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CLASS ACTION & PRODUCT LIABILITY ALERT

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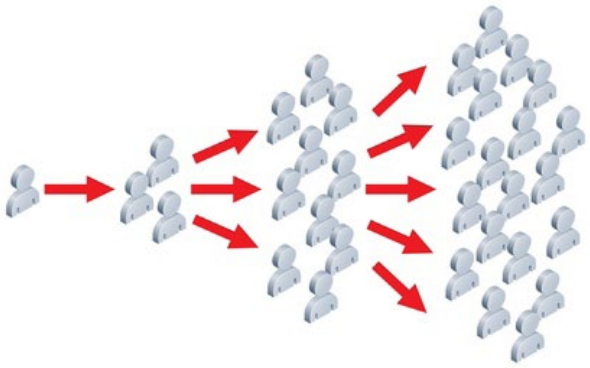
Can a class be certified if some members have no injury? The Sixth Circuit Court of Appeals says yes, the Ohio Supreme Court says no, and the US Supreme Court takes up the question.



When a plaintiff seeks to bring a class action on behalf of "all purchasers" of a product or device, the court typically faces a conundrum: Can it certify such a broad class even though some of the purchasers likely have no injury? For years, courts have struggled to answer this question. For example, the Seventh Circuit Court of Appeals has held that courts can certify classes if some members likely have no injury, but should deny certification if "a great many" class members have no injury or if some class members could not have been injured. *Kohen v. Pacific Investment Mgmt. Co. LLC.* Such distinctions appear arbitrary and are difficult to make, particularly at the class certification stage.

Recent decisions from the United States Supreme Court give some reason to hope for clarity in this muddled area of the law. In *Wal-Mart Stores, Inc. v. Dukes*, the Court held that "Rule 23 does not set forth a mere pleading standard," that a plaintiff "must be prepared to prove

that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.," and that a court must engage in a "rigorous analysis" of whether the prerequisites to class certification have been met even

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though such an analysis will frequently overlap with an inquiry into the merits. In *Comcast Corp. v. Behrend*, the Court reversed class certification where the plaintiffs failed to prove that there was a method to determine legally-available damages on a classwide basis, as required to establish predominance. And in *Halliburton Co. v. Erica P. John Fund, Inc.*, the Court held that defendants can introduce evidence at the class certification stage to rebut evidentiary presumptions relied on by the plaintiffs to establish a prerequisite to class certification. These cases establish that before a court decides the issue of class certification, it must consider all relevant evidence submitted by the defendant, resolve any factual or legal disputes that are material to its Rule 23 analysis and require the plaintiffs to prove that they have met the prerequisites to class certification based on evidence, not speculation.

Based on these Supreme Court cases, it would be reasonable to expect courts to analyze "all purchaser" classes rigorously and to deny class certification whenever plaintiffs fail to provide evidence that the *fact* of injury is a common issue that will predominate over individualized issues. But that has not been the case. Instead of reaching this principled and seemingly obvious conclusion, courts have gone in different directions. The Sixth Circuit Court of Appeals and the Ohio Supreme Court have issued conflicting decisions and the United States Supreme Court seems unlikely to address the issue in the cases pending before it. It is probable, therefore, that the need for clarity will remain unabated for the foreseeable future.

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The Sixth Circuit Court of Appeals recently upheld certification of an "all purchaser" class despite evidence that some class members had no injury.

On Aug. 20, 2015, the Sixth Circuit Court of Appeals affirmed a decision to certify five single-state classes of all purchasers of Align, a probiotic nutritional supplement sold by Procter & Gamble Co. (P&G) that allegedly did not work as advertised and did not promote the plaintiffs' digestive health. *Rikos v. P&G Co.* The plaintiffs argued that class certification was proper because "it has not been proven scientifically that Align promotes digestive health for anyone." P&G replied that the plaintiffs had only provided evidence that Align did not work *for them* and asserted that other evidence showed that some purchasers were satisfied with the product. Relying on *Wal-Mart Stores, Inc. v. Dukes*, P&G argued that the decision to certify the all-purchaser classes should be reversed because the plaintiffs failed to "present evidence proving that class members suffered an actual common injury to establish commonality."

