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# Class Action Round-Up

Fall 2013


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# Where the (Class) Action Is

The third quarter saw a number of lower courts interpreting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), with varying results. Courts have also continued to explore the contours of CAFA removal (including exceptions to CAFA jurisdiction), arbitration provisions and who can enforce them, and the "silent killer" of class certification—the ascertainability requirement.

The third quarter was also noteworthy for the number of key *certiorari* decisions from the U.S. Supreme Court. The court agreed to revisit the "fraud-on-the-market" evidentiary issue in the *Halliburton Co. v. Erica P. John Fund* securities class action. At the same time, the court denied cert in *Marek v. Lane*, which asked whether a cy pres remedy that provides no direct relief to class members comports with the requirement of Federal Rule of Civil Procedure 23(e)(2).

The certiorari petitions remain pending in the *Whirlpool/Sears* front-loading washing machine class actions, where the defendants argue that, in light of *Comcast*, cases involving consumers who allegedly experienced a product defect have to be litigated on a member-by-member basis. ■



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# Antitrust

## Applying *Comcast*, D.C. Circuit Derails Freight Surcharge Class

*In re Rail Freight Fuel Surcharge Antitrust Litigation*, No. 12-7085 (D.C. Cir.) (Aug. 9, 2013). Vacating class certification.

Shippers who used railroads to ship items alleged that a number of railroads conspired to fix fuel surcharge rates. The shippers moved for class certification based on expert regression models that purportedly measured antitrust impact across the putative class, but as the railroads' expert pointed out, the plaintiffs' models produced a number of "false positives" because it "detect[ed] injury where none could exist." The plaintiffs' expert conceded the flaw, but the district court nevertheless certified the class because, in its view, the plaintiffs' regression models were "plausible." The court didn't address the flaw in the plaintiffs' statistical models.

Applying *Comcast*, the D.C. Circuit vacated class certification because the district court ignored the flaw in the plaintiffs' statistical models, and that flaw went to whether there was common proof of classwide injury: "It is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it."

## Court Certifies Indirect-Purchaser Class, Spurning Defense's *Comcast* Arguments

*In re Cathode Ray Tube (CRT) Antitrust Litigation*, No. 3:07-cv-05944 (N.D. Cal.) (Sept. 24, 2013). Judge Conti. Granting class certification.

Indirect purchasers of cathode ray tubes—the tubes are used in electronics products such as televisions and computer monitors—accused CRT manufacturers of price-fixing. The indirect purchasers proffered an expert report claiming that the manufacturers' alleged anticompetitive practices drove up the cost to direct buyers, who in turn passed on inflated prices to the indirect purchasers.

Judge Conti certified the indirect purchaser class, rejecting the defendants' argument that *Comcast* requires "class action plaintiffs to prove and calculate their damages at the class certification phase." Judge Conti ruled that the indirect purchasers' expert used a plausible damages model. That was sufficient, the court reasoned, because plaintiffs don't have to prove the merits at class certification.

## Michigan Court Certifies Class of Detroit Nurses

*Cason-Merenda v. VHS of Michigan, Inc.*, No. 06-15601 (E.D. Mich.) (Sept. 13, 2013). Judge Rosen. Granting class certification.

Registered nurses (RNs) sued eight Detroit-area hospitals alleging that the hospitals' providers conspired to hold down wages by exchanging compensation-related information. The RNs settled with seven hospitals, leaving defendant VHS to litigate the claim. The district court certified a damages class, concluding that common legal and factual issues regarding wage suppression predominated.

### CLASS-IFIED INFORMATION

See the A&B Securities Litigation Group's advisory "The Supreme Court to Revisit the 'Fraud-on-the-Market' Theory in Halliburton."

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### ▪ Court Denies Milk Consumers Class Certification

*In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation*, No. 1:09-cv-03690 (N.D. Ill.) (Aug. 23, 2013). Judge Dow. Denying class certification.

Consumers of dairy products sued Dairy Farmers of America Inc. alleging that it fixed the price of dairy products sold on futures exchanges.

Judge Dow denied class certification because the alleged price-fixing took place in a market that didn't include the indirect purchasers. The indirect purchasers belong to a retail market of finished dairy products, but the allegedly restrained market consisted of cheese and milk futures bought and sold on commodities exchanges.

### ▪ Plaintiffs Can't Have Their Cake and Eat It, Too

*In re Titanium Dioxide Antitrust Litigation*, No. 10-0318 (D. Md.) (Aug. 26, 2013). Judge Bennett. Granting motion to compel arbitration.

Small purchasers of titanium dioxide alleged that, beginning in 2003, leading titanium-dioxide producers conspired to fix prices. After the court granted class certification, the defendants filed a joint motion to compel arbitration.

Judge Bennett granted the motion, broadly applying contractual clauses on arbitration, forum selection, class action waiver, and jury-trial waiver. The court also permitted the nonsignatory defendants to arbitrate under the doctrine of equitable estoppel: "[Plaintiffs] cannot rely on their contracts to assert this Sherman Act claim, yet repudiate the clauses within those contracts that preclude certain members from participating in this class action litigation." The court then amended the class definition to exclude claimants whose contracts contained arbitration or other relevant provisions. ■


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# Banking

## Seventh Circuit Reverses Decertification Order in ATM Case

*Hughes v. Kore of Indiana Enterprise Inc.*, No. 13-08018 (7th Cir.)(Sept. 10, 2013). Reversing decertification order.

