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Class Action Litigation Newsletter Summer 2020: Ninth Circuit

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Brady v. Autozone Stores, Inc., **No. 19-35122, __ F.3d. __ (9th Cir. June 3, 2020)**

Ninth Circuit confirms that a plaintiff's voluntary settlement of individual claims moots the class allegations under the plaintiff retains a personal stake in the case.

This issue in this case was "what happens when a class representative voluntarily settles on his individual claims without indicating any financial stake in the unresolved class claims." Plaintiff asserted violations of meal break laws. Following denial of class certification, plaintiff settled his claims for $5,000, which also covered any "claims to costs or attorneys' fees." The agreement did not provide for any financial award for plaintiff if the unresolved class allegations ultimately were successful. Following the settlement, an appeal of the certification rulings was filed.

The Ninth Circuit found the appeal moot, reasoning that plaintiff did not retain a "personal stake in the case." A personal stake must be "concrete" and "financial," which "turns on [the] language of the settlement agreement." Plaintiff's agreement did not allow for any additional compensation for the class allegations, and he released any claim for costs and fees. Plaintiff also had no proof of an obligation to pay advanced costs unless the class was certified.

Canela v. Costco Wholesale Corp., No. 18-16592, __ F.3d __ (9th Cir. July 9, 2020)

Ninth Circuit rules that lawsuits filed under California's Private Attorney General Act (PAGA) are not "class actions" under the Class Action Fairness Act (CAFA).

Plaintiff brought a claim in California superior court under PAGA, alleging that Costco violated California Labor Code section 1198 by failing to provide employees with adequate seating as required by section 14 of California's Wage Order 7-2001. Canela's complaint said "Class Action Complaint" on its cover page and included references to the lawsuit as a class action. Costco removed the case to federal court based on the federal diversity statute, 28 U.S.C. § 1332(a) and CAFA. About a year later, plaintiff informed the District Court that she did not intend to pursue a class action. The district court concluded that, because Canela had denominated her lawsuit as a "class action" and had sought class status on her PAGA claim as of the time the case was removed from state court, the district court retained CAFA jurisdiction even though Canela later decided not to pursue class certification. Costco then moved for partial summary judgment, contending that, without a certified class, Canela lacked Article III standing to represent absent aggrieved employees and could not represent absent "aggrieved employees" under Rule 23. The district court denied Costco's motion, and Costco appealed.

Addressing traditional diversity jurisdiction, the Ninth Circuit panel held that the amount in controversy did not meet the statutory threshold at the time of removal. Because the named plaintiff's pro-rata share of civil penalties, including attorney's fees, totaled $6,600 at the time of removal, and the claims of other employees could not be aggregated with hers under *Urbino v. Orkin Services of California, Inc.*, 726 F.3d 1118 (9th Cir. 2013), the requisite $75,000 jurisdictional threshold was not met. Accordingly, the court held the district court lacked diversity jurisdiction at the time of removal.

The panel also held that the district court lacked subject matter jurisdiction under CAFA because plaintiff's stand-alone PAGA lawsuit was not, and could not have been, filed under a state rule similar to Rule 23. The panel held that the rule in *Baumann v. Chase Investment Services Corp*., 747 F.3d 1117, 1122 (9th Cir. 2014), that "PAGA actions are [] not sufficiently similar to Rule 23 class actions to trigger CAFA jurisdiction," controlled. The panel also rejected Costco's argument that, because the named plaintiff originally sought class status in her complaint, her case was filed as a class action within the meaning of CAFA. Rejecting a "formalistic" approach, the court explained that the "substance and essentials" of the complaint must be evaluated when deciding whether a state cause of action is filed under a state law similar to a "class action" under CAFA. The court explained that because "PAGA suit is a type of *qui tam* action" it is not similar to a "class action" under CAFA, and thus subject matter jurisdiction was lacking at the time of removal.

Grodzitsky v. American Honda Motor Co., 957 F.3d 979 (9th Cir. 2020)

Ninth Circuit affirms decision denying class certification and excluding expert testimony under *Daubert* at the class certification stage.

