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DUE PROCESS

When a state elects to depart from the federal procedures for adjudicating aggregated claims, a question often arises whether the procedures employed by the state court satisfy the dictates of the Due Process Clause, attorney Mark A. Perry says in this BNA Insight. The author analyzes the U.S. Supreme Court's ''considerable guidance'' on this and related topics, and offers a roadmap for constitutionally adjudicating these claims in state court.

Due Process Limitations on Aggregating Claims Under State Procedural Law

BY MARK A. PERRY

In its most recently concluded term, the Supreme Court of the United States issued two decisions in federal class action cases that highlight some recurring issues involving the federal constitutional constraints on state-law procedures for aggregating claims.

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In one case, the Court reiterated that the States are not required to follow the federal procedures for class-action litigation. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2378 (2011). In the other, the Court held that absence of notice and opt-out rights ''violates due process'' where monetary claims ''predominate,'' and noted the ''serious possibility'' that this requirement extends to all monetary claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011).

Together, these decisions serve as a useful reminder that, while the states are free to devise and implement their own procedures for adjudicating aggregated claims, the Due Process Clause in particular stands as a ''backstop'' to ensure that the rights of all parties—plaintiffs, defendants, and absent persons whose interests would be affected by the judgment—are adequately protected and preserved. (By ''aggregated claims'' I mean generally those cases in which one or more identified plaintiffs proposes to represent other persons not present before the court. While the most commonly used form of aggregation is the class action, others are recognized and practiced in various jurisdictions.)

Procedural Protections

It is of course not news that the Due Process Clause prevents courts, both state and federal, from entering judgments affecting absent persons unless constitutionally sufficient procedures have been followed to protect their interests. The Supreme Court has long recognized, for example, that if the identified plaintiff is an ''inadequate'' representative of absent persons, those persons

are not bound by a judgment nominally entered against them. *Hansberry v. Lee*, 311 U.S. 32 (1940). And in general, the Court has noted that ''absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims.'' *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811 (1985).

The Supreme Court has specified certain ''minimal procedural due process protections'' that must be afforded whenever a judgment ''concerning a claim for money damages or similar relief at law'' may affect the rights of absent persons:

> The [absent] plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an ''opt out'' or ''request for exclusion'' form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members.
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> *Shutts*, 472 U.S. at 812 (internal quotations and citations omitted).

In federal court, these constitutional requirements ''are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.'' *Taylor v. Sturgell*, 128 S. Ct. 2161, 2176 (2008). Indeed, the Supreme Court has explained that ''properly conducted class actions'' are within the limited set of cases in which nonparties may constitutionally be bound to a judicial judgment. *Id.* at 2172. The Court in *Taylor* listed six categories of such cases, and held that—at least for federal cases—these categories are exclusive. ''In this area of the law,'' the Court said, ''crisp rules with sharp corners are preferable to a round-about doctrine of opaque standards.'' *Id.* at 2177 (internal quotation and citation omitted). The corollary, it should be noted, is also true: A federal class action that is not ''properly conducted''—that is, that does not adhere to the dictates of Rule 23—may violate the Due Process Clause. *Dukes*, 131 S. Ct. at 2559; *see also e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-48 (1999).

But in our system of dual sovereignty, state courts are not obligated to follow federal procedural rules. Indeed, while many States have modeled their class-action rules on Federal Rule 23, their courts may *implement* such rules quite differently. The Supreme Court made this point in a case from last term: ''Federal and state courts . . . can and do apply identically worded procedural provisions in widely varying ways.'' *Smith*, 131 S. Ct. at 2377. The example considered by the Supreme Court was Rule 23(b)(3)'s ''predominance'' requirement, which a federal court construed to mean that ''the presence of a single individualized issue . . . precluded class certification,'' while a state court construed the analogous requirement of its own rule as allowing certification even in the presence of such an individualized issue (thus ''diverg[ing] from the [federal court's] interpretation.''). *Id.* at 2378.

