help the trier of fact; the testimony is based on sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case

Expert Testimony and Class Certification?

- *Wal-Mart* opinion strongly suggested expert testimony submitted in support of a motion for class certification should face *Daubert* scrutiny.
- Not all Circuits have considered the issue post-*Wal-Mart,* and the law currently is in a state of flux.
  - *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613-14 (8th Cir. 2011) (court's inquiry on motion for class certification is preliminary and limited, and it was not error to conduct a "tailored" *Daubert* analysis in class certification context).
  - *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982-84 (9th Cir. 2011) (district court correctly conducted a *Daubert* analysis, but only considered admissibility; district court was also required to consider persuasiveness and to decide a battle of the experts).

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (U.S. 2011)

131 S. Ct. 2541, *2553; 180 L. Ed. 2d 374, **392;
2011 U.S. LEXIS 4567, ***27; 112 Fair Empl. Prac. Cas. (BNA) 769

F.R.D. 189, 192 (ND Cal. 2004). The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under *Federal Rule of Evidence 702* and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.[8] The District Court concluded [*2554] that *Daubert* did not apply to expert testimony at the certification stage of class-ac proceedings. *222 F.R.D., at 191*. We doubt that [*** is so, but even if properly considered, Bielby's testim does nothing to advance respondents' case. "[W]he 0.5 percent or 95 percent of the employment decisior Wal-Mart might be determined by stereotyped think is the essential question on which respondents' theor commonality depends. If Bielby admittedly has answer to that question, we can safely disregard wha has to say. It is worlds away from "significant proof" Wal-Mart "operated under a general policy discrimination."

8 Bielby's conclusions in this case have elic criticism from the very scholars on wl conclusions he relies for his social-framew analysis. See Monahan, Walker, & Mitcl Contextual Evidence of Gender Discriminat The Ascendance of "Social Frameworks," *94 L. Rev. 1715, 1747 (2008)* ("[Bielby's] rese into conditions and behavior at Wal-Mart did meet the standards expected of social scien research into stereotyping and discriminatio *id., at 1745, 1747* ("[A] social framew necessarily contains only general statements al reliable patterns of relations among variables and goes no further. . . . Dr. Bielby claime present a social framework, [***29] but testified about social facts specific to Wal-Ma *id., at 1747-1748* ("Dr. Bielby's report prov no verifiable method for measuring and tes any of the variables that were crucial to conclusions and reflects nothing more than Bielby's 'expert judgment' about how ger stereotyping research applied to all mana across all of Wal-Mart's stores nationwide for multi-year class period").

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The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal-Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. [**LEdHR12] [12] It is also a very common and presumptively reasonable way of [**393] doing business--one that we have said "should itself raise no

of Wal-Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their

F.R.D. 189, 192 (ND Cal. 2004). The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under *Federal Rule of Evidence 702* and our *Daubert* case, see *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.[8] The District Court concluded [*2554] that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. *222 F.R.D., at 191*. We doubt that [***28] is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. "[W]hether

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Comcast Corp. v. Behrend, Case No. 11-864

- Supreme Court argument set for November 5, 2012.
- Issue presented:

  "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.“

Environmental Class Actions

- U.S. class action rules do not create substantive rights but are a procedural mechanism for enforcement of legal rights found elsewhere.
- Sources of environmental liability in the U.S. include:
  - Federal laws and regulations
  - State laws and regulations
  - Common law causes of action

Some U.S. Common Law Causes of Action for Environmental Harm

- Nuisance
  - Unreasonable interference with or loss of use or enjoyment of property
- Trespass
  - Direct physical invasion of or contamination of property
- Negligence
  - Damages for bodily injury caused by exposure, diminished property values, clean-up costs
- Strict liability
  - Because defendant's activity was ultrahazardous, plaintiff need not prove negligence

Relief Sought in U.S. Environmental Class Actions

- Compensatory damages
  - Real property damage (clean-up costs, decrease in property value, loss of use of property, “stigma” damages)
  - Economic loss (lost profits and damages to tourism, fishing, boating, or other industry)
  - Personal injury (pain, suffering, medical expenses, medical monitoring costs, loss of wages and earning capacity, emotional distress, loss of consortium)
- Punitive damages (where available)
- Injunctive relief (where tortfeasor will not otherwise cease harmful behavior)

Rule 23 & Toxic Torts Claims

- Original focus of Rule 23 was not mass torts or personal injury claims
- Committee Notes to 1966 Amendments stated:
  - A "mass accident" resulting in injuries to numerous persons *is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways*. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. 39 F.R.D. 69, 103 (1966) (emphasis added).

