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Class Actions: An Update from the Courts of the Financial Capital of the World

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Today's Agenda

- Health Insurance Class Actions: Nationwide Medicare Reimbursement Class Cases Infect the Second Circuit
- Antitrust Class Actions
- Securities Class Action Developments
- COVID-19 Insurance Coverage Class Actions

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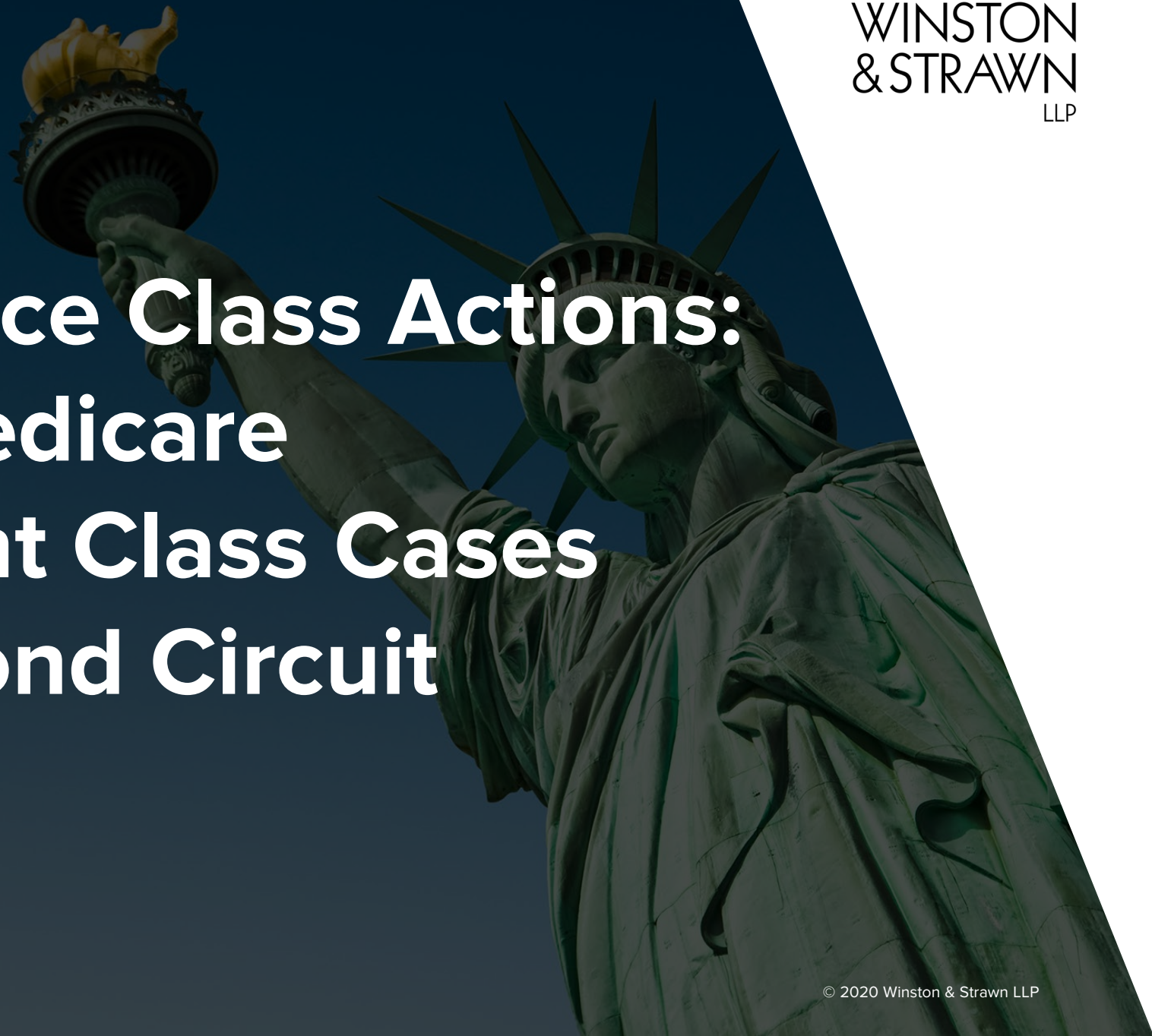

Health Insurance Class Actions: Nationwide Medicare Reimbursement Class Cases Infect the Second Circuit

Medicare Secondary Payer Act ("MSP") Class Action Lawsuits

- Dozens of class action lawsuits filed across the country on behalf of Medicare Advantage Organizations accuse auto and other liability insurance companies of failing to reimburse for medical payments arising from auto accidents, seeking double damages and attorneys' fees.

