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Class Action Round-Up

Summer 2014

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Where the (Class) Action Is

During the second quarter of 2014, we saw various federal courts interpret and apply *Comcast* and other courts apply the Third Circuit's *Carrera* decision—with mixed results for class defendants. Some plaintiffs' counsel have responded to *Comcast* with classwide damage models built to withstand *Daubert* challenges; others have not, giving defendants strong arguments against certification. Ascertainability continues to be a battleground, but courts' interest in the subject varies outside the Third Circuit.

Highly anticipated decisions from the U.S. Supreme Court in *Halliburton* and *Fifth Third Bancorp* will have a significant impact on securities and ERISA class actions. And defendants facing litigation in California welcomed an important decision by the California Supreme Court in *Duran*, which rivals the U.S. Supreme Court's *Dukes* decision in its scrutiny of statistical proof and its rejection of trial by formula.

There were also important decisions in the privacy area, including denial of class certification in the *Hulu Privacy Litigation* and dismissals in the *In re Nickelodeon Consumer Privacy Litigation*. And although the Seventh Circuit's *Pella* decision is a cautionary tale for all class litigants in that circuit, we continue to see heightened scrutiny of class settlements and a willingness to deny final approval in many jurisdictions.

As always, we welcome your feedback about the *Round-Up*. Please let us know how we can make it better. We hope you enjoy the report.

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Antitrust

Eighth Circuit Revives (Part of) Grocery Stores' Class Action

In re Wholesale Grocery Products Antitrust Litig., No. 13-1297 (8th Cir.) (May 12, 2014). Reversing grant of summary judgment and reversing in part denial of class certification.

The Eighth Circuit revived grocery stores' putative class action against two wholesalers that allegedly conspired to allocate geographic markets under the guise of an asset-exchange agreement. The Eighth Circuit vacated the grant of summary judgment to the wholesalers and also vacated the district court's denial of class certification to grocery stores that purchased from a specific warehouse. The appellate court affirmed the denial of certification to a proposed broader class of grocers. ■

CLASS-IFIED INFORMATION

Adam Biegel

Adam Biegel discusses current antitrust issues at a Class Actions seminar sponsored by The Institute of Continuing Legal Education in Georgia on Sept. 5 in Atlanta.

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Banking

- **Individualized Damages Doom Class Claims against JPMorgan**

  Duarte v. J.P. Morgan Chase Bank, No. 2:13-cv-01105 (C.D. Cal.) (April 7, 2014). Judge King. Denying class certification.

  JPMorgan offered a mortgage modification program to certain consumers. The plaintiff homeowner accepted the bank's offer and modified her mortgage. On behalf of a putative class of borrowers, she alleged that the bank's offer was misleading and violated several California statutes because accepting the offer damaged her creditworthiness.

  The court denied certification because individual damages issues predominated. In the court's view, any injury caused by an impaired credit score would differ from class member to class member.

- **Court Says "Not So Fast My Friend" in Quicken Loans Class Action**

  Kingery v. Quicken Loans, No. 2:12-cv-1353 (S.D. W.Va.) (June 4, 2014). Judge Goodwin. Decertifying class.

  Judge Goodwin originally certified a class of consumers for whom Quicken obtained credit checks in connection with mortgage loans. After a closer examination of the summary judgment evidence, the court held that the named plaintiff was not a member of the proposed class, so it decertified the class. The named plaintiff failed to present any evidence that Quicken used her credit score.

CLASS-IFIED INFORMATION

Matt McGuire

Matt McGuire looks at legal lessons learned at the American Conference Institute's 3rd Bank and Non-Bank Forum on Mortgage Servicing Compliance, to be held Nov. 20-21 in Washington, D.C.

- **Creative Subclassing Permits Multistate Classes in Force-Placed Insurance Suit against U.S. Bank**

  Ellsworth v. U.S. Bank, N.A., No. 3:12-cv-02506 (N.D. Cal.) (June 13, 2014). Judge Beeler. Granting class certification.

  Borrowers challenged U.S. Bank's practice of charging for flood insurance—also known as force-placed insurance—that the bank purchased for residential properties securing mortgage loans. Borrowers alleged that the force-placed insurance was artificially inflated by kickbacks and policy backdating.

  The court certified three multistate classes, each with two subclasses that grouped home states by the type of contract law. The court held that Ninth Circuit case law, including *Mazza v. American Honda*, supported that approach. ■

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Consumer Fraud

California District Court Certifies Cane Juice Suit

Werdebaugh v. Blue Diamond Growers, No. 5:12-cv-2724 (N.D. Cal.) (May 23, 2014). Judge Koh. Granting class certification.

Judge Koh certified a California class of almond milk purchasers who claimed that the products' labels were false and misleading because they used the words "evaporated cane juice" and "all natural." The court held that the class was ascertainable, rejecting the Third Circuit's *Carrera* decision because it differs from Ninth Circuit law.

