

“What keeps you up at night?”

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Third Circuit Approves Nationwide Settlement Class Including Members Lacking A Legally Cognizable Claim Under State Law

By Francis X. Riley, III and Michael Rowan

SUMMARY

Sullivan v. DB Investments, Inc., et al., ___ F.3d ___, 2011 WL 6367740 (3d Cir. 2011) restricts the ability of the members of a settlement class to successfully object to certification under Federal Rule of Civil Procedure 23 due to differences in the state law applicable to class members. On the other hand, *Sullivan* allows entities who have suffered an injury, which is not legally cognizable under the law of their particular state, to share in a settlement fund and obtain some measure of redress for their injuries. *Sullivan* also allows defendants in nationwide class action suits to finally resolve all claims in one action (as DeBeers sought to do) and avoid the costs and risks of piecemeal litigation with entities excluded from the settlement class. Finally, *Sullivan* re-affirms the principle that a party attempting to defeat certification of a litigation class under Rule 23 may be able to do so based on differences in substantive law applicable to class members. The Third Circuit made clear that those differences take on added significance in the context of a litigation class.

BACKGROUND

On December 20, 2011, the Third Circuit, sitting *en banc*, released its long awaited decision in *Sullivan v. DB Investments, Inc., et al.*, ___ F.3d ___, 2011 WL 6367740 (3d Cir. 2011) in which it voted 7-2 to affirm the District Court’s certification of two nationwide settlement classes comprising direct and indirect purchasers of gem-quality diamonds from DeBeers, S.A. and related entities. Plaintiffs alleged that DeBeers, the undisputed dominant player in the wholesale diamond market, engaged in price-fixing and monopolization by, among other things, limiting sales to certain preferred wholesalers (direct purchasers). Those preferred wholesalers then re-sold cut or finished diamonds to jewelry manufacturers and retailers (indirect purchasers). Both the direct and indirect purchasers alleged the same antitrust injury (higher diamond prices) and sought injunctive relief under the Clayton Act. Due to the distinction in antitrust law between direct and indirect purchasers, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the direct purchasers

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sought damages under the Sherman and Clayton Acts, while the indirect purchasers sought damages only under state antitrust, consumer protection, and unjust enrichment statutes and common law.

The parties agreed to resolve their claims and the District Court preliminarily approved a nationwide settlement class consisting of direct purchasers and another class consisting of indirect purchasers. Several members of the indirect purchaser class objected to certification on the basis that common questions of law and fact did not predominate over individual issues as required by Rule 23(b)(3). Specifically, the objectors argued that the predominance requirement was not met because the substantive law of many states prohibited indirect purchasers from recovering damages for antitrust injuries. The objectors therefore believed that the settlement fund for the indirect purchaser class should be divided only among those class members who came from states which allowed indirect purchasers to recover damages for antitrust injury. The District Court rejected all objections and approved both settlement classes. The Third Circuit initially reversed certification in a split decision, but subsequently vacated that opinion and granted rehearing *en banc*.

THE THIRD CIRCUIT AFFIRMS CERTIFICATION

The issue on appeal was whether the variations in state law applicable to members of the indirect purchaser class defeated certification under the predominance inquiry of Rule 23(b)(3). The Third Circuit held that the differences in state law did not defeat certification under Rule 23(b)(3). The Third Circuit reasoned that common questions of law and fact predominated over individual issues because all purchasers (both direct and indirect) alleged a common scheme by DeBeers which resulted in a common injury (inflated diamond prices). The Third Circuit further held that the common claims and injuries alleged by all purchasers would entail the use of common proofs regardless of whether the claims were asserted under federal law or the law of the various states.

WHAT IS THE LESSON TO BE LEARNED FROM SULLIVAN?

A primary lesson from *Sullivan* is the Third Circuit's view that certification of litigation classes and settlement classes do not entail the same analysis under Rule 23. The Third Circuit concluded that “state law variations are largely irrelevant to certification of a settlement class” because settlement classes do not present the problems that may be encountered in managing, trying, and proving claims presented by a litigation class under the varying laws of numerous states.

WHAT HAPPENS NEXT?

Based on a strong dissent in which two judges opined that the majority's decision was inconsistent with recent Supreme Court precedent, and public comments made by counsel for the objectors, it is possible *Sullivan* will be appealed to the United States Supreme Court. The deadline for filing a petition for certification is on or about March 19, 2012. Saul Ewing will monitor this matter and provide an update if such a petition is filed.

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