

A large, white marble statue of Abraham Lincoln, seated and pointing forward with his right hand. The statue is set against a background of vertical wooden panels.

# CLASS ACTION

## Locke Lord's Looking Ahead 2011

### Supreme Guidance

In 2011, the United States Supreme Court is expected to deliver opinions in several class action cases that likely will have significant impact on business practices, including the form of arbitration provisions, litigation practices and strategy, the preclusive effect of federal court denials of class certification on subsequent similar state court claims, the scope of Federal Rule of Civil Procedure 23(b), the proof needed for certification in securities fraud cases, and the impact of the federal Due Process Clause on state-based class actions.

## Anticipated State Law Decisions

The Illinois Supreme Court recently heard oral argument in *Barber v. American Airlines, Inc.*, No. 110092. At issue in Barber is whether defendant American Airlines' unilateral refund of the baggage fee at issue, after the case was filed but before the plaintiff moved for class certification, rendered the case moot or was an attempted "pick-off" that would not moot the class action. The trial court dismissed the case as moot because there was no longer an actual controversy between named plaintiff Barber and the defendant as a result of the refund. The First District Appellate Court reversed, however, finding that American Airlines' refund to Barber was an improper attempt to pick Barber off to avoid the class action suit. *Barber v. American Airlines, Inc.*, 398 Ill. App. 3d 868 (1st Dist. 2010).

The California Supreme Court is expected to render soon its decision in class action case *Brinker Restaurant Corp. v. Superior Court*, No. S166350. The California appellate court held that the trial court erred in certifying Brinker for class treatment because individualized issues predominated. *Brinker Restaurant Corp. v. Superior Court*, 165 Cal. App. 4th 25 (4th Dist. 2008). The state supreme court granted review in October 2008, and the case has been fully briefed since 2009. *Brinker*, as well as *Faulkinbury v. Boyd & Associates, Inc.*, which the California Supreme Court accepted for review in October 2010 (Docket No. S184995), involves the interpretation of certain provisions of the California Labor Code and related Wage Orders—specifically, whether an employer provides required meal and rest breaks by making them available or must take further action to ensure that the breaks are actually taken—and the impact that interpretation has on the class certification analysis.

## Class Action Waivers

One of the most highly-anticipated Supreme Court decisions of the current term is *AT&T Mobility LLC v. Concepcion*, No. 09-893. Plaintiffs Vincent and Liza Concepcion sued AT&T over its allegedly fraudulent practice of offering free mobile phones but charging consumers sales tax on the full retail value of the phones. The Wireless Service Agreement the Conceptions signed contained an arbitration provision that included a class action waiver clause stating AT&T "and you agree that no Arbitrator has the authority to ... order consolidation or class arbitration." After the Conceptions' case was consolidated with a similar putative class action, AT&T sought to compel arbitration of the Conceptions' claims. The federal district court found both that the class action waiver clause was unconscionable and unenforceable under California law and that the Federal Arbitration Act did not preempt California law governing the unconscionability of the class action waiver clause. *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008). The Ninth Circuit Court of Appeals affirmed. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. Oct. 27, 2009). The U.S. Supreme Court granted AT&T's petition for a writ of certiorari, and the Court heard oral argument on November 9, 2010. The Supreme Court's opinion could have substantial implications for countless consumer and other form arbitration agreements containing class action waiver clauses, and the potential impact of the Court's decision is evidenced by the number of *amici curiae*—26—that filed briefs for and against the decision below.

## Second Attempts at Certification in State Court

Also pending before the U.S. Supreme Court, and argued on January 18, 2011, is *Smith v. Bayer Corporation*, No. 09-1205. At issue in *Smith* is the Anti-Injunction Act, which precludes a federal court from enjoining state court proceedings except when authorized by Congress or "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. In the case below, *In re Baycol Products Litigation*, 593 F.3d 716 (8th Cir. 2010), the Eighth Circuit affirmed a district court's order enjoining Keith Smith and Shirley Sperlazza, plaintiffs in a West Virginia state court case against Bayer, from proceeding with a class certification motion where a federal MDL court had previously denied certification of similar claims

## Anticipated State Law Decisions (cont'd.)

Finally, the Fifth Circuit Court of Appeals is poised to decide a question at the intersection of federal class action cases and Texas law: Whether a federal court may use the equitable doctrine of *cy pres* to give away residual class action settlement proceeds where there is a state unclaimed property law that governs unclaimed funds. *All Plaintiffs v. State of Texas*, No. 10-40119 (argued Dec. 8, 2010). In recent decades, a growing practice in federal court class action settlements has been using *cy pres* to donate residual settlement funds to charitable organizations. Yet, many states, like Texas, have statutes governing abandoned or unclaimed property. So when a federal class settlement allocates funds to identified class members, and a class member does not claim the funds, are those funds “abandoned” or “unclaimed” property that must be disposed in accordance with the applicable state statute? The answer to this question has implications beyond *cy pres* distributions—it could also apply to any disposition of federal class action settlement funds when:

