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Litigators of the Week: Knocking Out Class Certification for a Second Time in the Marriott Data Breach MDL

By Ross Todd

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Twice, a certified class of Marriott International Inc. guests whose personal information was hacked in 2018 has gone up to the Fourth Circuit.

And this week, for the second time in less than two years, the appellate court granted defendants in the multidistrict litigation a rare interlocutory win, scuttling class certification.

Back in August 2023, the appellate court found that U.S. District Senior Judge Paul Grimm in Greenbelt, Maryland, erred by granting class certification before considering whether the plaintiffs had signed valid and enforceable class-action waivers. «The time to address a contractual class waiver is before, not after, a class is certified,» Circuit Judge Pamela Harris wrote for the panel at the time, remanding the case to consider the waiver issue.

On Tuesday, with Grimm retired and the MDL reassigned to U.S. District Judge John Preston Bailey in Wheeling, West Virginia, the Fourth Circuit reversed class certification entirely. Bailey had ruled that Marriott waived its class action waiver argument by proceeding with the MDL,

Courtesy photos

L-R: Matthew S. Hellman & Lindsay Harrison ofJenner & Block, and Devin S. Anderson & Craig S. Primis of Kirkland & Ellis.

and, even if it hadn't, the provision would be invalid and unenforceable.

This week, Circuit Judge Pamela Harris wrote for the unanimous panel—the same three judges who heard the prior appeal in the case—saying they read the waiver provision differently. "Parties in an MDL do not act in a representative capacity, and pretrial MDL consolidation does not strip cases of their 'individual' nature," Harris wrote. "We can find no other court holding that a defendant's participation in an MDL deprives it of the right to rely on a contractual class-waiver defense, and we will not be the first.".

Our Litigators of the Week are **Matthew Hellman** and **Lindsay Harrison** of **Jenner &**

Block, who represent Marriott, and **Devin Anderson** and **Craig Primis** of **Kirkland & Ellis**, who represent Accenture, the IT service provider that managed the hacked database.

Lit Daily: How would you characterize what was at stake here for your clients?

Matt Hellman: This one was pretty big. A nationwide MDL certifying a really large class. The parties had been litigating for years, and now we were finally going to learn if our class defenses were valid. Not only were the classes at issue huge, but they were bellwether classes. Whatever happened here was going to affect an even larger number of claims down the line.

Devin Anderson: For our client, Accenture, the district court's decision to certify "issue" classes on just two elements of a cause of action set up the prospect of a class trial that would not even resolve a single plaintiff's claims, and would at least theoretically pave the way for millions of follow-on individual trials to resolve complex issues of injury, causation and damages. We did not think that procedure was supported by Rule 23 or workable as a practical matter, and we are gratified that the Fourth Circuit rejected that approach in this case.

How did this matter come to you and your firms?

Lindsay Harrison: We are fortunate to have a longstanding relationship with Marriott dating back to when Matt and I were young associates. Because we know the company so well, when Marriott first announced the data security incident in November 2018, they brought us in to help manage the response alongside the incredible team at Marriott. There was a lot of incoming, which included the class action lawsuits that were ultimately sent to the MDL. Our co-counsel at **Baker & Hostetler** ably handled the litigation in the MDL, and then we came back in for the appeals—one after the first class certification order, and then this one again.

Craig Primis: We have had a long and productive working relationship with Accenture, and our team has had a lot of success fending off class actions more generally. When plaintiffs added Accenture as a defendant in this case in the summer of 2019, our team was a natural fit.

Who all was on your team and how did you divide the work?

Primis: Devin and I have been on this matter from day one, and Devin has led our team alongside our partner **Emily Long** for the past six years through motions to dismiss, fact discovery, expert discovery, class certification and appeal. Devin argued all the key motions and appeals in this case and achieved a great outcome for Accenture. We have had a great team at our client, Accenture, as well.

Hellman: We had the kind of team that makes Jenner special. In addition to Lindsay and me, the team had three appellate all-stars—our partner **Liz Deutsch** and two of our associates, **Mary Marshall** and **Emanuel Powell**. We didn't divide up the work so much as serially work through all the issues in the case together. We traded many (many) drafts back and forth. Between the lengthy case history and number of issues in play, the challenge in the briefing was to tell a clear story that kept the court focused on the big reasons why we thought we were right. And all of this work built on the superb work that Jenner lawyers had done over the years from the prior appeal. And of course we had the benefit of the Baker team, which knew everything there was to know about the proceedings in the district court and were thought partners throughout. And we also coordinated well with the Accenture team, which presented separate but related issues in their briefs.

What's important in this decision to data breach defendants and other defendants at the class certification stage?

