SIPPY CUP CASE SHOWS THE DOWNSIDE OF DEFEATING MULTI-STATE CLASS CERTIFICATION: THE BEAST JUST GROWS MULTIPLE HEADS

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To Our Clients and Friends:

For the last several years, federal courts have been unanimous in recognizing that state consumer fraud laws differ too much to permit certification of nationwide classes alleging state law claims. Until yesterday's decision in a case involving allegedly tainted baby bottles and sippy cups, however, companies did not know how judges would respond if plaintiffs brought multiple *single-state* class actions and then asked a multi-district litigation transferee judge to decide a series of single-state or targeted multistate certification motions. The MDL court's decision in *In re Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation*, MDL No. 1967, shows that the consumer plaintiffs' bar's inability to win nationwide certification has a potential downside for defendants, as it may merely multiply their defense costs and force them to refight the same battles in multiple courts.

The *Bisphenol* court, Senior Judge Ortrie Smith of the District of Missouri, began yesterday's decision with good news for the defendants. He denied all six motions plaintiffs had filed in 24 coordinated cases, in which the plaintiffs had sought certification of three multi-state classes to litigate claims under single-state laws or allegedly similar groups of laws. But, although the judge indicated that the plaintiffs' claims may lack factual commonality (in addition to the problems raised by variances even in supposedly "similar" state laws), he did not decide the motions on their substance. Instead, he considered the motions for single-state class certification to be "matters related to the administration of individual trials" that should be decided by transferor courts, not by an MDL judge. Judges in the originating courts with only single-state cases before them, Judge Smith noted, may "conclude — without the vagaries of multiple jurisdictions to worry about and a greater familiarity with that state's law — that a statewide class is appropriate."

In a section of the *Bisphenol* opinion titled "Epilogue," Judge Smith said that the plaintiffs "shall be permitted an opportunity to persuade [him] that a class of Missouri consumers should be certified." Judge Smith said that, "[i]n order to maximize the assistance provided

to transferor courts," he intends to decide the Missouri certification motion and litigate one or more Missouri cases "through final judgment" before he remands the other cases to their originating courts for litigation of separate certification motions and then trial.

This *Bisphenol* decision showcases the quandary MDL transferee courts may face with increasing frequency in the post-Class Action Fairness Act-era. The upshot of Judge Smith's decision is that, even if the defendants defeat certification of a Missouri class, they face the prospect of having to relitigate the matter in front of multiple judges in other states, with the plaintiffs claiming in each case that differences in their clients' facts or that state's applicable laws should yield a different conclusion. By contrast, even had Judge Smith elected to tackle plaintiffs' various motions and deny certification of *all* single-state classes, it is not clear such a decision would have put the issue to rest: The plaintiffs could try to relitigate the question before the transferor courts after remand, arguing that circumstances have changed.

Although the alternative — the prospect of a judge certifying a nationwide class for trial when state laws differ too much for that trial to be conducted fairly — would be worse, splitting a huge nationwide case into numerous still-daunting state cases is still problematic. Wherever possible, it is preferable to focus judges on factual differences that should bar *any* class certification, as opposed to focusing on state law differences that may end up merely compounding the problem.

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