# Obtaining Class Certification in New Jersey Just Became an Even More Daunting Task

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Recent decisions from New Jersey's high court and the U.S. Court of Appeals for the Third Circuit should make it more difficult for a plaintiff to obtain nationwide class certification for state-law tort claims and, most likely, certification of statewide classes for such claims. Proving that common questions of *law* predominate in multi-state classes has always been difficult. The New Jersey Supreme Court significantly raised that bar when it adopted a new choice-of-law standard in *P.V. v. Camp Jaycee*.[1] *Camp Jaycee* throws a wrench into the typical plaintiff strategy of urging the court to apply the law of a single jurisdiction nationwide to avoid the insurmountable obstacles imposed by application of the laws of many states. Similarly, the Third Circuit in *In re Hydrogen Peroxide Antitrust Litigation*,[2] ($H_2O_2$) has made it substantially more difficult to demonstrate that common questions of *fact* predominate by articulating standards of proof that district courts must follow in conducting a "rigorous analysis" of the requirements of Rule 23. Under $H_2O_2$, a district court must resolve *all* factual and legal disputes relevant to class certification, even when the disputes go to the merits and even when conflicting expert testimony is presented. Class certification will be a daunting task under these decisions, which may prove fatal to the aspirations of plaintiff class-action lawyers seeking to use New Jersey's plaintiff-friendly consumer protection laws to certify nationwide classes.

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## *International Union v. Merck*

The New Jersey high court portended the current reality in *International Union of Operating Engineers Local No. 68 Welfare v. Merck & Co., Inc.*[3] In *International Union*, the plaintiff sued on behalf of a nationwide class of third-party, non-governmental payors, alleging that Merck's marketing of the prescription drug Vioxx violated the New Jersey Consumer Fraud Act (CFA). The plaintiff argued that the CFA should apply to the entire class because New Jersey's interest in regulating the conduct of its corporate citizens outweighed any other state's interest. The Supreme Court ultimately reversed the order granting nationwide class certification because (among other reasons) it concluded that proving the essential elements of the plaintiff's CFA claim, and the defenses to those claims, would fundamentally involve individualized issues of fact, and thus, common questions of fact did not predominate.[4] Importantly, as guidance to courts facing motions to certify nationwide classes under New Jersey's then-existing choice-of-law rules, the *International Union* court declared that "certification of a nationwide class is 'rare,' and application of the law of a single state to all members of such a class is even more rare."[5]

## Choice of Law and *P.V. v. Camp Jaycee*

With its decision in *Camp Jaycee*, the New Jersey Supreme Court ushered in a new era in New Jersey conflict-of-law analysis in tort actions by abandoning the flexible "governmental-interest" test in favor of the approach embodied by the *Restatement (Second) of Conflict of Laws* (1971).[6]

In *Camp Jaycee*, the plaintiff alleged that she had been sexually assaulted by another camper during her stay at a campsite in Pennsylvania, where the defendant, a New Jersey not-for-profit corporation, operated its charitable summer program. Unlike New Jersey, Pennsylvania had abrogated charitable immunity, and therefore application of Pennsylvania law would permit the plaintiff to prosecute her claims. Reviewing the history of New Jersey's choice-of-law jurisprudence, the *Camp Jaycee* court announced that "we now apply the Second Restatement's most significant relationship standard in tort cases," requiring application of the "law of the state of the injury . . . unless another state has a more significant relationship to the parties and issues." Based upon its analysis, the court concluded that "Pennsylvania, the state in which the charity chose to operate and which is the locus of the tortious conduct and injury, has at least as significant a relationship to the issues as New Jersey, and that the presumptive choice of Pennsylvania law therefore has not been overcome."

The *Camp Jaycee* decision represents a sea change in the law regarding conflicts of law in tort cases by adopting the *Second Restatement*'s mandatory presumption that the law of the place of the injury applies. Now, the *lex loci* presumption is the starting point of the analysis and "recognizes the intuitively correct principle that the state in which the injury occurs is likely to have the predominant, if not exclusive, relationship to the parties and issues in the litigation."[7] The competing governmental

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public policies at issue—which previously were the touchstone of the analysis—are now simply one of many factors that a court must consider under *Camp Jaycee* to determine whether a state other than the one in which the injury occurred has such a significant relationship to the tortious conduct that the *lex loci* presumption must give way.

