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A Better Method For Achieving Broader Class Action Reform

By **Kahn Scolnick and Bradley Hamburger** (June 5, 2018, 12:36 PM EDT)

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For several years, Ted Frank and his Center for Class Action Fairness have represented objectors to class action settlements in an attempt to curtail abuses of the modern American system of class action litigation. Frank's mission is to stop what he views as flawed class actions in which "Plaintiffs' lawyers are getting rich without winning anything for their clients, and the consumers are getting ripped off."[1] His laudable goal "is to make it more difficult and less profitable for lawyers to pursue what he considers to be abusive suits."[2]

In recent months, the U.S. Department of Justice and many state attorneys general have adopted Frank's approach and assumed an increasingly active role in objecting to proposed class action settlements. These objections may stem from legitimate concerns about certain class settlement practices, but there is good reason to believe that these objections — like those of Frank — are an effort to achieve broader class action reform.

While we are sympathetic to concerns about class litigation abuse, we believe that putting up roadblocks at the settlement stage is not the best approach to reforming class actions. Rather, what is needed is for courts to exercise careful oversight at the earliest stages of litigation, by weeding out and dismissing meritless putative class claims at the outset before a defendant is subjected to expensive and intrusive discovery, and by faithfully applying Rule 23's "stringent requirements for certification that in practice exclude most claims."[3]

DOJ and State AGs Are Increasingly Objecting to Proposed Class Action Settlements

Since 2005, the Class Action Fairness Act, or CAFA, has required parties to class actions pending in federal court to provide the DOJ and state attorneys general with notice of the terms of any proposed settlement.[4] Parties who hope to settle must wait 90 days after giving this notice before a settlement can go into effect. The idea is that providing notice to the government will "safeguard plaintiff class members' rights," because it allows public officials "to voice their concerns if they believe that the class action settlement is not in the best interest of their citizens."[5]

By the DOJ's own estimate, the federal government receives around 700 CAFA settlement notices per

year.[6] But as long as CAFA has been around, the DOJ had exercised its prerogative to comment on a proposed settlement only twice, both times more than 10 years ago. This February, however, that all changed, when the DOJ filed a statement of interest objecting to a proposed class action settlement in Cannon v. Ashburn Corp., a seemingly run-of-the-mill consumer class action in New Jersey federal court.[7]

In Cannon, the plaintiffs alleged that an online wine retailer deceived consumers by selling wines at a "discount" when in fact the wines had never been sold at their purported original prices. The parties reached a proposed settlement in which class members were to receive coupons worth $0.20 to $2.25 off selected wines from the retailer's website. The parties valued the settlement at more than $10 million, and plaintiffs' counsel requested $1.7 million in fees.

Even though the federal government had no direct interest in the case, the DOJ sharply criticized the proposed deal as worthless and unfair. The DOJ argued that the settlement "provides extremely limited value to consumers and yet seeks to transfer a massive $1.7 million windfall payment to plaintiffs' counsel."[8] According to the DOJ, there was also no evidence that the class members had suffered "any actual harm," because they "received the products they ordered at the prices to which they agreed."[9] Even if there were merit to the plaintiffs' claims, the DOJ argued that the coupons — which were for a low-dollar value, were nontransferable, expired within a year, and required the plaintiffs to purchase more of the defendants' products — were so worthless that the "principal effect" of the proposed settlement must be to "induce the defendants to pay the class lawyers enough to make them go away."[10]

The DOJ was not the only governmental entity to speak up in Cannon: 19 state attorneys general filed an amicus brief, echoing many of the same critiques as the DOJ.[11] For example, the AGs complained that the proposed settlement "generates business for defendants and provides class counsel with the settlement cash while the class languishes with restricted coupons that will (at best) produce only a fraction of the value provided to class counsel."[12] The AGs also argued that the proposed settlement illustrated "precisely why CAFA exists": to empower courts to police "inherent tensions" in class action litigation, in which defendants want to "minimiz[e] the cost of the total settlement package" and class counsel want to maximize fees.[13]

The DOJ's and the state AGs' objections in Cannon had their intended effect, as the district court declined to approve the proposed settlement.[14] The court explained that it shared some of the "objectors' and the states AGs' concerns" about the value of the proposed settlement, and ultimately there were "too many questions ... without answers."[15] Yet while the district court rejected the settlement, it did not dismiss any of the class members' claims.

