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Class & Collective Action Group Newsletter

Federal Appellate Courts

Ninth Circuit's Stay of Mandate in *Patel v. Facebook, Inc.*

Key Issue

Whether plaintiffs' invasion of privacy claims are sufficient to support standing where the alleged violations did not result in physical harm or the loss of money or property.

Background

In May 2015, Facebook users in Illinois filed three putative class actions alleging that the company violated the Illinois Biometric Information Privacy Act ("BIPA") by using data from uploaded photos to create facial recognition software for its "Tag Suggestions" feature, which allows the site's users to recognize friends. Plaintiffs agreed to transfer the actions to California, where they were consolidated into one proposed class action in September 2015.[1]

In April 2018, Judge James Donato of the U.S. District Court for the Northern District of California certified a class of "Facebook users located in Illinois for whom Facebook created and stored a face template after June 7, 2011."[2] Facebook appealed the decision.[3]

On August 8, 2019, a panel of the Ninth Circuit affirmed certification of the class and noted that Facebook's facial recognition technology "invade[d] an individual's private affairs and concrete interests."[4] On October 18, 2019, the Ninth Circuit denied Facebook's motion for rehearing *en banc*.[5]

Current Briefing

On October 24, 2019, Facebook filed a motion for a stay of the Ninth Circuit's mandate pending its forthcoming petition for certiorari to the Supreme Court.[6] In its motion, Facebook indicated that it would raise the following questions in its petition: (1) whether the invasion of privacy that plaintiffs allegedly suffered establishes Article III standing under the Supreme Court's decision in *Spokeo, Inc. v. Robins*;[7] (2) whether a court must find that common issues predominate before certifying a class under Rule 23(b)(3); and (3) whether the "enormous statutory award" that plaintiffs seek violates

[1] *In re Facebook Biometric Info. Privacy Litig.*, No. 3:15-cv-03747-JD (N.D. Cal. May 14, 2015).

[2] *In re Facebook Biometric Info. Privacy Litig.*, 326 F.R.D. 535, 543 (N.D. Cal. 2018).

[3] *Patel v. Facebook, Inc.*, No. 18-15982 (9th Cir. May 30, 2018).

[4] *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1273 (9th Cir. 2019). The opinion is available here.

[5] Order, *Patel*, No. 18-15982 (9th Cir. Oct. 18, 2019), ECF No. 105.

[6] Facebook's Motion for a Stay of the Mandate Pending the Supreme Court's Disposition of its Anticipated Petition for a Writ of Certiorari, *Patel*, No. 18-15982 (9th Cir. Oct. 24, 2019), ECF No. 106-1.

[7] 136 S. Ct. 1540 (2016).

Rule 23(b)(3)'s superiority requirement and the constitutional due process provisions because it is unconnected to an actual injury.[8] In an opposition filed one day later, plaintiffs contend that Facebook has failed to raise any issues appropriate for the Supreme Court's review.[9]

On October 30, 2019, the Ninth Circuit granted Facebook's motion to stay the mandate until January 16, 2020, thereby providing Facebook time to file a petition for a writ of certiorari in the Supreme Court.[10] The stay will remain in effect if the Supreme Court grants certiorari.[11]

Thoughts & Takeaways

If the Supreme Court grants certiorari, the case could present an opportunity for guidance on what privacy and data breach violations are actionable under *Spokeo*, which would likely have significant ramifications for class litigation given the growing trend of similar actions. Damages under the BIPA are set at $1,000 for each negligent violation and $5,000 for each reckless or intentional violation. With a class of potentially seven million Facebook users, the case could have significant consequences for the social media giant and far-reaching implications in the data privacy space.

That said, the Ninth Circuit's decision is consistent with a January 2019 ruling from the Illinois Supreme Court that found that BIPA does not require a plaintiff to allege separate "actual damages beyond violation of … rights under the Act in order to bring an action under it."[12] Plaintiffs assert that because the instant action involves questions of state law that have been decided by the state's highest court, the Supreme Court is even more unlikely to grant review.

Read the motion to stay the mandate here, the brief in opposition here, and the order granting the stay here.

Ninth Circuit Order Vacating Class Certification in *Vargas v. Lott*

Key Issue

Whether a district court conducted a sufficiently comprehensive review in granting final approval of a settlement class given objections concerning (1) the actual relief the class would receive and (2) the presence of a "clear sailing" provision under which defendant Ford Motor Company would not object to class counsel's fee request.

