May 15, 2020

Class & Collective Action Group Newsletter

Survey of COVID-19-related Class Action Complaints

The COVID-19 pandemic has disrupted all aspects of life, including business operations, in the United States and abroad. That disruption and the resulting economic consequences have fueled a large number of new class action complaints against companies in a variety of industries, including travel and transportation, events and entertainment, sports, food production and retail, pharmaceuticals and life sciences, and even higher education. The majority of these complaints assert claims for securities fraud, unfair business practices, breach of contract, or negligence. As discussed below, each of the theories of liability articulated by plaintiffs thus far presents its own challenges with respect to class certification and on the merits. For example, many of the plaintiffs' claims raise novel issues related to injury, causation, and defendants' knowledge of and liability for COVID-19-related risks, all of which could present individualized inquiries that predominate over common questions of law or fact. And these challenges will be complicated by the fact that many of the complaints seek to certify expansive classes. We summarize below many of the new COVID-19-related cases that have been filed to date, highlighting these key issues and challenges.

Securities Fraud

Plaintiffs have brought several securities claims against companies for representations or omissions made concerning their COVID-19-related business opportunities and risks.

Two cases rest on allegations that issuers overstated business opportunities in connection with COVID-19, thereby inflating share prices that subsequently dropped in light of contrary analyst reports. The first case alleges that Inovio, a biotechnology company, falsely claimed that it had developed a COVID-19 vaccine "in a matter of about three hours once [it] had the DNA sequence from the virus," and announced its plan to start human trials in April 2020.[1] An analyst called the claim "ludicrous," and Inovio clarified that it had designed a "vaccine construct," not a vaccine.[2]

A similar case was brought against SCWorx, which "provides data content and services related to the repair, normalization, and interoperability of information for healthcare providers."[3] Plaintiff alleges that SCWorx's share price artificially

[1] Class Action Complaint ¶¶ 4–5, *McDermid v. Inovio Pharms, Inc.*, No. 2:20-cv-01402-GJP (E.D. Pa. Mar. 12, 2020), ECF No. 1 ("*McDermid* Compl.") (emphasis omitted); *see also* Verified Shareholder Derivative Complaint, *Beheshti v. Kim*, No. 2:20-cv-01962 (E.D. Pa. Apr. 20, 2020), ECF No. 1.

[2] *McDermid* Compl. ¶ 6 (emphasis omitted).

[3] Class Action Complaint ¶ 2, *Yannes v. SCWorx Corp.*, No. 1:20-cv-03349 (S.D.N.Y. Apr. 29, 2020), ECF No. 1 ("*Yannes* Compl.").

increased after the company announced it received a purchase order for two million COVID-19 rapid testing kits. The share price subsequently dropped after an analyst's report suggested that SCWorx's potential supplier of the tests has a history of fraud, and moreover, that the purchaser was unlikely to be able to handle such a large order.[4] Plaintiffs allege that SCWorx failed to disclose these facts, and that SCWorx's positive statements regarding the purchase order were materially misleading and lacked a reasonable basis.[5]

The final case involves an alleged failure to disclose material information concerning COVID-19's likely effect on business operations.[6] In *Atachbarian v. Norwegian Cruise Lines*, plaintiff alleges that Norwegian knew as early as February 20, 2020 that COVID-19 would have a devastating impact on the cruise industry, but instead of disclosing that risk, Norwegian "took steps to falsely induce potential customers to book trips" by downplaying the threat of COVID-19.[7] Norwegian's share price dropped after news reports leaked Norwegian sales scripts that encouraged the sales team to downplay COVID-19; however, around the same time, Norwegian and three other major cruise lines had also announced that it would suspend all of its U.S. voyages for at least one month. This case and others like it may present challenges for plaintiffs seeking to establish a nexus between COVID-19-related omissions and subsequent share price deflation in light of industry-wide losses.

While only a relatively small number of securities fraud cases have been filed so far, we anticipate an increase in securities claims as the pandemic persists and investors continue to scrutinize issuer disclosures.[8]

Unfair Business Practices

To date, two separate complaints have been filed alleging unlawful price increases charged by sellers of various goods during states of emergency triggered by COVID-19. Both complaints are brought under California state statute, and we anticipate may be brought under other, similar state statutes, potentially in conjunction with common-law claims of the type discussed below.

In a wide-ranging complaint, plaintiffs assert California state law claims against Costco, Whole Foods, Walmart, Amazon.com, Trader Joe's, and other egg producers, wholesalers, and grocers that allegedly "illegally marked up egg prices following [California Governor Newsom's] declaration of an emergency."[9] California Penal Code § 396 provides that, for the 30 days following a state or national declaration of emergency, it is illegal to increase the price of certain products or services by more than 10 percent of the pre-emergency price. Plaintiffs allege the price of eggs "nearly tripled" following the California state of emergency declaration and "remain much more than 10 percent higher than they were prior to the declaration of emergency."[10]

Named plaintiffs each bought eggs from one or more defendant and seek to represent "[a]ll consumers who purchased eggs in the state of California that were sold, distributed, produced, or handled by any of the defendants" during California's ongoing state of emergency.[11] Notably, plaintiffs do not allege an

[4] *Yannes* Compl. ¶¶ 3–6.

[5] *Id.* ¶ 8.