Rule 23 & Toxic Torts Claims

- Early attempts at class certification for environmental damage or toxic torts failed because courts found individual issues predominated over common issues.
- Some toxic tort classes have been certified, including but not limited to:
  - Single-incident environmental torts (discrete spill affecting recognizable group of plaintiffs in the same way)
  - Property damage-only cases
  - Medical monitoring
    - Note that courts frequently have rejected class certification in these categories as well.
- Defendants have used class certification to resolve claims and limit liability through settlement classes.

Class Certification Hurdles for Toxic Torts

- Putative class actions involving toxic exposure claims present serious challenges for class certification
- Toxic tort claims often involve
  - Multiple defendants and/or defendants whose conduct changed over time
  - Discharge(s) of multiple substances
  - Years or decades of discharges
  - Plaintiffs who are dispersed geographically
  - Plaintiffs with differing times, durations, and intensity of alleged exposure and with differing types of damages

Toxic Tort Class Actions

- The predominance of individual issues in environmental and toxic tort litigation is a fundamental stumbling block to class certification, where
  - No one set of operative facts will establish liability, and/or
  - No single proximate cause applies equally to each class member.
- Litigating a class action that includes predominantly individual issues would be inefficient.

Medical Monitoring Claims

- Not a traditional tort law cause of action
- Allows recovery of the costs of periodic medical appointments and tests to detect the early signs of diseases associated with exposure to toxins
  - Some jurisdictions recognize medical monitoring as a cause of action, e.g., *Pennsylvania, Redland Soccer Club, Inc. v. Dep't of the Army*, 696 A.2d 137, 142 (Pa. 1997).
  - Some treat it as a type of relief granted in connection with a traditional tort cause of action, e.g., *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 359 (La. 1998).
- Aggregation of claims for expensive medical testing presents serious litigation risks for defendants.

Typical Elements of Medical Monitoring Claim

- Where medical monitoring is available, a plaintiff typically must prove:
  - Exposure greater than background levels,
  - To a proven hazardous substance,
  - Caused by the defendant's negligence,
  - As a proximate result of the exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease,
  - Plaintiff's risk of contracting a serious latent disease is greater than (a) the risk of contracting the same disease had he or she not been exposed and (b) the chances of members of the public at large of developing the disease,

Typical Elements of Medical Monitoring Claim (Cont'd)

- A monitoring procedure exists that makes the early detection of the disease possible,
- The monitoring procedure has been prescribed by a qualified physician and is reasonably necessary according to contemporary scientific principles,
- The prescribed monitoring regime is different from that normally recommended in the absence of exposure, and
- There is some demonstrated clinical value in the early detection and diagnosis of the disease.

Medical Monitoring Class Certified—West Virginia State Court

- Plaintiffs who lived near a zinc smelter facility alleged that exposure arsenic, cadmium, and lead increased the risk that they would contract various diseases.
- The trial court certified a medical monitoring class and a property damage class.
  - Following a 6-week trial, a jury found in favor of the class, awarding over $55M for property damage, $130M for medical monitoring, and nearly $200M in punitive damages.
- West Virginia's Supreme Court affirmed class certification. *Perrine v. E.I. Du Pont Nemours & Co.*, 694 S.E.2d 815, 861 (W. Va. 2010).
  - The court reduced the punitive damages award, *id.* at 881, and remanded for a jury trial on a statue of limitations issue, *id.* at 853.

Class Certification (and Trial)—Followed by Settlement

- In early 2011, prior to trial on the statute of limitations question, the parties settled the *Perrine* class action for $70 million, plus the cost of 30-year medical monitoring program.
  - *Perrine v. DuPont,* 04-C-295-2, Circuit Court, Harrison County, West Virginia, Final Order Approving Settlement (Jan. 4, 2011), available at http://perrinedupont.com/uploads/Final_Order_Approving_Settlement_01-04-11.pdf

Class Actions Seeking Medical Monitoring

- Plaintiffs in medical monitoring classes often cannot show the cohesiveness required for Rule 23(b)(2) class certification.
  - See, e.g., *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011) (affirming district court's refusal to certify medical monitoring class of persons allegedly exposed to pollutant).
- Courts have been divided on whether the remedy of medical monitoring may proceed under Rule 23(b)(2) (injunctive relief) or whether plaintiffs must meet the requirements for Rule 23(b)(3) (monetary compensation).

