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The Growth of International Securities Litigation

By Noah Wortman and Alistair Croft. Assisted by Pierre-Jérôme Bouchard, Dr. Arndt Eversberg and Maarten van Luyn

The term "class action" has become part of the everyday vernacular in many parts of the world, even in jurisdictions that do not recognize class actions as a form of legal redress. Historically, various types of so-called "representative actions" have existed "since the earliest days of English law." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832, 119 S.Ct. 2295, 2308 (1999) (citations omitted). Class actions, however, are a recent invention, created by English courts sitting in equity as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682,

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The Arbitration Clause Defense to Class Actions Has a Hole In It

Arbitration Swarms Have Arrived And Present A Defense Nightmare

By Rey E. Gallo

In 2010, like many of you, I saw the writing on the wall. After being trained and practicing for years as a business litigator, I'd begun prosecuting consumer fraud and employment class actions—just as arbitration clauses began to block that path. Back then, we were still beating arbitration clauses regularly, usually by arguing unconscionability. But today any competent lawyer can draft an enforceable arbitration agreement: Provide for binding arbitration of all disputes. Invoke AAA rules and jurisdiction. Maybe throw in a reference to the FAA. And stop there.

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700-701, 99 S.Ct. 2545, 2557-2558 (1979). The "usual rule" referenced in *Califano* is more commonly referred to as the "necessary parties rule." The necessary parties rule is first set out in U.S. Supreme Court Justice Joseph Story's 1820 opinion that stated, "It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, ***however numerous they may be.***" *West v. Randall*, 29 F. Cas. 718, 721 (No. 17, 424) (C.C.D.R.I. 1820) (Story, J.) (emphasis added).

In 1842, the U.S. Supreme Court enacted Equity Rule 48, which stated:

"Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."

This rule allowed a single individual to represent a larger group, establishing the primary prerequisite for a class action lawsuit – a large number of plaintiffs. Rule 48 was eventually replaced and since 1938 class actions have been governed under Rule 23 of the Federal Rules of Civil Procedure. In 1966, Rule 23 was revised, giving class members the ability to opt-out of an action (and thereby retain their right to file an individual lawsuit).

But class actions do much more than simply address the situation of "too many plaintiffs" to litigate a case manageably: "The justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03, 100 S.Ct. 1202, 1211-12 (1980). Moreover, "the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion." *General Telephone Co. v. Falcon*, 457 U.S. 147, 155, 102 S.Ct. 2364, 2369, 72 L.Ed.2d 740 (1982) (quoting Califano).

To proceed as a class action, Rule 23(a) requires that the U.S. District Court make the following findings: (1) Numerosity - the number of class members renders it impracticable to join them in the action, (2) Commonality - the class members' claims share common questions of law or fact, (3) Typicality - the claims or defenses of the proposed class representatives are typical of those for the rest of the class, and (4) Adequacy - the proposed class representatives will adequately protect the interests of the entire class.

In addition to these requirements, Rule 23(b) provides that the U.S. District Court must make at least one of the following findings: (1) requiring separate actions by or against the class members would create the risk of inconsistent rulings, or that a ruling with respect to individual class members may be dispositive of other class member claims thereby "substantially impair[ing] or imped[ing] their ability to protect their interests"; (2) the party against whom the class seeks relief "has acted or refused to act on grounds generally applicable to the class" so that injunctive or declaratory relief as to the entire class would be appropriate; or (3) common questions of law or fact "predominate" over class member specific questions, and proceeding by way of class action would be "superior to other available methods" for resolving the dispute.

In addition to the requirements for certification of a class action in Rule 23, the Private Securities Litigation Reform Act of 1995 (PSLRA) instituted a statutory framework for securities class action litigation. Under the PSLRA, a lead plaintiff and lead counsel is appointed to direct the securities class action on behalf of all like situated investors. However, despite these procedures, in 2010, the U.S. Supreme Court's seminal decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, changed the landscape and arguably led to an increase in non-U.S. securities litigation. Since then, a number of international jurisdictions have developed collective redress procedures to enable actions by global investors.

In brief, *Morrison* held that the U.S. federal securities laws apply only to securities purchased on domestic stock exchanges. Since then, investors have increasingly turned to forums

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across the globe to recoup losses and assert their rights as shareholders associated with securities purchased or sold outside the U.S. Indeed, shareholder securities actions have been filed and settled across the world in countries including the U.K., Canada, Australia, the Netherlands, Germany, France, Denmark, Italy, Spain, Israel, and Japan, to name a few. We consider some of these jurisdictions in more detail.

In addition to differences in substantive and procedural law, the availability of third-party litigation funding in certain jurisdictions provides a significant practical distinction, compared with the way in which U.S. class actions are generally funded. For example, in U.S. securities class actions, the lawyers leading the action usually pursue the litigation on a contingency fee arrangement. However, many jurisdictions (including, but not limited to, Hong Kong, Singapore, France and Germany) prohibit or severely restrict the use of contingency fee agreements by lawyers.

Another crucial difference is that the U.S. system generally does not require the losing party to pay the legal fees and expenses (including witness expenses and court costs), whereas in many non-U.S. jurisdictions the losing party is ordered by the court to pay the successful party's costs (so called "adverse costs"). Where a third-party funder is involved, the funder generally agrees to pay any adverse cost orders.

These factors have led to an increase in demand for third-party funding for securities litigation. The funder provides non-recourse finance to the representative plaintiff and class members with common claims, which enables them to seek redress with the costs and risks transferred to the funder.

Canada

Canada has been a relatively fertile ground for statutory secondary market cases in recent years. According to statistics published by the National Economic Research Associate, Inc. (NERA), 14 new securities class actions were filed in 2019 (highest number historically). Approximately 100 actions have been filed since the provincial securities act, most of which are identical, came into effect in the mid-2000s.

The Canadian statutory regimes offer claimants significant benefits, including a dispensation from being required to prove that they relied on the issuer's documents or statements containing misrepresentations, and an assessment of damages based on formulas tied to market pricing.

On average, settlements reached on behalf of classes of investors have been relatively modest. NERA reports that four securities class actions were settled in 2019, and that the amounts appear to reflect a downward trend, with a median settlement for the period 2015-2019 at CAD6.4 million (46% lower than 2010-2014 and 64% lower than 2006-2009).

These mixed results may cause some investors, especially large institutional ones, to opt-out of class proceedings and prosecute their own individual claims with a view to obtaining a better outcome, a phenomenon that is common in the U.S. but relatively new in Canada.

For example, in 2019, New York-based Blackrock, Inc., the world's largest asset manager, and the California State Teachers' Retirement System (CalSTRS), the largest educator-only pension fund, chose to opt-out of a secondary market securities class action against pharmaceutical Bausch Health Companies (formerly Valeant Pharmaceutical) to file their own separate claims for losses suffered after Valeant's stock plummeted by 90% in the wake of allegations of fraud and faulty accounting practices.

The availability of third-party litigation funding in recent years, either for a class of investors or for an opt-out claimant, could make Canada an attractive jurisdiction for investors. A recent decision by the country's highest Court generally confirmed the validity of funding arrangements, which can be used either as a tool for class counsel facing very significant disbursements such as economic experts or by corporate claimants, including large investors, who wish to realize on the value of litigation assets while limiting their own risks and expenses. *See, 9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 (CanLII).

U.K.

The U.K. has traditionally favored opt-in collective redress. The procedures include Group Litigation Orders (GLOs), where the claims have "common or related issues of fact or law, and Representative Proceedings, where one or more claimants can represent other claimants with the "same interest." which is a narrower test. Examples of GLOs are the Lloyds shareholder claims and Volkswagen

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consumer claims. A recent example of a representative proceedings is the data abuse claim, *Lloyd v Google*, where the Court of Appeal (CoA) held that several million individuals had their browser generated information (something of value) taken without their consent. The case is currently on appeal to the U.K. Supreme Court (UKSC).

