

District of Columbia Bar

Antitrust and Consumer Law Section

Presents a Summer Series Off-The-Record Brown Bag Program

Private Attorney General Actions Under D.C. Law

Presentation by Tracy D. Rezvani, Finkelstein Thompson & Loughran

CASES DISCUSSED

- *Xanthakos v. Sony BMG and Electronic Privacy Information Center v. Sony BMG*: This case involved the “root kit” issue in Sony BMG’s music CDs. The case was settled at MDL (SDNY); *Xanthakos and EPIC* did not object or opt-out. Related case, *Cooke v. Sony BMG*, filed an appeal to the Second Circuit of the preliminary approval order that sought to enjoin the Private AG action by virtue of a settlement in a class action. The appeal is pending. *Cooke* was filed by Rubin, Winston, Diercks, Harris & Cooke, LLP in Washington, D.C.
- *Kohan v. H&R Block*: The case focuses on H&R Block’s sales and marketing of Express IRA. Defendant removed under diversity jurisdiction.
- *Salzberg v. General Electric Company*: GE Monogram dishwashers (3 specified models) are alleged to be defective. Judge Retchin dismissed the Private AG and class claims without opinion. Notice of Appeal filed. David DeBruin will discuss the arguments raised by his client, GE, in obtaining the dismissal with prejudice.
- *Hoyte v. Yum!Brands, Inc. d/b/a KFC*: Suit filed June 13, 2006 to enjoin KFC from continuing to use trans fats. Suit filed by Heideman, Nudelman & Kalik, P.C.

ISSUES FOR FUTURE COURT ANALYSIS

1. **Removal & Standing**: Defendants will attempt to remove Private AG cases to federal court under diversity jurisdiction. Defendants will have the hurdle of providing a

basis for alleging the amount in controversy and the usual aggregation principles, to the extent it can be applied in DC after *Allapatah*,¹ will be the issue before the Court.

However, they can also try to use the *Williams v. Purdue Pharma* line of cases to dismiss the complaint once removed². Although a class action, and not a Private AG action, the *Williams* line of cases has been cited, with mixed success, by defendants. *Cf.* No. 03-9183, *Hakki v. Zima*, 2006 WL 852126 (D.C. Super. Court March 28, 2006)(accepting *Williams* on standing in class case) with *Reigner v. Ingersoll-Rand Co.*, No. 04-1769 (D.D.C. Nov. 23, 2004)(rejecting *Williams* reading of CPPA remedies and remanding in Private AG case). However, *Zima* did not discuss the “no injury” standing of the amended CPPA with respect to Private AG actions but in connection with a class action. However, as Superior Court opinion, its precedential value is limited. Thus, these removal and standing issues are ripe for Court of Appeals and District Court review.

Additionally, California state courts have not held themselves to the Article III standard and hence, its former Private AG provision did not raise any standing issues. California’s federal courts, however, have remanded these actions due to a lack of standing under Article III. *See, e.g., Mortera v. North Am. Mortgage Co.*, 172 F. Supp. 2d 1240 (N.D. Cal. 2001). The D.C. Court of Appeals, although an Article I court, has referred to Article III principles in the past. *Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002). Expect defendants to argue that without an injury, a Private AG suit is impossible in the District of Columbia despite the clear

¹ *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005).

² *Williams v. Purdue Pharma*, 2003 U.S. Dist. LEXIS 19268 (D.D.C. 2003)(although “disgorgement” not used in the complaint, the Court strained to find language to support the theory and held “unified interest” as a means of taking jurisdiction). Later, in a subsequent proceeding, the Court dismissed the claim for lack of standing since the plaintiff could not prove injury under the ascertainable loss theory. *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171 (D.D.C. 2003).

language of the statute. Of course, in the Superior Court, you can analogize to Qui Tam suits and argue assignment of claim from the government or argue that the statute itself confers the standing. There is case law to support such standing theories in the District and elsewhere. Thus, although likely raised by defendants as an argument in favor of dismissal, it should fail.

