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CLASS CERTIFICATION

Two Sidley Austin attorneys examine Rule 23 of the Federal Rules of Civil Procedure and how courts have treated the plaintiff requests in putative consumer class actions to apply the rule where limited funds—or claims of limited funds—are noticeably absent from the proceedings.

INSIGHT: Rule 23(b)(1)(B): A Mechanism to Avoid A Famine or Means to Achieve an Undeserved Feast?

By Kara McCall and Simone Jones

Plaintiffs bringing putative class actions historically have relied, almost exclusively, on Federal Rule of Civil Procedure 23(b)(2) or 23(b)(3) in their attempts at class certification. However, plaintiffs in putative consumer fraud class actions increasingly are looking to the less-onerous appearing Rule 23(b)(1)(B) as an alternative mechanism for class certification, potentially signaling the emergence of a new trend. There is a significant problem with this approach, however: rarely, if ever, do the facts and allegations of putative consumer fraud class actions present the risks that Rule 23(b)(1)(B) was enacted and interpreted to avoid, placing the actions well outside the limited scope of Rule 23(b)(1)(B).

The text of Rule 23(b)(1)(B) expressly limits its application to cases where individual adjudications would be dispositive or substantially affect the rights of others not parties to the adjudications. The drafters of Rule 23(b)(1)(B) provided examples of situations that meet this standard and may merit application of the rule, including actions against fraternal benefit associations challenging reorganization of the societies, actions by shareholders to compel corporate entities to pay dividends, and actions charging breach of trust against certain fiduciaries. These scenarios are beyond the scope of this article.

Relevant here, the drafters also discussed the ''classic'' Rule 23(b)(1)(B) case—the so called ''limited fund'' case—where a defendant has a limited pool of money from which to pay the claims of all current and potential plaintiffs. A Rule 23(b)(1)(B) class action ''followed by separate proof of the amount of each valid claim and proportionate distribution of the fund,'' the drafters wrote, solves the problem presented by these cases. The Supreme Court in *Ortiz* later analyzed limited fund class actions and recognized that ''[t]he concept driving this type of suit was insufficiency, which alone justified the limit on an early feast to avoid a later famine.'' *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 838 (1999). Following *Ortiz*, courts largely limited application of Rule 23(b)(1)(B) to cases that presented allegations of limited funds (and the other, specific factual scenarios provided by the drafters), with some courts refusing to certify an action pursuant to Rule 23(b)(1)(B) unless it fell within this singular fact pattern.

This article begins with an examination of the history of Rule 23 and subsection (b)(1) generally, and proceeds with an analysis of the Supreme Court's ruling in *Ortiz*. It next evaluates other, more recent court developments that reflect how courts have treated the requests of plaintiffs in putative consumer class actions to apply Rule 23(b)(1)(B) where limited funds—or claims of limited funds—are noticeably absent from the proceedings. The article concludes with a discussion regarding the inappropriateness of the attempts by plaintiffs in putative consumer fraud class actions to broaden the limited scope of Rule 23(b)(1)(B) and transform a

rule designed to prevent famines into one that provides undeserved feasts.

The History of Rule 23

The original Rule 23, adopted in 1937, allowed a representative lawsuit to be brought when the right to be enforced for or against the class was:

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought. Fed. R. Civ. P. 23 (1938).

The key drafter of original Rule 23 described these three class-suit categories as true, hybrid, and spurious, respectively. Newberg on Class Actions § 1:14 (citing James W. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L.J. 551, 570-576 (1937)); *see also* Fed. R. Civ. P. 23 advisory committee's note (1966).

Rule 23 remained untouched for nearly three decades. But citing ''[d]ifficulties with the original rule'' and particularly the obscurity and uncertainty resulting from certain of the terms used in the original Rule 23 (*e.g.*, ''joint,'' ''common,'' ''secondary,'' ''several''), the drafters completely rewrote Rule 23 as part of the 1966 amendments with the hopes of, *inter alia*, ''describ[ing] in more practical terms the occasions for maintaining class actions.'' *See id*. What resulted was a new Rule 23 that structurally is very different from its predecessor.