Since 2015, the only opt-out procedure that exists in the U.K. is within competition claims before the Competition Appeal Tribunal (CAT). This is akin to a U.S.-style class action where a representative, including a litigation funder, acts on behalf of a class. The rules require the court to certify the class as a Collective Proceedings Order (CPO). The test is (a) it is "just and reasonable" to authorize the proposed representative; (b) the claims "raise the same, similar or related issues of fact or law;" and (c) the proposed claim is "suitable to be brought in collective proceedings."

To date, the CAT has not granted a CPO. However, it has been asked to rule on competing opt-out and opt-in classes, both funded by litigation funders, in the well-publicized illegal Truck Cartel. That CPO hearing was vacated pending the appeal to the UKSC of *Merricks v Mastercard*, a funded GBP14 billion follow-on claim against MasterCard, on behalf of approximately 46 million MasterCard users. In that case, the CAT refused to grant an opt-out CPO due to a lack of adduced data to calculate aggregate damages and the claimant's proposed distribution to class members. The CoA stated the CAT had set the bar too high at the class certification stage; it was not necessary to be able to calculate exactly how much harm any particular individual had suffered, rather it was sufficient to consider an aggregate level of damages for the class as a whole and issues of distribution were a matter for trial. The case was heard by the UKSC in May 2020 and judgment is expected shortly. If the UKSC endorses the lower threshold set by the CoA, this is likely to give rise to many other actions and allow a number of competition cases that are currently stayed to proceed.

In the U.K., many collective redress claims are brought on the back of EC Commission findings of cartels (follow-on), regulatory fines, misleading disclosures to the market, or litigation which has been successful in other jurisdictions, such as the US.

Litigation funding has been available for a number of years in the U.K.; however, given the significant costs and risks of collective redress actions, funders undertake very thorough due diligence before agreeing to fund.

The Netherlands

In recent years the Netherlands have become a favored jurisdiction in Europe for litigating and settling class actions, ranging from follow-on claims for antitrust damages to securities litigation.

With respect to securities litigation specifically, the Netherlands is one of the jurisdictions outside the U.S. where investors have secured some of the largest settlements to date. The prime example is the *Fortis/Ageas* case, offering compensation to investors of up to EUR1.3 billion.

This is due to a combination of easy recognition of Dutch judgments across the European Union; a reliable legal system, including a fairly effective class action system, which was recently reformed to include both class action claims for monetary damages and a mixed opt-out/opt-in system; relatively low litigation costs; and hardly any adverse cost risk as compared to some common law jurisdictions such as the U.K. In addition, and of specific relevance to securities litigation, is the substantial presence of international holding and finance companies. These factors all contribute to both foreign and domestic investors increasingly opting to litigate in the Netherlands.

Until this year, real collective proceedings were limited to declaratory relief and no monetary damages could be claimed. However, monetary damages could be followed up through collective settlements achieved through the old Act on Resolution of Mass Damages (WCAM) mechanism, which basically recognizes agreed settlements.

In practice, 'collective' litigation for damages was often achieved through the alternative route of group actions, *namely*, actions that use bundling of claims of multiple individual plaintiffs into one set of litigation. Group actions are brought by representative entities usually special purpose vehicles. These representative entities can obtain damages on behalf of the (bundled) individual claimants involved. They either obtain authorization to represent or act on behalf of those claimants through individual powers of attorney or purchase, mostly with deferred purchase price, the claimants' claims by executing individual assignments.

The Dutch Act on the Resolution of Mass Claims in Collective Action

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(WAMCA) came into force in January 2020. This introduced the option to claim monetary damages directly on a collective basis under an opt-out regime for Dutch residents and an opt-in regime for parties residing abroad relating to events starting on or after November 15, 2016, or events continuing after that date.

There are some admissibility requirements to be able to use the WAMCA regime in the Netherlands, the most important of which is the "scope rule," which means that a collective action under Dutch law can only be brought if it has a sufficiently close connection to the Dutch jurisdiction. Such a connection is generally deemed to exist if the appointed exclusive representative shows that any one of the following three conditions can be met:

1.the majority of the claimants reside in the Netherlands;

2.the defendant resides in the Netherlands; or

3.the event(s) on which the class action is based took place in the Netherlands.

However, it should be noted that the mere fact that a defendant resides in the Netherlands may not be sufficient if there is no other circumstance that connects the case to the Dutch jurisdiction as in the case of a somewhat artificial anchor defendant residing in the Netherlands.

The opt-out is, in principle, limited to class members, residing in the Netherlands. However, in the event that foreign class members can be relatively easily defined and identified, the Dutch court has the authority to extend the opt-out class to those foreign class members.

Although it is quite early to tell how this new Dutch regime will be applied in practice, it does provide claimants with even more options. It is being closely monitored to assess how these improved options to initiate collective actions can be used most effectively and how this will impact the trend of large international securities claims being litigated in the Netherlands.

Germany

The overarching issue for collective redress in Germany is the fact that there is no well-tried legal instrument either for consumer claims or corporate matters. Therefore, like other continental European countries, Germany has no history of mass claims of any nature.

In 2005, the Capital Markets Model Case Act (KapMuG) came into force. This was intended to address the thousands of individual shareholder cases against *Deutsche Telekom* that were stuck at the court of first instance in Frankfurt. However, it is an ineffective, complex, and lengthy procedure that, nevertheless, is mandatory for institutional and retail investor claims. The KapMuG is limited to providing declaratory judgments and therefore, does not put enough pressure on the defendants. After the court issues its final decision on the matters before it, assuming the decision is positive for the claimants, they are then required to proceed with their own cases for individual damages. Although the limitation period is estopped until a decision in the model case is issued, many claimants do not proceed with their individual claims. They have either lost interest, maybe have died in the meantime, or do not have the financial resources to pursue their case.

A similar situation has arisen in the Volkswagen Diesel Emissions case. Due to the Volkswagen scandal, the government introduced a similar procedure for consumers called *Musterfeststellungsklage* (model action for a declaratory judgment).

Neither action has an opt-in or U.S.-style opt-out procedure. Therefore, both types of action are only useful for those claimants who join the respective action. The result is that the German courts have little experience with these cases.

Conclusion

Securities litigation law around the world is rapidly changing. As discussed above, and despite no international forum existing, class action litigation has become and will continue to be increasingly global. While the scope of jurisdiction in the U.S. over non-U.S. securities and issuers after *Morrison* is still being developed, shareholders continue to find alternative jurisdictions in which to bring their claims. With the continued emergence of developing markets, litigants and lawyers will increasingly face litigation that involves parties of differing nationalities and disputes impacting multiple jurisdictions. Depending on the jurisdiction(s) involved, investors may have viable options to recoup losses and assert their rights as shareholders associated with securities purchased or sold outside the U.S. Moreover, where a class action is backed by a litigation funder, given the significant costs and risks assumed by the funder, investors will know that thorough due diligence has been undertaken on the merits of the action.

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About Omni Bridgeway

Omni Bridgeway is a global leader in dispute resolution finance, with expertise in civil and common law legal and recovery systems, and operations spanning Asia, Australia, Canada, Europe, the Middle East, the U.K. and the U.S. Omni Bridgeway offers dispute finance from case inception through to post-judgment enforcement and recovery. Since 1986, it has established a proud record of funding disputes and enforcement proceedings around the world.

Omni Bridgeway is listed on the Australian Securities Exchange (ASX:OBL) and includes the leading dispute funders formerly known as IMF Bentham Limited, Bentham IMF and ROLAND ProzessFinanz. It also includes a joint venture with IFC (part of the World Bank Group).

About the Authors

Noah Wortman is Senior Manager, Collective Redress at Omni Bridgeway. He has extensive experience advocating for global investors, promoting corporate governance and investor stewardship, and implementing strategies to achieve collective redress.