Anderson: As a lawyer who spends a lot of time in both trial and appellate courts in data-breach cases, I can say that this decision is very important. It is the first data-breach appellate decision to grapple with these issues of injury, class waiver and the use of issue classes. Both the Fourth Circuit's decision rejecting the use of issue classes in this case and the district court's decision below, which rejected plaintiffs' theory that they experienced class-wide harm to the "value" of their personal information, signal that defendants in data-breach cases may have strong defenses at class certification.

Harrison: A defendant facing an onslaught of class action litigation shouldn't have to prove dozens of times that the class waiver its customers agreed to is enforceable. But that was the implication of the position taken by the plaintiffs in this case. They argued that by agreeing to have all the cases put into an MDL for pretrial proceedings, Marriott had waived its contractual right to litigate individually, without class actions. So they were saying you have to choose between an MDL and enforcement of a class waiver. If that were upheld, it would put companies in a terrible position. And given how many class actions are filed today, this could have been disastrous for businesses. The plaintiffs also seemed to think that the class waiver here was not enforceable because it wasn't coupled with an arbitration clause, but that argument went against a wall of precedent enforcing class waivers. If that had been affirmed, it would have rendered a huge number of class action waivers unenforceable.

With this decision in-hand, what are the moments from oral argument that stand out to you?

Hellman: There were a few things that I can remember—although it's mostly a haze. It felt a little bit like a reunion because we were back in front of the same panel in the same courtroom as the first go-around. The panel asked their characteristically sharp questions, but it felt like they had fewer for me than I was expecting. So I felt pretty good when I sat down. Some of the Marriott law department's senior leaders were in attendance at both oral arguments, so it was nice to deliver a pair of wins—the first being temporary, and this one a little longer-lasting …

Anderson: We have been litigating class certification issues in this case for nearly four years, and this was our second trip to the Fourth Circuit on interlocutory review. When I stood up for rebuttal, I decided to make a plea for the court not to send the class issues back to the district court to "try again." I'm not sure whether that did the trick, but we are pleased that the Fourth Circuit made clear that this class phase of proceedings is complete.

You've been up at the circuit court twice on interlocutory appeal now. Is this the MDL process working or malfunctioning?

Primis: This was just one part of the overall MDL process, which seems to be working. The provision for interlocutory review of class-certification decisions is there for circumstances precisely like these, where there are important issues that can have a significant impact on the shape of a case. The fact that the Fourth Circuit granted review both times the district court made rulings that in our view were outlier positions shows that the process is working.

Hellman: It's taken awhile, but I think this decision will help it work better in the future. The Fourth Circuit clarified that just because it's an MDL, that doesn't mean that normal rules for raising defenses, or the normal applicability of class waivers, are somehow changed. That

kind of regularity and predictability should make the MDL process faster and more efficient going forward.

What comes next here?

Harrison: The case will be remanded back to the district court. The Fourth Circuit was clear that the class waiver is broad and applies to all the plaintiffs' claims, including under consumer protection statutes, negligence claims and contract claims. Absent a certified class, all that remains are individual claims by individual litigants. Because there's no evidence that any of the individual plaintiffs were injured, and the plaintiffs didn't even try to demonstrate anything like identity theft resulting from this incident, we can't imagine there is much left for individual plaintiffs to fight over.

Anderson: We are back to the trial court, where I'm sure there will be further discussion of what proceedings will follow.

What can others take from what you accomplished?

Hellman: The Fourth Circuit gave us the opportunity not once, but twice, to explain why the certification orders here had to be reversed. The panel could not have been more prepared each time, and the result was a decision that we obviously think is correct for our case, but which will also illuminate how these kinds of cases are supposed to work going forward.

Anderson: The importance of making sound strategic decisions in fact and expert discovery. Behind every successful appeal is a lot of hard work in the trial court. The work the defense side did in fact and expert discovery to knock down plaintiffs' theories of harm during these earlier phases of the case set us up for success on appeal.

What will you remember most about this matter?

Hellman: The way the team honed our arguments over not just one, but two, appeals—each with its own 23f petition before we briefed the merits. It's so satisfying in our profession to work with really, really smart people to identify the best arguments, test them and then keep on refining them so that our clients are in the best possible position. That really never gets old, and we're so proud to have achieved this victory for Marriott.

Harrison: The way the result grew out of an incredible amount of collaboration. Collaboration internally at Jenner, but also with Marriott, with Baker and with Kirkland. Our arguments continued to get better every time we collaborated with our colleagues and clients and co-counsel, so I will remember this as a true collective achievement.

Anderson: I do a lot of class action and data-breach work in both trial and appellate courts, so I'll remember the interesting and knotty class-certification issues that we briefed and litigated before the district court and the Fourth Circuit. Judge Niemeyer suggested the case might be a lawyer's paradise at oral argument, and he wasn't wrong.

Primis: As a senior litigator at this firm, what I'll remember most about this case is watching a partner like Devin, whom I've mentored over the years, take charge and develop a winning strategy over this long-running case. There is nothing better.