Interesting Post-Dukes Class Action Procedural Ruling

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Taking a look at the fairly recent decision denying class action certification in In re: Bisphenol-A (BPA) Polycarbonate Plastic Products Liability Litigation, 2011 WL 2634248 (W.D. Mo. July 5, 2011), we weren't as much interested in the result (denial of class certification) as in the procedure the court adopted following the Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011), decision. Heck, the plaintiffs were pursuing multi-jurisdictional class certification in Bisphenol-A. That was pretty much a lost cause for them before Dukes. Indeed, Dukes might not have been as damaging to multi-jurisdictional class actions as the Court's other recent opinion in Smith v. Bayer Corp., 131 S. Ct. 2368, 2377 (2011), which made the point that even identically-phrased enactments (rules in Smith, but equally applicable to the UCC or a Restatement section) can be interpreted differently in different jurisdictions, thus creating "different standards." Multi-jurisdictional class actions are dead as a doornail (although why a doornail is less animate than, say, a picture frame or a pencil is beyond us).

But we digress.

In Bisphenol-A, the court, after denying certification, adopted some interesting procedures. One of them was to postpone determining, one way or the other, whether single-state class actions (other than in the court's home jurisdiction) might be certifiable even though the multi-jurisdictional one plainly wasn't:

"There is also the prospect that one or more transferor courts will conclude – without the vagaries of multiple jurisdictions to worry about and a greater familiarity with that state's law – that a statewide class is appropriate.13

13 This should not be taken as suggesting that transferor courts should (or should not) certify statewide classes."

Bisphenol A, 2011 WL 2634248, at *10 & n.13.

This decision to defer single-state class certification until after an MDL remand – when judges with superior knowledge of individual states' laws would make the decisions – is rather novel. We can't think of another instance in which an MDL has left a class certification issue for a

transferor court remand, given the Rule 23(c) language about "early practicable time." In one sense it could be good for our side, since the class action purveyors will have to litigate, both in the MDL and after remand, for quite a while (and spend their own money) without knowing if there will be any "common fund" at the end of the litigation rainbow. In another sense it could be adverse for our side, depending on whether the statute of limitations is tolled in the interim. But it's certainly a significant procedural wrinkle worth thinking about.

And there's a second post-Dukes procedural innovation of sorts – one that we advocated vigorously, but not terribly successfully, back when the ALI was considering its Principles of the Law of Aggregate Litigation. That's the court's decision in its "epilogue" to give the eventual MDL transferor courts more than mere pieces of paper, such as trial plans, with which to determine if common issues actually exist or predominate. Instead, the Bisphenol-A court decided, why not try some actual cases first and let the transferor courts make their class certification decisions based upon real experience?

"In order to maximize the assistance provided to transferor courts, the undersigned intends to delay remand until after one or more cases have been litigated through final judgment. . . . The Court cannot presently assess the propriety of certification. . . . In addition, the parties should begin preparation for bringing one or more cases to trial."

Bisphenol A, 2011 WL 2634248, at *10.

While there are some epilogues we can't stand (Ron-Hermione? That pairing would produce a murder-suicide within a year.), we do like this one. We believe that the numerous individual vagaries in cases involving product-related claims tend to get glossed over by trial plans, which are sterile exercises compared to the nitty-gritty of actual trials. If more courts were to go this route, and require the trying of cases before deciding class certification, the number of certified classes – already small – would practically vanish as the trials revealed all the multitude of ways in which individual claims actually differ from one another.