SUTHERLAND

LEGAL ALERT

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In a Class of Their Own: the Impact of the Supreme Court's October 2012 Term on Class Actions

During its recently concluded October 2012 term, the Supreme Court of the United States decided seven cases that are likely to have a significant impact on class action practice. This term's decisions addressed evidentiary standards for class certification, materiality in securities fraud class actions, jurisdiction under the Class Action Fairness Act, offers of judgment, the enforceability of class action waivers in arbitration clauses, and the use of state DMV databases to identify and solicit potential class action plaintiffs.

The October 2012 term decisions impacting class actions are discussed briefly below (with links to the Sutherland Legal Alerts on each case), followed by a summary of several cases the Supreme Court will hear during its October 2013 term that could resolve circuit splits on issues affecting class actions and derivative actions.

October 2012 Term

Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds, No. 11-1085

The Supreme Court affirmed certification of a federal securities fraud class action in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*. The Court held that, in a securities fraud class action based on the "fraud on the market theory," class plaintiffs are not required affirmatively to prove materiality at the class certification stage. Rather, materiality is a question common to all members of the class in determining whether common issues predominate. (For link to full Sutherland Legal Alert, click here.)

Standard Fire Insurance Co. v. Knowles, No. 11-1450

In *Standard Fire Insurance Co. v. Knowles*, the Court unanimously held that a damages-limiting stipulation by the named plaintiff in a putative class action is not binding on absent class members before class certification and therefore cannot defeat removal under the Class Action Fairness Act. (For link to full Sutherland Legal Alert, click here.)

Comcast Corporation v. Behrend, No. 11-864

In *Comcast Corporation v. Behrend*, the Court held that certification of a Rule 23(b)(3) damages class was improper when the plaintiffs' damages model fell short of establishing that damages were capable of measurement on a class-wide basis. The impact of this decision on class certification is likely to be the most debated of the group in coming years. (For link to full Sutherland Legal Alert, click here.)

Genesis HealthCare Corp. v. Symczyk, No. 11-1059

In a narrowly crafted decision, the Court held in *Genesis HealthCare Corp. v. Symczyk* that, if an unaccepted offer of judgment moots an individual claim (a question the Court expressly declined to reach), then the individual's would-be collective action under the federal Fair Labor Standards Act is also moot. (For link to full Sutherland Legal Alert, click here.)

Oxford Health Plans LLC v. Sutter, No. 12-135

In *Oxford Health Plans LLC v. Sutter*, the Court unanimously held that when an arbitrator determines that the parties intended to authorize class-wide arbitration, that determination survives judicial review under Section 10(a)(4) of the Federal Arbitration Act as long as the arbitrator was arguably construing the contract. (For link to full Sutherland Legal Alert, click here.)

Maracich v. Spears, No. 12-25

In *Maracich v. Spears*, the Court held that the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725, does not allow attorneys to mine databases maintained by state departments of motor vehicles for the purpose of client solicitation, even when such solicitation is meant to locate additional plaintiffs for a class action. (For link to full Sutherland Legal Alert, click here.)

American Express Co. v. Italian Colors Restaurant, No. 12-133

In *American Express Co. v. Italian Colors Restaurant*, potentially the most far-reaching decision of the group, the Court held that a court cannot invalidate a class action waiver in an arbitration agreement on the ground that it may leave a party unable to vindicate its statutory rights economically, even if the plaintiff's cost of individual arbitration would exceed the potential recovery. (For link to full Sutherland Legal Alert, click here.)

October 2013 Term Preview

Chadbourne & Parke LLP v. Troice, No. 12-79; Willis of Colorado Inc. v. Troice, No. 12-86; and Proskauer Rose LLP v. Troice, No. 12-88 (consolidated)

In the consolidated cases *Chadbourne & Parke LLP v. Troice*, *Willis of Colorado Inc. v. Troice*, and *Proskauer Rose LLP v. Troice*, the Supreme Court has been asked to resolve a circuit split and clarify when the federal Securities Litigation Uniform Standards Act (SLUSA) preempts state law securities class actions.