As Cannon demonstrates, governmental entities have now adopted the same tactic that Frank and the Center for Class Action Fairness have been using for years. And this approach to reining in questionable class actions at the settlement stage is likely to continue. The DOJ announced earlier this year that it intends to increase its scrutiny of class action settlements, saying that the DOJ is "looking to get involved" and is "already in a better position" to review proposed CAFA settlements.[16]

The alignment between Frank and governmental entities was made express in Frank v. Gaos, an important case concerning the use of cy pres in class action settlements that is currently pending before the U.S. Supreme Court. In that case, Frank himself objected to a class settlement of invasion-of-privacy claims against Google that would give plaintiffs' counsel more than $2 million in attorneys' fees, but beyond $5,000 incentive payments to the three named plaintiffs, would award no monetary recovery to

class members.[17] Instead, $5.3 million was to be allocated to a variety of nonprofit organizations.[18] Sixteen AGs filed an amicus brief in support of certiorari in Frank.[19]

The state AGs' amicus brief, in support of Frank's position, condemned the proposed cy pres-only settlement, which they argued "allows class counsel and defendants to reach a mutually beneficial settlement to the detriment of class members, who receive none of the ~$8.5 million that changes hands."[20] The AGs argued that cy pres-only settlements represent a particularly stark "conflict of interest between class counsel and their clients because the inclusion of a cy pres distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class."[21] With the AGs' backing, Frank was able to obtain Supreme Court review of his objections to this class settlement.

The Better Approach: Weeding Out Meritless Claims and Consistently Enforcing Rule 23

As Cannon and Frank illustrate, class action settlements are now facing increased governmental scrutiny. To be sure, there are legitimate reasons to call for closer examination of certain proposed settlements — for instance, to protect the interests of class members, prevent excessive fee awards, and deter any potential collusion between class and defense counsel. But Cannon and Frank suggest that the DOJ and state AGs may be focusing on attacking class settlements as an indirect means of reining in class actions more generally.

A successful objection to a class settlement does not necessarily curtail the more fundamental problem of abusive class actions — at least not for the individual defendants involved, on a case-by-case basis. Indeed, only in the rarest of cases would courts go beyond simply rejecting a proposed settlement as unfair, by declaring affirmatively that the underlying lawsuit "should have been dismissed out of hand" because it was meritless and thus "no better than a racket" for the class counsel.[22] As a result, upon the rejection of a proposed class settlement, defendants faced with these abusive lawsuits are typically in an even worse position than if the settlement had been approved, with increased litigation costs and massive potential exposure — which often results in another settlement down the road in which the defendant grossly overcompensates the class and their counsel in order to ensure court approval, even in the face of flimsy claims and speculative damages.

If the DOJ's and state AGs' overarching goal is to rein in abuses in class litigation generally, then their focus — like that of Frank — should not be at the end of a case, after a defendant has expended substantial resources in discovery, and has succumbed to the "pressure ... to settle even unmeritorious claims" that is inherent in a "court's decision to certify a class."[23] Instead, what's really needed is for lower courts to weed out meritless claims at the outset of a case, and to more consistently enforce the federal pleading standards and Rule 23 at the class certification stage.

