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Class & Collective Action Group Newsletter

Federal Appellate Courts

Decision in *TVPX ARS, Inc. v. Genworth Life & Annuity Insurance Co.* (Eleventh Circuit)

Key Issue

The preclusive effect of a class action settlement and release on claims brought on the basis of the settling defendant's subsequent acts.

Background

This case concerns two separate actions brought against the same life insurance company over a span of 18 years. The first action (the "2000 *McBride* action") resolved in a class settlement, and the second was filed in 2018 as a putative class action by a plaintiff who acquired an interest in a life insurance policy held by a member of the 2000 *McBride* settlement class.

In the 2000 *McBride* action, plaintiffs sued defendant Genworth Life and Annuity Insurance Company ("Genworth") for fraud and breach of contract in connection with life insurance policies that plaintiffs purchased from Genworth.[1] Plaintiffs sought to represent a class comprised of "current or former owners of flexible premium adjustable life insurance policies issued by Genworth between August 1, 1980 and May 20, 2004."[2] The *McBride* plaintiffs alleged that Genworth "sold them universal life insurance policies and represented that the policies had fixed, single, or vanishing premiums even though they did not."[3] Plaintiffs also alleged that Genworth "assessed premiums in amounts higher than the premiums contracted for by the parties" and improperly increased "cost of insurance," which is a "monthly charge to compensate Genworth for the mortality risk of the guaranteed death benefit."[4]

Genworth resolved the *McBride* claims through a class settlement in 2004.[5] The settlement agreement required class members to "release all 'past, present and future' causes of action that were 'based upon, related to, or connected with, directly or indirectly, in whole or in part (a) the allegations, facts, subjects or issues set forth or raised in the [2000 *McBride* action] or (b) the Released Conduct.'"[6] The term "Released Conduct" was broadly defined to include "essentially every aspect" of the defendant's life

[1] *McBride v. Genworth Life & Annuity Ins. Co.*, No. 4:00-CV-217 (CDL), 2019 WL 6001566 (M.D. Ga. Mar. 15, 2019).

[2] *Id.* at *1.

[3] *Id.*

[4] *Id.* at *1, *4.

[5] *Id.* at *2.

[6] *TVPX ARS, Inc. v. Genworth Life & Annuity Ins. Co.*, —F.3d—, No. 19-11178, 2020 WL 2730789, at *2 (11th Cir. May 26, 2020).

insurance policies, including "cost of insurance rates and charges."[7] Additionally, the notice sent to class members stated that class members that did not opt out might surrender claims related to "cost of insurance charges" and "cost of insurance rates."[8]

In 2018, plaintiff TVPX ARS, Inc. ("TVPX") filed a putative class action against Genworth, similarly alleging that Genworth violated the terms of its life insurance policies by imposing inflated "cost of insurance" charges on its clients.[9] TVPX alleged that the "cost of insurance charge" must be determined "according to Genworth's expectations of future mortality," such that if "mortality rates are projected to decline," so too should the cost of insurance rates charged by Genworth.[10] But according to TVPX, Genworth had actually ***increased*** its cost of insurance charges from 2013 through 2018, "even though mortality expectations improved during that same time period."[11]

Genworth moved to enforce its 2004 class action settlement of the *McBride* action and sought to enjoin TVPX's putative class action on the grounds that it was precluded under the *res judicata* doctrine.[12] TVPX argued that its claims were not precluded because they did "not share an identical factual predicate with the claims" in the *McBride* action.[13] The district court rejected TVPX's arguments and granted Genworth's injunction. First, the court held that both the 2000 *McBride* action and TVPX's claims involved the same "primary right and duty," *i.e.*, "Genworth's contractual duty to administer the insurance policy in accordance with its terms, including terms on setting cost of insurance rates and charges."[14] In support of that conclusion, the court cited the 2004 *McBride* settlement's broad release of "known and unknown" claims, and a clause in the settlement stipulation that the *McBride* "[p]laintiffs alleged [Genworth] breached the insurance contract 'by increasing the monthly cost of insurance rates'—indicating that the *McBride* parties intended such claims to be finally adjudicated."[15]