As to damages, the court rejected a price-premium model and a full-refund model but in light of *Comcast* permitted the consumers to move forward on a regression model because it properly controlled for factors such as price and seasonality.

Conagra Class Action Gets Canned in California District Court

Jones v. Conagra Foods, Inc., No. 3:12-cv-01633 (N.D. Cal.) (June 13, 2014). Judge Breyer. Denying class certification.

Judge Breyer denied certification of proposed classes of purchasers of three different Conagra products—Hunt's tomatoes, PAM cooking spray and Swiss Miss hot cocoa—who alleged that Conagra had misleadingly advertised the products as "100% natural" and "a natural source of antioxidants."

The named plaintiffs could not establish Article III standing to seek injunctions because they did not intend to buy the products in the future. They also failed to establish ascertainability, commonality and predominance because individual class members were exposed to different label statements that changed over time and varied among the same class of products. Additionally, the plaintiffs' damages model was defective because it failed to account for other factors that might explain the consumers' decisions to purchase the products.

Dole's Fruity Class Action Moves Forward

Brazil v. Dole Packaged Foods, LLC, No. 5:12-cv-1831 (N.D. Cal.) (May 30, 2014). Judge Koh. Granting certification of California class.

Judge Koh certified a California-only class of purchasers of approximately 10 Dole packaged fruit products that use the words "all natural fruit." The court approved the plaintiffs' regression model for measuring damages because it controlled for factors such as price, income, advertising, seasonality and regional differences. The plaintiffs satisfied the *Comcast* standard by detailing a method for isolating the effect of the alleged misrepresentation and comparing identical products before and after the disputed label was introduced.

CLASS-IFIED INFORMATION

Kara Kennedy

Kara Kennedy tracks issues impacting automotive class actions in two *Law360* articles: "Automotive Recalls, Mootness and Class Actions" and "A Strategy for Defeating Auto Industry Class Actions."

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▪ Maybelline Wipes Away 24-Hour Class Action

Algarin v. Maybelline, LLC, No. 3:12-cv-3000 (S.D. Cal.) (May 12, 2014). Judge Battaglia. Denying certification.

The court denied a proposed class of purchasers of Maybelline's SuperStay 24HR lipcolor and foundation who claimed that the products failed to live up to the promise of 24-hour coverage. Although the court found that the class was not ascertainable, it held that the lack of ascertainability alone did not defeat class certification.

Continuing on to the Rule 23 factors, the court held that several elements of the California consumer protection claims were not subject to common proof. The court relied heavily on defendant's expert survey evidence showing that materiality and reliance varied from consumer to consumer, which made the named plaintiffs' claims atypical. And another defense expert opined that many purchasers were satisfied with the product, which meant that economic injury was not a common issue.

Turning to predominance, the court held that the plaintiffs' price-premium model failed *Comcast* as a method for determining classwide damages. The plaintiffs did not demonstrate that any damages stemmed from the alleged misconduct and did not adequately account for variations in price. The court also held that plaintiffs' damages model would require assessment of each claim based on the number and type of products purchased and whether a coupon was used to complete the purchase.

▪ Bridgestone Rolls Away from Supply Fee Class Action

Toben v. Bridgestone Retail Operations, LLC, No. 13-3329 (8th Cir.) (May 13, 2013). Affirming summary judgment.

A Bridgestone customer sued the car and tire servicing company alleging that its practice of charging a "supply fee" violated the Missouri Merchandising Practices Act. The fee was explained on an in-store placard along with the customer's signed and itemized estimate of charges. The customer alleged that the shop supply fee was for profit (not supplies) and filed a class action on those grounds. Bridgestone filed a motion for summary judgment, which the district court granted.

The Eight Circuit affirmed because the undisputed evidence did not prove deception, fraud, false pretense, false promise or any other violation of the Missouri statute. Indeed, Bridgestone was not required to use the word "profit" in describing the shop supply fee because the clear and conspicuous disclosures about the fee were not misleading.

CLASS-IFIED INFORMATION

Cari Dawson

David Venderbush

Read The Supreme Court's Class Action Certification Trilogy, published by Cari Dawson and David Venderbush in *Corporate Counsel*.

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California District Court Certifies Sexual Energy Supplement Class Action

Ortega v. Natural Balance Inc., No. 2:13-cv-5942 (C.D. Cal.) (June 19, 2014). Judge Collins. Granting motion for class certification.

Purchasers of a sexual energy supplement filed a putative class action alleging that the manufacturer falsely marketed the supplement as having health benefits and aphrodisiac properties when no such benefits existed. The court granted the motion for class certification, finding that each of the Rule 23 requirements was satisfied.

The proposed class was ascertainable because it was limited to individuals who lost money after purchasing the supplement. The common question of whether the supplement's label was false or misleading predominated over individual questions.

