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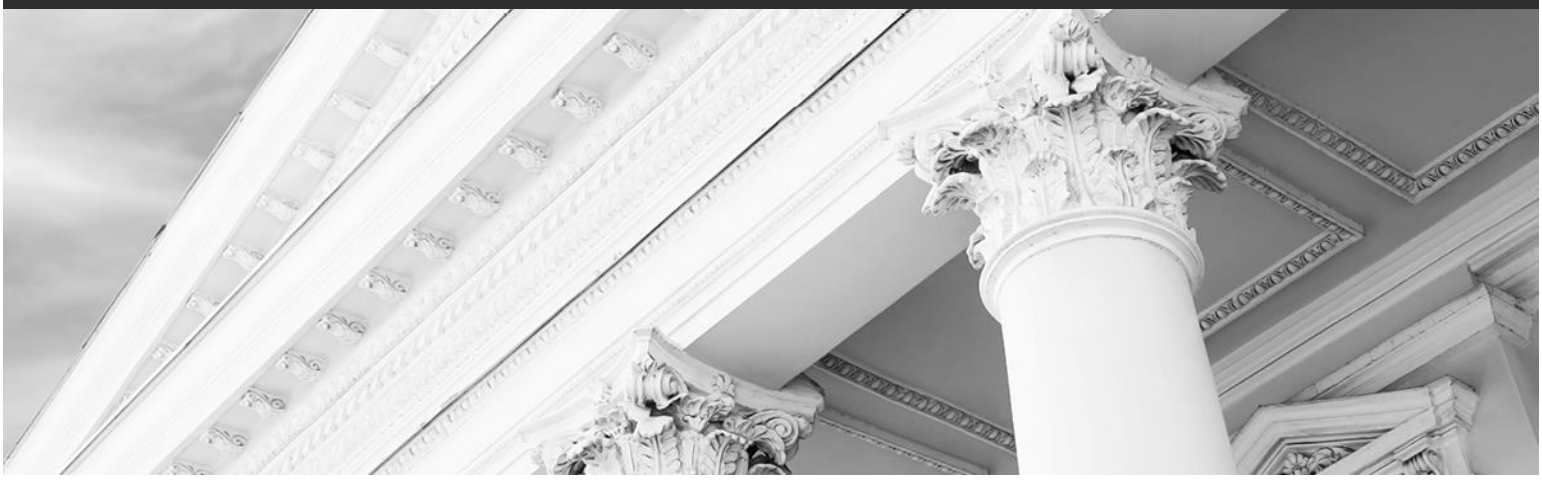

In this Issue:

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

Highlights from this issue include:

- Supreme Court grants cert in securities class action to address whether the *Basic* presumption of class-wide reliance can be rebutted based on the generic nature of the alleged representation and that the statement had no price impact.
- Massachusetts appellate court emphasizes that evidence is required to support class certification, even under state law.
- District court in the Second Circuit holds that *Daubert* analysis must be conducted at the class certification stage.
- Third Circuit holds that the failure to register tires under federal law is not enough to confer standing.
- Seventh Circuit holds that violations of the data retention and destruction requirements of the Biometric Information Privacy Act are sufficient for standing.
- Eighth Circuit affirms certification in RICO class action involving contracts subject to individual negotiation.
- Ninth Circuit reiterates that, in class settlements involving coupons, attorneys' fees that are based on the coupons must be evaluated under the value-of-redemption method.
- Ninth Circuit holds that FINRA rule prohibiting arbitration of class actions could not be used to bar enforcement of arbitration provision with a class waiver.
- Eleventh Circuit holds violation of FACTA's truncation requirement insufficient for standing.

U.S. Supreme Court

Arkansas Teacher Ret. Sys. v. Goldman Sachs Grp., Inc., No. 20-222 (U.S. Supreme Court, certiorari granted Dec. 11, 2020)

U.S. Supreme Court agrees to address class certification ruling where the defendant presented evidence showing that generic alleged misstatements had no price impact.

In 2011, shareholders brought a purported securities fraud suit against Goldman Sachs and three of its former executives (collectively, "GS"), alleging they had misrepresented the existence of conflicts of interest surrounding several collateralized debt obligation transactions involving subprime mortgages, and that plaintiffs were purportedly injured when GS's stock price dropped following the disclosure of those conflicts in a 2010 SEC complaint and elsewhere. After discovery, plaintiffs moved for class certification, invoking the *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) presumption of class-wide reliance. The district court granted the motion and held that GS had failed to meet its burden to rebut the presumption, despite evidence that GS's stock price had not decreased on at least 34 occasions when the media had reported on the alleged conflicts before the filing of the SEC complaint. The court reasoned that such evidence "speaks to the statements' materiality and not to price impact," and thus should not be considered at this stage. *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10-CV-3461, 2015 U.S. Dist. LEXIS 128856, at *20 (S.D.N.Y. Sept. 24, 2015).

On appeal, the Second Circuit unanimously vacated that decision, reasoning that the district court had failed to apply the proper standard in considering whether the presumption invoked by plaintiffs had been rebutted (i.e., by a preponderance of the evidence). *Arkansas Teachers Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 485 (2d Cir. 2018). The Second Circuit reasoned that a defendant seeking to rebut the *Basic* presumption bears the ultimate burden of persuasion, notwithstanding the language of Federal Rule of Evidence 301. *See id.* at 484. The Second Circuit also held that the district court should have considered evidence that GS's stock price had not decreased when the media reported on the company's alleged conflicts of interest before 2010, as such evidence was relevant to the "fundamental" issue of price impact.

