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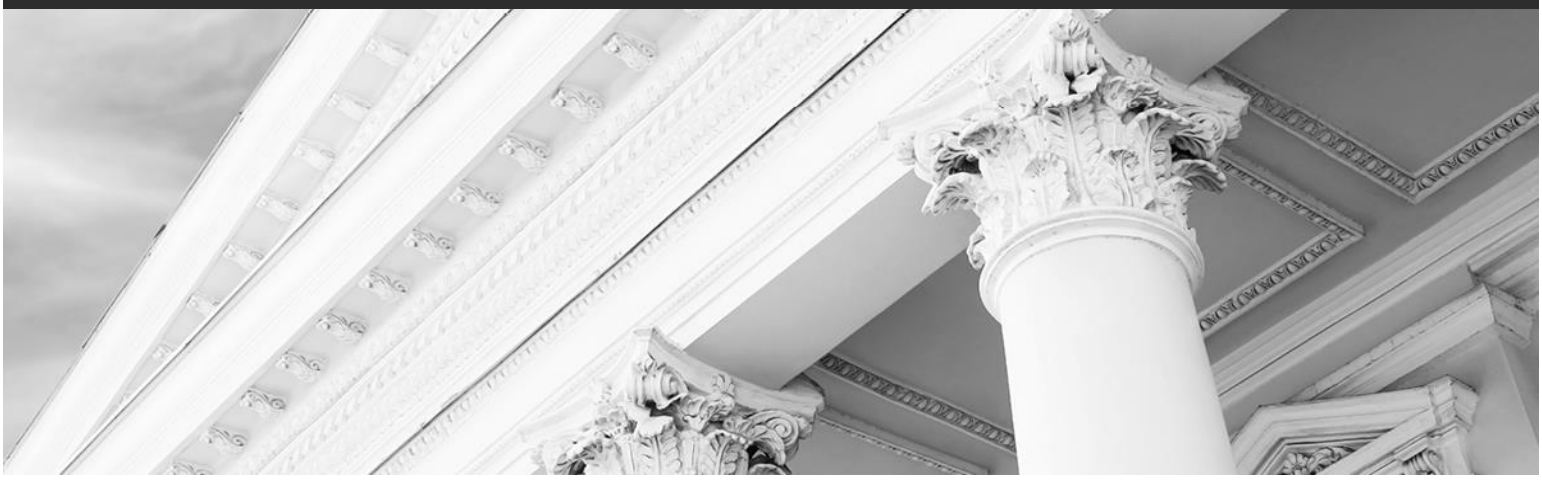

In this Issue:

This GT Report Summarizes Recent Class-Action Decisions From Across the United States

Highlights from this issue include:

- A federal district court ruling that plaintiffs' decision to forgo certain damages theories may result in a finding that plaintiffs are not adequate class representatives.
- A decision from the Second Circuit addressing when and how merits issues may be considered in the context of class certification.
- Reminders from the Third Circuit that parties must expressly agree to class arbitration, and that courts must undertake a rigorous analysis when deciding class certification.
- Competing decisions from the Fifth and Seventh Circuits, as well as various district courts, regarding how and when the U.S. Supreme Court's *Bristol-Myers* ruling on personal jurisdiction applies to claims asserted on behalf of nonresident class members.
- Multiple decisions rejecting class certification based on variations in state warranty and contract law.
- A decision from the Eighth Circuit affirming decertification where the legal theory underlying plaintiff's request for class certification proved invalid.
- A Ninth Circuit decision holding that Rule 26 does not authorize precertification discovery to identify a new class representative.
- A California Court of Appeal decision adopting *China Agritech, Inc. v. Resh* and its bar on tolling for successive class actions.

First Circuit

Emmanuel v. Handy Techs., Inc., 2020 U.S. Dist. LEXIS 34066 (D. Mass. Feb. 27, 2020)

Court enforces clickwrap arbitration agreement formed on smartphone.

This decision involved a putative class action arising out of a wage-and-hour dispute where plaintiff alleged defendant misclassified him as an independent contractor under the Fair Labor Standards Act and the Massachusetts Wage Act. The court held a one-day bench trial on the issue of arbitrability and entered judgment against plaintiff. The court first considered whether the parties formed an agreement to arbitrate through "online contracts of adhesion." The court concluded the terms of the agreement were reasonably communicated to plaintiff, who accepted the contract through a "clickwrap agreement," even though plaintiff did not view the full text of the agreement. The court also determined that the arbitration agreement was not unconscionable. Even though the agreement was a contract of adhesion, that alone did not render it procedurally unconscionable, nor did the fact plaintiff viewed the agreement on a "tiny smartphone screen." As to substantive unconscionability, the court found cost-splitting provisions did not render the agreement unconscionable because other terms and relevant arbitration rules allowed defendant to offer to pay for the arbitration costs, which defendant did here. The court also held that the unilateral modification clause was not a bar to enforceability because the court could sever any modification deemed unconscionable or otherwise unenforceable.