Noah splits his time between Philadelphia and London with a global remit covering North America, the U.K. and Europe, Australia and Asia. He strives to provide access to justice for global institutional investors (including financial institutions, superannuation schemes, asset managers and owners, and sovereign wealth and pension funds) and others via litigation funding strategies and teaming with highly qualified colleagues, counsel, experts and advisers across a myriad of areas and across the globe. These include global shareholder litigation (class/group, opt-out/direct, and opt-in), antitrust/competition/cartel litigation, complex financial or commercial litigation, global privacy/data breach litigation, and global patent litigation.

Noah was formerly Managing Director, Americas and Global Head of Class Action Services for London-based Goal Group. There he was responsible for the company's operations and strategic vision in the Americas and led the company's worldwide initiatives in securities and antitrust class action litigation services on behalf of its global institutional investor clientele. Before joining Goal Group, Noah served in similar roles at Stewarts Law and Kessler Topaz Meltzer & Check LLP helping global institutional investors exercise their rights to recover for their investment losses pursuant to securities laws in jurisdictions around the world.

Noah is a frequent speaker around the globe on the topic of shareholder legal redress, recovery, rights and responsibilities. He is also a member of several leading global institutional investor organizations and sits on the International Corporate Governance Network's Shareholder Responsibilities Committee, the Sovereign Wealth Fund Institute's Event Advisory Board, and the Council of Institutional Investors' Markets Advisory Council.

Alistair Croft is an Investment Manager at Omni Bridgeway and is responsible for originating cases, due diligence, the management of funded cases in EMEA and the enforcement of awards and judgments globally.

Prior to joining Omni Bridgeway in 2015, Alistair practiced law for over a decade, becoming a barrister and partner in commercial firm in the City of London, with a broad practice, advising on international arbitration, complex cross-border litigation, fraud, enforcement, shareholder and joint venture disputes, contentious trust matters for UHNWI and insolvency. ¤

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Arbitration Clause, *from page 1*

Voila—no class actions. Millions of small wrongs go unremedied. Consumers and employees lose. Business wins. Giles and Sebok, in a 2011 Duke Law Review article, asked,

"...[W]ill plaintiffs' lawyers skilled in bringing small-value, large-scale litigation—the typical consumer, employment, and antitrust claims that have made up the bulk of class action litigation over the past forty years—hit upon a viable business model which would allow them to arbitrate one-on-one claims efficiently and profitably? The obstacles are tremendous: without some means of recreating the economies of scale and reaping the fees provided by the aggregative device of Rule 23, no rational lawyer would expend the resources to develop and arbitrate individual, small-value claims against well-heeled defendants."

I joked darkly that perhaps we should stop fighting consumer fraud and commit it (if you can't beat 'em...). No class actions means defendants face at most a small number of claims compared to the profits they can generate with misleading marketing or illegal employment practices. The "Arbitration Clause Defense" has seemed to simply work. In the last ten years, Corporate America has avoided being sued for countless legally actionable small wrongs. Plaintiffs' lawyers review meritorious cases and sadly inform the prospective client that, due to the arbitration clause, there is no economically viable means of asserting the claim.

Instead I found myself developing a strategic and tactical response to the Arbitration Clause Defense. With the efforts of many other enterprising plaintiff's lawyers, that response has today blossomed into a practical, manageable, scalable strategy that can beat the Arbitration Clause Defense in cases meeting a certain profile. That strategy is now supported by purpose-designed technology that I've built, new statutory protections, and case law made by bold members of the Plaintiff's bar. This article briefly tells that story and provides some insights into when, how, and why arbitrations swarms really work for plaintiffs.

Necessity is the Mother of Invention

In 2007 I began representing a group of clients victimized by culinary school marketing fraud, in *Amador v. California Culinary Academy*, San Francisco Superior Court Case No. ____. My clients had been lead to believe that 12 months of specialized training would make them chefs. Roughly speaking, each owed $60,000 in student debt, much of it at high (private) interest rates. They couldn't live on the $11 an hour wage they earned after graduating. So they definitely couldn't pay those loans. Contrary to the marketing and sales pitches they'd received, no more than 5% of graduates of the school *ever* became chefs. Because all student debt is non-dischargeable under the bankruptcy code, my clients, from recent high school grads to second-career middle-aged adults, were insolvent for life except to the extent I could help.

There was an arbitration clause with no provision for class arbitration. We thought we could beat it, but even if we did we expected to lose on class certification. I'd never done mass torts work, or had a high-volume practice. It sounded like a nightmare. But the human suffering involved emboldened me. I signed 35 clients, filed a putative class action, held a press conference, and began signing more. We reached 500 by the one year mark with zero advertising—someone had posted my fee agreement and questionnaire on MySpace. It was nightmare. We had Mailchimp, Yahoo Groups, and some CRM tools, but they didn't talk to each other and tended to facilitate the leaking privileged information by clients who didn't really understand the situation. And, clients talking to each other resulted in misinformation. Among my least favorite operational issues was that clients would ask us if we're received things they claimed to have mailed us. Multiple times we had not. And then, of course, there were the phone calls.

We successfully defended the motion to compel arbitration, and got some good discovery. But the writing on the class certification wall was clear: individual issues of reliance would probably defeat class

Arbitration Clause, *from page 8*

certification. What's more, no one had ever won a fraud case against a school. And the "individual responsibility" defense could ring true with a judge or jurors. How can a school guarantee you success?

I was confident in my own individual responsibility argument—the individual responsibility of the company for its sales and marketing messaging. But I wanted a technological solution for managing very large numbers of cases. And there wasn't one out there. So, I began designing one, hired a software developer, and built a prototype. We automated screening, interviewing, and signing on the web, building a "software as a service" application complete with a secure client portal for managing our clients once signed. It was ready for launch in the summer of 2010. We'd discovered the class list, and thus had a cost-effective way to reach the rest of the 5,000 class members (direct mail and email). With these means in hand, we posed a real threat to sign half the class as individual clients, complete with their emotional distress damages, potentially tripling the per-person recovery. We reached an unprecedented $41+ million settlement at mediation that fall. The defendants had chosen to buy a class wide release from 5,000 class members rather than face what seemed likely to be 2500 individual plaintiffs.

First use

Our first actual use of the new system began in February 2011, in an essentially identical companion case against a sister school in Los Angeles, *Vasquez v. California School of Culinary Arts*, Los Angeles Superior Court Case No. ____. We again defeated the motion to compel arbitration for most of our clients, but a few class members (those who signed the latest form of agreement) were ordered to arbitrate. And the defendants were determined to proceed and win on class certification. We launched a website using my new software and began notifying class members of the situation by email and mail. It was a thrill to just watch 1,000 class members screen, interview, and sign themselves up over the course of a few months. It turns out that systems work, even for lawyers.

We filed those 1,000 cases in four actions, all related to our original filing. California's permissive joinder statute essentially mirrors the federal one. There is no requirement that common issues predominate. The existence of common issues of fact or law is sufficient. We clearly had that. See *Petersen v. Bank of America*, 232 Cal.App.4th 238 (2014). And because filing fees are generally per action and not per plaintiff, it only costs us $1,600 to file them.

We lost on class certification in *Vasquez*, as predicted. But I was glad. While economic damages might have been recovered that way, the path presented real risks for the plaintiff's side. We'd be limited to the common case, excluding much of our best evidence. And damages for the human suffering of our clients could not be recovered. There'd been suicides, people had drunk themselves to death, marriages were destroyed, etc.

I also loved the idea that if we lost one case at trial, we could just try the next one. I was confident that sooner or later we'd start winning. I also knew that in an individual model the clients who stepped forward would recover, with money they needed not going to folks who had weak claims or didn't care enough to participate.