[6] Class Action Complaint, *Atachbarian v. Norwegian Cruise Lines*, No. 1:20-cv-21386-CMA (S.D. Fla. Mar. 31, 2020), ECF No. 1.

[7] *Id.* ¶¶ 22–24.

[8] *See also* Complaint, *Wandel v. Gao*, No. 1:20-cv-03259 (S.D.N.Y. Apr. 24, 2020), ECF No. 1 (alleging that a Chinese apartment management company prepared defective offering materials in connection with its IPO by failing to disclose business risks associated with the onset of COVID-19 in Wuhan, China).

[9] Class Action Complaint ¶ 1, *Fraser v. Cal-Maine Foods, Inc.*, No. 3:20-cv-02733 (Apr. 20, 2020), ECF No. 1.

[10] *Id.* ¶ 6.

[11] *Id.* ¶ 55.

agreement or conspiracy between defendants to fix or raise prices or to restrict supply or otherwise interfere with the market for eggs in California. Indeed, the complaint states that "consumers such as plaintiffs lack access to information about which of the defendants . . . participated in the price-gouging."[12] Among other challenges for plaintiffs, the complaint may present individualized fact issues as to each defendant's liability. Each defendant may avail itself of the Penal Code's safe harbor provision, which provides that a price increase greater than 10 percent is lawful if "directly attributable" to additional costs it incurred, labor used by the business, or seasonal adjustments in rates (if such rates are regularly scheduled or previously contracted).[13] Here, the price that any particular consumer paid for eggs bought from any particular defendant may be a function of individualized market factors that could bring the allegedly increased prices within the safe harbor provision.

A separate complaint against Amazon.com alleges violations of California's unfair competition law, negligence, and unjust enrichment concerning a variety of products sold by Amazon and by third-party sellers using Amazon's e-commerce platform.[14] Plaintiffs allege that, in light of stay-at-home orders due to COVID-19, consumers are more reliant on e-commerce for essential goods, and that Amazon has taken advantage of greater consumer demand by increasing its prices.[15] Plaintiffs also argue that Amazon is responsible for all sales on its e-commerce platform, including products sold by third parties, because Amazon functions as the seller by controlling prices, creating the sales platform, and interacting directly with consumers.[16] Finally, plaintiffs argue that, even if Amazon does not control third-party sellers that use its e-commerce platform, the alleged price gouging was foreseeable, and Amazon "has a legal duty to prevent foreseeable harm arising from the use of its platform."[17]

The proposed *Amazon.com* consumer class is vast. It includes all persons in California who purchased a protected product—including "all consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels"—from Amazon.com at an inflated price as defined by the California Penal Code.[18] In addition to raising the question of Amazon.com's liability for the actions of third-party sellers,[19] this case raises individualized issues of liability similar to those in the *Fraser* egg price complaint, though on a significantly broader scale, given the number of industries and products at issue.

Breach of Contract

There have been a number of proposed class actions asserting breach of contract and consumer protection claims against businesses that have been prevented from providing services or that have had to significantly alter the services they provide, including businesses in the entertainment, sporting, travel, and higher education industries.

[12] *Id.* ¶ 1.

[13] Cal. Penal Code. § 396(b).

[14] Class Action Complaint, *McQueen v. Amazon.com, Inc.*, No. 4:20-cv-02782 (Apr. 21, 2020), ECF No. 1.

[15] *Id.* ¶¶ 35–42.

[16] *Id.* ¶¶ 58–73.

[17] *Id.* ¶ 67.

[18] *Id.* ¶ 77.

[19] In the context of defective product claims, three circuit courts of appeals have analyzed whether Amazon.com is a "seller" and whether it is liable for actions of the third-party sellers that use its e-commerce platform. *See Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3d Cir.), *reh'g en banc granted and opinion vacated*, 936 F.3d 182 (3d Cir. 2019); *Fox v. Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019); *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019).

For example, plaintiffs have filed separate complaints against ticket merchants StubHub and Ticketmaster challenging alleged changes to the companies' refund policies. StubHub formerly refunded ticket purchasers for canceled events, but in light of mass cancellations, shifted to offering purchasers a voucher for 120% of their purchase price that can be applied to the purchase of any ticketed event within the next 12 months.[20] StubHub still offers refunds to consumers where required by state law.[21] In a separate case, plaintiffs sued Ticketmaster for no longer offering refunds for postponed or rescheduled events; refunds are only available when an event has been canceled.[22]

Plaintiffs in both cases claim that the refund policies were incorporated into their ticket purchase agreements, and that defendants' refusal to honor the prior refund policies constitutes breach and a violation of California consumer protection and unfair business practices laws.[23] Both cases are brought on behalf of nationwide classes and potential subclasses.[24] Each case may present individualized legal inquiries as to whether the defendant's changes to its refund policy constitute breach—and whether plaintiffs are entitled to refunds—under varying state laws that govern these issues.[25]

In other cases, plaintiffs seek refunds from merchants for specific events or services. For example, organizers of the popular festival South by Southwest ("SXSW"), the music festival Lightning in a Bottle, and a conference for nurses held at sea by Royal Caribbean all face similar claims for allegedly failing to refund consumers' ticket fees or deposits.[26] Likewise, Major League Baseball, Six Flags, and Vail ski resorts face separate refund claims from season pass holders (and purchasers of single-use tickets) who claim they have overpaid for passes or memberships they cannot presently use.[27] Many major airlines are defending similar claims by consumers seeking compensation for changed or canceled itineraries who allege that airline credits are insufficient restitution.[28] In all cases, plaintiffs seek to represent nationwide classes, thereby posing commonality and predominance problems: courts may need to apply a patchwork of varying state laws to the nationwide class to determine which consumers, if any, are entitled to relief.