Conley v. Roseland Residential Trust, 2020 U.S. Dist. LEXIS 38275 (D. Mass. Mar. 5, 2020)

Class certification denied based on plaintiffs' decision to forgo claims for actual damages.

In this putative class action brought by tenants against their former landlord and its billing contractor, plaintiffs alleged that defendants wrongly charged them for gas and water utilities by using unlawful "sub-metering" systems, which allegedly violated Massachusetts General Laws Chapter 93A (the Massachusetts Consumer Protection Act), and constituted negligent misrepresentation. Plaintiffs sought to certify a class of "[a]ll current and former residential tenants who [w]ere charged for gas, water and/or sewer submetered services by" the defendants based on the theory that the use of the submetered systems were unlawful because they did not comply with state law. In seeking certification, plaintiffs disavowed any claim for overcharges, focusing solely on the theory that the submetering systems were unlawful, thus entitling plaintiffs and the class to a refund. The court concluded that although commonality and predominance were satisfied because of plaintiffs' narrow theory, adequacy and typicality were not. According to the court, plaintiffs, "in an effort to create the largest possible class, have eschewed any claim of actual pecuniary damages in order to mount an attack on" the sub-metering practice generally. The record, however, suggested at least some putative class members may have overpayment claims. Accordingly, in those circumstances, plaintiffs' claims were not typical, nor were plaintiffs adequate representatives. Explaining that "adequacy and typicality are 'particularly important because of the res judicata implications of a class judgment[,]'" the court denied class certification.

Savino v. Souza, 2020 U.S. Dist. LEXIS 61775 (D. Mass. Apr. 8, 2020)

Court grants class certification for claims by immigration detainees seeking declaratory and injunctive relief to require government to protect them from COVID-19.

Civil immigration detainees brought this putative class action alleging they were held in tight quarters and were unable to keep safe social distancing from others who may carry COVID-19. Plaintiffs asserted violations of due process as a result of confinement in conditions "that include the imminent risk of contracting COVID-19," and violations of section 504 of the Rehabilitation Act for failure to provide reasonable accommodations, in the form of protection against COVID-19. Plaintiffs demanded release or implementation of social distancing and other hygienic practices recommended by infectious disease experts. The court granted their motion for class certification.

The court certified a class of all civil immigration detainees who were then held in custody in North Dartmouth, Massachusetts. The court rejected the government's argument the court was barred from enjoining or restraining the "operation" of immigration enforcement actions except in their application to "an individual alien against whom proceedings under such chapter have been initiated" because the plaintiffs sought declaratory relief, which posed no obstacle to class certification. The court also rejected the government's challenge to commonality and typicality, which was based on the argument that putative class members were not "similarly situated" because (i) they "are of different ages and all present different levels of health" at the time, (ii) some detainees were subject to statutorily mandated detention while others are not, and (iii) "each detainee presents a different risk of flight and/or public safety threat if released." The court explained the variation did not defeat commonality or typicality because a common question of law and fact was "whether the government must modify the conditions of confinement—or, failing that, release a critical mass of Detainees—such that social distancing will be possible and all those held in the facility will not face a constitutionally violative 'substantial risk of serious harm.'" According to the court, even perfectly healthy putative class members were seriously threatened by the virus.

Doucette v. CarMax Auto Superstores Inc., 2020 U.S. Dist. LEXIS 49639 (D. Mass. March 23, 2020)

Court grants motion to compel arbitration to avoid class-action claims because Federal Arbitration Act's "transportation worker" exclusion did not apply.

A former employee brought this putative class action alleging his former employer failed to pay wages in violation of the Fair Labor Standards Act and the Massachusetts Wage Act. The court granted defendant's motion to dismiss the complaint and compel arbitration pursuant to the Federal Arbitration Act (FAA) because, as part of the hiring process, plaintiff agreed to an arbitration agreement containing a class-action waiver.

The court rejected plaintiff's argument the FAA's "transportation worker" exemption applied and, as such, the FAA did not mandate arbitration of plaintiff's claims. That exclusion exempts from FAA coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." After analyzing the scope of the exclusion and whether plaintiff was engaged in interstate commerce, the court concluded the exemption did not apply as plaintiff was not engaged in the "transportation industry in interstate commerce.

