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Certification of a National Class Under State Law: Is *Electronic Arts* a Trend or an Outlier?

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In opposing class actions, defendants often rely on variations among state laws to defeat certification by arguing that common questions of law do not predominate and that manageability problems preclude certification. Where claims are certified in a multistate class action, it has become increasingly common for courts to certify state sub-classes for claims under state law. These courts have reasoned that the law of the jurisdiction where the consumer allegedly was affected by the defendant's conduct—typically his or her home state—most properly applies to govern that plaintiff's claim. In December 2010, however, Judge Vaughn Walker of the United States District Court for the Northern District of California certified a nationwide class under the law of a single state, California, in *Pecover v. Electronic Arts, Inc.*,[1] an antitrust action involving videogame maker Electronic Arts (EA). The *Electronic Arts* decision allows consumers from around the country to pursue claims under California state law solely based on the defendant's contacts with California, even where the majority of the class purchased the product in another state and had no contacts with California at all.

This ruling has important implications for class action practice, not only in antitrust matters, but also in consumer and products liability class actions where the question of which law applies is central to certification of a class. Differences among state laws persist for many claims brought by consumers, including claims under state antitrust laws and consumer protection statutes. If the law of a single state with more permissive liability standards (such as California) is applied to a national class, then that state's law effectively becomes "national" law and may supersede contrary policy judgments reflected in other states' laws. In *Electronic Arts*, the plaintiffs are indirect purchasers who, as a result of Judge Walker's decision, can maintain antitrust damages claims under California law even though many of them are barred by *Illinois Brick Co. v. Illinois* from pursuing claims under the antitrust laws in their home states.[2]

EA unsuccessfully petitioned for appellate review of Judge Walker's decision under Federal Rule of Civil Procedure 23(f). As a result, Judge Walker's decision continues to stand in tension with other district court decisions, both in the Ninth Circuit and elsewhere, denying certification of a nationwide class action under one state's law. With this split in authority, the plaintiffs' bar may rely on the *Electronic Arts* ruling to argue for the certification of nationwide classes with increased frequency.

The Certification Decision in Pecover v. Electronic Arts

In *Electronic Arts*, two videogame purchasers alleged that by securing exclusive licenses to make video games featuring NFL and NCAA teams, EA foreclosed competition in the market for football videogames and caused consumers to pay more for those games than they would have otherwise.[3] Significantly for purposes of their antitrust claims, the plaintiffs were indirect purchasers, meaning that they bought their videogames not from EA, but from an intermediary, such as Wal-Mart or Best Buy.

Plaintiffs' complaint included six counts: (1) violation of Section 2 of the Sherman Act; (2) violation of California's antitrust statute, the Cartwright Act; (3) violation of California's Unfair Competition Act; (4) unjust enrichment; and, in the event the court did not apply California law on a nationwide basis, (5) violation of other state antitrust laws and (6) violation of other state consumer protection statutes.[4] Following the court's ruling on EA's motion to dismiss, the surviving claims consisted of (1) a count for violation of Section 2 of the Sherman Act to the extent the plaintiffs sought injunctive relief, (2) the California state law causes of action, and (3) a claim for violation of the District of Columbia's Consumer Protection Procedures Act.[5] The court held that the two plaintiffs, who purchased their video games in California and in the District of Columbia, lacked standing to bring claims under the laws of any other states.[6]

Plaintiffs then moved for certification pursuant to Federal Rules of Civil Procedure 23(b)(2) and 23(b)(3). The court refused to certify a Rule 23(b)(2) class after concluding that plaintiffs did not establish that injunctive relief predominated over their claims for monetary damages.[7]

