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Lit Alerts Update: U.S. Supreme Court Declines to Review Ninth Circuit Panel CAFA Decision in Romo

In the October 2013 and March 2014 editions of Lit Alerts, we discussed the Ninth Circuit's panel decision in *Romo v. Teva Pharmaceuticals USA, Inc.*, No. 13-56310 (Sept. 25, 2013), which held that a plaintiff's motion for coordination of state actions did not constitute a proposal for the actions to be "tried jointly" such that removal under the Class Action Fairness Act of 2005 (CAFA) is authorized. CAFA authorizes removal of "mass actions," defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). On June 30, 2014, the United States Supreme Court denied Teva's petition for certiorari in *Romo*.

The Supreme Court's denial clears the way for the Ninth Circuit to answer in an *en banc* decision whether coordinated, but not consolidated, cases can be properly removed under CAFA. *En banc* arguments before the Ninth Circuit were heard earlier in June, where Teva's counsel argued that plaintiff's proposal for coordination went beyond requests to coordinate pretrial issues, and that some issues would instead be addressed in some form of a joint trial. The Ninth Circuit has not yet issued a decision.

California Arbitration: FAA Does Not Preempt Representative Private Attorney General Act Actions

The California Supreme Court recently held that the Federal Arbitration Act (FAA) does not preempt California's public policy prohibiting waivers in employment contracts of representative actions brought under the Labor Code Private Attorney General Act of 2004 (PAGA), Cal. Labor Code § 2698 et seq. *Iskanian v. CLS Transp. Los Angeles, LLC*, No. S204032 (June 23, 2014). The Court reasoned that "the FAA aims to ensure an efficient forum for the resolution of private disputes, whereas a PAGA action is a dispute between an employer and the state Labor and Workforce Development Agency."

On the other hand, the Court overruled its private class action decision in *Gentry v. Superior Court*, 42 Cal. 4th 443, 463-64 (2007), explaining that under *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), "a class waiver is not invalid even if an individual proceeding would be an ineffective means to prosecute certain claims . . . because class proceedings interfere with fundamental attributes of arbitration."

E-Discovery: Federal District Court Rejects Request for Deposition on ESI Storage Prior to Written Discovery

In *Miller v. York Risk Servs. Grp.*, No. 2:13-cv-1419 JWS (D. Ariz. Apr. 15, 2014), a federal district court denied plaintiffs' Motion To Compel the defendant to participate in a Rule 30(b)(6) deposition regarding the manner and methods it used to store and maintain electronically stored information.

The plaintiffs contended that starting with discovery of the manner and means by which the defendant stored

ESI would allow plaintiffs to tailor their subsequent discovery requests. In a short opinion issued without oral argument, the court rejected this argument, concluding that “such an inquiry puts the cart before the horse and likely will increase, rather than decrease, discovery disputes.” Instead, the court reasoned, the parties should begin with inquiries seeking substantive information. If the defendant then asserted that retrieval would be unduly burdensome, the court allowed, it might then be appropriate to conduct a deposition of the type sought by the plaintiffs.

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