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Navigating Jurisdictional Issues In Class Action Litigation

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Takeway: Class action litigation implicates jurisdictional issues in a number of ways. Class action defendants generally prefer federal over state courts and – when presented with the opportunity – will seek to remove putative class actions under the Class Action Fairness Act ("CAFA"). Class defendants also will seek to enforce forum selection clauses requiring litigation in another country. And the personal jurisdiction issue can be leveraged to object to the certification of a nationwide class in a putative class action filed outside of the class defendant's home forum. Recent decisions by the Fifth, Eleventh, and Ninth Circuits show how these issues play out in class litigation.

In *Madison v. ADT, L.L.C.*, --- F.4th ----, No. 21-90028, 2021 WL 3732741 (5th Cir. Aug. 24, 2021), two individual plaintiffs filed a putative class action against an employee of ADT LLC ("ADT") in Texas state court, alleging that he misused his access privileges to ADT's home surveillance systems to spy on ADT customers in their homes. ADT, already a defendant in similar privacy actions in Texas and Florida, intervened in the suit and, as a non-resident citizen creating minimal diversity, removed the action to the Northern District of Texas under CAFA. But the district court granted the plaintiffs' motion to remand to state court based on CAFA's "home state" exception, which requires a federal court to abstain from exercising jurisdiction if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). The Fifth Circuit granted ADT's application for permission to appeal under CAFA and reversed the remand order, finding ADT the "real target" and therefore a "primary defendant" in the case. 2021 WL 3732741, at *2. The panel concluded: "[Plaintiffs] claim to represent a class of plaintiffs seeking millions in recovery for the invasion of their privacy, although, as of yet, they have asserted claims against only the offending employee (who is imprisoned). But the thrust of this suit is to gain access to ADT's deep pockets, and ADT, having properly intervened, must be considered a primary defendant under CAFA." *Id*.

In *Turner v. Costa Crociere S.P.A.*, --- F.4th ----, No. 20-13666, 2021 WL 3673727 (11th Cir. Aug. 19, 2021), Paul Turner, a Wisconsin resident who had sailed out of Fort Lauderdale, Florida on the Italian cruise ship *Costa Luminosa*, filed a putative class action against the Italian cruise operator and its American subsidiary, alleging negligence and other claims arising from a COVID-19 outbreak on the cruise (Mr.

Turner himself contracted the virus). But by purchasing his cruise ticket, Mr. Turner agreed to a forum selection clause requiring that any litigation be filed "only in the courts of Genoa, Italy." 2021 WL 3673727, at *1. The Southern District of Florida found the forum selection clause enforceable and granted defendants' motion to dismiss on *forum non conveniens* grounds. The Eleventh Circuit affirmed, relying on a long line of federal cases enforcing forum selection clauses (including in the cruise ticket context), and emphasizing the "heavy burden of proof" faced by a plaintiff in proving a clause unenforceable. *Id*. at *2.

In *Moser v. Benefytt, Inc*., --- F.4th ----, No. 19-56224, 2021 WL 3504041 (9th Cir. Aug. 10, 2021), Kenneth Moser, a California resident, filed a putative class action in the Southern District of California against Benefytt Technologies, Inc. ("Benefytt"), a Delaware corporation headquartered in Florida, alleging that it was responsible for unwanted sales calls that violated the Telephone Consumer Protection Act ("TCPA"). Mr. Moser moved for the certification of two nationwide classes under the TCPA. Benefytt opposed certification, arguing (among other things) that the district court could not certify nationwide classes because it lacked specific personal jurisdiction over the claims of non-California class members under the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017).

In *Bristol-Myers*, the Supreme Court held that a California state court did not have specific personal jurisdiction over nonresident plaintiffs' claims in a mass action against a non-resident corporation. Although that case did not address whether it applied to class actions, many class defendants have argued that *Bristol-Myers* prohibits a federal court from exercising specific jurisdiction over the claims of non-resident class members, as we have addressed in a number of articles. *See, e.g.,* *Fifth Circuit rules that defendant did not waive Bristol-Myers personal jurisdiction defense asserted at class certification stage* (April 17, 2020); *Second Circuit rejects personal jurisdiction over claims by out-of-state class plaintiffs and again quashes claim of "reasonable consumer" deception* (April 13, 2020); *Seventh Circuit rules that Bristol-Myers personal jurisdictional ruling does not apply to class actions* (March 31, 2020); *Deepening district court discord on application of Bristol-Myers to class actions highlights need for appellate guidance* (June 4, 2018).

The district court rejected Benefytt's jurisdictional objection and certified the nationwide classes, on the ground that Benefytt had waived the argument by failing raise the jurisdictional defense in a motion to dismiss under Federal Rule 12(h)(1). On appeal, the Ninth Circuit concluded (over the dissent of District Judge Kathleen Cardone) that it had appellate jurisdiction under Federal Rule 23(f) and that the district court erred in ruling that Benefytt had waived its jurisdictional argument to the certification of the nationwide classes. The panel vacated the class certification order and remanded to the district court to consider Benefytt's jurisdictional objection.