For the damages class, plaintiffs proposed a nationwide class under California law or, alternatively, the certification of 20 state subclasses, for several states that allow indirect purchaser claims.[8] The court certified the requested nationwide damages class over EA's objection that constitutional limitations prevented the class-wide application of California law. Before applying one state's law to a national class, *Phillips Petroleum Co. v. Shutts* requires the court to determine whether there is a significant conflict of law and, if so, whether the forum state has a "significant contact or significant aggregation of contacts" to ensure that the application of its law "is not arbitrary or unfair."[9] In finding there were significant contacts, Judge Walker emphasized EA's connections with California, including the location of its headquarters there (which was noted on the videogame packaging), the fact that the licensing agreements at issue originated, in part, in California, and the fact that the company's retail contracts included a choice-of-law clause selecting California law.[10] The court reasoned that these contacts were sufficient to support the application of California law without running afoul of *Shutts*.[11]

In opposing certification, EA argued that state law differences, including variations between the states on indirect purchaser standing, created a conflict and prevented certification. EA emphasized that each state has an interest in regulating conduct affecting its resident consumers and in making its own policy judgments about the most effective manner in which to do so.[12] After noting that even the plaintiffs conceded that state law differences existed, the court reasoned that to the extent California law exceeds the protections afforded by other states, other states "have no legitimate interest in denying higher recoveries to their residents."[13] The court also went so far as to note that "the relative interests of other states generally is not a matter of *constitutional* concern" for due process.[14] The court held that it was EA's burden to prove that California law did not apply and concluded that it had not done so.[15]

Importantly, Judge Walker's decision stands in tension with several other district court opinions, including others in the Northern District of California,

denying certification of a nationwide class under the law of a single state.[16] In other antitrust actions, for instance, courts have declined to certify a national class under the laws of a state that allows for indirect purchaser claims.[17] One prominent example is Judge William G. Young's ruling in the *Relafen* antitrust litigation in the District of Massachusetts, which declined to apply Pennsylvania law to the entire class on the basis that the defendant was headquartered there, notwithstanding the fact that Pennsylvania had a "substantial connection" to the claims given the nature of the conduct alleged.[18] The court concluded that the "more significant contact" was the "location of the sales to the [plaintiffs]," and that applying one state's law to out-of-state transactions "would be at best a novelty" and raise serious due process concerns.[19] Judge William Alsup of the Northern District of California embraced *Relafen*'s holding in denying certification of a national class under California law in the *Graphics Processing Units Antitrust Litigation*.[20]

Implications of Electronic Arts *for Antitrust and Other Class Actions*

At the very least, Judge Walker's decision contributes to a growing split in authority in the federal courts, particularly in the Ninth Circuit. As a result, there is some uncertainty as to whether, and under what circumstances, a single state's law can be applied in certifying a nationwide class. In this context, it cannot be taken for granted that conflicts between state laws—always a common tool in defense counsel's arsenal—necessarily will defeat certification.

The *Electronic Arts* decision also carries with it the potential for raising the stakes, particularly in key jurisdictions like California, that already see an abundance of class litigation activity. The prospect of certifying a single national class rather than multiple state subclasses provides an attractive incentive for plaintiffs' counsel to more aggressively pursue even more marginal cases. A national class carries with it a greatly increased potential for damages, especially when compared to the exposure represented by even a significant number of multistate subclasses. Plaintiffs' counsel may view this as providing increased leverage for settlement. This decision also may result in the filing of more putative nationwide class actions in states like California, where there is a more permissive liability standard for certain causes of action and precedent supporting the certification of a national class under the forum's law.

Yet the *Electronic Arts* decision may have some factual limitations. Notably, EA is headquartered in California, and the case involved single-firm conduct with no out-of-state conduct alleged. Of course, these facts can vary depending on a defendant's circumstances and the nature of the claims, particularly where the activities at issue—such as decisions made about design or marketing of a product or service, the location of a manufacturing facility, or conduct involving a co-defendant—occur in different locations. The analysis in *Electronic Arts* is most unfavorable for companies headquartered in California or companies with otherwise strong contacts with California. In any event, class action practitioners can expect that choice-of-law issues will remain central—and hotly disputed—when courts decide certification motions.

