August 12, 2019

Class & Collective Action Group Newsletter

Federal Appellate Courts

Decision in *Vazquez v. Jan-Pro Franchising International*

Key Issue

Whether the California Supreme Court's decision in *Dynamex Ops. W. Inc. v. Superior Court*,[1] which set standards for differentiating employees from independent contractors, applies retroactively.

Background

In 2008, plaintiffs from a number of states filed a proposed class action in the District Court for the District of Massachusetts alleging that Jan-Pro Franchising International developed a three-tier franchising model to avoid paying its janitors minimum wages and overtime compensation by misclassifying them as independent contractors. The claims of the California plaintiffs were eventually severed and sent to the District Court for the Northern District of California, which granted summary judgment in favor of Jan-Pro in May 2017.[2] While this case was proceeding, in a separate test case, affirmed on other grounds on appeal, the Massachusetts court ruled in favor of Jan-Pro.[3]

Separately, in April 2018, the California Supreme Court held in *Dynamex* that to prove an individual is an independent contractor, rather than an employee, the hiring entity must show: "(A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."[4]

In May 2019, on appeal from the District Court's decision, the Court of Appeals for the Ninth Circuit held that the *Dynamex* decision applied retroactively, and thus the final judgment in Jan-Pro's favor in the Massachusetts case was not entitled to preclusive effect.[5] Specifically, the court pointed to California's strong presumption of retroactivity, the *Dynamex* court's characterization of its decision as a clarification rather than a departure from established law, and the lack of indication that California courts would be likely

[1] *Dynamex Ops. W. Inc. v. Superior Court*, 416 P.3d 1 (Cal. 2018).

[2] *Roman v. Jan-Pro Franchising Int'l, Inc.*, No. 16-05961 WHA, 2017 WL 2265447 (N.D. Cal. May 24, 2017).

[3] *See Depianti v. Jan-Pro Franchising Int'l, Inc.*, 873 F.3d 21 (1st Cir. 2017).

[4] *Dynamex*, 416 P.3d at 7.

[5] *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 923 F.3d 575 (9th Cir. 2019).

to hold that the decision only applied *prospectively*. Jan-Pro then filed a request for rehearing.

Decision

On July 22, 2019, the Ninth Circuit issued an order withdrawing its May 2019 opinion in *JanPro* and announcing that it would file an order certifying to the California Supreme Court the question of whether *Dynamex* applies retroactively.[6]

Thoughts & Takeaways

California employers will see their risk of liability of worker misclassification lessen significantly if the California Supreme Court rules that *Dynamex* does *not* apply retroactively. Meanwhile, legislation is pending in the California State Senate which would codify certain portions of the *Dynamex* ruling, including the "ABC" test as articulated therein.

However, the potential impact of the decision on other businesses may be minimized given the prevalence of mandatory individual arbitration clauses in contracts between companies and employees/independent contractors, which may reduce the frequency of such actions.

Read the order here, the Ninth Circuit's prior decision here and the *Dynamex* decision here.

Oral Argument on Mandamus Petition in *Logitech Inc. v. United States District Court for the Northern District of California*

Key Issue

Whether a District Court judge's standing order prohibiting parties in a putative class action from discussing a class-wide settlement until after a class has been certified should be withdrawn as unconstitutional and in conflict with Rule 23 of the Federal Rules of Civil Procedure.

Background and Hearing

Plaintiff James Porath brought a putative class action against Logitech in the District Court for the Northern District of California in May 2018, asserting common law fraud and claims under California's Unfair Competition Law and False Advertising Law based on allegations that Logitech advertised a speaker system as having four drivers when, in reality, it only had two.

After the case was assigned to Judge William H. Alsup, the court entered a standing order which, among other things, prohibited the parties from discussing settlement of class claims until after a class had been certified. The order did note that some putative class actions may be appropriate for earlier resolution, in which case the parties must make a motion for appointment of interim class counsel.