The Seventh Circuit reversed an order from the Southern District of Indiana decertifying a class of ATM users. The district court decertified the class in part because it believed that a class action would not be superior to individual suits, but the Seventh Circuit held that class treatment was appropriate because lawyers would not likely take on an individual case where the fees would be so low. The district court also decertified the class because providing the class members with notice would require subpoenas to hundreds of banks. The Seventh Circuit disagreed, holding that notice through publication (on ATMs and in the local paper) would suffice.

## Home Loans Are Inherently Individualized

*In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, No. 1:10-md-2193 (D. Mass.) (Sept. 4, 2013). Judge Zobel. Denying class certification.

Twenty-six different proposed classes of borrowers sued Bank of America, alleging that it mismanaged their requests for loan modifications under the new federal home-loan modification program. Judge Zobel denied certification to all of them because each borrower's loan modification depended upon their satisfying several prerequisites, none of which were susceptible to classwide proof.

## Another Loan-Modification Class Foreclosed by Individualized Inquiries

*In re CitMortgage Inc. Home Affordable Modification Program (HAMP) Litigation*, No. 2:11-ml-02274 (C.D. Cal.) (Oct. 7, 2013). Judge Fischer. Denying class certification.

CitiMortgage borrowers that entered into home-loan modification agreements under federal relief programs sued CitiMortgage, alleging that it failed to reach a decision regarding modification of the plaintiffs' home loans before the date required under the loan documents. The court denied class certification because the putative class members' claims turned on individual evidence about each borrower's loan. The court also relied on *Comcast* to hold that class certification was inappropriate because the borrowers had failed to propose a method of measuring damages on a classwide basis. ■


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# Consumer Fraud

- **Always the Ascertainability Requirement. Always.**

  *Hayes v. Wal-Mart Stores, Inc.*, No. 12-2522 (3d Cir.) (Aug. 2, 2013). Vacating class certification order and remanding.

  In a victory for class defendants of all kinds, the Third Circuit relied on Rule 23's implied ascertainability requirement to reverse a class certification order. The plaintiff alleged that Sam's Club offered and sold consumers extended warranty "Service Plans" on various "as is" items sold in its store, even though the warranty did not extend to those items. In vacating the certification of a Rule 23(b)(3) class, the Third Circuit cited its prior decision in *Marcus v. BMW of North America, LLC*, 687 F.3d 583, 593-94 (3rd Cir. 2012), and reaffirmed that a plaintiff "must show by a preponderance of the evidence that there is a reliable and administratively feasible method for ascertaining the class." The court held that the plaintiff provided no factual basis for determining the Sam's Club members who purchased "as is" items. The court also held that the evidence was thin on numerosity and predominance and thus ordered the district court to reevaluate those requirements or remand.

- **Retailer Prohibited from Relying on Manufacturer's Arbitration Clause**

  *Murphy v. DIRECTV, Inc.*, No. 11-57163 (9th Cir.) (July 30, 2013). Affirming and denying in part order compelling arbitration.

  DIRECTV subscribers alleged that Best Buy presented certain DIRECTV equipment as "for sale" when in fact the equipment was treated as a lease from DIRECTV. DIRECTV's customer agreement requires arbitration. The district court required the plaintiffs to arbitrate their claims against both DIRECTV and Best Buy, finding that Best Buy was entitled to arbitrate despite not being a party to the agreement.

## CLASS-IFIED INFORMATION

Partner Cari Dawson will be presenting on *Comcast* at the IADC 2014 Midyear Meeting.

The Ninth Circuit concluded that DIRECTV could enforce the arbitration provision, but not Best Buy. The court rejected Best Buy's arguments under the theories of equitable-estoppel, agency, and third-party beneficiary. The equitable estoppel argument failed because the plaintiffs relied "not on the Customer Agreement, but on Best Buy's alleged words and deeds in the course of transactions leading to the acquisition of equipment." The court also found that Best Buy and DIRECTV had disavowed an agency relationship and that the Customer Agreement was "ambiguous with respect to the parties' intent to benefit Best Buy."

- **Caught in a Spin Cycle: Seventh Circuit Recertifies Washing Machine Classes**

  *Butler v. Sears, Roebuck & Co.*, Nos. 11-8029, 12-8030 (7th Cir.) (Aug. 22, 2013). Reinstating class certification.

  Soon after the Supreme Court vacated and remanded *Butler v. Sears* to the Seventh Circuit following its decision in *Comcast*, the court of appeals reinstated its earlier ruling certifying two class actions against Sears over allegedly defective washing machines. The court repeated its earlier holding that the "basic question presented by the mold

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claim—are the machines defective in permitting mold to accumulate and generate noxious odors?—is common to the entire mold class," despite the potential for damages to vary across class members.

Judge Posner distinguished *Comcast*, holding that there was "no possibility in this case that damages could be attributed to acts of the defendants that are not challenged on a classwide basis; all members of the mold class attribute their damages to mold and all members of the control-unit class to a defect in the control unit."

Judge Posner then warned against focusing too closely on disparate damages in determining whether or not to certify a class: "It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individuals can be readily determined in individual hearings, in settlement negotiations or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification."

## ▪ *Dukes* Kills Another Point-of-Sale Class Action

*Eastman v. First Data Corporation*, No. 10-4860 (D.N.J.) (July 31, 2013). Judge Walls. Denying class certification.

Continuing the trend of an enhanced commonality analysis under Rule 23 post-*Dukes*, the District of New Jersey denied certification of a class of merchants suing the provider of hardware and software used to process credit card transactions at the point of sale (POS). The plaintiff alleged that the defendant defrauded "thousands of small businesses by charging an exorbitant and unconscionable fee under a purported lease agreement."