The Sixth Circuit Court of Appeals disagreed. Writing for the majority, Circuit Judge Moore held that injury was a common issue that predominated over individualized issues because "what Plaintiffs actually argue is that it has not been shown that Align works for *anyone*, i.e., that Align is 'snake oil.'" The Court criticized P&G's evidence that Align worked for some putative class members and further stated that such evidence went solely to the merits and was irrelevant to the class certification inquiry. The Court held that the plaintiffs' theory of liability was capable of classwide proof because plaintiffs' expert had testified that the issue of "whether Align works for *anyone* ... ***can be tested***" by means of correctly designed clinical trials that would be conducted in the future. The Court acknowledged that it was possible that this scientific evidence—once it was conducted—might show that Align worked for some individuals. The Court reasoned that such a result would still present a merits issue, would not "necessitate individualized mini-trials that should preclude class certification," and at worst might cause the district court "to revisit the issue of class certification." The Court also held that the fact that plaintiffs did not presently have evidence to prove injury on a classwide basis was no impediment, as they only needed to show "that *they will be able* to prove injury through common evidence, not that they have in fact proved that common injury."

Circuit Judge Cook dissented on the grounds that the majority opinion conflicted with the above-cited United States Supreme Court cases that require plaintiffs to provide "evidentiary proof" that the prerequisites to class certification are met, and also require courts to engage in a "rigorous analysis." Judge Cook argued that plaintiffs failed to meet their burden of pointing to evidence establishing commonality and predominance because they "offer[ed] no proof" to support their allegation that Align did not work for anyone. Instead, she noted that "all the available evidence tends to show the opposite." Judge Cook also argued that the question of whether Align works (or does not work) the same way for everyone—or works differently for different class members—was not only relevant to class certification, but was determinative of the predominance inquiry.

In a concurring opinion, District Judge Cohn recommended that "given the disagreements between the lead opinion and dissent," the district court bifurcate the issues, decide whether Align has digestive health benefits, and dismiss the case if it found the existence of any digestive health benefits.

Based on *Dukes* and its progeny, P&G appears to have a strong argument that the Sixth Circuit Court of Appeals erred by excusing plaintiffs from their burden of pointing to evidence that the commonality and predominance requirements were met, and instead allowing plaintiffs to rely on speculation that they *might* be able to obtain such evidence before trial. P&G has announced its intention to file a petition for writ of certiorari. Hopefully that petition will be granted.

The Ohio Supreme Court recently reversed certification of a class alleging violations of the Ohio Consumer Sales Practices Act because some class members had no injury.

On Aug. 27, 2015, the Ohio Supreme Court appeared to reach the opposite conclusion when it held that a court cannot certify a class unless the plaintiffs "demonstrate that they can prove, through common evidence, that all class members were in fact injured by the defendant's actions" *Felix v. Ganley Chevrolet, Inc.* The Court explained that although differences in the amount of class members' damages will not preclude a finding of predominance, differences in the fact of damage will do so. The Court noted that *Dukes* and its progeny required the type of "rigorous analysis" that led to this result.

At first blush, it would appear that the Ohio Supreme Court reasonably relied on Dukes to hold that class actions cannot be certified absent evidence of classwide injury. But the claims before the Court call that conclusion into question. The lawsuit was brought under the Ohio Consumer Sales Practices Act (OCSPA), Ohio Rev. Code 1345.09(B), which requires plaintiffs who bring class actions to "allege and prove that *actual damages* were proximately caused by the defendant's conduct." *Felix* (emphasis added). In other words, actual damages are an element of the claim. Given this requirement, it is unsurprising that "[p]roof of actual damages is required before a court may properly certify a class action."

