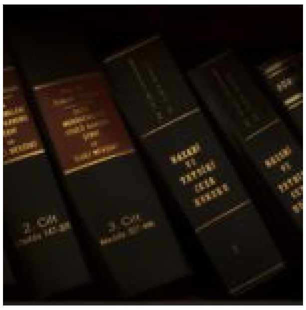

Bland v. Edward D. & Co., LP

By James L. Komie

Allegations that new financial advisors were rigidly controlled in the products they could sell and spent most of their time generating new sales leads are sufficient to state a claim that they should have been classified as non-exempt salespeople rather than exempt professionals and paid overtime under the FLSA.

Bland vs. Edward D. Jones & Co. LP, No. 18-cv-1832 (N.D. Ill., 3/30/20).

Plaintiffs are former trainee brokers of defendant Edward D. Jones & Co. In this putative class action, plaintiffs allege Jones violated the minimum wage and overtime requirements of the Fair Labor Standard Act ("FLSA") and state law through its administration of its broker training program and its classification of new financial advisors as exempt employees after graduating from the training program. Plaintiffs allege that, during the training program, they routinely studied/worked more than 40 hours per week and were not paid overtime. Plaintiffs also challenge the provision for repayment of training costs if they leave Jones within three years of graduating from the program. With respect to their work as new financial advisors, plaintiffs allege they should have been classified as non-exempt employees and paid overtime.

The Court dismissed plaintiffs' first amended complaint on a variety of grounds, including that it lacked sufficient detail. Plaintiffs filed a second amended complaint, which the Court now dismisses in part and sustains in part. The Court reaffirms its prior ruling that plaintiffs' allegations regarding the training costs repayment provisions of their trainee agreements do not state an FLSA minimum wage claim. Plaintiffs' theory is that allowing Jones to recover training costs would cause their effective rate of pay to fall below the minimum wage. Plaintiffs do not have standing to assert this claim since Jones did not recover training costs from any of them. Moreover, a training costs repayment provision works effectively as a loan and does not constitute a minimum wage violation.

The Court finds plaintiffs adequately allege an overtime claim for their time as trainees. Jones classifies trainees as non-exempt employees under the FLSA and thus must pay them overtime. The second amended complaint contains sufficient detail showing that plaintiffs worked more than 40 hours per week during specific weeks during their training period, including on self-study and practical training knocking on doors.

The Court also finds plaintiffs have stated a claim for overtime violations for their work as new financial advisors. Jones asserts that new financial advisors – unlike trainees – are exempt employees and thus are not entitled to overtime pay. Plaintiffs, however, adequately allege that their authority and discretion were rigidly circumscribed by Jones, making them more akin to non-exempt salespeople than exempt professionals under the "administrative" exemption to overtime rules. While most financial professionals are exempt professionals, the severe controls imposed by Jones on new financial advisors – including limiting investment options to one product for each category of customer – mean that new financial advisors are not truly analyzing and advising on customer financial needs. The Court notes new financial advisors at Jones spend the "majority of time trawling for sales leads" and don't have "dedicated office-space, further corroborating their allegations that they were more analogous to door-to-door salespeople than bona-fide managers." Under these facts, plaintiffs have stated a claim for non-payment of overtime wages.

(J. Komie*: Requiring trainee brokers to sign training costs repayment provisions has long been an iffy practice in the industry. As noted in the opinion, there are few arbitration awards involving training costs provisions. Most firms would have a hard time showing that the training costs number specified in the agreement bears any relation to the actual costs of training. Edward Jones' provision setting training costs at $75,000 has always been an outlier – most firms' contracts were $40,000 or less – and was ripe for challenge.)*

(SOLA Ref. No. 2020-18-05)

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Budicak, Inc. v. Lansing Trade Group, LLC

By James L. Komie

A commodities newsletter "transacts business" in Kansas where two of its subscribers are based in Kansas, rendering venue proper in the federal district court in Kansas under the Commodity Exchange Act.

Budicak, Inc. vs. Lansing Trade Group, LLC, No. 2:19-CV-2449 (D. Kan., 2/14/20).

In this putative class action, plaintiff alleges defendant Lansing Trade Group manipulated the wheat futures market in violation of the Commodity Exchange Act and the Sherman Antitrust Act. In an amended complaint, plaintiff adds defendant Cascade Commodity Consulting as a defendant, alleging that Cascade, which publishes a commodity newsletter from its office in Oregon, helped manipulate the market by amplifying false signals Lansing was sending. Cascade moves to dismiss for improper venue and lack of personal jurisdiction. The Court denies the motion.

