Class Actions

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I. INTRODUCTION

The year 2004 was an eventful one for the development of class action law in the Eleventh Circuit. In a series of decisions prior to 2004, the court consistently paid close attention to whether the individual issues raised by claims or defenses would predominate over any common issues and would thereby render a class action either unmanageable or unfair. For example, in *Andrews v. American Telephone & Telegraph Co.*,[1] the court reversed an order certifying a class of millions of telephone service customers who challenged their phone carriers' 900-number participation because of the impossibility of applying the gaming laws of all fifty states to hundreds of 900-number programs.[2] In the related case of *Sikes v. Teleline, Inc.*,[3] the court reversed certification of a class of phone service consumers who asserted that one specific 900-number violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"),[4] because individual issues of reliance and injuries predominated.[5] In *Jackson v. Motel 6 Multipurpose, Inc.*,[6] the court reversed an

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1. 95 F.3d 1014 (11th Cir. 1996).
2. *Id.* at 1023-25.
3. 281 F.3d 1350 (11th Cir. 2002).
4. 18 U.S.C. §§ 1961-1968 (2000).
5. *Sikes*, 281 F.3d at 1362-64.
6. 130 F.3d 999 (11th Cir. 1997).

order certifying a class of motel patrons who alleged race discrimination because plaintiffs' claims required "distinctly case-specific inquiries into the facts surrounding each alleged incident of discrimination."[7] Finally, in *Rutstein v. Avis Rent-A-Car Systems, Inc.*,[8] the court reversed certification of a class of Jewish plaintiffs who were allegedly denied corporate accounts pursuant to a discriminatory policy because individual factual issues predominated.[9] In these pre-2004 cases, the Eleventh Circuit applied the predominance requirements of Federal Rule of Civil Procedure 23(b)(3)[10] more consistently than some of its sister circuits.

II. KLAY V. HUMANA, INC.

Viewed in this context, the court's 2004 decision in *Klay v. Humana, Inc.*[11] is all the more notable. In *Klay* the court affirmed the district court's Rule 23(b)(3) certification of the national class of doctors who had submitted at least one claim for payment to any of the various defendant health maintenance organizations ("HMOs") between 1990 and 2002.[12] Plaintiffs, a group consisting of nearly every physician in the United States, alleged that defendant HMOs conspired to deny payments to physicians in violation of various RICO provisions.[13]

Plaintiffs consisted of two main groups: physicians compensated under a fee-for-service plan and those compensated under capitation plans. Under a fee-for-service plan, an HMO reimburses doctors for medically necessary treatment performed on a covered patient. To receive payment for services rendered, doctors submit forms to the HMOs that identify medical procedures by standardized codes reflecting the nature and difficulty of the procedures. Plaintiffs alleged that the HMOs' computer systems were designed to systematically underpay doctors through a variety of methods including: denying payment for certain codes representing expensive procedures; interpreting codes as requests for reimbursement of less expensive procedures; grouping codes for several procedures together as only a single code; and delaying reimbursement.[14]

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7. *Id.* at 1006.
8. 211 F.3d 1228 (11th Cir. 2000).
9. *Id.* at 1240-41.
10. FED. R. CIV. P. 23(b)(3).
11. 382 F.3d 1241 (11th Cir. 2004), *cert. denied*, 125 S. Ct. 877 (2005).
12. *Id.* at 1246.
13. *Id.*
14. *Id.* at 1246-48.

Plaintiffs further alleged that defendants intentionally denied and delayed payments under capitation plans. Under a capitation plan, a patient specifies a doctor as his "primary care provider," and the specified physician receives a small monthly fee, or capitation payment, for each patient registered to him. The physician then must provide all medical services the patient requires. Plaintiffs alleged that the HMOs underpaid the physicians by failing to pay capitation fees for many patients who registered with a physician but never actually visited him and by failing to pay the physicians the leftover funds intended to cover a patient's prescription medications. Like the fee-for-services plaintiffs, the capitation-plan plaintiffs also alleged the same grievances for reimbursement claims that were not covered under the capitation plans.[15]

