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Despite Judge Kavanaugh's thin record on class actions, one tea leaf suggests hostility to using Rule 23 to obtain a "class-wide jackpot"

by Jason Steed

Since his appointment to the U.S. Court of Appeals for the D.C. Circuit in 2006, Judge Brett Kavanaugh has sat on few class-action appeals. But now that he's been nominated to take Anthony Kennedy's place on the U.S. Supreme Court, we thought we'd take a quick look at how potential-Justice Kavanaugh has handled class actions.

Generally, Judge Kavanaugh has sided with defendants, and the consensus is that he's pro-business. But on three occasions he was part of a unanimous three-judge panel that ruled in favor of class plaintiffs. *See NB ex rel. Peacock v. District of Columbia*, 682 F.3d 77 (D.C. Cir. 2012) (holding plaintiffs had Article III standing to bring suit); *Artis v. Bernanke*, 630 F.3d 1031 (D.C. Cir. 2011) (holding plaintiffs had exhausted administrative remedies and could bring suit); *Schuler v. PricewaterhouseCoopers LLP*, 514 F.3d 1365 (D.C. Cir. 2008) (holding plaintiffs had satisfied ADEA's procedural requirements to bring suit). And on one other occasion he wrote a short opinion concurring in the judgment to create a 2-1 majority in favor of a class of retired pilots. *See Stephens v. U.S. Airways Group, Inc.*, 644 F.3d 437, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (agreeing pilots were entitled to interest on lump-sum retirement benefits under ERISA). None of these cases addressed Rule 23 issues.

Notably, Judge Kavanaugh has never written a majority opinion dealing directly with class-action issues. In *Mills v. Giant of Maryland, LLC*, 508 F.3d 11 (D.C. Cir. 2007), Judge Kavanaugh wrote an opinion affirming the dismissal of the class's claims—but the opinion doesn't address any issue specific to class actions because the case was dismissed on the merits. The *Mills* case was a class action brought by lactose-intolerant individuals against nine milk sellers, and Judge Kavanaugh's opinion (written for a panel that included Judge Merrick Garland) held that, under D.C. law, the risk that milk can cause stomach discomfort to lactose-intolerant individuals who don't yet know of their condition cannot support a failure-to-warn claim.

Similarly, in *Cannon v. District of Columbia*, 783 F.3d 327 (D.C. Cir. 2015), a class of retired police officers claimed that offsets of their salaries violated the Public Tax Act. Judge Kavanaugh wrote the majority opinion without addressing any issue specific to class actions, holding that there was no violation of the Public Tax Act as a matter of law.

Judge Kavanaugh's only notable class-action-specific opinion is his dissenting opinion in *Cohen v. United States*, 650 F.3d 717 (D.C. Cir. 2011). In *Cohen*, taxpayers brought a putative class action challenging the

adequacy of a tax-refund procedure that the IRS had established to refund excessive telephone excise taxes. The district court dismissed the action for lack of jurisdiction but the D.C. Circuit (voting 6-3, *en banc*) reversed, holding that the establishment of the refund procedure was an agency action that could be reviewed by the federal court.

Judge Kavanaugh dissented, reasoning that the federal court did not have jurisdiction to review the IRS's refund procedure because (a) the class plaintiffs already had an adequate judicial remedy through a refund suit that each plaintiff could bring individually, after following the refund procedure, and (b) the plaintiffs' claims weren't ripe until they had first gone through that procedure. 650 F.3d at 736 (Kavanaugh, J., dissenting). The introduction to his analysis suggests Judge Kavanaugh harbors at least some skepticism about the use of Rule 23 to create the risk of massive class-wide liability.

After describing the refund process the government had established, Judge Kavanaugh noted that the named plaintiffs had failed to utilize the refund process or to file an individual tax refund suit. "Instead, plaintiffs decided to up the ante." *Id.* at 737. After asking "why plaintiffs didn't simply file the relevant forms with the IRS to get refunds," Judge Kavanaugh opined that the answer "seems to be that plaintiffs are litigating primarily on behalf of others, not themselves." *Id.*

"Plaintiffs' ultimate objectives are class certification and a court order that the U.S. Government pay *billions* of dollars in additional refunds to millions of as-yet-unnamed individuals who never sought refunds from the IRS or filed tax refund suits," wrote Judge Kavanaugh. *Id.* "It seems that plaintiffs have deliberately avoided filing individual refund claims with the IRS and filing tax refund suits because they think they have a better chance of obtaining class certification if they don't take those steps." *Id.* According to Judge Kavanaugh, class certification constitutes a "necessary prerequisite to the class-wide jackpot plaintiffs are seeking here." *Id.*

A single dissenting opinion is a thin reed for predicting that a possible Justice will be hostile to class actions. But Judge Kavanaugh's opinion in *Cohen* does echo the sentiments of many class-action defendants who face a risk of massive class liability despite their efforts to resolve the issue voluntarily (or the ability of the putative class members to resolve the claim on an individual basis). Given Judge Kavanaugh's oft-mentioned pro-business tilt, class-action defendants may hope this tea leaf portends a Justice who will police perceived abuses of Rule 23 by class-action plaintiffs.