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Class Action Litigation Newsletter - Summer 2021: Sixth, Seventh, and Eighth Circuit

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Highlights from this issue include:

- Supreme Court rules that class members who did not suffer concrete harm do not have Article III standing to sue for violation of a federal statute.
- Supreme Court holds that generic nature of a misstatement is important evidence to show no price impact at the class certification stage, but that defendant bears the burden of persuasion to prove a lack of price impact.
- District court in the First Circuit (D. Mass.) grants motion to strike nationwide class allegations at the pleading stage.
- Second Circuit holds that a plaintiff cannot establish injury-in-fact sufficient to confer Article III standing where personally identifiable information was inadvertently disclosed and not yet misused by any third party.
- Third Circuit follows majority rule that American Pipe tolling applies to plaintiffs who file individual suits before a ruling on class certification.
- Fourth Circuit finds ERISA plaintiff established Article III standing and reverses denial of class certification.

- District court in Fifth Circuit (N.D. Tex.) denies class certification because individual issues predominate in case alleging fraud and misrepresentation.
- Divided Sixth Circuit panel affirms dismissal of proposed insurance coverage class action.
- Seventh Circuit affirms summary judgment for defendant in consumer class action, finding no reasonable consumer would be materially misled by alleged misrepresentations.
- Eighth Circuit reverses class certification, holding that plaintiff's expert's computer technology and algorithm cannot overcome individualized inquiry into economic loss.
- Ninth Circuit reverses approval of class action settlement, holding that under revised Rule 23(e)(2)(C)(iii), a district court must review a proposed class settlement for unfair collusion.
- D.C. district court permits tolling of putative class members' claims under American Pipe because they are based on the same acts and will be proven by the same evidence as prior claims.

Sixth Circuit

Wilkerson v. Am. Family Ins. Co., 997 F.3d 666 (6th Cir. 2021)

Divided Sixth Circuit panel affirms the dismissal of a proposed Ohio class-action suit seeking payment of taxes and fees in insurance payouts for totaled cars.

Wilkerson, a driver with an automotive insurance policy with American Family Insurance Company, was in a car accident and suffered a total loss. She sued American Family on behalf of a putative class of insureds after American Family refused to reimburse the taxes and fees that she paid for her new car as a part of the "actual cash value" under the policy terms. Wilkerson argued that excluding the taxes and fees from the "actual cash value" was a breach of contract under the policy, which stated that American Family "will pay for loss of or damage to your insured car and its equipment, less the deductible." American Family moved to dismiss, contending that other language in the policy controlled. Concluding that "actual cash value" was unambiguous and did not include taxes and fees, the district court granted the motion to dismiss. The plaintiff appealed.

The Sixth Circuit panel affirmed in a 2-1 decision. The majority opinion acknowledged that the phrase "actual cash value of stolen or damaged property" could carry some ambiguity. Relying on Ohio rules for contractual interpretation, the court recognized that "actual value" could mean "the measure of damages for the loss or destruction of personal property is the market value" or "the replacement cost minus normal depreciation for the damaged car." But considering the four corners of the policy, the court concluded that American Family's policy confirms that "actual cash value" means market value only. Otherwise, the court explained, American Family provisions limiting liability to (1) "the actual cash value of the stolen or damaged property" or (2) "the amount necessary to repair or replace the property" would be rendered "incoherent" under the plaintiff's interpretation.

Bradford v. Team Pizza, Inc., No. 1:20-cv-60, 2021 U.S. Dist. LEXIS 99413 (S.D. Ohio May 26, 2021)

Southern District of Ohio adds to growing circuit split, ruling that employer's reimbursement of vehicle-related expenses not bound by IRS reimbursement rate method.

In this minimum-wage FLSA collective action, pizza delivery drivers sued Team Pizza Inc., a company operating a portfolio of pizza delivery stores in Ohio. The plaintiffs alleged that Team Pizza "violated the minimum wage provisions of the FLSA and Ohio laws by requiring delivery drivers to pay for automobile expenses and other job-related expenses out of pocket and not properly reimbursing them for these expenses."

The dispute turned on the Department of Labor's anti-kickback regulation, 29 C.F.R. § 531.35, which requires that employers pay minimum wages "finally and unconditionally" or "free and clear" of job-related expenses. Under the regulation, "if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the law in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid under the law." Here, the alleged "work tools" were pizza delivery vehicles. The plaintiffs claimed they were entitled to reimbursement under the IRS mileage reimbursement rates, while Team Pizza argued that only a "reasonable approximation" method is required.

Federal courts have differed on how the FLSA treats the reimbursement of pizza delivery drivers' vehicle expenses. Some courts (including district courts in Ohio and Illinois) have held that the IRS mileage reimbursement rate is the proper standard. Conversely, other courts (including district courts in Colorado, Kansas, New York, and Missouri) have decided that the FLSA does not require employers to use the IRS rate but instead allows them "reasonably approximate" pizza delivery drivers' vehicle expenses. The approaches differ depending on whether the anti-kickback regulation is deemed ambiguous. Courts adopting the IRS reimbursement rate method have determined that the anti-kickback regulation is ambiguous because it lacks guidance on how the mileage rate should be calculated. Other courts have adopted the reasonable approximation standard set forth in FLSA regulations because they explain how reimbursements are treated for calculating overtime rates.

