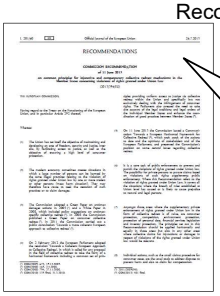
EU Class Action Reform

A solution looking for a problem?

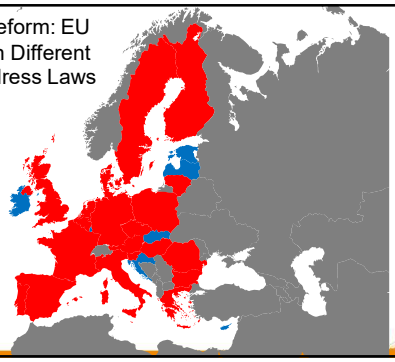
Context for Reform: 2013 Commission Recommendation



SAFEGUARDS

- Admissibility to be determined at earliest opportunity
- Loser pays rule preserved
- Opt-in claims only
- No punitive damages
- No incentives for lawyers to bring unnecessary claims
- No contingent fees

Context for Reform: EU Countries with Different Collective Redress Laws



Context for Reform

- Scandals impacting EU consumers
  - VW Dieselgate
  - Ryanair flight cancellations

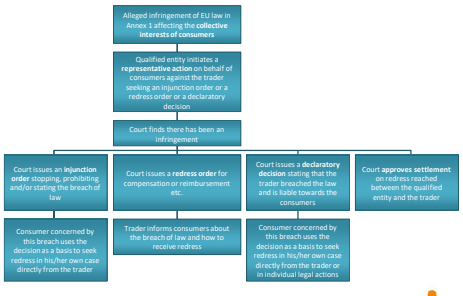
Proposed Reform

In April 2018 the EU Commission announced its "New Deal for Consumers" including a draft Directive to:

- Introduce a form of collective redress (class action)
- This will replace the current Injunctions Directive

If passed the Directives would have to be implemented by each Member State

Proposed EU Representative Actions



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US Class Action Trends

Tom Sullivan, Partner – Philadelphia Office

- Notable Class Action Decisions in 2018
- Personal Jurisdiction in Class Actions After *Bristol-Myers Squibb*
- Evidentiary Standards in Class Certification Hearings
- Forthcoming Supreme Court Class Action Decisions

NOTABLE CLASS ACTION DECISIONS IN 2018

Epic Systems Corp. v. Lewis, __ S. Ct. __, No. 16-285 (May 21, 2018)

- U.S. Supreme Court opinion issued on May 21, 2018
- Majority opinion written by Justice Gorsuch
- Resolved a circuit split on whether arbitration agreements containing provisions restricting employees' rights to pursue class and collective actions violate the National Labor Relations Act ("NLRA") and are thus unenforceable under the Federal Arbitration Act ("FAA")
- Holding: Congress has instructed in the FAA that arbitration agreements providing for individualized proceedings must be enforced, and neither the FAA's savings clause nor the NLRA suggests otherwise

Future Implications of *Epic Systems Corp. v. Lewis*

- Employers can now require individual arbitration on most issues
  - Note that several limitations on arbitration remain; i.e., arbitration provisions cannot waive an employee's right to file a discrimination complaint with the EEOC
- Some states, including New York and Washington, have recently enacted laws that prohibit mandatory arbitration of sexual harassment cases. Other states are currently considering similar laws.
  - These laws may be subject to challenge on grounds of federal preemption by the FAA in light of *Epic Systems*

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Update of the Law CLE June 14, 2018

Practical Tips

- In light of *Epic Systems v. Lewis*, audit your relevant arbitration agreements & refine as needed.
- Consider the risks/costs of numerous arbitrations—this is what the plaintiffs' bar has warned about.