Medical Monitoring Classes

- Examples of Circuit court decisions rejecting medical monitoring class actions:
  - 3rd Circuit: *Barnes v. Am. Tobacco Co., 161 F.3d 127* (3d Cir. 1998), *cert. denied,* 526 U.S. 1114 (1999).
  - 4th Circuit: *Ball v. Union Carbide Corp.,* 385 F.3d 713, 728 (4th Cir. 2004).
  - 8th Circuit: *In re St Jude Med., Inc.,* 425 F.3d 1116, 1120 (8th Cir. 2005); *In re St Jude Med., Inc.,* 522 F.3d 836, 840 (8th Cir. 2008), *reh'g denied,* 522 F.3d 836 (8th Cir. 2008).
  - 9th Circuit: *Zinser v. Accufix Research Inst., Inc.,* 253 F.3d 1180, 1196, *amended,* 273 F.3d 1266 (9th Cir. 2001).
  - 10th Circuit: *Boughton v. Cotter Corp.,* 65 F.3d 823 (10th Cir. 1995).

Medical Monitoring: Is It Such a Great Idea?

- Opponents of medical monitoring for uninjured plaintiffs argue that making the remedy available
  - Encourages highly speculative claims and equally conjectural awards;
  - Diverts scarce medical resources away from truly injured individuals who need them most;
  - Subjects defendants to open-ended liability; and
  - Places significant strain on a judicial system that is generally ill-equipped to formulate and then supervise complex medical monitoring regimes.
- Medical risks of screening often outweigh the potential benefits.

Approval of Federal Class Action Settlements

- FRCP 23(e) requires a court approving a class settlement agreement to find that it is "fair, reasonable, and adequate."
  - Factors to be considered are not delineated in the Rule and vary across federal Circuits.
  - In general, the fairness assessment turns on the "treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class." Manual for Complex Litigation § 21.62.
  - Adequacy looks to the relief granted within the class action process versus what individual class members may have received without the class action. *Id.*

Judicial Review of Class Settlements

- Judge as Class Fiduciary
  - "District judges must therefore exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions to consider whether the settlement is fair, adequate, and reasonable, and not a product of collusion. Indeed, the district court judge *functions as a fiduciary of the class*, who is subject therefore to the high duty of care that the law requires of fiduciaries."
    - *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 748 (7th Cir. 2006) (emphasis added, internal quotations and cites omitted).
  - "The judge who presides over the class action and must approve any settlement is charged with responsibility for preventing the class lawyers from selling out the class."
    - *Thorogood v. Sears, Roebuck & Co.,* 547 F.3d 742, 745 (7th Cir. 2008).

Judicial Review of Class Settlements

- Review of a proposed class action settlement generally involves two hearings.
  - At preliminary fairness evaluation, the judge should make a preliminary determination that the proposed class satisfies requirements of Rules 23(a) and one subsection of 23(b) and directs preparation of notice(s) to the class.
  - At a formal fairness hearing, proponents of the settlement provide evidence that the proposed settlement is "fair, reasonable, and adequate," and the court also may hear from objectors and class members.

Possible Factors in Evaluating Class Settlement

- Some factors that may bear on review of a class settlement include:
  - Relative advantages of proposed settlement versus likely outcome of trial on the merits;
  - Probable time, duration, and cost of trial;
  - The maturity of the litigation and degree of knowledge about the underlying substantive issues;
  - Whether the settlement amount is significantly less than estimated actual damages as determined in discovery, settlement, or litigation of other cases;
  - Whether claimants with similar allegations will receive similar treatment;

Possible Factors in Evaluating Class Settlement (Cont'd)

- Whether named plaintiffs receive exclusive or disproportionately large relief compared to unnamed class members;
- The extent of participation in the settlement negotiations by class members or class representatives, and by a judge or special master, and whether defendant has selected a negotiator from among plaintiffs' counsel without court approval;
- The number, character, and force of objections by class members;
- Whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right;