Federal pleading standards and Article III's standing requirement are meant to impose substantial hurdles for weak cases to make it out of the starting gate. It has been well established since Twombly and Iqbal that, in order to survive a motion to dismiss, plaintiffs must go beyond reciting the elements of a claim by alleging specific facts showing a plausible entitlement to relief.[24] And two terms ago, in Spokeo Inc. v. Robins, the U.S. Supreme Court reminded lower courts that, to establish Article III standing, a plaintiff must have suffered a "concrete" injury-in-fact, i.e., an injury that "actually exist[s]."[25] It is not enough for a plaintiff to allege a "bare procedural violation" of a statute — such as a violation of the Fair Credit Reporting Act, as was the case with the Spokeo plaintiff — if that violation is "divorced from any concrete harm."[26]

For claims that can satisfy Article III and survive a motion to dismiss, the Supreme Court has made clear in recent years that Rule 23 imposes yet another substantial barrier. In Wal-Mart Stores Inc. v. Dukes, the court explained that "Rule 23 does not set forth a mere pleading standard," but instead requires plaintiffs to "affirmatively demonstrate ... that there are in fact sufficiently numerous parties, common questions of law or fact, etc."[27] The court clarified that it is not enough for plaintiffs to allege that "common 'questions'" of law or fact pertain to the whole class — any half-way competent plaintiff's counsel would be able to do that.[28] And in Comcast Corp. v. Behrend, the court held that Rule 23 mandates close scrutiny of expert damages evidence at the class certification stage. In Comcast, the court held that, in order for a class to be certified under Rule 23(b)(3), plaintiffs must show that "damages are capable of measurement on a classwide basis"; if they are not, common issues do not "predominate" over individualized ones.[29]

Yet despite these decisions, many federal courts of appeals and district courts continue to allow for easy certification of expansive class actions, often comprised of uninjured persons asserting dubious claims. Rather than treat Rule 23 as a limited procedural device designed, in the words of the Supreme Court, to "in practice exclude most claims," the trend in many of the lower courts has instead been to expand the use of class actions. For example, two circuits have held that Rule 23 can be satisfied with inadmissible evidence.[30]

Several courts of appeals have also exempted absent class members from Article III standing requirements entirely.[31] Forget Spokeo's concern that plaintiffs show a "concrete" injury; under these appellate court decisions, a case could theoretically proceed on behalf of millions of plaintiffs who need not even show that they were injured at all.

Another troubling line of cases allows classes to be certified even if class members can never be identified.[32] This rule creates several problems. With no way to determine who is actually in the class, it's impossible for courts to provide unidentified class members with effective notice of the lawsuit as required by due process and Rule 23(c)(2)(B), let alone provide redress for the class members' injuries, which is a key element of Article III standing. Failing to identify class members also hampers courts' ability to determine whether "common answers" unite all of the class members' claims, or whether common issues "predominate" over individualized ones.

Lower courts' lax enforcement of class action gatekeeping devices has real-world impacts. When class actions include members who cannot be identified or even demonstrate injury, defendants are left to defend against expansive putative classes and exponentially larger potential damages awards. And because the possibility of interlocutory appeal from a class certification order is far from certain, defendants in class actions are often left with two less-than-optimal choices: (1) settle, which often requires overcompensating the class members and their counsel, in order to secure court approval in the face of objections, or (2) face considerable costs and risks in heading to trial. Unsurprisingly, settlement is usually the least bad choice.

Of course, this is how we end up with so many of the settlements that Ted Frank — and now, the DOJ and state attorneys general — find objectionable. But government intervenors should keep in mind that seemingly low settlement figures do not necessarily reveal collusion or unfairness to class members. Rather, nominal settlement consideration offered to class members may just signal the weakness in the underlying claims. And weak claims should result in low settlements. Government intervention at the settlement stage in weak cases can have the unintended effect of increasing the cost of defending against such suits — and increasing the incentives for plaintiffs' counsel to file unmeritorious suits in the first place.

This is not to say that the DOJ and state AGs do not have an important role to play at the class settlement stage — just as Frank has played an important role in spotting potentially collusive settlements and raising his concerns with courts. There are often legitimate reasons to question the propriety of proposed settlements, and courts must discharge their fiduciary duty to ensure that class settlements are truly fair, reasonable and adequate under all the circumstances. But to the extent that the DOJ and state AGs are looking to rein in class action abuses more generally, their efforts would be better focused on the earlier stages of litigation.