Background

In *Vargas v. Ford Motor Co.*, a proposed class of consumer plaintiffs brought misrepresentation and warranty claims against Ford for alleged defects in certain Ford transmission systems used in its Fiesta and Focus vehicles for certain model years.[13] The defects allegedly caused delayed shifting, delayed acceleration, and premature internal wear on the transmission system.[14]

In 2017, Ford and putative class counsel reached a settlement agreement that afforded two forms of relief to the proposed class.[15] *First*, Ford agreed to repair each class members' transmission systems at no cost and to make a $50 cash payment; however, if the transmission defects were not resolved after the second repair visit, class members would also receive escalating cash payments or discount certificates for the third and each subsequent repair visit.[16] *Second*, class members could seek through

[8] *Id.*

[9] Opposition of Plaintiffs-Appellees to Motion to Stay the Mandate, *Patel*, No. 18-15982 (9th Cir. Oct. 25, 2019), ECF No. 107-1.

[10] Order, *Patel*, No. 18-15982 (9th Cir. Oct. 30, 2019).

[11] *Id.*

[12] *See Rosenbach v. Six Flags Entm't Corp.*, No. 123186 (Ill. Jan. 25, 2019).

[13] *See Vargas v. Lott*, —F. App'x—, Nos. 17-56745, 17-56746, 2019 WL 4391225, at *1 (9th Cir. Sept. 13, 2019).

[14] *Id.*

[15] *Id.*

[16] *Id.* at *2.

arbitration Ford's repurchase of their vehicle if repurchase is an authorized remedy under the class member's state lemon law.[17] Class counsel's expert estimated the settlement's value at $35 million.[18] The settlement also contained a "clear sailing" provision, under which Ford agreed not to object to class counsel's requested fee award of $8,856,000.[19]

The district court held a fairness hearing and finally approved the settlement in October 2017.[20] Objectors argued that the settlement did not offer meaningful relief to class members. For example, the $35 million valuation was based on an estimated class of two million Ford owners eligible for repairs, but the actual claims rate and eligibility were expected to be much lower.[21]

Decision

In an unpublished decision, a split Ninth Circuit panel reversed the district court's final approval order and remanded for further consideration.[22]

The majority held that the district court's analysis was procedurally inadequate because it failed to comprehensively explore relevant fairness considerations and non-frivolous objections. In particular, the majority found that the district court did not take a hard look at the disparity between the represented value of the settlement ($35 million) and its likely actual value, given that "the actual claims rate is likely to be very much less than 100%."[23] Moreover, the court expressed concern that the fee award was disproportionate to the likely recovery, especially given that the clear sailing provision guaranteed that Ford would not object to class counsel's requested fees.[24]

Jude Rawlinson dissented, contending that the district court did not abuse its discretion and that the majority's opinion would have the court over-step its role and subject the district court to excessive scrutiny.[25] While the majority expressed its holding in terms of the district court's inadequate procedural review, Judge Rawlinson emphasized that the settlement "was reached through arms-length negotiations supervised by a mediator, resulted in substantial relief to the parties, and was consummated following extensive investigation of the facts and applicable legal theories."[26]

Thoughts & Takeaways

Vargas discusses important factors that courts should address when finally approving a pre-certification class settlement, and which parties should consider in formulating settlements to reduce scrutiny and to avoid potential reversal. For example, parties should be aware that, under Ninth Circuit precedent, "when confronted with a clear sailing provision, the district court has a heightened duty to peer into the provision and scrutinize closely the relationship between attorneys' fees and benefit to the class."[27] *Vargas* is also notable in holding that a district court should "ma[ke] an effort to estimate the likely claims rate" as part of its comprehensive review and explain its conclusions with a "sufficiently reasoned response."[28] That holding may be cited by objectors to other settlements, particularly because the estimated value of a claims-made settlement may

[17] *Id.* at *1. The settlement also provided that participants who successfully arbitrated their claims would be entitled to up to $6,000 in attorneys' fees.

[18] *Id.*

[19] *Id.*

[20] *See Vargas v. Ford Motor Co.*, No. CV12-08388 AB (FFMx), 2017 WL 4766677 (C.D. Cal. Oct. 18, 2017).

[21] *See Vargas*, 2019 WL 4391225, at *1.

[22] *Id.*

[23] *Id.*

[24] *Id.* at *2.

[25] *Id.* at *4.

[26] *Id.*

[27] *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011).

[28] *See Vargas*, 2019 WL 4391225, at *1-2.

often be supported by expert testimony that is not subject to the same degree of adversarial challenge that would occur in a litigated class certification proceeding.

