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Class & Collective Action Group Newsletter

Federal Appellate Courts

Order Affirming Remand in *Harris v. KM Industrial, Inc.* (Ninth Circuit)

Key Issue

Whether the district court properly held that the defendant's amount-in-controversy calculation rested on unreasonable and unsupported assumptions, and thus that the defendant did not sufficiently prove that the Class Action Fairness Act's ("CAFA") $5 million threshold for federal jurisdiction was satisfied.

Background

Plaintiff Levone Harris filed a class action complaint in California state court against his former employer, KM Industrial, Inc. ("KMI"), alleging multiple violations of the California Labor Code.[1] The complaint did not include an amount-in-controversy enumeration.[2] KMI filed a notice of removal to the United States District Court for the Northern District of California,[3] asserting that the federal district court had subject matter jurisdiction under CAFA because the amount in controversy exceeded $5 million (and CAFA's other jurisdictional requirements were met).[4]

KMI relied on a declaration from the human resources director of its parent company to support its amount-in-controversy calculation. Critically, KMI's calculation was premised on the assumption that each member of the proposed "Hourly Employee Class" would also be included within two proposed sub-classes: a "Meal Period Sub-Class" and a "Rest Period Sub-Class."[5] This assumption had the effect of ascribing "Meal Period" and "Rest Period" damages to each member of the Hourly Employee Class.[6]

The plaintiff moved to remand the case to state court, claiming that the assumptions underlying KMI's damages allegations were "unfounded" and "improperly inflate[d] the amount in controversy."[7] In opposition to the plaintiff's remand motion, KMI submitted a second declaration that "essentially

[1] *Harris v. KM Indus., Inc.*, 980 F.3d 694, 696 (9th Cir. 2020).

[2] *Id.* at 699.

[3] *Id.* at 697.

[4] *Id.*; 28 U.S.C. § 1332(d)(2).

[5] *Harris*, 980 F.3d at 698. According to the complaint, KMI unlawfully deprived the Meal Period sub-class of "uninterrupted, duty-free meals for at least thirty (30) minutes for each five (5) hour work period," and the Rest Period sub-class of "net rest period[s] of at least ten minutes for each four hour work period, or major fraction thereof." *Id.* at 697.

[6] *Id.* at 698.

[7] *Id.*

repeat[ed] the information" contained in the first declaration.[8] Still lacking from the second declaration was "specific evidence" to support KMI's key assumption regarding the membership of the sub-classes.[9]

The district court granted the plaintiff's motion to remand.[10] The district court found that KMI provided no "indication of how many putative class members worked shifts that would entitle them to a meal or rest break," thus risking a "gross[] exaggerat[ion]" of KMI's calculation based on the assumption that all of them did.[11] Accordingly, the district court concluded that KMI "failed to show that [the plaintiff's] claimed damages exceed $5 million by a preponderance of the evidence."[12]

Decision

A divided Ninth Circuit panel affirmed the district court's order granting the plaintiff's motion to remand.

The majority began by setting forth the Ninth Circuit's framework for analyzing challenges to removal based on the amount in controversy. Where a defendant seeks removal and the complaint does not enumerate damages, "the defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court."[13] However, when the amount in controversy is contested, what the defendant must do to succeed in removing the case depends on whether the plaintiff mounts a "facial attack" or a "factual attack" on the defendant's damages allegation.

For a "facial attack"—which "accepts the truth of the [defendant's] allegations but asserts that they 'are insufficient on their face to invoke federal jurisdiction'"—the typical motion to dismiss pleading standard governs.[14] In other words, the court "accept[s] the allegations as true and draw[s] all reasonable inferences in the defendant's favor" to decide if the jurisdictional allegations are sufficient.[15] A defendant need not submit evidence to support its allegations when a facial attack is made.[16] By contrast, when rebutting a "factual attack"—which challenges the substance of the allegations—the defendant must show the jurisdictional threshold is met by a preponderance of the evidence.[17]

The majority concluded that the plaintiff mounted a factual, rather than facial, attack on KMI's amount-in-controversy allegations, as the plaintiff challenged the substance of KMI's core assumption that all members of the putative Hourly Employee Class also qualified as members of the Meal Period and Rest Period sub-classes.[18] The plaintiff argued that KMI's assumption was unreasonable because KMI did not evaluate multiple factors that would help determine whether Hourly Employee Class members worked shifts that were long enough to qualify for the sub-classes.[19] In reaching its conclusion, the majority distinguished a recent decision by the Ninth Circuit, *Salter v. Quality Carriers, Inc.*, on which KMI relied. In *Salter*, the

[8] *Id.* at 698 n.3.