Judge Walls held that the plaintiff failed to establish that a classwide proceeding would generate "common answers." First, the plaintiff failed to show that she could prove, with common evidence, that each class member was charged usurious interest, and the plaintiff's expert failed to "take into account the additional goods and services that [defendants] provided to [their] customers in addition to the POS terminals." Second, the plaintiff failed to show that she could prove, with common evidence, that defendants failed to disclose certain information because "[t]estimony from every individual merchant and sales representative would be needed in order to determine whether [defendants] disclosed certain information." Third, the plaintiff failed to show that unconscionability could be proven with common evidence because "the unconscionability inquiry will require determining the value to each individual merchant."

## ▪ "All Natural" v. "Nothing Artificial": Walking a Fine Line in California

*Astiana v. Kashi Company*, No. 3:11-cv-1967 (S.D. Cal.) (July 30, 2013); *Thurston v. Bear Naked, Inc.*, No. 3:11-cv-2890 (S.D. Cal.) (July 30, 2013). Judge Huff. Granting in part and denying in part class certification.

In two related cases, plaintiffs accused Kashi and its subsidiary Bear Naked of falsely advertising certain products as "all natural" or containing "nothing artificial" despite the presence of artificial or synthetic ingredients. The court declined to certify a class of purchasers of all of Kashi's products that were labeled "100% Pure & Natural" or "100% Natural." The court ruled that the plaintiffs failed "to sufficiently show that 'natural' has any kind of uniform definition among class members, that a sufficient portion of class members would have relied to their detriment on the representation, or that that defendant's representation of natural in light of the presence of the challenged ingredients would be considered to be a material falsehood by class members."

But the court certified a class of consumers who purchased a specific subset of the defendants' products labeled as "natural," mostly because the defendants conceded that these products were synthetic. The court determined that these products contained ingredients that the

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FDA has ruled "are not permitted in certified 'organic' foods." Similarly, the court certified a class of consumers who purchased products labeled as containing "Nothing Artificial." The court rejected Kashi's argument that differences in the products and motivations of their customers "prevent the bulk of issues from being common," noting that courts "routinely find commonality in false advertising cases that are materially indistinguishable from this matter." It was sufficient to the court that "all class members were exposed to such representations and purchased Kashi products, creating a 'common core of salient facts.'" ■

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# ERISA

- **Sixth Circuit: Retirees Can't Use ERISA to Circumvent Arbitration**

  *VanPamel v. TRW Vehicle Safety Systems, Inc.*, No. 12-2173 (6th Cir.) (July 23, 2013). Compelling arbitration.

  TRW retirees alleged that their former employer's modification of their health care benefits breached the collective bargaining agreement negotiated by their union. The district court granted TRW's motion to compel arbitration. On appeal, the plaintiffs conceded that the CBA contained a general arbitration provision, but argued that, under *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), the arbitration cover did not cover their claims because it did not specifically mention ERISA claims. The court disagreed, pointing out that, unlike the age-discrimination claims at issue in *14 Penn Plaza*, ERISA claims derive in part from rights that retirees have under a CBA and are thus bound up in the CBA. ■

## CLASS-IFIED INFORMATION

Read *Law360*'s "'Presumption of Prudence' in ERISA Cases at Risk?" by Partner Doug Hinson and Senior Associate Emily Seymour Costin.


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# Insurance

## ▪ *Comcast* Applied to Defeat Insurance Class Action

*Halvorson v. Auto-Owners Insurance Co.*, No. 12-1716 (8th Cir.) (July 3, 2013). Reversing class certification.

Policyholders sued Auto-Owners, claiming that it acted in bad faith and breached coverage provisions in North Dakota auto policies by applying an arbitrary 80th percentile benchmark for determining "usual and customary" medical charges. The district court granted certification because the reasonableness of the 80th percentile benchmark was an issue common to all class members.

The Eighth Circuit reversed under *Comcast* because certain putative class members—for example, those whose medical providers accepted payment at the 80th percentile as payment in full—were not injured and lacked standing. Determining which claimants were injured would require individualized inquiries, and those individualized inquiries would predominate over any common issues.

## ▪ Third Circuit: CAFA Doesn't Apply to Claims Brought by an Association

*Erie Insurance Exchange v. Erie Indemnity Co.*, No. 13-1415 (3d Cir.) (June 28, 2013). Affirming remand to state court.

Four members of a reciprocal insurance exchange sued Erie Indemnity Co. in Pennsylvania state court, claiming that Indemnity had misappropriated more than $300 million in fees. The suit was brought on the association's behalf under a state statute that allowed an association's members to sue in the association's name as trustees ad litem. Indemnity removed the case to federal court under CAFA.

The Third Circuit affirmed the remand to state court because CAFA applies only to cases filed under Rule 23 or a state-law equivalent, and Indemnity did not allege or argue that this case was filed under any rule allowing a representative to bring a "class action." The court was not persuaded by Indemnity's arguments that the "substance" of the allegations mimicked a class action. The case did not meet the CAFA's definition of "class action" because the state statute permitting the suit did not have the look or feel of a class-certification statute. ■


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# Labor And Employment

## Ninth Circuit Relaxes CAFA Removal Standards

*Rodriguez v. AT&T Mobility Services LLC*, No. 13-56149 (9th Cir.) (Aug. 27, 2013). Vacating order remanding case to state court.

