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Class Action Roundup

Winter 2017

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Where the (Class) Action Is

Welcome to the latest edition of *Class Action Roundup*, covering the fourth quarter of 2016. As has been the case throughout the year, class actions continue to play a key role in courtrooms across the country. The *Spokeo* decision again impacts cases involving consumer protection and data breaches as judges weigh in on how certification is applied in different circumstances. Employment cases this quarter run the gamut, from exotic dancers and college athletes to Uber drivers and flight attendants.

Consumer class actions involving gaming, cooking oils and even mattresses are highlighted in this issue along with a handful of environmental cases examining water contamination issues in both Flint, MI, and Goshen, IN. While this quarter witnessed approval of a historic settlement of $1.575 billion in a case involving HSBC, we also feature smaller settlement agreements and some that were denied for being "overbroad."

There are many other issues covered here, including products liability cases and several in the financial services industry. We hope you enjoy this final installment for 2016 and welcome any feedback you have on this or other publications from the class action team. Look for our first edition of 2017 summaries to be published soon.

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Antitrust

- **Foul, but No Harm: Antitrust Violation Without Injury Insufficient**

  American Sales Co. v. AstraZeneca LP, Nos. 15-2005, 15-2006, 15-2007 (1st Cir.) (Nov. 21, 2016). Affirming jury verdict.

  Pharmaceutical retail outlets and wholesale drug distributors brought suit alleging that AstraZeneca made improper reverse payments (i.e., payments made to stop a party from challenging the validity of a disputed patent) to its competitors when it settled a patent dispute related to its Nexium product. The case went to trial—the first reverse payment case tried before a jury since the Supreme Court's 2013 *FTC v. Actavis* decision—and resulted in a verdict in the defendants' favor. The First Circuit affirmed the jury verdict and rejected numerous arguments, including arguments related to the trial court's exclusion of a number of plaintiffs' causation theories. ■

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Alston & Bird stays the course with our 18th consecutive year on *Fortune*'s "100 Best Companies to Work For®" list.

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Banking & Financial Services

- **Judge to BofA: Usur Are Subject to the NBA's Usury Limits**

  Farrell v. Bank of America NA, No. 16-cv-00492 (S.D. Cal.) (Dec. 19, 2016). Judge Lorenz. Denying motion to dismiss.

  Judge Lorenz denied Bank of America's motion to dismiss claims by a named plaintiff on behalf of a putative class, alleging that the bank charged customers usurious interest rates on overdrawn accounts. The bank contended that the National Bank Act's prohibition on usurious interest rates did not apply to follow-on overdraft fees, imposed when the borrowers failed to correct an overdrawn account within five days, because this represents a fee and not an interest charge. Rejecting the bank's argument, the court concluded that the charge is an interest charge because it stems from an extension of credit. ■

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Elizabeth Corbett

Former acting chief of staff of the Consumer Financial Protection Bureau Elizabeth Corbett joins Alston & Bird.

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Consumer Protection

Ticked-off Ticket Holders Can't Tackle the NFL

Bruce Ibe, et al. v. Jerral Wayne Jones; Ken Laffin, et al. v. National Football League, et al., No. 15-10242 (5th Cir.) (Sep. 9, 2016). Affirming district court decisions.

Disgruntled ticketholders for Super Bowl XLV sued the NFL and the host team Dallas Cowboys, claiming that they were either displaced from their seats, relocated, or had an obstructed view of the field. The lower court dismissed the Cowboys from the case, dismissed the fraud-related claims against the NFL, granted summary judgment to the NFL on the obstructed-view claims, and denied class certification. The jury returned a verdict for the ticketholders' breach of contract claim.

The ticketholders appealed to the Fifth Circuit, which affirmed the various lower court decisions. First, because the ticketholders failed to show a contract with the Cowboys, and because all the tort claims were premised on the existence of a contract with the Cowboys, the team's dismissal was correct. Second, the fraud claims were appropriately dismissed because the NFL did not intend to skirt the contract. Given the "frantic last-minute installation of seats and potential adverse publicity," the fraud claims were "not plausible." Third, other related fraud claims were barred by the economic loss rule. Fourth, the "obstructed view" ticketholders could not show a breach of contract because their tickets only entitled them to view the field and not, for example, large television screens. Finally, denial of class certification was appropriate because there were fewer than 50 members of the class and because determinations of seats being "worse" required individualized inquiries.