Under both the Commodity Exchange Act and the Sherman Act, venue is proper in any judicial district where, among other things, defendant "transacts business." Two of Cascade's 82 subscribers reside in Kansas. Moreover, Cascade updates its subscriber content daily, meaning it has continuous interaction with its Kansas subscribers. As such, Cascade transacts business in Kansas and venue is proper there. Nor would it violate Cascade's due process rights to make it defend this case in Kansas. Cascade admittedly has very few contacts with Kansas, but they are not so *de minimis* as to violate due process. Cascade regularly conducts business across state lines and modern technology and transportation make defending a case in a foreign jurisdiction much easier than it used to be.

(J. Komie: It has been a very long time since I've read a case construing International Shoe. One of the many benefits of being a Contributing Editor to this publication is dusting off seldom used parts of one's legal education.) (EIC: See SOLA Ref. No. 2019-36-03 for an earlier decision in this case by the Northern District of Illinois, ordering a transfer of venue. Mr. Komie also summarized that decision.)

(SOLA Ref. No. 2020-13-04)

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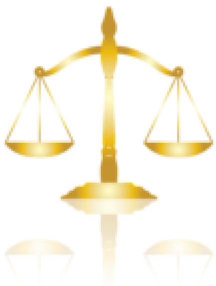

North Sound Capital LLC v. Merck & Co., Inc.

By David C. Franceski, Jr.

In order to preclude later-filed opt-out claims related to a settled class action as "proceed[ing]" in a single, "covered class action" under SLUSA, some actual coordination between the related class action and the opt-out actions is required; a mere functional relationship or functional coordination will not suffice.

North Sound Capital LLC vs. Merck & Co., Inc., Nos. 18-2317, -2318, -2319, -2320 (3rd Cir., 9/12/19).

Opt-Out plaintiffs in these consolidated appeals challenged the district court's dismissal of state law claims filed (along with untimely federal claims) after final approval of a related class action as claims "otherwise proceed[ing] as a single action" under SLUSA. Finding them functionally related to the settled class actions, the district court found the opt-out actions precluded by the mass action provision of SLUSA. On appeal, plaintiffs, who did not participate in the class action and specifically excluded themselves from it, were cited in the final class settlement approval Order as "not bound" by the class settlement or any other orders or judgments in the class action, and only filed their claims after the class settlement was finalized, maintained otherwise.

In a 2 to 1 precedential decision, the Third Circuit Court of Appeals agrees with opt-out plaintiffs and reverses the dismissals. According to the Court, the question whether SLUSA precludes opt-out plaintiffs' claims turns on whether they, individually or taken together, constitute a covered class action. Rejecting defendants' argument that the single-action requirement requires only a "functional relationship" between the class action and the later-filed opt out actions, the Appellate Court concludes, both under constitutional principles and the plain text of SLUSA, "which does not deny any individual plaintiff the right to enforce state law causes of action," that "some actual coordination" is required to constitute a single action.

Neither opt-out plaintiffs' identification of their action as "related to" the settled class action, nor the benefits they will obtain from discovery taken in that action amounts, in the Court's view, to requisite coordination under SLUSA. Citing Black's Law Dictionary, the Appellate Court further finds that in order to "proceed as a single action," the actions must in some manner or for some purpose be combined for joint management — which barring some "extraordinary exception" cannot be the case if the actions, as is the case here, never overlap in time. According to the Court, its reading of the mass action provision ensures that SLUSA, in conjunction with Rule 23, passes constitutional due process muster, and steers SLUSA jurisprudence "toward safer water" and away from a line of decisions which have become "increasingly unmoored from the statutory text."

(D. Franceski: Though certainly good news for these plaintiffs, this decision may pose a dilemma for future opt-outs: whether to file during the pendency of the class action and risk

being found to have coordinated in a single action, or wait for the conclusion of the class action and have their claims challenged as untimely under federal statutes of repose or state statutes of limitation. We previously reported the Appellate Court's dismissal of opt-out plaintiffs' federal claims as untimely under the Supreme Court's Anz decision in SOLA No. 2017-35-04.)

(SOLA Ref. No. 2019-40-03)

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Fan v. StoneMor Partners LP

By David C. Franceski, Jr.

The use of equity proceeds from future investors to pay down borrowings used for distributions to current investors of "pre-need" revenue from burial service sales otherwise tied up in state-mandated trusts is not federal securities fraud, if disclosures of such "feedback loop" render any alleged non-disclosures immaterial.

Fan vs. StoneMor Partners LP, No. 17-3843 (3rd Cir., 6/20/19).