On remand, the district court again granted class certification. *See In re Goldman Sachs Grp., Inc.*, No. 10-CV-3461, 2018 U.S. Dist. LEXIS 137414 (S.D.N.Y. Aug. 14, 2018). This time, the court considered the evidence that GS's stock price had not moved, but held that "[t]he absence of price movement … in and of itself, is not sufficient to sever the link between the first corrective disclosure and the subsequent stock price drop." The court held that GS (not plaintiffs) bore the burden of persuasion to rebut the *Basic* presumption by a preponderance of the evidence, and that GS had failed to do so.

On appeal for a second time, a new Second Circuit panel affirmed in a 2-1 decision. Among other things, the majority rejected the argument that "general statements" are legally insufficient for plaintiffs to invoke the *Basic* presumption. *Arkansas Teacher Retirement System v. Goldman Sachs Group., Inc.*, 955 F.3d 254, 266 (2d Cir. 2020). The court reasoned that applying such a rule would effectively require consideration of whether the alleged misstatements were "immaterial as a matter of law," and thus functioned as "a means for smuggling materiality into" the class certification analysis. The majority ruled that the lower court "applied the correct legal standard and reasonably concluded by a preponderance of the evidence that the [SEC complaint and other] disclosures revealed new and material information to the market."

Judge Richard J. Sullivan, on the other hand, dissented, stating that the majority was "miss[ing] the forest for the trees" and "essentially turning the [*Basic*] presumption on its head." He reasoned that "it's fair for this court to consider the nature of the alleged misstatements in assessing whether and why 'the misrepresentations did not in fact affect the market price of Goldman stock.'" "Candidly," he stated, "I don't see how a reviewing court can ignore the alleged misrepresentations when assessing price impact. Here the obvious reason for why the share price didn't move after 36 separate news stories on the subject of Goldman's conflicts is that no reasonable investor would have attached any significance to the generic statements on which Plaintiffs' claims are based."

On August 21, 2020, GS petitioned for certiorari, which was granted on December 11, 2020. The Supreme Court agreed to consider two questions in connection with this appeal: (1) whether the *Basic* presumption can be rebutted by pointing to the generic nature of the alleged misstatements and showing that the statements had no impact on the price of the security, and (2) whether a defendant has both the burden of production in rebutting the presumption as well as the ultimate burden of persuasion, or whether that ultimate burden rests with the plaintiff.

First Circuit

In re Lantus Direct Purchaser Antitrust Litig., Civil Action No. 16-12652-JGD, 2020 U.S. Dist. LEXIS 240574 (D. Mass. Dec. 22, 2020)

District court holds that allegations of a continuing scheme are sufficient to confer standing for plaintiff to pursue claims based on conduct after plaintiff's last purchases.

In this case, a direct purchaser of products used to treat diabetes brought a putative class action alleging that the manufacturer engaged in anti-competitive conduct to prevent or delay competitors from entering the market and charging supra-competitive prices. The district court denied the manufacturer's motion to dismiss for lack of standing, noting that the putative class-action nature of the case did not alter the plaintiff's obligation to establish Article III standing – citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The motion to dismiss focused on traceability, whether plaintiff adequately alleged that conduct after June 2016 caused a concrete and particularized injury sufficient for standing. The plaintiff had stopped purchasing the product in early 2016, and thus the defendant argued that plaintiff did not have standing to assert claims based on post-purchase conduct, which could not have caused plaintiff any injury. The court rejected this argument. According to the court, the First Circuit has "trained [the] Article III focus in class actions on 'the incentives of the named plaintiffs to adequately litigate issues of importance to them.'" To establish standing in this context, named plaintiffs are not required to show that their claims are identical to the putative class members' claims, as such a standard would confuse the requirements of Rule 23 and Article III "by rendering superfluous the commonality and predominance requirements necessary to certify a class under Rule 23." Thus, according to the district court, the standing question is not whether there are differences between the plaintiff and putative class members' claims, but rather whether "the differences that do exist [are] the type that leave the class representative with an insufficient personal stake in the adjudication of the class members' claims." Here, the plaintiff alleged a common, continuing scheme of anti-competitive conduct, which the court held was sufficient at the pleading stage to assert claims based on post-purchase conduct.

Henry v. Bozzuto Management Co., 98 Mass. App. Ct. 690 (2020)

Massachusetts Appeals Court reaffirms that evidence is required to support class certification.

This case involved allegations that a landlord had mishandled plaintiff's security deposits. Plaintiff sought to assert this claim on behalf of a putative class but failed to present evidence showing that the certification requirements were satisfied. The trial court denied certification, and the Appeals Court affirmed, explaining that a plaintiff bears the burden of providing information sufficient for a motion judge to form a "reasonable judgment" that the class met the requirements. The Appeals Court concluded that the plaintiff failed to offer "anything more than argument and speculation about whether and how the defendant's practices in handling tenants' security deposits affected anyone else." Thus, the Appeals Court concluded that there was "no evidentiary showing that any other person was affected as the plaintiffs were, let alone that there were numerous such persons."

