

Class Actions

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In an important decision favoring employers, the Eleventh Circuit joined the ongoing debate among circuits regarding the procedure for certifying employment discrimination class action claims. In *Cooper v. Southern Co.*, the court ruled that a class action, in which plaintiffs predominantly seek money damages, should not be maintained under Federal Rule of Civil Procedure 23(b)(2).]

11th Circuit Reins in Class Action Certification Under Federal Rule of Civil Procedure 23(b)(2)

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Employers have reason to celebrate a recent victory in the battle among federal circuit courts regarding the availability of compensatory and punitive damages in Federal Rule of Civil Procedure 23(b)(2) class action suits. In *Cooper v. Southern Co.*, the Eleventh Circuit (covering Alabama, Florida and Georgia) reiterated its earlier holding that certification under 23(b)(2) is not proper in cases where final relief relates exclusively or predominantly to money damages. The court bolstered its stance by rejecting the plaintiffs' argument that the class could be certified under Rule 23(b)(2) only as to injunctive and declaratory relief, leaving damages issues for individual determination.

Factual Background

In *Cooper v. Southern Co.*, seven plaintiffs alleging Title VII and Section 1981 violations based on race discrimination sought declaratory and injunctive relief, back pay, and compensatory and punitive damages for a proposed class of approximately 2,400 employees. The District Court for the Northern District of Georgia denied class certification and entered summary judgment against each of the seven named plaintiffs. In upholding the district court's decision, the Eleventh Circuit held that the proposed class did not meet the commonality and typicality requirements of Rule 23(a). The court further held that the plaintiffs failed to meet their burden of establishing one of the three prerequisites set forth in Rule 23(b). In particular, the Eleventh Circuit concluded that the plaintiffs did not establish predominance or that damages were incidental to equitable and declaratory relief.

After thoroughly reviewing the record, the Eleventh Circuit delivered a lengthy and well reasoned opinion—the by product of which is a comprehensive guide for determining whether a class action should be certified. The court examined each of the requirements

of class certification under Rule 23(a)—numerosity, commonality, typicality and adequacy of representation—and determined that the trial court did not abuse its discretion in denying certification based on the plaintiffs' failure to establish the commonality and typicality requirements. Although the court's decision regarding Rule 23(a) was dispositive of the case, the court went on to address the plaintiffs' issues regarding Rule 23(b).

Rule 23(b)

In addition to the Rule 23(a) requirements, potential class representatives must also show that the action is one of the types of actions listed in Rule 23(b) as maintainable under the class action rule. In *Cooper*, the plaintiffs contended that the action qualified under both Rule 23(b)(2) and Rule 23(b)(3). Rule 23(b)(2) requires that “the party opposing the class has acted or refused to act on grounds generally applicable to the class,” thereby making broad injunctive and/or declaratory relief appropriate to the class as a whole. Rule 23(b)(3) requires that the common questions of law or fact predominate over questions affecting the class members individually and that a class action is the superior method for litigating the class claims. Of particular significance, is the court's discussion regarding class certification requirements under Rule 23(b)(2).

The court's analysis of Rule 23(b)(2) began by restating its decision in a prior case that damage claims sought under Rule 23(b)(2) “must be incidental to the equitable and declaratory relief because the basic premise of such a class action—that class members suffer a common injury properly addressed by class-wide equitable relief—begins to break down when the class seeks to recover monetary relief to be allocated based on individual injuries.” (emphasis added) In doing so, the court declined to adopt the

position taken by the Second Circuit, which has rejected this incidental damages standard.

Under the incidental damages standard adopted by the Eleventh Circuit, damages must flow directly from liability to the class as a whole. Incidental damages, therefore, will be more in the nature of a group remedy as opposed to damages requiring complex individualized determinations. Circuits lining up on this side of the debate argue that the incidental damages standard is supported by the advisory committee note to Rule 23, which explains that Rule 23(b)(2) certification is *improper where final relief relates exclusively or predominantly to money damages*. Accordingly, monetary damages must be incidental to equitable relief if class action is sought under Rule 23(b)(2).

The Eleventh Circuit notably went one step further in its alliance with the incidental damages standard, however, when it rejected the plaintiffs' argument that the district court could have certified the class under Rule 23(b)(2) only as to the injunctive and declaratory relief. The court noted that for many of the class members, monetary damages "might be of far greater significance than injunctive relief" and determining the level of damages for each class member would require "detailed, case-by-case fact finding." According to the Eleventh Circuit, this is precisely the type of individualized determinations that should not be considered "incidental" to the claims for injunctive and declaratory relief.

The court noted that the plaintiffs' argument was further weakened by their request for a jury trial because the Seventh Amendment entitles them to have all matters determined by a single jury before the trial court could make decisions regarding equitable relief. The court reasoned that even if the district court could conduct an initial bench trial on the merits of the plaintiffs' equitable claims, a single jury would have to hear more than 2,000 individual claims regarding compensatory damages.

The Cooper decision sets a high standard in the Eleventh Circuit for certifying a class seeking compensatory or punitive damages under Rule 23(b)(2), limiting use of that provision to cases where damages are incidental to injunctive relief. The Cooper court further tightened the reins on class action discrimination suits by disapproving of bifurcated classes using Rule 23(b)(2), at least under the facts of Cooper. By limiting the

district court's ability to provide opt-out opportunities on the monetary damages issue, the court effectively requires district court judges to certify these cases under Rule 23(b)(3) or not at all.

Employers May Have Won Another Circuit Court Battle, but the War is Not Over Yet

The Cooper decision puts one more circuit on the side of the debate that favors employers. Nevertheless, it is important to remember that there is still a split among the circuits regarding the use of the incidental damages standard. Employers will have to await the ultimate outcome, which will undoubtedly have to be resolved by the Supreme Court.

Conclusion

Cooper v. Southern Co. is an important case to employers because the court:

- again narrowed the interpretation of Rule 23(b)(2);
- disapproved of the "certify now and worry later" approach; and
- provides a thorough road map for determining whether a class action should be certified under Rule 23(b)(2) in future class action certification situations.

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