Bloomberg BNA

Class Action Litigation Report®

VOL. 17, NO. 3 FEBRUARY 12, 2016

CERTIFICATION

LEGAL MALPRACTICE

The Ninth Circuit ruling in *Bobbitt v. Milberg*, allowing a nationwide class to proceed with legal malpractice claims against a prominent plaintiffs' law firm under a single state's law, offers insight into the intersection of choice-of-law principles and Federal Rule of Civil Procedure 23(b)(3)'s predominance test, and provides a ''cautionary lesson for plaintiffs and defendants alike,'' attorneys Jason H. Gould and Paul Glyn Williams say. One lesson: ''Fail to engage in the dirty details of a choice of law analysis at your peril.''

Biting The Hand That Fed Them – And Winning

BY JASON H. GOULD AND PAUL GLYN WILLIAMS

Choice of law is frequently a prominent – and sometimes a pivotal – factor in a court's analysis of whether to grant or deny certification of a nationwide or multi-state class.

Whether a federal court may apply one state's law to the claims asserted by the class rather than the law of each class member's state of domicile can significantly affect the court's evaluation of both the predominance and manageability tests set forth in Federal Rule of Civil Procedure 23(b)(3).

For obvious reasons, the parties in consumer class actions will often approach the choice of law question from opposite angles. Class counsel, seeking certification of a nationwide or multi-state class, will invariably argue that the laws of a single state (or the smallest possible number of states) should apply or that, to the extent the laws of multiple states are implicated, those laws do not materially differ.

Unsurprisingly, the party opposing class certification generally argues, whenever possible, that the need to apply the differing laws of multiple states causes individual issues to predominate over common issues and renders class treatment of the dispute unmanageable.

One prominent plaintiffs' class action firm, having made arguments for the application of a single state's law and for class certification in hundreds of cases across the country, recently found itself on the opposite (and losing) side of the same arguments. In *Bobbitt v. Milberg, LLP*, 801 F.3d 1066 (9th Cir. 2015), *petition for cert. filed, Milberg LLP v. Laber* (U.S. Dec. 8, 2015) (No. 15-734), the U.S. Court of Appeals for the Ninth Circuit elected to reverse an Arizona federal court's order denying class certification, and paved the way for a class of plaintiffs to pursue malpractice claims against their former class counsel, Milberg LLP.

The opinion, which allows a nationwide class to proceed under a single state's law, offers insight into the intersection of choice of law principles and Federal

 ISSN 1529-0115

Rule of Civil Procedure 23(b)(3)'s predominance test, and provides a cautionary lesson for plaintiffs and defendants alike.

What Went Wrong in the Underlying Litigation

In the underlying litigation, *Drnek v. Variable Annuity Life Insurance Co.*,[2] filed in 2001, the law firm then known as Milberg Weiss (and today known as Milberg LLP) represented a class of deferred annuity purchasers claiming that Variable Annuity Life Insurance Company (''VALIC'') had unreasonably induced clients into purchasing tax sheltered annuities that already earned tax-protected status. This was a large class, since VALIC had more than a million annuity customers spread among all fifty states, but it was nonetheless certified by the district court in 2004.[3] So far, so good for Milberg.

Three weeks later, however, Milberg made a mistake that proved devastating for its case: it failed to meet the deadline set for expert disclosures. When defense counsel brought this to the court's attention, the court, as a sanction, struck the class plaintiffs' expert witnesses. Without those witnesses, Milberg was unable to prove causation and damages for the named plaintiffs or the class.[4] As a result, the court vacated class certification and entered judgment for VALIC.[5]

The New Malpractice Class Action

Appeals failed, and in 2009, members of the previous *Drnek* class filed their own class action – this time against their former counsel, alleging legal malpractice against Milberg based on negligence and breach of fiduciary duties.[6] The case, styled *Bobbitt, et al. v. Milberg LLP, et al.*, was brought in the United States District Court for the District of Arizona and sought certification of the same nationwide class of plaintiffs that had been certified in the underlying case. This situation pitted Milberg directly against the class it had previously represented.

The class certification question came before the *Bobbitt* court with no reasoning from the *Drnek* court, where class certification had been granted but not explained before the case became derailed.[7] The district court, therefore, grappled anew with the problem of how to certify such a large class, noting out of the gate the elephant in the room: ''the law of up to fifty states is implicated in this case inasmuch as Plaintiffs assert a nationwide class action based on state causes of action for legal malpractice stemming from negligence and breach of fiduciary duties.''[8] That posed a choice of law problem as well as a predominance issue.