Charter Disconnects from Modem Class Action

Grawitch v. Charter Communications, Inc., No. 13-1606 (8th Cir.) (May 2, 2014). Affirming granting of motion to dismiss.

Internet subscribers filed a putative class action against Charter Communications alleging that their modems were incapable of operating at the speed the company promised. When Charter refused to refund the purchase price, the customers asserted a claim for violation of the Missouri Merchandising Practices Act. Charter removed the case to federal court, and the district court granted Charter's motion to dismiss. The subscribers appealed.

The Eighth Circuit affirmed the district court's exercise of removal jurisdiction because the subscribers each sought up to $50,000 in damages—a number that in the aggregate, could satisfy the $5 million amount-in-controversy requirement. The appellate court also affirmed the dismissal, concluding that the subscribers failed to plead pecuniary loss.

CLASS-IFIED INFORMATION

Cari Dawson

Cari Dawson is a faculty speaker at the 18th Annual National Institute on Class Actions, to be held Oct. 23-24 in Chicago.

0 for 2: Court Refuses to Certify Class of Health Plan Subscribers for Second Time

Franco v. Connecticut General Life Insurance Co., No. 2:07-cv-6039 (D.N.J.) (April 14, 2014). Judge Chesler. Denying renewed motion for class certification.

CIGNA health plan subscribers sued the managed care company alleging that it suppressed reimbursements for out-of-network benefits. Judge Chesler originally denied class certification because plaintiffs could not establish harm through common evidence.

In their renewed motion for class certification, the plaintiffs reframed their injury as the payment of premiums for inferior health insurance. But Judge Chesler saw through the ruse, concluding that the plaintiffs were complaining about the same injuries as in their earlier class-certification motion. So he denied certification again. ■

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Environmental

- **Iowa Supreme Court: Clean Air Act Doesn't Preempt State Law; High Court Sidesteps the Fray**

  Freeman v. Grain Processing Corp., No. 13-723 (Iowa) (June 13, 2014); *GenOn Power Midwest LP v. Bell*, No. 13-1013 (U.S.) (June 2, 2014). Reviving air emissions class action based on state law.

  Landowners alleged that Grain Processing's facility emitted chemicals and byproducts that endangered their health and trespassed on their land. The landowners appealed after the district court granted Grain Processing's motion for summary judgment.

  The Iowa Supreme Court revived the landowners' action, holding that neither the Clean Air Act nor its Iowa analog preempted the claims. The court deemed the Clean Air Act a "floor," not a ceiling, on pollution control.

  The ruling gains significance in light of the U.S. Supreme Court's denial of certiorari in *GenOn Power Midwest LP v. Bell*. GenOn asked the Court to decide whether the Clean Air Act preempted state law after the Third Circuit revived a similar suit to *Freeman*. But the Court declined review. Future air-based class actions seem likely, especially in those circuits (the Third, Fourth and Sixth) that have curtailed the Clean Air Act's preemptive effect.

- **Class Action Not Available for North Dakota Gas Royalty Owners**

  Sorenson v. Burlington Resources Oil & Gas Co., L.P., No. 13-132 (D.N.D.) (May 14, 2014). Judge Hovland. Capping class actions against gas companies.

CLASS-IFIED INFORMATION

Meaghan Boyd

Geoff Rathgeber

Meaghan Boyd and Geoff Rathgeber survey the environmental class action landscape in "*Parko* Provides Guidance on Contamination Class Actions," published by the American Bar Association.

Due to lagging infrastructure, natural gas companies in North Dakota flared 29 percent of their production last year. (In contrast, companies in Texas flared less than one percent.) North Dakota landowners alleged that they were owed royalties for the gas that was flared.

The court held that landowners had not exhausted administrative remedies with the North Dakota Industrial Commission and thus could not proceed in court. The Commission reviews claims on a case-by-case basis, so the district court's ruling may effectively bar class actions related to natural gas royalties in North Dakota. ■

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ERISA

- **High Court Rejects "Presumption of Prudence" for Fiduciaries of Employer Stock Ownership Plans**

  Fifth Third Bancorp et al. v. Dudenhoeffer et al., No. 12-751 (U.S.) (June 25, 2014). Vacating reversal of grant of motion to dismiss.

  The U.S. Supreme Court resolved a conflict among the circuit courts about the "presumption of prudence" for fiduciaries of employer stock ownership plans (ESOP). The "presumption of prudence" entitles an ESOP fiduciary to a presumption that its decision to buy or sell stock complied with ERISA. Circuit courts previously held that to overcome the presumption, plaintiffs must allege and prove that the company faced impending collapse.