[9] *Id.* at 698.

[10] *Harris v. KM Indus., Inc.*, No. 19-CV-07801-WHO, 2020 WL 1970704 (N.D. Cal. Apr. 24, 2020).

[11] *Id.* at *3.

[12] *Id.*

[13] *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 87 (2014).

[14] *Harris*, 980 F.3d at 699 (quoting *Salter v. Quality Carriers*, 974 F.3d 959, 964 (9th Cir. 2020)).

[15] *Salter*, 974 F.3d at 964.

[16] *Id.*; *see also Dart Cherokee*, 574 U.S. at 89.

[17] *Harris*, 980 F.3d at 699; *Salter*, 974 F.3d at 964.

[18] *Harris*, 980 F.3d at 700.

[19] *Id.*

plaintiff challenging removal pursuant to CAFA argued that the defendant's amount-in-controversy allegation was insufficient because the defendant offered "only a short declaration by one of its employees" to establish the amount in controversy and did not provide any business records to support the declaration.[20] The *Salter* panel concluded that the plaintiff brought just a facial attack because he "challenged the form, not the substance" of the defendant's amount-in-controversy allegations.[21] By contrast, the plaintiff in *Harris* "directly challenged the truth of KMI's allegation that all 442 Hourly Employee Class members worked shifts long enough to qualify for meal and rest periods," not merely the form of the evidence submitted by KMI to support its allegation.[22]

The majority held that KMI failed to meet its burden to prove CAFA's amount-in-controversy by a preponderance of the evidence. The majority found that KMI failed to show that the assumptions underlying its amount-in-controversy calculation were reasonable, as was its burden to demonstrate.[23] The majority agreed with the district court that KMI did not provide any evidence to support its key assumption regarding sub-class membership, and noted that this assumption found no support in the complaint itself.[24] KMI's calculation, therefore, would unreasonably and artificially inflate the amount in controversy. And in such circumstances, a court should "not supply further assumptions of its own" to fill in the gaps or compensate for unreasonable assumptions.[25] While the plaintiff did not introduce his own evidence, the majority stated that a factual attack "need only challenge the truth of the defendant's jurisdictional allegations by making a reasoned argument as to why any assumptions on which they are based are not supported by evidence."[26]

Finally, the majority held that a remand to the district court for additional factfinding was unnecessary because the plaintiff and KMI already had an adequate opportunity to submit evidence regarding the amount in controversy.[27]

The dissent reasoned that the district court's standard of proof was too exacting, overlooking that the "amount in controversy is simply an *estimate* of the total amount in dispute."[28] According to the dissent, while it was possible that KMI's key assumption regarding a complete overlap in class and sub-class membership did not entirely hold up, "there [was] no basis in the record for concluding that the potential difference . . . is material to the ultimate jurisdictional determination in this case."[29] The dissent also noted that it was "ambiguous" whether the plaintiff's remand motion raised a factual or facial attack, and the plaintiff's precise challenge to KMI's assumption was "most clearly flagged" in its reply brief, depriving KMI of an adequate opportunity to respond.[30] The dissent would therefore reverse the remand order, or at least remand to the district court for further submission of evidence.

[20] *Salter*, 974 F.3d at 963.

[21] *Id.* at 961, 964.

[22] *Id.*; *Harris*, 980 F.3d at 700-01.

[23] *Harris*, 980 F.3d at 701.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 700.

[27] *Id.* at 702.

[28] *Id.* at 707 (Collins, J., dissenting).

[29] *Id.*

[30] *Id.* at 708 (quoting *Wichansky v. Zoel Holding Co.*, 702 F. App'x 559, 560 (9th Cir. 2017)).

Thoughts & Takeaways

Harris highlights the significance of whether a challenge to removal is facial as opposed to factual, as the burden of the removing party is vastly different depending on the nature of the challenge. *Harris* makes clear that when a plaintiff opposes removal under CAFA by challenging the substance of the defendant's jurisdictional allegations, the defendant must submit competent evidence to show that the assumptions underlying its allegations and amount-in-controversy calculations are reasonable. Notably, *Harris* also shows that a plaintiff can make a factual attack, and succeed, without introducing its own evidence outside the pleadings.

