IADC Committee Newsletter

CLASS ACTIONS AND MULTI-PARTY LITIGATION

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IN THIS ISSUE

Robert P. Donovan and Jamie D. Taylor examine some of the defenses that exist when named plaintiffs, in consumer law actions seek injunctive relief only on behalf of a proposed class under Rule 23(b)(2).

Fooled Again and Again? -- Not Likely According to the Third Circuit Challenges to 23(b)(2) Injunction Claims in Consumer Fraud Class Actions

ABOUT THE AUTHORS

Robert P. Donovan, Esq. is a partner at McElroy, Deutsch, Mulvaney & Carpenter, LLP. As national trial counsel for a prominent beverage company, Mr. Donovan has successfully defended against claims regarding natural labeling in actions filed in California, New Jersey and Florida. Mr. Donovan graduated from Rutgers University Law School – Newark in 1988, winning the Nathan Baker trial competition twice; he obtained his undergraduate degree from Villanova University in 1984, graduating Magna Cum Laude. He can be reached at rdonovan@mdmc-law.com.

Jamie D. Taylor, Esq. is a commercial litigator at McElroy, Deutsch, Mulvaney & Carpenter, LLP and has been actively involved in the defense against natural labeling claims. Ms. Taylor is a 2008 graduate of Rutgers University Law School in Newark and was a Senior Managing Editor of the Rutgers Conflict Resolution Law Journal. She obtained her undergraduate degree from the University of Michigan in 2003. She can be reached at jtaylor@mdmc-law.com.

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The Class Actions and Multi-Party Litigation Committee serves all members with an interest in class action trends and issues raised across the country in class action cases. Members publish newsletters on developments in class action law and present on topics of interest at committee meetings. The Committee has sponsored or co-sponsored a number of major CLE programs recently, such as one on the sub-prime mortgage and financial crisis class actions currently being filed across the country.

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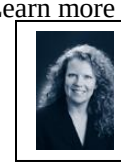

Kara T. Stubbs
Vice Chair of Publications
Baker Sterchi Cowden & Rice, L.L.C.
stubbs@bscr-law.com

To avoid the predominance and superiority analysis required under Fed. R. Civ. P. 23(b)(3), some plaintiffs are seeking class certification under Fed. R. Civ. P. 23(b)(2) only.[1] This tactic, however, opens the door to a number of viable defenses especially in the consumer law context.

One of the more prominent defenses is the lack of Article III standing of the proposed class representative to seek injunctive relief.[2] Because federal courts delve behind the pleadings and examine the underlying merits of the claims that are also relevant to Rule 23 factors, see *In re Hydrogen Peroxide Antitrust Litig.*, 552 F. 3d 305, 309-310 (3d Cir. 2009); see also *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), courts have required plaintiffs to demonstrate standing in order to satisfy Fed. R. Civ. P. 23. See *McNair v. Synapse Group, Inc.*, 672 F.3d 213, 224-26 (3rd Cir. 2012); see also *Robinson v. Hornell Brewing Co.*, 2012 WL 1232188 *3 (D.N.J. April 11, 2012).

In *McNair*, the trial court had denied class certification under Rule 23(b)(2) due to lack of a demonstrable cohesive class. On appeal, the Third Circuit affirmed the ruling on a different ground, finding that the plaintiffs, having already become aware of the alleged fraudulent marketing campaign, did not have proof that they were likely to suffer irreparable harm in the future and hence lacked Article III standing to prove the relief sought on behalf of the class. *Id.* at 224-226.

When considering whether the plaintiffs in *McNair* would get fooled again, the possibility was too far-fetched to constitute a reasonable likelihood of future injury for Article III standing purposes. "Perhaps they may accept a Synapse

[1] Rule 23(b)(2) cases "may be maintained if Rule 23(a) is satisfied and if … 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." See *Wal-Mart Stores Inc. v. Dukes*, 131 S.Ct. 2541, 2557 (stating that the key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them. Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages").

[2] Article III is a threshold inquiry and a court cannot even reach class certification issues under Fed. R. Civ. P. 23 if a plaintiff lacks standing to assert any claim against a defendant in the first place. Standing is not optional for plaintiffs in federal court. In order to satisfy the Constitution's Article III standing requirement, plaintiffs must show: (1) an "injury in fact, that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the challenged conduct; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590-91, 112 S.Ct. 2130 (1992). Whether a plaintiff has standing to seek injunctive relief in federal court raises additional issues. In order to pursue an injunction on behalf of the class, in addition to the usual requirements of standing, the plaintiffs must show that they are likely to suffer future injury from the defendant and that the requested relief will prevent that future injury. *McNair v. Synapse Group Inc.*, 672 F.3d 213, 225 (3d Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011); *James v. City of Dallas, Tex.*, 254 F.3d 551, 563 (5th Cir. 2001); see also *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. 2004)(stating in the context of injunctive relief, the plaintiff must demonstrate a real or immediate threat of an irreparable injury).