Finally, colleges and universities that have shifted to remote-only learning are facing suits from students and parents who allege they overpaid for an on-campus Spring 2020 semester experience

[20] Class Action Complaint ¶¶ 15–16, 22, *McMillan v. StubHub, Inc.*, No. 3:20-cv-00319 (W.D. Wis. Apr. 2, 2020), ECF No. 1 ("*StubHub* Compl.").

[21] *Id.* ¶ 23.

[22] Class Action Complaint, *Hansen v. Ticketmaster Entm't, Inc.*, No. 3:20-cv-02685 (N.D. Cal. Apr. 17, 2020), ECF No. 1 ("*Ticketmaster* Compl.").

[23] Claims include: violations of the California Consumer Legal Remedies Act; conversion; unjust enrichment; false advertising; fraud; and unfair trade practices in violation of the California Business and Professions Code. *See id.* ¶¶ 40–99.

[24] *See id.* ¶ 32; *StubHub* Compl. ¶¶ 56–57.

[25] *See, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 593–94 (9th Cir. 2012) (vacating certification of nationwide class because "each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place").

[26] *See* Plaintiffs' Class Action Complaint, *Bromley v. SXSW, LLC*, No. 1:20-CV-439 (W.D. Tex. Apr. 24, 2020), ECF No. 1; Class Action Complaint, *Jimenez v. Do Lab, Inc.*, No. 2:20-cv-3462 (C.D. Cal. Apr. 14, 2020), ECF No. 1; Class Action Complaint, *Nesis v. Do Lab, Inc.*, No. 2:20-cv-03452 (C.D. Cal. Apr. 14, 2020), ECF No. 1; Class Action Complaint, *Mitchell v. NurseCon at Sea, LLC*, No. 1:20-cv-21503 (S.D. Fla. Apr. 8, 2020), ECF No. 1.

[27] *See* Class Action Complaint, *Ajzenman v. Office of the Comm'r of Baseball*, No. 2:20-cv-3643 (C.D. Cal. Apr. 20, 2020), ECF No. 1; Plaintiffs' Class Action Complaint, *Rezai-Hariri v. Magic Mountain LLC*, No. 8:20-cv-00716 (Apr. 10, 2020), ECF No. 1; Class Action Complaint, *Hunt v. Vail Corp.*, No. 4:20-cv-02463 (N.D. Cal. Apr. 10, 2020), ECF No. 1.

[28] *See* Complaint – Class Action, *Ward v. Am. Airlines, Inc.*, No. 4:20-cv-00371-Y (N.D. Tex. Apr. 22, 2020), ECF No. 1; Class Action Complaint, *Manchur v. Spirit Airlines, Inc.*, No. 1:20-cv-10771 (D. Mass. Apr. 21, 2020), ECF No. 1; Class Action Complaint, *Alvarez v. Hawaiian Airlines, Inc.*, No. 1:20-cv-00175 (D. Haw. Apr. 20, 2020), ECF No. 1; Class Action Complaint, *Bombin v. Sw. Airlines Co.*, No. 5:20-cv-01883 (E.D. Pa. Apr. 13, 2020), ECF No. 1; Class Action Complaint, *TM Solutions USA LLC v. LATAM Airlines Grp. S.A. Inc.*, No. 1:20-cv-21552-JAL (S.D. Fla. Apr. 13, 2020), ECF No. 1; Class Action Complaint, *Levey v. Concesionaria Vuela Compañía de Aviación, S.A.P.I. de C.V.*, No. 1:20-cv-2215 (N.D. Ill. Apr. 8, 2020), ECF No. 1; Class Action Complaint, *Rudolph v. United Airlines Holdings, Inc.*, No. 1:20-cv-02142 (N.D. Ill. Apr. 6, 2020), ECF No. 1.

that they did not receive.[29] Some plaintiffs limit their claims to fees, *e.g.* for facilities or services that students cannot use while they are off-campus,[30] whereas others seek broader relief in the form of pro-rated tuition refunds.[31] The claim for tuition refunds in particular may not be susceptible to common proof at trial, considering that the value of an "on-campus" education as compared to remote learning may be subjective and based on myriad factors that vary by student. For example, the named plaintiff suing Cornell University alleges that "[t]he online learning options being offered to Cornell students are subpar in practically every aspect, from the lack of facilities, materials, and access to faculty. Students have been deprived of the opportunity for collaborative learning and in-person dialogue, feedback, and critique."[32] The named plaintiff, an architecture student, offers some more tangible examples of her alleged injury: she cannot use Cornell's "laser cutters, 3D printers, wood and metal shops" that she argues are necessary for her particular field of study.[33] Even still, it remains to be seen whether deprivation of "the opportunity for collaborative learning" constitutes a cognizable injury at all, and whether class members have suffered an injury may vary major-by-major and student-by-student.