FACTA Claims Fiction Under *Spokeo*

Meyers v. Nicolet Restaurant of De Pere LLC, No. 16-2075 (7th Cir.) (Dec. 13, 2016). Affirming denial of class certification.

Jeremy Meyers alleged that Nicolet Restaurant violated the Fair and Accurate Credit Transactions Act (FACTA) by failing to truncate the expiration date of his credit card on his receipt. Meyers brought the action on behalf of himself and "everyone who had been provided a non-compliant receipt at Nicolet." The district court denied class certification on the ground that Meyers failed to establish that classwide issues would predominate.

The Seventh Circuit agreed that class certification was not appropriate, but on the ground that Meyers lacked Article III standing. Meyers failed to show that he suffered any concrete or particularized harm, such as identity theft, flowing from the violation. Under *Spokeo*, a plaintiff does not "automatically satis[fy] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." The restaurant's purported failure to truncate did not cause Meyer any harm and did not create any appreciable risk of harm because Meyers discovered the violation immediately without anyone else ever seeing the noncompliant receipt.

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▪ Ninth Circuit: Ascertainable ≠ Administratively Feasible

Briseno v. ConAgra Foods Inc., No. 15-55727 (9th Cir.) (Jan. 3, 2017). Affirming class certification.

Consumers who purchased Wesson-brand cooking oil products labeled "100% Natural" alleged the labels are false and misleading because the oil is made from bioengineered ingredients. ConAgra argued that there is no administratively feasible way to identify members of the proposed classes because consumers would not be able to reliably identify themselves as class members. The district court held that, at the certification stage, it is sufficient to define the class by an objective criterion (i.e., consumers who purchased Wesson oil during the class period).

The Ninth Circuit made clear that a plaintiff need not show that an administratively feasible method of identifying class members exists at the class certification stage because such a showing is not part of Rule 23(a)'s ascertainability requirement. Rule 23's use of specifically enumerated "prerequisites" to the exclusion of others indicates that additional criteria (e.g., administrative feasibility) should not be read into Rule 23. The court acknowledged that the Third Circuit has adopted a freestanding administrative feasibility requirement, but rejected the Third Circuit's approach because "Rule 23(b)(3) already contains a specific, enumerated mechanism to achieve [the administrative feasibility] goal: the manageability criterion of the superiority requirement."

▪ Gamer Stuck on Pause After Accidentally Signing Up for Membership

L.S. v. Webloyalty.com Inc., et al., No. 15-3751 (2nd Cir.) (Dec. 20, 2016). Affirming dismissal in part, vacating in part, and remanding for further proceedings.

A minor was allegedly deceived into enrolling in a fee-based monthly discount club operated by Webloyalty after purchasing a video game and unwittingly registering for Webloyalty's "Shopper Discounts" to receive an advertised coupon. After a 30-day free trial elapsed, the gamer was charged monthly until his bank account no longer had sufficient funds.

The Second Circuit affirmed in part and reversed in part the district court's dismissal of the plaintiff's claim that Webloyalty violated the Electronic Funds Transfer Act (EFTA) by allegedly receiving unauthorized transfers. The plaintiff had authorized the transfer of funds to Webloyalty by entering his personal information—including his name and the last four digits of his debit card—and the transfer of funds itself did not violate the EFTA. But the district court's dismissal of the appellant's second EFTA claim—failing to provide him a copy of the authorization for the transfer—was reversed because it was not properly adjudicated at the motion to dismiss stage. And the district court's dismissal of the plaintiff's Connecticut Unfair Trade Practices Act (CUTPA) claim was reversed because a deceptive practice can cause substantial injury to consumers and violate consumer protection law even if it does not constitute common law fraud.

▪ A Smoke Alarm by Any Other Name Still Smells the Fire

Zito v. United Technologies Corporation, et al., No. 16-1302 (2nd Cir.) (Dec. 21, 2016). Affirming dismissal of fraud, implied warranty of merchantability, and Connecticut Unfair Trade Practices Act claims.

