Blogs
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Food & Consumer Packaged Goods Litigation

Industry Insights: Key Takeaways from Northern District of California's Class Action Symposium

On December 10, 2020, the U.S. District Court for the Northern District of California held its Class Action Symposium. The symposium is as timely as ever. Food, beverage, and consumer product class actions are rocketing, with projected filings up 24 percent over 2019. The Northern District of California sees a substantial subset of these filings, earning it the nickname "the Food Court." The symposium featured distinguished speakers such as the Honorable Charles Breyer, Erwin Chemerinsky, and several of the nation's leading class action litigators. In a matter of hours, the symposium packed in a variety of top-of-mind topics for practitioners: (1) guidance for class action settlements, (2) key developments in Ninth Circuit case law, and (3) predictions about class action cases at the Supreme Court. Here we summarize the riveting discussion and cull top tips for litigators. **Panel 1: Class Action Settlement Approval** *Panelists: Judge Breyer (U.S. District Judge), Melissa S. Weiner (Pearson, Simon & Warshaw, LLP), Bambo Obaro (Weil, Gotshal & Manges LLP)* The first panel emphasized the Northern District's Procedural Guidance for Class Action Settlements that was updated in December 2018 but remains critical to approval of settlements in the Northern District. The panelists highlighted several provisions not to be missed:

1) Reversionary Clauses - The Guidance notes that the Ninth Circuit "disfavor[s]" reversions of unclaimed funds back to the defendant. Nevertheless, if parties insist on a reversionary clause in their settlement, the Guidance encourages that parties be prepared to explain—in a motion for preliminary approval and otherwise—the potential amount of such reversion and why reversion is appropriate at all. The panelists commented that parties can avoid a reversionary clause by entering into a common fund settlement (generally favored by plaintiffs) or claims-made settlement (generally favored by defendants—and objectors).

2) Settlement Administration - The Guidance reminds practitioners of several oft-omitted disclosures relating to class administrators. In a motion for preliminary approval, practitioners should disclose (1) the proposed administrator, (2) the selection process, (3) how many administrators submitted proposals, (4) what methods of notice and payment were proposed, (5) the administrator's costs, (6) who will pay the costs, and (7) most often missed, the lead class counsel's firms' history of engagements with the settlement administrator over the last two years. The panelists urged that omitting this information could quickly lead the court to deny the parties' proposal.

3) Notice - The Guidance sets out both suggestions and requirements for notice to class members—and even provides draft language for such notice. Practitioners should be prepared to address how notice will be as pervasive as possible, relying on mail, email, and/or social media and taking into account education level and language needs of class members. Several disclosures are required on the notice form: (1) contact information for counsel, (2) the address of the settlement website, (3) instructions on how to access the case docket, (4) the date of the final approval hearing, and (5) that the hearing date may change without further notice. As Judge Breyer observed, court's remain keen on notice, so practitioners are advised to pay particular attention to this section.

5) Objections and 9) Timeline - Courts are also keen on opt-out and objection procedures. Like the notice provision, the Guidance provides a draft of the opt-out notice. The Guidance further recommends that parties "ensure that class members have at least thirty-five days to opt out or object to settlements and the motion for

attorney's fees and costs." As the panelists pointed out, counsel are often caught off guard by the 35-day guidance.

