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2020 Trends in Bet-the-Company Class Actions

From the Eleventh Circuit shutting down incentive payments, to courts coming to grips with 'Bristol-Myers' in the class context, the year has been filled with major developments. Notably, the courts have also begun to lay the groundwork for additional developments.

By Joshua Briones, Esteban Morales and Adam B. Korn

2020 has been a year of change, including in high-stakes class action litigation. From the Eleventh Circuit shutting down incentive payments, to courts coming to grips with *Bristol-Myers* in the class context, the year has been filled with major developments. Notably, the courts have also begun to lay the groundwork for additional developments, setting up a 2021 that may be as tumultuous as this last year.

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No Incentive Payments for Class Representatives in Eleventh Circuit

The Eleventh Circuit unexpectedly delivered a major blow to class action plaintiffs in *Johnson v. NPAS Solutions*, where it held individual incentive awards for class representatives were "decidedly objectionable" and invalid. The court specifically noted, "Although it's true that such awards are commonplace in modern class action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them." The Eleventh Circuit cited *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), in its decision, and after a thorough analysis declared that Supreme Court precedent prohibits these awards. While it is unclear whether courts outside the circuit will adopted this analysis, it could substantially de-incentivizing individuals to become class representatives. While the awards class representatives receive are relatively small, it begs the question: With no award, will potential class representatives want to subject themselves to a trying discovery process?

'Facebook v. Duguid': A Game Changer

The Telephone Consumer Protection Act (TCPA) has been, and continues to be, a highly active area of class action litigation. On Dec. 8, 2020, the Supreme Court held much anticipated oral argument in *Facebook v. Duguid,* Case No. 19-511 (2020), to determine whether an automatic telephone dialing system (ATDS) includes devices that can store and automatically dial telephone numbers without generating those numbers in sequence or at random. At the center of the case lies the TCPA's statutory ATDS definition, which is the subject of a circuit split: the Third, Seventh, and Eleventh circuits require random or sequential number generation, while the Second, Sixth, and Ninth Circuits do not. Argument lasted over an hour and included several eyebrow-raising

questions. Among those, Justice Sotomayor posited: "Today almost all phones have the ability to store and dial telephone numbers. If what Congress wanted to do was stop a call that was automatic, and that's what it accomplished, wouldn't it be its job, not ours, to update the TCPA to bring it in line with the times?" A decision is expected in the spring of 2021 (or summer at the latest). Whatever the outcome, it will likely dramatically alter the landscape of TCPA class actions across the country.

COVID-19 Class Actions

While the pandemic has been a blow to many businesses across the country, it has been a boon to class actions. Some of the most active areas of litigation have involved academic institutions, which were forced to close and shift to online learning. These lawsuits seek refunds for tuition, housing, and other academic fees under a variety of theories. While some cases have been dismissed, several have survived motions to dismiss.

COVID-19 class actions are not limited to academic institutions, and there has been a plethora of litigation relating to products (such as hand sanitizer), transportation (including flight cancellations), event cancellations, gym membership, insurance coverage, and data privacy. Many of these cases are still in early stages but have the potential to continue to transform the class action landscape.

Constitutional Review of Statutory Damages Awards

In *Perez v. Rash Curtis & Associates*, the Northern District of California entered an eye-watering judgment of $267 million for the plaintiffs, one of the largest TCPA judgments of all time. The jury found that more than 500,000 calls were made using a dialer without consent. The case is on appeal to the Ninth Circuit (20-15946) and is being challenged on grounds that the damages are unconstitutionally excessive. Of note, in 2019 the Eighth Circuit Court of Appeal upheld a district court's determination in *Golan v. FreeEats.com,* that a TCPA violation of $500 per call would have violated the due process clause. The court limited the jury's award to $10 per call, which resulted in a $32 million award. We expect the Ninth Circuit to at least provide some guidance for future review of massive statutory damages awards when it decides *Perez*.

Evolving Standing Requirement for Class Action Cases

Courts of Appeal continued to tackle standing requirements in class action lawsuits. In *Ramirez v. TransUnion*, for example, the Ninth Circuit held that all absent class members under Rule 23 need to have Article III standing to recover damages at the final-judgment stage. The court, however, determined that only class representatives must establish standing during the class certification stage. This case could have significant ramifications, as classes will now need to be made up of members with standing post-certification.

'Bristol-Myers,' Personal Jurisdiction and Class Actions

Courts of appeal continue address the application of the Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, in which the court reaffirmed the need for personal jurisdiction before a court can hear a plaintiff's claim. Throughout 2020, courts of appeal struggled with its application in the class action context. In *Mussat v. IQVIA*, the Seventh Circuit held that *Bristol-Myers* does not apply to class actions, concluding that only named plaintiffs in a class action need to demonstrate personal jurisdiction in the forum where they raise their claims. Unlike *Mussat*, the D.C. Circuit held in *Molock v. Whole Foods Mkt. Grp.* that courts need not consider whether a court has personal jurisdiction over absent class members until class certification. The Fifth Circuit has also weighed in on the issue in *Cruson v. Jackson National Life Insurance Company*, but failed to address whether *Bristol-Myers* applies to class actions. The Fifth Circuit remanded the issue holding that the *Bristol-Myers* defense is not available until a class is certified, suggesting that class action defendants may be wise to raise the argument in that circuit.

Conclusion

Given the number of potentially impactful cases pending in appellate courts around the country and areas of law that are rapidly evolving, businesses do well to continue to monitor new developments in the spaces above throughout 2021.

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