Plaintiffs, purchasers of limited partnership units in defendants' burial products and services business, appealed from the district court's dismissal of their federal securities fraud putative class action for lack of materiality in the misstatements alleged, or *scienter* in making them. Plaintiffs' action followed a 45% price drop after defendants restated three years of financial statements that, under GAAP regulations, temporarily precluded defendants from additional equity sales needed to finance distributions. Due to the nature of its business, revenue from pre-need burial sales must be held in trust and could not be distributed, or under GAAP rules could not be booked as current revenue, until services were finally delivered.

Plaintiffs based their claim on three categories of misstatements: failure to disclose that: (1) defendants' ability to make cash distributions was contingent on access to the capital markets; (2) the primary source of cash for distributions was cash flow when its real source of liquid cash was equity proceeds; and (3) that the distributions were actually funded by borrowings from defendants' credit facility. Though fully recognizing this financial "feedback loop" – cash distributions funded by borrowed cash paid down through equity proceeds "attracted" through growing pre-need sales and cash distributions disclosed as current revenue in non-GAAP financials — the Appellate Court affirms the judgment of the district court that the alleged misstatements were not material. According to the Court, defendants in its public financial filings and press releases disclosed sufficient information about its method for funding distributions to render any omissions immaterial.

As the Court points out, defendants' Form 10-ks defined "Available Cash" to include substantial borrowings, which might materially adversely affect its ability to generate sufficient cash to continue paying distributions. Further, defendants' parallel GAAP and non-GAAP financials "demonstrated the mathematical reality that [defendant] was not able to fund its distributions" from day-to-day operations, and defendants' press releases clearly disclosed the use of equity proceeds to pay down the revolving credit facility which the company used for its borrowing needs. Finally, the Court finds, under the heightened pleading standards of the PLSRA, that, even if the alleged misstatements were material, defendants did not act with *scienter*. Characterizing defendants' business as one of "the leveraging of assets to maximize distributions despite the state trust requirements attached to its pre-need sales," the Court concludes that it is not their place "to correct the cost of doing business when it meets the requirements of the law." Though the Court acknowledges "the economic harm to [defendants'] investors," it "cannot say it was the result of fraud."

(D. Franceski: Given the economic reality that the source of distributions to current investors was equity proceeds from future investors and "the economic harm" which the Appellate Court acknowledges, one might view defendants' business as a "fully disclosed" [albeit non-actionable] Ponzi scheme. Perhaps the "security" of the trust proceeds, which was obviously of little help to plaintiffs as current investors, saved the day for defendants.)

(SOLA Ref. No. 2019-34-06)

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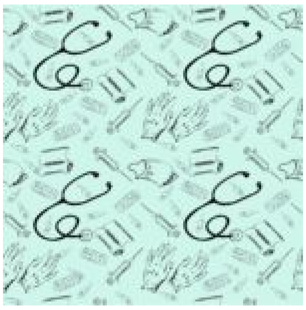

Evans v. ZB, N.A., dba California Bank & Trust

By Ben Suter

The District Court's order dismissing the Complaint is reversed because Plaintiff's alleged sufficient factual matter to support some, if not all, of their claims for relief.

Evans vs. ZB, N.A., dba California Bank & Trust, No. 18-15094, 2019 U.S. App. LEXIS 18781 (9th Cir., 6/24/19).

The Court reverses the judgment of the District Court, finding that the decision to dismiss the complaint for failure to state a claim upon which relief could be granted was unwarranted, because the Plaintiffs had plausibly pled claims for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and conspiracy to commit fraud.

Plaintiffs brought a class action against Defendant California Bank and Trust ("CB&T"), alleging the bank knowingly assisted a $125 million fraudulent scheme initiated by International Manufacturing Group, Inc. ("IMG"), one of CB&T's clients. IMG concededly operated a Ponzi scheme under the guise of raising capital to import rubber medical gloves from Asia, for which CB&T issued millions of dollars in loans. IMG siphoned money from later investors to pay back the loans and disperse lulling payments to earlier investors.

CB&T stopped loaning IMG money in 2009, but continued to operate IMG's deposit accounts and disperse funds. Eventually the scheme collapsed and IMG declared bankruptcy shortly thereafter. Plaintiffs allege that, by 2009, CB&T had discovered IMG was operating a fraud on investors. Rather than terminate the relationship, Plaintiffs allege CB&T helped IMG defraud investors to generate fees, interest, and funds to repay itself. Plaintiffs allege CB&T knew IMG's entire "wholesale import business" was a sham, because CB&T knew that IMG had virtually no income from its latex glove import business. CB&T moved to dismiss the Complaint for failure to state a claim upon which relief could be granted. The District Court granted the motion, and Plaintiffs appealed. The Court, in a two-to-one decision, reverses the District Court's dismissal of the case, finding that Plaintiffs had plausibly stated three claims for relief (out of the eight claims originally pled).