Finally, the district court found that TVPX's claims were premised on a continuation of the same conduct that was at issue in the 2000 *McBride* action, not new wrongful conduct that would make *res judicata* inapplicable.[16] The district court reasoned that the *McBride* plaintiffs and TVPX challenged "virtually indistinguishable" conduct—in the first case, that Genworth set its cost of insurance rates "improperly and on a whim," and in the second, that Genworth set its cost of insurance rates without considering mortality expectations.[17] The district court concluded that "TVPX's predecessor in interest and Genworth had a deal. . . . Fourteen years after the deal, TVPX asserts claims . . . that share an identical factual predicate with the claims covered by the deal. It can't do that. Claim preclusion forbids it."[18]

TVPX appealed the district court's judgment. On appeal, TVPX argued that (1) its claims were not barred by *res judicata* because they arose from a different factual predicate than the claims covered

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[7] *Id.*

[8] *Id.*

[9] *McBride*, 2019 WL 6001566, at *4.

[10] *Id.*

[11] *TVPX*, 2020 WL 2730789, at *3.

[12] *McBride*, 2019 WL 6001566, at *4.

[13] *Id.*

[14] *Id.* at *7.

[15] *Id.* at *7-8 (citation omitted).

[16] *Id.* at *8.

[17] *Id.*

[18] *Id.* at *9.

by the 2004 *McBride* settlement, and (2) the district court's order relied on the impermissible factual finding that Genworth had in fact engaged in the same conduct dating back to the 2000 *McBride* action.[19]

Decision

An Eleventh Circuit panel vacated the district court order and remanded for further fact-finding to determine whether Genworth's challenged practices in the TVPX action had been ongoing since the 2000 *McBride* action.[20] The panel agreed with the district court's finding that both the settled 2000 *McBride* action and TVPX's pending case involved the same "rights and duties"—*i.e.*, whether Genworth's practices for setting cost of insurance rates complied with its policies' requirements.[21] But that alone did not bar TVPX's claims. The panel held that "a class release may not preclude a subsequent action unless 'the released conduct arises out of the "identical factual predicate" as the claims at issue in the case.'"[22] *Res judicata* requires that "full relief must have been available in the first action in order for the second action to be barred," or in other words that TVPX must have been capable of bringing the same claims in the first action.[23]

The panel held that the factual record did not support the district court's finding that an "identical factual predicate" existed in the settled 2000 *McBride* action and TVPX's pending case. The district court relied on the *McBride* plaintiffs' allegation that Genworth had failed to disclose that monthly cost of insurance was determined "at the whim" of Genworth's management.[24] However, the panel found this to be insufficient because the *McBride* complaint said "nothing about how Genworth actually calculated [the cost of insurance] at the time of the *McBride* settlement," whereas TVPX's pending case alleged that Genworth manipulated its cost of insurance in a particular way: by failing to account for changes in mortality expectations.[25]

The panel also rejected Genworth's reliance on a prior version of TVPX's complaint, which alleged that Genworth "left its [cost of insurance] rates unchanged for decades."[26] Genworth argued from that allegation that the panel could conclude its cost of insurance practices that TVPX challenged were the continuation of the same conduct at issue in the 2000 *McBride* action. The panel rejected that argument because it rested on an allegation from a non-operative version of the complaint, and TVPX's "operative complaint says nothing about whether Genworth's [cost of insurance rates] were similarly untethered to mortality expectations prior to the [2013-2018] class period."[27] Lacking evidence that the defendant had engaged in the same practices during the settled case and leading up to the pending case, the court vacated the district court's order and remanded for further factual development.[28]

Thoughts & Takeaways

The panel's decision is instructive of how defenses of claim preclusion and release apply to subsequent litigation that overlaps with a prior class settlement. It also highlights key considerations for defendants considering how to structure a class settlement to mitigate future litigation risk.

[19] *TVPX*, 2020 WL 2730789, at *4.

[20] *Id.* at *6.

[21] *Id.* at *4.

[22] *Id.* at *5 (citing 6 William B. Rubenstein, *Newberg on Class Actions* § 18:19 (5th ed. Dec. 2019)).

[23] *Id.* at *4 (citing *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1287 (11th Cir. 2006)).

[24] *Id.* at *5.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at *6.

