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PLAL And Its Effects On Class Action Litigation

Law360, New York (November 14, 2008) -- The American Law Institute recently distributed the latest version of the Principles of the Law of Aggregate Litigation (PLAL) to its members.

The purpose of an ALI principles project is to make the law in a particular area more coherent without necessarily adhering to existing case law. That is certainly the case with PLAL, on both counts.

While if does add unity to an area of the law that developed largely on an ad hoc basis, it departs from existing law to do so.

In particular, PLAL takes a number of positions likely to expand significantly the scope and frequency of class actions.

PLAL reaches this result in quite a few ways, but the chief avenues by which it would expand the universe of class actions are two:

(1) It departs from the language of Federal Rule 23, and thus from most state class action rules that to a greater or lesser extent parallel Rule 23, by essentially doing away with predominance as a test for the types of claims that can be certified as class actions. “Predominance” is not found in either the black letter or the comments of PLAL.

(2) It would sanction the routine certification of what PLAL calls “common issues” — individual causes of action or elements of a cause of action — without regard to the overall commonality of the litigation or cause of action as a whole.

In terms of current procedures, PLAL would make single-issue certification under Rule 23(c)(4) the rule, rather than the exception, as such certifications are currently regarded in most jurisdictions.

These issues are related. Single issue certification under current law has always been limited precisely because of its potential affect on the predominance requirement.

If single issues could be certified as class actions without regard to whether common issues predominate across the litigation as a whole, the concept of predominance could easily be circumvented.

Widespread single issue certification would allow class action proponents to ask the court to slice causes of litigation into smaller and smaller pieces until something could be found in which a “common issue” predominated.

Both the elimination of predominance as a general restraint upon class certification and the ubiquity of single issue classes would change the existing legal landscape dramatically — leading to a significant expansion of both the types of matters amenable to class action certification and the frequency of such aggregations.

Currently, predominance is the single greatest impediment to certification of class actions in just about any action for damages.

The extent to which class action litigation would expand may be gauged by the illustrations that the ALI has appended to sections 2.01 and 2.03 of the draft PLAL — the sections in which these alterations of current law are proposed:

In §2.01, illustrations 1 and 7, the issue of reliance in a fraud case, perhaps the quintessential individual issue under current law, could be certified as a common issue should there be a “common body of evidence, if believed by the fact finder.”

In practice this example would support class certification of any “common” reliance evidence that the proponent alleges a fact finder might believe, since, of course, this supposed limitation is not testable until trial — should there ever be one, since most certified actions settle.

In §2.03, illustration 4, the common issue that supports class certification is the “geographic scope of seepage” in a point source pollution case. Such certifications are uncommon (but not unheard of) under current law because the spread of pollution is not an issue where “proof as to one” qualifies as “proof as to all.”

In such cases, no particular property owner need prove the entire “geographic scope” of the pollution. That is unnecessary. All any claimant need prove in order to recover is that the defendant polluted the specific property in question.

Section 2.03, illustration 6 provides another instance of reliance in a fraud case being a common, certifiable issue — whenever there is a “standardized sales pitch.”

The illustration fails to consider that recipients even of “standardized” pitches vary in the degree to which they actually believed what was being said.

In §2.03, illustration 8, PLAL would punch two more holes in the currently individualized reliance issue, this time where the law either imposes an “objective, reasonable-person

standard for reliance," or when the law "presumes reliance upon proof of a material misrepresentation."

In either case, however, the illustration ignores the effect of relevant legal defense.

Whatever might be the standard for the plaintiff's prima facie case, defendants do have a right to defend.

An "objective" standard might be overcome, in a particular case, with evidence that the particular plaintiff in fact acted unreasonably.

Similarly a "presumption" of reliance may be rebutted with evidence of non-reliance.

PLAL also views implied warranty cases as generally amenable to class certification.

In §2.03, illustrations 9 and 12, the "breach" issue in implied warranty of merchantability cases is a separate common issue.