- 42 U.S.C. 1395y(b)(3)(A): "There is established a private cause of action for damages (which shall be in an amount double the amount otherwise provided) in the case of a primary plan which fails to provide for primary payment (or appropriate reimbursement) in accordance with paragraphs (1) and (2)(A)."

First MSP Act Class Action in SDNY

- *MSP Recovery Claims, Series LLC v. Tech. Ins. Co., Inc.*, No. 18 CIV. 8036 (AT), 2020 WL 91540, at *1 (S.D.N.Y. Jan. 8, 2020).
  - Putative class brought this case against insurance companies alleging a failure to reimburse conditional Medicare payments as required by Medicare Part C.
  - Claims brought pursuant to assignment agreement between plaintiffs and a Medicare Advantage Organization.
  - Defendants contended that Plaintiffs lack standing because the complaint does not adequately allege facts sufficient to show that the claims fall within the scope of the assignment agreement.
  - Court dismissed for lack of standing.

Multiple MSP Class Actions in the Courts of the Second and Third Circuit

- MSP Recovery Claims, Series LLC v. The Hartford Financial Services Group, Inc., No. 3:20-cv-00305-JCH (D. Conn.)
- MSP Recovery Claims, Series LLC v. National Liability & Fire Ins. Co., No. 3:18cv1827 (D. Conn.)
- MSP Recovery Claims, Series LLC v. AIG Property Casualty Company, No. 1:20-cv-02102-VEC (S.D.N.Y.)
- MSP Recovery Claims, Series LLC v. Hereford Insurance Company, No. 1:20-cv-04776-ER (S.D.N.Y.)
- MSP Recovery Claims, Series LLC v. 1199SEIU Benefit and Pension Funds, No. 1:20-cv-01480-JPO (S.D.N.Y.)
- MSP Recovery Claims, Series LLC v. Merchants Mutual Insurance Company, No. 1:19-cv-00524-JLS (W.D.N.Y.)
- MSP Recovery Claims, Series LLC v. Erie Indemnity Company, No. 1:20-cv-00075-SPB (W.D. Pa.)

Key considerations for Insurance Companies

- ✓ Build MSP compliance protocols.
- ✓ Address conditional payment reimbursement to Medicare Advantage Organizations.
- ✓ Develop procedures aimed at identifying possible MAO enrollment and MAO claims.
- ✓ Defend class action claims vigorously with motion to strike and experts detailing the individualized nature of Medicare reimbursement claims.

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Antitrust Class Actions

Drug Price-Fixing Class Actions

- *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184 (3d Cir. 2020)
  - Direct purchasers of brand drug brought putative class action against brand and generic drug manufacturers.
  - Third Circuit overturned district court decision certifying a class and remanded for a more rigorous analysis of predominance with respect to antitrust injury.
    - District court assumed that average prices used by plaintiffs' expert were acceptable without resolving underlying factual disputes, e.g., whether the market was characterized by individual negotiations
    - District court did not scrutinize each expert's evidence for pricing and discounting data to determine what was credible and could be used
    - District court improperly used more lenient predominance standard for damages – rather than stricter standard applicable to injury

No-Poach Class Actions

- Current risk is high. On the private side alone, dozens of class actions have been filed nationwide across multiple industries – some resulting in significant settlements.
- Complaints predominantly are surviving the motion to dismiss phase.
- Courts reluctant to commit to a standard of review (per se, rule of reason or quick look) until after discovery.
- Examples of new settlements / complaints:
  - *In Re Railway Industry Employees* (W.D. Pa.)
  - *Susan Giordano, et al., v. Saks Incorporated et al* (E.D.N.Y.)

Market Manipulation Class Actions

- *Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86 (2d Cir. 2019)
  - Purchasers of aluminum allege that operators of warehouses and banks that traded in aluminum derivatives on London Metals Exchange conspired to inflate price component of aluminum by artificially lengthening delays involved in warehousing services market.
  - The Second Circuit reversed lower court decision, found that plaintiffs had standing despite not participating in the warehousing market:

    There is no rule in antitrust law that defendants who undertake to restrain markets by concerted anticompetitive actions can be liable to victims in only one market, much less that they can be liable only in the market that is the first locus of restraint, regardless of the identity of the market that motivated the restraint.

Market Manipulation Class Actions

- *In re SSA Bonds Antitrust Litig.*, 420 F. Supp. 3d 219 (S.D.N.Y. 2019)
  - Investors alleged foreign bond traders and banks operating as dealers conspired to restrain trade in market for supranational, sovereign, and agency (SSA) bonds.
  - District Court dismissed for lack of jurisdiction and improper venue and affirmed that investors lacked antitrust standing because alleged misconduct occurred in the inter-dealer "market" and not the dealer-to-customer market where investors transacted.
- *In re Mexican Gov't Bonds Antitrust Litig.*, 412 F. Supp. 3d 380 (S.D.N.Y. 2019)
  - Pension funds alleged that financial institutions conspired to artificially depress auction prices for Mexican government bonds and artificially inflate secondary market prices of those bonds.
  - District Court dismissed the complaint because plaintiffs impermissibly relied on "group pleading" by failing to articulate link between allegations and the specific defendants.