*Rodriguez* is the latest in a steady stream of circuit court decisions (and the second recent one from the Ninth Circuit) accepting appeals of remand orders under CAFA's discretionary review provision and then reversing the remand. The plaintiff filed a putative class action against AT&T on behalf of retail sales managers in AT&T wireless stores in the Los Angeles area. After AT&T removed the case to federal court, Rodriguez moved to remand based on his allegations that the "aggregate amount in controversy is less than" $5 million. In response, AT&T submitted declarations showing that the amount in controversy "could not be less than roughly $5.5 million and was likely double that amount." The district court rejected AT&T's evidence and remanded the case to state court, concluding that AT&T had not demonstrated with a "legal certainty" that the case met CAFA's amount in controversy.

Following the Supreme Court's recent decision in *Standard Fire*, the Ninth Circuit held that the plaintiff could not stipulate away CAFA jurisdiction by disavowing aggregate classwide damages more than $5 million. Although a named plaintiff can bind himself, he cannot bind putative class members. The Ninth Circuit also concluded that *Standard Fire* "effectively overruled" the Ninth Circuit's legal-certainty standard. In its place, the Ninth Circuit adopted the widely used preponderance-of-the-evidence standard.

## No Overtime? That Just Ain't Rite.

*Indergrit v. Rite Aid Corporation*, No. 08-Civ-9361 (S.D.N.Y.) (Sept. 26, 2013). Judge Oetken. Granting class certification in part.

### CLASS-IFIED INFORMATION

Review our write-up on *Rodriquez*.

Judge Oetken certified a class of Rite Aid store managers in New York seeking overtime pay. The company tried to stave off class certification by pointing to fluctuations in job responsibilities based on each store's labor allocation, size, location and staff experience. But in the end, the question of whether the managers were exempt employees hinged on common issues about hiring and firing, discipline, supervision, discretion and scheduling.

All was not lost for Rite Aid: The court certified the class only as to liability because the store managers had not shown that damages were susceptible to classwide proof.

## Workers to Nordstrom: Don't Sell Us Short

*Balasanyan and Maraventano v. Nordstrom, Inc.*, No. 3:11-cv-2609; 3:10-cv-2671 (S.D. Cal.) (Aug. 12, 2013). Judge Miller. Granting in part class certification.

Judge Miller approved a California-wide class in two wage lawsuits brought by Nordstrom sales workers. The plaintiffs alleged that the tony department store has an illegal policy of paying sales workers only

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by commission even while they perform non-sales related activities like stocking shelves and attending meetings. The court allowed the class claims to go forward, but only as to time worked before opening and after closing. And the court denied certification of the proposed nationwide class.

### ▪ Another Class Action Waiver Provision Upheld

*Richards v. Ernst & Young, LLP*, No. 11-17530 (9th Cir.) (Aug. 21, 2013). Reversing denial of motion to compel arbitration.

A former Ernst & Young employee brought a wage-and-hour claim against the Big Four accounting firm. Ernst & Young moved to compel arbitration, but the district court denied the motion because it concluded that the company had waived its right to arbitration by failing to assert it as a defense in a separate action by two other former employees that later was consolidated with the plaintiff's claims. The Ninth Circuit reversed, noting that a party asserting waiver bears a heavy burden of proof. Because the plaintiff was not prejudiced, the court reasoned, Ernst & Young could force arbitration.

### ▪ Second Circuit: FLSA Does Not Preclude Waiver of Class Claims

*Raniere v. Citigroup, Inc.*, No. 11-5213 (2d Cir.) (Aug. 12, 2013). Reversing denial of motion to compel arbitration.

Citigroup employees sought to recover uncompensated overtime wages. Citi moved to compel arbitration. The district court held that the class waiver in the arbitration clause was unenforceable under the FLSA, so it denied Citi's motion.

The Second Circuit reversed, holding that the FLSA does not preclude the waiver of class claims. It also rejected the employees' argument that collective action waivers are unenforceable when it is not economically feasible for an individual to pursue their statutory rights.

### ▪ There's No Place Like Home: Defendant Permitted to Assert CAFA's Home-State Exception Three Years into the Litigation

*Gold v. New York Life Insurance Co.*, No. 12-2344-cv (2d Cir.) (Sept. 18, 2013). Affirming dismissal.

The Second Circuit affirmed the dismissal of the plaintiffs' class complaint based on CAFA's "home state" exception. Under that exemption, a federal district court must dismiss a class action when two-thirds or more of the class and the primary defendants are citizens of the state in which the action was filed.

On appeal, the plaintiffs argued that New York Life waived any argument based on the "home state" exception because it waited three years to raise it. Explaining that the home-state exception is not jurisdictional, the Second Circuit held that New York Life raised the exception within a reasonable time because it did not realize until class discovery that two-thirds of the class were New York citizens.

### ▪ Lowe's in Need of Improvement?

*Shepard v. Lowe's HIW, Inc.*, No. 3:12-CV-03893 (N.D. Cal.) (Aug. 19, 2013). Judge White. Granting class certification.

A group of individuals who installed products for Lowe's sued the company, claiming that they were misclassified as independent contractors and denied employment benefits as a result. The workers argued that Lowe's controlled all aspects of their installation jobs by designating the installers' customers, requiring the installers to wear Lowe's shirts and hats, and instructing the installers to tell customers that they were Lowe's employees.

Judge White granted class certification, concluding that minor differences among the workers' contracts did not override the common question of whether the workers were free from Lowe's control.

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### ▪ Another Blow to Plaintiffs in the Continuing *Dukes v. Wal-Mart* Litigation

*Dukes v. Wal-Mart Stores, Inc.*, No. 01-02252 (N.D. Cal.) (Aug. 2, 2013). Judge Breyer. Denying class certification.

