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Class Action Round-Up

Spring 2015

Where the (Class) Action Is

Welcome to our first rundown of critical class action decisions in 2015. We lead with news of the Supreme Court's acceptance of the *Spokeo* case, which will address a key issue on actual harm and Article III standing in class actions. Stay tuned for more developments.

Privacy continues to be an active area, with plaintiffs having trouble alleging actual injury. "Natural" cases are also persisting to give the courts problems as everybody awaits guidance from the FDA. This quarter also witnessed class action activity in antitrust, employment, insurance, and securities arenas.

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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Supreme Court

- **High Court Agrees to Hear *Spokeo*: Injury-in-Fact or Injury-in-Law?**

  Spokeo, Inc. v. Robins, No. 13-1339 (U.S.) (Apr. 27, 2015). Granting petition for writ of certiorari.

  On April 27, 2015, the U.S. Supreme Court granted certiorari in *Spokeo, Inc. v. Robins*—setting the stage for an important decision on whether a technical violation of a federal statute is enough to satisfy the injury-in-fact Article III standing requirement or whether there must be allegations of concrete and particularized injury. The Ninth Circuit ruled that actual harm is not needed to show injury in fact; alleged statutory violations are enough for constitutional standing.

  A decision by the Supreme Court to limit congressional power to confer standing would doom many class actions brought under federal statutes like the Fair Credit Reporting Act, Telephone Consumer Protection Act, and the Truth in Lending Act. ■

CLASS-IFIED INFORMATION

Nowell Berreth

Nowell Berreth will discuss his Supreme Court win in *Dart Cherokee* at the DRI National Class Action Seminar July 23-24 in Washington, DC.

Antitrust

Sixth Circuit Denies Rule 23(f) Petition

In re VHS of Michigan, Inc., No. 14-0107 (6th Cir.) (Feb. 3, 2015). Affirming class certification.

Detroit-area nurses sued a local hospital for conspiring to suppress wages under two theories of liability: (1) a per se wage-fixing agreement, and (2) a rule of reason theory involving the sharing of wage information. The Sixth Circuit previously remanded for reconsideration of certification in light of *Comcast v. Behrend*. On the return appellate trip, the Sixth Circuit affirmed because *Comcast* did not apply. The two liability theories were mutually exclusive and thus aggregated damages were not a risk.

Third Circuit Instructs That a Rigorous Analysis Applies to Expert Testimony

In re Blood Reagents Antitrust Litig., No. 12-4607 (3rd Cir.) (Apr. 8, 2015). Vacating class certification and remanding.

The district court certified a class of blood reagent direct purchasers suing drug companies for price fixing. The Third Circuit kicked the case back to the district court to rigorously analyze the credibility of the purchasers' expert testimony in light of *Comcast*.

CLASS-IFIED INFORMATION

David Carpenter

Amanda Waide

David Carpenter and Amanda Waide provide a thorough, rigorous analysis of how the "8th Circuit Continues Trend of Rigorous Rule 23 Analysis" in *Law360*.

De Minimus Uninjured Class Members? No Problem

In re Nexium Antitrust Litig., Nos. 14-1521, 14-1522 (1st Cir.) (Jan. 21, 2015). Affirming class certification.

Third-party payors (TPPs) sued AstraZeneca on a generic pay-for-delay claim. AstraZeneca challenged the TPPs' proposed class definition as overbroad because it included uninjured class members, such as consumers who refuse to take generic drugs. The First Circuit rejected that challenge because the "de minimis" number of uninjured class members could be separated at a later date. ■

Consumer Protection

- **Hain Celestial Case "Naturally" Remains Pending While FDA Provides Guidance**

  Astiana v. The Hain Celestial Group, Inc., No. 12-17596 (9th Cir.) (Apr. 10, 2015). Reversing trial court's dismissal.

  Astiana claimed that she was duped into purchasing Hain's "all natural" cosmetics containing allegedly synthetic and artificial ingredients such as benzyl alcohol and airplane antifreeze. Faced with Hain's primary jurisdiction arguments, the district court dismissed the claims for the parties to seek expert guidance from the Food and Drug Administration (FDA).