This case involved allegations that window regulators installed on vehicles were defective because they caused windows to fall into the doorframes, which increased the likelihood of injuries or accidents. In seeking class certification, plaintiffs submitted expert evidence purporting to show a common defect. But the expert's opinion had multiple flaws, including being based on an inappropriate "life of the vehicle" standard for design defects and an analysis of only 26 vehicles without any showing that this sample was representative or reliable. The district court denied certification on commonality grounds and excluded the expert's opinion under *Daubert*.

On appeal, the Ninth Circuit affirmed, explaining that, in "evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*." The court emphasized the expert's testimony that he believed the regulators had a

"common defect" because they were not "durable enough" to "last the life of the vehicle," and conceded that he was unable to identify a "common solution" to the purported defects in the regulators and had no opinion concerning the proper manufacturing method that should have been. "Due to these concessions," the expert "did not and could not provide a reliable opinion demonstrating a common defect for over 400,000 regulators," thus making class certification improper.

Cheslow v. Ghirardelli Chocolate Co., No. 19-cv-07467-PJH, 2020 WL 1701840 (N.D. Cal. April 8, 2020); Prescott v. Nestle, USA. Inc., No. 19-cv-07471-BLF, 2020 WL 3035798 (N.D. Cal. June 4, 2020)

Multiple courts conclude that no reasonable consumer would understand the terms "white chips" or "white morsels" on product packaging to refer to white "chocolate" or imply the product contains chocolate.

In this pair of lawsuits, the same law firm filed separate class actions against Ghirardelli and Nestle, alleging false advertising claims based on the contention that the terms "white chips" and "white morsels," on the defendants' product packaging misleads consumers into believing that the products contain chocolate. Both defendants moved to dismiss, and the district courts in both actions (involving different judges) granted the motions. The courts independently concluded that, as a matter of law, no reasonable consumer would understand the terms "white chips" or "white morsels" on the product packaging as referring to chocolate, finding that the package labels at issue do not include the word "chocolate," and therefore contain no affirmative statements or representations that would support a qualitative assumption that the chips are made of chocolate.

The court in *Cheslow* also found that "the adjective 'white' in 'white chips' does not define the food itself but rather defines the color of the food." The *Cheslow* court also found that the placement of a package marked "white chips" alongside packages marked semi-sweet chocolate, bitter-sweet chocolate, or milk chocolate only serves to highlight the absence of the word 'chocolate' in the description of 'white chips.'

Sonner v. Premier Nutrition Corp., No. 18-15890, __ F.3d. __ (9th Cir. June 17, 2020)

Ninth circuit holds that a plaintiff must demonstrate that she has an inadequate remedy at law when seeking equitable relief.

Plaintiff filed a putative class action regarding "Joint Juice," a nutritional product manufactured, marketed, and sold by defendant. Plaintiff alleged that defendant falsely advertised that its product provided health benefits, in violation of the UCL and CLRA. Plaintiff sought damages under the CLRA and restitution under the UCL. Two months before trial, plaintiff dropped the CLRA damages claim, hoping that the district court would award equitable restitution under the UCL without a need for a jury trial. The plan backfired when the district court dismissed her claims for restitution because an adequate remedy at law, i.e., damages, was available under her CLRA claim.

On appeal, the Ninth Circuit affirmed the district court's decision (albeit on different grounds) and held, as a threshold jurisdictional issue, that under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), federal courts must apply equitable principles derived from federal common law to claims for equitable restitution. The panel

held that state law cannot circumscribe a federal court's equitable powers, even when state law affords the rule of decision. Explaining that federal law requires a party to prove they have an inadequate remedy at law when seeking an equitable remedy like restitution, regardless of whether California may have abrogated that requirement under state law.

Van v. LuLaRoe, No. No. 19-35242, ___ F.3d __ (9th Cir. June 24, 2020)

Ninth Circuit rules that the loss of the use of money, even a tiny sum, is sufficient to plead Article III standing.

Plaintiff filed a putative class action on behalf of defendant's customers in Alaska who were improperly charged sales taxes. Defendant moved to dismiss the complaint for lack of Article III standing arguing that plaintiff could not establish injury in fact where defendant had fully refunded the tax charges and her claim for interest alone was insufficient to establish standing.

