ARE NATIONWIDE STATE-LAW CLASSES TENABLE EVEN FOR SETTLEMENT PURPOSES? THE THIRD CIRCUIT REJECTS ONE BUT LEAVES A PARTIALLY OPEN DOOR

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To Our Clients and Friends:

Although the federal Courts of Appeals have been consistently rejecting certification of contested multistate *litigation* classes involving claims under differing state consumer, antitrust and unjust enrichment laws, the Third Circuit's rejection on Monday of a closely-watched settlement involving sales of diamond jewelry represents the first time an appellate court has rejected a *settlement* class on this basis. The specific problem the Third Circuit had with the settlement — the parties attempted to settle with a nationwide class a cause of action that half the states expressly did not recognize — may not recur. However, the Court's direction to district judges to scrutinize state law variations more closely, even in the settlement context, demonstrates that parties proposing to resolve nationwide consumer claims will have to carefully demonstrate why the settlement class satisfies this and all other elements of Rule 23.

Monday's decision in *Sullivan v. DB Investments, Inc.* involved admitted price fixing by the De Beers family of diamond companies. Retail (*i.e.*, indirect) purchasers of diamond jewelry, unlike direct purchasers, could not maintain damages claims against De Beers under federal antitrust laws, so instead a number of indirect purchasers sued under state antitrust, consumer fraud and unjust enrichment laws. Most of the cases filed around the country were consolidated for pretrial purposes in New Jersey. De Beers entered into settlement discussions and ultimately agreed to put $272.5 million into a fund to settle the indirect purchasers' claims. Under the settlement, essentially anyone who purchased diamond jewelry since 1994 could file a claim for recovery from this fund.

On review of the District Court's approval of this settlement, to which 34 class members objected, the Third Circuit held that the district judge failed to give sufficient consideration to variations in the applicable state laws. In particular, the Court noted that half the states' antitrust laws, like federal law, bar damages claims by indirect purchasers, while other states require obtaining the state attorney general's permission before suing. Thus, indirect purchasers in those states had no antitrust claim to assert. The Court found similar differences in state consumer fraud and unjust enrichment laws as applied to alleged price-fixing. "These variations in state antitrust law are not trivial," the Court said. "They represent fundamental policy differences among the several states, and they are in consequence as different as it is possible to be, with some states giving substantive antitrust rights to indirect purchasers, other states giving more limited rights, and others denying such rights altogether."

The plaintiffs sought to characterize these differences as "little more than impediments to litigation that would make trial management difficult but that may safely be ignored for settlement purposes." The Third Circuit, however, held that "[t]he lack of substantive rights cannot be wished away by the promise of easier litigation management." The Court also expressed concern about a federal court creating rights that states had not seen fit to provide, stating that "[s]acrificing the principles of federalism to obtain the benefits of a settlement is a poor trade." The defendant's decision not to challenge the plaintiffs' contention that common questions predominated "does not relieve a district court of its independent obligation to ensure that [Rule 23's] requirements are satisfied" – an obligation the Third Circuit found that "[t]he District Court did not adequately satisfy."

The Third Circuit acknowledged that class certification findings of this kind are reviewed for an abuse of discretion and stated that its holding "is not a repudiation of all nationwide class actions based upon state law." Nor, it said, "are we requiring district courts to undertake rigorous state-by-state analyses in all cases." The Court purported to limit its holding to cases in which "only some . . . jurisdictions recognize the claims for which recovery is sought." In a footnote that undoubtedly will be cited in future certification motions, the Court wrote that "[i]n many cases, it will be evident that all class members share common legal or factual questions, even if the precise elements of proof for their claims vary among jurisdictions." In those cases, "[d]istrict courts in their sound discretion will determine the level of analysis to undertake when deciding whether variations in state law warrant detailed examination and a description of similarities and differences." In the *De Beers* case, however, the Third Circuit made clear that no analysis could have justified the settlement. Indeed, the Court directed that if the District Court certifies a new multistate settlement class on remand, it cannot be nationwide.

This decision highlights that defendants proposing to settle multistate or nationwide consumer claims need to think carefully about how variations in the relevant state laws may affect the predominance of common questions even in the settlement context. The parties to a settlement should provide the court with the information it needs actually to be able to *find* predominance. The *De Beers* decision demonstrates that silence on these issues may put a settlement at risk.

Please feel free to contact us with any questions.

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