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# ILLINOIS HIGH COURT REFINES STATE CLASS ACTION JURISPRUDENCE

by

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In a state whose infamous plaintiff-friendly litigation centers provided strong impetus for the Class Action Fairness Act, the Illinois Supreme Court has, over the last several years, taken a multidirectional approach to creating a rational body of authority to guide class litigation and bring fairness to class action cases litigated in Illinois courts. Some of its decisions have focused on refining the substantive law, especially the Illinois Consumer Fraud Act, which has underlain the class action explosion. *See, e.g., Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134 (2002); *Shannon v. Boise Cascade Corp.*, 208 Ill.2d 517 (2004); *Price v. Philip Morris Inc.*, 219 Ill.2d 182 (2006). Other cases have given contour to the Illinois class action statute and the extraterritorial application of Illinois law. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100 (2005). The Court also amended Supreme Court Rule 306(a) to mirror Federal Rule of Civil Procedure 23(e), allowing interlocutory appeal of class certification decisions by petition to the appellate court.

The passage of the Class Action Fairness Act (CAFA) has not mooted the relevance of state decisions on class action issues. Indeed, in the last several months, the Illinois Supreme Court has continued to address issues of relevance to Illinois class action practice, releasing an important decision overturning class certification in a mass tort case, and another decision addressing the enforceability of contractual class action waivers. Although the decisions are mixed, they provide valuable assistance to the defense of Illinois-based class actions, and in the avoidance of class litigation in its entirety.

***A Train Wreck Averted: Smith v. Illinois Central Railroad.*** In *Smith v. Illinois Central Railroad Co.*, 233 Ill. 2d 441 (Nov. 30, 2006), the Illinois Supreme Court overturned a certified class on purely procedural grounds. In so doing, it expanded on the important class action principles it recently articulated in *Avery v. State Farm*. Prior to *Avery*, the Illinois Supreme Court had not addressed standards for class certification in nearly twenty-five years. In *Avery*, the court overturned, on substantive and procedural grounds, a \$1.18 billion judgment obtained by a nationwide class of policyholders asserting claims for breach of contract and violation of the Illinois Consumer Fraud Act. The court observed that the proponent of class certification must demonstrate that a successful adjudication of the class representative's individual claim will establish a right of recovery in other class members. It also observed that federal decisions provide persuasive authority on certification issues under the Illinois class action statute, 735 ILCS § 5/2-801.

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In *Smith*, ten class representatives sought recovery for personal injuries and property damage on behalf of over 1,000 class members who lived in the vicinity of a train derailment and chemical release. Illinois Central, relying on *Avery*, argued that the claims of the class representatives could not establish an individual right of recovery in other class members; individual issues regarding the nature and extent of chemical exposure, the fact, nature and extent of damages, and issues of individual medical causation would outweigh common questions of law and fact. When the trial court granted class certification, Illinois Central sought interlocutory review. The Fifth District Appellate Court, over a dissenting opinion based on *Avery*, affirmed the trial court's certification decision, holding that the court had not abused its discretion in finding that commonality and numerosity were present, and that class resolution provided the most efficient method for adjudicating the claims.

The Illinois Supreme Court did not equivocate in finding that individual issues of exposure, causation and damage defeated “predominance” and prevented class adjudication. It adopted the reasoning of influential decisions from the Texas Supreme Court and the U.S. Court of Appeals for the Fifth Circuit explaining the many aspects of personal injury/mass tort cases that make them unsuitable for class treatment. Moreover, while a decision overturning certification of a mass tort case might not be surprising in another jurisdiction, *Smith* is remarkable for the court's endorsement of arguments central to the defense of class actions of all stripes:

- The class device is procedural, and does not alter burdens of proof or substantive rights.
- Efficiency and expedience cannot deprive defendants of their rights to a fair trial.
- The predominance requirement is much more rigorous than mere commonality, and requires more than a simple tabulation of common questions.
- A court must evaluate the issues that will predominate at trial by considering the substantive claims and defenses.
- The predominance requirement ensures that the class is sufficiently cohesive to warrant adjudication on a representative basis.
- Where the predominance requirement is met, adjudication should resolve the entire controversy, and all that should remain for individual class members is filing proof of their claim.
- Where damages cannot be determined by a mathematical or formulaic calculation, individual damage issues alone may predominate over common questions.
- Aggregating claims can alter substantive tort jurisprudence. By removing individual considerations from the adversarial process, class certification can deprive the tort system of a valuable method for screening out marginal and unfounded claims.

The Illinois Supreme Court concluded that the plaintiffs could not demonstrate predominance because “proof of proximate causation and damages will be highly individualized and will consume the bulk of the time at trial.” It reversed the judgments of the trial and appellate courts.

***A Dropped Call?: Kinkel v. Cingular Wireless.*** On another “hot topic” in class action litigation, the Supreme Court, in October, 2006, released its opinion in *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1 (2006), invalidating on grounds of unconscionability a class action waiver clause in a contractual arbitration agreement. Such clauses have provided a first line defense to class certification since the U.S. Supreme Court ruled, in *Green Tree Financial Corp v. Bazzle*, 539 U.S. 444 (2003), that an arbitration clause can allow class adjudication if, in the arbitrator's view, state contract law supports a conclusion that the parties agreed to it. While not a victory for defendants, *Kinkel* provides detailed guidance to sellers of consumer goods and services on how to draft enforceable class action waivers.