## $H_2O_2$

As if *International Union* and *Camp Jaycee* were not disheartening enough for aspiring nationwide class representatives, the Third Circuit's recent decision in $H_2O_2$ created another high hurdle to class certification. In $H_2O_2$, purchasers of hydrogen peroxide and other related chemical compounds alleged that chemical manufacturers conspired to fix prices and restrain trade, and the district court certified a class of purchasers of the chemical compounds in the United States.[8] On appeal, the Third Circuit explained that Rule 23 is not a "mere pleading rule[],"and that much more than just a "threshold showing" is necessary to meet the certification requirements of Rule 23. Instead, the $H_2O_2$ court explained the standard of proof that a plaintiff must satisfy to obtain class certification, in three significant respects. First, a plaintiff must *prove* and a district court must *find*—by a preponderance of all relevant fact and expert evidence—that each of the requirements of Rule 23 has been met. Second, the "rigorous" evidentiary and legal analysis that a district court must conduct under Rule 23 includes the resolution of factual and legal issues that go to the merits of the plaintiff's substantive claims. And third, when experts clash, the district court must resolve the conflict through factual findings. The Third Circuit found that the $H_2O_2$ plaintiffs did not satisfy their burden of proof on class certification and therefore vacated the order certifying the class.

## Predominance of Questions of Fact

In evaluating the predominance requirement in cases seeking class certification of CFA claims, district courts will now have to consider the impact of both *International Union* and $H_2O_2$. For example, in *McNair v. Synapse Group, Inc.*,[9] the plaintiffs claimed that the defendant, a marketer of magazine subscriptions, violated the CFA in automatically renewing a customer's magazine subscriptions by charging the credit or debit card used at signup unless the customer calls to cancel. In rejecting class certification and a presumption of causation advanced by the plaintiffs, the *McNair* court observed that to establish causation in a CFA case, *International Union* instructs courts to look "not only to defendant's conduct but also to the class members' conduct and then evaluate[] whether both were sufficiently uniform or common for class certification to be inappropriate." More importantly, the *McNair* court noted that *International Union* and $H_2O_2$ both reflect the principle that injury cannot be presumed.

## Predominance of Questions of Law

The holdings of *Camp Jaycee* and $H_2O_2$ recently converged in *Agostino v. Quest Diagnostics, Inc.*[10] In *Agostino*, the plaintiffs, on behalf of putative nationwide classes and sub-classes, asserted claims, under federal law, common law, and the CFA and similar consumer-protection laws of the various states, challenging the billing and collection practices of Quest and its outside debt-collection agencies. According to the plaintiffs, the CFA could be applied to the statutory-fraud claims of all members of the class. After conducting the "rigorous analysis" required by $H_2O_2$, the district court denied the plaintiffs' motion for class certification in its entirety.

Applying *Camp Jaycee* and section 148(1) of the *Second Restatement*, the *Agostino* court rejected the plaintiffs' argument that the CFA and New Jersey's common law of fraud applied to the claims of all class members because Quest's principal place of business is located in New Jersey and the allegedly unlawful billing practices occurred there. Judge Chesler found that each class member's home state represented the place where the class members received and relied upon the allegedly unlawful bills and letters. Those circumstances required application of the "strong presumption" that the law of each class member's home state applied to his or her statutory and common-law fraud claims. Seeing no evidence to rebut the presumption, the court found that "each state has an overwhelming interest in seeing its own consumer protection statute govern in cases where residents were victims of fraud perpetrated within the state's borders." The court concluded that the marked differences among the applicable consumer protection statutes and common-law fraud claims militated against certification of a nationwide class. The *Agostino* court also found class certification inappropriate because individualized (rather than class-wide) evidence was needed for the plaintiffs to prove their claims.

Judge Chesler's opinion in *Agostino* was, however, recently criticized by District Judge Debevoise in *In re Mercedes-Benz Tele-Aid Contract Litigation*,[11] where the plaintiffs sought to certify a class of individuals who purchased automobiles from Mercedes-Benz U.S.A., LLC. The plaintiffs alleged that Mercedes misled its customers by promoting automobiles equipped with "Tele-Aid," an emergency-response system that links subscribers to roadside assistance through an analog signal provided by AT&T Wireless Services, Inc. The plaintiffs' CFA claim sought relief for Mercedes's alleged failure to disclose, prior to sale, the future obsolescence of the Tele-Aid analog system. As part of its choice-of-law analysis, the *Mercedes-Benz* court applied the "most significant relationship" test but did not apply the presumption of section 148(1). Judge Debevoise found that *Agostino* "relie[d] on an interpretation of the Restatement that is at odds with the plain meaning of section 148, which calls for such a presumption only in cases where 'the plaintiff's action in reliance took place in the state where the false representations were made and received.'" According to Judge Debevoise, because the alleged omissions were not both "made and received" in the same state, section 148(2), which does not contain a mandatory presumption, was the appropriate provision to be applied.