Since most economic loss actions routinely include breach of warranty allegations, under PLAL class certification would become nearly universal in this type of litigation.

Another indication of PLAL's friendliness to class certification is §2.04, illustration 1, which sets forth a road map by which medical monitoring claims would not only be certifiable as class actions, but would be certifiable as mandatory, non-opt out classes.

As long as a medical monitoring claim is pleaded a demand for a monitoring "fund," that remedy is considered "indivisible" remedy because, from the plaintiffs' perspective, if one person is entitled to monitoring, then so would everyone else who's similarly affected.

The fundamental nature of PLAL remains essentially the same as in prior drafts. It would change the standard litigation model.

The rules of civil procedure, and the American legal system as a whole, contemplate individual plaintiffs (even if many of them) suing individual defendants.

If a cause of action cannot realistically be brought except in an aggregated fashion, that should call into question the viability of the claim itself, unless authorized legislatively.

Similarly, the rules of professional responsibility are poorly adapted to aggregate litigation, since they presuppose that lawyers represent, and owe their professional duties to, real clients, not legal fictions like "classes" or "consolidations."

But under PLAL, the guiding principle for aggregation decisions would no longer be whether common issues "predominate" but rather whether the arguably "common" issue sought to be certified would "drive the resolution" of the litigation.

As a replacement for existing procedural safeguards, PLAL proposes, in §2.09(A)(3), that there should be an interlocutory appeal as of right from "any determination of common issues on the merits" – that is, long after the actual certification of a single-issue class.

However, the nature of such an appeal has not received the attention it deserves, given the importance given that innovation in PLAL. Numerous foundational questions have not been addressed, such as:

(1) If such an appeal is not provided, does PLAL's approval of broad "common issue" certification break down?

(2) What is the relationship of this interlocutory appeal to existing Rule 23(f) interlocutory review of class certification, and would the creation of a later appeal decrease the use of Rule 23(f)?

(3) What would the scope of review be?

(4) What would the standard of review be?

(5) Would affirmance preclude the lower court from later revisiting certification or liability issues?

(6) Would failure to raise an issue during one of these multiple interlocutory appeals result in waiver of that issue once there is an appeal from a final judgment?

Before the current version of Rule 23 is abandoned, these questions need to be answered.

There are a number of other notable features of PLAL as currently proposed. Judicial authority to order non-consenting plaintiffs in "other proceedings" (persons not before the court) to pay "common costs" to lawyers they have not retained is allowed. See PLAL §2.09.

PLAL would create an opt-in class mechanism for anybody, anywhere in the world, to sue American defendants in American courts over events that happened overseas. §2.10.

An unsuccessful attempt to certify a class action would have no collateral estoppel effect, allowing plaintiffs to attempt certification of identical classes in other jurisdictions. §2.12.

PLAL would allow "common issue" certification on the basis of a "trial plan" that might never be implemented, instead of encouraging actual test-case trials at which the manageability of a consolidated trial could be judged in practice. §2.13.

That is not to say that there have not been any improvements in current PLAL draft. Earlier versions were even more hospitable to aggregation of litigation. This is more balanced in a number of ways:

(1) class action treatment of personal injury claims is “broadly” rejected,

(2) the right of to defend common issues with individualized proof is recognized, if not supported by any illustrations,

(3) a circular “material advancement” test for certification is gone, although whether the “drive the resolution” test that replaces it is actually any better is debatable,

(4) the draft endorses searching review (including discovery) of the allegations of the class prior to a certification decision,

(5) choice-of-law based upon a corporation’s principal place of business will be recognized as a minority view; and

(6) punitive damages in the context of class actions are treated in a more neutral fashion than before.

The current draft PLAL could be voted on by the ALI as early as May, 2009. Those whose practices involve aggregated litigation may wish to become familiar with PLAL, since even in its unadopted, draft form it has been cited by several courts.

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