When a State elects to depart from the federal procedures for adjudicating aggregated claims, the question necessarily arises whether the procedures actually employed in the state-court litigation satisfy the dictates of the Due Process Clause. One way to think about this is that due process concerns are *implicated* in every case in which a court proposes to adjudicate the rights of absent persons; but the federal constitution is *violated* only where the procedural protections actually provided are deficient. *See Ortiz*, 527 U.S. at 847.

So what is a state court to do when confronted with a due process objection to aggregation? (Such an objection may be raised by the defendant even if the rights involved are those of absent persons on the other side of the ''v.'' *Shutts*, 472 U.S. at 804-06.) Here the Supreme Court has offered considerable guidance, in cases arising from both state and federal courts. The former directly resolves the due process issues, since the Supreme Court has no authority to review state law procedures in the absence of a constitutional claim. The latter often addresses due process concerns, and the Court's analysis of federal procedural rules often parallels questions arising under state procedures. Thus, while States are free to depart from federal procedures, and often do, the Supreme Court's approach to aggregate litigation in federal cases provides something of a roadmap for constitutionally adjudicating similar claims in state court.

Notice, Opt-Outs, And Adequacy of Representative

The first step is to examine the need for, and sufficiency of, notice to all persons potentially affected by the judgment. We know that notice is required where monetary claims ''predominate,'' and the Supreme Court recently indicated that there is a ''serious possibility'' that entry of any monetary judgment would violate due process in the absence of notice. *Dukes*, 131 S. Ct. at 2559. Thus, at least where money is at stake, the prudent course is to require notice. On the other hand, if the representative plaintiff is seeking *only* declaratory or injunctive relief—with no monetary claims at all—then notice may not be required, at least so long as the claim fits within a historical tradition of representative adjudication. *See* Fed. R. Civ. P. 23(b)(2). As the Supreme Court has explained, Federal Rule 23(b)(2), which governs such cases, ''does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause.'' *Dukes*, 131 S. Ct. at 2559.

Closely aligned with the procedural protection of notice is the provision of opt-out rights—the ability of absent persons, upon receiving notice of the suit, to exclude themselves from it. They may do so in order to pursue their own claims individually, because they have moral or other objections to participating in the lawsuit, or for a host of other reasons. The Federal Rules provide for optional notice in some cases (such as injunction-only or limited fund class actions), but do not expressly authorize opt-outs in those cases. *See* Fed. R. Civ. P. 23(c)(2)(A). This raises an interesting question, as yet unresolved by the Supreme Court, whether there exist aggregated claims in which due process may be satisfied by the provision of notice without a corre-

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sponding right of opt-out. Where state procedures allow for such a bifurcation of procedural protections, this question could well arise.

Another related issue is *when* notice must be given. Most class actions are ultimately settled, and the federal rules require both judicial approval and mandatory notice to affected persons before such a settlement may be effectuated by judgment. *See* Fed. R. Civ. P. 23(e). The Supreme Court has observed with respect to state-court litigation that ''[m]ost jurisdictions . . . require that a class action, once certified, may not be dismissed or compromised without the approval of the court.'' *Shutts*, 472 U.S. at 810. The Court did not mention pre-settlement notice, and has not (yet) resolved whether such notice, as required by federal procedures, is constitutionally required.

A second major area of concern is the adequacy of the identified or representative plaintiff—that is, whether he or she or they can and will appropriately advance and defend the interests of the absent persons on whose behalf they purport to act. The Supreme Court has set forth minimum requirements for adequate representation:

> A party's representation of a nonparty is ''adequate'' for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and the party are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented.
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> *Taylor*, 128 S. Ct. at 2176 (internal quotations and citations omitted).

One key aspect of the adequate-representation requirement is the avoidance of conflicts among the putative claimants. If the proposed class is comprised of persons or groups with differing interests or objectives, one or another may come up short if the named plaintiff does not share those same goals. For example, bondholders may have different interests than stockholders in a corporate dispute; salaried employees may be differently situated than hourly employees in an employment dispute; and consumers may have different objectives than retailers in an antitrust or commercial fraud suit. The Supreme Court confronted this issue in a case involving latent diseases attributable to asbestos exposure, holding that there was an impermissible conflict between claimants who were presently injured and those who might manifest an injury in the future. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997).