For example, subsection (a) no longer includes the ''obscure and uncertain'' terms discussed *supra*. It instead more clearly provides the four requirements, previously expressed or implied elsewhere in Rule 23, that a plaintiff must satisfy to bring a putative class action lawsuit: numerosity, commonality, typicality, and adequacy. And although subsection (b) previously was the home of shareholders' rights, it now ''functionally describes the different situations in which a class action was thought to be appropriate by the drafters'' of the new Rule 23. Fed. Prac. & Proc. Civ. § 1753. The four categories of class actions in the new Rule 23—Rule 23(b)(1)(A), Rule 23(b)(1)(B), Rule 23(b)(2), and Rule 23(b)(3)—replace the true, hybrid, and spurious categories in the old Rule 23. The new Rule 23 makes clear that a plaintiff's putative class action can be certified only if the plaintiff satisfies the Rule 23(a) prerequisites and the case fits within at least one of these enumerated Rule 23(b) categories, which are presented at a very high level below.

Rule 23(b)(1)(A) allows certification of a class action if the prosecution of separate actions by or against individual class members creates the risk of ''inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.'' Fed. R. Civ. P. 23(b)(1)(A). To guide the application of Rule 23(b)(1)(A), the drafters of amended Rule 23 provided several exemplary scenarios where Rule 23(b)(1)(A) could be appropriate. They specifically referenced separate lawsuits brought ''by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment.'' Fed. R. Civ. P. 23 advisory committee's note (1966). Certification pursuant to Rule 23(b)(1)(A) is also appropriate, the drafters wrote, for ''individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance.'' *Id*.

Rule 23(b)(1)(B)—the subject of this article—authorizes certification of a class action if individual actions create the risk of ''adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.'' Fed. R. Civ. P. 23(b)(1)(B). The drafters noted that the plain case of Rule 23(b)(1)(B) is ''when claims are made by numerous persons against a fund insufficient to satisfy all claims.'' Fed. R. Civ. P. 23 advisory committee's notes (1966). In this scenario, ''[t]he vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have no representation in the lawsuit.'' *Id*. That is, the limited fund would be depleted by the first plaintiffs, without any money flowing to later claimants. If the action is certified under Rule 23(b)(1)(B), however, the claims of all claimants are captured, and recoveries under the claims are reduced on a *pro rata* basis because there are insufficient funds available to satisfy the claims in full.

Rule 23(b)(2) permits a class action when ''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.'' Fed. R. Civ. P. 23(b)(2). The drafters provided a number of illustrative situations to guide application of Rule 23(b)(2), including scenarios involving allegations of civil rights discrimination, claims by retailers against sellers claiming that the sellers sold goods to the class at higher prices than those set for other purchasers, and patentees that sell and/or license products on the condition that the purchaser or licensees also buy or obtain licenses to use other, unlicensed goods. *See* Fed. R. Civ. P. 23 advisory committee's notes (1966).

Rule 23(b)(3) permits a class action when 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.'' Fed. R. Civ. P. 23(b)(3). The drafters noted that in situations to which Rule 23(b)(3) relates, the need for class action treatment is not as clear, but such treatment may nonetheless be convenient and desirable given the particular facts of each case. Fed. R. Civ. P. 23 advisory committee's notes (1966). The drafters provided, as an example of a scenario to which Rule 23(b)(3) may apply: a case where fraud was perpetrated on a number of individuals using similar representations, unless there were material variations in the representations or in the reliance by those to whom the misrepresentations were addressed. *Id*.

Although Rule 23 has been amended since 1966, the above-referenced provisions remain current, and none of the subsequent revisions have been as extensive as those seen in the 1966 amendments.

The Supreme Court's Ruling in *Ortiz*

In *Ortiz*, the Supreme Court was faced with ''a class action prompted by the elephantine mass of asbestos cases.'' 521 U.S. at 821. The case had been certified by the district court under Rule 23(b)(1)(B) using a limited fund theory, after an agreement among the defendant, its insurers, and counsel established a limit of $1.525 billion to be made available to the settlement class. *Id*. at 824-825. The funds overwhelmingly were to be paid by the insurers of the defendant and not the asbestos manufacturer defendant itself. *Id*. The Court began its analysis with an examination of the historical context of Rule 23. *Id*. at 832-833. It then presented the ''[c]lassic examples'' of Rule 23(b)(1)(B) provided by the drafters, noting that in each category, ''the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.'' *Id*. at 833-834.