  The Ninth Circuit found error in the dismissal rather than staying the case. Instead of a bright-line rule, "efficiency" is the "deciding factor" in whether to invoke primary jurisdiction. "Because the Ninth Circuit 'has not clearly adopted the doctrine of equitable tolling in primary jurisdiction cases,' prudence dictates that a court should stay proceedings rather than dismissing them when there is a 'possibility' that the running of the statute of limitations during administrative proceedings could affect the parties' rights."

- **Don't Hate the Player, Hate the Game: Xbox Gamers Certify Class Alleging Scratched Discs**

  Seth Baker v. Microsoft Corp., No. 12-35946 (9th Cir.) (Mar. 18, 2015). Reversing striking of class allegations.

  A putative class of Xbox users alleged that Microsoft's gaming console is defective because internal system components gouged game discs, rendering them permanently unplayable. The district court denied class certification because the defect, which occurred in less than 1 percent of consoles, required an individualized analysis of damages and possible consumer misuse.

  The Ninth Circuit showed significant leeway to the plaintiffs, concluding that "[w]hat Microsoft is really arguing is that plaintiffs cannot prevail on the merits.… [This] has no place in the determination of whether an action may proceed on a class-wide basis." In such a case, the appropriate focus is on the defect rather than the damages. "[A]lthough individual factors may affect the timing and extent of the disc scratching, they do not affect whether the Xboxes were sold with a defective disc system."

- **Ninth Circuit Weighs in on Butter Substitute's "No Trans Fat" Claim**

  Reid v. Johnson & Johnson, No. 12-56726 (9th Cir.) (Mar. 13, 2015). Reversing trial court's dismissal of UCL, FAL, and CLRA claims for lack of standing and preemption.

CLASS-IFIED INFORMATION

Cari Dawson

"The best of the best": Cari Dawson was named one of the country's "Most Influential Black Lawyers" by *Savoy Magazine*.

(continued on next page)

Reid challenged a number of codefendant McNeil Nutritionals' assertions about Benecol regarding the presence of trans fat. Benecol is a vegetable oil-based spread that McNeil sells as a healthy substitute for butter or margarine. The product label declares that Benecol contains "No Trans Fat" when it does contain minimal amounts.

The district court held that Reid lacked standing because he failed to "set forth alleged facts showing that Benecol's statements may deceive a reasonable consumer." But according to the Ninth Circuit, "the reasonable consumer standard, unlike the individual reliance requirement . . ., is not a standing requirement. Rather, it raises questions of fact that are appropriate for resolution on a motion to dismiss only in 'rare situation[s].'" The Ninth Circuit also held that the nutrient claims on Benecol's label were not authorized by the FDA and that the plaintiffs' claims were therefore not preempted.

- **Passing the Buck on Wells Fargo's Arbitration Demands**

In re Checking Account Overdraft Litig., No. 13-12082 (11th Cir.) (Feb. 10, 2015). Vacating order denying motion to compel arbitration.

Wells Fargo chose not to move to compel arbitration of the claims of the named plaintiffs in the *Overdraft* MDL. While the motion for class certification was pending, but before any class was certified, Wells Fargo filed a conditional motion to compel individual arbitration of absent class members. The district court denied the motion.

The Eleventh Circuit vacated and remanded because the district court's pronouncement was premature. With no class yet certified, there was no existing justiciable controversy between Wells Fargo and any absent class members, and therefore, the district court lacked jurisdiction under Article III to determine whether to compel the arbitration of potential claims of any absent class members. Moreover, the named plaintiffs lacked standing under Article III to assert rights on behalf of the absent class members in seeking affirmance of the district court's order.

- **Just Google "FTC Settlement": Parents of Gamers Don't Need Duplicative Class Action Against Google**

Ilana Imber-Gluck v. Google Inc., No. 5:14-cv-01070 (N.D. Cal.) (Apr. 3, 2015). Judge Whyte. Denying class certification.

Google allegedly allowed minor children to purchase "Game Currency" while playing games downloaded from the Google Play Store. Google's Game Currency program was the subject of a recent settlement with the Federal Trade Commission (FTC). This settlement, Google argued, precluded a finding of superiority and adequacy under Rule 23 for this follow-on class action.

The district court agreed with Google. There was no superiority because "[a] class action would 'require a substantial expenditure of judicial time which would largely duplicate' the work of the 18 month FTC investigation." Moreover, the FTC settlement already provided nearly all of the possible relief the consumers sought. ■

Employment

Ninth Circuit Grants Second Bite at Removal Apple

Reyes v. Dollar Tree Stores, Inc., No. 15-55176 (9th Cir.) (Apr. 1, 2015). Reversing district court's decision to remand.