Second Circuit

In re Namenda Indirect Purchaser Antitrust Litig., No. 1:15-CV-6549, 2020 U.S. Dist. LEXIS 247078 (S.D.N.Y. Jan. 12, 2021)

S.D.N.Y. finds that a complete *Daubert* inquiry is necessary in evaluating expert reports at the class certification stage.

In this putative antitrust class action, plaintiffs alleged that they were forced to pay supra-competitive prices for the Namenda drug after certain purported actions were taken by Forest Laboratories. Plaintiffs' motion for class certification relied on two expert reports, one of which defendants moved to exclude, arguing that the expert's methodology and data was unreliable. The court ultimately denied the motion to exclude, but in so doing, assessed whether *Daubert* applied at the class certification stage.

In assessing this issue, the court noted that "[n]either the Supreme Court nor the Second Circuit has opined about whether district courts must evaluate whether a proffered expert's opinions are admissible under *Daubert* for the[m] to be considered in support of class certification." The court then examined the approaches taken in different circuits, including the Third and Seventh Circuits (holding that the district court must perform a full *Daubert* analysis) and the Eighth Circuit (holding that "evidence that might otherwise be admissible at trial under *Daubert* can still be considered for certification"). The court also noted that the Ninth Circuit has found "the Eighth Circuit's reasoning persuasive." On balance, the court ruled that it would follow the Third and Seventh Circuits' approach and that "a complete Daubert inquiry is necessary." As such, the court concluded that "only expert reports that would otherwise be admissible at trial under *Daubert* can be considered in support of class certification."

In re Fyre Festival Litig., No. 17-CV-3296, 2020 U.S. Dist. LEXIS 233484 (S.D.N.Y. Dec. 11, 2020)

S.D.N.Y denies class certification based on lack of adequacy given the proposed class representative's residence in the Netherlands.

In this putative class action arising out of the promotion of a luxury music festival, plaintiff sought to certify a class of "[a]ll persons who purchased tickets to and/or made travel arrangements in connection

with Fyre Festival." According to plaintiff, the proposed class consisted of 5,000 individuals who purchased tickets and/or traveled to the festival.

In evaluating the threshold requirements under Federal Rule of Civil Procedure 23(a), the court found that the plaintiff could not establish either the typicality or the adequacy requirements. As to typicality, the court found that "[t]he proposed class representative Daniel Jung has not revealed which statements he heard or saw, when he heard or saw them or when he acted in detrimental reliance by purchasing tickets to the Festival or expending money on travel. With ticket purchasers relying on different statements made over an extended period of time, by several different actors, Jung has not shown that his claims are typical of those that would be made by absent class members of the would-be class."

As for adequacy, the court found that Mr. Jung was inadequate because of his residence abroad. Specifically, the court noted that it "is unable to conclude on this record that Jung, who resides in the Netherlands, can adequately monitor and direct counsel in this case," and that even if all other requirements for class certification could be established, that would still not be enough; indeed, the court would still "require further briefing on whether a foreign national residing 3,600 miles away can serve as an adequate class representative on claims arising exclusively under the law of the various states of the United States."

Third Circuit

Thorne v. Pep Boys-Manny Moe & Jack Inc., 980 F.3d 879 (3d Cir. 2020)

Third Circuit holds that selling tires not registered in accordance with federal law is insufficient to confer standing.

In one of many class actions against tire retailers, plaintiffs alleged that the defendant was selling tires without helping customers register them under the National Traffic and Motor Vehicle Safety Act. Arguing that the lack of proper registration created safety risks and made their tires less valuable than properly registered tires, plaintiffs asserted state consumer fraud and warranty claims. The retailer moved to dismiss, arguing that plaintiffs did not allege any concrete or imminent injury and thus did not have standing. The district court agreed, and the Third Circuit affirmed.

On appeal, plaintiffs argued that the lack of proper registration meant they had not received the benefit of their bargain because, if their tires were recalled, the manufacturer would not be able to contact them. The Third Circuit rejected this argument. "Unalleged, uncertain future events do not make her Pep Boys tires worth less at the time of purchase than equivalent registered tires," and the lack of registration did not render the tires "defective." The Third Circuit also held that the lack of registration was not, in and of itself, enough to establish standing, explaining "[i]f Pep Boys shirked its tire registration obligations, it committed only a "bare procedural violation" that caused neither actual harm nor a concrete material risk of harm." And even if plaintiff's "alleged harm associated with a future recall of her tires were concrete, her risk of actual injury is too speculative for Article III standing purposes."

Sixth Circuit

McNamee v. Nationstar Mortgage, LLC, No. 14-cv-1948, 2020 WL 7202628 (S.D. Ohio Dec. 7, 2020)

Southern District of Ohio rejects motion for decertification based on inadequacy of class counsel.

In this putative class action, defendant moved for decertification based on inadequacy of plaintiff's counsel, pointing to: a 5-to-6-month delay in sending notice to the class; the filing of only two sets of written discovery requests; and the failure to designate an expert, take a 30(b)(6) deposition, authenticate certain documents, and develop evidence "aside from plaintiff's own self-serving testimony."