On appeal, defendants primarily argued that the common issues of fact and law upon which the RICO violations were alleged did not predominate over the issues specific to each plaintiff.[16] The court stated that "[c]ommon issues of fact and law predominate if they 'ha[ve] a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief.'"[17] The court concluded that "[t]he existence of a conspiracy, and whether the defendants aided and abetted each other" were common issues of fact and law to all plaintiffs that predominated over the claims.[18] The court distinguished the case from *Rutstein v. Avis Rent-A-Car Systems, Inc.*[19] and *Jackson v. Motel 6 Multipurpose, Inc.*,[20] in which individualized issues predominated.[21] In those cases, "individuals were seeking to litigate separate discrimination claims that arose from a variety of individual incidents together in the same class action simply because they alleged that the acts of discrimination occurred pursuant to corporate policies."[22] In contrast, the RICO claims at issue in *Klay* were

> not simply individual allegations of underpayments lumped together, and the allegation of an official corporate policy or conspiracy is not simply a piece of circumstantial evidence being used to support such individual underpayment claims. Instead, the very gravamen of the

15. *Id.* at 1248-49.
16. *Id.* at 1251.
17. *Id.* at 1255 (quoting Ingram v. Coca-Cola Co., 200 F.R.D. 685, 699 (N.D. Ga. 2001)).
18. *Id.* (citing *In re* Managed Care Litig., 209 F.R.D. 678, 696 (S.D. Fla. 2002)).
19. 211 F.3d 1228 (11th Cir. 2000).
20. 130 F.3d 999 (11th Cir. 1997).
21. *Klay*, 382 F.3d at 1256-57.
22. *Id.* at 1257.

> RICO claims [was] the "pattern of racketeering activities" and the existence of a national conspiracy to underpay doctors.[23]

The "very heart of the plaintiffs' RICO claims" were the corporate policies and practices common to all plaintiffs, thus making the class appropriate for certification despite its massive size.[24] The court further noted that individual issues regarding reliance and damages did not preclude class certification because the circumstantial evidence used to prove reliance was "common to the whole class."[25] The court reasoned that all communications with the physicians conveyed essentially the same message: "the defendants would honestly pay physicians the amounts to which they were entitled."[26]

Although the court acknowledged its holding in *Sikes* that reliance may not be presumed in fraud-based RICO actions, it determined that "the simple fact that reliance is an element in a cause of action is not an absolute bar to class certification."[27] The court reasoned that

> while each plaintiff must prove his own reliance in this case, we believe that, based on the nature of the misrepresentations at issue, the circumstantial evidence that can be used to show reliance is common to the whole class . . . . Consequently, while each plaintiff must prove reliance, he or she may do so through common evidence (that is, through legitimate inferences based on the nature of the alleged misrepresentations at issue).[28]

The court did not address how defendant's right to defend each claim would be adjudicated.

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23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 1258.
27. *Id.* at 1257-58. In a similar vein, the Seventh Circuit also permitted certification of a RICO class in *Carnegie v. Household International, Inc.*, 376 F.3d 656 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 877 (2005). In *Carnegie* Judge Posner noted that the court was "dubious" of the Fifth Circuit's presumption against class certification in RICO cases based on the need to determine reliance on fraud and injury individually for each plaintiff. 376 F.3d at 663. To the contrary, Judge Posner explained that

> [t]he question whether RICO was violated can be separated from the question whether particular intended victims were injured, and thus can—or so a district court could determine without being thought to have abused its discretion—be resolved in a single proceeding with the issue of injury parceled out to satellite proceedings, as is frequently done in class action tort litigation.

Id.
28. *Klay*, 382 F.3d at 1259.

