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Class Action Litigation Newsletter Spring 2020 - Fourth Circuit, Fifth Circuit, Sixth Circuit

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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."

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