For choice of law questions, Arizona has adopted the Restatement's ''most significant relationship test,'' which calls for evaluation of various contacts according to their ''relative importance with respect to the particular issue'':

1) The place where the injury occurred;

2) The place where the conduct causing the injury occurred;

3) The domicile, residence, nationality, place of incorporation and place of business of the parties;

4) The place where the relationship, if any, between the parties is centered.[9]

Courts are charged with considering these factors qualitatively, rather than quantitatively.[10] The district court acknowledged that if such a conflicts analysis results in the application of many states' laws, it may overwhelm the ''common'' questions in the case with ''individual'' questions and thus prevent certification of the class for lack of predominance.[11] On motion for class certification, then, the district court found itself first engaging in the necessary choice of law analysis.[12] Ultimately, the court decided that the law of up to 50 states applied and declined to certify the class.[13]

The Ninth Circuit Reverses

On appeal, the Ninth Circuit approached the choice of law question very differently from the Arizona dis-

[2] Case No. 4:01-00242-TUC-WDB (D. Ariz.) (''Underlying Litigation'').

[3] *See* Underlying Litigation, Jan. 9, 2004 Order (Dkt. # 193); *Bobbitt v. Milberg, LLP*, 285 F.R.D. 424, 426 (D. Ariz. 2012) (''District Court Opinion'').

[4] Underlying Litigation, Aug. 5, 2004 Order (Dkt. # 322).

[5] Underlying Litigation, Aug. 5, 2004 Order (Dkt. # 323).

[6] District Court Opinion, 285 F.R.D. at 425.

[7] *Id.* at 426.

[8] *Id.*

[9] Restatement (Second) Conflict of Laws § 145; District Court Opinion, 285 F.R.D. at 429.

[10] *Id.* at 429.

[11] *See* Fed. R. Civ. P. 23(b)(3); District Court Opinion, 285 F.R.D. at 434 (collecting cases).

[12] District Court Opinion, 285 F.R.D. at 428-29.

[13] *Id.* at 429.

Jason H. Gould is a shareholder in the Washington, D.C. office of Carlton Fields, where he represents a variety of clients, including life insurance companies, in class actions and other complex commercial litigation disputes, including regulatory enforcement proceedings. Mr. Gould also counsels clients in a wide range of matters, including regulatory compliance, and assists clients with business practices reviews and litigation exposure analyses. Paul Glyn Williams is an associate in the Washington, D.C. office where he focuses on class action and other complex commercial litigation matters. They can be reached at jgould@carltonfields.com and pwilliams@carltonfields.com, respectively.

  CLASS ISSN 1529-0115

trict court. It analyzed the same Restatement factors but reached a different conclusion, criticizing the district court for overemphasizing the importance of the numerous domiciles of the plaintiffs and instead settling on a relatively simple answer to the choice of law question.[14]

Taking each conflicts factor in turn, the Ninth Circuit first disagreed with the district court on the ''place of injury'' test. Although the district court saw the ''place of injury'' as the place ''where the absent class members who suffered the economic loss were located,'' the Ninth Circuit viewed the injury as Milberg's ''negligent behavior,'' which took place in Arizona ''when Milberg failed to meet deadlines and make timely filings in the Arizona court.''[15] As such, the place of injury was Arizona, not the domiciles of the respective class members. This reflected a substantively different understanding of ''economic loss'' from that of the district court: for the Ninth Circuit, the injury was not the right to recover on the underlying claim, which ''remained intact after the decertification of the class,'' but the right to recover *as a class*, which was an interest held in Arizona.[16]

For much the same reason, the Ninth Circuit found that the second factor, ''where the conduct causing the injury occurred,'' also favored applying Arizona law. Unlike the district court, which had focused on ''where counsel performed the brunt of their legal work,'' the Ninth Circuit focused on the ''critical conduct causing the injury,'' which was the failure to meet deadlines in Arizona.[17] Arizona's interest in deterring bad conduct within its courts trumped the interest of each class member's state of domicile in compensating class members for their loss.[18]

The fourth factor, ''center of the relationship of the parties,'' was given little weight in the district court's analysis because the attorneys had ''no practical relationship with [] absent class members,'' who never met with their lawyers or even received class notice.[19] But the Ninth Circuit found this factor also favored the application of Arizona law; ''the test [] focuses not on the magnitude of the relationship between the parties,'' the court held, ''but on the state where the relevant relationship existed and that state's interest in the claim.''[20] Arizona's law was *de facto* the most significant because it was the *only* state in which any kind of relationship existed between Milberg and absent class members.