The Supreme Court, cautioning against ''adventurous application of Rule 23(b)(1)(B),'' warned that the ''greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse.'' *Id*. at 842, 845. Consequently, the Court instructed that the ''prudent course'' is to ''stay close to the historical model'' in limited fund actions. *Id*. at 842. After setting forth three ''presumptively necessary'' characteristics of a limited fund, the Court concluded that the case did not present the classic problem of there being ''a 'fund' with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.'' *Id*. at 841-842. Indeed, according to the Court, the plaintiffs failed to show that ''the fund was limited except by the agreement of the parties'' themselves. *Id*. at 848. Certification pursuant to Rule 23(b)(1)(B), the Court held, therefore was improper. *Id*. at 864-865.

Analysis of Relevant Case Law

Following *Ortiz*, many courts have summarily rejected the requests of plaintiffs in putative consumer class actions to certify classes pursuant to Rule 23(b)(1)(B) because the cases do not present limited fund scenarios. *See, e.g.*, *Zaycer v. Sturm Foods Inc.*, 896 F. Supp. 2d 399, 404 n.2 (D. Md. 2012) (''Generally, courts will only certify a class under this subsection of Rule 23 if the defendant has severely limited assets or is almost insolvent.''); *Petrolito v. Arrow Fin. Servs. LLC*, 221 F.R.D. 303, 313 (D. Conn. 2004) (noting that ''Rule 23(b)(1)(B) is typically applied in limited fund cases; there is no such allegation of limited defendant resources here''). A few courts, however, have more thoroughly evaluated, even outside the limited fund context, whether the claims of plaintiffs in putative consumer class actions warrant certification under Rule 23(b)(1)(B).

In *Gonzalez v. Corning*, the plaintiffs filed multiple putative class actions against Owens Corning and Owens Corning Sales LLC alleging that certain fiberglass asphalt roofing shingles were defective. 317 F.R.D. 443, 450 (W.D. Pa. 2016). The plaintiffs ultimately filed a motion for class certification, requesting that the court certify, among others, a class pursuant to Rule 23(b)(1)(B). *Id*. The plaintiffs argued that certification was warranted under Rule 23(b)(1)(B) where the claims of certain owners were subject to discharge as a result of a bankruptcy order that had been entered against Owens Corning. *Id*. at 453. The plaintiffs sought a class under Rule 23(b)(1)(B) for the purpose of seeking a declaration that the class's claims were not in fact discharged. *Id*.

The *Gonzalez* court stated that, ''[a]lthough Rule 23(b)(1)(B) has been used in labor relations cases, certain ERISA suits, and suits in which inmates seek injunctive relief, the traditional and most common use of the rule is in 'limited fund' cases.'' *Id*. at 508. The court noted, ''[i]n those cases, the rule protects plaintiffs where separate lawsuits might exhaust a defendant's resources, such that earlier plaintiffs might recover to the prejudice or exclusion of later plaintiffs.'' *Id*. The court nonetheless considered the plaintiffs' argument that Rule 23(b)(1)(B) applies outside the limited fund context where ''a statutory defense will impair the rights of all class members,'' while noting that the cases upon which the plaintiffs relied for support of this point were limited fund or ERISA breach of fiduciary duty cases. *Id*. The *Gonzalez* court ultimately declined to certify a class pursuant to Rule 23(b)(1)(B) because, *inter alia*, the relief sought by the plaintiffs was either moot or had to be obtained on an individual, rather than classwide, basis. *Id*. at 510. In making this determination, it relied on the ''fact-specific'' inquiry that it was required to apply, which, by its nature, could not be applied on a classwide basis to the claims of all owners throughout the country, who were asserting different legal claims under different state laws and based upon different pertinent facts. *Id*. at 492. The Third Circuit recently affirmed the district court's holding. *See Gonzalez v. Corning*, 885 F.3d 186 (3d Cir. 2018).