Second Circuit

Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc., 955 F.3d 254 (2d Cir. 2020)

Second Circuit rejects argument that sought to inject a merits determination about materiality into the class-certification analysis.

The Second Circuit again addressed this class action brought by Goldman Sachs (Goldman) shareholders against the investment company. Plaintiffs allege Goldman made false statements about its conflicts of interest regarding collateralized debt transactions involving subprime mortgages thereby artificially maintaining its stock price. The Second Circuit previously reversed class certification for this same class of investors, concluding that the district court had applied the wrong standard of proof to Goldman's evidence rebutting the presumption of reliance. On remand the district court considered Goldman's rebuttal evidence, rejected it as insufficient, and again certified the class.

In this second appeal, Goldman argued that the district court improperly certified the class because it relied on general statements about the business instead of misstatements about "specific, material financial or operational information" or about meeting "market expectations" regarding specific metrics. The Second Circuit rejected these arguments on the ground that class certification was not the proper procedural stage to determine whether the alleged statements were sufficiently material to support a claim of securities fraud. The Second Circuit acknowledged that the class certification analysis may "overlap" with merits issues, but this principle does mean a court can undertake a "free-ranging" examination of the merits. The Second Circuit concluded that, although Goldman might be correct that certain statements were insufficiently material, this had nothing to do with whether common issues predominated under individual issues: "[t]his is why materiality is irrelevant at the Rule 23 stage. Win or lose, the issue is common to all class members."

Third Circuit

Marbaker v. Statoil USA Onshore Properties, Inc., --- Fed. Appx. ----, 2020 WL 733049 (3d Cir. Feb. 13, 2020)

Third Circuit reiterates that parties must affirmatively agree to classwide arbitration.

Plaintiffs in *Marbaker* alleged that defendants underpaid for oil and gas leases, filing a putative class action seeking a declaratory judgment that the oil and gas leases permitted class arbitration. The district court dismissed the declaratory judgment claim and the Third Circuit affirmed. Relying on *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010), the panel explained that "courts will not force parties 'to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.'" Because class arbitration "differs greatly from bilateral arbitration [as it] aggregates many more disputes, handles much higher stakes, compromises confidentiality, and binds absent parties," "[c]ontractual silence is not enough," and "[w]e will not infer consent." Rather, there must be an "affirmative 'contractual basis'" for finding the parties consented specifically to class arbitration. The panel found these requirements were not met in the oil and gas leases because they did not mention class arbitration. Plaintiff argued the incorporation of the AAA arbitration rules in the oil and gas leases also incorporated the AAA's Supplementary Rules for Class Arbitrations. The panel rejected that argument, reasoning that a short reference to the AAA rules is insufficient to incorporate the "panoply" of AAA supplementary rules. Even if the supplementary rules were incorporated, that would be insufficient to "infer consent" to class arbitration because even those rules require consent to class arbitration.

In re Lamictal Direct Purchaser Antitrust Litig., 957 F.3d 184 (3d Cir. 2020)

Third Circuit reaffirms that class certification requires rigorous analysis.

In re Lamictal is a pharmaceutical antitrust case in which plaintiffs claim that two pharmaceutical companies violated antitrust laws when settling a Hatch-Waxman lawsuit by delaying the entry of a generic product. The district court certified a class of direct purchasers. On appeal, the defendants challenged the district court's ruling on the predominance requirement, specifically whether common issues predominated over individual issues as to antitrust injury.

The panel reversed, reiterating that the district court must conduct a "rigorous analysis" with respect to "three key aspects": (1) the court must consider whether the factual determinations are supported by a preponderance of the evidence; (2) the court must resolve all factual and legal disputes, even if they overlap with the merits; and (3) the court must consider all factual and expert evidence, even if introduced by the party opposing class certification. Plaintiffs argued the district court acted properly because, under *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), the predominance requirement was satisfied "unless no reasonable juror could believe the common proof at trial." The panel rejected this argument, concluding that "a putative class must demonstrate that its claims are capable of common proof at trial by a preponderance of the evidence." The panel then reversed the predominance finding on the issue of antitrust injury because the district court relied on averages rather than resolving the factual and expert issues presented by the parties: "[i]t was up to the District Court to scrutinize the evidence to determine what was credible and could be used in the expert analysis."

Fourth Circuit

In re: Lumber Liquidators Chinese-Manufactured Flooring Products Marketing, Sales Practices & Products Liability Litigation, 952 F.3d 471 (4th Cir. Mar. 10, 2020)

Fourth Circuit reverses attorneys' fee award for failure to apply coupon settlement provisions of CAFA.