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Update of the Law CLE June 14, 2018

In re Hyundai and Kia Fuel Economy Litig., No. 15-56014 (9th Cir. Jan. 23, 2018)

- C.D. Cal. granted class certification in a nationwide class settlement on claims including California state law claims. The district court did not address whether choice-of-law principles permitted the application of California's consumer protection laws to plaintiffs from all other states.
- The Ninth Circuit reversed the district court's approval of the nationwide class settlement. The Ninth Circuit noted that Rule 23(b)(3)'s predominance inquiry was far more demanding than Rule 23(a)'s commonality requirement, and that where plaintiffs bring a nationwide class action under CAFA and invoke Rule 23(b)(3), the court must consider the impact of potentially varying state laws.
- Both parties have filed petitions for rehearing en banc.
- Note that this decision does not affect nationwide settlements based on federal claims or settlements based on state laws that are essentially identical.

Practical Tips

- After *In re Hyundai*, watch for this issue to be raised in other circuits and carefully scrutinize proposed nationwide class settlements.
- Class actions in the Ninth Circuit are becoming easier to certify but harder settle.
- Does this heighten the significance of raising personal jurisdiction issues under *Bristol-Myers Squibb?*

PERSONAL JURISDICTION IN CLASS ACTIONS AFTER *BRISTOL-MYERS SQUIBB*

Bristol-Myers Squibb Co. v. Superior Court of California

- Groundbreaking personal jurisdiction decision issued June 19, 2017
- The U.S. Supreme Court held that California state courts lacked personal jurisdiction over non-residents' claims in a mass tort action where the defendant was not subject to general jurisdiction in California and the non-residents' claims lacked any connection to California.
- Debates have sprung up in many courts since *Bristol-Myers Squibb* about the decision's applicability to class actions.
- No circuit court of appeals has weighed in on this issue yet.

Decisions Applying *BMS* to Class Actions

- *DeBernardis v. NBTY, Inc.*, No. 17-C-6125 (N.D. Ill. Jan. 18, 2018)
  - The court rejected a named plaintiff's attempt to bring a nationwide class action alleging that a distributor of dietary supplements made false and misleading representations regarding its potential benefits. The named plaintiff sought to represent both an Illinois state class and a putative nationwide class on claims of consumer fraud, breach of warranty, and unjust enrichment.
  - Defendants argued that, pursuant to *Bristol-Myers Squibb*, Illinois lacked personal jurisdiction over absent class members who had no connection to Illinois.
  - The District Court dismissed the claim of non-Illinois residents, reasoning that it was "more likely than not" that the Supreme Court would eventually apply *Bristol-Myers Squibb* to prevent nationwide class actions in a forum where there is no general jurisdiction over the Defendants.
- *Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc.*, — F. Supp. 3d —, No. 14 C 2032, 2018 WL 1255021 (N.D. Ill. Mar. 12, 2018)
  - This Court reached the same conclusion in applying *Bristol-Myers Squibb* to class actions, reasoning that due process applies equally to class actions
- *Wenokur v. AXA Equitable Life Ins. Co.*, No. CV-17-00165, 2017 WL 4357916 (D. Ariz. Oct. 2, 2017)
  - Although the case focuses on venue, the Court briefly noted that it "lacks personal jurisdiction over the claims of putative class members with no connection to Arizona and therefore would not be able to certify a nationwide class."

Decisions Concluding *BMS* Does Not Apply To Class Actions

- *Jack Fitzhenry-Russell v. Dr. Pepper Snapple Group, Inc.*, No. 17-cv-00564 (N.D. Cal. Sept. 22, 2007)
  - The court agreed with the plaintiff and held that *Bristol-Myers Squibb* did not apply to class actions, and therefore did not limit the personal jurisdiction of the court in this putative class action.
  - The plaintiff brought California state law claims against Dr. Pepper based on alleged misrepresentations about the ingredients of Canada Dry Ginger Ale. The plaintiff argued that *Bristol-Myers Squibb* applied only to state court, rather than federal court, actions, and that it applied only to mass tort, rather than class, actions.
  - The district court rejected the idea that *Bristol-Myers Squibb* applied only to state court actions, but agreed with the plaintiff that *Bristol-Myers Squibb* did not apply to class actions. Notably, the named plaintiffs in *Fitzhenry-Russell* were all California residents seeking to represent a nationwide putative class—the court suggested that the residence of the named plaintiffs was significant in its decision not to apply *Bristol-Myers Squibb*.
- *Molock v. Whole Foods Market, Inc.*, 297 F. Supp. 3d 114 (D.D.C. Mar. 15, 2018)
  - The Court held that *Bristol-Myers Squibb* did not apply to class actions, reasoning that unnamed class members are not akin to plaintiffs in mass tort actions because each plaintiff in a mass tort action is a real party in interest.
  - The Court also reasoned that the additional requirements for class certification supplied due process safeguards not applicable in the mass tort context.

