COURT PREEMPTIVELY DENIES CLASS CERTIFICATION BEFORE DISCOVERY

March 19, 2009

To Our Clients and Friends:

On March 16, a judge issued a decision denying class certification preemptively, on the defendants' motion, before discovery. *Picus v. Wal-Mart Stores, Inc.*, No. 2:07-cv-682-PMP (D. Nev.), involved "Ol' Roy" brand pet food products, which were advertised as "Made in the USA," but which allegedly contained ingredients manufactured in China. The court held that each class member, in order to prove a claim of consumer fraud, would have to demonstrate that the "Made in the USA" label *caused* him or her to buy the pet food. This could not possibly be done on a class basis, the court found, because "the choice to purchase Ol' Roy products could be based on a variety of factors unrelated to the 'Made in the USA' label, such as price, convenience, or a pet's preference for the product."

The court's willingness to wrestle with these issues *before* requiring the defendants to produce discovery makes the *Picus* decision stand out from the many other recent decisions denying class certification in consumer fraud cases. Many prior cases had recognized defendants' ability to seek pre-discovery relief. *See* Slip. Op. at 4-5, *citing Walls v. Wells Fargo Bank, N.A.*, 262 B.R. 519, 523 (Bankr. E.D. Cal. 2001) ("[I]f, as a matter of law, a class cannot be certified . . . it would be a waste of the parties' resources and judicial resources to conduct discovery on class certification.") and *Vinole v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 639 (S.D. Cal. 2007) ("A defense-driven determination of class certification is appropriate when awaiting further discovery will only cause needless delay and expense.") *Picus*, however, becomes one of the first cases in which a court actually has granted this relief.

Picus also is notable because the court "ordered the parties to provide the Court supplemental briefing as to the material differences in state law" relevant to the plaintiff's claims. In response to that order, the plaintiff "eliminated her fraud and unjust enrichment claims" and recast her formerly nationwide consumer fraud claims as applying instead only to the residents of eight specific states that she claimed had similar laws. Slip Op. at 3. In other words, just by *asking* whether different state laws were sufficiently similar to warrant lumping their residents together into a single class, the judge caused the plaintiff to drop voluntarily the bulk of her class action claims.

The proceedings in *Picus* are consistent with the 2003 amendments to Rule 23(c)(1)(A). The Rule now requires certification decisions to be made "at an early practicable time." The Advisory Committee stated that the intent of this rule is to foster "[a]ctive judicial supervision" of the certification-related discovery process in order "to achieve the most

effective balance that expedites an informed certification determination." In *Picus*, "active judicial supervision" meant requiring the plaintiff to show how a class could be certified before allowing the plaintiff to obtain class-related discovery.

The *Picus* court decided these issues by construing the plaintiff's complaint "under the legal standards for a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss." Slip. Op. at 5, citing *Walls*, 262 B.R. at 524; *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607, 614 (W.D. Wis. 2003). When defendants seek to deny class certification before any discovery at all has occurred, courts have been consistent in applying this standard and requiring defendants to prove "that no conceivable set of facts" adduced in discovery could lead to class certification. *Power v. GMAC Mortgage Corp.*, No. 06 C 4983, 2007 WL 723509, at *5 (N.D. Ill. Mar. 7, 2007). If at least some discovery has been conducted, however, courts have been more willing to consider extrinsic evidence and engage in a full Rule 23 analysis on which the burden remains with the plaintiff to show entitlement to certification. *See Thornton v. State Farm Mut. Ins. Co.,* No. 1:06-cv-00018, 2006 WL 3359482 (N.D. Ohio Nov. 17, 2006)*; Bennett v. Nucor Corp.*, No. 3:04CV00291SWW, 2005 WL 1773948 (E.D. Ark. July 6, 2005); *Thomas v. Moore USA, Inc.*, 194 F.R.D. 595, 597 (S.D. Ohio 1999).

Picus illustrates that defendants facing class actions with obviously problematic class definitions — including those alleging nationwide claims under varying state laws or where individual reliance and causation are at issue — may not need to face burdensome and expensive discovery before being able to defeat class certification. These defendants should consider whether this kind of preemptive motion may be available in their cases.

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Please do not hesitate to contact us with any questions.

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