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[1] Ashby Jones, A Litigator Fights Class-Action Suits, Wall St. J., Oct. 31, 2011, available at https://www.wsj.com/articles/SB10001424052970203554104577002190221107960.

[2] Caleb Hannan, This Lawyer is Making it Less Profitable to Sue When Companies Merge, Bloomberg, Aug. 2, 2017, available at https://www.bloomberg.com/news/articles/2017-08-02/this-lawyer-is-making-it-less-profitable-to-sue-when-companies-merge.

[3] Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

[4] 28 U.S.C. § 1715.

[5] The Class Action Fairness Act of 2005, S. Rep. 109-14, at 28 (2005).

[6] U.S. Dep't of Justice, Associate Attorney General Brand Delivers Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society (Feb. 15, 2018), https://www.justice.gov/opa/speech/associate-attorney-general-brand-delivers-remarks-washington-dc-lawyers-chapter.

[7] Statement of Interest of the United States, Cannon v. Ashburn Corp., No. 16-cv-1452 (RMB/AMD) (D.N.J. filed Feb. 16, 2018).

[8] Id. at 1.

[9] Id. at 5.

[10] Id. at 1-2, 7 (quoting In re Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F.3d 551, 556 (7th Cir. 2017)).

[11] Amicus Curiae Brief of Nineteen Attorneys General, Cannon v. Ashburn Corp., No. 16-cv-1452 (RMB/AMD) (D.N.J. filed Feb. 23, 2018).

[12] Id. at 12.

[13] Id. at 10-11.

[14] Cannon v. Ashburn Corp., 2018 WL 1806046, at *1 (D.N.J. April 17, 2018).

[15] Id. at *20-21.

[16] U.S. Dep't of Justice, Associate Attorney General Brand Delivers Remarks to the Washington, D.C. Lawyers Chapter of the Federalist Society (Feb. 15, 2018), https://www.justice.gov/opa/speech/associate-attorney-general-brand-delivers-remarks-washington-dc-lawyers-chapter.

[17] In re Google Referrer Header Privacy Litig., 869 F.3d 737, 740-41 (9th Cir. 2017), cert. granted sub nom. Frank v. Gaos, 86 U.S.L.W. 3549, 3552 (U.S. April 30, 2018) (No. 17-961).

[18] Id. at 740.

[19] Brief of the Attorneys General of Arizona, Alabama, Alaska, Arkansas, Colorado, Idaho, Indiana, Louisiana, Mississippi, Nevada, North Dakota, Oklahoma, Rhode Island, South Carolina, Texas, and Wyoming as Amicus Curiae in Support of Petitioners, Frank v. Gaos, No. 17-961 (U.S. Feb. 7, 2018) [hereinafter 16 Attorneys General Amicus Br.].

[20] 16 Attorneys General Amicus Br. at 2.

[21] Id. at 4.

[22] In re Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F.3d 551, 556 (7th Cir. 2017).

[23] Shady Grove Orthopedic Assocs. PA v. Allstate Ins. Co., 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

[24] Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

[25] 136 S. Ct. 1540, 1548 (2016).

[26] Id. at 1550.

[27] 564 U.S. 338, 350 (2011).

[28] Id. at 349.

[29] 569 U.S. 27, 34 (2011).

[30] See Sali v. Corona Reg'l Med. Ctr., 889 F.3d 623 (9th Cir. 2018); In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 612-13 (8th Cir. 2011).

[31] See, e.g., Neale v. Volvo Cars of N. Am. LLC, 794 F.3d 353, 362 (3d Cir. 2015); Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014); see also generally Theane Evangelis & Bradley J. Hamburger, Article III Standing and Absent Class Members, 64 Emory L.J. 383 (2014).

[32] See, e.g., In re Petrobras Secs., 862 F.3d 250, 264 (2d Cir. 2017); Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1123 (9th Cir. 2017).