The court in *Klay* also rejected the argument that individualized damage issues prevented a finding of predominance.[29] The court again labored to distinguish *Sikes v. Teleline, Inc.*[30] and *Rutstein* as cases in which the need for individualized assessment of damages was enough to preclude Rule 23(b)(3) certification.[31] The court then emphasized that cases like that "rarely, if ever, come along," though it cited two of these apparent rarities, *Sikes* and *Rutstein*, in its own published decisions in the last five years.[32] The court opined that individualized damage inquiries, though necessary, could perhaps be accomplished by reference to forms.[33] The court then observed that "[i]t is ridiculous to expect 600,000 doctors across the nation to repeatedly prove these complicated and overwhelming facts."[34]

The court then examined "whether . . . plaintiffs' federal claims satisfied the second prong of the Rule 23(b)(3) test[:] [whether] a 'class action is superior to other available methods . . . .'"[35] The court recited the rule's "'non-exhaustive' list of four factors courts should take into account in making this determination": (1) class members' interests "in individually controlling the prosecution or defense of separate actions"; (2) the extent of related litigation already commenced by or against class members; (3) the desirability of concentrating claims in the particular forum; and (4) the likely difficulties of managing the class action.[36] The court then focused on the two factors the parties addressed: the desirability of litigating in a single forum and the manageability of the class.[37] The court concluded that: (1) proceeding in one forum would save the litigants time and expense; (2) the district court had already handled several preliminary matters; and (3) the individual claims were likely too small for attorneys working on a contingent fee basis to pursue them individually.[38] The court also concluded that any foreseeable manageability problems did not counsel against class certification because common issues predominated.[39] Moreover, the number of

29. *Id.*
30. 281 F.3d 1350 (11th Cir. 2002).
31. *Klay*, 382 F.3d at 1259 (citing FED. R. CIV. P. 23(b)(3)).
32. *Id.* at 1260.
33. *Id.*
34. *Id.*
35. *Id.* at 1269 (quoting FED. R. CIV. P. 23(b)(3)).
36. *Id.* (quoting Miles v. America Online, Inc., 202 F.R.D. 297 (M.D. Fla. 2001)).
37. *Id.*
38. *Id.* at 1270-71.
39. *Id.*

problems arising from class certification would be fewer than the potential problems if class members filed 600,000 separate lawsuits.[40]

Although it approved the certification of the RICO class, the court determined that individualized issues of fact on the breach of contract claims would predominate and that class certification should not be permitted.[41] The court noted that there appeared to be no material differences among state laws addressing the breach of contract issue.[42] The court hesitated to conclude that common issues predominated because of the number of contracts and not all plaintiffs had signed the same form contract.[43] The fact that defendants had conspired to underpay doctors and accordingly programmed their computers did nothing to establish that any individual doctor was underpaid on any particular occasion. The court also observed that defendants breached their contracts in a variety of specific ways that were not subject to generalized proof for a large number of physicians.[44] For the same reasons, the court determined that the unjust enrichment claims and claims under state prompt-pay statutes also could not be certified.[45] The state prompt-pay statutes, the court noted, differed from each other and entailed additional individualized determination of fact that precluded certification.[46]

The opinion in *Klay* is noteworthy for its rhetorical flourishes. The court seems, at times, vehemently unsympathetic to the managed care industry that was plaintiffs' target. *Klay* is difficult to reconcile with the court's prior application of Rule 23(b)(3)'s predominance and superiority requirements. Moreover, by approving the certification of a federal RICO class but disapproving the certification of the breach of contract claims, the opinion seems internally inconsistent. Future cases, therefore, are likely to limit the decision to its facts.

Klay is also significant for rejecting a few lines of argument against class certification that have been successful in other circuits. For example, the court rejected the Seventh Circuit's observation that a class action is not superior to other means of resolving the dispute when the case puts "'the fate of an industry in the palm of its hand.'"[47] The

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40. *Id.* at 1273.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* It is not entirely clear why the same analysis did not preclude certification of the even more complex RICO claims.
45. *Id.*
46. *Id.*
47. *Id.* at 1274 (quoting *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995)).

court responded, "[w]e are courts of justice, and can give the defendants only that which they deserve; if they wish special favors such as protection from high—though deserved—verdicts, they must turn to Congress."[48] The court declared: "[i]t would be unjust to allow corporations to engage in rampant and systematic wrongdoing, and then allow them to avoid a class action because the consequences of being held accountable for their misdeeds would be financially ruinous."[49]