(1) the settlement payments are allocated to identified members; and (2) the agreement is silent on the issue of unclaimed funds. Whatever decision the Fifth Circuit reaches, the pending *All Plaintiffs* case highlights questions important to structuring a class settlement:

- Does the class settlement allocate payments to identified class members, or does it create a general fund from which class members are entitled to seek distributions?
- Does the class settlement agreement address the disposition of any unclaimed or residual funds?
- Is a donation of unclaimed funds part of the settlement agreement itself? Such a donation likely would be viewed differently than a post-settlement, judicial disposition of unclaimed settlement funds.

brought by other plaintiffs. The questions raised in *Smith* include the extent to which a federal court denying class certification has personal jurisdiction over absent class members for the purposes of enjoining them from seeking certification of similar claims in a state court case. Defendants will be watching this case to see whether and to what extent plaintiffs can attempt a second bite at the apple in state court after a federal court denies class certification.

## Certification of Monetary Damages Claims Pursuant to Rule 23(b)(2)

The Supreme Court recently granted Wal-Mart’s petition for a writ of certiorari in a large gender discrimination class action, *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277. The plaintiffs in *Dukes* purport to represent a class of about 1.5 million women who work or used to work at more than 3,400 Wal-Mart stores across the country. The plaintiffs allege that Wal-Mart violated Title VII of the Civil Rights Act of 1964 through discriminatory pay and promotion policies. They seek injunctive and declaratory relief, as well as back pay and punitive damages. The district court certified a class under Federal Rule 23(b)(2), finding that the plaintiffs’ claims sought primarily injunctive, not monetary, relief. The Ninth Circuit affirmed certification under Rule 23(b)(2) for current employees but remanded to the district court for further consideration regarding former employees and punitive damages. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). On December 6, 2010, the Supreme Court granted Wal-Mart’s cert petition as to the first question presented—whether claims for monetary relief can be certified under Rule 23(b)(2)—and an additional question raised by the Court itself—whether certification in the case pursuant to Rule 23(b)(2) was consistent with Rule 23(a). The case will be argued on March 29, 2011.

## Proof Required in Securities Fraud Cases at Class Certification Stage

On January 7, 2011, the Supreme Court granted review in *Erica P. John Fund, Inc. v. Halliburton Co.*, No. 09-1403, in which the district court denied class certification in a securities fraud case against Halliburton. The plaintiff brought claims against Halliburton and its former CEO for alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5. The district court

denied the plaintiff's motion for class certification, finding that the plaintiff had failed to prove loss causation—the causal connection between the alleged misstatements, their correction, and the decline in stock price—as required by *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007). The Fifth Circuit Court of Appeals affirmed. *Archdiocese of Milwaukee Supporting Fund, Inc. v. Halliburton Co.*, 597 F.3d 330 (5th Cir. 2010). In its petition for a writ of certiorari, the plaintiff argued that the district and appellate courts wrongly required it to establish loss causation at the class certification stage. At the Court's invitation, the U.S. Solicitor General filed an *amicus curiae* brief on December 3, 2010, recommending that the Court grant review. It is likely this case will be scheduled for argument in April 2011, but no argument date has yet been set.

### Cert Petition pending in Tobacco Case

Pending before the Court is a petition by Louisiana state court defendants in a tobacco class action, seeking review of the class judgment entered against them. In *Philip Morris USA Inc. v. Scott*, No. 10-735, the defendants challenge the judgment, which requires them to pay more than \$241 million (plus interest) to fund a smoking cessation program for the benefit of the class members. The plaintiffs, representing a class of all Louisiana smokers, alleged that the defendants committed fraud by distorting public knowledge regarding the addictive effects of nicotine. The defendants argued to the U.S. Supreme Court that the state court proceedings and judgment violated the federal Due Process Clause. The defendants also sought a stay of the judgment pending the high court's ruling on their petition for a writ of certiorari. Concerned with potential due process violations, Justice Scalia found that the defendants had met their heavy burden for a stay application and granted the defendants' motion to stay the judgment. *Philip Morris USA Inc. v. Scott*, No. 10A273, 561 U.S. \_\_ (Sept. 24, 2010). In particular, Justice Scalia expressed concern that, although in Louisiana fraud requires proof of detrimental reliance on misrepresentations, the class members were not required to show detrimental reliance to benefit from the smoking cessation program fund. The class members accordingly benefitted from the class judgment even though they had not presented evidence necessary to prove any individual damages. The Court is expected to rule soon on the defendants' petition.

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