Although the court found the 5-to-6-month delay in sending class notice "troubling," it held that the delay "did not rise to the level of inadequate representation." In so holding, the court noted several mitigating factors, including the fact that class counsel promptly sent class notice once briefing on the motion for decertification had concluded and the fact that the opt-out period had passed. The court also explained that the error was "not part of a broader pattern of deficient performance" and there were no "other factors present to suggest class counsel [was] inadequate."

The court then rejected arguments that class counsel failed to vigorously pursue discovery. In so doing, the court explained that "the number of sets of written discovery alone does not necessarily mean class counsel neglected to obtain necessary information or documentation," that documents can be authenticated by witness testimony, and that the "self-serving testimony . . . would appear to be some relevant evidence."

Seventh Circuit

McFields v. Dart, 982 F.3d 511 (7th Cir. 2020)

The Seventh Circuit holds commonality, typicality, and predominance were lacking where a proposed putative class challenged a jail's dental treatment process.

This appeal arose from the district court's denial of class certification. Plaintiffs were detainees from the Cook County Jail, each of whom alleged harm resulting from the jail's dental treatment policy. Plaintiffs claimed that the jail's policy, requiring detainees to submit health service request forms in lieu of face-to-face dental assessments, caused gratuitous pain. The district court denied class certification and found that the individualized inquiries related to each plaintiff were incompatible with the commonality, typicality, and predominance requirements of Rule 23.

The Seventh Circuit affirmed, ruling that the district court had not abused its discretion in denying class certification. The court, after reviewing the various dental issues, pains experienced, and individualized facts and circumstances, found that the proposed class lacked the necessary commonality and predominance for certification. Furthermore, the court found the named plaintiff atypical, determining that it was the delay in execution of his referral to receive dental care rather than the denial of a face-to-face assessment that caused his injury.

Fox v. Dakkota Integrated Sys., LLC, 980 F.3d 1146 (7th Cir. 2020)

Seventh Circuit finds that data retention violations under section 15(a) of the Illinois Biometric Information Privacy Act can constitute concrete injuries sufficient to establish Article III standing.

This appeal challenged a district court's finding that class action plaintiffs lacked Article III standing after asserting violations of the Illinois Biometric Information Privacy Act (BIPA). The named plaintiff was an employee of a defendant auto supplier that relied on third-party software to retain employee biometric data for timekeeping purposes. On behalf of a proposed class, the plaintiff alleged numerous violations of section 15(a) of BIPA, claiming that her employer unlawfully disclosed her biometric data to third parties, failed to publicly disclose or develop retention and destruction guidelines, and failed to comply with guidelines for scheduled destruction of biometric data. The district court held that plaintiffs lacked standing based upon the Seventh Circuit's decision in *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 619 (7th Cir. 2020).

The Seventh Circuit reversed, clarifying its prior holdings concerning claims brought under section 15(a). The court reiterated the narrow scope of *Bryant*, where the only alleged violation of section 15(a) was the duty to publicly disclose data retention and destruction protocols. The court emphasized that, because the named plaintiff in this case alleged that her employer failed to comply with data retention and destruction protocols, this amounted to more than procedural, unparticularized harms, and rose to the level of concrete injuries. The court further held that the plaintiffs' status as union members, and the potential collective bargaining implications associated, established Article III standing in accordance with *Miller v. Southwest Airlines Co.*, 926 F.3d 898, 902–03 (7th Cir. 2019).

Eighth Circuit

Custom Hair Designs by Sandy v. Cent. Payment Co., LLC, 984 F.3d 595 (8th Cir. 2020)

Eighth Circuit affirms certification in a RICO class action involving payment processing contracts subject to individual negotiation.

This case involved fraudulent concealment and RICO claims against a credit card payment processor. Plaintiffs were small retailers that used defendant's processing services. They alleged that defendant misrepresented a number of fees, added fees with no value, and inflated fees without prior approval from issuing banks. The processing contracts, however, were subject to individual negotiation and differed on what fees were permitted. The district court granted class certification, and the Eighth Circuit affirmed.

On appeal, defendant argued that the commonality and predominance requirements were not satisfied because the processing contracts differed, with many allowing the challenged fees. But the Eighth Circuit rejected this argument for two reasons. First, although the price terms were subject to negotiation, all plaintiffs alleged that defendant failed to obtain bank preauthorization for the challenged fees and the contracts were otherwise the same. Second, the court concluded that any variability in what fees were permitted went to damages, not liability.

The Eighth Circuit also rejected defendant's argument that individual issues relating to the statute of limitations defense defeated predominance. Defendant asserted that plaintiffs were relying on fraudulent concealment to toll the limitations period and argued that each class member must show reasonable

diligence, which was an individualized question. The Eighth Circuit, however, concluded that this issue could be addressed based on class-wide proof of defendant's misrepresentations that certain fees were mere "pass through" costs when in fact they had not been approved by the issuing banks.

Defendant also argued that class certification was improper because its agents separately negotiated with each class member, which meant that those discussions would need to be analyzed individually to determine whether a misrepresentation occurred. The Eighth Circuit rejected this argument as well, concluding that plaintiffs were relying on uniform misrepresentations that banks had authorized fee increases. According to the court, "[a]gent communications are relevant as a defense, but only if [defendant] could prove agents disclosed [the] intention to charge higher fees without issuing bank authorization."

