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## EMPLOYEE RETIREMENT INCOME SECURITY ACT

*Bailey v. Verso Corp.*, No. 17-cv-332, 2021 WL 673164 (S.D. Ohio Feb. 22, 2021) (Newman, J.)

Plaintiff retirees brought suit for violation of the Employee Retirement Income Security Act (“ERISA”), seeking recovery of life insurance and death benefits. The parties sought class certification preliminary approval of the settlement reached.

The Court granted the motion, reasoning in support of its decision first that the settlement was reasonable in light of counsel’s reasons for approval: the length and vigorous contesting of litigation, provision of certainty and similar treatment of all class members, the legal likelihood of success, and the reasonable attorney’s fee award. The Court also noted economic reasons for preferring settlement, and that courts in ERISA cases often are afforded considerable discretion in awarding fees.

In terms of class certification, the Court found numerosity sufficient by virtue of 152 class members. For commonality, the Court found a common question in whether the benefits at issue vested for a lifetime. Likewise, typicality was met by the fact that any class member could have brought the same claim resulting in a recovery for the class. For adequacy, the Court found no conflict of interest and that counsel were well qualified. Looking at Rule 23(b)(2), the Court found that the class as a whole would benefit from declaratory relief. Finding certification appropriate on this basis, the Court approved the proposed notice.

*Boley v. Universal Health Services, Inc.*, No. 20-cv-2644, 2021 WL 859399 (E.D. Penn. Mar. 8, 2021) (Kearney, J.)

Plaintiffs brought an ERISA suit against employer plan fiduciaries and moved for certification.

The Court granted the motion, reasoning first that numerosity was satisfied by virtue of there being 60,000 plan participants. In terms of commonality, the Court found that Defendants’ common plan of action in managing funds involved numerous common questions of law and fact. While Defendants challenged this same logic as the basis for a finding of typicality, citing support from a decision from the United States Court of Appeals for the Fifth Circuit (purportedly holding that the potential for individual defenses under Section 404(c) rendered certification inappropriate), the Court found that later cases had held the potential defenses under section 404(c) would defeat claims on a class-wide basis, and that this did not defeat commonality and typicality.

The Court also rejected Defendants’ theory that individual inquiries were needed to establish which claims were time-barred, arguing that this did not negate the presence of common issues. Defendant also argued Plaintiffs’ claims were atypical, but the Court found that the focus of the claims involved conduct dealing with all plan participants and not individual investment choices. As such, the Court found commonality and typicality were met.

For adequacy, the Court found no conflicts, and that counsel was well qualified.

Turning to Rule 23(b)(1), while Defendants argued that this type of certification was improper because Plaintiffs were seeking individual monetary relief, the Court found this argument would require that all classes seeking any such relief could never use Rule 23(b)(1), and noted that a prior case had rejected this argument. In that regard, the Court agreed with the logic of that case and found the instant case’s class was not barred from certification under this rule section. The Court then found that certification was appropriate both under subsections (A) and (B) for the claims at issue.

## EMPLOYMENT

*Ward v. United Airlines, Inc.*, No. 19-cv-03423, 2021 WL 534364 (N.D. Cal. Feb. 12, 2021) (Beeler, Mag. J.) Plaintiffs brought suit against their employer, seeking unpaid wages in violation of state contract laws and labor laws. Plaintiffs moved for certification of two classes, one for pilots and another for flight attendants.

The Court granted the motion, first reasoning in support of its decision that a class size in the hundreds was sufficient for purposes of numerosity. Turning next to commonality, the Court rejected Defendant's challenges, including that: (1) calculation of pay involved individualized variables; and (2) not all class members were subject to California law. The Court found that these calculations could be determined from uniform-format wage statements, and that the class members were either all based in California locations and do not perform the majority of their work in any one state. As such, the Court found commonality satisfied.

In terms of typicality, the Court found the issue undisputed, and that all claims were identical. For adequacy, the Court found no conflicts, rejecting Defendant's contention that one plaintiff was inadequate to pursue injunctive relief because of a lack of standing in that said plaintiff was a retiree. There, the Court found that another Plaintiff was the proposed representative for the injunctive relief claim, satisfying adequacy.

Turning next to Rule 23(b)(3) predominance, the Court found that its previous commonality analysis was sufficient, and that a class action would be superior given the predominance of common questions and the existence of Private Attorney General Act claims. Thus, certification was appropriate under Rule 23(b)(3). The Court further ruled that the single injunction sought barring one type of pay calculation was sufficient for certification under Rule 23(b)(2) as well.