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Securities Class Action Developments

Third Circuit Application of SLUSA

- *North Sound Capital, LLC v. Merck & Co, Inc*., No. 18-2317, 2019 WL 4309663 (3d Cir. Sept. 12, 2019).
  - Putative class members opted out of securities class settlements and filed individual actions. District Court dismissed state law fraud claims as precluded by Securities Litigation Uniform Standards Act of 1998 ("SLUSA") on basis that class action and opt-out actions had "proceeded as a single action."
  - The Third Circuit reversed. Opt-out plaintiffs could pursue state law claims against the same defendants because their suits did not fall within the definition of a "covered class action" as defined by SLUSA.
  - Held: Two suits are only subject to SLUSA if the actions are combined for case management or for the resolution of a common issue.
  - Based on this ruling, opt-outs may now proceed with state law claims seeking similar relief as long as there is no "actual coordination" between class action and the opt-out lawsuits.

Early COVID Securities Class Actions

- *Wandel v. Gao*, No. 1:20-cv-03259 (S.D.N.Y. Apr. 24, 2020) (omissions)
  - Believed to be first COVID-19-related case filed in connection with an IPO.
  - Putative class action brought by shareholder against company leasing and managing apartments in China, including Wuhan.
  - Alleged: January 2020 IPO registration statement failed to fully disclose its pandemic-related risks and rental market demand in light of COVID; only "obliquely warned" that "business could…be adversely affected by the effects of Ebola virus disease, H1N1 flu, H7N9 flu, avian flu, Severe Acute Respiratory Syndrome, or SARS, or other epidemics," without specifically referencing COVID-19, even though as of the offering materials' effective date "the coronavirus was already ravaging China — particularly Wuhan."

Early COVID Securities Class Actions

- *Yannes v. SCWorx Corp.*, No. 1:20-cv-03349 (S.D.N.Y. Apr. 29, 2020)
  - Putative investor class action against healthcare services company alleged to have artificially inflated its stock by falsely claiming to have received purchase order to sell millions of COVID-19 rapid testing kits.
  - Investment research firm referred to the purported deal as "completely bogus" and backed by fraudsters and convicted felons, causing severe drop in company's stock.
  - Additional derivative and putative class action claims based on similar allegations have since been filed.
    - *See Lozano v. Schessel*, No. 1:20-cv-04554 (S.D.N.Y. June 15, 2020) (derivative complaint);
    - *Leeburn v. SCWorx Corp.*, No. 1:20-cv-04072 (S.D.N.Y. May 27, 2020) (proposed class action).

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COVID-19 Insurance Coverage Class Actions

COVID-19 Insurance Class Action Trends

- The coronavirus pandemic has been disastrous for business operations.
- Company losses stem from, among other things, government-ordered closures, reductions in employee productivity, and changes in consumer purchasing behavior.
- Companies are increasingly looking to their insurance carriers to try to recover their losses. For the most part, insurers do not share their policyholders' view that pandemic-related losses are covered business interruption losses.
- Although insurance disputes are generally fact-specific, and highly dependent on the circumstances of the loss and the policy language at issue, there has been a push to aggregate coronavirus disputes through class actions and multidistrict litigations (MDLs).

COVID-19 Insurance Class Action Trends

- To date, more than 200 class actions have been filed throughout the country. Sixteen have been filed in the Second Circuit, and 30 have been filed in the Third Circuit, which many believe to be more insured-friendly.
- The class action cases are in their initial stages, and, accordingly, courts have yet to address their suitability for class status.
- There are significant questions, however, about whether plaintiffs can establish commonality and typicality, among other requirements, due to the differences in the types of losses experienced by policyholders (including whether the coronavirus was actually present at an insured's location), the applicable policy language, and the specifics of the government order(s) with which an insured complied.

COVID-19 Insurance Class Action Trends

- In an early win for insurers, on August 12, 2020, the Judicial Panel on Multidistrict Litigation ruled against a single nationwide MDL for coronavirus business insurance claims. *See IN RE: COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2942.
- Notwithstanding plaintiff's lawyer Mark Lanier's plea that "the world economy" depended on certification of an MDL, the JPML found that "different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries located in different states" precluded MDL treatment.
- The JPML did, however, leave the door open for insurer-specific MDLs. The JPML will hear argument on September 24, 2020 as to whether MDLs specific to Lloyd's, Cincinnati, Travelers, Hartford, and Society Insurance should proceed.

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