A California district court remanded Dollar Tree's rest-break class action to California state court not once, but twice. The first time, the Class Action Fairness Act (CAFA) amount in controversy was not satisfied. On remand, the state court certified a broader class than requested in the complaint, and the amount in controversy of that class exceeded $5 million. After Dollar Tree removed again, the district court held it untimely because it was based on the same complaint as the first removal.

The Ninth Circuit disagreed. A second removal is permitted upon a relevant change of circumstances. The certification of a broader class than anticipated was one such circumstance that created new grounds for removal.

Ambiguity Is Key

Ogiamien v. Nordstrom, Inc., No. 2:13-cv-05639 (C.D. Cal.) (Feb. 24, 2015). Judge Wright. Denying plaintiff's motion for class certification.

Shamea Ogiamien moved to certify a class of former Nordstrom employees for unpaid time undergoing bag checks. The district court denied certification when it found predominating individualized questions of whether an employee carried a bag, whether Nordstrom checked an employee's bag, and whether Nordstrom's policy harmed employees.

CLASS-IFIED INFORMATION

Brett Coburn

Brooks Suttle

Brett Coburn and Brooks Suttle warn that "The Fair Credit Reporting Act Can Be a Trap" in *Entrepreneur* magazine.

Consistency Is Key

Koval, et al., v. Pacific Bell Telephone Co., No. JCCP004637 (Cal. Ct. App.) (Dec. 31, 2014). Reaffirming the order denying class certification.

Pacific Bell Telephone employees sued for failing to relinquish control over their activities during meal and rest breaks and failing to compensate them for that time. The lower court denied the motion for class certification because the alleged policies were not consistently applied and thus the employees could not establish commonality.

The California 1st District Court of Appeal agreed. The fact that the policies were conveyed to class members orally resulted in "diverse practices and differing interpretations as to what the rules required," rendering the action unsuitable for class treatment. ■

Environmental

- **Power Plant Prevails in Preemptive Strike**

  Bell v. Cheswick Generating Station, No. 12-929 (W.D. Pa.) (Jan. 28, 2015). Judge Bissoon. Granting motion to strike class action allegations.

  Facing class claims by neighboring property owners, the power plant defendant brought a pre-discovery motion to strike the class allegations. Judge Bissoon granted the motion, agreeing with the defendant that the proposed class—landowners and residents within one mile of the plant—was a "fail-safe" class defined to include those who satisfy the elements of the class's cause of action. Because the proposed class would require the court to reach the merits at the certification stage, it was administratively infeasible. *Bell* reminds us that when the right (i.e., wrong) class comes around, a preemptive motion to strike the class allegations makes sense.

- **They're Always After Me Lucky Charms!**

  Ebert v. General Mills, Inc., No. 13-3341 (D. Minn.) (Feb. 27, 2015). Judge Frank. Certifying a class of property owners.

  Judge Frank certified a class of Minnesota landowners with property damage claims against General Mills. The court bifurcated the action into two phases—liability under Rule 23(b)(2) and damages under Rule 23(b)(3).

  Future litigants could use *Ebert* as a blueprint for environmental class litigation: narrowly tailor the class and pursue hybrid certification. The narrow class is more likely to satisfy typicality, and the hybrid approach allows advocates to suppress issues of individualized damages that accompany property claims. Defendants should beware of such attempts to satisfy Rule 23 burdens, gain leverage via certification, and then lever into settlement negations for a pot of gold. ■

CLASS-IFIED INFORMATION

Peter Masaitis

Evan Woolley

Drift down to Peter Masaitis and Evan Woolley's take on how "Uber Class Actions Come to California Fast and Furiously" in *Law360*.

Insurance

- **Trick Us Once, Shame on You; Trick Us 2.5 Million Times… Too Individualized to Prove in a Class Proceeding**

  Friedman et al. v. Dollar Thrifty Automotive Group, Inc., No. 1:12-cv-02432 (D. Col.) (Jan. 27, 2015). Judge Daniel. Denial without prejudice of motion to certify class.