  A putative class of former Fifth Third employees alleged that the bank and certain of its employees violated ERISA's duty of prudence. The district court dismissed the complaint, holding that the allegations were insufficient to overcome the presumption of prudence. The Sixth Circuit reversed, holding that the presumption does not apply at the pleading stage but agreed that ESOP fiduciaries are entitled to a presumption of prudence.

  The Supreme Court reversed, holding that ESOP fiduciaries are not entitled to a presumption of prudence but instead are subject to the same duty of prudence as other ERISA fiduciaries. ■

CLASS-IFIED INFORMATION

Doug Hinson

Doug Hinson is co-chair and speaker at the American Conference Institute's 8th National Forum on ERISA Litigation on Oct. 27- 28 in New York.

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Labor & Employment

- **No Class Relief for Ex-Employees Who Claim that Dollar General Nickel and Dimed Them**

  Paulino v. Dollar General Corporation, No. 3:12-cv-75 (N.D. W.Va.) (May 9, 2014). Judge Groh. Denying class certification.

  Judge Groh denied class certification for a putative class of former Dollar General employees who claimed that the discount retailer failed to pay their full wages within 72 hours of termination as required by West Virginia law. The class definition created an improper "fail safe class"; meaning that membership turned on whether each individual employee had a valid claim under state labor law. Judge Groh also pointed to independently fatal problems of commonality, typicality and predominance stemming from individualized inquiries about "involuntarily termination," the timing of discharge and the date of final wage payment.

- **The Story Continues: Newspaper Employees Granted Class Certification … Again**

  Wang v. Chinese Daily News, Inc., No. 2:04-cv-01498 (C.D. Cal.) (April 15, 2014). Judge Marshall. Granting motion for class certification.

  A group of *Chinese Daily News* employees filed suit alleging that they were routinely required to work more than 40 hours per week without receiving overtime, that they were denied meal and rest breaks, that they were improperly compensated for unused vacation pay and that they were issued inaccurate wage statements. The district court certified the class, granted summary judgment in the plaintiffs' favor on some of the claims and held a jury and a bench trial. The Ninth Circuit affirmed on all sides. The U.S. Supreme Court vacated the Ninth Circuit's decision in light of *Dukes*.

CLASS-IFIED INFORMATION

Brett Coburn

Simply hired: Mitigate legal risks in employee recruitment, selection and hiring through our Hiring Practices Audits aimed at implementing hiring best practices and strategies.

Molly Jones

Molly Jones raises a red flag for employers in "EEOC Targets Employers' Waiver and Release Agreements," published by HR.BLR.com.

On remand, the district court once again found that class certification was proper. The plaintiffs demonstrated that the employer's treatment of the class members was consistent, not subject to discretion, and the entire class was injured by the employer's conduct.

- **A Little More Pep in Their Step: Mechanics Granted Class Certification**

  Tokoshima v. Pep Boys, No. 3:12-cv-4810 (N.D. Cal.) (April 28, 2014). Judge Breyer. Partially granting motion for class certification.

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Three former Pep Boys employees filed suit alleging that the automobile parts retailer and repair company failed to pay minimum wage and to indemnify employees for necessary business expenses. They sought to certify a "wage class" and a "tool class."

The court certified the "wage class" because the minimum wage claim rose and fell on the legality of a common, companywide policy. As to the "tool class," the court determined that individual issues predominated. Because Pep Boys' policies permitted, but did not require, employees to use their own tools at work, the employees could not establish classwide liability.

▪ Supreme Court of California: Statistical Proof Cannot Trump Otherwise Valid Individual Defenses to Liability or Damages

Duran v. U.S. Bank National Association, No. S200923 (Cal.) (May 29, 2014). Judge Liu. Affirming appellate court's decision reversing class judgment and remanding for new trial on liability and damages.

Loan officers of USB sued for unpaid overtime alleging they had been misclassified as exempt employees under the California Labor Code's outside salesperson exemption. The trial court implemented a statistical sampling plan in order to determine USB's liability and damages, allowing testimony about the work habits of only 21 of 260 plaintiffs and then extrapolating the average amount of overtime reported by the sample group to the class as a whole.

The California Supreme Court held that the trial court abused its discretion by implementing the sampling plan: the sample size was too small and the sample was not random, resulting in a whopping 43.3 percent margin of error. The Court further held that statistical sampling must be developed with expert input and must afford the defendant an opportunity to "impeach the model. "The Court, however, did not resolve whether statistical sampling can *ever* be used in a misclassification action to prove an employer's liability to absent class members.

▪ Madison Square Garden Slam Dunks Interns' Class Claims

Fraticelli, et al. v. MSG Holdings, L.P., No. 1:13-cv-6518 (S.D.N.Y.) (May 7, 2014). Judge Furman. Denying motion for conditional certification.

A group of unpaid interns sought conditional certification of a Fair Labor Standards Act (FLSA) collective action, based upon claims that Madison Square Garden had a common policy of not paying interns. The court denied the interns' motion for conditional certification, holding that they could not make the modest factual showing that the interns were victims of a common policy that violated the law.