Despite another Southern District of Ohio decision adopting the mileage-reimbursement-rate approach, the court in this case sided with Team Pizza. Relying on a plain-language interpretation of the FLSA regulation, the court found that the anti-kickback regulatory language was not "genuinely ambiguous" and ruled that Team Pizza could "reasonably approximate" the vehicle-related expenses and was not required to use the actual or IRS rate to comply with the FLSA.

Seventh Circuit

Weaver v. Champion Petfoods USA Inc., No. 20-2235, 2021 WL 2678801 (7th Cir. June 30, 2021)

Seventh Circuit affirms trial court's grant of summary judgment for defendant on the basis that plaintiff offered no evidence from which a reasonable consumer could prove that the mere risk of a presence of BPA or pentobarbital rendered the phrase "biologically appropriate" misleading and plaintiff failed to provide sufficient evidence that a reasonable consumer would be materially misled by representations regarding "fresh regional ingredients" or outsourcing.

This appeal arose from the trial court's grant of summary judgment for defendant, a manufacturer of pet food. Plaintiff alleged that Defendant Champion Petfoods USA Inc. misrepresented its dog food in three ways: (1) stating that the food was "biologically appropriate"; (2) stating that it included fresh, regional ingredients; and (3) stating that it is "never outsourced" and is "prepared" in Champion's kitchens. Plaintiff argued that because there was a risk that the food was contaminated with Bisphenol A ("BPA") and pentobarbital through the supply chain, the food was not "biologically

appropriate." Plaintiff further argued that because the dog food was not made solely with fresh ingredients, the label representation that it features fresh ingredients was false. Finally, plaintiff asserted that the representation "never outsourced" was false because some of the ingredients were sourced internationally.

The Seventh Circuit upheld summary judgment regarding the "biologically appropriate" representation finding that, with regard to BPA, plaintiff "offered no evidence that a reasonable consumer here would interpret 'biologically appropriate' as certifying the product was BPA-free" and, with regard to pentobarbital, plaintiff "lacks standing because he failed to show that the dog food he purchased was at risk of containing pentobarbital." Similarly, the Seventh Circuit upheld summary judgment on the fresh, regional ingredients claim and the "never outsourced" claim because the packaging did not state that it was made with "100% fresh regional ingredients" and plaintiff did not offer evidence showing that a reasonable consumer would be materially misled by the representations.

MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co., 994 F.3d 869 (7th Cir. 2021)

Seventh Circuit holds that, by failing to move to compel discovery in the district court, plaintiff could not complain on appeal that defendant was not responsive to the general discovery requests served during class discovery.

Plaintiff debt collectors brought a class action against Defendant State Farm Mutual Automobile Insurance Company. Two years prior, the Seventh Circuit decided an appeal in litigation between the same parties where the district court had dismissed plaintiffs' claims for lack of standing, affirming the district court's ruling finding that plaintiffs had to identify specific examples of unreimbursed payments to demonstrate the existence of an actual injury.

The appeal in this case arose from the trial court's grant of State Farm's motion for summary judgment. The district court ruled that, while plaintiffs pled a concrete, individualized injury through an illustrative beneficiary, they failed to raise a genuine issue of material fact at summary judgment. Ultimately, the evidence showed that the reimbursement of physical therapy at issue for the illustrative beneficiary was for an injury that occurred prior to the car accident from which the claim arose. As a result, the district court granted State Farm's motion for summary judgment, and the Seventh Circuit affirmed.

On appeal, plaintiffs argued that they needed additional discovery to oppose State Farm's summary judgment motion. In particular, plaintiffs sought additional non-party discovery related to three additional illustrative beneficiaries that had not been pled and asserted that State Farm was not responsive to general discovery requests during class discovery. The Seventh Circuit held that plaintiffs could not complain about what transpired during discovery when they never filed any motions to compel State Farm to respond to a single request in the district court.

Lukis v. Whitepages Inc., 19 C 4871, 2021 WL 1600194 (N.D. Ill. Apr. 23, 2021)

District court denies motion to strike class allegations based on matters outside the pleadings rather than on flaws inherent to the class as alleged in the complaint.

In this putative class action under the Illinois Right of Publicity Act, the district court was presented with multiple motions, including Whitepages Inc.'s motion to strike class allegations. Whitepages asserted that plaintiff's testimony demonstrated that she was an inadequate class representative,

and that class counsel was inadequate for putting her forward as the named plaintiff. The court noted that Whitepages's motion to strike relied heavily on evidence outside the pleadings and noted that it is unclear whether a motion to strike class allegations can properly go beyond the complaint. The court reviewed authority and concluded that the majority rule was that a motion to strike class allegations must be limited to the face of the complaint. The court thus denied the motion to strike.

Eighth Circuit

Ford v. TD Ameritrade Holding Corp., 995 F.3d 616 (8th Cir. 2021)

Eighth Circuit holds that technology cannot overcome individualized inquiry into economic loss in duty of best execution case.