The plaintiffs in all three cases bought certificates of deposit (CDs) from entities that were allegedly part of a Ponzi scheme. SLUSA precludes most state-law class action claims that allege "a misrepresentation or omission of a material fact in connection with the purchase or sale of covered securities," and CDs are not "covered securities" under the statute. 15 U.S.C. § 78bb(f)(1)(A). The defendants argued that SLUSA barred the plaintiffs' state law claims because (1) plaintiffs had alleged that a representation that the CDs were backed by a diversified portfolio of marketable securities helped induce the CD purchases and (2) some buyers sold covered securities to fund their CD purchases.

The district court agreed with the defendants, but the Fifth Circuit reversed. Adopting the Ninth Circuit's test, the Fifth Circuit held that "the fraudulent schemes of the [defendants], as alleged by the [plaintiffs], are not more than tangentially related to the purchase or sale of covered securities and are therefore not sufficiently connected to such purchases or sales to trigger SLUSA preclusion." *Roland v. Green*, 675 F.3d 503, 522 (5th Cir. 2012). Regarding the plaintiffs' second argument, the Fifth Circuit held that "the fact that some of the plaintiffs sold some 'covered securities' in order to put their money in the CDs was not more than tangentially related to the fraudulent scheme and accordingly, provides no basis for SLUSA preclusion." *Id.* at 523. The "tangentially related" standard adopted by the Fifth and Ninth Circuits conflicts with the standards adopted by the Second, Sixth, and Eleventh Circuits, which, although different, are all broader and require the dismissal of a larger group of cases.

Mississippi ex rel. Hood v. AU Optronics Corp., et al., No. 12-1036

The question presented in *Mississippi ex rel. Hood v. AU Optronics Corp.* is whether a state's *parens patriae* action seeking recovery on behalf of individual consumers is removable as a "mass action" pursuant to the Class Action Fairness Act (CAFA) when the state is the sole plaintiff and the claims arise under state law. The Supreme Court is again poised to resolve a circuit split, as the Fifth Circuit held in *Hood* that such a case is removable, while the Fourth, Seventh, and Ninth Circuits have held to the contrary.

In *Hood*, the State of Mississippi sued a group of liquid crystal display manufacturers and claimed that they harmed consumers by conspiring to fix prices. The State sought monetary recoveries on behalf of individual consumers. The defendants jointly removed the case and asserted that federal jurisdiction was established under CAFA.

The State moved to remand the case to state court on the ground that its claims were asserted on behalf of the general public, which precluded federal jurisdiction. The district court granted the motion. The defendants appealed to the Fifth Circuit, which reversed, holding that the action qualified as a CAFA "mass action" and that the State brought the case in the interest of individual citizens, so CAFA's "general public" exception was not applicable.

UBS Financial Services v. Union de Empleados, No. 12-1208

The question presented in *UBS Financial Services v. Union de Empleados* is whether the proper standard of review for a dismissal of a derivative action for failure to adequately allege demand futility under Federal Rule of Civil Procedure 23.1 is *de novo* or abuse of discretion.

The plaintiff filed a shareholder's derivative action against the defendant alleging wrongdoing in connection with various investment funds that the defendant managed. The defendant moved to dismiss the action under Rule 23.1 because the plaintiff had not made a pre-suit demand on each of the fund's board of directors to remedy the wrongdoing, and because the plaintiff had not pled sufficient facts to show that making such a demand would be futile. The district court agreed and dismissed the plaintiff's claim.

On appeal, the plaintiff argued that the First Circuit should review the district court's dismissal *de novo*, while the defendant argued that the proper standard of review was abuse of discretion. The First Circuit held that *de novo* review was the proper standard and, applying that standard, determined that the plaintiff had adequately pled demand futility.

In the Supreme Court, the defendant-petitioner argues that the proper standard of review is abuse of discretion, consistent with decisions of the Second, Third, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits.

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