Plaintiffs alleged Lumber Liquidators falsely represented its laminate flooring complied with California's formaldehyde-emission limits. The parties reached a settlement creating a non-reversionary "common fund" consisting of $22 million in cash and $14 million in Lumber Liquidators vouchers. Class counsel moved for an attorneys' fee award of $11.16 million, which was 31% of the fund to be paid out of the cash portion. The district court overruled objections to the fee application and approved the settlement.

On appeal, the Fourth Circuit reversed the fee award. The objectors argued the "quick-pay" provision (allowing attorneys' fees to be paid prior to the payments to class members) was improper. But the panel rejected that argument because quick-pay provisions have been approved by other federal courts and concerns over Lumber Liquidators' ability to pay class members in the future were speculative.

The panel then considered the argument that the district court failed to follow the "coupon" settlement provisions of the Class Action Fairness Act ("CAFA") (28 U.S.C. § 1712(a)-(c)). Plaintiffs argued the vouchers were not "coupons" because they were worth "many hundreds of dollars," were transferrable, and did not expire for three years. While observing the "coupon" settlement provisions of CAFA were "badly drafted" leading to disagreement among federal courts, the panel relied on the legislative history, dictionary definitions, and factors developed by the Seventh and Ninth Circuits to find that the vouchers qualified as "coupons" under CAFA, including because: (1) the vouchers "require class members to do

business with Lumber Liquidators in the future"; and (2) class members would have to spend money on top of the vouchers to replace their floors, "to benefit the company that allegedly lied to and injured them." The panel rejected the argument that CAFA's coupon provisions did not apply because the settlement included a cash component: "[t]o do so would defeat CAFA's purpose of exacting scrutiny of 'coupon' settlements and permit parties to perform an end run around CAFA by including a nominal cash award as a settlement term."

Fifth Circuit

Cruson v. Jackson Nat'l Life Ins. Co., 954 F.3d 240 (5th Cir. 2020)

Fifth Circuit holds that personal jurisdiction challenge as to nonresident class members not available until class certification stage and reverses class certification based on state-law variation and individualized evidence relevant to defenses of waiver and ratification.

This case alleged that a life insurance company was overcharging annuity holders by miscalculating early withdrawal fees in breach of the annuity contracts. The district court certified a nationwide class of annuity holders and held that defendant waived its personal jurisdiction defense as to nonresident class members by not raising it in its first responsive pleading. The Fifth Circuit reversed.

Holding that the defendant had not waived its personal jurisdiction challenge, the court explained that this defense was not available at the outset of the case. "Certification of a class is the critical act which reifies the unnamed class members and, critically, renders them subject to the court's power." Thus, before certification, a personal jurisdiction defense as to nonresident class members was unavailable and could not have been waived.

The court also reversed the class certification order, holding that the district court had not conducted a sufficiently rigorous analysis of variations in state contract law. Explaining that "suits involving form contracts often lend themselves to class treatment," the court concluded that "this is not always so." "Predominance in form contract cases may be defeated, for instance, if individualized extrinsic evidence bears heavily on the interpretation of the class members' agreements, or if there may be considerable variation in the state law under which any extrinsic evidence would have to be scrutinized." The Fifth Circuit found that the district court's failure to conduct this analysis was reversible error.

The Fifth Circuit also held that the district court erred in assessing defendant's waiver and ratification defenses. The life insurer argued that these defenses made class certification improper because they depend on each class member's knowledge of how it was calculating early withdrawal fees and acceptance of that practice. The district court rejected this argument on the ground that class members had to know the legal ramifications of their decision to pay the withdrawal fees, as well as the relevant facts. The Fifth Circuit disagreed with the district court and reversed, explaining that "the knowledge contemplated in the defenses of waiver or ratification is knowledge of the essential facts of a transaction, not the legal effects of those facts."

Sixth Circuit

Forsher v. J.M. Smucker Co., No. 19-cv-194, 2020 WL 1531160 (N.D. Ohio Mar. 31, 2020)

Court dismisses multi-state class allegations based on state-law variation.

Plaintiff alleged that defendant falsely advertised "natural" peanut butter because it was made using sugar that "may" have been derived from bioengineered or genetically modified beets. The court granted defendant's Rule 12(b)(6) motion, dismissing plaintiff's claims as speculative and insufficient to show that a reasonable consumer would be misled under California's Consumer Legal Remedies Act and false advertising and unfair competition laws, and concluding that a putative class action asserting breach of warranty claims under the laws of 44 states was unmanageable. Observing manageability issues "can be determined at the Motion to Dismiss stage," the district court held that state warranty law "varies widely from state to state making it unsuitable for class-wide resolution." The court specifically noted that states differed on the elements required to establish breach of express warranty claims, including whether reliance, pre-suit notice, or privity are required. Although the court acknowledged that other jurisdictions had used subclasses to address issues caused by state law variations, it held such an organizational method was "not responsive to the unmanageability problem present" in the case, primarily because "in the Sixth Circuit, subclasses are not a substitute for compliance with Rule 23."