Analyzing these factors, the Ninth Circuit clearly favored the application of Arizona's law to the claims presented in the case rather than the law of each class member's state of residence. This left the third factor, ''domicile of the parties,'' as the one clear obstacle. As the Ninth Circuit noted, this factor had played a large part in the district court's decision below.[21] For the district court, the animating consideration had been not so much injury as compensation: plaintiffs might have been injured in Arizona, but they would be compensated in their home states, rendering the interests of their home states greater than that of Arizona.[22] While the Ninth Circuit acknowledged that some Arizona cases have given this factor ''extreme weight,'' it ultimately took a different approach and accorded the factor ''little weight'': there was ''no single state where a number of parties are 'grouped,' '' the court reasoned, and each domicile law bore ''little relation to the injury.''[23] In doing so, the court refocused the analysis from the place of compensation to the place of injury, and found that this factor did not prevent application of Arizona law.[24]

Ultimately, the Ninth Circuit concluded that the law of Arizona applied to the common law claims of a class of plaintiffs hailing from every state in the country. The court was not overly concerned with the presence of these numerous domiciles in the class;[25] rather, it criticized the district court for giving this fact, in and of itself, inordinate weight, noting that the predominance analysis was designed to ''determine the applicable law individually, rather than collectively,'' asking ''whether common questions of law related to *each* class member's *individual* claim predominate.''[26] Accordingly, the Ninth Circuit reversed the district court's order denying class certification, and remanded the case for further proceedings.

Plaintiffs Won . . . Does It Matter?

Regarding the interplay between the choice of law and predominance analyses, other federal courts have put it best: it's complicated.[27] On class certification, courts may be forced to engage in a choice of law analysis that, at an early stage in the litigation, is unlikely to yield ''clear winning and losing arguments.''[28] The Ninth Circuit largely skirted this complexity by focusing so heavily on the place of injury – a powerful factor in this case and one that is likely to minimize the ripple effects of the *Bobbitt* opinion in class certification jurisprudence. Milberg's singular act of failing to meet court deadlines was a sufficiently straightforward injury that one state's law could apply on a class-wide basis, but this will likely operate to limit the precedential significance of the opinion in situations with more inherent complexity. Such complexity is typical in large consumer class actions, including those involving the nonuniform practices of sales agents or brokers transacting business in various states.[29] Milberg cited these cases in

[14] *Bobbitt v. Milberg, LLP*, 801 F.3d at 1071-72 (''Circuit Court Opinion'').
[15] District Court Opinion, 285 F.R.D. at 429; Circuit Court Opinion, 801 F.3d at 1070.
[16] *See* Circuit Court Opinion, 801 F.3d at 1071.
[17] District Court Opinion, 285 F.R.D. at 431; Circuit Court Opinion, 801 F.3d at 1071.
[18] *See* Circuit Court Opinion, 801 F.3d at 1071.
[19] District Court Opinion, 285 F.R.D. at 430-31.
[20] Circuit Court Opinion, 801 F.3d at 1071.
[21] *Id.* at 1072.
[22] District Court Opinion, 285 F.R.D. at 430.
[23] Circuit Court Opinion, 801 F.3d at 1072 & n.3.
[24] *Id.* at 1071-72.
[25] *Id.* at 1072.
[26] *Id.*
[27] *See, e.g.*, *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 309 (3d Cir. 2011); *Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 750 (7th Cir. 2006).
[28] *Sullivan*, 667 F.3d at 309.
[29] *See, e.g.*, *In re LifeUSA Holding Inc.*, 242 F.3d 136, 147 (3d Cir. 2001); *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 211 (5th Cir. 2003); *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002); *Van West v. Midland Nat'l Life Ins. Co.*, 199 F.R.D. 448, 454 (D.R.I. 2001); *N.J. Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160, 170 (S.D.N.Y. 2011), *aff'd*, 477 F. App'x 809 (2d Cir. 2012).

its appellate brief, an irony that may not be lost on its attorneys.[30]

The Ninth Circuit's *Bobbitt* opinion also presents a clear lesson for defendants: fail to engage in the dirty details of a choice of law analysis at your peril. To some extent, plaintiffs in *Bobbitt* ''got lucky.'' As noted by the court below, it was their burden to engage in a rigorous choice of law analysis and they failed to do so, a fact largely glossed over in the Ninth Circuit's opinion.[31] But equally, defendants must be aware that significant and potentially case-winning arguments on class certification may be lost if the court's choice of law analysis and determination prove adverse to their position. *Bobbitt* was a case in which putative class members numbered more than a million and resided in every state. Now, as a result of the Ninth Circuit's choice of law analysis, and unless the Supreme Court grants Milberg's certiorari petition and reverses, one state's law will apply to all claims in the case, and counsel for Milberg thus will be unable to argue on remand that the variations in the breach of fiduciary duty and/or negligence laws among the fifty states defeat Rule 23(b)(3)'s predominance requirement. This is not to say that all the prerequisites for class certification under Fed. R. Civ. P. 23 will be met – the Ninth Circuit expressly refrained from opining on the rule's other requirements.[32] But given that variations among the various states' laws was the sole basis relied upon by the district court in its decision denying class certification, a major obstacle to class certification no longer exists as a result of the Ninth Circuit's opinion.

[30] Appellee's Brief, Dkt. 31-1, at 67.

[31] District Court Opinion, 285 F.R.D. at 435 & n.6.

[32] Circuit Court Opinion, 801 F.3d at 1072 n.5.

  CLASS ISSN 1529-0115