Ninth Circuit

Chambers v. Whirlpool Corp., 980 F.3d 645 (9th Cir. 2020)

For purposes of awarding attorney's fees on the coupon portion of a class action settlement, Ninth Circuit holds that the trial court improperly applied a lodestar-only methodology.

This case involved a putative class action against Whirlpool alleging overheating dishwashers. As part of a settlement, the parties agreed to payments in cash for repairs or replacements where overheating had occurred, and coupons for a discount on purchases of new dishwashers within certain timeframes. The parties could not agree on the monetary value of the coupons that would be redeemed – Whirlpool estimated as low as $4.2 million and plaintiffs estimated $116.7 million. With respect to fees, plaintiffs' counsel requested $15 million (approximately $9 million in lodestar with a 1.68 multiplier), relying on a supposed settlement value in the range of $55.7 million to $116.7 million. The district court used a lodestar-only methodology and awarded $14.8 million in fees. Defendant appealed the fee award.

The Ninth Circuit reversed the fee award, finding that the Class Action Fairness Act (CAFA) and settled precedent prohibit using the lodestar method for coupon settlements, even for cases brought in diversity jurisdiction. Instead, the percentage-of-redemption-value method must be applied to any "portion" of a fee award "attributable to the award of . . . coupons." Based on the record, the Ninth Circuit noted that only 4% of claims submitted by class members could involve cash reimbursement. The remaining 96% were for coupons. The Ninth Circuit remanded, ordering the district court to determine the overall settlement value through expert testimony, and then use the lodestar approach for the monetary portion of the settlement, and the percentage-of-redemption-value method for the coupon portion, to arrive at an attorney's fees award.

Harris v. KM Industrial, Inc., 980 F.3d 694 (9th Cir. 2020)

District court properly remanded case where defendant made improper assumptions about the amount in controversy under CAFA.

Plaintiff asserted wage and hour claims in state court on behalf of a putative class that consisted of 442 "persons in hourly or non-exempt positions in California," and also persons in a "meal period subclass" and a "rest period subclass." Defendant removed under CAFA, arguing that the amount in controversy was approximately $7 million. For purposes of its calculations, defendant assumed that all of the members of the hourly employee class also were members of the meal period and rest period subclasses.

Plaintiff moved to remand to state court, challenging the assumption as "unfounded" and arguing that the calculation was inflated. The district court agreed, also finding that defendant failed to meet its burden of proof by a preponderance of the evidence and granted plaintiff's motion to remand.

On appeal, the Ninth Circuit affirmed. The court first concluded that plaintiff asserted a factual rather than a facial attack on CAFA jurisdiction. Although plaintiff did not introduce evidence, the court explained that a factual attack "need only challenge the truth of the defendant's jurisdictional allegations by making a reasoned argument as to why any assumptions on which they are based are not supported by evidence." Once plaintiff challenged the removal assumption, defendant had the burden to show that the assumptions were reasonable. But the defendant presented no evidence that every member of the meal and rest period subclasses were members of the hourly employee class or that putative class members worked shifts long enough to qualify for breaks. Ultimately, the court agreed that "relying on the factually unsupported and unreasonable assumption that the 442 Hourly Employee Class members worked shifts long enough to entitle them to meal and rest periods would exaggerate the amount in controversy."

Laver v. Credit Suisse Secs., LLC, 976 F.3d 841 (9th Cir. 2020)

FINRA rule prohibiting arbitration of class actions cannot be used to bar enforcement of contractual class-action waiver.

Plaintiff, a former financial advisor with Credit Suisse, filed a proposed class action, alleging that Credit Suisse improperly attempted to avoid payment of deferred compensation in connection with a wind down of its advisory business operation. Credit Suisse, a FINRA member, moved to compel arbitration of plaintiff's individual claims based on a class-action waiver contained in his employment agreement. Plaintiff argued that FINRA Rule 13204(a)(4) barred Credit Suisse from pursuing arbitration. However, as construed by the district court, the rule prohibits only the compelled arbitration of certified or putative class action claims. The district court therefore granted Credit Suisse's motion to compel, requiring arbitration of the individual claims.

On appeal, plaintiff argued that the FINRA rule prevented Credit Suisse from enforcing the class waiver in any forum. The Ninth Circuit rejected this contention, finding that the rule could not supersede the right to enforce a contractual arbitration provision, pursuant to its terms, under the Federal Arbitration Act (FAA). The Ninth Circuit noted that the rule did not state a bar to class action waivers on its face, and even an interpretation to that effect would impermissibly interfere with the availability of arbitration and create a scheme inconsistent with the FAA.

Bahamas Surgery Center, LLC v. Kimberly-Clark Corp., No. CV 14-8390-DMB (PLAx), 2020 U.S. Dist. LEXIS 232728 (C.D. Cal. Dec. 9, 2020)

Former class counsel obligated to notify a decertified class of decertification.

Following decertification, the district court considered whether notice to class members was required. The court found "persuasive authority" supporting the duty of a court and counsel to provide notice, including for the purpose of ensuring that class members suffered no prejudice. In reaching this conclusion, the district court rejected defendants' contention that it lacked authority to order notice because the parties had filed a stipulation to dismiss under Rule 41(a)(1)(A)(ii), which took effect without the need for action from the court.