Seventh Circuit

Mussat v. IQVIA, Inc., 953 F.3d 441 (7th Cir. 2020)

Seventh Circuit rules that *Bristol-Myers* does not apply to a putative class action asserting federal claims.

This case involved a putative class action under the Telephone Consumer Protection Act. After receiving two unsolicited faxes from a Delaware defendant headquartered in Pennsylvania, plaintiff asserted claims on a nationwide basis "on behalf of itself and all other persons in the country who had received similar junk faxes from [the defendant] in the four previous years." The district court granted the defendant's motion to strike the class definition on grounds that the court lacked personal jurisdiction as to nonresident members of the proposed class under *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). The Seventh Circuit reversed, holding that *Bristol-Myers* does not apply to federal claims asserted as part of a nationwide class.

The panel began by noting that, before *Bristol-Myers*, "there was a general consensus that due process principles did not prohibit a plaintiff from seeking to represent a nationwide class in federal court, even if the federal court did not have general jurisdiction over the defendant." Reasoning that class actions "are different from many other types of aggregate litigation," and that the "absent class members are not full parties to the case for many purposes," the panel believed there was no "reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so," at least for claims asserted under a federal statute.

Joiner v. SVM Management, LLC, 2020 IL 124671

Illinois Supreme Court reaffirms that a class action is mooted by a tender of full relief before a motion for class certification, even when the plaintiff rejects the tender.

The Illinois Supreme Court reaffirmed its previous decisions holding that a class action is moot when there is a tender of full relief before class certification. The Court chose to revisit these decisions based on the United States Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), which held a rejected settlement offer under Fed. R. Civ. P. 68 would not moot a class action lawsuit. The Illinois Supreme Court upheld its prior decisions by distinguishing between a "tender" under 735 ILCS 5/5-126 and an offer of judgment under Fed. R. Civ. P. 68(a). In contrast to Rule 68, the Illinois rule does not provide for an offer of judgment, instead providing that a defendant must "tender what he or she shall conceive sufficient amends for the injury done or to pay the unliquidated damages or demands" to shift costs to plaintiff. The Court defined a tender as only effective if it is for the entire amount owed, the defendant produces the tender (a mere offer or promise is insufficient), and the defendant admits liability. Based on this distinction, and because an Illinois plaintiff cannot reject a tender that completely satisfies his or her demand, the Illinois Supreme Court reaffirmed the rule that a proper tender made before a class certification motion has been filed ends the case as to that plaintiff.

A discussion of the Illinois appellate court's decision in *Joiner*, which the Illinois Supreme Court upholds in this case, can be found in the Greenberg Traurig Class Action Litigation Newsletter, Fall 2019

Douglas v. W. Union Co., 955 F.3d 662 (7th Cir. 2020)

Seventh Circuit confirms a non-class member does not have standing to appeal.

This case addressed an objector's appeal following approval of a class action settlement under the Telephone Consumer Protection Act. The district court ruled that the objector-appellant was not a member of the class. The objector did not challenge that ruling, instead asking the Seventh Circuit to reverse the district court's decision not to award him attorney fees. Pointing to the Supreme Court's holding in *Marino v. Ortiz*, 484 U.S. 301 (1988), the panel emphasized that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." Because the objector was not a class member, the court ruled he lacked standing to appeal. The Seventh Circuit further explained that, although there are exceptions that allowed certain nonparties to appeal, those exceptions apply only "when the district court has ordered them to do something (as with a contempt citation issued to nonparty witnesses) or when they are agents of parties to the suit (as with attorneys seeking fees)"—neither of which applied.

Eighth Circuit

*Stuart v. Glob. Tel *Link*, 956 F.3d 555 (8th Cir. 2020)

Eighth Circuit affirms order decertifying nationwide class where the unifying legal theory used to support certification proved invalid.

This case involved claims for violations of the Federal Communications Act (FCA) and unjust enrichment brought by prisoners against the telephone company providing service to jails and prisons. The Eighth Circuit affirmed the district court's decertification of a nationwide class, as well as a decision granting summary judgment for the defendant on the merits.