Read the opinion here.

Federal District Courts

Order Granting Class Certification in *Karinski v. Stamps.com, Inc.* (C.D. Cal.)

Key Issues

(1) Whether defendants rebutted plaintiff's "price maintenance" theory of loss causation, and (2) Whether defendants' attempt to rebut price impact was a "truth-on-the-market" defense that was raised prematurely at the class certification stage.[31]

Background

Plaintiffs brought a class action on behalf of investors against Stamps.com, Inc. and its senior executives, claiming that defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act. The plaintiffs alleged that defendants made a series of misstatements that portrayed Stamps.com as having a strong and exclusive partnership with the U.S. Postal Service ("USPS"), and that the USPS had approved the company's USPS "reseller program." According to plaintiffs, during the class period the company maintained a strained relationship with the USPS, in part because the company allegedly used its "reseller program" to give unauthorized discounts to its customers at the expense of USPS. Instead of driving new, high-volume clients to the USPS, Stamps.com allegedly cannibalized existing, low-volume USPS customers to earn a profit in a practice known as postal arbitrage, where the company received USPS products at discounted price, and then sold those products at a profit to low-volume customers that did not qualify for the discounted prices. According to plaintiffs, this led to an approximate annual revenue loss of $235 million for the USPS.[32]

The USPS investigated the company's practices, and following that investigation, the company allegedly made corrective disclosures on two dates: first on February 21, 2019, when the company announced that its partnership with the USPS had ended, and then on May 8, 2019, when the company announced the termination of its USPS reseller program. Stamps.com's stock price dropped by 57% and 56% on each of those dates, respectively.[33]

Among other arguments made in its motion for class certification, the lead plaintiff argued that it was entitled to the fraud-on-the-market

[31] Order, *Karinski v. Stamps.com, Inc.*, No. 19-cv-01828-MWF-SK (C.D. Cal. Nov. 9, 2020), ECF No. 172 (the "Order").

[32] Memorandum in Support of Motion for Class Certification at 1-3, *Karinski*, No. 19-cv-01828-MWF-SK, (C.D. Cal. June 29, 2020), ECF No. 120.

[33] *Id.* at 4.

presumption of reliance established in *Basic v. Levinson*,[34] and therefore that it had sufficiently alleged predominance for purposes of Rule 23(b)(3). In support, the plaintiff submitted an expert report purporting to show that the Stamps.com shares traded on an efficient market, and that there had been a price impact on Stamps.com shares on the days of the corrective disclosures.[35]

In opposition to class certification, the defendants primarily argued that plaintiffs could not demonstrate any price impact from the alleged misrepresentations, and therefore individual issues of reliance would predominate over common questions. Citing to *Halliburton Co. v. Erica P. John Fund Inc.*, the defendants asserted that they could establish the lack of price impact by establishing either that the stock price did not increase on the day of the alleged misrepresentation (*i.e.*, there was no "front-end" price impact), or that the stock price did not decrease on the day of the alleged corrective disclosure (*i.e.*, there was no "back-end" price impact). With their own expert witness, defendants argued that there was no statistically significant, positive price impact on the dates of the alleged misstatements.[36] As to a back-end impact, the defendants argued that the alleged corrective disclosures did not have a price impact because the market was already aware of the issues between the USPS and the company.[37] Specifically, defendants argued that information about the USPS's strained relationship with Stamps.com, Stamps.com's postal arbitrage practices, and potential termination of the reseller program had been widely reported by market commentators for years before the 2019 "corrective disclosures."

In a footnote, defendants argued that the district court should engage with the price impact analysis at the class certification stage, even though that analysis would necessarily overlap with merits issues.[38] In support, defendants cited to the Seventh Circuit's recent decision in *In re Allstate Corp. Securities Litigation*[39] and the Second Circuit's 2018 decision in *Arkansas Teachers Retirement System v. Goldman Sachs Group, Inc.*[40]

Plaintiffs responded first that the lack of front-end price impact was consistent with their "price maintenance" theory of loss causation. Under this theory, a misrepresentation would serve to "prevent inflation from leaving the stock price," and therefore one would not expect to see a stock price movement on the day of the alleged misrepresentation.[41] Second, the plaintiff argued that the defendant's back-end price impact arguments were premature (and therefore improper) "truth-on-the-market arguments." The plaintiffs asserted that discussion of whether the allegedly hidden information was already in the market went to the issue of materiality, which was assumed at the class certification stage.[42]

Decision

The district court granted class certification on November 9, 2020.