Negligence

Finally, crewmember and passenger plaintiffs have brought separate actions against cruise line operators for negligence as COVID-19 spread onboard their vessels.[34] In *Nedeltcheva v. Celebrity Cruises*, the crewmember named plaintiff asserts Jones Act[35] negligence and unseaworthiness claims. The named plaintiff alleges that Celebrity Cruises failed to take appropriate measures to protect thousands of its crewmembers across its entire fleet, despite having actual or constructive knowledge of the risk of COVID-19.[36] In support, plaintiff points to early reports of COVID-19 aboard non-Celebrity vessels, including the *Diamond Princess* in Japan, and guidance issued by the U.S. Centers for Disease Control and Prevention.[37] Despite these developments in mid-February 2020, Celebrity Cruises allowed crewmembers to board and embark on several voyages in early March. Celebrity Cruises allegedly failed to take preventative and responsive actions to limit the spread of COVID-19 aboard its vessels, including because it failed to (1) screen or test individuals when they boarded; (2) enact social distancing measures; and (3) warn crewmembers as to the risks of COVID-19 and educate them on methods for reducing their exposure to the virus.[38]

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[29] *See, e.g.*, Class Action Complaint, *Watson v. Univ. of S. Cal.*, No. 2:20-cv-04107 (C.D. Cal. May 5, 2020), ECF No. 1; Class Action Complaint, *Schoening v. Seton Hall Univ.*, No. 2:20-cv-05566 (D.N.J. May 5, 2020), ECF No. 1; Class Action Complaint, *Rojas v. Fla. Bd. of Governors Found., Inc.*, No. 2020 CA 000846 (Fla. Cir. Ct. May 4, 2020), ECF No. 1; Class Action Complaint, *Doe v. Vanderbilt Univ.*, No. 3:20-mc-09999 (M.D. Tenn. Apr. 27, 2020), ECF No. 262; Original Class Action Complaint, *Brandmeyer v. Regents of the Univ. of Cal.*, No. 4:20-cv-2886 (N.D. Cal. Apr. 27, 2020), ECF No. 1 ("*Univ. of Cal.* Compl."); Original Class Action Complaint, *Miller v. Bd. of Trs. of Cal. State Univ.*, No. 2:20-cv-03833 (C.D. Cal. Apr. 27, 2020), ECF No. 1; Class Action Complaint and Demand for Jury Trial, *Hassan v. Fordham Univ.*, No. 1:20-cv-03265 (S.D.N.Y. Apr. 25, 2020), ECF No. 1; Class Action Complaint and Demand for Jury Trial, *Haynie v. Cornell Univ.*, No. 5:00-at-99999 (N.D.N.Y. Apr. 23, 2020), ECF No. 88 ("*Cornell* Compl."); Class Action Complaint (Jury Trial Demanded), *Marbury v. Pace Univ.*, No. 1:20-cv-03210-JMF (S.D.N.Y. Apr. 23, 2020), ECF No. 1; Class Action Complaint, *Student A v. Bd. of Trs. of Columbia Univ.*, No. 1:20-cv-03208 (S.D.N.Y. Apr. 23, 2020), ECF No. 1 ("*Columbia* Compl."); Class Action Complaint, *Dixon v. Univ. of Miami*, No. 2:20-cv-01348-BHH (D.S.C. Apr. 8, 2020), ECF No. 1; Class Action Complaint, *Rickenbaker v. Drexel Univ.*, No. 2:20-cv-1358-BHH (D.S.C. Apr. 8, 2020), ECF No. 1.

[30] *See Univ. of Cal.* Compl. ¶¶ 8, 18–20.

[31] *See Columbia* Compl. ¶¶ 4, 51-52, 80; *Cornell* Compl. ¶ 7.

[32] *Cornell* Compl. ¶ 5.

[33] *Id.* ¶ 8.

[34] *See* Complaint and Demand for Jury Trial, *Nedeltcheva v. Celebrity Cruises Inc.*, No. 1:20-cv-21569-UU (S.D. Fla. Apr. 14, 2020), ECF No. 1 ("*Nedeltcheva* Compl."); Class Action and Individual Complaint for Damages, *Archer v. Carnival Corp. & PLC*, No. 3:20-cv-02381 (N.D. Cal. Apr. 8, 2020), ECF No. 1 ("*Archer* Compl."); Complaint and Demand for Jury Trial, *Turner v. Costa Crociere S.P.A.*, No. 1:20-cv-21481-KMM (Apr. 7, 2020), ECF No. 1.

[35] Relevant here, the Jones Act extends the Federal Employer Liability Act to allow vessel crewmembers to sue employers for personal injury suffered in the course of their employment. *See* 46 U.S.C. § 30104.

[36] *Nedeltcheva* Compl. ¶¶ 21–32.

[37] *Id.* ¶ 31.

[38] *Id.* ¶ 47.