Defendants picked off 300 of our cash-strapped 1,000 clients with low statutory settlement offers. But the total of those payments added to $2 million. We put the word out that our clients already had recovered millions of dollars. And we watched as our website effortlessly screened and signed 400 more.

Fifty of our clients had signed the enforceable version of the arbitration agreement. We demanded arbitration for all 50. Some settled. But the parties found one where they could agree to disagree on claim valuation, and went to a hearing. The defense spent a fortune in fees, and lost. The arbitrator awarded $60,000 in damages, plus attorneys' fees of $150,000. At the next earnings call, an equities analyst asked the publicly traded defendant parent company's senior leadership: "If you're facing 1,000 of these cases,

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and each one is worth $210,000, aren't you insolvent?"

Corporate parent and defendant Career Education Company, trading as CECO on the NYSE, could dismiss one decision as a fluke, but didn't much want to arbitrate any others. And neither did we. The case settled in 2014. **The Atlantic Monthly** Reported our clients' confidential settlement as $17.5 million, based on CECO's SEC filings. It wasn't nearly enough. But CECO's bankruptcy risk was a real risk. There were numerous other CECO schools just like that one, using the same marketing and sales tactics (they all closed for good a few years later).

The model had worked. By alternately threatening to use and using technology to effectively run mass joinder cases, and arbitration swarms, we'd recovered more than $60 million for victims who, if all we'd attempted was a class case, would have gotten roughly . . . nothing. Which is why no other lawyers were taking these cases.

We also faced no "fee award risk" as our fees were set by our agreements with our clients, not by a court that might not understand the true economics of a plaintiff's practice (the uncompensated time spent vetting cases, or lying awake at night, the need for a return on capital in addition to hours, the way the winning cases have to pay for the less profitable ones to keep us in business, etc.)

The Threat

As noted in numerous articles, while key aspects of arbitration favor defendants—they are the arbitrators' repeat customers—certain procedural protections developed to shield consumers and employees from the consequences of their unequal bargaining power give consumers and employees some leverage.

Among these is the requirement that the corporate defendant (respondent) pay the arbitrator, and most of the administration fees. An AAA arbitration these days might cost a consumer claimant $200. The defendant then has to pay the balance. Generally, this means about $3,500 in simple consumer cases, where arbitrators receive a low fixed fee. In employment cases, where in California arbitrators get paid hourly and full discovery is allowed, arbitrator fees alone can reach tens of thousands of dollars.

Further, consumer and employment fee shifting statutes are generally one way. Corporate defendants pay their own attorneys and the arbitration costs even when they win. They pay all that plus damages and the claimants attorneys' fees when they lose. All talk about the purported cost efficacy of arbitration suddenly feels not so accurate. There's nothing efficient about conducting hundreds of thousands (and perhaps somebody soon tens of thousands) of largely identical arbitrations.

As a consequence, those claimant lawyers willing and able to bring large numbers of individual arbitration claims gain a dramatic negotiating advantage as they can impose a significant cost on respondents' efforts to squelch class actions—in cases fitting this profile.

Incremental Advances—More Success Stories

Based on initial successes back then, and believing this was the future (until the day when the Class Action Fairness Act ends arbitration's reign in consumer and employment cases), in January of 2014, I launched **LEVERAGE**, a commercial version of our prototype client intake and management software. **LEVERAGE** takes our prototype multiple steps further, and has continued to evolve since then, today including the ability to mostly-automate automate client discovery responses, bots that autonomously execute individualized follow-up as needed, and more.

Incremental success, and better technology, have helped to drive adoption of the arbitration swarm model described above and its use where arbitration clauses are enforceable to preclude any model of group justice other than the arbitration swarm. Perhaps perfectly suited to the model have been California employee misclassification cases against gig-economy defendants. Here are a few examples, of other firms' efforts in these cases, including some of the

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more prominent gig-economy ones. (Of course, the ultimate settlement results are confidential, and any arbitration rulings have been non-public. So, we can only infer what happens after cases disappear into the arbitration vortex. But from how hard respondents are fighting to avoid arbitration, and the fact that goods well-funded plaintiffs' firms seem to execute this strategy repeatedly, the only reasonable inference is it's paying off for claimants.) (Many of these cases were run using **LEVERAGE**, though others have done it the hard way, with less advanced technological solutions and/or a lot more manpower.)

- Schneider Wallace had a provisionally certified FLSA action against WIS (a provider of manpower to conduct large scale inventory work) with 15,000 opt-ins when the court granted a motion to compel arbitration. They individually signed more than thousand class members, proceeding to demand arbitration for each (and ultimately reaching a substantial class settlement in bankruptcy).
- Outten & Golden signed hundreds of employees misclassified as exempt from wage and hour laws and ran a wage and hour arbitration swarm against Buffalo Wild Wings.
- Outten & Golden later signed more than 200 clients against Uber and 400 clients against Lyft for California employment (independent contractor) misclassification cases.
- David Sugerman signed 325 culinary school fraud victims and conducted bellwether arbitrations before resolving those cases on a defined class basis.
- Keller Lenkner signed 1,100 Lyft drivers for a California misclassification case, submitted them to AAA, and then litigated to require Lyft to arbitrate.
- Keller Lenkner signed 5,000 Doordash drivers for a California misclassification case, submitted each one to AAA, paid the fees, and then litigated to require Uber to actually arbitrate them.
- Keller Lenkner similarly signed and filed 12,000 Uber Drivers' California employment misclassification cases, and ultimately successfully moved to compel Uber to arbitrate.
- Lichtman & Liss-Riordan reportedly have signed and resolved on the order of 80,000 Uber Driver Misclassification arbitration claimants.

New and Old Law Precludes the Stall Defense

Lichtman & Liss-Riordan appears to win the prize for going big so far, ultimately forced to outsource various client interactions. Keller Lenkner deserves real credit not just for their boldness in going to scale—perhaps facilitated by their partners' experience building a litigation funding business—but also for getting court orders requiring Defendants to have their cake or eat it. Whereas I would typically negotiate for a bellwether approach to resolving 5,000 arbitrations (figuring I'd save a million or two in filing fees), Keller Lenkner went straight to paying all the individual filing fees to submit thousands of individual claims to AAA, making the threat of having to conduct and pay for each of those individual claims as real as possible for the respondent.

(As suggested above, this expense was arguably unnecessary in California, though the issue has yet to be litigated to my knowledge. In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, the California Supreme Court concluded that "when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court." Since in court these cases would be handled jointly, whether via class treatment or by permissive joinder (having at least that much commonality), arguably one filing fee is legally all that is required, at least in California. See *Petersen v. Bank of America*, 232 Cal. App.4th 238 (2014).)

Gibson Dunn attempted to save

Arbitration Clause, from page 11

Doordash from paying millions of dollars in up-front AAA fees in multiple ways. First by having Doordash seek a modification of the arbitration agreement substituting a different arbitration provider when AAA declined to give Doordash a price break (which would, after all, have been unseemly, particularly as Keller Lenkner has posted the full cash price for each claimant). Next, Doordash sought to use an existing class action, wherein it had obtained an order compelling all class members to arbitration, to settle the case out from under the Keller Lenkner clients. Dismayed by Doordash's refusal to abide by the agreement it had enforced against its drivers, Judge Alsup ultimately wrote: "This hypocrisy will not stand" and ordered Doordash to arbitrate. Any settlement is private, and Keller Lenkner declined to be interviewed, but I'm guessing these and all the Keller Lenkner cases have or shortly will settle reasonably favorably to the claimants. Doordash's AAA bill would likely have been on the order of $10M to start, with massive hourly charges to follow. And, for those who don't know, post 2019, California law is designed specifically to make Uber drivers and others like them employees as a matter of law.