The court held that the fact that the interns were not paid did not imply a common policy that violated the law. Instead, the key inquiry was whether the interns were considered employees or trainees. The interns worked in approximately 100 different departments for Madison Square Garden and their experiences varied greatly. Thus, whether an intern was an employee or trainee had to be determined on a case-by-case basis, thwarting the interns' claims that Madison Square Garden had a *common* policy that violated the law.

▪ Arbitration Clause Strips Strippers of Class Claims

Espinosa v. Rick's Cabaret Int'l, No. 1:13-cv-24565 (S.D. Fla.) (April 17, 2014). Judge Ungaro. Compelling arbitration.

Dancer-entertainers brought class claims against a nightclub chain alleging violations of the FLSA. But the dancer-entertainers had signed independent contractor agreements with arbitration provisions, so the court compelled arbitration, rejecting arguments that the cost of arbitration was too burdensome.

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▪ Ninth Circuit Upholds Nordstrom's Class Action Waiver

Davis v. Nordstrom, No. 12-17403 (9th Cir.) (June 23, 2014). Reversing denial of motion to compel arbitration.

Following the Supreme Court's decision in *Concepcion* invalidating California's rule against class-action waivers in arbitration agreements, Nordstrom amended its arbitration policy to include a waiver of most class actions. The district court held that Nordstrom could not unilaterally change the arbitration agreement, but the Ninth Circuit reversed, holding that California employers can unilaterally change the terms of employment, including arbitration provisions.

▪ Individual Issues Predominate in Costco Employee Row

Stiller v. Costco Wholesale Corp., No. 3:09-cv-2473 (S.D. Cal.) (April 15, 2014). Judge Curiel. Decertifying class.

Judge Curiel decertified a class of approximately 30,000 Costco employees who claimed that the company locked them inside warehouses at the end of their shifts but failed to pay them for overtime. The court determined that there was no classwide method for determining whether, how often or for how long the class members were purportedly shorted for off-the-clock pay.

▪ Transit Workers Win Class Certification

Stitt v. The San Francisco Municipal Transportation Agency, No. 4:12-cv-03704 (N.D. Cal.) (May 4, 2014). Judge Rogers. Granting class certification.

Judge Rogers certified a class of public transit workers claiming that the San Francisco municipal government violated the FLSA by not paying for the time logged by the workers when their routes were behind schedule, the time spent filling out and turning in vehicle inspection forms at the end of the day and the time spent in meetings with higher-ups. The court ruled that the workers had shown that the transit agency knew its scheduling policies would subject the operators to extra time without compensation. ■

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Privacy & Security

Ninth Circuit Nixes Two ECPA Class Actions

In re Zynga Privacy Litigation, No. 11-18044 and *In re Facebook Privacy Litigation*, No. 12-15619 (9th Cir.) (May 8, 2014). Affirming dismissal of two putative class actions.

In two privacy cases, the Ninth Circuit held that the plaintiffs failed to state a claim for violations of the Wiretap Act, Stored Communications Act, and Electronic Communications Privacy Act (ECPA) because they did not allege that either Facebook or Zynga disclosed the "contents" of a communication—a necessary element of the claims.

The information that Facebook and Zynga transmitted to third parties included users' Facebook IDs and the address of the webpage from which the users' HTTP request to view another webpage was sent. According to the Ninth Circuit, that was merely record information about a user's communication, not the contents of the communication, because it was not the "substance, purport, or meaning" of the communication.

Ninth Circuit Zips Up Zip Code Decision for Redbox

Sinibaldi, et al. v. Redbox Automated Retail, LLC, No. 12-55234 (9th Cir.) (June 6, 2014). Affirming dismissal.

The Ninth Circuit affirmed the lower court's dismissal of a putative class action alleging that Redbox violated California's Song-Beverly Credit Card Act by requiring renters of DVDs, Blu-ray discs and video games to enter their zip codes as part of the credit card transaction at Redbox kiosks. The district court had concluded that the Act did not apply to Redbox's rental kiosks because Redbox is not a brick-and-mortar retailer, but the Ninth Circuit took a different approach, holding that Redbox's collection of personal identifying zip code information was permissible under the deposit exception to the Act.

Putative Plaintiffs' Hulu Dance Cut Short

In re Hulu Privacy Litigation, No. 3:11-cv-3764 (N.D. Cal.) (June 17, 2014). Magistrate Judge Laurel Beeler. Denying class certification.

Judge Beeler denied plaintiffs' motion for certification of a putative class alleging that Hulu violated the Video Privacy Protection Act by disclosing their viewing histories and personal information to Facebook.

After considering expert reports and surveys, Judge Beeler concluded that the class was not ascertainable. She reasoned that it would be too difficult to ascertain a defined class of consumers who used both Hulu and Facebook.