On appeal, the Ninth Circuit held that the district court erred by concluding the interest was too little to support Article III standing. The panel held that plaintiff suffered a cognizable and concrete injury: the loss of a significant amount of money (over $500) for a substantial amount of time. The panel concluded that the temporary loss of use of one's money constituted an injury in fact for purposes of Article III. The panel noted that plaintiff did not assert that she was injured because she lost interest income, but rather that she was injured because she lost the use of her money, which was an actual, concrete, and particularized injury.

Walker v. Nestle, Inc., No. 3:19-cv-723-L-BGS, 2020 WL 3317194 (S.D. Cal. June 17, 2020)

Court holds that defendants cannot use California's Anti-SLAPP statute to attack false advertising claims based on commercial packaging and websites, which fall under the commercial speech exemption to the statute.

In this case, plaintiff filed a putative class action based on the allegation that the statements on defendant's chocolate product packaging are deceptive because they falsely lead consumers to believe that the products were produced in accordance with environmentally and socially responsible standards, when they purportedly were not. This included references to the "Nestle Cocoa Plan," "UTZ Certified" and "Sustainably Sourced," and representations that defendant "Support[s] farmers" and "help[s] improve the lives of [ ]cocoa farmers." Plaintiff alleged she purchased defendant's chocolate products in reliance on the social and environmental benefits prominently featured on the packaging and would not have purchased them had she known they were false. According to plaintiff, the labels were deceptive because defendant sources its cocoa from West African cocoa plantations that rely on child labor and child slave labor, and which contribute to deforestation and use other practices harmful to the environment.

Defendant moved to dismiss under California's Anti-SLAPP (Strategic Litigation Against Public Participation) statute, codified at California Civil Procedure Code § 425.16. Defendant argued that the statements on its Nestle Cocoa Plan website regarding efforts to combat child and slave labor in West Africa and reduce the negative effect of cocoa farming on the environment were within the scope of the Anti-SLAPP statute because they concern an issue of public interest.

Denying the motion, the court noted that the California legislature enacted the Anti-SLAPP Law to

stem “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” But the court also pointed out that, in response to a “disturbing abuse” of the Anti-SLAPP Law, the California legislature subsequently enacted two exemptions, including the “commercial speech exemption.” The court found this exemption applied expressly to product packaging, which is designed to sell products, and also applied to statements on defendant’s website.

Silver v. BA Sports Nutrition, No. 20-cv-00633-SI, 2020 WL 2992873 (N.D. Cal. June 4, 2020)

Court rules that “Superior Hydration” and “More Natural Better Hydration” claims are non-actionable puffery as a matter of law.

Plaintiff filed a putative class action based on the contention that defendant falsely advertised that BodyArmor sports drinks provide “Superior Hydration” on the label of its drinks, and through other marketing such as in-store displays, social media and television. The complaint also referenced non-label advertising, such as on billboards, promoting BodyArmor as the “More Natural Better Hydration” drink. Plaintiff claimed that, in contrast to these representations, BodyArmor on balance is not nutrient beneficial for the general public but is instead an unlawfully fortified junk food.

Defendant moved to dismiss, contending that plaintiffs did not plausibly allege that they were misled by BodyArmor’s labeling and advertising because the statements “Superior Hydration” and “More Natural Better Hydration” are non-actionable puffery as a matter of law, and the product labels accurately disclosed the contents of the sports drinks, including the sugar content. In addition, defendant contended that the FDA regulations upon which plaintiffs relied for their “fortification” claims were inapplicable. Defendant also argued that all of plaintiffs’ claims are barred by the First Amendment, and that plaintiffs cannot seek injunctive relief.

The court granted defendant’s motion, concluding that the “fortification” allegations failed because plaintiff did not adequately allege any violations of FDA regulations. The court also agreed that the statements “Superior Hydration” and “More Natural Better Hydration” were non-actionable puffery because they were general, vague statements about product superiority, rather than a misdescription of a specific or absolute characteristic of the product. The court found it implausible that a reasonable consumer would view the BodyArmor label and other marketing about “superior,” “more” or “better” and believe that BA was making a specific, verifiable claim about BodyArmor’s superior hydrating attributes.