[defendant's] offer in the future, but speaking generally, the law accords people the dignity of assuming that they act rationally, in light of the information they possess." *Id* at 225. The court reasoned that the plaintiffs could be harmed again only if they repurchased subscriptions from the same service despite their knowledge of the service's allegedly untoward practices:

> Because Appellants are familiar with Synapse's practices as well as the various names under which it operates, it is a speculative stretch to say they will unwittingly accept a Synapse offer in the future. But even if they did, they would only be harmed if they were again misled by Synapse's subscription renewal techniques, which would require them to ignore their past dealings with Synapse. In short, Appellants ask us to presume they will be fooled again and again. While we cannot definitively say they won't get fooled again, it can hardly be said that Appellants face a likelihood of future injury when they *might* be fooled into inadvertently accepting a magazine subscription with Synapse and *might* be fooled by its renewal tactics once they accept that offer.

Id. at 225 n. 15 (emphasis added).

The Third Circuit ruled that while the plaintiffs may have had standing to seek monetary relief, they did not have Article III standing to pursue injunctive relief because they could not show a reasonable likelihood of future injury. *Id.* at 225, n.15.

This rationale was followed by the United States District Court for the District of New Jersey in *Robinson v. Hornell*, where the plaintiff made a similar claim that a label was deceptive to him. Because that plaintiff admitted that he would not purchase the product again as labeled, that plaintiff could not prove likelihood of future injury for Article III standing purposes. *Robinson*, 2012 WL 1232188 at *4. As a result, the motion for class certification under Rule 23(b)(2) was denied. *Id.* at *7. Similarly, in *Dicuio v. Brother Intern. Corp.*, 2012 WL 3278917 * 15 (D.N.J. Aug. 9, 2012), the Court followed *McNair* and found that absent an allegation that plaintiffs, customers who still owned and used defendants' printers, intended to purchase another one of Defendants' printers in the future, the mere chance that plaintiffs may choose at some later date to do so and thereby suffer more harm is not sufficient to confer Article III standing.

Courts in other jurisdictions have also concluded that a plaintiff, who is a former customer with no facts to show that he or she will be subject to a challenged practice, lacks standing to pursue injunctive relief on behalf of a consumer class because the plaintiff is unlikely to suffer future harm. See *Castagnola v. Hewlett-Packard Co.*, 2012 WL 2159385 *6 (N.D. Cal. 2012) (no standing to pursue injunctive relief where "[p]laintiffs do not allege that they intend to purchase products from Snapfish.com in the future or that, if they did, they would seek to participate in the Snapfish Valuepass SM program. Even if they did include such allegations, however, Plaintiffs now have knowledge of the terms and conditions of the program, know that HP would transfer their billing information to Regent, and

know that Regent, rather than HP, administers the program. Thus, the Court concludes they have not alleged facts showing a realistic threat that they would be harmed by Defendants' conduct in the future."); *In re Intel Laptop Battery Litigation*, 2011 WL 7290487 *2–3 (N.D. Cal. 2011) (no standing to pursue injunctive relief where plaintiff's cause of action was entirely based on a past purchase of a computer and plaintiff did not allege an intention to purchase another laptop in the future); *Veal v. Citrus World, Inc.*, 2013 WL 120761 *6 (N.D. Ala. Jan. 8, 2013)(where the court dismissed a class action lawsuit on grounds that the plaintiff failed to adequately allege standing to pursue claims that packages of "Florida's Natural Orange Juice" were improperly labeled "100% orange juice" because the plaintiff "did not allege how he will suffer a future injury," and therefore could not demonstrate "that his injury is likely to be redressed by a favorable ruling"); see also *Mason v. Nature's Innovation*, 2013 WL 1969957 (S.D. Cal. May 13, 2013); *Silverstein v. Procter & Gamble Mfg. Co*., 2008 WL 4889677 (S.D.Ga., Nov. 12, 2008); *Rikos v. Proctor & Gamble*, 782 F.Supp. 2d 522 (S.D. Ohio 2011).