On the issue of predominance and price impact, the court found that plaintiffs had produced "ample" evidence of a price impact, and accepted the plaintiffs' arguments that (1) the lack of a front-end price impact was not persuasive given the plaintiffs' "price maintenance" theory of loss causation, and that

[34] 485 U.S. 224 (1988).

[35] *Id.* at 8, 14-21.

[36] Opposition to Motion for Class Certification at 10-12, *Karinski*, No. 19-cv-01828-MWF-SK, (C.D. Cal. Aug. 31, 2020), ECF No. 157 (the "Opposition").

[37] *Id.* at 12-13, 16-17.

[38] Opposition at 10 n.4.

[39] 966 F.3d 595, 600 (7th Cir. 2020).

[40] 879 F.3d 474, 486 (2d Cir. 2018).

[41] Reply in Further Support of Motion for Class Certification at 10-11, *Karinski*, No. 19-cv-01828-MWF-SK (C.D. Cal. Oct. 15, 2020), ECF No. 161.

[42] *Id.* at 8-9.

(2) the defendants' challenges to the corrective disclosures were premature challenges to materiality, not reliance. The court further stated that even if it had been persuaded that the defendants' argument was not a truth-on-the-market defense, it would not defeat predominance because "whether particular statements were actually disclosures" is a common question that can be adjudicated on a class-wide basis.[43]

Thoughts & Takeaways

This case signals a continued challenge for defendants attempting to rebut the *Basic* presumption of reliance using a price impact theory in securities class actions. The district court did not follow the approach recently taken by the Seventh Circuit in *In re Allstate*, which held that, at the class certification stage, district courts "must be willing to consider evidence offered by the defense to show that the alleged misrepresentations did not actually affect the price of the securities," even if the evidence may overlap with the merits issues of materiality and loss causation.[44] Although *In re Allstate* was not controlling in *Karinski*, the district court's failure to engage with the Seventh Circuit's decision may indicate a continued reticence to address these arguments at class certification. At the very least, it demonstrates that courts have taken inconsistent approaches to assessing price impact at the class certification stage. For that reason, defendants asking the court to evaluate price impact at the class certification stage might benefit from dedicating significant attention to this issue when opposing class certification.

This case also further shows that challenges to the widely-accepted price maintenance theory of loss causation will continue to pose an uphill challenge to those asserting front-end price impact arguments against class certification.

Read the opinion here.

Dismissal of Claims in *Palmer v. Amazon.com, Inc.* (E.D.N.Y.)

Key Issue

Whether, under the primary-jurisdiction doctrine, claims of deficient protections against COVID-19 in the workplace belong in federal court or instead in front of the Occupational Safety and Health Administration ("OSHA").

Background

In *Palmer v. Amazon.com, Inc.*, putative class plaintiffs allege that Amazon has failed to protect its workers and their relatives against the threat of COVID-19 or to pay COVID-related sick leave. The *Palmer* plaintiffs work at (or are relatives of those who work at) the JFK8 fulfillment center located in Staten Island and claim to have been injured by the spread of the virus at the facility.[45] Among other things, the plaintiffs allege that Amazon failed to comply with public health guidance by encouraging sick workers to come into work, preventing workers from adequately washing their hands or sanitizing their work stations, failing to perform adequate contact tracing of sick employees, and failing to pay for COVID-related sick leave.[46]

On March 20, 2020, New York Governor Andrew Cuomo issued the "New York State on PAUSE" Executive Order ("NYSOP"), closing all non-essential businesses but permitting essential businesses like Amazon to continue operating on the condition that they comply with New York State Department of Health guidance and directives for maintaining a

[43] Order at 10-12.

[44] *In re Allstate*, 966 F.3d at 607-09.

[45] Amended Complaint at 1-2, *Palmer v. Amazon.com, Inc.*, No. 1:20-cv-02468-BMC (E.D.N.Y. July 28, 2020), ECF No. 63 ("Am. Compl.").