CLASS-IFIED INFORMATION

Derin Dickerson

Derin Dickerson takes up the issue of data privacy at the California Minority Counsel Program's 25th Anniversary Business Conference, to be held Oct. 20-21 in San Francisco.

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NICK Is for Kids—But Is the VPPA?

In re Nickelodeon Consumer Privacy Litigation, MDL No. 2443 (D.N.J.) (July 2, 2014). Judge Chesler. Dismissing claims against Viacom.

Plaintiffs sued Viacom alleging that it violated the Video Privacy Protection Act by placing a text file on computers visiting Nickelodeon websites that allows Viacom to collect certain information about what the individual does while on the website.

The court dismissed the claims because the plaintiffs failed to allege the disclosure of any personally identifiable information. None of the information that plaintiffs complained about identified any particular person, let alone what they watched. ■

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Securities

- **Investors Can't Show They All Signed Up for Bob Brinker**

  Goodman v. Genworth Financial Wealth Management, No. 2:09-cv-5603 (E.D.N.Y.) (April 15, 2014). Judge Bianco. Denying class certification.

  Investors brought securities fraud claims against Genworth Financial and its CEO alleging that they misrepresented the role that Robert Brinker—famed financial advisor and radio personality—would play in managing their portfolio. Judge Bianco rejected the class on predominance grounds, because the plaintiffs could not prove reliance through common evidence. There was no way to know whether all of the putative class members chose to invest based on statements about Brinker's connection with Genworth. As important, there was no efficient market, so the fraud-on-the-market presumption did not apply. And the *Affiliated Ute* presumption of reliance was not in play, because the alleged fraud stemmed from misrepresentations—not omissions.

- **U.S. Supreme Court Declines to Overrule *Basic v. Levinson*'s Presumption of Reliance but Holds That Defendants Can Rebut the Presumption at Class Certification.**

  Halliburton Co. v. Erica P. John Fund, Inc., No. 13-317 (U.S.) (June 23, 2014). Vacating denial of class certification and remanding.

  Erica P. John Fund filed a putative class action against Halliburton alleging that the oil field services company made misrepresentations that inflated Halliburton's stock price. In 2011, the U.S. Supreme Court vacated the trial court's denial of class certification, holding that a securities fraud plaintiff need not prove loss causation at the class certification stage to invoke *Basic Inc. v. Levinson*'s presumption of reliance.

CLASS-IFIED INFORMATION

Susan Hurd

Defendants now have another argument against class certification, notes Susan Hurd in "The Supreme Court's *Halliburton* Decision: What Impact Will It Have on Class Certification?" published by *Inside Counsel*.

On remand, Halliburton argued that the trial court should nevertheless deny class certification. The company argued that the evidence introduced to disprove loss causation also rebutted the presumption of reliance because it showed that Halliburton's alleged misrepresentations had not affected the stock price. Without the benefit of that presumption, each investor would have to prove individual reliance, causing individual issues to predominate over common ones. The district court disagreed and certified the class, and the Fifth Circuit affirmed.

The Supreme Court granted certiorari. The Court declined to overrule *Basic*'s presumption of reliance, but the Court held that defendants must have an opportunity to rebut the presumption *at class certification* by putting on evidence of lack of price impact. The Court rejected the Fund's argument that *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184 (2013) required price-impact evidence to be left for the "merits," emphasizing that reliance "has everything to do with the issue of predominance." ■

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Settlements

Antitrust

In re Dynamic Random Access Memory (DRAM) Antitrust Litigation, MDL No. 1486 (N.D. Cal.) (June 27, 2014). Judge Hamilton. Approving $310 million settlement.

Several attorneys general and indirect purchasers of computer memory chips settled their claims accusing manufacturers of fixing prices. Under the settlement, defendants will establish a settlement fund of $310 million, to be paid on a claims-made basis.

The court approved the settlement despite the fact that the class includes members from states that do not allow claims by indirect purchasers. The court overruled objections to a contingent provision of the settlement that would trigger the *cy pres* distribution of a portion of the settlement proceeds under certain circumstances. The court also awarded $77 million to class counsel for attorneys' fees.

In re Refrigerant Compressors Antitrust Litigation, MDL No. 2:09-md-02042 (E.D. Mich.) (June 16, 2014). Judge Cox. Approving $30 million settlement.

Direct purchasers settled their claims against Panasonic, two Whirlpool units, Tecumseh Products Company and its affiliates and Danfoss Flensburg GmbH alleging that they and other companies conspired to fix prices on devices that compress refrigerant gas, such as refrigerators, freezers and water coolers. The four settlement agreements provide a settlement fund of just over $30 million. The court approved approximately $9 million in attorneys' fees and costs, to be paid out of the fund.