  Customers alleged that Dollar Thrifty Automotive Group "tricked" them into buying various add-on insurance options for rental car agreements and sought to represent 2.5 million class members. But because the purchase of add-on products ultimately turned on individualized face-to-face conversations at the check-out counter, the court held that the plaintiffs did not satisfy, among others, the commonality and typicality requirements of Rule 23. Notably, the plaintiffs claimed that Dollar agents used uniform scripts to describe the add-on products, but Dollar presented effective rebuttal evidence disproving that claim.

- **Due Process Requires Notice and an Opportunity to Be Heard**

  Baldwin Mut. Ins. Co. v. McCain, No. 1131058 (Ala.) (Feb. 20, 2015). Reversing and remanding trial court's certification decision.

  The trial court certified a class action even though the defendant had not had an opportunity to oppose the class definition at an evidentiary hearing. The trial court reasoned that the defendant had previously had an opportunity to present evidence against the plaintiff's prior class definition, so it did not need a second opportunity. The Alabama Supreme Court disagreed, holding that if the plaintiff offers a "materially different" class definition after the first evidentiary hearing, the procedural requirements of Ala. Code § 6-5-641 start anew. The high court's holding reiterates its prior ruling in *Baldwin Mutual Insurance Co. v. Edwards*, 63 So. 3d 1268 (Ala. 2010). ■

CLASS-IFIED INFORMATION

Frank Hirsch

Change your out-of-office message and hear Frank Hirsch speak about the TCPA at ACI's 23rd National Conference on Consumer Finance Class Actions & Litigation July 27-28 in Chicago.

Privacy

- **Nickelodeon Children's Website Tracking Lawsuit Tossed Again—And This Time for Good**

  In Re: Nickelodeon Consumer Privacy Litigation, No. 2:12-cv-07829 (D.N.J.) (Jan. 20, 2015). Judge Chesler. Dismissing with prejudice.

  A New Jersey district court judge ended what remained of a putative MDL accusing Google and Viacom of violating the Video Privacy Protection Act (VPPA) and state privacy laws by tracking children's activity online. Judge Chesler rejected the plaintiffs' "theoretical" argument that Google could use IP addresses, Viacom's cookie data, and personal data collected from its Google account network to piece together users' identities. In addition, Google's policy of not registering accounts to children under age 13 "rule[d] out the entire class of Plaintiffs, all of whom are under that age."

- **"Stop Asking for My [ZIP Code] Number," Says Newly-Certified Class to Wal-Mart**

  Fraser, et al. v. Wal-Mart Stores, Inc., et al., No. 2:13-cv-00520 (E.D. Cal.) (Dec. 23, 2014). Judge Nunley. Granting motion to certify class.

  A California district judge certified a putative class of over 100,000 Wal-Mart customers alleging that the retailer violated California's Song-Beverly Credit Card Act by collecting ZIP code information to complete credit card transactions. Judge Nunley was not persuaded by Wal-Mart's arguments about the transactions' dissimilarities, including differences in Wal-Mart's ZIP code collection policy based on credit card types and amount charged and the Act's application to business card transactions. Judge Nunley focused on Wal-Mart's potentially illicit company policy to hold that the transactions were all reasonably similar, permitting certification.

Dominique Shelton

CLASS-IFIED INFORMATION

Privacy Tracker published Dominique Shelton's article "Court Sides with Hulu in VPPA Case, Grants Summary Judgment with Prejudice."

- **Judge to Putative Class: "You're too late!"**

  Reaves, et al. v. Cable One Corp., No. 1:11-cv-03859 (N.D. Ala.) (Mar. 17, 2015). Judge Haikala. Granting motion to dismiss.

  An Alabama district court judge dismissed as time-barred a putative class action alleging that Cable One violated the Electronic Communications Privacy Act (ECPA) by sending information about users' web history, downloads, and messages to an advertising company without user knowledge or consent. Judge Haikala held that the ECPA's two-year statute of limitations barred the lawsuit because a 2008 ECPA class action based on nearly identical facts gave the class plaintiffs a reasonable opportunity to discover Cable One's alleged ECPA violation. Judge Haikala permitted the named plaintiff's individual ECPA suit to proceed because the class action tolled the statute for her claim.

