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Second Circuit Quarterly

Second Circuit Had a Busy First Quarter of 2016

Other rulings focus on subject-matter jurisdiction, attorney obligations

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So far this year, the U.S. Court of Appeals for the Second Circuit has decided issues ranging from securities law to what it means to be "Hispanic." From that broad range, this quarterly review focuses on three cases of particular interest to Connecticut practitioners. The cases tackle issues such as courts' overzealous gatekeeping with regard to expert testimony; the settlement dilemma of class actions of dubious merit; and a warning to those seeking to withdraw representation before getting court approval.

In *In re Pfizer Securities Litigation,* 14-2853-cv, the Second Circuit continued its recent crackdown on district courts that have overstepped their role as gatekeeper of expert witness testimony, reviving a class action lawsuit seeking tens of billions of dollars in shareholder losses from a pharmaceutical giant. See last year's *United States v. Litvak,* 808 F.3d 160 (2d Cir. 2015), for a similar example. This time, the court addressed complicated questions about whether expert opinions can rely on novel legal theories and whether an entire opinion is invalid if only one severable theory is suspect.

Pfizer shareholders brought securities fraud claims related to two drugs, Celebrex and Bextra. Another company, Searle, developed the drugs and agreed to co-market them with Pfizer

beginning in 1998. Pfizer obtained the exclusive rights in 2003. The plaintiffs claimed that as early as 1998, Pfizer and Searle knew of and concealed studies that linked the drugs to cardiovascular problems. The companies nonetheless continued to promote the drugs' safety, artificially inflating Pfizer's stock price until the fall of 2004, when new information about the cardiovascular risk became public.

The plaintiffs offered two theories of liability. They first argued that Pfizer was responsible for Searle's misstatements (and any resultant stock price inflation) because it had authority over those statements under the co-marketing agreement. In the alternative, the plaintiffs advanced an "inflation-maintenance" theory, alleging that even if Pfizer was not liable for Searle's misstatements, it had maintained the artificially inflated stock price through a series of post-2003 misstatements.

The plaintiffs hired a prominent law professor, Daniel Fischel, as an expert. Using event studies, he calculated how much the alleged misstatements had inflated Pfizer's share price, assuming that the plaintiffs would prove their inflation-maintenance theory. Shortly after he prepared his opinion, the district court concluded that Pfizer was not responsible for Searle's alleged misrepresentations. It then excluded Fischel's opinion because he failed to disaggregate the inflation caused by Pfizer's alleged misstatements from that caused by Searle's. The district court also took issue with Fischel's methodology with regard to two specific moves in Pfizer's stock price, an independent reason the district court gave to exclude the entire opinion. With this testimony excluded, the district court granted summary judgment to Pfizer.

The Second Circuit reversed. On the first issue—disaggregation—the court concluded that the district court had misunderstood Fischel's opinion. In calculating the stock price inflation caused by Pfizer's misstatements, Fischel had assumed that the plaintiffs' inflation-maintenance theory was legally valid and would be factually proved. The court noted that these assumptions may prove false, particularly since the Second Circuit has not yet considered such a theory. But in evaluating whether Fischel's opinion was reliable and helpful to the finder of fact under Rule of Evidence 702, the district court should have assumed that the plaintiffs would be able to prove their theory. And if they did, Fischel would have had no reason to disaggregate. As a result, the district court abused its discretion by excluding the opinion on this ground.

On the second ground, the court agreed that Fischel's opinion regarding two (of several) movements in Pfizer's stock price was unreliable. Nonetheless, it concluded that the district court had abused its discretion by excluding the entire opinion, because the expert's opinion on this issue could be easily excluded without calling into question his entire opinion. *Pfizer* is thus a useful reminder that motions to exclude expert testimony should be decided based on the reliability of an expert's theory, not the legal adequacy of a party's claims. And it instructs district courts to avoid excluding an entire opinion based on doubts about a discrete (and severable) aspect of the opinion.

The Second Circuit grappled with subject-matter jurisdiction and the settlement of low-value class actions in *Gallego v. Northland Group,* 15-1666-cv. The defendant allegedly violated the Fair Debt Collection Practices Act (FDCPA) when it sent debt collection letters that included a callback number but not the name of the person

at that number. Although the FDCPA does not require this, the plaintiff argued the FDCPA incorporated a callback name requirement in the New York City Administrative Code. Notwithstanding obvious weaknesses in the plaintiff's case, the parties agreed to settle the class claims for $17,500, with $35,000 in attorney fees. The district court rejected the settlement, refused to certify the class and dismissed the claims for lack of subject-matter jurisdiction.

The Second Circuit vacated the dismissal. While it agreed that the FDCPA neither incorporated local standards of conduct nor itself required a callback name, the court was careful to note the distinction between the failure to state a viable claim and the failure "to raise a substantial federal question for jurisdictional purposes." The court explained that a claim should survive a jurisdictional challenge unless it is "essentially fictitious," "wholly insubstantial" or "obviously frivolous." The adverbs have meaning, the court explained, and set a "low bar." Thus, so long as a claim is not plainly and squarely foreclosed by binding precedent, a court has subject-matter jurisdiction to consider it.

Although the district court had jurisdiction, the Second Circuit agreed that class certification was inappropriate, a decision that demonstrates the court's sensitivity to class action abuse. Noting that the class members would receive less than 17 cents and that few class members were expected to participate, the court portrayed the proposed settlement as an example of "mass indifference, a few profiteers, and a quick fee to clever lawyers."

The skepticism on display in *Gallego* is a good example of a growing apprehension among circuit courts of class action abuse. And while an appellate court's rejection of a settlement often shifts the burden and costs of litigation back to the defendant, *Gallego* alleviated that burden by openly opining about the claim's lack of merit. Practitioners on both sides should watch to see if this closer review of questionable class action settlements becomes a trend in the Second Circuit.

Finally, the Second Circuit firmly reminded attorneys that the court decides when an attorney's obligations in a case ends. Two unnamed attorneys failed to attend a court-ordered mediation session. Their excuse: their client had fired them shortly after they filed the appeal. They had tried (but failed) to withdraw before the mediation session. In an order "posted on the court's website for the benefit of other counsel," Judge Denny Chin reminded us that a client's decision to fire counsel does not relieve that attorney of court-ordered obligations. Until the court relieves them of those obligations, attorneys must appear at the court-ordered mediation, or at least notify the mediator of the issue and request an adjournment. Chin stressed that these court-ordered mediation sessions are not optional. Although Chin did not refer the matter to the court's grievance panel, it is a stern reminder of the continuing obligations to our clients. •

Benjamin M. Daniels and David R. Roth are associates in Wiggin and Dana's Appellate and Complex Legal Issues Practice Group. This is their first installment of quarterly articles highlighting recently decided and pending cases before the U.S. Court of Appeals for the Second Circuit, focusing on decisions of particular interest to Connecticut practitioners.