

Class Action Litigation Update: Key Developments From Second Quarter 2020

There were several notable developments in the second quarter of 2020 affecting class actions. The Judicial Panel of Multidistrict Litigation will hold a hearing at the end of July on several requests to consolidate lawsuits related to the COVID-19 pandemic on an industry-wide basis. Courts issued important decisions addressing Article III standing and the proper analysis for class certification claims. And the U.S. Supreme Court declined to review decisions that make it more difficult for companies to enforce their arbitration agreements to defeat lawsuits in California that seek public injunctive relief.

1

Plaintiffs Seek To Force COVID-Related Class Actions Into Industry-Wide MDLs.

With the COVID-19 pandemic continuing to affect the entire United States, lawsuits stemming from the pandemic have increased. Plaintiffs in several COVID-related class actions have asked the Judicial Panel for Multidistrict Litigation to consolidate their cases into industry-wide MDLs. Among the issues that the Panel is expected to take up at its next July 30, 2020 hearing include cases involving:

- Insurance disputes over losses businesses have suffered due to COVID-19.
- Small businesses alleging that banks did not properly disburse Paycheck Protection Program loans.
- Agents alleging that banks improperly denied them fees for preparing Paycheck Protection Program loan applications for small businesses.
- Ticket purchasers alleging that secondary event ticket sellers refused refunds for events disrupted by the pandemic.

In addition to the cases being heard at the end of July, plaintiffs-consumers are seeking consolidation of putative class actions against airlines for allegedly failing to refund tickets that were canceled due to the pandemic. And a group of skiers is asking for consolidation of their proposed class actions alleging that insurance companies failed to reimburse them for ski trips canceled due to COVID-19.

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Some, But Not All, Claims Under The Illinois Biometric Information Privacy Act Satisfy Article III Standing Requirements.

In class actions involving violations of the Illinois Biometric Information Privacy Act (BIPA), plaintiffs have tried to avoid removal to federal court by arguing that they would lack Article III standing—a barrier they do not face in state court. That argument will have less success following the Seventh Circuit's decision in *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617 (7th Cir. 2020). There, the court concluded that a plaintiff's allegations that her biometric information was taken without her informed consent, in violation of BIPA, satisfied Article III's injury-in-fact prong for standing. Applying the approach set forth in Justice Thomas's concurrence in *Spokeo v. Robbins*, 136 S. Ct. 1540 (2016), the *Bryant* court held that the plaintiff's alleged injury—the collection and storage of her fingerprint information—was a violation of her private rights, which satisfied Article III's injury-in-fact requirement. However, the plaintiff lacked Article III standing to pursue a claim related to the alleged lack of a publicly available schedule of personal information, because that was a violation of public rights.

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The Third And Eighth Circuits Reaffirm The Predominance Requirement Of Rule 23(b)(3).

Two recent appellate decisions reaffirm the need for district courts to closely scrutinize attempts to certify a class. The Third Circuit in *In Re: Lamictal Direct Purchaser Antitrust Litigation*, 957 F.3d 184 (3rd Cir. 2020), reversed a district court's class certification order in an antitrust case of a class of purchasers of an anti-epilepsy drug. In the process, the Third Circuit reiterated that plaintiffs must establish that their claims are capable of common proof by a preponderance of the evidence. The Third Circuit rejected plaintiffs' argument that a lower standard announced in *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016) applied, reasoning that *Tyson Foods* was different because it involved claims under the Fair Labor Standards Act. The Third Circuit also faulted the district court for relying on averages to show that the injury was capable of common proof.

Likewise, the Eighth Circuit in *Stuart v. Global Tel *Link*, 956 F.3d 555 (8th Cir. 2020) held that class certification was properly denied in an action alleging that a prison technology company overcharged inmates for phone calls. The suit was based on rules promulgated by the Federal Communications Commission. But after those rules were subsequently vacated by the D.C. Circuit, the plaintiffs no longer had a common question unifying the class, making certification inappropriate.

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Appeal Of Denial Of Class Certification Is Moot Where Plaintiff Settles Individual Claims With No Financial Stake In Class Claims.

When settling class actions, class-action defendants should be aware of a recent Ninth Circuit decision addressing the circumstances in which a settling plaintiff can appeal a denial of class certification. In *Brady v. AutoZone Stores, Inc.*, 960 F.3d 1172 (9th Cir.

2020), the Ninth Circuit held that a plaintiff's appeal of an order denying class certification was moot after the plaintiff settled his individual claims because the plaintiff no longer "retain[ed]—as evidenced by an agreement—a financial stake in the outcome of the class claims." *Id.* at 1175. Defendants in the Ninth Circuit should be cognizant of *Brady* in negotiating settlements with class representatives following the denial of class certification, as any settlement that allows the individual plaintiff to retain a financial stake in the class claims may allow the plaintiff to appeal an order denying class certification.

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The Ninth Circuit Holds That Class Counsel's Initial Fee Proposal Is Starting Point For Later Determining Attorneys' Fees and Expenses.

The Ninth Circuit has instructed district courts to engage in a more thorough analysis before awarding attorneys' fees and expenses that vary from the initial proposal class counsel may make when seeking a leadership role at the outset of a case. In *In re Optical Disk Drive Products Antitrust Litigation*, 959 F.3d 922 (9th Cir. 2020), the district court had appointed lead counsel in reliance on the fee proposal submitted by the firm. When the firm submitted its fee requests at the conclusion of the litigation, it asked for a greater amount than was contemplated by its initial proposal, purportedly due to unexpected circumstances that arose during the litigation. The Ninth Circuit emphasized that while district courts have the authority to adjust fees upward from an initial fee proposal based on unexpected circumstances, when an initial fee proposal differs from the final fee award sought, the district court must explain why a difference is justified.

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U.S. Supreme Court Denies Review Of California's *McGill* Rule.

A previous quarterly update mentioned that the U.S. Supreme Court had been asked to address the enforceability of arbitration agreements in the context of whether the so-called *McGill* rule in California is preempted by the Federal Arbitration Act. In June 2020, the U.S. Supreme Court denied review of these cases. As a result, the *McGill* rule remains in effect in California, and businesses operating in California must continue to take that rule into account when fashioning their arbitration clauses.

On July 22, 2020, Covington lawyers will discuss the risks, challenges, and strategic considerations posed by arbitration agreements, including the implications of the *McGill* rule. To register for the webinar, please click [here](#).

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California Supreme Court Issues Pair Of Decisions On California's Unfair Competition Law.

The California Supreme Court recently settled two open questions under California's Unfair Competition Law (UCL). In *Abbott Laboratories v. S.C. (Rackauckas)*, No. S249895 (2020), the Court held that city and county prosecutors can impose civil

penalties for UCL violations that occur anywhere in California, not just those within the boundaries of their respective city or county. And in *Nationwide Biweekly Administration, Inc. v. Superior Court of Alameda County*, 9 Cal.5th 279 (2020), the Court confirmed that “in causes of action under the UCL or [False Advertising Law] seeking injunctive relief and civil penalties, the gist of the actions is equitable, and there is no right to a jury trial under California law either as a statutory or constitutional matter.” That decision may extend by analogy to the California Private Attorneys General Act of 2004, which is also equitable in nature but allows for civil penalties.

If you have any questions concerning the material discussed in this update, please contact the following members of our Class Actions Litigation practice:

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