Read about the opinion here. As of November 2019, the district court is also conducting trials of certain cases brought by settlement opt-out plaintiffs. Read more about the trials here.

Eleventh Circuit Decision in *AA Suncoast Chiropractic Clinic v. Progressive Am. Ins. Co.*

Key Issue

Whether the district court erred in certifying an injunction class under Federal Rule of Civil Procedure 23(b)(2) where the putative class sought retrospective relief and the proposed class may be both under- and over-inclusive.

Background

The appeal in *AA Suncoast Chiropractic Clinic v. Progressive American Insurance Co.* arises from a dispute concerning Florida's provisions governing the amount of insurance coverage available to motorists in automobile accidents, and when that coverage may be limited.[29] Under Florida law, car insurance policies must provide personal injury benefits up to $10,000, but only injured motorists who have an "emergency medical condition" ("EMC") are eligible to receive the full $10,000. For non-EMC accidents, coverage is capped at $2,500.[30] Florida law also governs who decides whether an accident involves an EMC (an "EMC Determination").

Plaintiffs are chiropractic and medical providers who treated injured motorists insured by Progressive; the motorists paid for plaintiffs' services by assigning their insurance benefits to plaintiffs. After plaintiffs provided services to the motorists, Progressive capped payment at $2,500, relying upon a "negative EMC Determination" (i.e., a determination that the accident did not involve an emergency medical condition). Plaintiffs claim that the caps violated Florida law because the Negative EMC Determinations were made by non-treating healthcare providers, and that coverage may only be capped if a treating healthcare provide makes a Negative EMC Determination.[31]

Plaintiffs sought certification of an injunction class and a damages sub-class. Whereas Rule 23(b)(3) requires plaintiffs to establish that "questions of law or fact common to class members predominate" over individualized questions, under Rule 23(b)(2), plaintiffs seeking certification of an injunction class must instead show that the party opposing the class "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[32]

The proposed injunction class sought, among other relief, an injunction to "restore coverage limits to $10,000 for affected policies," and a declaration that Progressive's practice of relying on Negative EMC Determinations by non-treating providers is unlawful.[33]

Applying the respective Rule 23 standards, the District Court for the Middle District of Florida denied certification of the proposed damages class for failure to satisfy Rule 23(b)(3)'s predominance and superiority requirements.[34] However, it granted certification of an injunction class that included medical providers who (1) "received an assignment of benefits" under a Progressive policy; (2) provided medical services; and (3) were "given notice

[29] *AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co.*, 938 F.3d 1170 (11th Cir. 2019).

[30] *See id.* at 1172.

[31] *See id.* at 1172-73.

[32] Fed R. Civ. P. 23(b)(2).

[33] *AA Suncoast*, 938 F.3d at 1173.

[34] *See id.*

by Progressive that available PIP benefits were reduced to $2,500 because of a Negative EMC Determination that Progressive obtained from a Non-Treating Provider."[35]

Progressive sought interlocutory appeal of the injunction class certification; plaintiffs did not appeal the court's denial of certification of the proposed damages class.

Decision

The Eleventh Circuit panel reversed the district court's certification of the injunction class as an abuse of discretion. The court concluded that the purported "injunction class" was really a damages class in disguise, seeking to circumvent the predominance and superiority inquiries under Rule 23(b)(3), and that the proposed relief—restoring coverage limits and requiring Progressive to reprocess affected claims—was designed to remedy past harm from plaintiffs' inability to receive the full $10,000 coverage and not to protect future interests.[36]

In reaching its conclusion, the court first assessed plaintiffs' own framing of their injury as "the loss of an opportunity to have received money in the past."[37] The requested declaratory relief was similarly designed to remedy retrospective harm by allowing class members to receive benefits beyond the $2,500 cap for services already performed.[38] Second, the court considered the class definition. The court acknowledged that there may be parties with a future interest in changes to Progressive's EMC Determination policy, but plaintiffs' class definition would include only members who had already performed services under a capped Progressive policy, underscoring that its aim was retrospective and not prospective relief.

Separately, the court found that the proposed class was both over-inclusive because it was not limited to providers who are likely to treat Progressive insureds in the future, and under-inclusive because it did not include providers who had not yet faced denied or capped claims.[39]

Thoughts & Takeaways

AA Suncoast is instructive in its discussion of the separate requirements for certification under Rule 23(b)(2) and Rule 23(b)(3), and for its in-depth rejection of plaintiffs' attempt to recast a remedy for past harm into injunctive relief. Significantly, the court refused to allow plaintiffs to proceed as a class for relief that, while styled as "injunctive," really amounted to a request for damages—or for a determination that would allow plaintiffs to seek damages from past wrongs. The court's order is consistent with the conclusion reached by at least one other circuit that has addressed a similar set of proposed classes that likewise refused to certify under Rule 23(b)(2) a class that actually sought damages.[40]

Read about the opinion here.

