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## Appeals court upholds decision in favor of Venable client, Synapse Group, Inc.

DISTRICT COURT DECISION DENYING CLASS CERTIFICATION AFFIRMED

Venable lawyers successfully defeated appeal of a denial of class certification in a putative multi-state class action pending in the United States Court of Appeals for the Third Circuit, styled *McNair v. Synapse Group Inc.* Case No. 11-1743 (March 6, 2012, 3d Circuit). Initially filed in the United States District Court for the District of New Jersey, the suit challenged a variety of marketing practices including data-pass, adequacy of disclosures, continuity programs, and cancel/save procedures under multi-state consumer fraud statutes as well as claims under the federal Electronic Funds Transfer Act and Unordered Merchandise Statute. After failing to gain certification of a Rule 23(b)(3) damages class, plaintiffs amended their complaint seeking (b)(2) certification for an injunctive relief class. After failing to gain certification a second time, plaintiffs' obtained an interlocutory Rule 23(f) appeal from the Third Circuit to challenge the certification denial. After briefing and oral argument, the Third Circuit affirmed, holding that the named plaintiffs lacked Article III standing to pursue prospective relief because they were no longer Synapse customers.

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Defendant Synapse Group Inc. is a subsidiary of Time Inc. and a leading marketer of magazine subscription services using a continuous service plan. Synapse markets magazine subscriptions to consumers in a wide variety of promotional offerings – often for introductory periods that are free or at greatly reduced rates. Synapse promotes these subscriptions through various third-party retain businesses, websites and other marketing channels. Much like a newspaper or cable or internet subscription, most Synapse magazine subscriptions automatically renew unless the customer cancels. Regardless of how a Synapse customer initiates a subscription, Synapse discloses in its initial offer that subscribers will be automatically charged for renewals if they do not cancel. Synapse also sends a notification postcard to the subscriber prior to an automatic renewal charge. Subscribers are provided a toll free number to call and cancel.

The toll free number connects subscribers to an “Interactive Voice Recognition” telephone system. Between 70% and 80% of all customers who called Synapse expressing an intent to cancel did so successfully in that same call.

Charles McNair, the first plaintiff to bring suit, was a former Synapse subscriber who sued Synapse in New Jersey federal court on behalf of a nationwide class, claiming that Synapse’s IVR system was deceptive and asserting federal diversity jurisdiction under the Class Action Fairness Act (“CAFA”). After initial discovery, plaintiff filed an amended complaint naming additional plaintiffs and asserting new claims against other aspects of Synapse’s business, including the design of Synapse’s postcard renewal notifications. Specifically, plaintiffs claimed that the format of Synapse’s postcard renewal notification was deceptive. The amended complaint asserted counts under numerous state consumer protection statutes, the Unordered Merchandise Statute, and the Electronic Funds Transfer Act.

After further discovery and motion practice dismissing the federal statutory claims, plaintiffs moved for certification under Rules 23(b)(2) and 23(b)(3) to pursue damages and injunctive relief. The district court (Linares, J.) denied plaintiffs’ first class certification, holding that class claims for unwanted subscription renewal charges presented disparate factual circumstances and individual liability issues. *McNair v. Synapse Group, Inc.*, No. 06-5072, 2009 WL 1873582 (D.N.J. June 29, 2009). The district court ruled that 23(b)(3) predominance was therefore lacking and that a (b)(2) class could not be certified because the class relief was predominantly monetary. Shortly thereafter, plaintiffs sought to amend their complaint and renew a (b)(2) injunction-only class.

Synapse opposed plaintiffs’ motion for leave to amend on grounds that the new complaint would divest the court of CAFA jurisdiction and because, as former customers, the named plaintiffs lacked Article III standing to pursue prospective injunctions on behalf of themselves or a class. The district court nonetheless granted plaintiffs’ motion. *McNair v. Synapse Group, Inc.*, No. 06-5072, 2009 WL 3754183 (D.N.J. Nov. 5, 2009). The resulting Second Amended Complaint asserted damages on behalf of the named plaintiffs, but struck all damage claims on behalf of the putative class members and sought only an injunction for the class.

Plaintiffs renewed their class certification motion, which the district court denied on grounds that the newly defined injunction-only class lacked the necessary cohesion for certification as a (b)(2) class. *McNair v. Synapse Group, Inc.*, No. 06-5072, 2010 WL 4777483 (D.N.J. Nov. 15, 2010), den. recons., 2011 WL 666036 (D.N.J. Feb. 14, 2011). Plaintiffs petitioned the Third Circuit for an interlocutory appeal under Rule 23(f), which the appellate court granted shortly after the petition was filed.

Venable presented several noteworthy arguments on appeal. First, we asserted that because the named plaintiffs were all former customers, they lacked Article III standing to seek injunctive relief. Although plaintiffs countered that the state

consumer statutes provided them with injunctive remedies and that they were reasonably likely to be fooled into becoming Synapse customers in the future, we cited case authorities holding that similar projections were far too speculative to show an immediate threat of future injury rising to the level necessary to establish Article III standing. Venable also argued that plaintiffs' new injunction-only class failed to meet the required \$5,000,000 amount in controversy under CAFA and that speculation about the value of injunctive relief did not satisfy their burden.

On the Rule 23 class certification issues, Venable contended that the district court's second denial of a (b)(2) injunction class certification was an unassailable exercise of judicial discretion because it conformed to the court's initial order denying a Rule 23(b)(3) class and was thereby guided by the Law of the Case Doctrine. We also cited to the recent Supreme Court class action decision in *Wal-Mart v. Dukes*, which held that a class of current and former Wal-Mart employees could not be certified under Rule 23(b)(2) when the class members would be entitled to money damages. Under *Dukes*, the McNair plaintiffs were precluded from dispensing with class monetary claims so that (b)(2) certification for injunctive relief could proceed. We also argued that the proposed class lacked cohesion because there was no significant trait binding them together as a group under (b)(2), which requires class members to be bound by a preexisting or continuing legal relationship or by a common significant common trait such as race or gender. Unlike the consumer claims presented in this case, the (b)(2) class is expressly devised for civil rights cases or instances of systemic institutional deficiencies. In any event, the factual differences between the named plaintiffs' experiences as Synapse customers rendered cohesion impossible to find in the same way predominance was lacking in plaintiffs' initial certification motion under (b)(3).

The Third Circuit affirmed the district court's order denying class certification, but on grounds going only to named plaintiffs' lack of Article III standing and without reaching any of the remaining issues presented for review. The Third Circuit held that as former customers, the plaintiffs did not have Article III standing because they could not demonstrate a sufficiently real and immediate likelihood of future injury from the challenged conduct. The court noted that standing can be addressed on a 23(f) appeal. The court stated that while plaintiffs may "perhaps" accept a Synapse offer in the future, generally speaking "the law accords people the dignity of assuming that they act rationally, in light of the information they possess."

We are grateful for the Third Circuit's decision upholding denial of class certification in this case. This is a significant decision because it confirms the constitutional requirement that class action plaintiffs must have an ongoing stake in the defendant's conduct to seek any prospective relief. Even when state consumer protection statutes provide injunctive remedies, that relief cannot be sought for a class by former customers with no stake in the defendant's future conduct. Nor does the 'capable of repetition yet evading review' exception to mootness apply in this

situation because, as the court observed, there still must be a reasonable expectation that the same complaining party will be subject to the same conduct again. The decision also clarified the range of issues that a federal appellate court may reach on interlocutory appeal of a class certification order.

Venable attorneys involved were Tom Gilbertsen (lead counsel), Danielle Foley, and Liz Forbes.

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