CLASS-IFIED INFORMATION

David Carpenter

James Cash

David Carpenter and James Cash highlight an issue that has divided the courts in High Stakes In Play With Rule 68 Decisions, published in *Law360*.

In re Celexa & Lexapro Marketing & Sales Practices Litigation, MDL No. 09-md-2067 (D. Mass.) (June 3, 2014). Judge Gorton. Denying motion to intervene and granting limited discovery to party seeking to intervene.

A lead plaintiff representing purchasers of Celexa in a Missouri class action moved to intervene in a multidistrict litigation (MDL) in which a conditionally approved class settlement agreement was pending. She claimed she was entitled to intervene as of right pursuant to Rule 24(a)(2) or, alternatively, that discretionary intervention was proper under Rule 24(b). In denying the motion to intervene under both subsections, the court found that the MDL settlement would not impair her ability to protect her interest, as she could object to its fairness or opt out altogether, and that there was no evidence that the settlement was the product of improper collusion.

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The potential intervenor also moved in the alternative for an order permitting certain discovery regarding the proposed settlement. The court found that she already had access to voluminous discovery but granted her access to very narrow discovery to allow her to challenge the adequacy of the damages to be awarded in the MDL.

Keller v. National Collegiate Athletic Association, No. 4:09-cv-1967 (N.D. Cal.) (June 9, 2014). Judge Wilken. Settlement approval pending.

The National Collegiate Athletic Association (NCAA) agreed to pay $20 million to settle claims that it violated college student-athletes' publicity rights through video games made by Electronic Arts Inc. (EA Sports) that used student-athletes' likenesses without compensation. The agreement would bring to an end the class action brought against the NCAA, EA Sports and the Collegiate Licensing Co., as the latter two settled in an earlier agreement worth $40 million. The plaintiff filed a motion for preliminary approval of the settlement agreement on June 30, 2014.

Banking

Dolfo v. Bank of America, N.A., No. 3:11-cv-2828 (S.D. Cal.) (April 25, 2014). Judge Sabraw. Approving injunctive relief settlement.

Plaintiffs Rick and Susan Dolfo settled claims on behalf of a class of California borrowers challenging Bank of America's policy of establishing impound accounts that allowed it to pay borrowers' property taxes and insurance without their consent. The plaintiffs alleged that the bank opened the impound accounts even though the homeowners were already meeting their obligations and charged the borrowers with penalty fees related to the impound accounts, which sent them into default. The plaintiffs sought injunctive relief and corrections to individual accounts but no monetary damages.

The settlement gives class members the option of closing the impound accounts and an opportunity to pay off negative impound account balances over time without interest. The settlement does not release monetary claims stemming from Bank of America's alleged practice, which class members can still pursue in individual lawsuits. The court awarded the plaintiffs $500,000 in attorneys' fees and $7,500 to the named plaintiffs as a service award.

Horn v. Bank of America, N.A., No. 3:12-cv-1718 (S.D. Cal.) (April 14, 2014). Judge Curiel. Approving settlement.

The parties settled a class action in which the plaintiffs accused Bank of America of underreporting deferred-interest mortgage payments to the Internal Revenue Service, which reduced property owners' mortgage interest deductions. As a result of the settlement, the bank will reissue tax forms for tax years 2010-2013, along with $40 for each amended form to offset the cost of filing amended returns. The total amount of recoverable deductions is estimated to be more than $223 million, with an average of $5,500 additional interest reported for each of the more than 90,000 class members.

Bank of America will also pay an estimated $51.7 million for unreported interest payments for tax year 2009, as class members are no longer able to file an amended return. It will also pay the costs of class notice and administration, $10.5 million to class counsel for attorneys' fees and incentive payments of $25,000 for each of the named plaintiffs.

Government Takings

Haggart v. United States, No. 09-103L (Fed. Cl. Ct.) (May 21, 2014). Judge Lettow. Approving $140 million settlement.

A class of 253 plaintiff landowners in King County, Washington, settled claims alleging that their land was improperly taken by the federal government when railway easements on their property were turned into recreational trails. The court's final approval is reportedly the largest "rails to trails" settlement in history. The total settlement amount of $140.5 million consists of $110 million in principal, $28 million in interest and $2.6 million in statutory attorneys' fees and costs.

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In addition to the statutory attorneys' fees, class counsel is entitled to $33 million from the common fund as a contingent fee. The court decreased the requested 30 percent contingency amount by applying different percentages of recovery to different ranges of the settlement.

Securities

Securities and Exchange Commission v. CR Intrinsic Investors, LLC, No. 1:12-cv-8466 (S.D.N.Y.) (June 18, 2014). Judge Marrero. Approving $600 million "No Admit, No Deny" settlement.