In affirming decertification, the panel focused on a decision by the D.C. Circuit that undercut the legal basis for plaintiffs' class certification theory. Plaintiffs had obtained certification based on the theory that (i) the defendant was charging excessive rates and fees because those charges included a markup for the commissions it had to pay state and local correctional facilities, and (ii) those commissions were impermissible as a matter of law based on FCC regulations. But in *Global Tel*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017), the court had rejected plaintiffs' theory on commissions, and the Eighth Circuit concluded that this decision rendered plaintiffs' "theory of class certification … untenable," thus undercutting any basis for commonality or predominance.

The panel also concluded that, based on the D.C. Circuit's ruling that the FCC only could limit charges for interstate, as opposed to intrastate, telephone calls, certification also was improper as to plaintiffs' claim that deposit fees were excessive because plaintiffs had "presented no reliable mechanism" for separating interstate from intrastate calls. Finally, in affirming decertification on the unjust-enrichment claim, the panel held that defendant's voluntary-payment doctrine defense, which bars plaintiff from recovering money she has voluntarily paid, posed a panoply of individualized questions that foreclosed predominance.

Ninth Circuit

In re Williams-Sonoma, Inc., 947 F.3d 535 (9th Cir. 2020)

Ninth Circuit rules that Rule 26 does not authorize discovery before class certification to help locate a new class representative.

This appeal involved a dispute over a discovery order requiring defendant to provide a list of California purchasers so plaintiff could identify a new class representative. The original plaintiff was a Kentucky resident who sued over alleged violations of California consumer protection laws. After the district court ruled that the Kentucky plaintiff could not bring claims under California law, plaintiff propounded discovery to find a California plaintiff. The district court directed defendant to produce a list of California customers who had purchased bedding products during the relevant period. That order was not appealable, so defendants petitioned for a writ of mandamus.

On a 2-1 vote, the Ninth Circuit granted the writ petition and held the discovery order represented a clear error of law. The Ninth Circuit relied on *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), in which the Supreme Court held the names and addresses of class members were outside the scope of relevant discovery under Rule 26(b)(1). Since plaintiff's claims and defenses involved the application of Kentucky law, discovery regarding unknown class members for the possible pursuit of California claims was not relevant. Accordingly, the Ninth Circuit held that Rule 26 does not authorize discovery before class certification when the express purpose is to find a new lead plaintiff.

Carpenter v. Petsmart, 2020 WL 996947 (S.D. Cal. Mar. 2, 2020)

Court holds that *Bristol-Myers* applies to class actions, striking nationwide class allegations.

Plaintiff purchased a "Tiny Tales Homes" habitat from defendant for his pet hamsters, but alleged that, because of a design defect, his pets were able to chew through connector pieces in the habitats and escape, never to be seen again. Plaintiff brought claims on behalf of a nationwide class, alleging claims for breach of the Magnuson-Moss Warranty Act, breach of warranty, fraud by omission, and unjust enrichment.

Defendant moved to strike the nationwide class allegations, arguing among other things the court lacked personal jurisdiction over defendant with respect to claims alleged on behalf of putative class members who purchased Tiny Tales Homes outside of California, and plaintiff lacked standing to assert claims under other states' laws.

In addressing these issues, the court considered the applicability of *Bristol-Myers*, where plaintiffs (including non-California residents) brought a mass action in California state court, claiming defendant's drug product harmed their health. The United States Supreme Court held that "there must be an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation."

The court in *Petsmart* provided a detailed summary of the three approaches most courts have taken to personal jurisdiction challenges in class actions: (i) *Bristol-Myers* does not apply to class actions; (ii) *Bristol-Myers* does apply to class actions; and (iii) the issue should be addressed at class certification. The court ultimately followed the second approach, holding that "the rationale for the holding in *Bristol-Myers* indicates that if and when the Supreme Court is presented with the question, it will also hold that a court cannot exercise specific personal jurisdiction over a defendant for the claims of unnamed class members that would not be subject to specific personal jurisdiction if asserted as individual claims." The court also specifically rejected the "class actions are different" argument often used to support the first approach: "[t]he Court, however, is not persuaded that the procedural requirements for a class action constitute a basis for finding that the rationale behind the holding in *Bristol-Myers Squibb* does not apply to nationwide class actions involving individual claims for which there would not be specific personal jurisdiction if those claims were filed individually." Thus, the court granted defendant's motion to strike the nationwide class allegations.

Amaraut v. Sprint/United Management Company, 2020 WL 1820120 (S.D. Cal. Apr. 10, 2020)

Court declines to prevent plaintiffs' counsel from commenting on, or communicating with, class members in a competing, settled case.