After purchasing a "smoke alarm," Vincent Zito claimed that the manufacturers misled him by failing to disclose conspicuously that his device uses ionization technology rather than photoelectric technology, which detects smoke from smoldering home fires at a faster rate. The alleged "actually deceptive" conduct was the labeling of the device as a "smoke alarm" when it was, purportedly, slower than other smoke alarms at detecting smoldering fires. The Second Circuit affirmed the district court's dismissal of Zito's lawsuit, finding that calling the product a "smoke alarm" was unlikely to mislead consumers because the product does indeed detect smoke.

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- **Class Certification Denied Because of Third-Party Retailer Issue**

  Alvin Todd, et al. v. Tempur-Sealy International Inc., et al., No. 13-cv-04984 (N.D. Cal.) (Sept. 30, 2016). Judge Tigar. Denying motion for class certification.

  A group of customers who purchased Tempur-Pedic mattresses, pillows, and other bedding products sued Tempur-Sealy International and various distributors for misrepresentation of their products as "formaldehyde free," "free of harmful VOCs," "allergen and dustmite resistant," "hypoallergenic," and with a "completely harmless odor." Tempur-Sealy's internal testing, according to the aggrieved customers, revealed that these products off-gassed many VOCs, including formaldehyde, which can cause allergic reactions.

  The trial court determined that the numerosity requirement was easily met. The court also determined the typicality and adequacy requirements were met, rejecting Tempur-Sealy's arguments that the plaintiffs should be disqualified for filing "sham affidavits" regarding their exposure to certain marketing materials. While the lack of recollection might somewhat undermine the credibility of a plaintiff's testimony, the court found that it fell short of rendering any of the plaintiffs atypical in this case. The court ultimately denied class certification on commonality and predominance grounds. Tempur-Pedic's allegedly misleading marketing was not extensive enough to infer exposure on a classwide basis. Further, 90 percent of Tempur-Pedic's products were sold by third-party retailers, and the class representatives had not demonstrated that the retailers actually implemented any widespread marketing campaign that Tempur-Sealy had designed. ■

CLASS-IFIED INFORMATION

Kristy Brown

Walk with Kristy Brown on "The Razor's Edge—Class Action Developments You Need to Know and the Cases You Need to Watch" at the Ascent 2017 Conference in Atlanta, May 3–4.

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Employment

Division I College Athletes Can Get Glory, but Not Wages

Gillian Berger, et al. v. NCAA, et al., No. 16-1558 (7th Cir.) (Dec. 5, 2016). Affirming that student athletes are not employees covered by the FLSA.

The Seventh Circuit upheld an Indiana district court's ruling that college athletes are not "employees" under federal law. Two former University of Pennsylvania track and field athletes brought suit against the NCAA and more than 120 Division I member schools, claiming that student athletes are "employees" within the meaning of the Fair Labor Standards Act (FLSA) and are thus entitled to receive minimum wage for their work. Explaining that there is a "revered tradition of amateurism in college sports" and that participation "is entirely voluntary," the Seventh Circuit affirmed the district court's refusal to apply a multifactor test to determine whether the athletes were employees. According to the court, "the factors used in the trainee and private-sector intern context fail to capture the nature of the relationship" between student athletes and their colleges.

Certification for Penthouse Club Dancers

Verma, et al. v. 3001 Castor Inc., No. 13-cv-03034 (E.D. Pa.) (Nov. 29, 2016). Judge Brody. Certifying class.

A Pennsylvania district court granted class certification to a group of exotic dancers claiming that the Penthouse Club Philadelphia violated the FLSA and Pennsylvania law by failing to pay them minimum and overtime wages. Instead of arguing that the plaintiffs were not similarly situated, the club argued that certification would be improper because the dancers had received ample compensation—up to $300 per hour—for private dances. The district court was not persuaded. It found that the private dance fees could not count as wages because the dancers were not paid a minimum wage of $2.13 per hour and were never told that the dance fees were not included in their wages. As a result, all FLSA and Rule 23 requirements were met.

Adult Entertainers Certified for Now

Shaw, et al. v. The Set Enterprises, et al., No. 15-cv-62152 (S.D. Fla.) (Dec. 5, 2016). Judge Dimitrouleas. Conditionally certifying class.