Third, it is now well-established in federal cases that the Rules Enabling Act—the federal statute authorizing Rule 23—precludes courts from eliminating claim elements or defenses in order to certify a class action. *See Dukes*, 131 S. Ct. at 2561. In other words, if an individual plaintiff would have to prove an element in a non-class case, then the same element must also be capable of being proved in a class case. Likewise, if a defendant has a defense available in an individual case, it cannot be deprived of the opportunity to present that same defense in a class case. *Id.* (''Because the Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge or modify any substantive right, a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims'') (internal quotations and citations omitted).

Possible State Restrictions

An intriguing question is whether a similar restriction applies, as a matter of federal due process, in state cases. That is, does the Due Process Clause preclude state courts from eliminating claim elements or defenses in the service of aggregation? Justice Scalia, writing only for himself, has indicated that this practice ''implicates constitutional constraints on the allowable alteration of normal process in class actions.'' *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, Circuit Justice, on application for stay). A state court had ''eliminated any need for plaintiffs to prove, and denied any opportunity for applicants to contest,'' a particular element of the claim. *Id.* Justice Scalia, noting that ''[t]he apparent consequence of the [state court's] holding is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others' through the procedural device of the class action,'' expressed his view that this result presented a due-process problem warranting review by the full Supreme Court. *Id.* The Court, however, subsequently declined to take up the case. *Philip Morris USA Inc. v. Jackson*, 131 S. Ct. 3057 (2011).

This is an area that is likely to spawn additional litigation. Aggregate litigation often creates incentives, and opportunities, to depart from normal procedures in order to facilitate the resolution of large numbers of claims. Some such departures are entirely appropriate, and indeed required to ensure efficiency and fairness; others, however, may impair the substantive rights of absent class members or defendants, and thus raise due process concerns. There are substantial arguments that the outright elimination of a claim element or defense in furtherance of aggregation violates the Due Process Clause. While time will tell whether such arguments ultimately prevail, state courts should at minimum be cognizant of the constitutional implications of restructuring substantive law in aid of procedural devices.

Fourth, and finally for present purposes, the Due Process Clause speaks to the manner in which cases can be tried. Although most class actions eventually settle, in the absence of a pending settlement aggregation issues should be resolved with the anticipation of an actual trial that will result in a constitutional judgment. *Cf. Amchem*, 521 U.S. at 619-22 (discussing role that settlement may play in federal class certification decisions). And some of the procedures commonly invoked to facilitate aggregated proceedings—for example, bifurcation of claims, issues, or defenses—themselves raise federal constitutional concerns. *Gasoline Products Co. v. Champlin Refining Co.*, 293 U.S. 494 (1931). To identify and resolve such concerns, all courts confronted with a proposal to aggregate claims should ask whether and how they can fairly be tried so that any resulting judgment will constitutionally bind all affected persons.

Federal courts often require proponents of class certification to prepare and propose a ''trial plan'' that lays out how the case would proceed to judgment if it were certified. *See* Advisory Committee Notes to Rule 23(c)(1)(A) (2003) (''A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.''). While such a plan may not itself be

required by due process, it is a useful tool for both litigants and courts to identify constitutional problems or defects in a proposal to aggregate litigation. Thus a state court confronted with such a proposal might give serious consideration to asking the litigants to propose a trial plan as a means of evaluating the efficiency and fairness of the proposed course of action.

Conclusion

The foregoing discussion identifies some of the principal due process issues that, according to the U.S. Supreme Court, may arise in aggregated litigation in state court. But it is far from an exhaustive list: The varieties of case management procedures that may be proposed by litigants and considered by courts are nearly infinite, and each in an actual case must be set up and tested against the demands of our federal Constitution, particularly its Due Process Clause.

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