In *Archer v. Carnival Corp.*, passenger named plaintiffs bring a narrower suit on behalf of all passengers onboard a single voyage of the Grand Princess cruise from February 21, 2020 to March 10, 2020.[39] Plaintiffs sue Carnival for negligence and gross negligence, alleging that it failed to warn and take preventative action to protect the class after learning that at least one passenger aboard the Grand Princess's *prior* voyage sought medical treatment for "acute respiratory distress" on February 20.[40] On February 21, some of the passengers from the first voyage (to Mexico) disembarked, but 62 passengers and over 1,000 crew members remained aboard the vessel and new passengers boarded for the second voyage (to Hawaii).[41] Carnival allegedly "did not initiate effective measures to sanitize or disinfect the vessel in-between voyages, and did not implement any procedures for screening or testing existing or new passengers boarding the ship for the Hawaii voyage."[42]

In both cases, plaintiffs seek to represent classes comprised of individuals who actually contracted COVID-19, as well as individuals who were merely "at a heightened risk of exposure" to COVID-19.[43] Regardless of how the plaintiff class is defined, negligence claims based on these theories are likely to raise thorny questions regarding what constitutes an injury and what is required to establish causation in these circumstances. For example, plaintiffs alleging that they were "exposed" to COVID-19 must establish that exposure by itself is a cognizable injury, and plaintiffs that actually contracted COVID-19 will need to demonstrate that their injury is traceable to defendants' negligence. These questions are difficult enough to answer in any particular case, let alone in a class action where plaintiffs will need to demonstrate injury and causation on a class-wide basis despite individualized issues such as class members' particular health circumstances and non-voyage activity that may have exposed them to COVID-19.[44]

[39] *Archer* Compl. ¶ 1.

[40] *Id.* ¶ 39.

[41] *Id.* ¶¶ 41-42.

[42] *Id.* ¶ 43.

[43] *See Nedeltcheva* Compl. ¶ 15; *Archer* Compl. ¶ 63.

[44] *See AmChem Prods., Inc. v. Windsor*, 521 U.S. 591, 594 (1997) ("Although mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement, the Advisory Committee for the 1966 Rule 23 revision advised that such cases are ordinarily not appropriate for class treatment, and warned district courts to exercise caution when individual stakes are high and disparities among class members great."); *but see Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1136 (9th Cir. 2016) (rejecting argument that a "class is too broad because it includes a subset of people exposed to—yet ultimately not harmed by—a policy of non-disclosure," because it "merely highlights the possibility that an injurious course of conduct may sometimes fail to cause injury to certain class members").

Federal Appellate Courts

Third Circuit Order Vacating Class Certification in *In re Lamictal Direct Purchaser Antitrust Litig.*

Key Issue

The Supreme Court has held that class certification is only proper if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied."[45] The issue in this case is whether the district court properly conducted the requisite "rigorous analysis" when it determined that direct purchaser plaintiffs' antitrust claim was capable of common proof.

Background

Plaintiffs in this case are companies that directly purchased name-brand anti-epilepsy drug Lamictal from pharmaceutical manufacturer GlaxoSmithKline ("GSK") or the generic form of the drug, lamotrigine, from GSK's competitor Teva Pharmaceuticals ("Teva"). They filed a putative class action against GSK and Teva in the District of New Jersey alleging that Defendants committed antitrust violations arising out of their settlement agreement in a separate patent lawsuit.[46]

The underlying patent lawsuit resulted from Teva's desire to start marketing its generic version of Lamictal, called lamotrigine, before GSK's patent on Lamictal expired in 2009. In 2002, Teva filed an Abbreviated New Drug Application ("ANDA") for lamotrigine. Pursuant to the Hatch Waxman Act of 1984, manufacturers of generic pharmaceuticals who are first to file an ANDA, as Teva was here, can have exclusive marketing rights of the generic drug for 180 days—and thus only the name brand and the first filer's generic can be marketed during this period. To receive this exclusivity benefit when a name-brand manufacturer's patent term has not yet expired, ANDA filers must certify that placing their generic drug into the market would not violate the patent laws, either because the name-brand manufacturer's patent would not be infringed upon, or because the manufacturer's patent is invalid. Teva made this certification in its ANDA, which "automatically counts as patent infringement," and GSK sued Teva for patent infringement.[47] GSK's infringement suit triggered the U.S. Food and Drug Administration to withhold approval of Teva's generic drug lamotrigine for the earlier of 30 months or resolution of the litigation.

GSK and Teva subsequently settled the infringement suit. Pursuant to the settlement, Teva agreed to start selling lamotrigine (with exclusivity for 180 days) in July 2008, which was six months before it could have begun doing so if GSK had prevailed in its infringement claim, but later than it could have if Teva had prevailed. GSK in turn agreed not to introduce its own generic version of Lamictal to compete with lamotrigine.

Direct purchaser plaintiffs in the present case alleged that the GSK/Teva patent settlement constitutes an unlawful "reverse payment agreement," i.e., that GSK effectively paid Teva to delay its launch of lamotrigine by agreeing not to launch its own generic drug. Without this agreement, plaintiffs claimed, Teva would have introduced lamotrigine earlier and GSK would have launched its generic at the same time, and the two generics would have competed with each

[45] *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

[46] *See In re Lamictal Direct Purchaser Antitrust Litig.*, No. 2:12-cv-00995 (D.N.J.).

[47] *See Fed. Trade Comm'n v. Actavis, Inc.*, 570 U.S. 136, 143 (2013).

other. Plaintiffs alleged that they would have paid less for the drugs in this but-for world of competition between two generics offered by GSK and Teva.

The district court granted certification of a class of all companies that were direct purchasers of GSK's Lamictal or Teva's lamotrigine.[48] Defendants appealed with respect to class members that purchased the generic drug lamotrigine directly from Teva.