The parties attempted to take this route, arguing that the case was appropriate for early settlement. Judge Alsup denied the motion after expressing concerns about potential collusive settlements and entered a scheduling order that contemplated class discovery, expert disclosure and briefing on class certification.

In January 2019, after several interim procedural steps, Logitech filed a petition for a writ of mandamus (a procedure that allows a party to seek an order from an appellate court that is directed at a lower court judge) directing the District Court to withdraw its standing order, arguing that Judge Alsup's standing order improperly restricts the parties' First Amendment rights (free speech and petition) and conflicts with Rule 23 of the Federal Rules of Civil Procedure.[7]

The Ninth Circuit heard oral argument on the petition on July 18. Counsel for Logitech emphasized that Rule 23(e) contemplates significant judicial involvement in and oversight of the settlement

[6] *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, No. 17-16096, 2019 WL 3271969 (9th Cir. July 22, 2019).

[7] Renewed Petition for a Writ of Mandamus, *Logitech Inc. v. U.S. Dist. Ct. for the N. Dist. of Cal.*, No. 19-70248 (9th Cir. Jan. 25, 2019), ECF No. 1-1.

process, and that this is the proper mechanism to take into account concerns regarding a collusive or unfair settlement. A judge may not add to Rule 23(e) by instituting a standing order that imposes additional requirements regarding settlement, and courts generally allow the parties in a putative class action to negotiate and move for settlement. Counsel for the District Court argued that Judge Alsup's standing order does not provide a bar to settlement, and rather seeks to prevent settlement from occurring before the parties and claims have been fully identified. The relevant question, according to counsel, was not whether Rule 23(e) permits opportunity for settlement prior to class certification, but rather *requires* it.

Thoughts & Takeaways

As Logitech pointed out, the primary concern with standing orders such as the one in this case is that they force parties to a putative class action who may otherwise wish to settle the matter to engage in costly adversarial proceedings before being able to do so. While the stated aim of the order is to discourage collusive or unfair settlements that would harm absent class members, forcing defendants to engage in drawn-out litigation before being able to settle would presumably make the prospect of settling less appealing ex ante.

If the Ninth Circuit were to find such a standing order permissible, this could open the door to other courts instituting similar procedures. Furthermore, other orders could require parties to engage in even lengthier adversarial proceedings, or reorder actions entirely—for example, could a standing order require a mini-trial on the merits prior to class certification, or would this conflict with existing class-action jurisprudence?

Listen to the oral argument here.

Decision in *20/20 Communications, Inc. v. Lennox Crawford*

Key Issue

Whether the availability of class arbitration is a gateway issue that courts, not arbitrators, must decide in the absence of "clear and unmistakable" language in the arbitration agreement to the contrary.[8]

Background

In August 2016, certain employees filed separate individual arbitration claims against their employer, 20/20 Communications, but later amended the claims to assert identical class claims. 20/20 Communications, a national direct-sales and marketing company, requires as a condition of employment that its field sales managers sign the company's arbitration agreement, which contains a class arbitration bar under which employees agree not to bring class or collective actions to arbitration.

After the filing of the complaints, the company sought a declaration in the District Court for the Northern District of Texas that the issue of class arbitrability is a "gateway issue" for the court rather than the arbitrator to decide, and that the class arbitration bar provision in the employment agreements prevented class arbitration.[9] The District Court denied this declaration. Also during these District Court proceedings, one of the individual arbitrators issued a clause construction award, concluding that the class arbitration bar was unenforceable under the National Labor Relations Act.[10] The company filed a new action in the District Court to vacate that award, and the District Court denied the motion. The Court of Appeals for the Fifth Circuit consolidated both actions for the purpose of appeal.

[8] *20/20 Commc'ns, Inc. v. Crawford*, No. 18-10260, 2019 WL 3281412 (5th Cir. July 22, 2019).