[35] *See id.*

[36] *See id.* at 1174-75 (the injunctive relief sought "is not an injunction at all, and [plaintiffs'] declaratory request is both minimal and unconnected to the members of its class.")

[37] *Id.* at 1175-76.

[38] *See id.* at 1176.

[39] *See id.* at 1177-78.

[40] *See Kartman v. State Farm Mut. Auto. Ins. Co.*, 634 F.3d 883 (7th Cir. 2011).

Federal District Courts

Settlement of Bellwether Cases and Appeal of Negotiation Class Certification in *In re National Prescription Opiate Litigation*

Settlement Developments

On October 21, 2019, drug distributors AmerisourceBergen Drug Corp., Cardinal Health Inc. and McKesson Corp. and manufacturer Teva Pharmaceuticals Industries Ltd. reached an approximately $260 million settlement with Summit and Cuyahoga counties in Ohio, avoiding what was poised to be a bellwether trial in the multi-district litigation ("MDL") arising out of the opioid crisis. The settlement money will be used to fund addiction treatment and prevention programs. The defendants did not admit to any wrongdoing as part of the settlement.[41]

The agreement between three of the nation's largest distributors and the manufacturer does not end the National Prescription Opiate Litigation that involves thousands of actions brought by cities, counties and American Indian tribes against companies connected to the production, distribution and marketing of opioids.

As trial approached, there were reports of a nearly $50 billion settlement for global resolution of the thousands of suits encompassing the MDL and those filed by various states. Rumors have surfaced that disputes over potentially massive attorney's fees have thwarted these talks.

Ohio's Attorney General David Yost has been a vocal critic of the cases, arguing that plaintiffs' counsel could recoup funds that would be better used to combat the opioid epidemic. Yost also asked the Sixth Circuit to stay the bellwether trial, claiming that the plaintiff municipalities were encroaching on the state's authority to guard the public welfare. The Sixth Circuit rejected that request less than two weeks before the trial's scheduled October 21, 2019 start.[42]

The parties expect that future bellwether trials in certain of the more than 2,000 suits in the MDL will be scheduled for the first quarter of 2020. These cases may now be less likely to see trial in light of the recent settlements.

Rule 23(f) Petition to Appeal "Negotiation Class" Certification

Background

On September 11, 2019, Judge Polster of the Northern District of Ohio granted certification of a novel "negotiation class" of cities and counties in the opioid MDL. The impetus for the creation of the negotiation class was to encourage global settlement of the claims against opioid distributors and manufacturers, which has thus far been impeded by the possibility that many of the cities and counties that are already litigating their claims would opt out of a settlement class. To counter this, Judge Polster's order requires cities and counties that wish to opt-out of the negotiation class to do so before any settlement is reached, which will allow the parties' knowledge of the exact size of the class to inform the negotiations.[43] Any settlement requires preliminary approval by the court, an approval of at least 75% of the voting class members, and final court approval.

[41] *See* Sara Randazzo, *Last-Minute Opioid Deal Could Open Door to Bigger Settlement*, Wall St. J. (Oct. 21, 2019), https://www.wsj.com/articles/four-drug-companies-reach-last-minute-settlement-in-opioid-litigation-11571658212.

[42] *See* Order, *In re: State of Ohio*, No. 19-3827 (6th Cir. Oct. 10, 2019), ECF No. 32-1.

[43] *In re Nat'l Prescription Opiate Litig.*, —F.R.D.—, No. 1:17-MD-2804, 2019 WL 4307851, at *2 (N.D. Ohio Sept. 11, 2019).

Rule 23(f) Petition

On September 26, 2019, six Ohio cities that filed objections prior to certification petitioned the Sixth Circuit to review Judge Polster's certification order under Rule 23(f).[44] The cities argue that immediate appellate review of the certification order is warranted, as the certification order will commence an "arduous process" of notification of thousands of absent local governments, negotiations with those that do not opt out, voting to approve any settlement, and litigation regarding settlement fairness.[45] Appellate review of Judge Polster's decision now, the cities argue, would prevent the parties from undertaking this process only to have certification invalidated later.

