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Recent developments in the Seventh Circuit's class action jurisprudence: Not as pro-plaintiff as they first appear

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The Seventh Circuit has traditionally built a reputation as one of the more pro-defendant jurisdictions for defendants in class action lawsuits. But in the past two years the Seventh Circuit has issued a spate of decisions appearing to favor class plaintiffs. The court has rejected a "heightened ascertainability" requirement for class certification,[1] endorsed a broad understanding of standing in data breach cases,[2] and abandoned its rule allowing defendants to "pick off" named plaintiffs by offering full compensation for their individual claims.[3] The court also issued a trio of decisions certifying classes in the face of non-trivial individualized issues,[4] seemingly downplaying the significance of the Supreme Court's re-emphasis on the commonality and predominance requirements in *Wal-Mart* and *Comcast.*

Upon closer examination, however, none of these decisions is as pro-plaintiff as the first glance suggests. In each of these three areas, the court's holding overshadows more nuanced reasoning that may not always play in plaintiffs' favor. Although these cases may indeed make the Seventh Circuit's jurisprudence slightly more pro-plaintiff than it was in earlier days, they do not represent a significant lurch in that direction.

Heightened Ascertainability

Mullins v. Direct Digital involved the requirement implicit in Rule 23 that the members of a class be "ascertainable." That has always meant at least that a class must be defined clearly based on "objective" rather than "subjective" factors. *Id.* at 659-60. For example, a class cannot be defined by its mental state. Some federal circuits had gone further and imposed a "heightened" requirement that there also be "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Id.* at 662 (citing *Byrd v. Aaron's Inc.*, 784 F.3d 154, 161-71 (3d Cir. 2015)). The Seventh Circuit squarely rejected this heightened requirement in *Mullins*, holding that even a class of individual purchasers of a consumer product whose identities are not recorded in a database and do not possess receipts can be certified and ascertained through "self-identification by affidavit."

But the court's reasoning suggests that this rejection of a "heightened" ascertainability requirement may have little practical consequence. The court rejected the heightened requirement in part because the interests of reliability and administrative feasibility are "already adequately protected by [Rule 23's] explicit requirements." *Id.* at 662. The court noted in particular the superiority requirement of Rule 23(b)(3), which requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." This standard neatly bakes in something like the "administrative feasibility" required by heightened ascertainability, making the latter requirement unnecessary.

The Seventh Circuit explained that doing away with heightened ascertainability was still significant because it forces trial courts to examine administrative inconvenience in a comparative context. Put differently: Is the class action *more* administratively inconvenient than other possible methods of adjudication? If not, then certification may be appropriate. According to the Seventh Circuit, this means trial judges will need to tolerate some level of administrative inconvenience if alternatives are worse.

But is this standard really any different than the heightened ascertainability

requirement as it exists in other circuits? After all, *feasible* is a near-synonym for *possible*, suggesting that the heightened ascertainability requirement too allows certification if judicial management of the class is possible. *Mullins* may thus simply shift some of the action from ascertainability to superiority, but it is not obvious that this change will make much difference in the vast majority of cases where ascertainability is an issue.

"Picking Off" the Named Plaintiff

In *Chapman v. First Index, Inc.*, the Seventh Circuit abandoned its longstanding practice of allowing a defendant to moot a named plaintiff's claim simply by offering him all of the relief he individually requested. This practice left plaintiff's attorneys without a named plaintiff to prosecute the suit, meaning that, at least some of the time, the suit would be over. The court stopped this practice in *Chapman*, reasoning that an "offer of judgment does not satisfy the Court's definition of mootness, because relief remains possible." *Id.* at 786. Several months after *Chapman*, the Supreme Court went the same way. *See Gomez v. Campbell-Ewald Co.*, -- S.Ct. -- (2016).[5]

But this holding too is likely to have less significance than some observers believe. Prior to *Chapman*, class action plaintiffs routinely avoided a "pick-off" simply by filing a pro forma motion for class certification with or shortly after serving the complaint. Because the motion for class certification was pending, the Seventh Circuit held that satisfying the named plaintiff's individual claim could not moot the entire case. District courts in the Circuit recognized this stratagem and typically allowed such motions to remain on file indefinitely or strong-armed defendants into stipulating that they would not engage in a "pick off" attempt. Although an unwary plaintiff might have been the subject of a successful "pick-off," any plaintiff's lawyer had an easy way to prevent that tactic.

