Legal Backgrounder

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"CLAIMS SHAVING": AN EMERGING THREAT TO RIGHTS OF CLASS ACTION PLAINTIFFS

by

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Oceans of ink have been spilled detailing the extent to which consumer interests are ignored when a hard-fought class action lawsuit is finally settled. Critics from across the legal and political spectrum often bemoan the prevalence of "coupon settlements," in which lawsuits alleging that particular products or services are defective or inadequate are settled by providing class members with coupons good for the purchase of more of the product or service at issue. Such settlements receive special criticism when they are accompanied by multimillion-dollar fee payments to the attorneys who supposedly represented the interests of the class.

But for all the attention that has been devoted to abuses that occur at the end of the class litigation process, when these settlement deals are struck, precious little attention has been paid to an even more prevalent tactic that undermines consumers' legal interests at the very beginning of the litigation process. The practice of "claims shaving" (whereby plaintiffs' attorneys affirmatively waive certain claims on behalf of absent class members) has been around for years, but recently has gained momentum as the tactic of choice among attorneys seeking a convenient way to evade federal removal jurisdiction, or to eliminate nettlesome individualized issues that might preclude class certification. Whatever its purpose, claims shaving is at least as serious a threat to the due process rights of unwitting class members in consumer class actions as are worthless settlements.

Why would a plaintiff or plaintiff's attorney ever seek to waive a particular claim on behalf of absent class members? The answer may not be obvious. After all, one would think that both the range of possible relief and the jury appeal of a particular case would only increase with an increase in the number of legal theories asserted in the complaint. Yet in class actions, the interests of the plaintiff and his or her attorneys are not always aligned with the interests of the putative class. While an individual plaintiff (or an attorney for an individual plaintiff) might prefer to pursue the widest possible range of remedies for a particular wrong, the class action plaintiff (along with his or her lawyer) has a different set of incentives. In a class action, the paramount objective is to achieve certification of the largest possible class. Because class

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certification depends on a finding that the claims asserted by the named plaintiff are sufficiently "common" that they can be advanced according to classwide proof, any claims that require individualized proof undermine this objective. Economic considerations thus lead the class action plaintiff's attorney to consider waiving any individualized claims — regardless of their potential value to particular members of the putative class — in order to secure class certification.[1]

Perhaps the classic example of attempted claims shaving arose in *City of San Jose v. Superior Court*, a nuisance case decided by the California Supreme Court in 1974. *See* 12 Cal.3d 447 (1974). In *City of San Jose*, a group of landowners sued the City of San Jose on behalf of a putative class of all individuals who owned property situated in the takeoff-and-landing pattern of San Jose Municipal Airport. Despite the fact that California law permitted a nuisance plaintiff to seek damages for annoyance, inconvenience and discomfort, actual injuries to the land, and costs of minimizing future damages, the named plaintiffs sought only one remedy — diminution in market value — and purported to waive all others, presumably because the individualized proof they would have entailed was inconsistent with class treatment. After a lower court certified the class, the California Supreme Court reversed and ordered the class decertified.

While the decision in *City of San Jose* focused specifically on one requirement for class certification — the requirement that the named plaintiffs adequately represent the class — the court's rationale had clear due process overtones. The court began by observing that "a party cannot, as a general rule, split a single cause of action because the first judgment bars recovery in a second suit" arising out of the same essential set of facts. *Id.* at 464. The court then reasoned that, "by seeking damages only for diminution in market value, plaintiffs would effectually be waiving, on behalf of the hundreds of class members, any possible recovery of potentially substantial damages — present or future." *Id.* The court rejected that possibility and imposed what it described as a "fiduciary duty" under California law (but what sounds remarkably like a due process right) requiring named plaintiffs in class actions to "raise those claims reasonably expected to be raised by the members of the class." *Id.*

The *City of San Jose* confronted the problem of claims shaving nearly thirty years ago, but the problem has continued largely unabated in the ensuing decades. In the 1980s, claims shaving arose prominently as an issue in the landmark class action precedent of *Feinstein v. Firestone Tire & Rubber Co.* *See* 535 F. Supp. 595 (S.D.N.Y. 1982). There, named plaintiffs and their attorneys sought to prosecute a class action on behalf of all purchasers of allegedly defective Firestone tires. In order to avoid the need for individualized proof concerning death, injury, accident-related property damage, and other consequential damages incurred by some class members, the named plaintiffs decided simply not to pursue those claims. Instead, plaintiffs focused exclusively on a warranty theory they contended was commonly shared by all class members: that all purchasers of the tires at issue had experienced a diminution in value based on the presence of an undisclosed alleged product defect. Echoing the due process concerns of the California Supreme Court in *City of San Jose*, the federal court in *Feinstein* denied class certification and observed that:

> It is fair to say that, during the course of preliminary hearings in this case, plaintiffs so tailored the class claims in an effort to improve the possibility of demonstrating commonality. But that improvement . . . was purchased at the price of presenting putative class members with significant risks of being

[1]The economic analysis is simple. Class action plaintiffs' attorneys are typically compensated based on a percentage of the total value they recover on behalf of the class. In a hypothetical case in which three million class members share a common claim for $1.00, 200 of whom have claims arising out of the same set of circumstances that are worth an additional $10,000.00 (but that could be asserted only based on individualized proof), the plaintiffs' attorney would receive the greatest amount of compensation if he or she achieved certification by focusing on the common $1.00 claim and attempting to waive the much more valuable — but uncertifiable — claims of the other 200 class members.