First, litigants should be aware that, while a class action settlement release can bar future claims that were not actually raised (and might not have been presentable) in the settled action, there are still limits to a class settlement's preclusive effect. All federal circuit courts that have addressed the question have applied some version of the "identical factual predicate" standard that the panel applied here.[29] Second, a preclusion defense entails a fact-based inquiry to determine whether both the settled action and the potentially precluded action involve an "identical factual predicate."[30] To that end, settling parties, in addition to focusing on the language used in the settlement's release of claims, should focus on other documents such as the operative complaint or stipulations of fact that accompany a settlement agreement. Here, while both the district court and the panel focused their analysis on the precise text of the settlement agreement and the operative complaint from the 2000 *McBride* action, unlike the district court, the panel was unwilling to give effect to the broad release language when the precise conduct being challenged was not spelled out in the operative complaint.

Read the decision here.

Federal District Courts

Order Denying Class Certification in *Harvey v. Centene Management Co. LLC* (E.D. Wash.)

Key Issue

Whether a class action was a superior method of adjudicating a controversy where non-judicial alternatives enabled putative class members to seek reimbursement for their out-of-network healthcare expenses.

Background

Plaintiff Cynthia Harvey filed a complaint in the Eastern District of Washington alleging that defendant Centene Management Company, LLC ("Centene") "administered a health insurance plan (the 'Ambetter' product) with a legally inadequate network of medical providers and, when members were forced to seek care outside the Ambetter network, illegally allowed them to be billed more than they would have paid for in-network services."[31] Plaintiff moved to certify "a class of all who purchased the Ambetter product between January 11, 2012 and the present."[32]

Prior to Harvey's action, Washington state's Office of the Insurance Commissioner ("OIC") brought an enforcement action against Centene based on hundreds of complaints it received regarding Centene's inadequate network.[33] Centene resolved the enforcement action by entering into a Consent Order requiring it to "pay $1.5 million, admit[] its network was inadequate and failed to provide

[29] 6 William B. Rubenstein, *Newberg on Class Actions* § 18:19 (5th ed. 2020) ("Nearly every circuit has adopted this approach and none has rejected it."); *see also* Kris J. Kostolansky & Diane R. Hazel, *Class Action Settlements: Res Judicata, Release, and the Identical Factual Predicate Doctrine*, 55 Idaho L. Rev. 263, 275 n.91 (2019) (collecting cases).

[30] Rubenstein, *supra* note 29, § 18:19 ("The identical factual predicate inquiry is fact-based, with many courts finding later cases sufficiently related to the class action judgment as to be precluded and some courts occasionally finding later cases not factually identical and hence not precluded.").

[31] *Harvey v. Centene Mgmt. Co. LLC*, No. 2:18-cv-00012-SMJ, 2020 WL 2411510, at *1 (E.D. Wash. May 12, 2020).

[32] *Id.* at *2.

[33] *Id.* at *1.

members sufficient access to care, and [] to follow a 'Compliance Plan' approved by the OIC."[34]

The Compliance Plan, which was administered by an independent auditor, "provide[d] reimbursement to members who paid out-of-network charges when no in-network option was available."[35] Centene notified more than 70,000 plan members that they may be eligible for reimbursement for amounts they paid to out-of-network providers, and the independent auditor "sent follow-up letters to more than 10,000 members identified based on their claims history."[36] Ultimately, several hundred members submitted reimbursement requests; Centene reimbursed 113 of those claims and paid claimants eight percent annual interest on the overcharge amounts.[37] The OIC determined that Centene satisfied its obligations under the Compliance Plan.[38]

Centene opposed class certification on the basis that "Plaintiff and others like her have superior, non-judicial alternatives to a class action, and because issues common to the class do not sufficiently predominate to warrant certification."[39] Centene identified three alternative remedies. Putative class members could (1) seek relief from Centene directly and, if unsatisfied, appeal to an Independent Review Organization, which was certified by the OIC; (2) seek assistance from the OIC; or (3) participate in the Compliance Plan.[40] Harvey contended that a class action was superior to all three of Centene's proposed alternatives.[41]

Decision

The district court held that Harvey satisfied the Rule 23(a) requirements but denied class certification because a class action would not be superior to alternative methods of resolving the controversy.[42] The court also held that Harvey failed to satisfy predominance, since a class action would "entail thousands of individualized determinations of whether, and if so to what extent, a member was injured by Centene's alleged network inadequacy."[43]

As to superiority, the court reasoned that it was "not confined to considering judicial methods of handling the dispute but may instead consider administrative and other non-judicial avenues by which class members may obtain redress."[44] The court cited other cases in which courts have denied certification where plaintiffs could seek relief through a defendant's refund or product replacement programs.[45] The same applies where "administrative avenues to relief like those offered by the OIC exist."[46] Finally, participation in the Compliance Plan would also be a superior method of resolving the putative class claims, since Centene and the independent auditor had already provided notice to more than 70,000 plan members and satisfactorily evaluated the reimbursement requests they received.[47]

The district court rejected Harvey's arguments that these alternatives were inferior. Harvey argued that a class should still be certified despite the

[34] *Id.* at *2 (citation omitted).