A Florida district court conditionally certified a group of exotic dancers alleging that the owners of two adult entertainment clubs failed to pay them minimum and overtime wages in violation of the FLSA. The dancers presented evidence that approximately 300 entertainers worked at the club over a three-year span, all of whom were classified as independent contractors and not paid minimum or overtime wages. Because this evidence showed that a sufficient number of similarly situated plaintiffs existed, the court granted conditional certification.

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Brett Coburn

A rising minimum wage could have maximum impact on your bottom line, writes Brett Coburn in "Wage and Hour Law: Compliance and Consequences" for the *American Bankruptcy Institute Journal*.

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No Class Cert for Sandwich Shop Mangers from Different Loaves

Yirandi Aguiar, et al. v. Subway 39077 Inc., et al., No. 16-cv-23399 (S.D. Fla.) (Nov. 18, 2016). Judge Scola, Jr. Denying class certification.

A Florida district court denied a motion for conditional certification to an FLSA class of "store managers" working at 38 different Subway franchises owned and operated by one individual in the Miami area. The district court held that each of the managers was employed by a separate corporate entity and that no precedent allowed them to sue franchises with whom other managers in the class have no employment relationship. The court also held that it could not certify the class because the plaintiffs could not point to other employees—other than the ones already in the action—who wished to opt into the suit.

Court Pumps the Breaks on Lawsuit, Forcing Uber Drivers into Arbitration

Congdon, et al. v. Uber Technologies Inc., et al., No. 16-cv-02499 (N.D. Cal.) (Dec. 8, 2016). Judge Rogers. Granting in part motion to compel arbitration.

A California district court recently held that a group of eight Uber drivers who signed arbitration agreements must arbitrate their alleged claims that the ride-hailing company improperly took a cut of their fares by instituting a "safe rides fee." The group of plaintiffs, who did not opt out of the arbitration agreement in their contract with Uber, argued that the nonrecoverable filing fee of the complaint and the costs of arbitration were more than the total economic loss to the class members. The court rejected that argument, noting that Uber agreed to pay the full costs of arbitration. As a result, "the non-opt-out plaintiffs are faced with no obstacles in the effective vindication of their rights."

Flight Attendants Get in Formation, Make Class

Bernstein, et al. v. Virgin America Inc., No. 15-cv-02277 (N.D. Cal.) (Nov. 7, 2016). Judge Tigar. Certifying class.

A district court recently certified a class of 1,400 California-based Virgin America flight attendants who claim that the airline violated California law by failing to pay them for time worked before, after, and between flights, and not allowing meal breaks. The court also certified two subclasses: one of California residents and one of individuals who have left Virgin in the last four years.

Virgin argued that California wage laws do not apply outside the state. The court held that the extraterritoriality issue was relevant only to the California resident subclass and noted that while the law is unclear on whether plaintiffs could recover for time worked outside the state, they could at least recover for time worked in California.

Judge Gives Green Light to Avis Employees' Class Certification

Cuhna v. Avis Budget Car Rental LLC, No. 16-cv-10545 (D. Mass.) (Oct. 26, 2016). Judge Saylor. Granting class certification.

A federal judge in Massachusetts granted class certification to a group of Avis and Budget employees in an FLSA suit alleging that the rental car companies misclassified them as "damage managers" in order to avoid paying overtime. The plaintiffs claimed that their positions were wrongly classified as management positions (positions that exempted them from the overtime requirements of the FLSA) even though they had only limited authority and discretion. In opposing class certification, Avis argued that the damage managers have varying degrees of job responsibility and so were not sufficiently similar. The district court disagreed. Although there were some variances in the employees' specific duties, "the fact that Avis has reduced the job duties of all damage managers to one description" was sufficient to satisfy Rule 23.

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▪ Google May Face Certified Class in Age Bias Lawsuit

Heath v. Google Inc., No. 15-cv-01824 (N.D. Cal.) (Oct. 5, 2016). Judge Freeman. Granting motion for conditional certification.

Alleging that Google discriminates against older employment seekers, a group of job applicants over the age of 40 were granted conditional class certification in California federal court. The named plaintiffs allege that they applied to Google with significant experience, yet were turned down for multiple positions. The district court applied the lenient standard for conditional certification, noting that the absence of an express age discrimination policy will not necessarily protect Google from a discrimination suit.