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told later that they had impermissibly split a single cause of action. *Id.* at 606.

In light of *City of San Jose*, *Feinstein*, and a number of similar decisions from other courts around the United States, one might have imagined that the problem of claims shaving would simply fade away. Instead, it only intensified, in large part because of a spate of federal appellate decisions in the 1990s making the certification of product liability classes increasingly difficult because of inherently individualized issues relating to different product designs, product use, and injuries resulting from use of particular products.[2]

Reacting to this trend in the federal courts to increase judicial scrutiny of proposed product liability class actions, class action plaintiffs' attorneys developed ever more creative theories of liability that did not require individualized proof along these lines. An inherent feature of these theories was the named plaintiffs' affirmative waiver of any claims that could not be proven based on commonly applicable classwide evidence — regardless of whether some putative class members had such claims, and regardless of whether such claims might actually be more valuable to them than the claims their supposed representatives had elected to prosecute on their behalf. Class action plaintiffs nowadays are more likely to allege that they have *not* been injured by a challenged product or service than that they have; details of actual injuries will obviously vary from plaintiff to plaintiff, with the only "common" fact being the fact of purchase. Thus, in the late 1990s and beyond (nearly thirty years after *City of San Jose*), claims shaving as a tactic for achieving class certification has continued to occupy a place in the playbook of many class action plaintiffs' attorneys.[3]

As federal courts have become more savvy to the claims shaving phenomenon, class action plaintiffs and their attorneys have attempted to develop claims shaving strategies designed to keep themselves out of federal court altogether. It is by now well-established that certain state courts are much more willing than federal courts to certify even the most outlandish classes, without feeling the need to observe the formalities and analysis that has led federal courts to be much more careful about class certification.[4] Since the choice of forum sometimes determines the certifiability of a particular class just as surely as does the commonality of the claims involved, it makes sense that class action plaintiffs and their attorneys would seek to use the claims-shaving device to achieve their forum-related objectives. They do this in two ways, both designed to prevent defendants from removing class actions to federal court: (1) by waiving claims for damages that would exceed the $75,000 threshold that confers federal jurisdiction in cases between citizens of different states; and (2) by waiving claims arising under federal law.

Pendleton v. Parke-Davis is a perfect example of how claims shaving is used by class action plaintiffs in an effort to avoid having to litigate in federal court. *See* 2000 U.S. Dist. LEXIS 18410 (E.D. La. Dec. 7, 2000). In *Pendleton*, the named plaintiffs filed a complaint in Louisiana state court that purported to waive their right to recover attorneys' fees under a particular provision of the Louisiana civil

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[2] *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *In re American Med. Sys.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

[3] *See, e.g., In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 177 F.R.D. 360, 368 (E.D. La. 1997) (denying class certification in part because named plaintiffs who challenged safety of defendant's sport-utility vehicles sought only diminution-in-value recovery, and did not seek relief for death, personal injury, or other individualized injuries incurred by subsets of putative class members).

[4] *See* John H. Beisner & Jessica D. Miller, *They're Making a Federal Case Out of It — In State Court*, 25 HARV. J. L. & PUB. POL'Y 143 (2001).

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code. The only apparent reason for doing so was that, under Fifth Circuit law, a request for attorneys' fees may be used to satisfy the jurisdictional amount requirement of 28 U.S.C. § 1332.[5] Without denying that rationale, the named plaintiffs asserted that, as "masters of the complaint," they were entitled to limit their claims in a manner that ensured their choice of forum. The district court identified the claims shaving problem and rejected their attempt to evade federal jurisdiction, stating that:

> [S]uch a waiver [of attorneys' fees] is not in the best interest of the class as a whole. Attorney fees recoverable under Article 2545 are in addition to actual damages and are paid directly to the Plaintiffs by the Defendants in the event that the Plaintiffs prevail. If this right is waived, then attorney fees will only be awarded under Article 595, the Class Action Statute. Consequently, said attorney fees will be paid out of the damages recovered by the Plaintiffs, thereby reducing the amount of damages that each class member actually received. . . . [T]he representative plaintiffs cannot purport to take such action to deprive class members of their mandated recover of attorney's fees beyond the damage recovery and to pay attorney's fees out of their recovery. . . . Such action is not in the best interest of the class members whom the named parties and their attorneys purport to represent.

Pendleton, 2000 U.S. Dist. LEXIS 18410, at *15-16.

More recently, the Fifth Circuit has instructed district courts to watch out for jurisdictional claims shaving, observing among other things that "it is improbable that [named plaintiffs] can ethically unilaterally waive the rights of the putative class members . . . without their authorization." *See Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 724 (5th Cir. 2002).

The phenomenon of claims shaving, in short, is just as real a threat to the interests of consumers as the phenomenon of the valueless class settlement. Even more often than the reported case law would suggest, class action plaintiffs and their attorneys are engaged in a calculated process of waiving consumers' legal rights when the plaintiffs and their attorneys perceive that doing so would enhance their ability to obtain class certification (and the enhanced fee awards that go along with certification). For those who disdain valueless coupon settlements and similar features of modern class action practice, claims shaving merits serious attention.

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[5] *See In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995), *aff'd by an equally divided court sub nom. Free v. Abbott Labs.*, 529 U.S. 333 (2000).

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