The court approved the Securities and Exchange Commission's (SEC) $600 million "no admit, no deny" insider trading settlements with affiliates of CR Intrinsic Investors LLC and SAC Capital Advisors LP, but it did so somewhat reluctantly. The final approval follows the Second Circuit's ruling in June, finding that a judge had overstepped his authority by rejecting a settlement between the SEC and Citigroup Inc., where the bank neither admitted nor denied wrongdoing. Judge Marrero had previously refused to approve the settlements over concerns about the "no admit, no deny" policy, but it found the settlements were fair in light of the Second Circuit's *Citibank* ruling.

Labor & Employment

Otey v. CrowdFlower, Inc., No. 3:12-cv-05524 (N.D. Cal.) (April 15, 2014). Judge Tigar. Denying final approval without prejudice.

The plaintiffs moved for final approval of a settlement agreement resolving claims alleging that the defendant paid its contributors, which it classified as independent contractors, less than the minimum wage under the FLSA and Oregon labor laws. The agreement provided for a release of all wage claims, including collective action claims under the FLSA and Rule 23 class claims under Oregon law, in exchange for a settlement fund of $585,507, to be distributed as follows: (1) service awards totaling $38,700; (2) a maximum payment to opt-in plaintiffs of $111,807 and (3) attorneys' fees and costs of $435,000 to plaintiffs' counsel. The agreement called for a potential pro-rata increase to opt-in plaintiffs to ensure that at least half of the opt-in money ($55,903.50) was paid out to opt-in plaintiffs, but it did not specify whether any unclaimed amounts out of the $111,807 would revert to the defendants.

The court expressed the following concerns in denying the motion without prejudice: (1) it lacked sufficient information to determine whether the reduction of the original class from millions of individuals to approximately 100 was "fair and reasonable"; (2) it could not evaluate the fairness of the monetary and injunctive relief because plaintiffs did not explain how the parties reached the estimated hourly wages or potential recovery; (3) the proposed release of all wage claims, including those not raised in the litigation, was too broad; (4) the percentage of the settlement fund sought for attorneys' fees and costs (74.3 percent) greatly exceeded the 25 percent benchmark found in precedent, and counsel provided insufficient support to show that the rates and time spent were reasonable and (5) the court lacked sufficient information to determine whether the incentive awards were reasonable. In denying the motion without prejudice, the court provided plaintiffs 90 days to address the issues it raised in its order.

Products Liability

Eubank v. Pella Corporation, Nos. 13–2091, 13–2133, 13–2136, 13–2162, 13–2202 (7th Cir.) (June 2, 2014). Reversing and remanding final approval of class settlement.

In August 2013, the district court approved a class settlement that would resolve an eight-year-old suit alleging that Pella's windows are defective because water leaks result in premature wood rot and other damage. The district court valued the settlement at $90 million and approved the settlement despite objectors, who subsequently appealed the final approval order.

The Seventh Circuit reversed, stating that the approved settlement was "inequitable—even scandalous"; that class counsel must be replaced due to an egregious conflict of interest and that the supposed $90 million value of the settlement is grossly overestimated. According to

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the Seventh Circuit, this case involved "almost every danger sign in a class action settlement that our court and other courts have warned district judges to be on the lookout for."

Some of the more "scandalous" danger signs are unique to this case: (1) the lead class counsel (Weiss) was the son-in-law of the lead class representative (Saltzman)—"a relationship that created a grave conflict of interest; for the larger the fee award to class counsel, the better off Saltzman's daughter and son-in-law would be financially"—(2) Weiss was embroiled in a disciplinary proceeding that resulted in a recommendation to suspend him from practicing law for 30 months and (3) the other four original class representatives (other than Saltzman) objected to the settlement and were subsequently replaced with four new plaintiffs who went along with the proposed settlement.

Some of the other red flags, however, could potentially manifest in other class action settlements. The Seventh Circuit took issue with the $11 million in attorneys' fees ($2 million of which was paid prior to notice distribution) in light of its finding that the settlement was worth no more than $8.5 million—not $90 million, as estimated by the plaintiffs and the district court. The court also found that the "settlement strews obstacles in the path of any [class members]" and was, thus, "stacked against the class." The settlement allowed class members to file one of two types of claims: (1) a "simple" claim, which entitled them to a maximum recovery of $750; or (2) a claim that must be submitted to arbitration, which allowed a potential $6,000 recovery but also enabled Pella to assert a number of complete and/or partial defenses to defeat the claim. Some class members were entitled only to a coupon or an extension of a warranty, which was actually a "contractual entitlement that preceded the settlement rather than being conferred by it." In addition, the claims forms were long and required extensive information, and the notice was "not neutral and… did not provide a truthful basis for deciding whether to opt out." For these reasons, this case "underscores the importance both of objectors… and of intense judicial scrutiny of proposed class action settlements" and, thus, should serve as guidance to class litigants on how *not* to structure a class settlement. ■