Failure to pay arbitration fees looks exactly like a material breach of the arbitration agreement, and should allow the claimants to proceed in court. See *Brown v. Dillard's, Inc.* (2005) 430 F.3d 1004. Mass joinder might allow for a more efficient approach, and is clearly permitted by California state courts in cases of this type. See *Petersen.* Of course, Keller Lenkner doubtless felt the arbitration swarm with its hideous costs (again, so much for corporate claims about lower costs) was the bigger stick to wield in obtaining fair value for its clients.

Beyond precedents like Judge Alsup's scathing opinion, there is at least one new statute intended to both prevent dilatory behavior in arbitration and increase transparency. Effective January 1, 2020, the California legislature responded to Uber's tactics by amending the California Code of Civil Procedure. Section 1281.96 now requires disclosure by arbitral fora of certain general information about the nature of each proceeding, its participants, and its outcome. (So, in the future, we won't be guessing as to what happened.) Section 1281.97(a) now provides that, in a consumer or employee arbitration context, a drafting party failing to pay arbitration fees within 30 days of the due date is in default and waives its right to compel arbitration. The consumer or employee can then either move to compel (and recover fees for her trouble), pay the fees and proceed, or withdraw the claim and proceed in court (with the statute of limitations having been tolled from the moment of the arbitration demand, and sanctions against the breaching party mandatory, though in what amount the statute does not say).

Case Selection Considerations for Plaintiff's Lawyers and Warning Signs for Defendants

In class actions, where there is no other basis for fees, they can be recovered under the private attorney general doctrine. The applicability of that doctrine in an arbitration swarm is uncertain. An arbitrator with jurisdiction over just one claim might conclude that the existence of 1,000 co-clients makes no difference, and the PAGA doctrine does not apply. While I disagree, an individual basis for fees, either contractual or statutory, is nevertheless recommended.

There are other considerations. For example, the Class Action Defense still works wherever there is no cost-effective means to target market to the would-be class. Where the prospects can't be targeted by email or display ads, or direct mail, the cost of signing clients is often prohibitive. But where it's easy to target-market, as is ever more often the case given the current state of the internet, data, and targeted advertising providers like Facebook, Google, LinkedIn, Twitter, and others, the defendant may have a real problem. Similarly, there must be enough money at issue in each individual claim to warrant

Arbitration Clause, *from page 12*

the clients time commitment, and the lawyers' marketing costs. But where the amount at issue is more than nominal, volume can make up for small individual claims.

(Indeed, small claims can be the most coercive. Take for example the case where a consumer as a potentially valid $1000 claim (or even $100), there is little or no signing cost, and it will cost the defendant $3,500 to pay AAA to decide the matter. A rational defendant will pay $1,000 or more to avoid the fight, even if it has a 50% chance of winning. Similarly, a plaintiff's firm winning even half the time and recovering its fees and costs when it does can prosecute infinitely many claims—presumably handing a very-well-developed trial binder to a set of third year lawyers with personalities, maybe with part of the closing argument on videotape by the senior trial lawyer.)

Sadly, my experience as plaintiff's lawyer is that a case in consumer arbitration has to be about twice as strong to win as it does in court. I bat 850 at trial lifetime (bench and jury combined). In consumer arbitration, I'm now below 500. Same case selection, preparation, and execution. The only difference is, in my opinion, the forum. This reality has historically (and quite reasonably) emboldened defendants to go to a hearing in cases where they would not and should not if facing a jury, or even a bench trial. I recommend claimant lawyers select only strong cases for this model.

But where individual fees are recoverable by claimants and not respondents, where Arbitration cost are low or minimal for claimants, where the respondent so clearly did the wrong thing that an arbitrator can't in good conscious find otherwise, there's enough at issue to make asserting individual claims worthwhile, and Plaintiff's lawyers have a cost-effective means to market their services, potential respondents may face a viable arbitration swarm. And it may get very expensive quickly.

About the Author

Rey E. Gallo has dedicated his professional life to protecting the interests of his clients, large and small. He has negotiated numerous win-win deals for clients of all kinds, and has amassed a stunning winning percentage at trial (more than 85% of cases tried to verdict), reflecting not only his skills as a litigator but also his dedication to careful preparation, determination, and judgment about when to compromise. That credibility translates into negotiated results. Ray's settlement results exceed $100 million. He achieved these results in consumer fraud, legal malpractice, corporate fraud, and other matters. He avoids needless disagreements and the associated expense by being reasonable and likeable. His results and approach are reflected by his clients' loyalty, his many friendships with his former adversaries, and the referrals he regularly receives from both.

Ray is supported by truly cutting-edge technology (backed by our affiliate Gallo Digital and its software engineering team) and a team of talented and dedicated young lawyers and paralegals. Originally focused solely on representing businesses and executives, Ray now focuses significant effort on representing consumers in class and mass actions alleging large scale fraud, employees, and other victims of large scale wrongdoing. He also continues to handle professional liability cases and to act as outside general counsel to entrepreneurial and middle market businesses.

Ray is a graduate of Yale University and the UCLA School of Law. He has been listed in Martindale Hubbell's Bar Register of Preeminent Lawyers since 1999, and enjoys a "10" rating from AVVO.com. He was repeatedly selected as a "rising star" in Los Angeles Magazine's "Super Lawyers" edition. Ray was originally trained in litigation at, and associated with, Crosby Heafey Roach & May (now Reed Smith). ¤

Research Report

Who's Who: Survey of Suits Against China and the WHO Over COVID-19

by Psyche Maricon Castillon

Individuals, businesses, and states filed more than a dozen lawsuits in the United States against The People's Republic of China and the Chinese Communist Party over the novel coronavirus disease (COVID-19). Of these lawsuits, 10 are putative class action lawsuit, and two were filed separately by the states of Mississippi and Missouri asserting federal claims. The lawsuits allege similar claims – that China or its Communist Party deceived the public, suppressed critical information, arrested whistleblowers, denied human-to-human transmission, destroyed medical research, permitted millions of people to be exposed to the virus, and even hoarded personal protective equipment (PPE).

"Defendants are responsible for the enormous death, suffering, and economic losses they inflicted on the world, including Missourians, and they should be held accountable," Eric S. Schmitt, Attorney General of Missouri, said in a complaint filed on April 21. At the time Missouri filed the complaint, the state had 5,800 confirmed COVID-19 patients, with 177 deaths. As of June 29, Missouri had 21,254 confirmed COVID-19 cases, with 1,023 deaths.

Mississippi is the second state that sued China over the pandemic, raising virtually the same allegations as Missouri. At the time Mississippi filed the complaint on May 2, the state had at least 7,550 confirmed COVID-19 infections, with at least 303 deaths. As of June 29, Mississippi recorded 25,899 confirmed COVID-19 infections, with 1,039 deaths.

"This civil action seeks to hold Defendants accountable for the extraordinary public-health crisis that they created and to allow the State of Mississippi to recoup money lost as a result of Defendants' actions," Lynn Fitch, Attorney General of Mississippi, said in the complaint.

The first case filed on March 12 was by a group of individuals and business owners residing in Florida. A group of individuals, business owners, and health care workers from California, Louisiana, New York, Nevada, North Carolina, Pennsylvania, and Texas also filed separate suits. The lawsuit filed by the Texan residents alleged that China created and released COVID-19 as "a biological weapon." Two lawsuits, which are already dismissed for failure to state a claim at the time of writing, were filed pro se by inmates. Another lawsuit was filed against the United Nations, the World Health Organization, and the Centers for Disease Control and Prevention.

Jurisdiction: FSIA Exceptions Invoked

Under international laws, States are generally immune from suits in foreign courts. In the U.S., this generally accepted principle of international law is embodied in the Foreign Sovereign Immunities Act (FSIA) of 1976. Section 1605 of the FSIA, however, provides exceptions to the non-suability of States, and all lawsuits used this exception to allege that U.S. courts have jurisdiction over their cases against China.

