

## Sixth Circuit Assesses Class Action Criteria in Digestive Drug Litigation

Article By:

Litigation Group Squire Patton Boggs

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The importance of class definition was on display last week at the Sixth Circuit, in a case producing three separate opinions. In ***Rikos v. The Procter & Gamble Company***, a divided court affirmed the certification of classes covering five states and nearly half a decade of purchasers P&G’s digestive health drug Align, and in the process added to the (somewhat confusing) map of the post-*Dukes* and *Comcast* class action landscape.

Early last year, the plaintiffs sought—and the district court certified—five single-state classes led by three plaintiffs who purported to represent the purchasers of P&G’s digestive bacterial fortification drug Align. The plaintiffs alleged violations of various state laws on unfair competition and deceptive trade practices on the basis that the drug did not comport with P&G’s marketing claims about its efficacy. On appeal, P&G’s primary challenges to class certification included arguments regarding the commonality and typicality requirements of 23(a), the predominance requirement of 23(b)(3), and the developing doctrine of ascertainability.

The court rejected P&G’s claim that “[*Wal-Mart v.*] *Dukes* requires that named plaintiffs present evidence proving that class members suffered an actual common injury to establish commonality,” holding rather that the issue was “whether Plaintiffs have shown . . . that they can prove—not that have already shown—that all members of the class have suffered the ‘same injury.’” Finding the plaintiffs’ claim that Align simply did not work for anyone was a common question with a common answer and was adequate in light of *Dukes*, the court turned to typicality. On this point, the court concluded that some consumers’ satisfaction with Align was irrelevant to class certification. The court held that the typicality requirement was satisfied by the district court’s conclusion that the appropriate inquiry was “whether the purchaser received the product that was advertised.”

In its analysis, the Sixth Circuit declined to follow *Carrera v. Bayer*, the recent Third Circuit case overturning class certification due to the class’s “unascertainable” nature, citing criticism of the case by other circuits, the Third Circuit’s own subsequent limitation of the case, and the ready ascertainability of the *Rikos* classes. It also distinguished *Carrera* on its facts.

Judge Cohn penned a short concurrence, encouraging bifurcation of the case in order to assess Align’s health benefits on the merits as soon as possible and so dispose of the case. However, Judge Cook dissented from certification overall, arguing that the plaintiffs had merely pleaded, not

proven, Rule 23's requirements, in contravention of *Comcast*, *Amgen*, and *Dukes*. This is a key issue that has engendered much confusion in the caselaw in the wake of these Supreme Court decisions. Finally, the dissent found that the district court impermissibly shifted Rule 23's burden to P&G to disprove commonality, and that an examination of the drug's efficacy was a necessary intrusion into the merits of the case in line with the Supreme Court's "rigorous analysis" jurisprudence.

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