In *Kinkel*, the plaintiff brought a class action in Madison County alleging that the imposition of a \$150 early termination fee by her cellular phone provider constituted an illegal penalty, a breach of her service contract, and a violation of the Illinois Consumer Fraud Act. The service agreement included a

mandatory arbitration clause with a class action arbitration waiver. The defendant filed a motion to compel arbitration and stay the litigation. The circuit court refused to enforce the arbitration clause, finding it unconscionable. On the defendant's interlocutory appeal, the appellate court held that the arbitration clause *was enforceable* but that the *class* arbitration waiver *was not*. The appellate court found the class action waiver both procedurally and substantively unconscionable because it appeared in a contract of adhesion; was not sufficiently conspicuous; did not disclose that the plaintiff's share of the arbitration costs would nearly match the amount of her individual claim; and was one-sided in that Cingular would have no occasion to sue its customers on a class basis.

The Illinois Supreme Court affirmed the judgment of the Fifth District Appellate Court, as well as much of the appellate court's reasoning. Following its own recent decision, *Razor v. Hyundai Motor America*, 222 Ill. 2d 75 (2006), the Illinois Supreme Court noted that contract provisions may be voided due to procedural unconscionability, substantive unconscionability, or a combination thereof. The court observed some measure of procedural unconscionability in Cingular's class action waiver provision, but invalidated it principally on the basis of substantive unconscionability.

The court defined procedural unconscionability as a "situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware that he was agreeing to it." It found generally unpersuasive plaintiff's argument that Cingular's service contract was long, non-negotiable and difficult to understand: "Consumers routinely sign such contracts to obtain credit cards, rental cars, land and cellular telephone service, home furnishings and appliances, loans and other products and services. It cannot reasonably be said that all such contracts are so procedurally unconscionable as to be unenforceable." Nevertheless, the court did note that the contract failed to inform the plaintiff that she would bear a portion of costs of the arbitration, which imbued the contract "with a degree of procedural unconscionability" that, while not sufficient to invalidate the waiver, was a factor to consider in conjunction with substantive unconscionability.

As for substantive unconscionability, the Illinois Supreme Court adopted a standard that "examines the relative fairness of the obligations assumed. Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." The court then considered whether the class action waiver caused oppression where the contract did not disclose that the plaintiff would have to pay for part of the arbitration, where the plaintiff's share of the arbitration would be \$125; where her claim totaled only \$150; and where the substantive nature of her claim would require the assistance of a lawyer. The court conducted a lengthy review of decisions from other jurisdictions to conclude:

If there is a pattern to these cases it is this: a class action waiver will not be found to be unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for a particular claim being asserted in a cost effective manner. If the agreement is so burdened, 'the right to seek class-wide redress is more than a mere procedural device.'

The Illinois Supreme Court observed that the provisions of the Cingular contract "operate together to create a situation where the cost of vindicating the claim is so high that the plaintiff's only reasonable, cost-effective means of obtaining a complete remedy is as either the representative or a member of the class."

In conclusion, the Illinois Supreme Court noted that courts, in assessing the enforceability of class action waivers, must make case by case determinations, and consider "the totality of the circumstances. Relevant circumstances include the fairness and balance of the contract terms, the presence of unfair

surprise, and the cost of vindicating the claim relative to the amount of damages that might be awarded under the dispute resolution provisions of the contract.”

***What Does It Mean and Why Does It Matter?*** *Smith* and *Kinkel* provide an interesting contrast – in one case the Illinois Supreme Court recognizes that class litigation can deprive the legal system of evidentiary requirements that weed out “marginal and unfounded claims,” while in the other it recognizes that class litigation may offer the only method of vindicating certain low value rights. The court is, of course, merely using cases at the polar extremes on the continuum of individual interest in litigation to articulate policies that courts must use in evaluating all class cases. In *Smith* it used a mass disaster case to illustrate the manner in which individual issues trump common issues, especially in situations where individual litigants have financial incentive to seek relief. In *Kinkel*, the court recognized the traditional rationale for the class device as motivation to enforce low value claims that would otherwise go uncompensated. (“The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” *Amchem v. Windsor*, 521 U.S. 591, 616 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

As a practical matter, both cases provide important guidance to courts and practitioners.

With respect to *Smith*, CAFA will reduce the frequency with which Illinois courts will issue certification rulings. Nevertheless, *Smith* will guide Illinois courts in cases filed before CAFA, (of which there are many), and in future single-state actions against resident defendants – cases that fall outside of CAFA’s purview. It will also provide persuasive authority in factually analogous cases in federal court.

As for *Kinkel*, the court’s decision will determine whether class claims can go forward in arbitrations, and is binding on state and federal courts alike when they analyze class action waivers under Illinois law. It sets forth a method of evaluating the conscionability of such waivers that weighs the defendant’s contract rights against the policy favoring the use of class actions in cases where individual litigants have insufficient financial incentive to pursue claims. Ironically, it gives courts a chance to assess – and possibly influence – the likelihood of certification by an arbitrator under the guise of making a conscionability determination. Where a case has a strong likelihood of certification, courts will scrutinize the circumstances of the waiver more closely. As for drafting enforceable class action waivers, *Kinkel* warns that such provisions must be conspicuous and disclose the costs of any arbitration. Moreover, a court will be more likely to enforce a class action waiver if the agreement allows the plaintiff to make a “cost effective” individual recovery. Specific provisions that may support a valid waiver could include having the defendant pay the entire cost of the arbitration except where claims are brought in bad faith; agreeing to conduct the arbitration in close proximity to the plaintiff’s residence; not limiting the remedies that the arbitrator can award; not requiring that the results of the arbitration remain confidential; and incorporating choice of law provisions that adopt the law of a jurisdiction that favors class action waivers.