Decision

The Third Circuit panel granted interlocutory appeal and vacated the district court's class certification order, remanding for the district court to conduct the "rigorous analysis" that Rule 23 requires.[49] The decision centered around the predominance requirement, which is the only finding from the district court that defendants challenged.

First, the panel rejected plaintiffs' argument that "so long as their evidence of class-wide antitrust injury could sustain a jury finding, they meet the predominance requirement."[50] Plaintiffs' argument was based on the Supreme Court's decision in *Tyson Foods Inc. v. Bouaphakeo*, a Fair Labor Standards Act ("FLSA") case, where the Court held that "[t]he District Court could have denied class certification on this ground only if it concluded that *no reasonable juror* could have believed that the employees spent roughly equal time donning and doffing" their protective equipment.[51] But the Third Circuit held that this "no-reasonable-juror" standard articulated by the *Tyson Foods* court is limited to FLSA suits, which have unique evidentiary considerations. Relying on longstanding Third Circuit precedent, the panel confirmed that outside the FLSA context, plaintiffs in putative class actions must prove "by a preponderance of the evidence that [their] claims are capable of common proof at trial" to satisfy the predominance requirement.[52] Accordingly, plaintiffs in this case needed to show by a preponderance of the evidence that their antitrust claim, including plaintiffs' alleged overpayment injury, was susceptible to common proof at trial.

Second, the panel held that the district court failed to properly conduct the requisite "rigorous analysis" of whether common questions predominated.[53] Specifically, the district court failed to address the "micro-level analysis" advanced by each party and their competing experts regarding defendants' likely behavior in the but-for world, "even though it touche[d] on the merits."[54] The district court credited the plaintiffs' expert's use of averages to show what each direct purchaser would have paid in the but-for world. But it did not adequately analyze defendants' expert's testimony that "individualized inquiry" into the circumstances of each class member was necessary to determine injury, and the use of averages was unreliable because it masked that class members paid "dramatically different prices" for the drug, and that a significant portion of the class likely did not overpay at all.[55] As a result, the district court failed to conduct a "rigorous analysis" to determine whether averages were an acceptable means of proving injury on a class-wide basis in this case. As part of that analysis, the district court needed to resolve key factual disputes underlying the parties' theories and their competing expert reports (*e.g.*, whether the lamotrigine market was characterized by individual negotiations), "which would have required [the court] to weigh the

[48] *In re Lamictal Indirect Purchaser & Antitrust Consumer Litig.*, No. 12-CV-00995, 2018 WL 6567709 (D.N.J. Dec. 12, 2018).

[49] *In re: Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 2020 WL 1933260 (3d Cir. Apr. 22, 2020) ("*Lamictal*").

[50] *Id.* at *4.

[51] 136 S. Ct. 1036, 1049 (2016).

[52] *Lamictal*, 2020 WL 1933260, at *4.

[53] *See, e.g.*, *Comcast Corp.*, 569 U.S. at 33; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

[54] *Lamictal*, 2020 WL 1933260, at *6.

[55] *Id.*

competing evidence and make a prediction as to how they would play out at trial."[56]

Third, the panel explained that the district court confused the parties' dispute about antitrust injury as one about damages. The Third Circuit has held that the amount of damages does not need to be "susceptible of measurement across the entire class" for class certification purposes.[57] But this more lenient standard does not apply to proof of whether an injury occurred in the first place, as the fact of injury must be demonstrated by classwide proof. While defendants argued that averages were inappropriate to show injury since they masked many uninjured class members, the district court analyzed the problem as if some class members were simply less injured than others, and applied the "more permissive damages standard" in holding that the use of averages was therefore appropriate.[58] This conflation of the standards independently warranted remand.

Thoughts & Takeaways

The Supreme Court in *Comcast* emphasized that Rule 23 "does not set forth a mere pleading standard," but rather district courts must conduct a "rigorous analysis" of the evidence advanced by the parties to determine if the Rule 23 prerequisites for class certification are satisfied.[59] This analysis, the Court explained, will frequently "overlap with the merits of the plaintiff's underlying claim."[60]

The Third Circuit's opinion in *In re Lamictal* is consistent with *Comcast*'s mandate, and demonstrates that, when necessary, district courts should conduct a robust inquiry concerning the merits as part of the Rule 23 "rigorous analysis," even when such inquiry involves the resolution of complex factual disputes and weighing of competing expert testimony. Here, the Third Circuit faulted the district court for failing to scrutinize each party's "micro-level analysis," and for not resolving key factual disputes that could be central to ultimate liability, including for example whether Teva preemptively lowered the price of lamotrigine before introducing it into the market upon learning of GSK's competitive strategies (which would indicate the price of the drug was not artificially inflated as plaintiffs claim).

The Third Circuit's opinion also highlights potential hurdles plaintiffs may face when trying to use averages to prove class-wide injury. The Third Circuit explained that "[w]hile averages may be acceptable where they do not mask individualized injury," the rigorous analysis described above is needed to determine whether that is true.[61] And where, as here, the defendants submit evidence tending to show that averages are inappropriate—for instance, because the relevant market is characterized by individual negotiations on price, which could mean many class members suffered no overpayment injury—the district court will need to weigh the competing evidence and resolve relevant factual disputes (*e.g.*, whether the market really is characterized by individual negotiations) to make that determination.

