THIRD CIRCUIT APPROVES BROAD *DE BEERS* DIAMOND SETTLEMENT CLASS, BUT DOES IT ALSO REOPEN THE DOOR FOR CERTIFICATION OF MULTISTATE LITIGATION CLASSES?

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To Our Clients and Friends:

The Third Circuit U.S. Court of Appeals, sitting *en banc*, on Tuesday reversed an earlier panel decision and approved the long-pending $272.5 million settlement of price-fixing claims in the diamond market alleged against De Beers, S.A. The vacated panel opinion had rejected the settlement because it offers relief to all "indirect purchasers" of diamonds nationwide (*i.e.*, those who bought from retailers rather than directly from De Beers), even though neither federal law nor the laws of many states give indirect purchasers in those states standing to sue. The court's *en banc* decision holds that those purchasers' lack of a colorable legal claim does not bar their inclusion in a settlement class.

The court largely focused its analysis on certification of settlement classes, where no concerns exist about how a trial affecting class members with differing legal rights would be managed and where "global peace" is a valid and desirable goal. It held that so long as there are common factual and legal issues raised by the claims asserted, a court considering a global settlement need not act as though it has a motion to dismiss before it and thus concern itself with whether every member of a putative settlement class has a valid claim.

Although the court's decision came in that settlement context, the decision may present problems for non-settling defendants seeking to oppose class certification in cases in the Third Circuit (which includes the federal courts in Delaware, New Jersey and Pennsylvania). The court noted that the Third Circuit historically has taken a more liberal view with respect to certification of multistate *litigation* classes too, "approv[ing] the certification of nationwide [Rule 23](b)(3) litigation classes where 'the laws of the 50 states could be reduced to several general patterns.'" By expressly distinguishing recent decisions from other Circuits holding that differences in state laws preclude nationwide class certification (which decisions seemed to have all but buried the concept of multistate class actions), the court enabled plaintiffs in Third Circuit cases to argue that their bar for class certification is lower than it would be elsewhere. Indeed, just hours after the court issued its decision, the *De Beers* plaintiffs' counsel issued a news release lauding the decision as a victory for those *prosecuting* class actions, not just settling them.

Two dissenting judges strenuously took issue with what they called the majority's "remarkable declaration" that classes may be approved on a "'come one, come all,' regardless of substantive legal rights" basis. The issue, as the dissenters saw it, is not that courts considering certification of a settlement class have to analyze the merits of every claim before them, but that they cannot certify an all-inclusive class when "there are class members who, according to the plain terms of controlling law, have no claim at all, not even a dubious one."

But the majority concluded that because indirect purchasers may *file* lawsuits in states that do not confer standing on such purchasers, even though such suits would be quickly dismissed on the defendant's motion, courts may include those indirect purchasers in a settlement class if the defendants choose not to move to dismiss but to resolve all potential claims as part of a global settlement. In that context, the majority held, Rule 23 does not require — and may not even permit — analysis of whether every member of a putative class has a valid claim.

The Third Circuit's discussion makes it more likely that defendants desiring to resolve state law claims on a nationwide class basis will be able to do so, certainly in antitrust cases and ostensibly in any case where the defendants' conduct can be alleged to have had the same effect on all class members, regardless of their legal standing to seek redress for any injury. This approach will undoubtedly benefit defendants seeking to achieve "global peace" through a nationwide settlement. Time will tell whether district courts in the Third Circuit or elsewhere will apply the same approach in deciding motions to certify classes in contested cases, which may be much less to defendants' liking, or whether, in the context of contested class actions, the trend against certification of broad multistate claims continues.

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