However, some courts in California have rejected Article III standing challenges in this context, asserting that the purpose of the consumer protection statutes dictates this holding. *See e.g.*, *Henderson v. Gruma Corp.*, 2011 WL 1362188 at *7 (C.D. Cal. Apr. 11, 2011) ("If the Court were to construe Article III standing for FAL and UCL claims as narrowly as the Defendant advocates, federal courts would be precluded from enjoining false advertising under California consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter ('once bitten, twice shy') and would never have Article III standing"); *Larsen v. Trader Joe's Co*., 2012 WL 5458396 (N.D. Cal. June 14, 2012)(agreeing with the reasoning in *Henderson* and explaining that to hold otherwise would "eviscerate" the purpose of the state's consumer protection statute, because that holding would "bar any consumer who avoids the offending product from seeking injunctive relief); *Koehler v. Litehouse, Inc.*, 2012 WL 6217635 (N.D. Cal. Dec.13, 2012)(same).

The plaintiff's decision to pursue injunctive relief (only) on behalf of the proposed class raises other defenses to class certification including, but not limited to, improper claim splitting and the lack of necessity in pursuing the class action vehicle in the first place.

- THROWING THE BABY OUT WITH THE BATH WATER? To the extent the named plaintiff has voluntarily abandoned damage claims, the prejudice to unnamed class members should be closely examined. [3] Claim splitting

[3] Federal courts have recognized that named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs or claim split, have interests antagonistic to those of the class. See *Nafar v. Hollywood Tanning Sys., Inc.*, 339 Fed. Appx. 216, 224 (3d Cir. 2009); *In re Teflon Products Liability Litig.*, 254 F.R.D. 354, 368 (S.D. Iowa 2008); see *Arch v. American Tobacco Co., Inc.*, 175 F.R.D. 469, 480 (E.D. Pa. 1997); *McClain v. Lufkin Indus. Inc.*, 519 F.3d 264, 283 (5th Cir. 2008) (plaintiffs lacked adequacy where they sought to drop the class members' demand for compensatory and punitive damages in order to protect the "predominance" of non-monetary claims reasoning that "if the price of a Rule 23(b)(2) … class both limits individual opt outs and sacrifices class members' rights to avail themselves of significant legal remedies, it is too high a

triggers the likelihood that unnamed class members, should they later choose to sue for damages, will be exposed to a defense under *res judicata*. Fed. R. Civ. P. 23(b)(2) does not require that class members be given notice and opt out rights presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory and that depriving people of their right to sue in this manner complies with the Due Process Clause. *Wal-Mart*, 131 S.Ct. at 2558. In a 23(b)(2) action, all class members will be bound by the outcome because, like any other judgment of this Court, a final decision in a (b)(2) class is *res judicata* as to the entire class. *See Perlstein v. Transamerica Occidental Life Ins. Co.*, 2008 WL 2837185 at *4 (D.N.J. July 21, 2008).

- IS THIS TRIP REALLY NECESSARY? Given the fact that a named plaintiff can secure all the relief sought by pursuing an individual lawsuit, the question of whether an expensive and time consuming class action is appropriate for such limited relief has been successfully raised in a number of courts.[4]

Putative class representatives, suing for alleged consumer fraud, appear to be placing a round peg into a square hole by seeking to have a class certified for injunctive relief only. The new-fangled tactic of lopping off monetary claims of class members, in an attempt to fit the framework of Fed. R. Civ. P. 23(b)(2), justifiably raises a host of issues including standing, the danger of exposing unnamed class members to a bar under *res judicata* and a lack of necessity. A significant body of federal case law is emerging that casts doubt on a named plaintiff's right to pursue such a limited remedy on behalf of the proposed consumer class.

price to impose") *See also In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 401 (S.D.N.Y. 2008); *Miller v. Baltimore Gas & Elec. Co.*, 202 F.R.D. 195, 203 (D. MD. 2001)

[4] In *Carter v. Butz*, 479 F.2d 1084 (3rd Cir. 1973), the Third Circuit addressed an appeal where the district court denied class certification based on disparate factual circumstances of the proposed class and because the judgment of an individual plaintiff rendered a judgment for the class unnecessary. *Id.* at 1089. The Third Circuit ruled that denying class certification on necessity grounds was within the range of discretion permitted by Rule 23. *Id; see also. Suever v. Connell*, 2007 WL 3151964 *3 (N.D. Cal. 2007)(noting that class certification for prospective injunctive relief was not necessary to vindicate the rights claimed by plaintiffs for themselves and the putative class); see also *Zepeda v. INS*, 753 F.2d 719 n. 1 (9th Cir.1983)(acknowledging that in some cases plaintiffs can seek relief that necessarily will benefit others even without class certification).

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