

Class Action Group Of The Year: Sheppard Mullin

By **David Holtzman**

Law360 (February 7, 2023, 2:02 PM EST) -- Sheppard Mullin Richter & Hampton LLP settled several major lawsuits in the past year, including a historic agreement with New York City's Metropolitan Transportation Authority to make nearly all of its subway stations accessible for people with disabilities, earning the firm a spot among Law360's 2022 Class Action Groups of the Year.

The firm actually settled two cases with the MTA, the first of which, filed in 2017 in state court, claimed that the lack of elevators or ramps in many subway stations violated the city's Human Rights Law. Sheppard Mullin filed the second case in 2019 in federal court, calling the city's failure to install stair-free access as part of station renovations a violation of the federal Americans with Disabilities Act.

In both cases, Sheppard Mullin and nonprofit law firm Disability Rights Advocates represented a group of New York organizations and individuals seeking to provide equal access to the subway system.

"The use of the New York law was novel — that the overriding inaccessibility of the station was a violation of disabled people's human rights," Anna McLean, a leader on Sheppard Mullin's class action team, told Law360. "That was not a theory that had previously been advanced by anyone."

"Our argument was that anything under federal law is really a floor for accessibility, not a ceiling, because New York has explicitly said that its law is more expansive," said Daniel Brown, who led Sheppard Mullin's team on the case.

The settlement calls for at least 95% of the 364 subway stations that are currently inaccessible to people with disabilities to be upgraded by 2055. The two sides agreed on a schedule, with improvements to the first 81 stations to be included in the MTA's next five-year capital plan. By 2035, half of the stations should become accessible, McLean said.

Another case of significance for Sheppard Mullin was its defense of Axos Financial Inc., formerly BofI Federal Bank, in a securities case. Investors had accused the company of making false statements about underwriting standards, internal controls and compliance that resulted in a 47% stock drop.

John Stigi and Polly Towill argued the case for Sheppard Mullin in the Southern District of California, successfully challenging the investors' claim that statements by its client led to the stock decline. Instead, the case focused on two other causes: a whistleblower who said he was terminated for publicizing certain activities



at Axos, and articles on an online blog popular with investors looking to short-sell the company's stock. On appeal, the Ninth Circuit found the whistleblower claim to be plausible, but that the articles did not influence the stock price.

"The Ninth Circuit found that cannot form the basis of a claim because you can't rely on it to prove loss causation," said Jay Ramsey, also a leader of Sheppard Mullin's class action defense team. "A lot of issues coming up now with securities cases are arising from short-seller reports, and this holding has been cited several times by district courts since then."

Sheppard Mullin also won a notable state court case that went to a jury trial, representing Dignity Health, a large hospital provider in California. The company was challenged over how it handled meal and rest break periods for employees.

The action was filed as a Private Attorneys General Act suit, a type of litigation particular to the Golden State in which employees can sue on behalf of themselves and their colleagues.

"Under that law, if you have one violation for your named plaintiff — there were three nurses named — you can try to prove that same violation happened to, in this case, 2,300 other individuals. If it did, you can seek penalties much like a class action," Ramsey said.

Daniel McQueen and Nora Stilestein handled the case for Sheppard Mullin. A turning point came in their challenge to how the plaintiffs conducted a survey of Dignity Health employees to show how many of them suffered meal and rest break violations. Outside the jury's presence, McQueen picked apart the survey's sample size, the questions asked and how the data was analyzed. Afterwards, the court threw out the survey.

One example of the holes McQueen found in the survey was the lack of evidence that employers actually knew their staff had missed meal or rest breaks, he said.

"That was critical, because the employer could only be liable if they knew the employees had in fact missed their breaks," McQueen said. "The fact that a tree fell in the forest is meaningless unless someone knew about the tree falling."

One other case Sheppard Mullin is proud of is its win in *Gordon v. Target Corp.* in the Southern District of New York. Paul Garrity was the firm's lead attorney on the case.

The case was one of several filed in recent years against retailers and infant formula makers for misleading marketing. In this case, Target was selling formula made by Perrigo Co. geared toward children over a year old, rather than infants. The plaintiff claimed that information on containers on store shelves hid the fact it was not comparable to cow's milk because it had added sugar and it wasn't certified as nongenetically modified.

While a judge in a similar case in the Eastern District of New York turned away a toddler formula maker's motion to dismiss, the judge in Sheppard Mullin's case found the container labels would not have deceived reasonable customers.

For McLean, the outcome marked yet another instance of Sheppard Mullin attorneys changing the class action landscape.

"It turned the tide in this kind of litigation," McLean said.

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