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▪ District Court Enforces Injury Requirement in Data Breach Cases

Storm, et al. v. Paytime, Inc., No. 1:14-cv-01138 (M.D. Pa.) (Mar. 13, 2015). Judge Jones. Dismissing without prejudice.

A Pennsylvania district judge dismissed two consolidated data breach class actions against Paytime, a national payroll service company. Judge Jones held that the plaintiffs lacked Article III standing because they had not demonstrated any actual injury, i.e., actual or imminent misuse of their credit, personal, or financial information, as the Third Circuit requires.

▪ Beyond Systems Is Not Beyond Reproach

Beyond Systems, Inc. v. Kraft Foods, Inc., et al., No. 8:08-cv-00409 (4th Cir.) (Mar. 12, 2015). Denying petition for en banc review.

The Fourth Circuit declined to review its 2013 opinion that Beyond Systems was not entitled to hundreds of millions of dollars as a recipient of spam emails from Kraft. A jury and district court previously found that Beyond Systems was not an Internet service provider as defined by California or Maryland law, in part because it did not attempt to filter or block spam email from entering its system. The Fourth Circuit emphasized the evidence that Beyond Systems went out of its way to lure and obtain spam messages, even increasing its storage capacity, as a litigation and revenue-generating strategy. ■

Product Liability

- **What a Headache: Tylenol MDL Bellwether Case Set for June Trial Date**

  In re: Tylenol (Acetaminophen) Marketing, Sales Practices, and Products Liability Litigation, No. 2:13-md-02436 (E.D. Pa.); bellwether case—*Terry v. McNeil-PPC Inc.*, No. 2:12-cv-07263 (E.D. Pa.) (Jan. 29, 2015). Judge Stengel. Selecting bellwether plaintiff and setting trial date for June 2015.

  Plaintiff Rana Terry has been selected as the first bellwether plaintiff in a multidistrict litigation alleging that acetaminophen in Tylenol products was responsible for severe liver damage in consumers. Terry, who is the administrator of her sister's estate, claims that her sister took Tylenol Extra Strength in accordance with package instructions but, several weeks later, went to the emergency room and was diagnosed with catastrophic liver damage that caused her death a week later.

  The court determined that multidistrict litigation was appropriate in the case because of the need for simultaneous discovery in the 27 suits that have been filed against Tylenol producer Johnson & Johnson, the named defendant in the case. Terry's bellwether case is set for trial in June 2015. ■

CLASS-IFIED INFORMATION

Scott Elder

Nowell Berreth

Scott Elder is the co-chair and Nowell Berreth will moderate a discussion on GMOs at the ABA Section of Litigation Food & Supplements Fifth Annual Workshop, June 9 in Omaha.

RICO

- **Second Circuit Blesses 100,000 Debtor Class in "Sewer Service" Case**

  Sykes v. Mel S. Harris & Assoc LLC, Nos. 13-2742-cv, 13-2747-cv, 13-2748-cv (2nd Cir.) (Feb. 10, 2015). Affirming grant of class certification.

  The Second Circuit affirmed the certification of debtors subject to default judgments because of a faulty service conspiracy, i.e., "sewer service." Individualized questions on the amount of damages and whether or not particular debtors suffered injury were outweighed by the larger common question of the existence of the "sewer service" scheme. ■

CLASS-IFIED INFORMATION

Cari Dawson

Join Cari Dawson at the Duke Law Class-Action Settlement Conference July 23-24 in Washington, DC.

Securities

- **Knowledge Is Not Always Power**

  Steginsky v. Xcelera, Inc., et al., No. 3:12-cv-188 (D. Conn.) (Mar. 10, 2015). Judge Underhill. Denying plaintiff's motion for class certification.

  Steginsky brought a securities fraud class action claiming that the defendants engaged in a scheme that resulted in the company's controlling shareholders buying out the minority shareholders' stock at a "bargain-basement price." But the court denied the motion for class certification on the ground that Steginsky's claim was atypical of the class. Unlike the other putative class members, when Steginsky tendered her shares, she "believed that the defendants were perpetrating fraud by not informing shareholders of the actual value of the stock." This meant that her claims were subject to the defense of non-reliance—a defense unique enough to defeat class certification. ■

CLASS-IFIED INFORMATION

Jessica Corley

Jessica Corley discusses "Legal Threats Facing Boards in the Prevention and Management of Cybersecurity Risks" in *Chief Executive*.