Practical Tips

- At the outset of a case, consider when and how to raise this issue strategically—personal jurisdiction can be waived if not raised properly and at the right time.
- Assess potential implications of raising this defense, such as having to litigate multiple class actions in different states.

Circuits Are Divided on the Admissibility Standard for Evidence Submitted at the Class Certification Stage

EVIDENTIARY STANDARDS IN CLASS CERTIFICATION HEARINGS

Evidence Presented at Class Certification Stage Must Be Admissible At Trial

- Many courts, including the Second, Third, Fifth, Seventh, and D.C. Circuits, require that evidence presented at the class certification stage meet the same admissibility requirements as evidence presented at trial.
  - *See, e.g., Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) ("findings must be made based on adequate admissible evidence to justify class certification")
- This stringent standard is favored by defendants.

Evidence Admitted at Class Certification Does Not Have to be Admissible at Trial

- Some courts, including the Eighth and Ninth Circuits, have taken the approach that evidence presented at a class certification does not have to meet the same standard as evidence admissible at trial.
- In *Taylor Farms v. Pena*, 690 F. App'x 526 (9th Cir. 2017), the Ninth Circuit affirmed the district court's certification of a class, in which the district court had ruled that evidence presented at the class certification stage need not be admissible at trial.
  - Although the Defendant filed a certiorari petition with the Supreme Court, the Supreme Court denied the petition, effectively leaving the circuit split in play.
- This approach is a more relaxed standard that tends to be favorable for plaintiffs who might not have sufficient, admissible evidence to survive class certification under the more stringent test of admissibility at trial.

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Does *Daubert* Apply at the Class Certification Stage?

- Whether *Daubert* applies will affect briefing schedules: if expert depositions are delayed until after class certification, it will be hard to make a *Daubert* challenge
- The Sixth, Seventh, Ninth, and Eleventh Circuits have all held that a full *Daubert* analysis is required at the class certification stage
  - *Sali v. Corona Reg'l Med. Ctr.*, No. 15-56460, 2018 WL 2049680, at *7 (9th Cir. May 3, 2018) ("[I]n evaluating challenged expert testimony in support of class certification, a district court should evaluate the admissibility under the standard set forth in *Daubert*.")
  - *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815 (7th Cir. 2010) ("[W]hen an expert's report or testimony is critical to class certification, a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to a ruling on a class certification motion.").
  - *In re Carpenter Co.*, No. 14-0302, 2014 WL 12809636 (6th Cir. Sep. 29, 2014) ("Given the Supreme Court's statement in *Wal-Mart* and the district court's application of *Daubert* to critical witnesses," the district court did not abuse its discretion by conducting a *Daubert* analysis at the class certification stage.").
  - *Local 703, I.B. of T. Grocery & Food Employees Welfare Fund v. Regions Fin'l Corp.*, 762 F.3d 1248, 1258 n.7 (11th Cir. 2014) (quoting *Am. Honda*, "We hold that when an expert's report or testimony is critical to class certification, . . . the district court must perform a full *Daubert* analysis before certifying the class . . .")).

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Does *Daubert* Apply at the Class Certification Stage?

