Class Action Certification

The United States and California Supreme Courts Made It Easier to Certify Certain Class Actions

By Audra Ibarra

A righteous class action can be one of the most efficient ways to bring about social justice. First, it can be faster and more cost effective than litigating individual claims. Second, a class action can provide more incentive to protect group rights than potential individual claims with small recoveries. Third, in "limited fund" cases, a class action can ensure more equitable distribution of relief than individual claims in which early-filing plaintiffs deplete the fund. Finally, a class action can create a more consistent outcome and standard of conduct for a defendant to follow than individual claims.

However, in the most discussed class certification case last year, *Wal-Mart Stores, Inc. v. Dukes,* the United States Supreme Court essentially denied certification.[1] ((June 20, 2011) 131 S. Ct. 2541, 2550-61.) Although that case concerned sex discrimination in an employment context, litigators may be wondering if it is becoming generally more difficult to certify a class. The answer is no.

Less discussed, but equally important, are three recent cases in which the United States and California Supreme Courts essentially granted or increased the likelihood of class certification. In these cases, those courts made it easier to certify a state court class action, a private securities fraud class action and a tax refund class action.

A plaintiff may seek class certification in state court after denial in federal court

In *Smith v. Bayer Corp.*, the United States Supreme Court recently held that a plaintiff may seek class certification in state court after denial in federal court. ((June 16, 2011) 131 S.Ct. 2368, 2375-82.) The court further held that this is true even if the plaintiff was part of the class for which certification was denied.

In a separate case, George McCollins sued Bayer Corporation in West Virginia state court. McCollins claimed that Bayer had violated the state's consumer-protection statute and Bayer's warranties by selling an allegedly hazardous prescription drug called Baycol (which Bayer withdrew from the market that same month). Bayer removed the case to federal district court. McCollins asked the court to certify a proposed class of Baycol customers living in the state. But the court denied certification and dismissed McCollins' claims on the merits.

In *Smith*, Keith Smith and Shirley Sperlazza also sued Bayer in West Virginia state court based on Baycol claims similar to those of McCollins. However, their case remained in state court. They asked the trial court to certify a class identical to that of McCollins. Bayer asked the federal district court from the concluded *McCollins* case for an order enjoining the state trial court in *Smith* from hearing the motion for class certification. The district court issued the injunction. The federal Court of Appeals for the Eighth Circuit affirmed.

The United States Supreme Court reversed and resolved a split among the circuits. In an opinion by Justice Kagan, the court held that the federal Anti-Injunction Act prohibits, among other things, enjoining a new plaintiff from seeking class certification in state court after denial in federal court. Under the Act, "[a] Court of the United States may not grant an injunction to stay proceedings in a State court except ... to protect or effectuate

its judgments." (28 U.S.C. § 2283.) The Supreme Court explained that generally "[a] court's judgment binds only the parties to a suit." (131 S.Ct. at 2379.) The court found that a court's judgment rejecting class certification binds only the named parties to the suit. The court concluded that "[n]either a proposed class action nor a rejected class action may bind nonparties." (*Id.* at 2380.) Consequently, the court found it irrelevant that the plaintiff would have been included in the class if certification had been granted.

A plaintiff does not have to prove loss causation for class certification in a private securities fraud action

In *Erica P. John Fund, Inc. v. Halliburton Co.*, the United States Supreme Court recently held that a plaintiff does not have to prove loss causation for class certification in a private securities fraud action. ((June 6, 2011) 131 S. Ct. 2179, 2184-87.) The court further held that this is true even if actual loss may have been caused by factors other than fraud.

Erica P. John Fund sued Halliburton Co. in federal district court. The Fund claimed that Halliburton initially made misrepresentations designed to inflate its stock price, then later made disclosures which caused the price to drop. The Fund asked the court to certify a proposed class of Halliburton investors. But the court denied certification because the Fund failed to provide sufficient proof of loss causation for its claim. The Court of Appeals for the Fifth Circuit affirmed.

The Supreme Court vacated the judgment of the Fifth Circuit and resolved a split among the circuits. In an opinion by Chief Justice Roberts, the court held that proof of loss causation is not required for class certification in a private securities fraud action. The court explained that under the fraud-on-the market doctrine, a private securities fraud action requires "'transaction causation,' not loss causation." (*Id.* at 2186.) The court found that the transaction causation requirement generally is met if a plaintiff purchased defendant's stock at market price during the period of defendant's misrepresentation, because the plaintiff is presumed to have relied on defendant's misrepresentation. The court concluded that whether the misrepresentation and subsequent disclosure caused the actual loss is irrelevant:

> The fact that a subsequent loss may have been caused by factors other than the revelation of a misrepresentation has nothing to do with whether an investor relied on the misrepresentation in the first place, either directly or presumptively through the fraud-on-the market theory. (*Id.*)

A plaintiff may seek class certification for a tax refund

In *Ardon v. City of Los Angeles*, the California Supreme Court held that a plaintiff may seek class certification for a tax refund. ((July 25, 2011) 52 Cal.4th 241, 246-53.)

Estuardo Ardon, a resident of the City of Los Angeles, sued the City in state court. Ardon claimed that the City's telephone users tax was illegal. Ardon asked the trial court to certify a proposed class of similarly situated individuals. But the court denied certification. A divided Court of Appeal affirmed, specifically rejecting its own reasoning and contrary holding in a factually similar prior case.

The California Supreme Court reversed and resolved the conflict within the appellate courts. In an opinion by Justice Chin, the court held that the Government Claims Act generally permits a class claim for a tax refund against a local government. Under the Act, "[a] claim shall be presented by the claimant or by a person acting on his or her behalf." (Gov. Code, § 910.) The court explained that the Act authorizes a class claim unless there is specific legislation to the contrary:

> [The Act] provides the necessary legislative authorization for class claims of taxpayer refunds against local government entities ... in the absence of a specific tax refund procedure set forth in an applicable governing claims statute.

(52 Cal.4th at 252-53.) The court found that the Act authorized Ardon's class claim because there was no contrary legislation.

Conclusion

These cases are good news for litigators who prosecute class action cases, and for the public as well if the cases bring about social justice. In each of the above cases, the United States or California Supreme Court reversed or vacated the trial and appellate courts' denial of class certification.

> A plaintiff does not have to prove loss causation for class certification in a private securities fraud action.

The cases suggest that a class should litigate certification until it is granted or denied on appeal by the highest applicable court. Generally, that means the United States Supreme Court for a federal claim and the California Supreme Court for a state claim. However, if a class can recast a federal case into a state case or vice versa, the class may have twice the opportunity to seek certification. A plaintiff initially may be denied class certification on a federal case all the way through the United States Supreme Court. But a new plaintiff subsequently may recast the claim as a state case and seek certification until it is granted or denied on appeal by the California Supreme Court. Similarly, a plaintiff may be denied certification on a state case all the way through the California Supreme Court. But a new plaintiff may recast the claim as a federal case and seek certification until it is granted or denied on appeal by the United States Supreme Court. ■

[1] In *Wal-Mart Stores*, female employees brought a Title VII action against the chain store alleging sex discrimination. The court held that a class could not be certified because, among other things, the employees failed to provide sufficient proof that the store operated under a general policy of discrimination.

Audra Ibarra is an appellate attorney. She represents organizations and individuals in federal and state courts in civil and criminal appeals, writs and habeas petitions. She also serves as a Commissioner for the Judicial Nominees Evaluation Commission for the California State Bar and Judge Pro Tempore for California Superior Court. For more information, please go to www.aiappeals.com.

This article was previously published by the Bar Association of San Francisco in San Francisco Attorney Magazine.