This case involved a hybrid collective and class action—an "opt-in" collective action under the Fair Labor Standards Act and an "opt-out" state-specific class action under state wage and hour law. Defendant settled two related cases (the "*Navarette actions*"), handled by different plaintiffs' counsel. Plaintiffs moved to compel production of the contact information for class members in the settled cases, and the court granted the motion. Defendant moved to limit communications by plaintiffs and their counsel, to prevent them from: (1) commenting on the settlement of the *Navarette actions*; (2) providing an opinion regarding class members' rights in the settlement; and (3) encouraging class members to opt out.

The court denied defendant's motion. Noting its "duty and broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties," the court explained that any such order is "subject to restrictions mandated by the First Amendment and the Federal Rules." The court emphasized an order restricting communications must be based on a "clear record and specific findings" of the potential for serious abuse arising from the communications. Although the court acknowledged that plaintiffs' "words [were] often strong"—for example, referencing a reverse auction and criticizing plaintiffs' counsel in the *Navarette actions*—it did not find sufficient evidence of abuse.

Grande v. Eisenhower Med. Ctr., 44 Cal. App. 5th 1147 (2020)

In a joint-employer arrangement, a class of workers can bring a lawsuit against a staffing company, settle that lawsuit, and then bring identical claims against the company where they had been placed to work.

In a 2-1 decision, the California Court of Appeal held an employee's settlement agreement with a staffing agency on a wage-and-hour claim does not necessarily preclude the employee from later suing the staffing agency's client, for whom the employee performed services, on the exact same claims.

Plaintiff Lynn Grande was assigned through a temporary staffing agency, FlexCare, LLC (FlexCare), to work as a nurse at Eisenhower Medical Center (EMC). Grande became a named plaintiff in a class action lawsuit against FlexCare brought on behalf of FlexCare employees assigned to hospitals throughout California who alleged standard wage and hour claims, including unpaid overtime and meal and rest break claims. FlexCare settled with the class, and a release of claims was executed. The release included standard language releasing the named defendant's affiliates. But it did not expressly release EMC or FlexCare's clients. A year after FlexCare settled with the class, Grande brought a second class action on behalf of all nurses of any staffing agency employed and assigned to work at EMC and alleged the same violations against EMC, which was not a party to the original class action.

FlexCare intervened and argued: (1) the judgment in the FlexCare class action precluded Grande's claims against EMC on res judicata grounds, and (2) EMC was a released party under the FlexCare settlement agreement. The trial court ruled against FlexCare and EMC on both grounds, and FlexCare appealed.

The California Court of Appeal affirmed, holding EMC was not a released party because the release did not include words such as "clients, joint employers, joint obligors" of FlexCare or reference to "any client of FlexCare as to whom any class member may have provided services through FlexCare." The court further held that the doctrine of res judicata did not bar Grande's claims because joint employers generally are not liable for each other's Labor Code violations under *Serrano v. Aerotek, Inc.*, 21 Cal. App. 5th 773 (2018).

That FlexCare and MC were alleged to be jointly and severally liable and joint employers was not enough to satisfy the privity requirements of res judicata. The court departed from the Second District's decision in *Castillo v. Glenair, Inc.*, 23 Cal. App. 5th 262 (2018), which held a staffing agency and its client were in privity with each other for purposes of the wage and hour claims and therefore a class of workers cannot bring a lawsuit against a staffing company, settle that lawsuit, and then bring identical claims against the company where they had been placed to work.

Montoya v. Ford Motor Company, 46 Cal. App. 4th 493 (2020)

California court holds that, under *China Agritech, Inc. v. Resh,* multiple tolling periods in successive putative class actions could not be "stacked" to extend the statute of limitations.

This case involved breach of warranty claims that were time barred absent tolling under the *American-Pipe* doctrine. Plaintiff purchased a Ford Excursion in April 2003 but did not sue until June 2013. To avoid the statute of limitations, Plaintiff relied on tolling under *American Pipe* based on two putative class actions. On appeal, defendant argued that plaintiff could not toll the statute of limitations for successive class actions, and the court agreed.

Noting that the issue was one of first impression, the court explained that "[t]he question of whether the equitable tolling made possible in *American Pipe* should extend to a second class action is a question our federal compatriots have addressed at some length, and we find ourselves in agreement with their resolution of the issue." The court thus held that tolling for successive class action was improper: "we determine that to toll the statute of limitations during the period of a second class action contravenes the judicial economy and efficiency *American Pipe* was trying to achieve. To do so would take the law of class actions back full-circle to the pre-1966 class action procedure when putative class members (like [plaintiff]) could wait and see what sort of outcome would be forthcoming in a class action and then decide to opt out and file their own individual suit. Second class action tolling multiplies litigation, rather than consolidating and reducing it. We therefore hold the second class action against Ford did not toll the four-year statute," and the court reversed the judgment in favor of plaintiff.