[9] *20/20 Commc'ns, Inc. v. Blevins*, 357 F.Supp.3d 566 (N.D. Tex. 2019) ("*Blevins*").

[10] *20/20 Commc'ns, Inc. v. Crawford*, No. 17-cv-929, 2018 WL 1135658 (N.D. Tex. Feb. 28, 2018) ("*Crawford*").

Decision

The Fifth Circuit reversed and vacated the District Court rulings, holding that there is a presumption that the threshold question of class arbitrability is for courts, not arbitrators, to decide. The court explained that because class actions are conducted on behalf of and bind absent class members, they raise important due process concerns that must be evaluated by a court. For example, due process requires that absent class members "be afforded notice, an opportunity to be heard, and a right to opt out of the class," which is achieved through open litigation and not private arbitration. Additionally, other differences between privacy and confidentiality in arbitration and litigation must also be considered by courts.

Having decided that courts must determine arbitrability, the Fifth Circuit further held that the arbitration agreement at issue barred class arbitrations and foreclosed any suggestion that the parties had intended the question of arbitrability to be decided by an arbitrator. The court acknowledged that, when taken in isolation, three provisions in the agreement that vested the arbitrator with general powers (specifically, to resolve disputes related to the formation of the agreement, to administer the arbitration according to the AAA except where the agreement governed and to determine all disputes except as provided in the agreement) could arguably be construed to authorize arbitrators to decide the issue of arbitrability. However, the second and third provisions contained exceptions with reference to the agreement and, compared with the class arbitration bar in the agreement, none of the provisions had "clear and unmistakable" language empowering arbitrators to decide arbitrability, nor did they speak with specificity to the matter of class arbitration.

Thoughts & Takeaways

Although the Supreme Court has not decided whether class arbitrability is a gateway issue, the Fifth Circuit's opinion joined the Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits in holding that the availability of class or collective arbitration is a threshold question of arbitrability that must be decided by a court.[11] It will be interesting to see whether and how the other circuits will weigh in on this issue.

Read the decision here.

Other Noteworthy Developments

Paper Finding Inflation of Plaintiffs' Attorneys' Fees in Securities Class Actions

A new paper authored by law professors at New York University, University of Richmond and University of Michigan argues that the intense scrutiny by courts of fee awards in settlements of the largest securities class actions (which the paper calls "mega-settlements") incentivizes plaintiffs' firms in those actions to "make work" in order to justify large fee awards. Among other things, the paper finds that "make work" increased in cases against large companies that had multiple firms as lead counsel to the class, and that courts award higher fee multipliers in cases that exhibit certain characteristics that indicate a lower likelihood of dismissal and thus a higher likelihood of settlement, the latter of which "undermines the theory that multipliers compensate plaintiffs' attorneys for taking on cases which pose a higher risk of non-recovery."

[11] *Supra* note 8 at *2 (citing *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016), *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013), *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506-07 (7th Cir. 2018), *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017), *Eshagh v. Terminix Int'l Co., L.P.*, 588 F. App'x 703, 704 (9th Cir. 2014), *JPay, Inc. v. Kobel*, 904 F.3d 923, 935-36 (11th Cir. 2018)).

The paper ultimately asserts that "plaintiffs' attorneys are receiving windfall fee awards in mega-settlement cases at shareholders' expense," and that since evidence of corporate impropriety is often publicly available in these "mega-settlement" cases prior to commencement of a securities class action, "courts are conflating valuable fraud claims with the incremental value provided by a plaintiffs' attorney in litigating the case."

The paper is available for download here.

Securities Class Action Filings Near Record High in First Half of 2019

Cornerstone Research recently published its 2019 Midyear Assessment on securities class action filings, which found that there were 126 "core" federal securities class action filings (excluding filings related to M&A litigation) in the first half of 2019, one fewer than the historical high in the first half of 2017. The number of core securities filings against non-U.S. issuers also increased significantly. The number of filings related to M&A litigation, however, decreased from 91 in each half of 2018 to 72 in the first half of 2019. A number of these actions surrounded claims where the "Disclosure Dollar Loss" and "Maximum Dollar Loss" were above $5 billion and $10 billion, respectively.