[46] *Id.* at 2-3.

clean and safe work environment.[47] As part of the reopening process, New York has issued detailed and industry-specific guidance for businesses continuing operations.[48] Amazon is required to follow the New York Forward Interim Guidance for the Wholesale Trade Sector (the "Wholesale Guidance"). The minimum requirements described in the Wholesale Guidance include limiting operations to no more than fifty-percent capacity, implementing policies to minimize sharing of objects and touching of shared surfaces, providing the means for frequent handwashing and workstation sanitization, conducting regular cleanings of the facility, and conducting health screenings.[49] Additionally, New York requires companies to pay for sick leave for employees forced to quarantine pursuant to state law because they had contracted or been exposed to the virus and experienced symptoms.[50]

The plaintiffs alleged that Amazon fell short of these requirements. They accordingly sought relief in federal district court on four counts: (1) public nuisance, (2) breach of duty to protect health and safety of employees as required by New York Labor Law ("NYLL") § 200, (3) failure to timely pay earned wages under NYLL § 191, and (4) an injunction against future failure to timely pay earned wages under NYLL § 191.[51] Amazon moved to dismiss.

Decision

The district court dismissed without prejudice plaintiffs' claims for public nuisance and breach of the duty to provide a safe workplace based on the primary-jurisdiction doctrine.[52] The primary-jurisdiction doctrine permits district courts to refer a case to the appropriate administrative agency where doing so would create uniformity for like plaintiffs or where administrative expertise is desirable.[53] Courts in the Second Circuit consider four factors when deciding whether to refer a case to an agency for adjudication:

1. whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;

2. whether the question at issue is particularly within the agency's discretion;

3. whether there exists a substantial danger of inconsistent rulings; and

4. whether a prior application to the agency has been made.[54]

In this case, the district court noted that the Occupational Safety and Health Administration ("OSHA"), a federal agency within the Department of Labor, is "specifically charged with regulating health and safety in the workplace."[55] Moreover, "OSHA has broad prosecutorial discretion to carry out its enforcement responsibilities under the Occupational Safety and Health Act."[56] Upon the filing of a complaint that states reasonable grounds to believe that there is a health violation or danger, the Secretary of Labor inspects the workplace

[47] *Id.* at 12.

[48] *Id.* at 12-13.

[49] *Id.* at 13-15.

[50] *Id.* at 15-16.

[51] *Id.* at 47-55.

[52] Memorandum Decision and Order at 1, *Palmer*, No. 1:20-cv-02468-BMC (E.D.N.Y. Nov. 2, 2020), ECF No. 73 ("Mem. Dec. & Order").

[53] *Id.* at 8 (citing *Tassy v. Brunswick Hosp. Ctr., Inc.*, 296 F.3d 65, 68 (2d Cir. 2002)).

[54] *Id.* (quoting *Ellis v. Tribune Television Co.*, 443 F.3d 71, 82-83 (2d Cir. 2006)).

[55] *Id.* at 9.

[56] *Id.* (citing 29 U.S.C. § 651 et seq.).

and issues a citation to the employer if there is in fact a violation.[57] OSHA enforcement actions are subject to review by the Occupational Safety and Health Review Commission ("OSHRC"), and OSHRC decisions are reviewable by the federal courts of appeals.[58] In the rare cases in which an alleged violation reasonably could be expected to imminently cause death or serious physical harm, employees can seek relief directly and immediately in federal district court by seeking mandamus.[59]

The district court acknowledged that OSHA has not issued workplace health and safety requirements specific to COVID-19.[60] OSHA has, however, issued optional guidance on preparing workplaces for COVID-19 and has the authority and duty to act upon existing applicable standards for personal protective equipment, toxic and hazardous substances, and things of that nature.[61] As of October 2020, OSHA had received nearly 10,000 COVID-19 related complaints, had opened over 1,000 inspections, and had issued around 150 citations.[62] Against this backdrop, the district court determined that OSHA is better-situated than the courts to strike the appropriate balance between continuing business operations and taking protective measures.[63]

The district court emphasized that plaintiffs' claims require a detailed understanding of "how Amazon's employment practices and policies impact transmission of a poorly understood disease in [the warehouse]."[64] "But courts are not experts in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance. Plaintiffs' claims and proposed injunctive relief go to the heart of OSHA's expertise and discretion."[65] Further, the ever-evolving, uncertain, and fact-intensive nature of the COVID-19 pandemic creates a high risk of inconsistent rulings.[66] In light of these risks and intricacies, the benefits of referring the case to the agency outweighed the potential costs of delay in doing so.[67] Although plaintiffs' failure to file a complaint first with OSHA weighed against referral to the agency, the court reasoned that the other factors overwhelmingly supported agency referral.[68] Thus, the district court applied the doctrine of primary jurisdiction to dismiss without prejudice plaintiffs' public nuisance and NYLL § 200 claims.[69]