The *Dukes* plaintiffs suffered yet another defeat. The district court denied certification, holding that the plaintiffs failed to present sufficient statistical or non-statistical evidence of disparate treatment of the putative class and that the narrowed class still suffered from the same commonality problems identified by the Supreme Court—the plaintiffs could not identify a specific employment practice that was applicable to the class as a whole.

### ▪ Certification Denied Where Plaintiff Failed to Show Systemic Policy of Withholding Pay

*Greenhill v. Wise Alloys, LLC*, No. 3:12-CV-1849-HGD (N.D. Ala.) (Sept. 23, 2013). Judge Bowdre. Rejecting class certification.

The court denied class certification under the Fair Labor Standards Act to a putative class of workers seeking overtime wages, concluding that the plaintiff failed to allege a systematic policy to withhold pay. ■


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# Privacy

- **Faxes Lead to Fines: Seventh Circuit Affirms TCPA Decision on Faxed Ads for CPA Services**

  *Holtzman v. Turza*, Nos. 11-3188, 11-3746 (7th Cir.) (Aug. 26, 2013). Affirming class certification and summary judgment.

  The Seventh Circuit upheld the certification of a class of consumers who received unsolicited faxes advertising the defendant's CPA services. The unsolicited faxes—which the appellate court concluded were "advertisements" under the statute—violated the TCPA.

- **Ninth Circuit Revives FDCPA Class**

  *Holmes v. NCO Financial Services, Inc., et. al.*, No. 11-56969 (9th Cir.) (Aug. 16, 2013). Reviving class action.

  The Ninth Circuit revived a class action against debt collector NCO Financial Services, holding that a reasonable debt collector in NCO's position should have known that the named plaintiff's account was disputed because NCO did not have access to essential credit information before reporting the plaintiff's account as delinquent. The Ninth Circuit held that the plaintiff's evidence supported an inference that NCO's failure to learn that the account was disputed (and later failure to report as much) violated the FDCPA.

- ***Genesis* of Expanded Rule 68 in Florida District Courts**

  *Delgado v. Collecto, Inc.*, No. 8:13-cv-2511 (M.D. Fla.) (Dec. 5, 2013). Judge Covington. Granting motion to dismiss.

  *Jeffrey M. Stein, D.D.S., M.S.D., P.A. v. Buccaneers Limited Partnership*, No. 8:13-cv-2136 (M.D. Fla.) (Oct. 24, 2013). Judge Merryday. Granting motion to dismiss.

## CLASS-IFIED INFORMATION

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In a pair of TCPA class actions, Florida trial courts granted the defendants' motions to dismiss following Rule 68 offers of judgment to the plaintiffs for full relief of their individual claims. Relying on the U.S. Supreme Court's decision in *Genesis Healthcare v. Symczyk*, 133 S.Ct. 1523 (2013), the district courts ruled that the plaintiffs' "putative class action case[s were] rendered moot when [they were] offered a full and complete judgment under Rule 68." The courts recognized that *Genesis* involved a collective action under the Fair Labor Standards Act, but could "see no reason to confine the Supreme Court's discussion of constitutional principals [sic] narrowly so as to encompass only FLSA cases." With contrary opinions from other federal circuits, the issue is potentially headed to the Supreme Court. An extension of the *Genesis* rule to Rule 23 class actions would provide defendants with a potent weapon. ■


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# Products Liability

- **District Court Declares *Comcast* "Laid to Rest" Any Doubt Whether *Daubert* Is Fair Game at Class Certification Stage**

  Judge Copenhaver. *Coleman v. Union Carbide Corp.*, No. 2:11-cv-366 (S.D. W. Va.) (Sept. 30, 2013). Denying class certification.

  Residents of a small town in West Virginia sued the owners of a silicon alloy plant alleging that the plant emitted contaminates that significantly increased residents' chances of developing a serious illness. The plaintiffs sought certification of two medical-monitoring classes.

  The court denied class certification, holding that the proposed classes were unascertainable and not susceptible to objective identification. The court formed this conclusion after granting the defendants' *Daubert* motions to exclude the plaintiffs' experts. The court noted that because the plaintiffs had relied on their experts' opinions in their efforts to get class certification, the court was not prohibited from addressing the defendants' *Daubert* challenges at the class certification stage. Any suggestion to the contrary, the court declared, had been "laid to rest" by *Comcast*.

- **Third Circuit Sets High Bar for Ascertainability: No Receipts, No Class Action**

  *Carrera v. Bayer Corp.*, No. 12-2621 (3d Cir.) (Aug. 21, 2013). Vacating class certification.

  Purchasers of the One-A-Day WeightSmart diet supplement sued Bayer Corp., alleging that the drug manufacturer had falsely advertised the drug as having metabolism-enhancing effects that it does not possess. The district court certified a class of Florida consumers asserting claims under the Florida Deceptive and Unfair Trade Practices Act.

## CLASS-IFIED INFORMATION

CLE Opportunity: Crisis in the Company – Case Studies in Crisis Situations

The Third Circuit vacated the order on appeal. The Third Circuit concluded that the class was not ascertainable because neither class members nor Bayer (which did not sell the supplement directly to consumers) as likely to have sales records or receipts to corroborate purchases. The court rejected the plaintiffs' arguments that class members could be ascertained either through online purchases and loyalty card records, or through class member affidavits, because the plaintiffs offered no proof of purchase records and consumer affidavits were not reliable.