Top Tip: In Judge Breyer's own words, and on behalf of his judicial colleagues, "I urge all practitioners to read [the Guidance] at the outset of litigation." Specifically, Judge Breyer suggested that early familiarity could give practitioners an edge going into settlement negotiations. **Panel 2: Recent Updates in Class Action Litigation** *Panelists: Jocelyn Larkin, (The Impact Fund), Simona Agnolucci, (Willkie Farr & Gallagher LLP)* The second panel took a deep dive into two topics arising from recent Supreme Court decisions. As the panelists observed, district and circuit courts alike continue to grapple with applying these cases to the class action context. **Specific Personal Jurisdiction in light of *Bristol Myers Squibb*** - The Supreme Court held in *Bristol Myers Squibb v. Superior Court*, 137 S. Ct. 1773 (2017) that a California state court did not have specific jurisdiction over nonresidents' claims in a mass tort action because the defendant corporation did not have sufficient minimum contacts with California and nonresidents were not injured in California. The case, however, left open ended the question of whether the holding applies to class actions in federal court. Courts of Appeal in the Fifth, Seventh, and D.C. Circuits have concluded that *Bristol Myers Squibb* does not apply to class actions in federal court. Therefore, nonresident class members need not establish personal jurisdiction at the pleading stage. *Mussat v. IQVIA, Inc*., 953 F.3d 441 (7th Cir. 2020) (noting absent class members "are not considered parties" at the pleading stage); *Molock v. Whole Foods Market Group*, 952 F.3d 293, 297 (D.C. Cir. 2020) (acknowledging the unique status of putative class members, that they are "always treated as nonparties"); *accord Cruson v. Jackson National Life Insurance Company*, 954 F.3d 240 (5th Cir. 2020) (holding decision relating to a court's jurisdiction over the claims of nonresident putative class members must wait until certification). The Ninth Circuit is taking up the question in *Moser v. Health Insurance Innovations*, No. 19-56224 (9th Cir.), especially after several (but not all) California district courts have held in line with the Fifth, Seventh, and D.C. Circuits' rulings. *See, e.g., Sloan v. Gen. Motors LLC*, 287 F. Supp. 3d 840, 853 (N.D. Cal. 2018), *order clarified*, No. 16-CV-07244-EMC, 2018 WL 1156607 (N.D. Cal. Mar. 5, 2018), *and on reconsideration*, 438 F. Supp. 3d 1017 (N.D. Cal. 2020); *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc*., No. 17-CV-00564 NC, 2017 WL 4224723, at *4 (N.D. Cal. Sept. 22, 2017); *but see In re Samsung Galaxy Smartphone Marketing and Sales Practices Litig*., 2018 WL 1576457, at *2 (N.D. Cal. March 30, 2018). *Top Tip:* Because most circuits have not definitively resolved whether a *Bristol Myers Squibb* challenge is appropriate at the pleadings stage, defendants should continue to assert such arguments early in the case to avoid a finding of waiver. **Class Member Standing Under *Spokeo* -** The Supreme Court case, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), clarified the standard for Article III standing in the class action context, and as the panelists noted, there has been a cascade of decisions applying *Spokeo* since. Specifically, *Spokeo* held that a plaintiff must allege a concrete and particularized injury. This is a fact-specific inquiry and courts often look to the legislative intent and history of the statute under which relief is sought. For example, in *Campbell v. Facebook, Inc*., 951 F.3d 1106 (9th Cir. 2020), the Ninth Circuit looked to the intent behind the Electronic Communications Privacy Act to hold that plaintiffs alleged a concrete and particularized injury—Facebook had violated their right to privacy when it collected data from plaintiffs' personal messages. Beyond violations of one's right to privacy, the Ninth Circuit has held concrete injuries also arise from violations of one's right to accurate credit reports and one's right to remuneration, even after receiving a refund. *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020) (plaintiff alleged concrete injury after credit reporting agency placed him on a "terrorist" watch list); *Van v. LLR, Inc*., 962 F.3d 1160 (9th Cir. 2020) (temporary parting with money is a concrete injury, even though the money was eventually returned to plaintiff, because she lost the value of that money while she did not have it). *Top Tip:* The list of what constitutes a concrete and particularized injury is expanding. But in light of *Campbell*, practitioners can look to whether the plaintiff's alleged injury aligns with the interests the statute intended to protect. **Panel 3: Reshaping the Court – Recent Appointees to the Federal Bench** *Panelist: Erwin Chemerinsky (Dean of University of California Berkeley School of Law)* Panelist Erwin Chemerinsky made four observations about the past, present, and even future Supreme Court, particularly on whether it will weigh in on more class action cases. **The Supreme Court's Previous Term** - Chemerinsky concluded that the Supreme Court's previous term was a stand-out, differing in many respects from year's past.