First, the Court finds that Plaintiffs state a claim for aiding and abetting fraud, because they alleged sufficient factual matter to support their plausible assertion that CB&T: (a) knew IMG was defrauding investors, and (b) gave substantial assistance to IMG. For example, CB&T alleged that CB&T knew it was being repaid with investor funds (and not revenue from sales of latex gloves), because it traced a multi-million dollar loan repayment to an investor in IMG's wholesale account. Second, and for the same reasons, the Court finds that Plaintiffs had alleged sufficient facts to state a claim for aiding and abetting IMG's breach of fiduciary duty. Finally, the Court finds that Plaintiffs had stated a claim for conspiracy to commit fraud, having alleged that CB&T terminated the lending relationship in 2009, but also agreed to keep IMG's wholesale depository account open for long enough for CB&T to get fully repaid and hide the connection between the Ponzi scheme and repayment from it. Accordingly, the Court reverses the judgment of the District Court and remands the matter for further proceedings.

(B. Suter)

(SOLA Ref. No. 2019-27-04)

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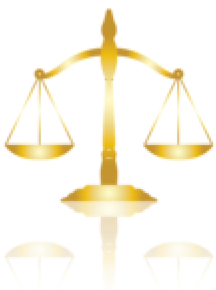

Fresno County Employees’ Retirement Association v. Isaacson/Weaver Family Trust

By Noah D. Sorkin

Plaintiffs’ class counsel is entitled to compensation from a common settlement fund, even where underlying action was brought pursuant to a fee-shifting statute.

Fresno County Employees' Retirement Association vs. Isaacson/Weaver Family Trust, No. 17-2662 (2nd Cir., 5/23/19).

The United States Court of Appeals for the Second Circuit reviews a lower District Court's decision granting class counsel's request for a percentage fee award from a common settlement fund. This fee award was compensation for counsel's representation of plaintiffs during a large class action alleging federal securities laws violations against a medical technology firm. The securities litigation resulted in a settlement requiring the class-action defendant to pay over $10 million into a common fund; the settlement also provided that plaintiffs' class counsel would receive its fees solely from this common fund. One member of the plaintiffs-class, the Isaacson/Weaver Family Trust, objected to this fee award, asserting that, since the class-action securities claims were originally brought pursuant to statutes containing so-called fee-shifting provisions (wherein counsel's fees would be paid by defendant and limited to counsel's hourly fee multiplied by the hours actually expended by counsel on the case (also known as a "lodestar")), counsel could not properly be paid out of the common settlement fund.

The Appellate Court now reviews the district court's decision that, because the parties' settlement agreement provided for counsel to be compensated from a common fund, counsel's fees were not restricted to the lodestar, even though the underlying claims were brought pursuant to a fee-shifting statute. The Isaacson/Weaver Family Trust argues that where, as here, an action is initiated under a statute that shifts plaintiffs' counsel's fees to a defendant once plaintiffs have prevailed, then those fees are limited to the unenhanced lodestar fee, even though the action was settled pursuant to the creation of a common fund. Plaintiffs-class counsel asserts that, whenever an action is resolved through the creation of a common fund, equitable principles allow a district court to award a fee using either the lodestar method or a percentage-of-the-common fund method. The Appellate Court now confirms the district court's award of fees from the common fund, agreeing with Plaintiffs' view.

As the Court notes, fee-shifting statutes are generally not intended to circumscribe the principle of the equitable fund doctrine, unless that doctrine interferes with the purpose of a fee-shifting statute; namely, to encourage the counsel's prosecution of certain actions by private parties. Where, as in the instant case, a common settlement fund results from the commencement of an action, no such interference exists and counsel is entitled to derive its fees from that common fund. The Court also analyzes the matter from the standpoint of the settling parties. Where plaintiffs' counsel's fees are awarded pursuant to a fee-shifting-statute, a defendant will be forced to pay for the costs of the statute's enforcement; the courts will, therefore, consider a reasonable fee with the defendant's perspective in mind. In contrast, where an attorney has settled a case and created a common fund, the courts will determine what a reasonable fee is from the plaintiffs' perspective, the defendant having no further interest in how the plaintiffs' class counsel and class members spend the fixed amount of money paid by defendant into the settlement fund.

(N. Sorkin)

(SOLA Ref. No. 2019-26-03)