The Court's holding in *Felix* therefore could reasonably be limited to a requirement that plaintiffs provide common evidence of a classwide injury in *OCSPA* class actions. Such a conclusion is supported by the "holdings" described in the opinion. "In this appeal, we address whether all members of a plaintiff class alleging violations of the [OCSPA] must have suffered injuries as a result of the conduct challenged in the suit. We hold that they must …." and "[W]e hold that all members of a class in class action litigation alleging violations of the OCSPA must have suffered injury as a result of the conduct challenged in the suit." Whether lower courts will choose to interpret the *Felix* decision narrowly or broadly remains to be seen.

The United States Supreme Court recently heard oral arguments regarding the viability of two "no injury" class actions.

The United States Supreme Court recently heard oral arguments in two cases that challenge, on different grounds, the viability of class actions that include members with no injury. Unfortunately, the questions asked by the Justices suggest that the Court's forthcoming decisions may not provide much-needed guidance on this issue.

Spokeo, Inc. v. Robins

In *Spokeo, Inc. v. Robins*, Robins brought a class action lawsuit under the Fair Credit Reporting Act (FCRA) and alleged that Spokeo, Inc., a company that publishes information about individuals on its website, published false information about him and thereby harmed his employment prospects. The district court dismissed the complaint for lack of standing. The Ninth Circuit Court of Appeals reversed, holding that "alleged violations of Robins' statutory rights are sufficient to satisfy the injury-in-fact

requirement of Article III" because plaintiffs alleging willful violations of the FCRA are not required to show actual harm. *Robins v. Spokeo, Inc.* The United States Supreme Court agreed to hear this question: "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute."

On Nov. 2, 2015, the Justices heard oral argument and appeared to be considering three different positions. Justices Sotomayor and Ginsburg seemed receptive to the argument that Congress can allow plaintiffs to sue based solely on statutory violations, without requiring an "injury in fact" beyond the mere violation of a legal right. Chief Justice Roberts and Justice Scalia appeared to lean in the other direction, expressing skepticism of the notion that Article III permits lawsuits to be filed despite the absence of actual injury. And Justices Kagan and Breyer suggested that it might be unnecessary to reach the question presented because Robins was in fact injured—psychologically, at least—when he learned that false information had been published about him.

It is therefore possible, but not certain, that the Court will decide whether plaintiffs can bring no-injury class actions, notwithstanding the injury-in-fact requirement of Article III, where the federal statute that creates the claim does not require evidence of injury. While such a decision would be somewhat helpful, it would only shed light on specific types of federal class actions and would not answer the broader question of whether it is permissible to certify a class where some of the members have suffered no injury.

Tyson Foods, Inc. v. Bouaphakeo

In *Tyson Foods, Inc. v. Bouaphakeo*, Bouaphakeo and other plaintiffs sued their employer, Tyson Foods, Inc., to recover unpaid wages in a class action brought under state law and Rule 23 of the Federal Rules of Civil Procedure, and a collective action brought under the Fair Labor Standards Act (FLSA). The district court certified the class action and collective action and allowed the claims to go to trial, which resulted in a jury verdict for the plaintiffs. The Eighth Circuit Court of Appeals affirmed. The United States Supreme Court agreed to hear two questions: "(1) Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective

action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample; and (2) whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages."

Although the second question summarizes the issue discussed here, it appears unlikely to be decided. On Nov. 10, 2015, the Justices heard oral argument and suggested by the focus of their questions that they were considering only the first question described above, and did not plan to reach the second question. Our colleagues reviewed the oral arguments in a recent podcast on our blog, *Antitrust Law Source*.

Conclusion

Despite the promise of *Dukes* and its progeny, there remains a regrettable lack of clarity regarding the viability of "all purchaser" class actions that include members who may be uninjured, are likely uninjured, or cannot possibly be injured. Although the Sixth Circuit Court of Appeals and Ohio Supreme Court appeared to address this issue in *Rikos* and *Felix*, the rationale and precedential value of those decisions is questionable. It also appears unlikely that the United States Supreme Court will squarely address this issue in the cases pending before it. Therefore, class action practitioners will need to litigate future state and federal cases with an eye toward furthering the jurisprudence in this area.

For more information please contact Caroline Gentry, Terry Miller, Joyce Edelman or any member of Porter Wright's Class Action or Product Liability Practice Groups.