The plaintiffs allege that their lawsuits fall under either the exceptions of §1605(a) (2) – in any case in which the action is based upon a commercial activity carried on in the United States or elsewhere or that causes a direct effect in the United States – and §1605(a) (5) – in any case in which money damages are sought against a foreign state for personal injury or death, or damage

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to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment – or both. A couple of cases invoke the "international terrorism exception under §1605A or the Justice Against Sponsors of Terrorism Act (JASTA), which was passed in 2016 to enable victims of 9/11 to file lawsuits against Saudi Arabia.

Successful lawsuits filed under §1605(a) (2) or the "commercial activity exception" were usually based on breach of contracts between a foreign state and a private party for the purchase and sale of goods. The Supreme Court has previously held that the gravamen of the complaint should be "particular conduct on which the action is 'based upon' (*OBB Personenverkehr AG v. Sachs*, 737 F. 3d 584, *citing SAUDI ARABIA, King Faisal Specialist Hospital and Royspec, Petitioners v. Scott NELSON et ux*., 507 U.S. 349). Missouri said the conduct of China arises from the following commercial activities: "(1) operation of the healthcare system in Wuhan and throughout China; (2) commercial research on viruses by the Wuhan Institute and Chinese Academy of Sciences; (3) the operation of traditional and social media platforms for commercial gain; and (4) production, purchasing, and import and export of medical equipment, such as personal protective equipment ("PPE"), used in COVID-19 efforts."

Successful lawsuits filed under §1605(a)(5) or the "territorial tort exception" typically involved injuries occurring inside the embassies or consulates of foreign states located in the United States. A claim that is based on the performance or failure to perform a discretionary function does not fall within the tort exception and is still protected by sovereign immunity. Missouri alleges that the tort exception applies because money damages are sought "against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States" and the Communist Party, which is a named defendant in Missouri's is not a foreign state or an agency or instrumentality of a foreign state and thus is not entitled to any form of sovereign immunity.

One of the lawsuits named the World Health Organization as defendant and invoked the commercial activity exception and the noncommercial tort exception. That lawsuit, which did not name China or any of its agencies, contends that there is no "discretionary acts" exception to jurisdiction under the FSIA, as "the WHO has acted clearly contrary to and in violation of conduct prohibited by the tenets of international health within the United Nations system, as well as the principles of human rights, universality and equity established in WHO's Constitution, as well as the ethical standards of the Organization."

Legislative Amendments to Permit Suits Against China

Legislators, aiming to hold China responsible for the damages caused by the COVID-19 pandemic, introduced several bills to amend the FSIA. The Holding the Chinese Communist Party Accountable for Infecting Americans Act of 2020 proposed by Sen. Tom Cotton (R-Arkansas) and Rep. Dan Crenshaw (R-Texas) provides that "A foreign state shall not

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be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury or death, or injury to property or economic interests, occurring in the United States and caused by—

(1) the spread of COVID-19; and

(2) a tortious act or acts, including acts intended to deliberately conceal or distort the existence or nature of COVID-19, of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred." The bill also proposes that a court can dismiss actions brought under the proposed exception if the Secretary of State certifies that the United States and the foreign state have agreed to the resolution of the claims.

Other similar bills were also introduced, including the Stop China-Originated Viral Infectious Diseases Act of 2020 (H.R. 6444), which proposes to add a new exception to the FSIA for cases in which a "foreign state is found, whether intentionally or unintentionally, to have discharged a biological weapon, as defined in section 2280(d)(3) of title 18, United States Code, in the United States or such discharge results in the bodily injury of a United States citizen."

The pending lawsuits seek to recover monetary damages from Chinese assets that are located in the U.S. China, through Global Times, a state-run Chinese newspaper, have called the lawsuits "absurd." The lawsuits are still in the initial stages. Summonses were already issued. Under the FSIA, the foreign defendants will have 60 days after service to serve an answer or other responsive pleading. How the lawsuits will progress is surely something cross-jurisdictional law practitioners should watch.

Plaintiffs' Lawyers

Matthew T. Moore and Vincent Duffy at **The Berman Law Group** represent the plaintiffs in *Alters, et al., v. People's Republic of China, et al., 20-cv-21108 (S.D. Fla.)* filed March 12, 2020; and *Aharon, et al., v. Chinese Communist Party, et al., 20-cv-80604 (S.D. Fla.)* filed on April 8, 2020. The *Alters* plaintiffs purport to represent 13 national classes and Florida subclasses. The *Aharon* plaintiffs purport to represent a national class along with an associated Florida subclass.

Larry E. Klayman of **Freedom Watch** represents the plaintiffs in *Buzz Photo, et al., v. People's Republic of China, et al., 20-cv-00656 (N.D. Tex.)*, filed on March 17, 2020. The *Buzz Photo* plaintiffs purport to represent a national class and two subclasses.

Robert T. Eglet and Tracy A. Eglet at **Eglet Prince** represent the plaintiffs in *Bella Vista LLC, et al., v. The People's Republic of China, et al., 20-cv-00574 (D. Nev.)* filed on March 23, 2020. The Bella Vista plaintiffs purport to represent one national class and two Nevada subclasses.

Tamara Housing Zavaliyenko at **Law Office of Tamara Zavaliyenko** represents the plaintiffs in *Bourque CPAs and Advisors, Inc., et al., v. The People s Republic of China, et al., 20-cv-00597 (C.D. Calif.)* filed on March 25, 2020. The *Bourque CPAs* plaintiffs purport to represent two national and two California classes.

Walter E. Teague, III, and

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Hoang Huy Tu at **The Tu Firm Aplc** represent the plaintiffs in *Cardiff Prestige Property, Inc., et al., v. Peoples Republic of China, et al., 20-cv-00683 (C.D. Calif.)* filed on April 8, 2020. The *Cardiff* plaintiffs purport to represent two national classes and their accompanying California subclasses. As of July 1, the Cardiff plaintiffs filed a notice of voluntary dismissal.

Joshua Lynn Strickland at **Law Offices of Myrt T. Hales Jr.** represents the plaintiffs in *Azelea Woods of Ouachita v. Peoples Republic of China, et al., 20-cv-00457 (W.D. La.)* filed on April 13, 2020. The *Azelea* plaintiffs purport to represent all "businesses in the State of Louisiana."

Charles D. Mandracchia of **Mandracchia & Mcwhirk, LLC**, represents the plaintiffs in *Smith, et al., v. Chinese Communist Party, et al., 20-cv-01958 (E.D. Pa.)* filed on April 20, 2020; and *Greco, et al., v. People's Republic of China, et al., 20-cv-02235 (E.D. Pa.)* filed on May 11, 2020. The plaintiffs in Smith and Greco do not purport to represent a class.

Steven Bennett Blau and Shelly A. Leonard of **Blau Leonard Law Group LLC** represent the plaintiffs in *Kling, et al. v. The World Health Organization, 20-cv-03124 (S.D.N.Y.)* filed on April 20, 2020.

Omar W. Rosales at **The Rosales Law Firm LLC** represents *Benitez-White v. Peoples Republic of China et al., 4:20-cv-01562) (S.D. Tex.)* filed on May 3, 2020. *Benitez-White* purports to represent "all U.S. residents and businesses that were affected by the COVID-19 pandemic through and including the date of the class notice."

Jonathan Percy Lemann, Donald Cole Massey, Robert Emmet Couhig, Jr., and William A. Barousse, at **Couhig Partners L.L.C.**, represent the plaintiffs in *Edwards v. People's Republic of China et al., 20-cv-01393 (E.D. La.)* filed on May 8, 2020. *Edwards* purports to represent "[a]ll Sheriffs in the United States of America, including the State of Louisiana, that have sustained, among other things, financial/monetary damages and/or losses and/or extra expenses related to the outbreak of COVID-19."