2. **Consolidation:** CAFA specifically carves out Private AG suits from its removal authority by holding that they are not “mass actions”. 28 U.S.C. §1332(d)(11)B(ii)(III). But what happens if you are removed, remand is denied, and the case is transferred to another court for consolidation and coordination. The legislative history of CAFA supports an argument that consolidation of Private AG claims is forbidden since consolidation is only listed for class and mass actions and private AG suits are specifically carved out. *See* S. Rep. 109-14. But what about removal under diversity jurisdiction? In other words, if removal is successful, and an action is transferred to another venue, how will the case be treated by the transferee court? Will the underlying reasoning for the CAFA carve-out, as well as the practical differences in prosecuting Private AG and class cases,³ cause courts not to consolidate?

3. **Remedies:** What types of remedies are envisioned by the CPPA for Private AG suites? Are all remedies available? Although the legislative history contains discussions of limiting the relief to injunctions and disgorgement, the statute specifically identifies injunctive relief and “additional relief as may be necessary” to restore the consumer. If

³ Private AG cases can go directly to the merits while class cases typically bifurcate discovery. Denial of class certification effectively ends the litigation as the cost of prosecuting the suit on an individual level is prohibitive. Class certification is not an obstacle to proceeding in Private AG cases. Finally, any settlement in a class case must withstand judicial and class scrutiny, with costly notice and administrative charges. Private AG cases do not require such procedures.

the Court of Appeals permits damages, how are they to be calculated on behalf of the “General Public”?

4. **Settlement:** There are a myriad of ethical, procedural, and *res judicata* issues to consider during settlement of “general public” claims. Many of the below issues have not been squarely addressed by California courts interpreting §17204:

- An injunctive remedy is easy to administer as a simple contractual agreement or order to refrain from doing a certain act. But what of monetary remedies? In the typical class action, if there is a monetary judgment or settlement (as opposed to injunctive relief), Rule 23 has procedures in place for how the class is identified, notified, and proceeds distributed. How did the DC Council envision settlement proceeds being distributed to the General Public?
- If the Attorney General obtains funds in settling an action brought under §28-3909, the monies recovered are payable to the District of Columbia Consumer Protection Fund under §28-3911. Are Private AG settlement funds also payable to the Fund? Or should they go to *cy pres* recipients? Of course, if one obtains an injunctive settlement or judgment, this issue becomes moot.
- The Department of Consumer Regulatory Affairs, under §28-3905, also is tasked with administering all settlement proceedings for cases brought by the Attorney General. Does this include administering the payment of any settlement funds to the general public (whether to direct consumers or *cy pres* recipients)?
- In *American International Industries v. Superior Court*, 72 Cal. App. 4th 1376 (Cal. App. 2nd 1999), the settlement reached by the Private AG was approved by the Attorney General’s office. There is no such requirement for AG approval in

the CPPA or under the former §17200; but it is suggested by some commentators as prudent. What will be required by the D.C. Court of Appeals?

- Can “general public” settlements bind others? What is the *res judicata* effect of such settlements? For *res judicata* to apply, should one get court approval of settlements as under Rule 23? Should defendants agree to a settlement class to be judged under Rule 23(f) to ensure that absent persons are bound? Can a mechanism like a “consent decree” for Private AGs be crafted and entered into the public record? Should injunctive relief settlements be officially entered by the Court so that they are a matter of public record?
- What are the due process implications of binding persons absent from the litigation? Does it matter if the named litigant is directly injured or uninjured (pure representative capacity)?
- What are the due process requirements on the named litigant? Does “adequacy of representation” as announced in *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), play a role? What about considerations highlighted by Rule 23(a)(4)?
- Can defendants try and “pick off” the named litigant in a representative action to avoid full liability? In class cases “picking off” the class representative is generally forbidden but §17200 didn’t specifically forbid the practice. The CPPA is also silent. However, arguably, the same ethical considerations afforded a class representatives should apply to private attorney generals. Besides, an individual settlement provides no *res judicata* effect for the defendants and hence no “peace of mind” against future suits (individual, class or other general public).