The Court issued only 53 decisions; the lowest number since 1862. The Court also cancelled oral arguments; it had not done so since October 1919 due to the Spanish flu. The Court rescheduled oral arguments to May 2019 and, from there, held arguments by telephone—for the first time ever—and continues to do so into 2021. Also for the first time, the Court allowed oral arguments by live broadcast. **Justice Amy Coney Barrett Replacing Justice Ruth Bader Ginsburg** - According to Chemerinsky, we can expect Justice Barrett to be a vocal conservative player on the Court, "in the mold of Antonin Scalia." But despite her conservative views, Chemerinsky does not expect Supreme Court *outcomes* to change, only the *margins*. For example, last term, 14 cases were decided by a 5:4 margin. He expects that these cases would have come down the same way with Justice Barrett, but with a 6:3 margin. He noted that, this term, we are already seeing Justice Barrett's conservativism in action. Justice Barrett was part of a 5:4 majority blocking government restrictions on houses of worship in New York. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 2020 WL 6948354 (U.S. Nov. 25, 2020). Chemerinsky surmises that without Justice Barrett, the holding would have swung the other way. **Class Action Cases in the Supreme Court** - After reviewing class action cases in the last decade, Chemerinsky observed that, surprisingly, there have not been that many before the Supreme Court. Of those that did make it to the Justices, most involve commonality, preemption, or tolling issues. *See, e.g., China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018) (holding that the statute of limitations is not equitably tolled under the American Pipe tolling doctrine for subsequent class actions); *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014) (holding Securities Litigation Uniform Standards Act did not preempt state law claims); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (holding plaintiffs failed to prove commonality for class cert because plaintiffs, females employees at Walmart, had inconsistent hiring and promotion experiences). None involve questions relating to the Class Action Fairness Act ("CAFA"), a hot topic in the Circuit Courts. Looking forward, Chemerinsky predicted CAFA cases will bubble up to the Supreme Court and, if certified, we could see the conservative Justices wanting to impose restrictions on available remedies under the Act. **Class Action Cases in the Ninth Circuit** - Chemerinsky discussed the "dramatic change" to the Ninth Circuit over the course of President Donald Trump's time in office. Of the 29 Ninth Circuit judges on current active status, 10 (or one third) were appointed by President Trump. These are young, very conservative individuals and are likely to shape the court for decades. For years the Ninth Circuit has had a reputation of being relatively liberal, but with these new appointees, that stands to change. As to how the Ninth Circuit has treated class actions, Chemerinsky observed a striking spike in class action cases in the last year alone, especially those expanding the availability of CAFA. *See, e.g., Canela v. Costco Wholesale Corp.*, 971 F.3d 845 (9th Cir. 2020) (treating wage and hour class action under California's Private Attorney General Act as a class action for the purposes of CAFA); *Salter v. Quality Carriers, Inc.*, 974 F.3d 959 (9th Cir. 2020) (holding that the removing party under CAFA is not required to make an evidentiary showing regarding the amount in controversy); *Greene v. Harley-Davidson, Inc*., 965 F.3d 767 (9th Cir. 2020) (concluding that the defendant satisfied the amount-in-controversy requirement for removal under CAFA by asserting $2.1 million in compensatory damages, $2.1 million in punitive damages, and $1 million in attorney fees). This is in sharp contrast to the Supreme Court, which has yet to hear any CAFA cases. But based on the spike in the Ninth Circuit and elsewhere, the Supreme Court may be taking up one of these CAFA cases very soon. *Top Tip:* Because conservative judges tend to want to restrict remedies available under CAFA, plaintiffs are likely to turn to state courts, making removal based on CAFA all the more important.

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