

'Rough Justice' Is Not Justice

Law360, New York (November 06, 2013, 2:59 PM ET) -- Recent decisions from the United States Supreme Court have highlighted the inherent tension in class action litigation between, on one hand, the ideal of an efficient system that can, on a collective basis, vindicate rights that would not otherwise be litigated and, on the other hand, the reality of a just system that neither tramples a defendant's right to raise all available defenses nor unfairly compromises the claims of absent class members.[1]

This tension has boiled up again in the Third Circuit in the context of established case law addressing the requirement under Federal Rule of Civil Procedure 23(c) that any class certification order must "define the class and the class claims." The Third Circuit has held that it is "an essential prerequisite of a class action" that any class must be "currently and readily ascertainable based on objective criteria." See *Marcus v. BMW of North America LLC*, 687 F.3d 583, 592-93 (3d Cir. 2012).

Several recent decisions this summer from the Third Circuit — including *Hayes v. Wal-Mart Stores Inc.*, 2013 U.S. App. (Aug. 2, 2013) and *Carrera v. Bayer Corp.*, 2013 U.S. App. (Aug. 21, 2013) — have reaffirmed that if the proposed class cannot be defined objectively, and class membership cannot be reliably and feasibly determined, then class certification is not appropriate.

On Oct. 2, 2013, Law360 reported that in one of those recent cases — *Carrera* — Public Citizen filed an amicus brief with the Third Circuit in support of the plaintiff's petition for rehearing or rehearing en banc that raises some interesting questions about the notion of justice in the class action context.

As Public Citizen rightly recognizes, the ascertainability rule in the Third Circuit can be an impediment to class certification. Focusing on what it evidently believes is the likelihood that this rule will allow defendants whose "wrongful conduct has harmed many people and resulted in injuries that are large in the aggregate, but not cost effective to redress individually" to escape being held accountable, Public Citizen argues that the Third Circuit's rule substitutes what Public Citizen pejoratively denominates "no justice" for "rough justice" in a way that Public Citizen, at least, thinks is unfair.

Carrera involved a claim that Bayer falsely and deceptively advertised its product One-A-Day WeightSmart by claiming that it enhanced metabolism. *Carrera* sought to certify a class of Florida purchasers of the product, but the Third Circuit reversed, finding that identification of Florida consumers who purchased the product (who were unlikely to have retained sales receipts) could not be reliably accomplished through retail purchase records, and the use of affidavits by purported class members would not allow Bayer to challenge class membership.

According to the Third Circuit, the risk that the class would include fraudulent or inaccurate membership

— and thus the risk that fraudulent or inappropriate claims would be paid — was damaging both to absent class members and Bayer.

Public Citizen, in its brief, wholly eschews any discussion of whether the inclusion of fraudulent or inaccurate class members would pose any harm to class action defendants such as Bayer. Rather, Public Citizen argues that while the inclusion of fraudulent or inaccurate class members may result in the payment of fraudulent or inappropriate claims — which would, in turn, reduce the value of each individual claim that is paid — this kind of “rough justice” is preferable to no class certification, which Public Citizen argues would mean “no justice” (i.e., no claims paid at all).

In Public Citizen’s view, rather than addressing this issue on the front end at the class certification stage, the courts should instead address this issue on the back end at the time of distribution of the class recovery, although Public Citizen does not suggest that its alternative procedures would ensure that no fraudulent or inappropriate claims may still be paid.

In making this argument, Public Citizen assumes that rational class members would choose to receive \$.80 on the dollar, with the knowledge that some undeserving class members would also receive this sum. (Public Citizen also inherently assumes that all, or nearly all, consumer class actions should result in some classwide recovery and that whether a wrongful defendant pays \$1.00 to each of 1 million claimants or pays \$.80 to each of 1.25 million claimants is of no moment.)

But Public Citizen offers nothing to support this position except its own view of disinterested economic self-rationalism. Diluting the claim of a deserving class member — which Public Citizen accepts as an inevitable consequence of its position — is wrong. So, too, is forcing a defendant to compensate an undeserving claim, which also would occur if Public Citizen’s approach were to be adopted.

Presumably, Public Citizen would be hard-pressed to deny that these are legitimate concerns — especially with respect to the diminution of otherwise-deserving class members’ claims. Nevertheless, its brief is silent on these two points.

Rather, Public Citizen’s position reflects a classic “ends-justifies-the-means” logic that would never be confused for justice — rough or otherwise — in an individual action. Why should a collective action operate under different notions of justice than individual actions? The short answer is that it should not, and the Third Circuit, at least with respect to the critical threshold issue of class ascertainability, agrees.

Josef Stalin is reported to have excused the brutality of his collective farming campaign with the comment, “You can’t make an omelet without breaking a few eggs.” Here, in its zeal to champion the rights of what it evidently believes are legions of aggrieved consumers, Public Citizen asks the Third Circuit to tolerate a fair amount of injustice in the name of rough justice.

The proverbial kitchen here, of course, belongs to the Third Circuit, which, up to now, has given much greater — and more balanced — consideration to the rights of absent class members and of class action defendants than Public Citizen would have it do.

Given the increasingly high-stakes importance of class certification, especially in the realm of consumer class actions, all those involved in class action litigation will no doubt await with interest whether the Third Circuit continues to maintain a balanced and just approach to class ascertainability.

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[1] See, e.g., Wal-Mart Stores Inc. v. Dukes, 564 U.S. ___, 131 S.Ct. 2541, 2561 (2011) (reversing class certification, in part, because “a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims”) and Standard Fire Ins. Co. v. Knowles, 568 U.S. ___, 133 S.Ct. 1345 (2013) (holding that a precertification stipulation by a putative class action plaintiff limiting the value of the potential class recover cannot legally bind absent class members).

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