James Barrett Wilson, Jr., at **James Barrett Wilson & Associates**, represents the plaintiffs in *Patella, et al., v. People's Republic of China, et al., 20-cv-00433 (M.D.N.C.)* filed on May 15, 2020. The plaintiffs in *Patella* purport to represent a North Carolina "Non-Commercial Tort Class."

Morgan, et al., v. United States of America et al., 5:20-cv-00494 (W.D. Okla.) filed on May 27, 2020; *Toks Banc Corp et al v. United Nations et al., 20-cv-00393 (E.D. Va.)* filed on June 1, 2020, and *James-El v. The People's Republic of China, et al., 20-cv-00517 (M.D.N.C.)* filed on June 9, 2020, were filed pro se by inmate plaintiffs.

Justin D. Smith of Attorney General of Missouri filed the case *State of Missouri v. People's Republic of China et al., 20-cv-00099 (E.D. Mo.)* on April 21, 2020. Lynn Fitch at the Office of the Attorney General filed the case *State of Mississippi v. People's Republic of China et al., 20-cv-00168 (S.D. Miss.)* on May 12, 2020. Both lawsuits did not purport to represent a class. ¤

Research Report

Who's Who in Haghebaert vs. Tandy Leather Securities Suit

by Psyche Maricon Castillon

Frederic Haghebaert filed a putative securities class action lawsuit against premier leather products distributor Tandy Leather Factory, Inc., and its officers on Nov. 7, 2019, on behalf of himself and "a class of persons and entities that purchased or otherwise acquired the Company's securities between March 7, 2018 and August 15, 2019, inclusive."

Mr. Haghebaert based his complaint on "materially false and/or misleading statements, and/or failures to disclose, Tandy Leather's securities traded at artificially inflated prices during the Class Period." The complaint points to a disclosure by the company on Oct. 18, 2019, that certain financial statements should no longer be relied upon, citing "misstatements primarily relating to the Company's methods of valuation and expensing of costs of inventory and related issues." Later on, the company disclosed that the errors included that inventory was stated using a methodology that attempted to approximate FIFO; warehousing and handling expenditures were not capitalized in the first and third quarters but were subsequently corrected on a semi-annual basis; and warehousing and handling expenditures were classified as operating expenses, resulting in an overstatement of operating expenses.

Typical of securities suits, the complaint alleged that Mr. Haghebaert and other members of the Class purchased or otherwise acquired Tandy Leather's securities relying upon the integrity of the market price of the Company's securities and market information relating to Tandy Leather, and have been damaged thereby.

The case was originally filed with the U.S. District Court for the Central District of California, but was later transferred to the U.S. District Court for the Northern District of Texas, Fort Worth Division, because Tandy Leather has its headquarters and transacts business in Fort Worth, Texas, which is located in the Northern District of Texas, Fort Worth Division; the company's officers, management-level employees, and at least some of its directors, are located in or around Fort Worth; and likely key witnesses and evidence are located in or around Fort Worth.

Class Action Prerequisite Impediment: Adequacy

Early in the case, the court already pointed out a flaw in Mr. Haghebaert's lawsuit, saying "[a]lthough plaintiff's complaint states in a conclusory way that the requirements of Rules 23(a) and 23(b)(3) are met, he uses conclusory logic and speculation to reach this conclusion." Thus, the court directed Mr. Haghebaert to file a class certification brief to allege facts establishing the putative class satisfies the requirements of Rules 23(a) and 23(b)(3).

Tandy Leather's motion to dismiss and opposition to the class certification brief focused mainly on the adequacy prerequisite. Mr. Haghebaert alleged that "he will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation." He asked for the court to appoint Glancy Prongay & Murray LLP as lead counsel and Steckler Gresham Cochran as liaison counsel and presented the law firms' resume as evidence that members of the purported class will "receive the highest caliber of legal representation."

Together with the firms' resume, Mr. Haghebaert also presented as evidence of adequacy that he purchased 100 shares of Tandy Leather's stocks at $5.80 per unit on June 14, 2019. Filings with the U.S. Securities and Exchange Commission show that Bandera Master Fund L.P. owned 32% of Tandy Leather's shares of stocks on March 11, 2019, which was within the class period. Tandy Leather also pointed out in documents filed in court that company insiders owned 58% of the outstanding shares during the class period.

"Plaintiff has also demonstrated a commitment to vigorously prosecute

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Who's Who in Haghebaert vs. Tandy Leather Securities Suit

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this action on behalf of absent Class members. He filed the initial complaint in this action and was the only

movant for lead plaintiff. Thus, absent his willingness to litigate this action, the Class would

have been ensured no recourse for Defendants' conduct," Mr. Haghebaert said in his class certification brief.

"Plaintiff is not the type of large, institutional investor with significant alleged damages that is preferred under the Private Securities Litigation Reform Act of 1995 (PSLRA). Instead, Plaintiff is an individual living in Belgium with only a few hundred dollars in purported damages. Without more, it is entirely unclear how Plaintiff possesses the willingness and ability to take an active role and control the litigation to protect the interest of absent shareholders," Tandy Leather countered.

Procedural Impediment: Lack of Personal Signature

There was also an inadequacy in procedural requirements in Mr. Haghebaert's case, which the court allowed to be cured. This concerned the lack of statutory requirements – to be personally signed by the plaintiff and must state that the plaintiff has reviewed the complaint and authorized its filings – of the sworn certification that accompanied the memorandum of law in support of Mr. Haghebaert's motion for appointment as lead counsel.

According to the court, the "sworn certification" contains at its end a declaration that purports to have been made under penalty of perjury "that the foregoing are true and

correct statements." The court was concerned that the document upon which Mr. Haghebaert relied does not satisfy the unsworn declaration requirements of 28 U.S.C. §1746. For the unsworn declaration requirements to be applicable, the verification by a declaration that it is under penalty of perjury should bear the date when it was executed, and the statement establishing that it is under the penalty of perjury must be "in writing of such person which is subscribed by him, as true under penalty of perjury, and dated."

The court said the document upon which Mr. Haghebaert relies does not appear to have been personally signed by him, but what the document contained was an electronically created signature. Thus, the court concluded that the document does not appear to satisfy the "personally signed by such plaintiff" requirement of the statute, nor does it satisfy the "in writing of such person" requirement of §1746.

When Mr. Haghebaert filed a reworded certification, the court took issue on the illegibility of the handwritten date above the purported signature of Mr. Haghebaert and the signature itself is illegible. The court noted that one of the requirements of §1746 is that the certification identifies "any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff." The court said it cannot tell from the illegible date put on the new certification whether that requirement has been satisfied.

Dismissal of Motion for Appointment as Lead Plaintiff

Eventually, the court denied Mr. Haghebaert's motion for the approval of his choice of class counsel because the law firms are not authorized to practice before the Texas court. The court said that Mr. Haghebaert attempts to impermissibly designate two law firms as class counsel but because he has not properly proposed class counsel, he cannot make a prima facie showing that such counsel has the zeal and competence required to satisfy Rule 23.

Moreover, the court also denied Mr. Haghebaert's bid to appoint him as the lead plaintiff as the court concluded he failed to make a prima facie showing that he has "the willingness and ability to take an active role in and control the litigation and to protect the interests

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Who's Who in Haghebaert vs. Tandy Leather Securities Suit

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of absentees." The court noted that although plaintiffs "need not be legal scholars and are entitled to rely on counsel," "the adequacy standard must reflect … Congress's emphatic command that competent plaintiffs, rather than lawyers, direct such cases." Mr. Haghebaert has not made even a preliminary showing as to this prong of the adequacy requirement.

The court said that even if it were to use Mr. Haghebaert's proposed analysis, he would still not be appointed lead plaintiff, pointing out that his $580.00 interest is not large enough to ensure that he will personally engage in vigorous advocacy instead of leaving the direction of the action entirely in the hands of counsel. The court also pointed out that Mr. Haghebaert resides in Belgium and finds it implausible that his $580.00 interest will motivate him to travel from Europe to the Northern District of Texas to attend hearings or settlement conferences of the action.