The reasoning of *Mercedes-Benz*—which rests initially and primarily on the conclusion that section 148(1) did not apply—may well be flawed. Critical to that conclusion is Judge Debevoise's finding that the alleged omissions were "made" in New Jersey, where *Mercedes-Benz* allegedly "planned and implemented" its actions, rather than in each plaintiff's home state, where plaintiffs received and relied upon such misrepresentations. Yet it appears that Judge Debevoise did not conduct the proper analysis in determining that section 148(1)'s presumption was inapplicable.

Underlying an omissions case like *Mercedes-Benz* must be some interaction between the plaintiff and the defendant during which the defendant had an opportunity to disclose to the plaintiff a

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material fact but did not. The *Mercedes-Benz* court should have made findings of fact, on a plaintiff-by-plaintiff basis, concerning the circumstances surrounding Mercedes's alleged failure to disclose Tele-Aid's future obsolescence. Mercedes may have allegedly made the *decision*, in New Jersey, not to disclose Tele-Aid's future obsolescence, but making that decision itself did not injure any consumers, cannot serve as the basis for a cause of action under the CFA, and is not a factor to be considered under section 148(1). It is the place where *the omission was actually made* that must be considered.

Instead, *Mercedes-Benz* effectively ignored *Camp Jaycee*'s instruction that "in tort cases," without limitation, "the law of the state of the injury is applicable unless another state has a more significant relationship to the parties and issues."[12] Improperly subjugating the place of injury to the place of the defendant's domicile renders *Mercedes-Benz*, at best, questionable precedential value.

## The Third Circuit Weighs In

The Third Circuit's August 5, 2009, decision in *Nafar v. Hollywood Tanning Systems, Inc.*,[13] approving of both *Agostino* and *Fink v. Ricoh Corp.*,[14] should provide significant guidance with respect to the proper choice-of-law analysis in consumer-product class actions. Notably, the court chose to approve of the *Agostino*'s choice-of-law analysis, and its application of the presumption of section 148(1), not the analysis advocated in *Mercedes-Benz*.[15]

## Conclusion

The decisions in *International Union*, $H_2O_2$, and *Camp Jaycee,* and now *Nafar,* should have a tremendous impact on the disposition of nationwide tort class actions brought in New Jersey state and federal courts, which are bound to apply *Camp Jaycee* to state-law tort claims. In the past, the governmental-interest test allowed a court great flexibility (i.e., discretion) in identifying the applicable law. In non-class-action cases, the conclusion that the law of the home state of the defendant should apply could often easily be justified by reasoning that the policies of the home state in policing conduct occurring within its borders outweighed the policies of any other state involved.

Whether driven by parochialism or a desire for certainty in the law for corporate citizens doing business within its state's borders, a class representative stood an even better chance of persuading a court to adopt that reasoning when the court sat in the state in which the defendant resided. Now, when *Camp Jaycee* is applied to a nationwide class action alleging state-law tort claims, the court *must* start with the mandatory presumption that the law to be applied is the law of each state in which an absent class member was injured. The extraordinary circumstances that would rebut that presumption are rare indeed, perhaps even rarer than the *International Union* court could envision. And the Third Circuit's new guidance on the "rigorous analysis" required when determining whether a class representative has established the Rule 23 elements will likewise make class certification an even more difficult challenge.

## Endnotes

1. 197 N.J. 132 (2008).
2. 552 F.3d 305 (3d Cir. 2008).
3. 192 N.J. 372 (2007).
4. 192 N.J. at 388–94.
5. *Id.* at 388 n.3.
6. 197 N.J. 132.
7. 197 N.J. at 144.
8. *Id.* at 308–09.
9. 2009 U.S. Dist. LEXIS 54908 (D.N.J. June 29, 2009).
10. Civ. No. 04-4362 (D.N.J. Feb. 11, 2009).
11. 257 F.R.D. 46 (D.N.J. 2009).
12. *See, e.g., id.* at 56, 59–60 (showing that *Camp Jaycee*'s presumption of the place of injury is absent from the court's choice-of-law analysis).
13. 2009 U.S. App. LEXIS 17561 (3d Cir. 2009).
14. 365 N.J. Super. 520 (Law Div. 2003) (nationwide consumer fraud false advertising class action).
15. *Nafar*, 2009 U.S. App. LEXIS 17561 at * 12–14.