DECEMBER 21, 2016

Recent Orders in Two California Class Actions Highlight the Need for a Well-Crafted Discovery Strategy

by Nancy Stagg

Recent decisions in two federal consumer class actions in California show how the U.S. Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* 564 U.S. 338 (2011) is a double-edged sword for class action defendants. While *Wal-Mart* is routinely heralded as a victory for class action defendants – because it finally put teeth into Rule 23's commonality requirement – the case poses a different reality for class action defendants in the discovery trenches. Just as often, *Wal-Mart* is cited by plaintiffs' counsel to justify broad, merits-based discovery requests to defendants pre-certification. In our experience, the key to handling overly-broad discovery requests is to first seek to limit the scope of those requests, particularly where a production involves too much effort and expense. If that fails, a defendant should utilize the information and documents produced to defeat class certification. These two recent class actions illustrate this point.

In the first case, *In re Coca-Cola Prods. Mktg. and Sales Practices Litig*., Case No. 14-md-2555-JSW 2016 WL 6245899 (N.D. Cal. Oct. 26, 2016), Magistrate Judge Maria-Elena James ordered the defendants in a food-additive mislabeling action to produce three broad categories of documents pre-certification, finding that "the line between merits and class certification discovery is not always bright,"… "because discovery going to the merits of a plaintiff's claim also often has 'significant bearing on issues such as predominance and commonality under Rule 23.'" (citing *Lindell v. Synthes U.S.A.*, 2013 WL 3146806 at *6 (E.D. Cal. June 18, 2013)). Among other requests, the court ordered the defendants to produce all of their communications with the FDA and other governmental agencies regarding the legality of defendants' labeling regarding phosphoric acid. Defendants argued that these documents did not go to *consumers'* decision-making and therefore were irrelevant to class certification. The court disagreed and found that if government entities warned defendants their labeling was misleading, such evidence would be "useful common proof to determine what consumers were likely to understand." The court did, however, limit production in response to two other broad requests, including internal market share data and communications between the defendants and their marketing and advertising consultants. Finding those pre-certification discovery requests as too broad and imposing a burden "not proportional to the needs of the case," the court declined to require defendants to produce all of the requested documents. Instead, the court ordered the parties to meet and confer, "tailoring and narrowing the production" to exclude any irrelevant and unhelpful materials and lessen Defendants' burden." While probably not as much relief as the defendants and their counsel hoped for, the court appeared sensitive to arguments

regarding proportionality and burden, especially in the pre-certification context.

In the second case, *In Re MyFord Touch Consumer Litigation*, Case No. 13-cv-03072-EMC (N.D. Cal. November 22, 2016), the defendants put to good use what had clearly been extensive pre-certification discovery to thwart the plaintiffs' effort to certify a class. There, plaintiffs alleged that defendants' in-car communication and entertainment system ("MFT") was defective and that the defendants had made false and misleading statements to consumers in numerous states, either by mispresenting, or entirely omitting, key information about the system.

In an order by U.S. District Court Judge Edward Chen, which denied plaintiffs' motion for reconsideration (seeking to certify additional classes) and granted defendants' motion for reconsideration (to decertify certain classes), the court ruled that plaintiffs were not entitled to a class-wide presumption of reliance on Ford's alleged misrepresentations and omissions. Instead, the court found that the information produced by Ford in discovery showed that information about the MFT system's problems was widely available to the public almost as soon as the system was released, including news reports, consumer surveys, and Ford's public statements. The district court also pointed to Ford's evidence that the MFT software was updated several times during the class period to address the problems, including three years' worth of internal communications about the MFT system. Given the evolving nature of the MFT software, the district court found there was too much variability in the material facts throughout the class period to permit a class-wide inference with respect to Ford's state of mind about the alleged MFT defects. As a result, the district court ruled that all of the plaintiffs' fraud-based claims requiring a showing of reliance could not be certified due to "predominance and manageability" concerns. This order shows how a class defendant can take advantage of extensive pre-certification discovery to defeat class certification.

Today's lesson? Try to limit pre-certification discovery at the outset on proportionality and burden grounds. But if that's not possible, and the discovery is ordered to be produced, be ready to pivot and use that same discovery to attack class certification by showing that common issues do not predominate, and that plaintiffs are not entitled to a class-wide presumption of reliance.

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