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[1] *Pecover v. Elec. Arts, Inc.*, No. 08-cv-02820, 2010 BL 313212 (N.D. Cal. Dec. 21, 2010).

[2] *See* 431 U.S. 720, 728-29 (1977). In *Illinois Brick*, the Supreme Court held that indirect purchasers generally may not bring damages claims under federal antitrust law. Though many states follow the rule of *Illinois Brick* and prohibit indirect purchasers from maintaining actions under state antitrust law, over 20 states and the District of Columbia recognize indirect purchaser claims.

[3] *Pecover*, 2010 BL 313212, at 2.

[4] *Pecover v. Elec. Arts, Inc.*, 633 F. Supp. 2d 976, 978-79 (N.D. Cal. 2009).

[5] *Id.* at 985.

[6] *Id.* at 984-85.

[7] *Pecover,* 2010 BL 313212, at 31-32.

[8] Pls.' Mot. for Class Certification, *Pecover v. Elec. Arts, Inc.*, No. 08-cv-02820 (filed Nov. 9, 2009), at 31-32. In moving for class certification, plaintiffs submitted declarations from residents of the remaining states to address the court's ruling on EA's motion to dismiss that the named plaintiffs lacked standing to assert claims under the laws of other states.

[9] *Philips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (quoting *Allstate Ins. Co. v Hague*, 449 U.S. 302, 312-13 (1981)).

[10] *Pecover*, 2010 BL 313212, at 37-38.

[11] Certain other courts have reasoned similarly based on the defendant's purported contacts with the forum. *See In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 69 (D.N.J. 2009) (concluding New Jersey law properly applied to consumer fraud claims, notwithstanding significant variations among state consumer protection statutes); *In re St. Jude Med. Inc. Silzone Heart Valves Prods. Liab. Litig.*, No. 01-cv-01396, 2006 BL 108360, at *7 (D. Minn. 2006), *rev'd by In re St. Jude Med. Inc. Silzone Heart Valves Prods. Liab. Litig*., 425 F.3d 1116 (8th Cir. 2005) (certifying national consumer protection class under Minnesota law based on defendant's contacts with that jurisdiction); *see also Keilholtz v. Lennox Hearth Prods. Inc.*, 268 F.R.D. 330, 340 (N.D. Cal. 2010) (holding that application of California law to nationwide class of consumer protection and warranty claims would not violate manufacturers' due process rights).

[12] *Pecover*, 2010 BL 313212, at 39 (discussing EA's counterarguments).

[13] *Id.* at 41.

[14] *Id.* at 36 (emphasis in original).

[15] *Id.* at 34-35.

[16] *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-18 (7th Cir. 2002) (collecting authorities and finding certification improper in consumer action involving warranty and consumer fraud claims, concluding that "[b]ecause these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458 (E.D. La. 2006) (holding that law of putative class members' home states properly applied to product liability claims); *In re Pharm. Indus. Average Wholesale Price Litig.*, 230 F.R.D. 61, 83 (D. Mass. 2005) (concluding that laws of plaintiffs' home states applied in putative class action asserting consumer protection statute claims); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 216 (E.D. Pa. 2000) (concluding in proposed consumer fraud class action that law of the state where each purchaser resided governed, emphasizing that "state consumer protection acts are designed to protect the residents of the states in which the statutes are promulgated."); *see also In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1027-28 (N.D. Cal. 2007) (declining to apply California law to national class in antitrust action); *In re Hitachi Television Optical Block Cases*, No. 08-cv-01746, at *9-10 (S.D. Cal. Jan. 3, 2011) (same in consumer protection and warranty action).

[17] *See, e.g., In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1027-28; *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 276-77 (D. Mass. 2004).

[18] *Id*.

[19] *In re Relafen*, 221 F.R.D. at 277.

[20] *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1027-28.