Clark v. Wesbtrae Natural, Inc., No. 20-cv-03221-JSC, 2020 WL 7043879 (N.D. Cal. Dec. 1, 2020)

Plaintiff properly served CLRA notice with initial complaint that sought injunctive relief, and then amended to include damages.

Plaintiff sued Westbrae, alleging that the labelling on its vanilla soymilk was misleading. According to plaintiff, "organic unsweetened vanilla soymilk" reasonably could be interpreted "as conveying that the [p]roduct's vanilla flavor is derived exclusively from the vanilla bean." Among other claims, plaintiff brought a claim under the Consumers Legal Remedies Act (CLRA). Upon filing the action, plaintiff served a notice on defendant, advising of the alleged mislabeling and demanding a cure. But plaintiff sought only injunctive relief on the CLRA claim, and disgorgement and restitution on the other claims. When plaintiff amended the complaint to include damages under the CLRA, Westbrae objected to the prayer as untimely, arguing that plaintiff sought "damages in substance, if not in form, by seeking disgorgement and restitution under the other California consumer protection statutes in his initial [c]omplaint."

The court disagreed, stating that the relief sought under the other statutes was irrelevant. Further, the court found that plaintiff had provided notice as required – "at least thirty days before" filing a CLRA damages claim in the amended complaint.

Drake v. Toyota Motor Corp., No. 2:30-cv-01421-SB-PLA, 2020 WL 7040125 (C.D. Cal. Nov. 23, 2020)

District court dismisses nationwide class allegations where named plaintiffs were only from two states.

Plaintiffs filed a proposed nationwide class action against Toyota, alleging a steering defect in certain vehicles. Named plaintiffs were citizens of California and Illinois, respectively. Plaintiffs asserted claims under California and Illinois consumer protection statutes and the federal Magnuson-Moss Warranty Act.

On defendants' motion to dismiss, the district court found that plaintiffs "do not have standing to assert claims from states in which they do not reside . . . and it is appropriate to address standing in advance of class certification." The district court therefore dismissed the nationwide class allegations, leaving only the California and Illinois claims pending. The dismissal extended to the Magnuson-Moss claim because "claims under the [act] stand or fall with [the plaintiff's] express and implied warranty claims under state law."

Radcliff v. San Diego Gas & Elec. Co., No. 3:20-cv-01555-H-MSB, 2020 WL 6395677 (S.D. Cal. Nov. 2, 2020)

Where arbitration agreement was not "permeated" with unconscionable terms, the court severed an improper term and compelled arbitration of individual claims.

Plaintiff filed proposed class action related to defendants' employment policies. At the beginning of his employment, plaintiff executed an offer letter and an agreement providing that arbitration would provide "the exclusive remedy for [any] claim or dispute." Defendants moved to compel arbitration on an individual basis, except on a non-arbitrable PAGA (Private Attorneys General Act) claim, and plaintiff raised numerous challenges to the enforcement of the provisions, including as to procedural and substantive unconscionability. The court rejected those challenges, except with respect to a cost-shifting

provision, which required a party "who brings arbitrable claims to a non-arbitration proceeding to pay the costs of the other resulting from such action." But because this was the only improper term – the agreement was not "permeated" with such terms – the court severed it, and enforced the remainder of the agreement to require arbitration of plaintiff's individual claims.

Gross v. Vilore Foods Co., Inc., No. 20cv0894 DMS (JLB), 2020 WL 417176 (S.D. Cal. Oct. 28, 2020)

To rely on the delayed discovery rule, plaintiffs must allege facts showing inability to discover alleged deception before limitations period elapsed.

Plaintiffs brought a putative class action against Vilore, alleging claims under the CLRA, Unfair Competition Law (UCL), and False Advertising Law (FAL) as well as other claims, based on the allegation that the juice-based "Guava Nectar," "Apricot Nectar," and "Peach Nectar" products they purchased were deceptively labeled because they represented on their labels that they were "100% Natural" and depicted fruits, but contained the artificial flavoring di-malic acid. Plaintiffs sought to represent classes of consumers that included individuals who purchased the juices at issue nearly six years before the action was filed, well outside the applicable statute of limitations. Defendant moved to dismiss plaintiffs' claims in part on the ground that they were time-barred. Plaintiffs tried to rely on the delayed discovery rule to toll the statutes of limitation, but the court held that plaintiffs had not alleged facts to support that theory. Specifically, the court held that, under plaintiffs' logic, the statute of limitations would be tolled for every reasonable consumer from the date he or she was deceived into making a purchase. The court rejected that argument and held that consumers must plead facts showing the inability to have discovered the deception before the statute lapsed, despite exercising reasonable diligence.

Freedline v. O Organic, No. 19-cv-01945-JD, 2020 WL 6290362 (N.D. Cal. Oct. 27, 2020)

Plaintiff failed to state claims under California consumer protection statutes on behalf of non-residents.

Plaintiff brought a putative class action against O Organics, based on the allegation that defendant misled consumers about the alcohol and sugar content in their kombucha beverage products. Plaintiff alleged claims under the UCL, FAL and CLRA on behalf of a putative nationwide class. Defendant moved to dismiss the claims alleged on behalf of non-California residents. The court granted the motion for two reasons. First, defendant identified significant differences in reliance and scienter requirements and remedies between the California consumer protection statutes in the complaint and corresponding statutes in other states – differences the Ninth Circuit has already held to be material for a choice-of-law analysis. Second, the court found that every state has a strong interest in applying its own consumer protection laws to transactions within its borders that affect its residents. The court held that these interests outweighed any interest California may have in applying its laws extraterritorially notwithstanding that defendant brewed and bottled its kombucha in California, is headquartered in the state, and does substantial advertising and marketing there.