Finally, the decision confirms the Third Circuit's view that possible individualized inquiries regarding the amount of damages class members may be entitled to—as opposed to whether an injury occurred in the first place—should not by itself defeat predominance. This position has been adopted by other circuit courts as well.[62]

Read the opinion here.

[56] *Id.*

[57] *Id.* at *7.

[58] *Id.*

[59] *See Comcast*, 569 U.S. at 33.

[60] *See id.* at 33-34.

[61] *Id.* at *6.

[62] *See, e.g.*, *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) ("[T]he presence of individualized damages cannot, by itself, defeat class certification under Rule 23(b)(3)").

Ninth Circuit Order Affirming Denial of Class Certification in *Grodzitsky v. American Honda Motor Co.*

Key Issue

Whether the district court properly denied class certification after excluding supporting expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[63]

Background

Grodzitsky v. American Honda Motor Co. was brought in the Central District of California as a putative class action alleging that the window regulators installed in certain Honda vehicles were defectively designed.[64] In support of their motion for class certification, the plaintiffs submitted an expert opinion regarding the alleged defect.[65] The plaintiffs' expert opined that Honda had failed to test its window regulators with the kind of vibrational stresses they would incur during operation.[66] Accordingly, the vehicles at issue allegedly suffered from a common defect: excessive "vibration[-] induced metal fatigue" that led to premature failure in the window regulators.[67]

Honda moved to exclude the expert's opinions as deficient under *Daubert*, and the district court granted Honda's motion.[68] The district court found that the opinion was not reliable because its opinion about the typical lifespan of an automobile's window regulator was based on the expert's own conclusory assertions rather than on industry standards, peer-reviewed literature, or other external information.[69] The district court was also skeptical of the methodology the expert employed to demonstrate the existence of a defect in the regulators. The expert examined "an extremely small sample size of window regulators"—twenty-six compared to over four hundred thousand installed in the class vehicles—and therefore, according to the district court, lacked a solid basis for opining that failed window regulators generally failed because of their alleged vulnerability to vibration.[70]

The district court excluded the expert's opinion and then subsequently denied the plaintiffs' motion for class certification, because without the expert's opinion as to the nature of a common defect in the Honda window regulators, the plaintiffs could not make the requisite showing of commonality under Rule 23.[71] The plaintiffs sought a Rule 23(f) appeal of the order denying class certification, which the Ninth Circuit granted.[72]

Decision

On appeal, a split Ninth Circuit panel affirmed the district court's exclusion of the expert's testimony.[73] The panel likewise agreed that the district court properly denied class certification because plaintiffs failed to offer any other evidence of a common design defect.[74]

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[63] 509 U.S. 579 (1993).

[64] *Grodzitsky v. Am. Honda Motor Co.*, —F.3d—, No. 18-55417, 2020 WL 2050659, at *1 (9th Cir. Apr. 29, 2020).

[65] *Id.* at *2.

[66] *Id.*

[67] *Id.*

[68] *Id.* at *3.

[69] *Id.*

[70] *Id.* at *3.

[71] *Id.* at *4.

[72] *Id.*

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

[74] *Id.* at *7.

Writing in dissent, Judge Murguia conceded that there were serious flaws with the expert's report, particularly with his ultimate conclusion that the window regulators likely failed because of their vibration-vulnerability defect.[75] However, she reasoned that the district court went too far when it excluded the entirety of the expert's testimony.[76] Those parts of the expert's testimony opining as to the existence of a design defect in the window regulators should not have been excluded, since they were adequately rooted in the expert's application of his forensic engineering expertise to his personal examination of sample regulators.[77] Because those portions of the expert's opinion should not have been excluded, the district court should have considered them when evaluating class certification.[78] Judge Murguia contended that plaintiffs "do not need to demonstrate that they will prevail on the merits to satisfy commonality."[79] It was therefore enough that the expert's testimony offered proof that the window regulators all suffered from a common design defect, such that "a classwide proceeding would generate common answers apt to drive the resolution of the litigation."[80]

The majority responded that the district court could not grant class certification on the basis of expert evidence "riddled with scientific and methodological flaws."[81] Rather, the district court was required to conduct a "rigorous analysis" of plaintiffs' claim that the proposed class suffered from a common design defect.[82] The majority concluded that the district court had conducted that analysis and determined that the expert's opinions going to commonality were afflicted by the same flaws that rendered the testimony unreliable.[83]

Thoughts & Takeaways

Grodzitsky is notable because both the majority and dissent appear to agree that the district court should not have considered the expert report in support of class certification to the extent it was inadmissible under *Daubert*. Their reasoning is in apparent tension with *Sali v. Corona Regional Medical Center*,[84] where a Ninth Circuit panel held for the first time that the "evidentiary proof a plaintiff must submit in support of class certification . . . need not be admissible evidence."[85]

In *Sali*, named plaintiffs brought employment claims on behalf of several proposed classes of registered nurses, alleging that the class members were not fully compensated and were denied meal periods and rest breaks.[86] In denying class certification, the district court held that the named plaintiffs failed to satisfy Rule 23(a)'s typicality requirement because plaintiffs did "not offer any admissible evidence of [their] injuries."[87] Plaintiffs relied on a single declaration authored by a paralegal for plaintiffs' counsel (the "Ruiz Declaration").[88] Ruiz prepared a spreadsheet of data he extracted from "a

[75] *Grodzitsky*, 2020 WL 2050659, at *7 (Murguia, J., dissenting).