Plaintiff alleged that the defendant, a brokerage company, violated its duty of best execution by routing trades to best profit the company rather than the customer. The plaintiff sought relief on behalf of both himself and a putative class. The magistrate judge recommended denial of Rule 23(b)(3) class certification due to a lack of predominance. He reasoned that each class member's economic loss would depend on an order-by-order analysis and thus defeat Rule 23's common issue requirement. However, the district court disagreed and granted class certification based on the plaintiff's expert, who presented an algorithm designed to "solve the predominance problem" and estimate each class member's economic loss.

Finding that economic loss was an individualized inquiry, the Eighth Circuit reversed the class certification. The court noted that economic loss associated with duty of best execution violations was a more difficult damages assessment than standard broker's fraud claims. This contributed to the challenge of certifying a best execution case, as the court highlighted in relying on a Third Circuit decision that also denied certification for similar claims, *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001). Ultimately, the Eighth Circuit concluded: "[D]espite advances in technology, individual evidence and inquiry is still required to determine economic loss for each class member. . . . Advanced computing power can expedite that determination, but it cannot change its underlying nature by converting individual experience into common evidence."

In addition, the court determined that the plaintiff sought to represent an improperly defined class. The class definition incorporated two elements of the claim—those seeking best execution and those sustaining economic loss. In doing so, class membership depended on having a valid claim, allowing "putative class members to seek a remedy but not be bound by an adverse judgment." For both reasons, the Eighth Circuit reversed the class certification and remanded the case.

Ahmad v. City of St. Louis, 995 F.3d 635 (8th Cir. 2021)

Eighth Circuit determines class certification is premature where Rule 23(b)(2) relief seeks to remedy discrete experiences of different named plaintiffs.

The three named plaintiffs sought to represent a putative class of protesters who allegedly had been unconstitutionally exposed to chemical agents, subjected to excessive force and improper searches, and arrested. Each of the named plaintiffs had experienced one of these actions, and they collectively sought injunctive relief against the City of St. Louis to limit police authority to interfere in public demonstrations. Under Rule 23(b)(2), the district court granted the plaintiffs' motion for class certification, noting that the city had acted or refused to act on grounds generally applicable to the protesters' allegations.

The Eighth Circuit reversed, holding that class certification had been premature. Although Rule 23(b)(2) certification may be appropriate for injunctive or declaratory relief, Rule 23(b)(2) classes require "even greater cohesiveness" than Rule 23(b)(3) classes because (b)(2) class members cannot opt out. As such, class certification is only appropriate where the same injunctive or declaratory relief would remedy all of the class members' injuries. In this case, each of the three named plaintiffs experienced a different injury, but they attempted to bring all three under the same umbrella by seeking broad injunctive relief, phrasing their request as "one super-claim." The court rejected this approach. Because the evidence at this stage had not established that a single injunction would remedy each of the plaintiffs'—and thus, class members'—injuries, the Eighth Circuit reversed the certification ruling as premature.

Donelson v. Ameriprise Fin. Servs., 999 F.3d 1080 (8th Cir. 2021)

Eighth Circuit holds motion to strike class allegations does not waive right to arbitrate and may be considered prior to a motion for class certification.

The plaintiff had entered into an agreement for the defendant-brokers to handle the plaintiff's financial trading. This agreement contained an arbitration clause that required arbitration for all disputes except putative or certified class actions. After trading practices allegedly went wrong, the plaintiff filed a putative class action against the defendants for violations of various federal securities laws and regulations. The defendants simultaneously moved to strike the class allegations and compel arbitration in line with the agreement. The district court denied both requests.

On appeal, the plaintiff asserted that, by seeking to strike the class allegations, the defendants had waived their right to arbitrate under the agreement. The Eighth Circuit disagreed, stating that a party may waive their right to arbitrate if they invoke the "litigation machinery" by engaging in the litigation process and seeking decisions on the merits. However, the court determined that filing a motion to strike class allegations in conjunction with the motion to compel arbitration did not run afoul of the defendants' right to arbitrate. In fact, it complemented this right because it addressed the single exception to the arbitration clause – a putative or certified class action.

The court next considered whether the district court abused its discretion in declining to strike the class allegations. Circuits are split on whether it is premature for a court to strike class allegations under Rule 12(f) prior to a motion for class certification where certification is a "clear impossibility." The Eighth Circuit determined it is not premature. Striking class allegations prior to certification briefing aligns with Rule 23(c)(1)(A), which allows courts to discern certification "at an early practicable time" without limiting that decision to the timing of motion practice. Requiring the defendants to delay this request would not only "needlessly force the parties to remain in court" when they had previously agreed to arbitrate but also risk the defendants' engaging in the "litigation machinery" and placing their arbitration right in jeopardy. As such, the Eighth Circuit held that the district court abused its discretion in denying the motion to strike, finding that the plaintiff's causes of action lacked cohesion, involved individualized inquiries, and otherwise did not comply with Rule 23(b)(2) requirements.

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