Taylor v. Costco Wholesale Corp., No. 2:20-cv-00655-KJM-DMC, 2020 WL 389970 (E.D. Cal. Oct. 7, 2020)

Retailer could not be liable for violation of California's consumer protection statutes where plaintiff did not allege that retailer personally participated in and exercised unbridled control over alleged unfair business practices.

Plaintiff brought a putative class action against Costco for selling Roundup, a weed killer containing the alleged cancer-causing chemical glyphosate. The manufacturer, Monsanto, was not a party to the case. Plaintiff alleged claims under the UCL based on the allegation that Costco did not provide him with information when he purchased the Roundup indicating that the product contained an ingredient that might be carcinogenic. On a motion to dismiss, the court found that plaintiff did not allege facts showing that Costco exercised unbridled control of the content of the Roundup label, which is required to impose liability on a retail seller of another company's product. The court found that Costco is not required to police representations made on products on its shelves, absent more involvement in creating and participating in the development of such representations in the first place.

Hildebrandt v. Staples the Office Superstore, LLC, 58 Cal. App. 5th 128 (2020)

California court of appeal holds that, when evaluating *American-Pipe* tolling, courts must focus on the pleading.

In an employment class action, the trial court granted summary judgment in favor of Staples, finding that all of the claims were time-barred, and the pendency of two related class actions provided no basis for tolling. The trial court found that tolling did not apply because: (1) the lead plaintiff in one of the suits held a different employment position than Hildebrandt; and (2) the trial court in the other suit denied class certification due to lack of commonality, which raised a "presumption" against tolling. As the basis for this presumption, the trial court relied on *Batze v. Safeway, Inc.*, 10 Cal. App. 5th 440 (2017).

The Second District Court of Appeal stated that the appeal "presents one issue" – whether Hildebrandt could invoke the class action tolling rule established by the United States Supreme Court in *American Pipe & Construction Co. v. Utah*, and adopted by the California Supreme Court in *Jolly v. Eli Lilly & Co.* In *Jolly*, the California Supreme Court described the *American Pipe* rule as follows: "[U]nder limited circumstances, if class certification is denied, the statute of limitations is tolled from the time of commencement of the suit to the time of denial of certification for all purported members of the class who either make timely motions to intervene in the surviving individual action . . . or who timely file their individual actions."

The Second District rejected the trial court's conclusion based on *Batze* – i.e., that Hildebrandt could not overcome the presumption against tolling because the "evidence showed tolling would be 'prejudicial' to Staples and the denial of class certification was not 'unforeseeable.'" The Second District found that *Batze* was not founded in *Jolly* or *American Pipe*. *Batze* contemplates a "factual inquiry in what the defendant could have predicted about what absent class member might have believed," while *Jolly* and *American Pipe* require focus on the "class action *pleading*." The Second District therefore reversed, holding that a trial court must examine the pleading and determine whether the defendant "had adequate notice sufficient to effectuate the purpose of the statute of limitations," and whether "the claims asserted on behalf of the putative class were sufficiently similar to the absent class members' individual claims, so that the absent class members can be found reasonably [to] have relied on the [class action] complaint as a basis for postponing their own actions."

Eleventh Circuit

Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917 (11th Cir. 2020)

Eleventh Circuit holds that an alleged violation of FACTA's truncation requirement alone is not enough for standing.

This case involved a putative class action against Godiva alleging violations of the Fair and Accurate Credit Transactions Act (FACTA). The gravamen of FACTA is that a merchant is prohibited from printing "more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." The merchant provided plaintiff with a receipt that contained 10 digits of his credit card number, and plaintiff asserted that this violation subjected him and the class members "to an elevated risk of identity theft."

After motion practice and discovery, the parties entered into mediation and reached a mediated settlement of the claims brought by Dr. Muransky. The parties subsequently notified the court of an agreement to resolve the case and sought court approval of the settlement. Two class members raised several objections to the settlement, including to plaintiff's standing. On October 28, 2020, the Eleventh Circuit, *sua sponte*, withdrew a prior opinion and issued an *en banc* decision (7-3 split), holding that, under *Spokeo*, plaintiff lacked the requisite Article III standing because he failed to "allege either a harm or a material risk of harm stemming from the FACTA violation. . . ."

The court explained that "the plaintiff needs to show that the defendant harmed him, and that a court decision can either eliminate the harm or compensate for it. That standard applies equally in the class action setting...." But here, plaintiff alleged only a violation of his statutory rights under FACTA. Citing *Spokeo*, the court concluded that a statutory violation alone was not enough. The court also held that the time allegedly spent safeguarding or destroying improper receipts was insufficient because "where a hypothetical future harm is not certainly impending, plaintiffs cannot manufacture standing merely by inflicting harm on themselves." The court also rejected plaintiff's attempt to analogize FACTA to the common law claim for breach of confidence because the requirements were too different. Finally, the court rejected plaintiff's argument that he was at an increased risk of identity theft because he "did not plead facts that, taken as true, plausibly allege a material risk, or significant risk, or substantial risk, or anything approaching a realistic danger."

