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# A Critical Step Toward Reining In Class Standing Doctrine

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In NECA-IBEW v. Goldman Sachs, the Second Circuit arguably opened up a new door in class action litigation when it held that investors in one securities offering had standing to represent a putative class of investors in other offerings, as long as the fraud claims on both securities gave rise to "the same set of concerns." The Second Circuit's recent decision in Policemen's Annuity and Benefit Fund v. The Bank of New York Mellon, argued by our colleague Charles Rothfeld, clarifies and narrows that ruling, especially as to claims for breach of contract.

At issue in Policemen's Fund were a series of residential mortgage-backed securities trusts. These trusts hold pools of mortgages and thus receive the stream of interest and principal payments from mortgage borrowers; beneficial ownership interests in the trusts are then sold to investors.

The Policemen's Fund plaintiffs are investors in 15 residential mortgage securitizations who sued the trustee (the Bank of New York Mellon) for alleged breaches of the trust agreements, state law duties and the federal Trust Indenture Act. The question in the case was whether the named plaintiffs — who had invested in some RMBS trusts within the class definition but had not invested in many others — nonetheless had standing to sue on behalf of putative class members who had invested in those other trusts. (The case also involved questions about the scope of the Trust Indenture Act; the court ultimately decided that the TIA doesn't apply to most RMBS).

The Second Circuit held that the named plaintiffs did not have standing to sue on behalf of the putative class members who had invested in trusts that the named plaintiffs had not. And helpfully for defendants, the court held that the named plaintiffs' claims did not implicate the "same set of concerns" as those of the other class members by focusing on the proof required for each claim.

Specifically, the court observed that "the absent class members' claims" in NECA "were similar to those of the named plaintiffs in all essential respects," because the alleged misstatements were in a shelf registration statement, and all of the securities were issued from the same shelf. In other words, the court explained, "the defendants' alleged Securities Act violations inhered in making the same misstatements across multiple offerings."

By contrast, the court explained, the claims at issue in Policemen's Fund required that the alleged

misconduct “be proved loan-by-loan and trust-by-trust”; the claims depend upon the potentially varying conduct of the trustee and the entities the trustee purportedly should have supervised.

The Second Circuit’s analysis thus represents a rejection of a free-floating and malleable approach, which some commentators have argued that NECA permits, to the question whether the claims involve the “same set of concerns.” Indeed, the court shot down the plaintiffs’ arguments that relied on such a nebulous conception of class standing.

First, the plaintiffs had suggested that it was the trustee’s allegedly common “policy of inaction” that was at issue, not its loan-specific conduct. That doesn’t solve the standing problem, the Second Circuit held, because “they would still have to show which [securitization] trusts actually had deficiencies that required BNYM to act in the first place.”

Second, the plaintiffs proposed to use statistical sampling to show defects across securitizations. But the court held that such a methodology, (which we have criticized before) would require that plaintiffs “augment” the proof that they would have offered on their own claims; that prospect “does nothing to reassure us that Plaintiffs themselves have any real interest in litigating the absent class members’ claims.”

Policemen’s Fund is an important step toward reining in what — if NECA-IBEW were interpreted the wrong way — could have been an unbounded test for class standing (itself a novel and amorphous doctrine). Now, if the proof that the plaintiff would present on its own claim does not — at a minimum — go a long way toward proving the claims of absent class members, then the tag-along claims may be dismissed at the pleading stage for lack of standing rather than waiting for class certification. That aspect of the Policemen’s Fund ruling significantly limits the ability of plaintiffs’ firms to leverage small investor clients who are not representative of a proposed class to bring overly broad class actions.

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***DISCLOSURE: Mayer Brown represented BNY Mellon in the case discussed.***

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