Tenth Circuit

In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices, & Antitrust Litig., MDL No. 2785, 2020 WL 1180550 (D. Kan. Mar. 10, 2002)

Kansas district court predicts Tenth Circuit would adopt less restrictive approach to ascertainability and Article III standing in class actions.

In this case, plaintiffs filed a putative nationwide class alleging that the manufacturer and distributor of EpiPens violated state antitrust laws, RICO, and the consumer-protection statutes of over twenty states, and engaged in unjust enrichment. The court entered a lengthy decision granting in part and denying in part plaintiffs' motion for class certification.

The court first addressed two threshold issues: ascertainability and standing. On ascertainability, the court found "no Tenth Circuit case … specifically addresses whether ascertainability is a separate requirement under Rule 23(b)(3)," and held that "the Tenth Circuit … would decline to recognize ascertainability as a separate, unstated requirement of Rule 23" as the Third Circuit and others have, but would instead "follow the Seventh Circuit's … less restrictive ascertainability test." On standing, the court held plaintiffs had standing to pursue their claims so long as "at least one named plaintiff resides in" each of the states under which plaintiffs had sued.

The court then addressed the Rule 23 requirements. After finding plaintiffs had satisfied each of Rule 23(a)'s requirements, it assessed whether common issues predominated under Rule 23(b)(3). The court first held that individualized damages issues did not preclude class certification because the defendants' challenges to plaintiffs' experts' methodologies "don't undermine their plausibility for establish[ing] classwide damages," but "instead go to the weight the trier of fact should give them" in deciding whether those methodologies establish that the class sustained damage as a whole.

The court concluded that, even though certain members of the class were not injured, class certification was not precluded, because those individuals could be excluded from the class. It rejected defendants' arguments that plaintiffs were required to prove all putative class members were injured under Article III to the Constitution, declining to follow recent decisions from the First and D.C. Circuits, instead finding that Tenth Circuit precedent holds there is no such requirement under Article III.

Finally, the court declined to certify the consumer-protection claims or the unjust-enrichment claims, finding the variances among the various states' substantive laws defeated predominance.

D.C. Circuit

Molock v. Whole Foods Mkt. Grp., Inc., 952 F.3d 293 (D.C. Cir. 2020)

Court holds that personal jurisdiction challenges to nonresident class members should be deferred to the class certification stage; appellant's petition for panel rehearing or rehearing en banc denied.

This putative class action involved allegations of wage and hour claims by current and former Whole Foods employees. Whole Foods moved to dismiss on several grounds, including that the district court lacked personal jurisdiction to entertain the claims of nonresident putative class members. The district court denied the motion in part and certified its order for interlocutory appeal pursuant to 28 U.S. § 1292(b). Whole Foods then filed a petition for leave to appeal, which was granted. At the heart of the appeal was the import and applicability of the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), which found that nonresidents' claims lacked an "adequate link" with California to justify the court's exercise of specific jurisdiction.

On appeal, Whole Foods argued that because the district court is sitting in diversity, the jurisdictional analysis is akin to that of a state court (as addressed by *Bristol-Myers*), and that the claims asserted on behalf of nonresidents should be dismissed because the district court lacked general and specific personal jurisdiction. Plaintiffs took a different view, arguing that class actions present an exception to the general rule regarding jurisdiction, and in the alternative, that any motion to dismiss would be premature as the class had not yet been certified (such that putative class members are not yet parties to the underlying action). The D.C. Circuit declined to address the main question about how to apply *Bristol-Myers*, instead concluding that the issue was premature. Because the class had not yet been certified, the court concluded that a motion to dismiss would be premature. Senior Judge Silberman expressed his views in a lengthy dissent, reaching the *Bristol-Myers* question and stating that class allegations unrelated to Whole Foods' contacts with the District of Columbia should not proceed.

On April 9, 2020, Whole Foods filed a petition for panel rehearing or rehearing en banc, arguing, among other things, that rehearing is appropriate because (1) the panel failed to recognize that the appropriate time to consider the question for personal jurisdiction over a named plaintiff's representative class action claims is at the pleadings stage, and (2) the issue certified for appeal (whether *Bristol-Myers* applies to class actions) is of utmost importance and was not reached by the panel, meaning that the D.C. Circuit would be "the first decision endorsing the proposition that in class actions, due process rights arising from challenges to personal jurisdiction must wait until after class certification." The D.C. Circuit denied the rehearing request on May 7, 2020.

This Greenberg Traurig Newsletter was prepared by the firm's Class Action Litigation Group.

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