5. Discovery: What discovery obligations will be placed on Private AGs? Can a defendant seek their deposition, documents in their possession, or responses to interrogatories or requests for admission? Will this answer be different if dealing with an individual versus an organization serving as the litigant? Does it matter if the litigant is a directly injured versus an uninjured Private AG?

“Private Attorney General” under the Consumer Protection Procedures Act

Current D.C. Code § 28-3905(k)(1) - Consumer Protection Procedures Act (CPPA):

A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia and may recover or obtain the following remedies:

- (A) treble damages, or \$1,500 per violation, whichever is greater, payable to the consumer;
- (B) reasonable attorney’s fees;
- (C) punitive damages;
- (D) an injunction against the use of the unlawful trade practice;
- (E) in representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or
- (F) any other relief which the court deems proper.

D.C. Code § 28-3905(k)(1) prior to amendments effective October 19, 2000:

Any consumer who suffers any damage as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia within the jurisdiction of the Department may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following:

- (A) a civil fine, payable to the Department, not to exceed \$500 per violation;
- (B) treble damages, or \$1,500 per violation, whichever is greater, payable to the consumer;
- (C) reasonable attorney’s fees;
- (D) punitive damages; and
- (E) any other relief which the court deems proper.

[*See Williams v. Purdue Pharma Co.*, 297 F. Supp. 171, 175-78 (D.D.C. 2003) (“only a ‘consumer who suffers any damages’ could bring [CPPA suit] before October 2000”)]

Former California Business and Professions Code § 17204:

Actions for injunction pursuant to this chapter may be prosecuted by the Attorney General or any district attorney or any city attorney . . . in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association or by *any person acting for the interests of itself, its members or the general public.*

Legislative History:

“Consumer Protection in the District of Columbia Following the Suspension of DCRA Enforcement of the Consumer Protection Procedures Act,” April 1999 Report of the D.C. Bar’s Antitrust Trade Regulation and Consumer Affairs Section (Principal Authors: Carl Messineo, Don Resnikoff, Patricia Sturdevant, Mara Verheyden-Hilliard) at 7-8:

One of the “critical shortfalls in the existing system”: “Public interest organizations, and private attorneys do not have the ability to seek injunctive relief and disgorgement of illegal proceeds in the public interest, as provided for example, by California consumer protection law.” [footnote to Cal. Bus. & Prof. Code §17200]

Under existing D.C. law, a public interest organization cannot undertake representative actions to stop fraudulent conduct prior to a victim losing money. For example, under California law, an organization that monitors fraud against the elderly can take immediate action to enjoin illegal conduct, such as a fraudulent sweepstakes, before a victim loses his or her life savings.

Proposed statutory language to implement recommendations in April 1999 Report. Presented by Mara Verheyden-Hilliard to D.C. Council’s Committee on Consumer and Regulatory Affairs at March 29, 2000 hearing on the FY 2001 budget.

California cases construing § 17204:

Hernandez v. Atlantic Finance Co., 164 Cal. Rptr. 279, 283-84 (Cal. Ct. App. 1980) (§ 17204 allows suit to be “brought by any person acting in his own behalf *or* on behalf of the general public” even if “not personally damaged by the conduct...to be enjoined”).

Committee on Children’s Television, Inc. v. General Foods Corp., 673 P.2d 660, 671 (Cal. 1983) (organizational plaintiffs have standing to sue under § 17204 on behalf of general public; court does not decide whether such plaintiffs may recover damages)

Stop Youth Addiction, Inc. v. Lucky Stores, Inc., 950 P.2d 1086, 1106-15 (Cal. 1998) (Brown, J., dissenting) (“Conferring on every resident of the state the power to vindicate the public interest [under § 17204] raises substantial separation of powers issues.”)

Original “private Attorney General” case:

Associated Industries v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (Frank, J.) (citing qui tam action under Federal Informers Act and holding that “Congress can constitutionally [confer] on any non-official person...authority to bring a suit to prevent action by an officer in violation of his statutory powers....Such persons, so authorized, are, so to speak, private Attorney Generals.”)