Predominance

The next trilogy of cases involves the application of Rule 23(b)(3)'s requirement that common issues predominate over individualized issues. In three successive cases, the Seventh Circuit reversed the district court's denial of class certification on the ground that this requirement was not met. In none of the three cases, however, did the Seventh Circuit hold that the facts of the case *required* certification. Instead, the court remanded for further consideration after determining that the district court improperly applied a bright line test, rather than carefully weighing the particular facts of each case.

IKO Roofing, for example, involved a proposed class of purchasers of allegedly defective roofing shingles. The district court denied certification based on the rule that "'commonality of damages' is essential" and the fact that each customer's experiences with the shingles would inevitably vary. 757 F.3d at 602. The Seventh Circuit held only that this approach was too absolute, given that there may be situations where the variation in damages is minor, and remanded for a determination as to whether that was the case here. The holding was thus that the district court's analysis was inadequate, not that its ultimate conclusion was necessarily wrong. Moreover, although the Seventh Circuit endorsed the idea that a district court may certify a liability-only class (leaving individualized damages issues for later), it acknowledged that such a course is inappropriate where "practical considerations . . . may make class treatment unwieldy despite the apparently common issues." *Id.* at 603. Thus, far from endorsing the certification of large classes with significant individualized damages issues, this holding suggests such a course is appropriate only where the resulting damages proceedings are limited enough to be judicially manageable.

Similarly, in *Suchanek*, the Seventh Circuit reversed what it held to be the district court's conclusion that all issues must be common, a standard that it called "too strict a test." 764 F.3d 755; *see also id.* at 756. Again, the Seventh Circuit did not hold that certification was required, and again the court only remanded for the district court to perform the weighing of individualized questions against common questions that Rule 23(b)(3) actually requires. *Id.* at 759-61.

Finally, the Seventh Circuit's holding in *McMahon* follows the same pattern. This time the Seventh Circuit held that the district court improperly applied a rule that "the existence of individual issues of causation automatically bars class certification under Rule 23(b)(3)." 807 F.3d at 875. The Seventh Circuit noted that applying such an absolute rule was particularly inappropriate in *McMahon*, since plaintiff's claims arose under the Federal Debt Collection Practices Act, a strict liability statute that imposes statutory damages even in the absence of individual causation and damages. *Id.* at 876. As in the two cases discussed above, the Seventh Circuit remanded to allow the district court to weigh whether the individualized damages questions presented sufficient practical obstacles to preclude certification. *Id.* at 876.

In sum, *IKO Roofing*, *Suchanek*, and *McMahon* do not necessarily broaden the circumstances under which the predominance requirement is satisfied. Instead, they remind district courts that they cannot take judicial shortcuts to deny certification. Rule 23(b)(3) does not present a bright line rule, but instead requires a nuanced weighing of individualized questions against common questions to determine which predominate. But this rigorous analysis is at least as likely to benefit defendants as it is plaintiffs. Indeed, more often than not defendants are the party urging the district court to delve into the facts and consider the practicalities of trying a case as a class action. Despite the pro-plaintiff outcomes, therefore, these three cases do not shift the law in plaintiffs' favor as much as it may seem at first. ■

Mr. Thies is a lawyer at Sidley Austin LLP. The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP and its partners. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.

1. *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015).

2. *Remijas v. Nieman Marcus Grp., LLC*, 794 F.3d 688 (7th Cir. 2015).

3. *Champan v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015).

4. *McMahon v. LVNV Funding, LLC*, 807 F.3d 872 (7th Cir. 2015); *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750 (7th Cir. 2014); *In re IKO Roofing Shingle Products Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014).

5. The Supreme Court left open the possibility that a defendant may still be able to "pick off" a named plaintiff by depositing the full amount of the plaintiff's individual claim in an account payable to the plaintiff.

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