[76] *Id.* at *8.

[77] *Id.*

[78] *Id.* at *9.

[79] *Id.* at *8.

[80] *Id.* (internal quotation marks and citation omitted).

[81] *Id.* at *6 (majority opinion).

[82] *Id.*

[83] *Id.* at *6-7.

[84] 909 F.3d 996, 1004 (9th Cir. 2018).

[85] *Id.* at 1004.

[86] *Sali v. Universal Health Services of Rancho Springs, Inc.*, No. 14-985 PSG (JPRx), 2015 WL 12656937, at *1 (C.D. Cal. June 3, 2015).

[87] *Id.* at *10.

[88] *Id.*

random sampling of" two of the named plaintiffs' timekeeper records and concluded from that data that the named plaintiffs did not receive full pay, meal periods, and rest breaks.[89] The Court excluded the Ruiz Declaration because it suffered from "multiple evidentiary issues": (1) Ruiz could not "authenticate the manipulated Excel Spreadsheets and other data that he relied upon to conduct his analysis"; and (2) Ruiz had "not demonstrated that he [was] technically qualified to conduct this analysis" under Rule 702.[90]

A Ninth Circuit panel reversed the district court's denial of class certification and held that the district court erred by striking the Ruiz Declaration "solely on the basis that the evidence is inadmissible at trial."[91] The panel's reasoning emphasized that class certification is a "preliminary stage," and the district court's "rigorous analysis" of the Rule 23 requirements should therefore not rise to the level of "a mini-trial" that rests on "formal strictures" of evidentiary requirements.[92] The Ninth Circuit held that, in evaluating expert testimony at class certification, "a district court should evaluate admissibility under . . . *Daubert*."[93] But this admissibility analysis "must not be dispositive"—rather, it should go only to the weight of the offered proof.[94] As a practical matter, "[l]imiting class-certification-stage proof to admissible evidence risks terminating actions" prematurely because "the evidence needed to prove a class's case often lies in a defendant's possession and may be obtained only through discovery."[95] Here, the district court erred by excluding "evidence that likely could have been presented in an admissible form at trial."[96]

While *Sali* signaled a lower hurdle for plaintiffs at class certification by allowing district courts to grant certification based on evidence that would be inadmissible at trial, *Grodzitsky* holds that the district court should not give any weight to an inadmissible expert report.

One way of reconciling these decisions might be to limit *Sali*'s reach to situations where a district court rejects otherwise-persuasive evidence on the basis of strictly formal flaws that could be cured later, *e.g.* after conducting more discovery. *Sali* emphasized that the district court erred because it elevated form over substance by failing to consider unauthenticated data that supported the merits of plaintiffs' claim because the data "likely could have been presented in an admissible form at trial."[97] On this reading of *Sali*, district courts may still refuse to consider evidence that is inadmissible for more fundamental reasons, *e.g.* where an expert's opinion rests on an unreliable methodology and thereby undermines the merits of plaintiffs' claim, as in *Grodzitsky* where the expert "failed to provide a reliable opinion demonstrating a common defect."[98] Unlike issues of document authentication, some methodological flaws in expert opinions cannot be cured simply by more discovery as *Sali* contemplates, but rather suggest that plaintiffs lack the ability to prove their claims on a classwide basis. After all, the plaintiffs in *Grodzitsky* were already on their "third try at class certification" and despite substituting in a new expert, plaintiffs were unable to overcome the "same shortcomings" that plagued plaintiffs' previous expert testimony.[99]

[89] *Sali*, 909 F.3d at 1003.

[90] *Sali*, 2015 WL 12656937, at *10.

[91] *Sali*, 909 F.3d at 1004-07.

[92] *Id.* at 1004.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 1006.

[97] *Sali*, 909 F.3d at 1006.

[98] *Grodzitsky*, 2020 WL 2050659, at *6.

[99] *Grodzitsky v. Am. Honda Motor Co.*, No. 2:12-cv-001142, 2017 WL 8943159, at *3 (C.D. Cal. Oct. 30, 2017).

The tension between the opinions in *Sali* and *Grodzitsky* suggests that the Ninth Circuit may be faced with appeals in the future challenging how district courts have applied these decisions.

In addition to these issues, *Grodzitsky* offers a useful counterbalance to *Sali*'s framing of class certification as a preliminary stage. While discovery may be ongoing at the class certification stage, a district court's decision to certify a class is a significant milestone in any litigation and has powerful consequences for both parties.[100] *Grodzitsky* reaffirms that courts should not make that decision freely, without regard to the court's gatekeeping role under *Daubert* and plaintiffs' evidentiary burden to satisfy the Rule 23 requirements. Despite reaching different conclusions, *Grodzitsky* and *Sali* are consistent in emphasizing that a district court should engage with the substance of plaintiffs' class certification evidence. Defendants and plaintiffs alike can benefit from that guidance by preparing to attack and defend class certification evidence on substantive grounds.

Read the opinion here.

[100] *See Sali v. Corona Regional Med. Center*, 907 F.3d 1185, 1188 (9th Cir. 2019) (Bea, J.), *dissent from denial of reh'g en banc* ("[A] district court's determination on class certification often 'sounds the death knell of the litigation,' whether by dismissal, if class certification is denied, or by settlement, if class certification is granted.").

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