In *Castro Valley Union 76 Inc. v. Vapor Sys. Techs. Inc.*, 2012 BL 277165, *1 (N.D. Cal. Oct. 22, 2012), the plaintiffs filed a proposed class action seeking damages for gas pumps that were allegedly defective, along with declaratory and injunctive relief. The defendant there argued that certification pursuant to Rule 23(b)(1)(B) was inappropriate because the plaintiffs had failed to establish that the defendant ''may be liable for more money than it has available.'' *Id*. at *6. The *Castro* court noted that although Rule 23(b)(1)(B) is often applied in limited fund cases, its application is not so limited. *Id*. The court nonetheless found that the injunctive relief that plaintiffs sought—an order precluding the defendant from continuing to advertise the gas nozzles as defect free and an order requiring the defendant to supply members of the class with non-defective nozzles—would not impact the interests of others having similar claims. *Id*. at *7. Nor would it ''substantially impair or impede their ability to protect their interests.'' *Id*. Finding the money damages sought were clearly intended to provide relief to individual members of the class, and that money damages would continue to be available even once the plaintiff received recovery, the court refused to certify the class under Rule 23(b)(1)(B). *Id*.

In *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 578 (N.D. Ill. 2005), the plaintiffs filed a putative class action alleging that the defendant misrepresented that Diet Coke from the fountain is the same product as Diet Coke sold in a can or bottle, thereby violating the Illinois Consumer Fraud and Deceptive Business Practices Act. The plaintiff argued that certification of the class pursuant to Rule 23(b)(1)(B) was appropriate because if

the plaintiff prevailed individually and disgorged all of the defendant's profits from the defendant's alleged improper conduct in Illinois, the defendant would likely argue that it would not have profits to disgorge if later sued by another class member. *Id*. at 583. The defendant responded that:

> [I]t cannot in good faith be disputed that Coca-Cola has adequate resources to pay claims of other putative class members. Even if Ms. Oshana were awarded a full disgorgement of all of Coca-Cola's profits from the sale of fountain diet Coke in Illinois, that amount would be only a small percentage of Coca-Cola's profits from the sale of fountain diet Coke in the United States and an even smaller fraction of Coca-Cola's profits from the sale of all of its products. *Id*. at 584.

The Court agreed. *Id*. In so doing, it noted that although ''certification of a class under 23(b)(1)(B) is not restricted solely to a limited fund rationale, limited funds are 'certainly the paradigm case.' '' *Id*. Finding that Rule 23(b)(1)(B) should be narrowly interpreted and that the plaintiff had failed to demonstrate a valid rationale for certification under a limited fund theory or otherwise, the court denied the plaintiff's request for Rule 23(b)(1)(B) certification. *Id*.

Conclusion

Courts should not countenance the attempts of plaintiffs in putative consumer class actions to evade the strictures of Rule 23(b)(2) and (b)(3) and inappropriately expand the scope of Rule 23(b)(1)(B). Although these plaintiffs sometimes argue that Rule 23(b)(1)(B) should not be limited to the factual scenarios articulated by the drafters, including limited fund cases, courts should recognize the Supreme Court's guidance that courts should adhere strictly to the historical antecedents limiting Rule 23(b)(1)(B)'s application for fear that failing to do so will create the potential for abuse.

However, even if courts apply Rule 23(b)(1)(B) outside the limited fund context, the text of Rule 23(b)(1)(B) itself is unequivocal that its application must be limited to cases in which the adjudication of individual actions ''would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.'' Plaintiffs in putative consumer class actions simply cannot, in most instances, make such a showing. Indeed, their claims for injunctive relief, largely requesting that the defendants stop marketing or selling products in a certain manner, are not dispositive of the interests of others and do not impair or impede the ability of other claimants to protect their interests. Further, their claims for monetary damages typically are intended to satisfy the claims of individual members. In other words, the relief that plaintiffs in putative consumer class actions seek does not impede the relief available to other potential class members.

The drafters of Rule 23 arguably contemplated certain of the scenarios presented in putative consumer class actions, drafting Rule 23(b)(2) and/or Rule 23(b)(3) for this purpose. These subsections expressly contemplate a scenario involving allegations of fraudulent representations made to a number of individuals. Consequently, courts should continue to require plaintiffs to seek certification of putative consumer fraud class actions pursuant to Rule 23(b)(2) and/or Rule 23(b)(3) as the law dictates. To allow otherwise would impermissibly expand the scope of Rule 23(b)(1)(B) to capture scenarios that the drafters did not intend and impermissibly allow plaintiffs to avoid the commonality and manageability requirements of Rule 23(b)(2) and (b)(3).

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