Possible Factors in Evaluating Class Settlement (Cont'd)

- The reasonableness of any provisions for attorney's fees, including whether the fees are so high in comparison to class recovery as to suggest collusion;
- The fairness and reasonableness of the procedure for processing individual claims under the settlement;
- Whether plaintiffs are receiving only nonmonetary relief (e.g., coupons and discounts) that may have little or no market value to the class;
- Whether supposed benefits to plaintiffs actually are illusory because of overly strict eligibility criteria;
- Whether defendants have claims on residual funds that may create inappropriate incentives to limit paying legitimate claims;

Possible Factors in Evaluating Class Settlement (Cont'd)

- Whether another court has accepted or rejected a substantially similar settlement;
- Whether there is appropriate fit between the claims in the complaint and the relief contemplated in the settlement (amendment of the complaint may be required); and
- The apparent intrinsic fairness of the settlement terms.
  - See generally Manual for Complex Litigation § 21.62.

Class Action Settlements: Notifications to State and Federal Officials

- Per 28 U.S.C. § 1715, each defendant must serve notice of proposed settlement on certain federal and state officials
  - Notice must be served 10 days after a proposed settlement of a class action is filed in court.
  - Notice must go to designated state officials of each state in which a class member resides.

Class Action Settlements: Notifications to State and Federal Officials (Cont'd)

- Notice under 28 U.S.C. § 1715(b) must consist of
  - Complaint(s)
  - Notice of any scheduled judicial hearing
  - Proposed or final notification to class members
  - Any proposed or final class action settlement
  - Any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants
  - Any final judgment or notice of dismissal
  - Any written judicial opinion relating to any proposed or final settlement, agreement of counsel, or final judgment or dismissal

Class Action Settlements: Notifications to State and Federal Officials (Cont'd)

- Notice to each state official must also include
  - If "feasible," the names of class members who reside in that official's state and that estimated proportionate share of the claims of such members to the entire settlement, or
  - A reasonable estimate of the number of class members residing in each state and the estimate proportionate share of the claims of such members to the entire settlement.
    - 28 U.S.C. § 1715(b)(7).

Class Action Settlements: Notifications to State and Federal Officials (Cont'd)

- A class member may refuse to be bound by a class action settlement if the class member demonstrates that the required notice has not been provided.
- Federal or state officials may choose to intervene in or object to a class action settlement.
  - The court may not enter final approval of a proposed settlement earlier than 90 days after the last required notice was served on the federal or state official.

Certification of Settlement Classes

- Defendants participate willingly in the class certification process
  - Scope of class
  - Size of settlement
- Sole purpose is to effect global settlement
- Issues left for court resolution are more limited

Selection of Class Counsel

- Attorneys representing classes control the litigation process far more than attorneys representing individual litigants.
- A court that certifies a class must appoint class counsel. Rule 23(g)(1).
  - Interim counsel may be appointed prior to class certification. Rule 23(g)(3).
  - If more than one applicant seeks appointment, the court "must appoint the applicant best able to represent the interests of the class." Rule 23(g)(2).
    - If only one applicant seeks appointment, that applicant may be appointed only if the court finds that counsel to be adequate. *Id.*

Rule 23(g): Appointing Class Counsel

- Rule 23(g) requires the court to consider the following factors in appointing class counsel:
  - Work done by counsel in identifying or investigating potential claims in the action;
  - Counsel's experience in handling class actions, other complex litigation, and the types of claims asserted by the class;
  - Counsel's knowledge of the applicable law; and
  - The resources that counsel will commit to representing the class.

Attorney Fees

- Rule 23(h) governs procedures for seeking attorney fees in a class action
  - Notice must be provided to the class members.
  - Class members (or a party from whom payment is sought) may object.
  - The court may hold a hearing and must find facts and state conclusions.
- Fees should be based on *actual benefits* conferred on the class.
  - It can be complicated to determine the value of nonmonetary benefits, such as in-kind settlements or injunctive relief.

Attorney Fees in U.S. Class Actions

- General "American rule": Each party responsible for paying its own attorney fees
- Contingent fees
- Common fund
  - *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)
- Under Rule 23 (h), fees awarded must be "reasonable"
  - Percentage of settlement
  - Lodestar

Class Management Issues

- Multiple class actions and coordination of related actions
- Claims processing
- Communications from class members

Thank You!

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