[35] *Id.*

[36] *Id.*

[37] *Id.* at *2, *5.

[38] *Id.* at *2.

[39] *Id.* at *3-4.

[40] *Id.* at *4-5.

[41] *Id.*

[42] *Id.* at *4-6.

[43] *Id.* at *4-7.

[44] *Id.* at *3.

[45] *Id.* at *4.

[46] *Id.*

[47] *Id.* at *5.

availability of relief from Centene, otherwise "any defendant with a customer service department could defeat superiority by arguing that it should be allowed to handle complaints in house."[48] The district court was not persuaded, since Centene "operates in a highly regulated industry, bound by a web of statutory and regulatory requirements over which an independent state agency, the OIC, has enforcement authority."[49] Moreover, unlike most companies' refund programs, Centene's reimbursement program allowed its plan members to appeal adverse decisions to an Independent Review Organization ("IRO"), and Centene is bound by the IRO's decisions.[50]

Harvey also argued that participation in the Compliance Plan was an inadequate alternative because its success relies on injured plan members to self-identify as having been improperly billed.[51] The court rejected that argument in light of the 70,000 notices that Centene had issued, and plaintiff failed "to explain how a notice sent to class members [as part of a class action proceeding] would yield a greater response."[52]

Finally, the court found that individualized, fact-specific determinations of the "threshold issue of injury-in-fact" would predominate over common questions.[53] The source of the problem was Harvey's broad class definition, which included "all those who purchased Ambetter policies since 2012"—approximately 100,000 putative class members—even though the record reflected that only about 14,000 of them were actually billed for out-of-network care, and even some of those plan members may be ineligible for reimbursement.[54] The court concluded that the inclusion of "many members who never suffered the alleged primary injury" in the class was "fatal" to certification.[55]

Thoughts & Takeaways

Harvey is notable in its holding that non-judicial alternatives, including remedy programs offered by a defendant and programs established to resolve an overlapping enforcement action, were superior to a class proceeding. Although other district courts have denied class certification on the basis that non-judicial alternatives were superior, the outcome appears to be uncommon. The norm is to compare a class proceeding only to other ***judicial*** alternatives: individual actions, a consolidated suit, or a multi-district litigation.[56] However, at least one court that rejected consideration of non-judicial alternatives as part of the superiority inquiry has been more receptive to similar arguments when framed in terms of adequacy: "A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests."[57]

When considering non-judicial alternatives to a class action, courts generally require that the relief is comparable to the remedy a plaintiff could receive in court, and that the relief must not be illusory.[58] The court in *Harvey* was satisfied with the notice process of the Compliance Plan (even though it

[48] *Id.* at *4 (citation omitted).

[49] *Id.*

[50] *Id.*

[51] *Id.* at *5.

[52] *Id.*

[53] *Id.* at *6.

[54] *Id.*

[55] *Id.*

[56] *See* Rubenstein, *supra* note 29, § 4:86.

[57] *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

[58] *Id.*

yielded only 113 paid claims) and the regulatory and supervisory network in which the defendant operated. Accordingly, at least in jurisdictions where courts consider non-judicial alternatives as part of the superiority inquiry, defendants may benefit from leveraging their existing claims resolution processes or other available remedies to challenge class certification.

Finally, *Harvey* highlights that the predominance and superiority factors often overlap analytically: the court's assessment that a class proceeding would present significant individualized inquiries undercut plaintiff's superiority arguments as well. Defendants may improve their chance of prevailing on a superiority challenge by coupling it with a robust challenge to predominance.

Read the decision here. Harvey sought interlocutory appeal of the denial of class certification on May 26, 2020.[59]

Order Denying Motion to Decertify Class in *Audet v. Fraser* (D. Conn.)