What's Next?

On April 15, Haghebaert filed a notice of voluntary dismissal of the action, without prejudice, to Tandy Leather and the three named individual defendants. As grounds, he stated that no opposing party has served either an answer or a motion for summary judgment.

Since April, Tandy Leather has received two additional delinquency notices from the Listing Qualifications Staff of The Nasdaq Stock Market LLC indicating that because the Company has not yet filed its Annual Report on Form 10-K for the year ended December 31, 2019, and its Quarterly Report on Form 10-Q for the three months ended March 31, 2020, the Company is not in compliance with the Nasdaq filing requirement, as set forth in Nasdaq Listing Rule 5250(c)(1).

Tandy Leather, however, has held its shareholders' meeting in early June and indicated that it is on track to complete by August 10 the restatement to reflect inventory not correctly stated at FIFO, the warehousing and handling not correctly capitalized, and the warehousing and handling incorrectly classified as operating expenses. Tandy Leather also named Steve Swank as its Chief Financial Officer. Mr. Swank joins Tandy Leather from Sears Hometown Stores, Inc., where he was the Vice President, CFO, and Treasurer.

Tandy Leather was not immune to the effect of the COVID-19 pandemic and has disclosed during its shareholders' meeting that while online orders were up 200% from last year, there was 40% decline in total sales as of May, with 406 employees furloughed or laid off on April 2 and eight stores permanently closed.

Plaintiffs' Lawyers

Frederic Haghebaert, plaintiff, is represented by R. Dean Gresham at **Steckler Gresham Cochran**; and Robert Vincent Prongay, Charles H Linehan, Lesley F Portnoy, Pavithra Rajesh, Robert V. Prongay, and Lionel Z. Glancy at **Glancy Prongay & Murray LLP**.

Defendants' Lawyers

Tandy Leather Factory Inc., Janet Carr, and Shannon L. Greene, defendants, are represented by Jessica Jones Mannon, Erin Molly Brewer, Michelle A. Reed, M. Scott Barnard, and Lauren Elisabeth York at **Akin Gump Strauss Hauer & Feld LLP**.

Tina L. Castillo, defendant, is represented by Sydne K. Collier, Jessica B Magee, and Michael W Stockham at **Thompson & Knight LLP**.

The case is assigned to Honorable **John McBryde**.

The case is FREDERIC HAGHEBAERT, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. TANDY LEATHER FACTORY, INC., JANET CARR, TINA L. CASTILLO, and SHANNON L. GREENE, Defendants, Case No. 4:19-cv-01000 (N.D. Tex.). ¤

Special Report

Top Class Action Litigation Defense Attorneys of 2020

Attorney	Firm	Accomplishments
Hyongsoon Kim	Akin Gump Strauss Hauer & Feld LLP	Secured denial of class certification for Vizio, Inc., in a false advertising consumer suit *(Brenner v. Vizio, Inc., 3:17-cv-05897 (W.D. Wash.))* Obtained dismissal for Sonos, Inc., by way of settlement, a consumer suit *(Matthew Steiner v. Sonos, Inc. et al., 2:19-cv-06289 (C.D. Calif.))*
M. Scott Barnard	Akin Gump Strauss Hauer & Feld LLP	Obtained dismissal for Tandy Leather Factory, Inc., in a securities suit *(Frederic Haghebaert v. Tandy Leather Factory, Inc. et al/, 4:19-cv-01000 (N.D. Tex.))*
Thomas Burke	Ballard Spahr LLP	Secured denial of class certification for Centra Tech, Inc., in a securities suit *(Rensel v. Centra Tech, Inc., et al, 1:17-cv-24500 (S.D. Fla.))*
Christopher J. Martinez	Dorsey & Whitney LLP	Secured dismissal, by way of settlement, for United Healthcare Insurance in an ERISA lawsuit *(W. et al v. United Healthcare Insurance et al., 2:19-cv-00223 (D. Utah))*
David A. Coulson	Greenberg Traurig	Secured dismissal for Mednax, Inc., in a stockholders' suit *(Cambridge Retirement System v. Mednax, Inc et al., 0:18-cv-61572 (S.D. Fla.))* Secured dismissal for Rheem Manufacturing Company in a false advertising suit *(Toca v. TUTCO, LLC et al., 1:19-cv-23949 (S.D. Fla.))* Obtained dismissal for Champion Petfoods USA Inc., in two false advertising suits *(Weaver v. Champion Petfoods USA Inc et al., 2:18-cv-01996 (E.D. Wis.)* and V*ado v. Champion Petfoods USA, Inc. et al., 3:18-cv-07118 (N.D. Calif.))* Secured denial of class certification for Champion PetFoods USA, Inc., in a false advertising suit *(Jennifer Reitman et al v. Champion PetFoods USA, Inc. et al., 2:18-cv-01736 (C.D. Calif.))*

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Attorney	Firm	Accomplishments
Craig R. Benson	Littler Mendelson PC	Secured final approval of class and collective settlements for T.L. Cannon Management Corp. in two Fair Labor Standards Act lawsuits filed in New York. *(Roach et al v. T.L. Cannon Corp. et al, 3:10-cv-00591 (N.D.N.Y.*; and *Hicks et al v. T.L. Cannon Management Corp. et al, 3:18-cv-01177 (N.Y.N.D.))* Obtained dismissal for The TJX Companies, Inc., by way of a settlement in a Fair Labor Standards Act lawsuit *(Parker v. The TJX Companies, Inc., 1:18-cv-04582 (E.D.N.Y.)* Secured dismissal, by way of stipulation, for Dircksen & Talleyrand Inc., in an employment discrimination lawsuit *(Pape et al v. Dircksen & Talleyrand Inc. et al, 1:16-cv-05377 (E.D.N.Y.))*
Dale Joseph Giali	Mayer Brown LLP	Secured dismissal, with leave to amend, for Nestle USA, Inc., of state law claims in a false advertising consumer class action suit in California *(Prescott et al v. Nestle USA, Inc., 5:19-cv-07471 (N.D. Calif.))* Obtained denial of class certification for Logitech, Inc., in a false advertising consumer class action suit in California *(Porath v. Logitech Inc., 3:18-cv-03091 (N.D. Calif.))*
Michael J. Puma	Morgan, Lewis & Bockius, LLP	Obtained summary judgment dismissals for Bimbo Foods Bakeries Distribution, Inc., and Bimbo Bakeries U.S.A., Inc., in two Fair Labor Standards Act cases. *(Franze et al v. Bimbo Foods Bakeries Distribution, Inc., 7:17-cv-03556 (S.D.N.Y.)* and *ODDO et al v. BIMBO BAKERIES U.S.A., INC. et al, 2:17-cv-04775 (E.D.Pa.))*

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Attorney	Firm	Accomplishments
Stephanie L. Sweitzer	Morgan, Lewis & Bockius, LLP	Reached settlement in principle for Bimbo Bakeries in a Fair Labor Standards Act suit *(TISCARENO v. BIMBO BAKERIES USA, INC., 5:19-cv-04058 (D. Ks.))* Obtained final approval of class and collective settlement for Nationwide Express, LLC, in a Fair Labor Standards Act suit *(Warfa et al v. Nationwide Express, LLC et al, 0:18-cv-03103 (D. Minn.))* Obtained denial of class certification for Connexions Loyalty, Inc., in a Fair Labor Standards Act suit *(Sweet, on behalf of himself and all others similarly situated, v. Connexions Loyalty, Inc., 2:19-cv-01997 (S.D. Ohio))*
Jerome F. Birn, Jr.	Wilson Sonsini Goodrich & Rosati	Secured dismissal for Gigamon Inc. of a securities suit *(Carpenter v. Gigamon Inc. et al., 3:17-cv-06653 (N.D. Calif.))*

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