▪ Williams-Sonoma Managers' Class Cert Bid Doesn't Pan Out

LaRose v. Williams-Sonoma Stores Inc., No. CC15543867 (Cal. Sup. Ct.) (Nov. 4, 2016). Judge Kahn. Denying class certification.

A California superior court denied class certification to a group of Williams-Sonoma store managers alleging that the company's wage policy violated California law. The managers alleged that Williams-Sonoma's standardized policies did not bestow sufficient managerial authority to make them exempt under California overtime laws. The court, however, found that the class members did not share common issues of law and fact—something that was fatal to their class certification bid. According to the court, the "significant differences in the duties and circumstances of the general managers from store to store makes it unlikely that class treatment is the best method for adjudicating the claims of the general managers." ■

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Adam Kaiser

John Aerni

Alston & Bird adds more than 50 years of litigation experience to our New York office with the additions of Adam Kaiser and John Aerni.

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Environmental

Sixth Circuit Applies CAFA Local Controversy Exception

Jennifer Mason, et al. v. Lockwood Andrews & Newman, et al., No. 16-2313 (6th Cir.) (Nov. 16, 2016). Judge Griffin. Upholding remand to state court.

A Sixth Circuit panel held that a proposed class action arising out of the Flint, Michigan, water contamination crisis fell within the Class Action Fairness Act's "local controversy" exception—kicking the case back to state court.

Residents of Flint sued civil engineering companies Leo A. Daly, a Nebraska company, Lockwood Andrews & Newman, a Texas corporation, and its local affiliate, alleging that the companies were negligent in upgrading and operating the Flint Water Treatment Plant—resulting in a public health disaster. The panel concluded that two-thirds of the proposed class were Michigan citizens, there was a *significant* local defendant, and that the alleged injuries were limited to the reach of Flint's water system – satisfying the statutory requirements of the local controversy exception.

The biggest takeaways from this otherwise quintessentially local case? First, even purportedly "naked" averments of *residence* create a rebuttable presumption of domicile and therefore *citizenship*. And second, when a foreign defendant provides services *through* a local entity, the local defendant's conduct can form a "significant basis" of the claims.

CLASS-IFIED INFORMATION

Paul Beard

The *Environmental Leader* talked to Paul Beard about the future of the EPA and Clean Water Act under the Trump Administration in "Trump to Hit EPA Hard Today."

District Court Denies Homeowners' Bid for Sanctions

Hostetler, et al. v. Johnson Controls Inc., No. 15-cv-00226 (N.D. Ind.) (Dec. 22, 2016). Judge DeGuilio. Denying sanctions.

In a putative class action over alleged groundwater contamination in Goshen, Indiana, homeowners sought sanctions against Johnson Controls for falsely stating they had no evidence that hazardous waste or asbestos existed at a former manufacturing facility.

Judge DeGuilio denied the homeowners' request, explaining that their complaints were no more than disputes over the characterization of certain evidence. Homeowners could not point to egregious falsehoods or bad-faith conduct that would warrant sanctions. The decision is a strong reminder of the significant hurdle facing parties seeking sanctions, with the court noting that such motions "should be used sparingly." ■

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Insurance

- **Reject Classes Due to Individual Questions and Predominance Issues: It's What You Do**

  Johnson v. GEICO Casualty Co., No. 16-1132 (3rd Cir.) (Nov. 29, 2016). Affirming class decertification.

  The Third Circuit affirmed an order decertifying two classes of GEICO customers claiming the insurance company inappropriately denied them medical coverage. The long-running case started in 2006, when two named plaintiffs sued, alleging GEICO violated its own personal injury protection policies and state insurance law when it denied them full payment by applying its "passive modality" and "geographic reduction rule" reimbursement calculations. Initially, the Delaware district court certified two classes, one for each reimbursement calculation model. But after discovery revealed one named plaintiff (the representative for both classes) had "flare-ups of pain in her neck" and "severe walking limitations before the accident," the district court granted summary judgment in favor of GEICO against the plaintiff on several of her individual claims. Subsequently, the court granted GEICO's motion to decertify the class, citing predominance issues related to the individual damage submissions by the plaintiff-customers. On appeal, the Third Circuit rejected the named plaintiff's challenges to both orders. It affirmed the decertification order, finding the predominance requirement was no longer satisfied due to "individualized issues relating to the calculation of damages," because each plaintiff would have to prove the "reasonableness, necessity, or causation" for each medical bill submission.