In the alternative, the district court determined that the public nuisance and NYLL § 200 claims could be dismissed for the following reasons. First, because the risks of infection with COVID-19 are common to the New York City community at large, plaintiffs' alleged injuries are not actionable in a private action for public nuisance.[70] Second, although plaintiffs' NYLL § 200 claim is not preempted by the federal Occupational Safety and Health Act, any such claim

[57] *Id.* (citing 29 U.S.C. § 657(f)(1); 29 U.S.C. § 658(a)).

[58] *Id.* (citing 29 U.S.C. §§ 660-661).

[59] *Id.* (citing 29 U.S.C. § 662).

[60] *Id.* at 10.

[61] *Id.*

[62] *Id.* (citing *COVID-19 Standards*, OSHA (last visited Oct. 30, 2020), https://www.osha.gov/SLTC/covid-19/standards.html).

[63] *Id.* at 10-11.

[64] *Id.* at 11.

[65] *Id.*

[66] *Id.* at 11-12.

[67] *Id.* at 12.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 13-14.

for past injury is preempted by New York's worker's compensation laws.[71] Finally, to the extent that plaintiffs' NYLL § 200 claim is based on the threat of future harm, a threat of future harm is not a cognizable injury in a tort action.[72]

Plaintiffs have noticed an appeal.[73]

Thoughts & Takeaways

With the primary-jurisdiction doctrine in play, government agencies such as OSHA might play a larger role, at least in the first instance, than the courts in responding to COVID-19 issues in the workplace. Pending the Second Circuit's resolution of the primary-jurisdiction issue on appeal, *Palmer* may be a harbinger for how courts might look to defer adjudication of contentious COVID-related cases that could carry sweeping consequences. Conceivably, courts could further develop the doctrine during the COVID-19 crisis and, going forward, find additional applications of the doctrine in an array of agency-regulated areas of law. At the same time, the doctrine could be the subject of constitutional challenges. The primary-jurisdiction doctrine has been recognized and occasionally applied by the United States Supreme Court.[74] But like other forms of abstention, the primary-jurisdiction doctrine is by its nature in tension with the constitutional command that the judicial power not be delegated and could be unconstitutional as-applied.[75]

Separately, it is worth highlighting that the *Palmer* decision did not address standing, despite the fact that several plaintiffs were relatives of Amazon employees—not Amazon employees themselves.[76] Such an extended chain of causation might pose another thorny issue for putative classes and for courts that engage with future cases.

Finally, we note that an additional putative class action against Amazon was recently filed in the Eastern District of New York: *Smalls v. Amazon*, No. 1:20-cv-05492. *Smalls* is led by a whistleblowing employee who was fired after claiming that black and brown Amazon employees are being infected at higher rates.[77] The *Smalls* lawsuit presently is styled as an employment discrimination action.[78] Between *Palmer* and *Smalls*, we can expect a variety of legal theories brought by diverse groups of plaintiffs in this rapidly developing area of the law.

Read the opinion here.

[71] *Id.* at 20.

[72] *Id.* at 21. The district court additionally dismissed with prejudice plaintiffs' NYLL § 191 claims for failure to timely pay COVID-19 leave. Mem. Dec. & Order at 1. Because COVID-19 leave is a form of paid sick leave, it is a benefit or wage supplement like vacation and holiday pay, rather than earnings. *Id.* at 22-23.

[73] Plaintiffs' Notice of Appeal, *Palmer*, No. 1:20-cv-02468-BMC (E.D.N.Y. Nov. 24, 2020), ECF No. 75.

[74] *See Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003); *United States v. W. Pac. R. Co.*, 532 U.S. 59, 62-64 (1956).

[75] *Cf. Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (discussing the abstention doctrine as a narrow exception to the rule that district courts adjudicate cases over which they have jurisdiction).

[76] Am. Compl. at 4-5.

[77] Class Action Complaint at 8-9, *Smalls v. Amazon, Inc.*, No. 1:20-cv-05492 (E.D.N.Y. Nov. 11, 2020), ECF No. 1.

[78] *Id.*

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