Key Issue

Whether a class should be decertified, or whether proceedings should be bifurcated to address liability issues before damages, where post-certification discovery revealed the lack of a "method by which a jury could determine aggregate damages with reasonable accuracy."[60]

Background

This case is brought by plaintiffs who invested in products "that ostensibly allowed them to share in the profits generated by 'mining'—or solving complex mathematical problems to clear transactions in—digital currency."[61] Plaintiffs claim they were defrauded in violation of Section 10(b) of the Securities and Exchange Act and also bring claims under Connecticut statutory and common law.[62]

The sole remaining defendant, Stuart Fraser, founded a company, GAW Miners, that offered a range of cryptocurrency mining investment opportunities.[63] First, GAW Miners "host[ed] computer hardware in its own datacenter, but allow[ed] customers to access and control their mining equipment via remote management software."[64] These services, called "Hardware-Hosted Mining" and "Cloud-Hosted Mining," essentially allowed investors to mine for cryptocurrency and receive profits from their mining without having to host or maintain the mining equipment themselves. As part of their investment, customers who participated in Hardware- or Cloud-Hosted Mining also owned an interest in the mining equipment itself.[65] Plaintiffs allege that "GAW Miners purchased very few pieces of mining equipment and did not have sufficient equipment to return to customers."[66]

GAW Miners next offered an opportunity to invest in "Hashlets," which confer the "right to profit from a slice of the computing power owned" by defendants that was used for cryptocurrency mining, but "without the right to acquire a specific piece of mining equipment."[67] The term "Hashlet" is a

[59] *See Harvey v. Centene Mgmt. Co. LLC*, No. 20-35468 (9th Cir. May 27, 2020).

[60] *Audet v. Fraser*, No. 3:16-cv-00940 (MPS), 2020 WL 2113620, at *1 (D. Conn. May 4, 2020).

[61] *Audet v. Fraser*, 332 F.R.D. 53, 58 (D. Conn. 2019).

[62] *Id.* at 62.

[63] *Id.* at 59.

[64] *Id.*

[65] *Id.* at 59-60.

[66] *Id.* at 60.

[67] *Id.* at 60.

reference to a computer's processing power, *i.e.*, its "hash rate."[68] Some investors bought Hashlets with U.S. dollars or Bitcoin, but others purchased Hashlets by converting the value of their existing Cloud-Hosted Mining equipment.[69] Again, plaintiffs allege that GAW Miners "dramatically oversold their computing capacity," and never dedicated sufficient mining equipment to support all Hashlet investors.[70]

Finally, defendants launched their own virtual currency, which they dubbed "Paycoin."[71] Before launching Paycoin, GAW Miners offered "Hashpoints," which were "promissory notes that could be purchased or mined and then exchanged for Paycoin when Paycoin launched."[72] GAW Miners allowed existing investors in Hashlets to convert Hashlets to Hashpoints, which would then convert to Paycoin.

In sum, an investor who subscribed to GAW Miners' services from the beginning could have ultimately acquired Paycoin through this series of transactions: shares in Cloud-Hosted-Mining → Hashlets → Hashpoints → Paycoin.

Plaintiffs allege that this series of transforming investment opportunities was really a Ponzi scheme designed to stave off payments to earlier investors that GAW Miners could not make by allowing investors to trade-up their investments.[73] Plaintiffs also allege that, leading up to Paycoin's launch, GAW Miners made fraudulent misrepresentations, including that Paycoin's value would not drop below a $20-per-coin floor, and that merchants like Amazon and Wal-Mart would accept Paycoin as currency.[74] But on release, Paycoin had not been adopted by merchants, and it soon began to trade below the $20 floor price.[75] The Securities and Exchange Commission investigated and criminally prosecuted GAW Miners and another individual for wire fraud in connection with these misrepresentations.[76]

In July 2019, the district court certified a class of "[a]ll persons or entities who, between August 1, 2014 and January 19, 2015, (1) purchased Hashlets, Hashpoints, HashStakers, or Paycoin; or (2) acquired Hashlets, Hashpoints, HashStakers, or Paycoin by converting, upgrading, or exchanging other products sold by [defendants]."[77] The court concluded that plaintiffs satisfied the Rule 23(a) requirements, including commonality, and that "Fraser's secondary liability for the alleged fraud will be the critical liability issue at the trial."[78]

In opposition to class certification, Fraser had argued that many of the class members may have broken even or profited from their investments or have other offsets to their alleged losses.[79] Fraser claimed that the court would need to conduct individualized inquiries to assess damages offsets that each class member may have received, thereby defeating predominance. The court rejected Fraser's arguments, concluding that it could determine the loss suffered by each class member "through the

[68] *Id.* at 59.