The court then dismissed the idea that pressure on a defendant to settle is a sufficient reason to avoid certifying a class.[50] The court noted that settlement pressures are a factor in considering whether to accept an interlocutory appeal under Federal Rule of Civil Procedure 23(f),[51] but should not also be considered in the certification ruling.[52] The court also rejected a notion embraced by a leading case, *Castano v. American Tobacco Co.*,[53] that whether the underlying theories are "immature" should be a factor in the Rule 23(b)(3) superiority calculus.[54]

The court also broke new ground by drawing a distinction in the superiority determination when the defendant's alleged behavior is intentional.[55] The court observed that courts take a "harder look" at whether a defendant deserves to be subject to potentially immense liability when the subject of the action is statutory damages for unintentional acts under a strict liability standard, or for technical violations of a complex regulatory regime.[56] The court also characterized defendants as "corporate behemoths with a demonstrated willingness and proclivity for drawing out legal proceedings for as long as humanly possible and burying their opponents in paperwork and filings."[57] The court reasoned these tactics weighed in favor of class certification.[58]

Klay likely will influence the way litigants argue class certification in the Eleventh Circuit. Substantively, the decision likely will encourage the filing of more marginal federal RICO claims. Although the new

48. *Id.*
49. *Id.*
50. *Id.*
51. FED. R. CIV. P. 23.
52. *Klay*, 382 F.3d at 1275.
53. 84 F.3d 734, 747 (5th Cir. 1996).
54. *Klay*, 382 F.3d at 1275.
55. *Id.* at 1271.
56. *Id.*
57. *Id.*
58. *Id.*

Class Action Fairness Act[59] is intended to expand federal jurisdiction over class actions, plaintiffs' lawyers may come to believe, after *Klay*, that federal court is not so bleak after all.

III. COOPER V. SOUTHERN CO.

While the court in *Klay* noted that it was affirming under an abuse of discretion standard,[60] adherence to that standard was the theme of 2004's other major class action decision, *Cooper v. Southern Co.*,[61] an employment discrimination case. In *Cooper* the court held that the district court did not abuse its discretion by denying class certification because plaintiffs failed to satisfy the commonality and typicality requirements of Federal Rule of Civil Procedure 23(a)[62] or the requirements of Rule 23(b)(2) or (3).[63]

Plaintiffs alleged that Southern Company and its various subsidiaries discriminated against African-American employees in promotion opportunities, performance evaluations, and compensation.[64] Plaintiffs' proposed class included:

> All African-American persons employed by Southern Company's Corporate Office, Georgia Power Company, Southern Company Services, Inc. or Southern Company Energy Solutions, Inc., in the United States at any time from July, 1998 to the present, who are subject to the Defendants' employment, personnel and human resources policies and practices and who have been, continue to be, or may in the future be adversely affected by the Defendants' racially discriminatory employment policies and practices ("the Class").[65]

Plaintiffs claimed that although the four defendant corporations differed in management structures, working environments, and employment practices, plaintiffs were subjected to "'common promotion and compen-

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59. Class Action Fairness Act of 2005, Pub. Law No. 109-2. President Bush signed the Act into law on February 18, 2005. Ken Herman, *Bush Praises Lawsuit Curbs: Measure Puts Class Actions in U.S. Courts*, ATLANTA J.-CONST., Feb. 19, 2005, at A3. Recently passed amendments to O.C.G.A. § 9-11-23 also make class certification in Georgia state courts generally more difficult or subject to greater appellate review. *See* Ga. S. Bill 19, Reg. Sess (2005).

60. *Klay*, 382 F.3d at 1260.

61. 390 F.3d 695 (11th Cir. 2004).

62. FED. R. CIV. P. 23(a).

63. FED. R. CIV. P. 23(b)(2)-(3).

64. *Cooper*, 390 F.3d at 702.

65. *Id.* at 703.