D.C. Circuit

Salvador v. Allstate Prop. & Cas. Ins. Co., No. 19-2754, 2020 U.S. Dist. LEXIS 225937 (D.D.C. Nov. 30, 2020)

D.C. District Court grants motion to strike class action allegations at the motion to dismiss stage, highlighting the prevalence of individualized issues.

In this putative class action, plaintiffs brought suit against several Allstate entities, contending that the defendants allegedly failed to (1) compensate one of the named plaintiffs for his injuries under the uninsured motorist coverage in his Allstate insurance policy and (2) warn consumers purchasing Allstate insurance that Allstate would take actions aimed at allegedly denying or delaying receipt of uninsured motorist benefits. Defendants moved to dismiss the second count of the complaint and moved to dismiss certain of the Allstate entities as defendants in the litigation; both motions were granted. At the same

time, defendants also filed a motion to strike the class allegations, which the court entertained at the outset and alongside the motion to dismiss – and subsequently granted.

In assessing the motion to strike, the court noted that D.C. Code Section 31-2406(f)(2) requires that "[e]ach insurer selling motor vehicle insurance in the District . . . shall include coverage for bodily injury or death" of at least $25,000 per person injured in an accident or $50,000 total for all persons injured in an accident "for the protection of persons insured . . . **who are legally entitled to recover** damages from owners or operators of uninsured motor vehicles." As such, "each claimant must be 'legally entitled' to recover damages to be encompassed in this code section," and thus "[t]o recover benefits pursuant to uninsured motorist coverage, the insured must prove coverage under the contract." In light of these requirements, the court determined that "individualized issues of fact and law would necessarily predominate over any common questions" both practically and legally. The individualized determinations that would need to be determined as to each purported class member included whether the proposed class member was actually injured, whether the class member was actually uninsured, Allstate's owing of benefits to that person, liability for the injuries in question (including any liability of the class member), causation, and appropriate damages. The Court found these individualized determinations would require "mini-trials" as to each claimant, rendering class treatment inappropriate.

White v. Hilton Hotels Ret. Plan, No. 16-856, 2020 U.S. Dist. LEXIS 185791 (D.D.C. Oct. 7, 2020)

D.C. District Court finds a "fail-safe" class cannot satisfy the definiteness requirement for class certification.

In this ERISA putative class action, plaintiffs sought class certification, and among other things, defendants argued the proposed class was impermissibly "fail-safe" in opposition. Put differently, defendants argued that the proposed class definition was defined in such a way that class membership is contingent on whether the person has a valid claim in the first place, making future merits determinations necessary to determine who is in the class or not. The court agreed, finding the class definition of persons who "have vested rights to retirement benefits that have been denied" requires the question of whose rights have actually vested to be determined before the scope of the class can be determined.

In reaching its holding, the court noted "the rule against [fail-safe] classes is not entirely settled," as several courts in the District have gone in different directions on this issue. Moreover, "[t]he D.C. Circuit has not opined directly on the matter." The court was, however, persuaded by the fact that eight other Circuits have "either adopted a categorical rule against fail-safe classes or discussed such a rule with approval." The court further highlighted that "the gravamen of the rule itself is rooted in compelling principles of fairness and common sense. As a practical matter, putative members of a fail-safe class are not identifiable after class certification, because the definition of a class member turns on the final result of the litigation itself. This creates tangible administrative problems for the courts, including difficulty in providing proper notice to class members."

As the court did permit plaintiffs a "final opportunity to amend their class definition," the parties have been briefing plaintiffs' renewed class certification motion since this decision was issued. As the court did flag additional potential barriers to class certification in its October 7, 2020 decision, including defects as to their proposed subclasses, it remains to be seen whether plaintiffs can overcome this hurdle.

Toxin Free USA v. J.M. Smucker Co., No. 20-CV-1013, 2020 U.S. Dist. LEXIS 222520 (D.D.C. Nov. 30, 2020)

D.C. District Court finds CAFA jurisdiction is improper unless the complaint itself invokes the class action litigation mechanism and/or indicates that the plaintiff intends to seek class certification in the future.

In this case, Toxin Free USA brought an action against the J.M. Smucker Company and Ainsworth Pet Nutrition, LLC in the Superior Court of the District of Columbia, alleging violations of two subsections of the District of Columbia Consumer Protection Procedures Act's private attorney general provision. Defendants removed the case to federal court and argued, among other things, that the case qualified as a class action under CAFA. Toxin Free filed a motion to remand, which was granted because, among other things, the case was not removable under CAFA.

In finding there was no CAFA jurisdiction, the court flagged several points relating to plaintiff's pleading and thus how Toxin Free "brought" this case. First, Toxin Free "did not label [its action] as a class action or reference Rule 23 of the D.C. Superior Court Rules of Civil Procedure or Rule 23 of the Federal Rules of Civil Procedure." Second, Toxin Free did not allege that it had met any of Rule 23's threshold or more specific requirements in its complaint. While discovery requests served by Toxin Free referenced class certification, the court found that to be insufficient to "convert this action into a class action" as "what matters in assessing jurisdiction under CAFA is 'how the action was actually filed" by the plaintiff in the first place.

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