[69] *Id.* at 60.

[70] *Id.*

[71] *Id.* at 60-61.

[72] *Id.* at 61.

[73] *Id.* at 60-61.

[74] *Id.* at 61.

[75] *Id.*

[76] *Id.* at 61-62.

[77] *Id.* at 62. "HashStakers" was a "fixed-rate" investment vehicle that allowed investors to store their Paycoin for a period of time and yielded a daily payout. *Id.* at 61.

[78] *Id.* at 67.

[79] *Id.* at 64.

claims process" after class certification.[80] Moreover, Fraser's arguments regarding individualized offsets presented an issue of damages—not injury—and therefore would not preclude class certification.[81] However, the court permitted Fraser to "take post-certification discovery related to [offsets] from class members" and noted that if "discovery shows that a material number of proposed class members had chargebacks or other compensating gains that negate or reduce their losses . . . , and that such proof is highly individualized, [Fraser] can file a motion to decertify the class as to damages."[82]

After conducting the permitted discovery, Fraser moved to decertify the class.[83] At the court's instruction, the parties also briefed whether the action should be bifurcated, with proceedings on liability first, followed by a proceeding concerning damages issues if needed. Neither plaintiffs nor Fraser favored bifurcation; plaintiffs argued for a "single trial where a jury could determine an aggregate damages award," and Fraser sought "decertification of the class as to damages."[84]

Decision

The court denied without prejudice Fraser's motion to decertify the class, but acknowledged that Fraser's post-certification discovery had substantiated that a classwide damages analysis would entail individualized inquiries as to various offsets that class members may have received. Fraser submitted evidence of several types of offsets, including "credit card chargebacks, reseller sales, Paycoin sales, Paycoin-to-Ion conversions, account sales, sales on the GAW Miners Marketplace, and netting gains and losses for individuals with multiple accounts."[85] The court was most compelled by the evidence that about 40 of the 490 class members—approximately 8 percent of the class—had received chargebacks, *i.e.*, refunds from their credit card companies, for their investments in Paycoin.[86] The chargeback amounts were often substantial, and some class members had "recovered the entirety of their investment."[87] The magnitude and distribution of the other offsets was more difficult to determine given that class members acquired and disposed of their Paycoin investments in a variety of ways, and those transactions were inconsistently recorded. Also, the amount that any class member may have recouped from selling Paycoin "depend[ed] heavily on the timing of any sales."[88]

In light of this evidence, the court decided to bifurcate the case with a trial on liability first, followed by a separate proceeding as to damages.[89] The court concluded that "[a]fter a trial on liability, the Court will have before it a more fulsome factual record and will be better positioned to determine how best to structure the subsequent [damages] proceedings," if necessary.[90]

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80 *Id.* at 73.

81 *Id.* at 73-74.

82 *Id.* at 74.

83 *Audet*, 2020 WL 2113620, at *1.

84 *Id.* at *6 n.13.

85 *Id.* at *1.

86 *Id.*

87 *Id.* at *7.

88 *Id.* at *3.

89 *Id.* at *7.

90 *Id.*

Thoughts & Takeaways

Audet is at least partially helpful to defendants because it acknowledges that indeterminate aggregate damages implicate a class action defendant's due process rights. The court declined to proceed with plaintiffs' proposed "combined trial on liability and damages" because a jury award of aggregate damages was "likely to prejudice Fraser."[91] Plaintiffs failed to demonstrate how they could reasonably estimate the chargeback offsets on an aggregate basis. In light of plaintiffs' shortcoming, the district court changed course from its earlier plan to resolve individual damages issues at the claims processing stage because doing so could alter Fraser's "substantive right to pay damages reflective of [his] actual liability."[92]

Audet also demonstrates the potential complications that parties may encounter in trying to prove or disprove damages in cryptocurrency fraud cases. While thorny issues of proof are not unique to the realm of cryptocurrency, the decentralized nature of cryptocurrencies—and the fact that transactions may occur outside of public exchanges—may undermine proof of classwide damages. If the court ultimately proceeds to the class damages phase, *Audet* may offer further insight into these issues.

Read the decision here.

[91] *Id.*

[92] *Id.* (quoting *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008)).

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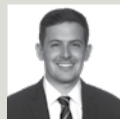

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