Additionally, the number of cases brought under the Securities Act of 1933 and filed in state court continues to rise in the wake of *Cyan, Inc. v. Beaver County Employees Retirement Fund*,[12] with 19 cases being filed in the first half of 2019. In contrast with the results from previous years, where the majority of these actions were filed in California state courts, in 2019, more of these actions have been filed in New York state courts than in California.

Read the full report here.

U.K. High Court Agrees to Hear Appeal in Consumer Opt-Out Collective Action

In July 2019, the Supreme Court of the United Kingdom agreed to hear Mastercard's appeal in a £14 billion ($17 billion) antitrust lawsuit. The appeal stems from a more than decade-old finding by the European Commission in 2007 that Mastercard infringed E.U. competition law by "setting a minimum price merchants must pay to their acquiring bank for accepting payment cards" in the form of interchange fees.

In 2016, Mastercard consumer Walter Merricks applied to the Competition Appeals Tribunal ("CAT") for a collective action order that would permit him to act as representative on behalf of 46 million U.K. consumers who had purchased goods and/or services from businesses in the U.K. that accepted Mastercard. His action alleges that Mastercard's high credit card charges for retailers were ultimately passed onto consumers as "pass-on costs." The CAT rejected his application in November 2018, holding that Merricks failed to provide full evidence capable of proving that the claims would be successful and to demonstrate how an aggregate award of damages could be distributed in such a way that would correspond to individual loss. However, in April 2019, England's Court of Appeal reversed and remanded for the CAT to reconsider the certification, holding that the CAT had imposed too high a bar for plaintiffs. Instead, plaintiffs need to demonstrate only that the claims rely on similar issues of fact or law and that the claims are suitable for an aggregate award of damages. Mastercard appealed the Court of Appeal's decision to the Supreme Court.

[12] 138 S. Ct. 1061 (2018) (ruling that state courts have subject matter jurisdiction over class actions alleging claims under the Securities Act of 1933).

This case is the second opt-out consumer collective action to test the contours of the U.K.'s collective action regime after the passage of the Consumer Rights Act authorizing such actions in 2015. The first proposed collective action did not receive approval for certification in 2017, when the CAT told plaintiffs they needed more economic data to support their application. The decision by the Supreme Court in Mastercard may ultimately clarify the requirements for plaintiffs at the certification stage, which could result in the U.K. encountering more consumer collective actions. Already, another application for a collective action has been filed with the CAT against several banks, alleging manipulation of the global foreign exchange market between 2007 and 2013 (read about this application here).

Read the Court of Appeal decision here and the lower court decision here.

District Court Tests "Hot Tub" Procedures in Antitrust Class Action

In a recent multidistrict litigation surrounding antitrust claims, a federal judge has ordered the parties to engage in "hot tub" procedures in connection with summary judgment.[13] "Hot tubbing" is a method by which experts for both parties sit together in the witness box, where they present evidence and are questioned by the court and counsel at the same time. Although this procedure is used in arbitration proceedings, it is less common in U.S. court cases.

The case in the District Court for the Northern District of California arises from direct and indirect purchasers who brought class actions against several capacitor manufacturing companies. Plaintiffs allege that defendants located in the U.S., Japan, Taiwan and Germany artificially raised prices and suppressed price competition for aluminum, tantalum and film capacitors. While certain defendants have settled, others are currently briefing motions for summary judgment, where hot tubbing will be used for presentation of expert evidence.

[13] Order, I*n re Capacitors Antitrust Litig.*, No. 14-cv-3264 (N.D. Cal. July 29, 2019), ECF No. 2404.

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