- The Eighth Circuit applies a tailored *Daubert* analysis at this stage
  - *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011) (holding that a "more conclusive *Daubert* inquiry at the class certification stage would [be] impractical," and that a more "focused" inquiry was necessary due to the preliminary nature of class certification)
- The Third and D.C. Circuits have avoided the issue of whether a *Daubert* analysis is necessary during class certification:
  - *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 24 (D.D.C. 2012) (recognizing the conflicting approaches and stating that "it is unclear whether a full analysis of [a class certification's expert's] report and testimony is even appropriate at this stage")
  - *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 187-88 (3d Cir. 2015) ("We have no occasion to examine whether there might be some variation between the Seventh and Eighth Circuit formulations. Consistent with our holding here, both courts limit the *Daubert* inquiry to expert testimony offered to prove satisfaction of rule 23's requirement.")

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Practical Tips

- Preserve this issue by making the argument that a more rigorous standard ought to apply at the class certification stage.

FORTHCOMING SUPREME COURT CLASS ACTION DECISIONS

Lamps Plus, Inc. v. Varela

- The U.S. Supreme Court granted certiorari to answer the following question:
  - Whether the Federal Arbitration Act forecloses a state law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements?
- After a data breach that resulted in the release of employee information, an employee filed a putative class action in CA federal court. At the time he was hired, the employee had signed an arbitration agreement in which he consented to arbitration of "all claims that may hereafter arise in connection with my employment or any of the parties' rights and obligations arising under this agreement."
- District Court granted the employer's motion to compel arbitration, but ordered class – rather than individual – arbitration. On appeal, a split Ninth Circuit panel affirmed, finding the language authorizes class arbitration.

Frank, et al. v. Gaos, et al.

- The U.S. Supreme Court granted certiorari to answer the following question:
  - Whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be "fair, reasonable, and adequate."
- The case centers on cy pres remedies in class actions. Google settled a case with users who accused the company of illegally sharing their search histories with advertisers. The settlement provided $5.3 million to six internet advocacy nonprofits, and $2.5 million in attorneys' fees to class counsel, but no direct benefit to the users.
- Sixteen State Attorney Generals filed amicus briefs in support of certiorari.
- The California district court approved the settlement, and the Ninth Circuit affirmed that decision.

Practical Tips

- If considering a *cy pres* settlement, ensure that a strong connection exists between the *cy pres* beneficiary and the class.
- Courts are especially suspicious if the *cy pres* relief is highly disproportionate to the relief received by the class.

Who can sue?

- Qualified Entities (QEs)
  - "Properly constituted"
  - "Legitimate interest"
  - Non-profit
  - Includes consumers association
  - Individual consumers **can't** bring claims
- Ad hoc QEs
  - Designated for specific actions
- QEs don't need contact with consumers
  - Member States can allow opt-out cases

For what?

- Broad scope of violations
  - Breach of any of 59 EU laws
- Includes:
  - Product liability
  - Misleading advertising
  - Data protection
  - Energy and environment
  - Financial services
  - Healthcare
  - Telecommunications and media services
- QE can ask for disclosure of documents (i.e., discovery) that support claim

Remedies

- Injunction to prevent conduct
- Declaratory relief to establish liability
  - Would be irrebuttable evidence for follow-on actions in the same Member State
  - A rebuttable presumption of liability in all other MS
- "Redress" such as damages
  - If injured consumers are identifiable, damages are awarded directly to them
  - If not, and in small value claims, damages should be paid to a "public purpose" that serves consumers

Concerns

Absence of safeguards and little guidance to courts

- No admissibility requirement
- No class certification step
- QE category potentially vast
- Proposal is silent on "loser pays" and punitive damages
- Risk of overlapping claims and forum shopping

Potential incentives for abuse

- Too much belief that the QE system will act as a deterrent to abusive litigation
- No limit on contingency fees
- 3rd party funding permitted
- No limit on QEs' fees and costs
- No limit on pay-outs to lawyers, investors
- No requirement that consumers be paid first

Next Steps

- The European Parliament and Member States must approve the proposed Directives
- The EU aim is for the Directive to be on the EU statute book by May 2019
- Member States would then have approximately 18 months to implement the directive at national level