Barriga v. 99 Cents Only Stores, LLC, No. E069288, __ Cal. App. 5th __ (June 26, 2020)

California Court of Appeal rules that trial courts have a duty to scrutinize “happy camper” declarations offered in opposition to a motion for class certification for actual or threatened abuse.

Plaintiff filed a wage and hour class action alleging various violations based on defendant’s alleged policy of locking late shift employees in the store at closing time and not paying for their time while they wait to be let out of the store. Plaintiff moved for class certification and, in opposing the motion, defendant offered 174 “happy camper” declarations from employees who claimed they were let out of the store immediately upon closing and/or were paid for their time waiting. But only 53 of the

declarants were members of the proposed class, and when plaintiff deposed 12 of the declarants, several testified that they had no idea what they lawsuit was about (even though all declarations contained an identical paragraph stating that the testimony would be used in the case), they didn't even know why they were appearing for deposition, and they were summoned by the company's human resources department, presented with declarations and told to sign them on the spot. Plaintiff moved to strike all 174 declarations on the ground that they were substantively inconsistent. The trial court denied the motion and granted class certification, in part based upon a community of interest demonstrated by the declarations, finding that it lacked authority to strike the declarations.

The court of appeal reversed and remanded for further consideration. The court explained that California courts have long recognized the trial court has both the duty and the authority to exercise control over precertification communications between the parties and putative class members to ensure fairness in class actions. Moreover, the lower federal courts have consistently held that an ongoing business relationship between the class opponent and putative class members – especially a current employer-employee relationship – creates the potential for abuse and coercion. Therefore, courts have cautioned that statements obtained by the class opponent from its employees, to oppose a class certification motion, must be scrutinized for actual or threatened abuse. If the trial court concludes the statements were obtained under coercive or potentially abusive circumstances, it has discretion to either strike those statements entirely or discount their evidentiary weight.

Williams v. U.S. Bancorp Investments, Inc., No. A156226, __ Cal. App. 5th __ (June 8, 2020)

California Court of Appeal rules that collateral estoppel does not prevent an absent class member in a class initially certified, and then decertified, from pursuing a separate, subsequent class action.

In 2005, *Burakoff, et al. v. U.S. Bancorp* was filed in Los Angeles County Superior Court, involving claims regarding wages, waiting time penalties and meal breaks. The court granted plaintiffs' motion for class certification on May 8, 2008. The plaintiff in *Williams* became employed at U.S. Bancorp in May 2007, and he was a member of the *Burakoff* class. On April 23, 2010, plaintiff filed a new class action in San Francisco Superior Court, alleging similar claims beginning the day after the *Burakoff* class period ended, and two subclasses consistent with those in *Burakoff*. On US Bancorp's demurrer, the San Francisco court stayed the new case as involving "the same primary rights" and "substantially the same causes of action" as *Burakoff*, pending the conclusion of *Burakoff*. In May 2011, the court decertified one subclass – the overtime subclass – as lacking commonality. The parties subsequently settled the case but not as to the overtime subclass. Plaintiff in *Williams* participated in the settlement.

Following motion practice regarding non-class arbitration and an earlier appeal, U.S. Bancorp renewed a motion to compel arbitration and argued that the class decertification order in *Burakoff* had collateral estoppel effect and barred the *Williams* claims. The San Francisco court dismissed the claims with prejudice on November 21, 2018.

On appeal, the court held that collateral estoppel does not apply to decertification orders, as a matter of law. Relying on the settled elements of collateral estoppel, the court ruled that absent class members in *Burakoff* were not "parties" for purpose of analyzing the order's preclusive effect. The court noted that "[a] 'party' to litigation is '[o]ne by or against whom a lawsuit is brought," and that plaintiff "filled no such role in *Burakoff*." The court also determined that, because the Los Angeles court had ultimately decertified the overtime class, named plaintiffs and counsel in *Burakoff* may not

have adequately represented plaintiff's interests. Because the overtime class was "rejected," no judicial finding of adequacy "survived to become final." In addition, the court noted that, as a logical matter, plaintiff could not be bound "as a member of a class action . . . to a determination that there could not be a class action."

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