- **In the Tenth Circuit, Actually Reading the Leases Allegedly Breached on a Classwide Basis Is a Prerequisite to Certification**

  *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, No. 12-3176; and *Chieftan Royalty Co. v. XTO Energy, Inc.*, No. 12-7047 (10th Cir.) (July 9, 2013). Vacating and remanding grant of class certification.

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In a pair of decisions in July 2013, the Tenth Circuit decertified Kansas and Oklahoma class actions filed against XTO Energy, Inc. alleging that the natural gas company had underpaid royalties owed under individual leases by improperly deducting service costs that it paid to "mid-stream" companies to put the gas into marketable condition. According to the complaints, the natural gas company was responsible for the cost of those services, not the lessees.

In decertifying the classes, the Tenth Circuit said that while that may be true, an implied duty to obtain a marketable product did not necessarily exist in all of the underlying leases, any one of which could contain an exception to the duty and the vast majority of which had not even been reviewed by the district courts or class representatives. The court added that questions of whether and at what point the gas at a particular well was "marketable" presented significant commonality problems because, in all likelihood, the answers would require a "well-by-well analysis."

### ▪ Colorado Judge Says Tenth Circuit Would Agree that CAFA Jurisdiction Continues Even After Class Allegations Are Stricken

*Edwards v. Zenimax Media Inc.*, No. 1:12-cv-411 (D. Colo.) (Sept. 27, 2013). Judge Daniel. Denying renewed motion to dismiss.

A Colorado video gamer filed a class action in state court against the manufacturers of *The Elder Scrolls IV: Oblivion*, a video game that allegedly contains a "universal animation" design defect that, "once manifested, effectively ends the player's game and forces him or her to restart." The manufacturers removed the case under CAFA and later moved to strike the plaintiff's class allegations. The district court granted the manufacturers' motion and denied the plaintiff's motion for leave to file an amended class action complaint. But when the manufacturers then moved to dismiss the case, the district court stated that, before deciding that motion, it had to determine whether it had subject matter jurisdiction given that the reformed complaint was now limited to the plaintiff's individual claims.

Recognizing that the Sixth, Seventh, Eighth, Ninth and Eleventh Circuits had all previously ruled that a federal district court retains jurisdiction over a case filed or removed under CAFA notwithstanding the denial of class certification (or the striking of class allegations), the district court determined that the Tenth Circuit would likely follow suit and therefore held that it had subject matter jurisdiction to decide the motion, ultimately denying it on all grounds.

### ▪ District Court to Plaintiff's Counsel: When Choosing a Class Representative from Among Your Friends, at Least Pick Someone without Memory Problems

*Bohn v. Pharmavite LLC*, No. 2:11-cv-10430 (C.D. Cal.) (Aug. 7, 2013). Judge King. Denying motion for class certification.

A consumer filed a class action against Pharmavite, LLC, after she purchased allegedly ineffective and deceptively marketed vitamin E supplements in November or December of 2011. Or at least that's how she originally remembered it. It turns out that the defendant had discontinued the supplement by that time and that the plaintiff had purchased the product in February 2009—almost two years earlier. Judge King found the plaintiff's faulty memory to be just one of several issues that raised "serious questions" about her standing to assert the the fraud and her ability to adequately represent the proposed class. Of course, the plaintiff and her husband's longstanding friendship with the plaintiff's attorney and his wife—the couples had gotten together weekly for the last seven to eight years—didn't help matters. Indeed, the court noted that the friendship was strong indicia of an ongoing conflict because, at best, the plaintiff may have unduly relied on her close friend in deciding to pursue the lawsuit and, at worst, the plaintiff may have filed suit only to assist her friend in recovering a sizeable fee award. The result? Motion denied.

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## ▪ District Court Applies Brakes in Toyota Prius Class Action, Says No Defect Means No Class

*In re Toyota Motor Corp. Hybrid Brakes Marketing, Sales Practices & Products Liability Litigation*, 2:10-cv-946 (C.D. Cal.) (July 30, 2013). Judge Carney. Denying motion for class certification.

As part of the Toyota Hybrid Brakes MDL, a Toyota Prius owner brought a putative class action against Toyota alleging that certain 2004-to-2009 Toyota Prius vehicles have defective anti-lock braking systems. According to the plaintiff, the anti-lock braking systems will at times activate even when unnecessary, "resulting in unsafe extended stopping distances." The plaintiff alleged that the defect was common to the California class that he sought to represent.

Judge Carney disagreed. The court noted that despite the plaintiff's retention of experts and presentation of expert testimony, the plaintiff had simply "failed to show any defect in the ABS, let alone a defect that is common to the class." So the court denied the plaintiff's motion. ■


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# RICO

## Food Distributor Forced to Eat Class Certification Ruling

*In re U.S. Foodservice Inc. Pricing Litigation*, No. 12-1311 (2d Cir.) (Aug. 30, 2013). Upholding class certification.

A district court certified a RICO class of approximately 75,000 customers complaining that U.S. Foodservice (USF) artificially inflated profits by setting up shell companies that manipulated the normal pricing practices in the food service distribution industry. USF appealed the certification decision, arguing that the large class lacked commonality.

The Second Circuit affirmed class certification, rejecting USF's argument that the plaintiffs could not show misrepresentation, reliance and injury through common evidence. The Second Circuit held that "any class heterogeneity is minimal and dwarfed by common considerations susceptible to generalized proof." ■


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# Settlements

## Antitrust

***In re Insurance Brokerage Antitrust Litig.***, No. 2:04-05184 (D.N.J.) (Aug. 1, 2013). Judge Cecchi. Approving a $10.5 million settlement.
Allegations: Policyholders alleged that insurance companies conspired to allocate customers in violation of the Sherman Act, RICO and other state laws.