## ENVIRONMENTAL

*C.J. Mahan Construction Co. v. Betzner*, No. CV-20-456, 2021 Ark. 42 (Ark. Mar. 4, 2021) (Wood, J.) Plaintiffs brought a class action against a construction company, arguing that Plaintiffs' water systems were contaminated with sewage due to Defendants' negligence as a general contractor on a bridge construction project, giving rise to numerous tort causes of action. Plaintiffs moved for class certification, which was granted on some of the claims. Defendants appealed, challenging ascertainability and predominance.

The Court affirmed, reasoning in support of its decision first that contrary to Defendants' contention that the circuit court would have to determine title to the properties involved, this could be accomplished with a brief review of public records—leaving this as no barrier to a finding of ascertainability. The Court similarly rejected Defendants' contention that the water customers could not be identified as necessarily being the same as the property residents without a review of customer receipts, reasoning that affidavits or testimony would be sufficient for this. The Court found that these terms involved objective criteria that met ascertainability, and therefore found no abuse of discretion on this point.

In terms of predominance, the Court noted that the circuit court found five common claims that predominated over individual issues. While Defendants argued that proximate causation issues in tort cases necessarily defeat predominance, and relied on a 2009 case as support, the Court found that in the instant case, there were overarching common issues that could establish liability even on proximate causation, and the circuit court had identified these as able to be determined on a class-wide basis. Therefore, the Court found no abuse of discretion on predominance.

The Court then looked at whether the circuit court erroneously certified the breach of contract claim, as Defendant claimed it was not identified in the complaint as a class action. The Court found Defendant had

failed to point to any Rule 23 support for its argument, and that the issue was sufficiently subsumed in the class action with notice to Defendants stemming from language in the complaint. The Court found Defendant had failed to argue against this at the circuit court level, and therefore failed to preserve the issue for appellate review.

## SETTLEMENT ISSUES

### *Objector*

*LeBlanc v. Texas Brine Co., L.L.C.*, No. 20-30208, 2021 WL 777756 (5th Cir. Mar. 1, 2021) (Southwick, J.) Plaintiffs brought suit against a salt-mining company and insurers, after a sinkhole emerged near the company's operations. After Plaintiffs and the insurers reached a settlement, a remaining defendant (the mining company) moved for partial summary judgment and objected to the settlement. After the United States District Court for the Eastern District of Louisiana denied the motions and approved the settlement, the defendant appealed.

The United States Court of Appeals for the Fifth Circuit dismissed the appeal, first examining whether the defendant had standing to object to a settlement where it was not a party. The Court found a potential exception could be if the Defendant suffered "plain legal prejudice" because of the settlement. The Court found the settlement's release of claims against the pre-2012 insurers released the claims against Defendant from the same time period. Nonetheless, Defendant remained free to pursue bad faith claims against the insurers.

Looking next to whether Defendant had a right to contribution or indemnity from the insurers, the Court found that Defendant had failed to show the physical injury that caused the property damage at issue occurred within the pre-2012 policy period. Therefore, the Court reasoned that Defendant had failed to show plain legal prejudice from the settlement, and thus lacked the standing to object to the settlement.

## TELEPHONE CONSUMER PROTECTION ACT

### *Faxes*

*Scoma Chiropractic, P.A. v. Dental Equities, LLC*, No. 16-cv-41, 2021 WL 719655 (M.D. Fla. Feb. 24, 2021) (*per curiam*)

Plaintiffs brought suit for violation of the Telephone Consumer Protection Act ("TCPA") after receiving unauthorized faxes, sent by both traditional fax machines and an online fax service. The issue of whether the use of an online fax service violates the TCPA was raised in a petition before the FCC in another litigation, and a stay was ordered while the matter was pending. After 18 months, the FCC ruling held that the TCPA did not apply to online fax services. Plaintiffs then re-filed for certification, seeking in the alternative separate classes based on this distinction if the Court so requires.

A magistrate judge heard the motion and found certification inappropriate for both class, first recommending deferral to the FCC ruling on the issue of standing for the online fax service class. The magistrate judge also found certification inappropriate for the stand-alone fax service class on grounds that Plaintiffs had not shown it would be feasible to identify these members separately, and that this in turn affected predominance and superiority with the need for individualized inquiries.

The Court then evaluated the magistrate's report in the context of the case, noting that four days after the magistrate's report was entered, the United States Court of Appeals for the Eleventh Circuit held that administrative feasibility was not a replacement for ascertainability under Rule 23. In light of that, the Court ruled that the certification motion could not be decided without the parties' opportunity to refashion their arguments in light of the Eleventh Circuit's decision. Accordingly, the Court denied pending motions without prejudice and required an amended certification motion be filed.

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