Substantively, the objecting cities raise a number of arguments against the adoption of a negotiation class. *First*, the cities contend that certification of the negotiation class violates Rule 23. The rule, the cities argue, only allows for certification of litigation or settlement classes. Certification of the negotiation class falls into the latter category because it "has no purpose or authority *other than* to seek to reach a settlement."[46] However, certification here precedes rather than follows an agreement to settle, even though Rule 23 requires a settlement to exist prior to certification of a settlement class. Further, certification of settlement classes gives putative class members the opportunity to opt out of the class with knowledge of the settlement terms; here, plaintiffs would only have knowledge of the share of any settlement they would receive, not the actual amount. The cities emphasized that in certifying the negotiation class, Judge Polster assessed a set of provisions presented by a group of "self-selected plaintiffs that the defendants have never indicated they would ever accept," which was inadequate to initiate notice procedures.[47]

The cities also highlight the lack of set procedures in Rule 23 that would protect absent class members in the negotiation class context, specifically the information that is required to be presented to absent class members before they can be bound. Not only will the plaintiffs not know the amount of money they would receive pursuant to a settlement before having to decide whether to opt-out or be bound by the negotiation class, but they would also not have knowledge of other important provisions of the settlement, such as whether the settlement would include non-monetary benefits, and cities and towns would not even know the proportion of a settlement they would receive. The cities contend that if the Sixth Circuit does not reverse certification, parties in "essentially any class action" in the future will rely on negotiation classes to evade settlement class procedures mandated by Rule 23.[48] The cities argue that Judge Polster's cited justification, that defendants insist on "global peace," would be applicable in many collective actions.

Second, the cities raised multiple constitutional arguments. In particular, the cities contend that class counsel faces incentives antithetical to the interests of the class: because counsel for the negotiation class would not have the opportunity to proceed to a trial, they would face an undue pressure to settle as the only way to receive attorneys' fees.[49] Moreover, their advocacy for the negotiation class itself, the cities argue, is evidence of the inadequate incentives. The cities also argue that the requirement that they choose whether to opt out with insufficient knowledge violates their due process rights.[50]

We will continue to monitor these developments and report on the outcome of the cities' petition. Read about the petition here.

[44] *See* Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f), *In re Nat'l Prescription Opiate Litig.*, No. 19-306 (6th Cir. Sept. 26, 2019), ECF No. 1-2.

[45] *See id.* at 4-6.

[46] *See id.* at 6-14.

[47] *Id.* at 9.

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

[49] *See id.* at 16-18.

[50] *See id.* at 18-20.

Other Noteworthy Developments

Cornerstone Research recently published a report on the increasing prevalence of opt-outs in securities class action settlements.[51] Of the 382 securities class action settlements between 2014 and 2018, there were at least 34 cases in which at least one plaintiff opted out—a rate of 8.9%. In comparison, between 1996 and 2013, the percentage of securities class action settlements with opt-outs was 3.4%.

While pension funds previously were among the most common plaintiffs in opt-out cases, they appeared in just four of the 34 opt-out cases between 2014 and 2018. Meanwhile, non-pension institutional investors, such as mutual and hedge funds, were plaintiffs in 15 of these cases.

The report notes a possible causal connection between the increasing likelihood of opt-outs and recent appellate decisions regarding the Securities Act's statute of repose. *First*, in *Police and Fire Retirement System of the City of Detroit v. IndyMac MBS, Inc.*, the Second Circuit held that the statute of repose was not tolled by the filing of a class action.[52] *Second*, in *California Public Employees' Retirement System v. ANZ*, the Supreme Court affirmed the Second Circuit's ruling that an individual action filed by a plaintiff that opted out of a class settlement after the expiration of the statute of repose was properly dismissed as time-barred, even though the putative class complaint was timely filed.[53] Although it was anticipated that these decisions may lead to a decrease in opt-outs, Cornerstone posits that these decisions may have resulted in well-funded institutional investors opting out of classes more frequently, and filing individual actions at an earlier time than before.

To help guard against the costs and potential exposure of multiple opt-out suits, defendants may increasingly turn to "blow provisions," which allow the class action defendant to terminate or renegotiate a settlement if a threshold percentage of the class opts out.

Read the report here.

[51] *See* Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements: 2014-2018 Update* (2019), https://www.cornerstone.com/Publications/Reports/Opt-Out-Cases-in-Securities-Class-Action-Settlements-2014-2018.

[52] 721 F.3d 95, 101 (2d Cir. 2013).

[53] 137 S. Ct. 2042, 2055 (2017).

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