## Consumer and Financial Fraud

***Hills et al. v. Kaiser-Francis Oil Co.***, No. 5:09-cv-00007 (W.D. Ok.) (July 30, 2013). Judge Russell. Approving a $35 million settlement.
Allegations: Mineral-rights owners alleged that Kaiser-Francis improperly reduced royalty payments for natural gas. The class consists of at least 29,000 and up to as many as 44,000 mineral rights owners.

***Greenberg v. Procter & Gamble Co. (In re Dry Max Pampers Litig.)***, No. 11-4156 (6th Cir.) (Aug. 2, 2013). Reversing settlement.
Allegations: A class of consumers sued Proctor & Gamble, alleging that certain Pampers-brand diapers cause diaper rash and chemical burns. The district court approved a settlement in September 2011.

On appeal, the Sixth Circuit rejected the settlement because it awarded class counsel a tidy sum ($2.73 million) without offering similar benefits to class members. The appellate court also held that the named plaintiffs were inadequate class representatives because their receipt of a special $1,000-per-child payment encouraged them to "compromise the interest of the class for personal gain."

***In re Checking Account Overdraft Litig.***, No. 1:09-md-02036 (S.D. Fla.) (Aug. 2, 2013). Judge King. Approving a $4 million settlement.
Allegations: Bank customers sued numerous banks (including Marshall & Ilsley Bank), claiming that the banks manipulated the posting order for debit-card transactions in an effort to increase overdraft fees.

In addition to agreeing to pay the $4 million settlement amount, Marshall & Ilsley also agreed to change their posting order for debit-card transactions, to limit overdraft fees to no more than four per day, and to apply overdraft fees only when an account has a negative balance of at least $5.01.

***Lindsay Held v. AAA Southern New England***, No. 3:11-cv-00105 (D. Conn.) (Aug. 7, 2013). Judge Underhill. Approving an $8 million settlement.

Allegations: AAA policyholders sued AAA of Southern New England, alleging that it cheated policyholders out of benefits that they had earned as club members. The class includes at least a million consumers.

***Rodriguez v. National City Bank***, No. 11-8079 (3d Cir.) (Aug. 12, 2013). Affirming district court's rejection of settlement.
Allegations: Hispanic and African-American mortgage customers sued National City Bank, alleging that it discriminated against racial minorities in financing home purchases. The class asserted claims under the Fair Housing Act and Equal Credit Opportunity Act.

The district court preliminarily approved a $7 million settlement in 2010, but after the Supreme Court decided ***Dukes***, the district court asked for supplemental briefing on whether ***Dukes*** prevented class certification. After reviewing the parties' briefing, the district court concluded that the proposed class did not satisfy Rule 23's requirements because there was no common, company-wide policy of discrimination. On the

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contrary, mortgage officers enjoyed wide discretion in their financing decisions.

The Third Circuit affirmed, emphasizing that "whether class action representatives are seeking certification for the purpose of settlement or with the intent to litigate, the members of the proposed class must meet the threshold requirements of Rule 23(a)."

***Stephenson v. Neutrogena Corp.***, No. 4:12-cv-00426 (N.D. Cal.) (Aug. 22, 2013). Judge Hamilton. Approving a $1.3 million settlement.
Allegations: Consumers sued Neutrogena, alleging that its "Neutrogena Naturals" product line was falsely labeled because the products contained artificial and synthetic ingredients. Under the settlement, class members will receive $1 per purchase of cleansers and $2 per purchase of moisturizers, up to $10 per consumer. Neutrogena also agreed to change its labeling and will "includ[e] a statement regarding the percentage of each product that is naturally derived."

***Moore et al. v. Verizon Communications Inc. et al.***, No. 4:09-cv-01823 (N.D. Cal.) (Aug. 28, 2013). Judge Armstrong. Approving settlement.
Allegations: Current and former landline customers alleged that Verizon included unauthorized third-party charges on landline phone bills. Under the settlement, a class member may file a claim for the full amount of the overcharge or alternatively may receive $40 if they don't want to file a claim.

***Bruce J Trombley v. Bank of Am. Corp.,*** No. 1:08-cv-00456 (D. R.I.) (Sept. 12, 2013). Judge DiClerico. Approving $4 million settlement.
Allegations: Credit-card customers sued Bank of America, alleging that the banking giant had unfairly imposed late fees and other penalties on customers who made timely credit card payments on or close to the due date.

***Angela Wise et al. v. Energy Plus Holdings LLC***, No. 1:11-cv-07345 (S.D.N.Y.) (Sept. 17, 2013). Judge Pauley. Approving $14.3 million settlement.

## CLASS-IFIED INFORMATION

To find out what Class Action CLEs we're offering in 2014, email cari.dawson@alston.com.

Allegations: A class of Energy Plus Holdings LLC customers accused the power provider of using false promises to lure them into contracts. The complaint alleged that Energy Plus touted the value of its rewards program and promised competitive market-based rates, but consistently charged two or three times the amount charged by local utilities.

The approved settlement includes up to $11 million for class members and attorneys' fees of $3.3 million.

## ▪ Labor and Employment

***Vedachalam v. Tata Consultancy Services Ltd.***, No. 06-963 (N.D. Cal.) (July 18, 2013). Judge Wilken. Approving $29.75 million settlement.
Allegations: Employees of Tata Consultancy Services who worked on nonimmigrant visas in the United States claim that they were underpaid. The settlement provides for a payment of around $1,600 to each class member.

***Hubbard et al. v. Donahoe***, No. 1:03-cv-01062 (D.D.C.) (July 31, 2013). Judge Leon. Approving $4.5 million settlement.
Allegations: Deaf and hearing-impaired postal workers alleged that the U.S. Postal Service failed to provide them reasonable accommodations. The settlement requires USPS to implement new technology and management structures to better accommodate its

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deaf and hearing-impaired workers, including making American Sign Language interpreting services available for all significant workplace communication, including hiring, promotion, discipline and safety discussions.

***Minor et al. v. FedEx Office & Print Services Inc.***, No. 3:09-cv-01375 (N.D. Cal.) (July 31, 2013). Judge Henderson. Approving $9.6 million settlement.
Allegations: Former FedEx employees sued the company, alleging that it violated California law by erasing overtime hours that employees had worked and assigning overnight shifts that split at midnight in an effort to ensure that the company would not pay overtime for shifts that straddled two days.

As part of the settlement, FedEx agreed to pay the class members unpaid overtime, vacation wages and work reimbursements.

## Products Liability

***Green v. Dr. Pepper Snapple Group Inc.***, No. 2:12-cv-09567 (C.D.Cal.) (July 18, 2013). Judge Olguin. Approving settlement.
Allegations: Consumers sued Dr. Pepper/7UP alleging that it misled consumers about the nutritional value, health qualities and ingredients in its soft drinks.

Under the terms of the settlement, three 7UP products will no longer contain Vitamin E and will not be labeled with the word "antioxidant."

***In re The Nvidia GPU Litig.***, No. 11-15186 (9th Cir.) (Sept. 4, 2013). Ninth Circuit. Approving settlement and $13 million in attorneys' fees.
Allegations: Nvidia customers accused the tech company of making defective graphic processing units that caused their computers to malfunction.

## CLASS-IFIED INFORMATION

The ABA Section of Litigation, Products Liability, has published Jenny Mendelsohn's "Comcast v. Behrend: Was It Really a Boon for Defense Attorneys?"

***Dennis v. Kellogg Co.***, No. 3:09-cv-01786 (S.D. Cal.) (Sept. 10, 2013). Judge Gonzalez. Approving $4 million settlement.
Allegations: A group of consumers alleged that Kellogg falsely advertised the brain-boosting power of its Frosted Mini-Wheats cereal and could not substantiate claims made in its ads and product labels that the cereal was clinically proven to improve children's attentiveness by almost 20 percent.

The settlement establishes a $4 million cash fund for consumer claims. The remainder will be distributed equally to the Consumers Union, Consumer Watchdog and the Center for Science in the Public Interest.

## Securities

***Hoppaugh v. K12 Inc. et al.***, No. 1:12-cv-00103 (E.D. Va.) (July 25, 2013). Judge Hilton. Approving $6.8 million settlement.
Allegations: K12 stockholders alleged that the online educator misled investors about its enrollment and students' performance on tests. According to the plaintiffs, K12 led investors to believe that the company was performing well, but then a ***New York Times*** article revealed otherwise, causing K12's stock price to plummet.

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***In re Citigroup, Inc. Securities Litig.***, No. 1:07-cv-09901 (S.D.N.Y.) (Aug. 1, 2013). Judge Stein. Approving $590 million settlement.
Allegations: Citigroup, Inc. investors alleged that, leading up to the 2008 financial collapse, the bank made misstatements and omissions about its collateralized debt obligation holdings.

***Scott v. ZST Digital Networks Inc.***, No. 2:11-cv-03531 (C.D. Cal.) (Aug. 1, 2013). Judge Fees. Approving $1.7 million settlement.
Allegations: Shareholders of ZST Digital Networks sued the company, alleging that it committed securities fraud by reporting different financial results in the United States than it did in China.

***Rubenstein v. Oilsands Quest Inc. et al.***, No. 1:11-cv-01288 (S.D.N.Y.) (Aug. 6, 2013). Judge Rakoff. Approving $10.235 million settlement.
Allegations: An investor class alleged that Oilsands Quest, Inc., and its directors overstated the value of a subsidiary by $136 million. When the overvaluation was revealed, the plaintiffs claim, the stock price plummeted.

***In re Citigroup, Inc. Bond Litig.***, No. 08 Civ. 9522 (S.D.N.Y.) (Aug. 20, 2013). Judge Stein. Approving $730 million settlement.
Allegations: Citigroup investors alleged that the banking conglomerate failed to disclose in offering materials its extensive exposure to subprime mortgage assets.

***Reid Friedman et al. v. Penson Worldwide Inc. et al.***, No. 3:11-cv-02098 (N.D. Tex.) (Aug. 23, 2013). Judge O'Connor. Approving $6.5 million settlement.
Allegations: A class of investors sued Penson Worldwide Inc. alleging that Penson lied in its financial reports and SEC disclosures about the safety of its margin loan business. When the truth came out, Penson was forced to correct its financial statements, resulting in a major drop in stock price, which—according to the class of investors—never recovered.

***In re Am. Int'l Group, Inc. Securities Litig.***, No. 1:04-cv-08141 (S.D.N.Y.) (Sept. 10, 2013). Judge Batts. Approving $72 million settlement.
Allegations: A class of shareholders claimed that General Reinsurance Corp. aided a $3.9 billion AIG accounting fraud by executing a sham $500 million reinsurance transaction to help AIG boost its claim reserves. ■