- **No Concrete Harm: *Spokeo* Strikes Again**

  Dutta v. State Farm Mutual Automobile Insurance Co., No. 14-cv-04292 (N.D. Cal.) (Nov. 3, 2016). Judge Breyer. Granting summary judgment.

  Our client successfully defended against a class-action claim alleging that it violated the Fair Credit Reporting Act (FCRA) when it denied the plaintiff's job application based on information in his credit report before providing him with certain required disclosures. The defendant won summary judgment on grounds that the named plaintiff's claims on behalf of a proposed class amounted to a "bare procedural violation" that did not satisfy the "concrete harm" requirement for Article III standing under the Supreme Court's 2016 *Spokeo* decision. We showed that the alleged delay in the FCRA disclosure did not cause concrete harm, because even if proper notice was given, the information in the credit report our client relied on in rejecting the plaintiff's application was accurate. Therefore, the end result would have been the same—the plaintiff's application would have been rejected—even absent the alleged violation. Judge Charles Breyer, brother of Justice Stephen Breyer, agreed, citing the weakness of the plaintiff's causation argument and concluding that his alleged harm, stemming from the delayed reporting of accurate information, is a "textbook example" of injury that does not give rise to Article III standing post-*Spokeo*. The decision is currently on appeal to the Ninth Circuit, with the appellant's opening brief expected to be filed in early April. ■

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Privacy & Data Security

CLASS-IFIED INFORMATION

Comment dit-on "Class Action" *en français?* France Adopts New Regime for Privacy Class Actions.

- **Lenovo Consumer Class Wins Some, Loses Some in Adware Dispute**

  In re: Lenovo Adware Litigation, No. 15-md-02624 (N.D. Cal.) (Oct. 27, 2016). Judge Whyte. Granting in part defendants' motion to dismiss and granting plaintiffs' motion for class certification.

  A class of consumers who purchased laptops on which certain adware was installed was certified for six claims of 12 that survived dismissal. Although Judge Whyte determined that the potential of future breaches on the compromised laptops was too speculative to meet *Clapper*'s "certainly impending" test for future injury, he found that the consumers had alleged sufficient injuries-in-fact from laptop performance issues to confer standing. Judge Whyte also dismissed the consumers' Electronic Communications Privacy Act claim and state negligence claims based on the economic loss rule. Although Judge Whyte certified classes of indirect and California purchasers, he left the door open for a future motion to decertify the indirect purchaser class on the ground that California law does not apply to them.

- **Book Closed on Barnes & Noble Data Breach Class Action, but a Bookmark Remains**

  In re: Barnes & Noble Pin Pad Litigation, No. 12-cv-08617 (N.D. Ill.) (Oct. 3, 2016). Judge Wood. Granting defendants' motion to dismiss.

  A putative class action against Barnes & Noble stemming from a 2012 data breach of the store's PIN pad terminals was dismissed for the plaintiffs' failure to allege economic or out-of-pocket damages, disclosure of private facts, or injuries caused by the bookseller's delay in notifying customers of the breach. The plaintiffs' second attempt to survive dismissal by alleging that Barnes & Noble's PIN pad terminals were specifically targeted for the purpose of stealing customers' personal information, that the customers made purchases before the hacking of the terminals, and that a fraudulent charge was made after the breach was not enough to satisfy the injury-in-fact requirement set forth in the Seventh Circuit's *Remijas v. Neiman Marcus Group* decision.

- **Anxiety Not Enough to Create Standing**

  Welborn v. Internal Revenue Service, et al., No. 15-cv-01352 (D.D.C.) (Nov. 2, 2016). Judge Collyer. Granting motion to dismiss.

  Judge Collyer granted the IRS's motion to dismiss a putative class action brought by taxpayers who utilized the IRS's Get Transcript Online program, which experienced a data breach in 2015 that allegedly exposed the tax-related information of 330,000 filers. Each of the named plaintiffs who utilized the Get Transcript Online program to view and print a copy of their prior-year tax information alleged injuries stemming from the breach, including the risk of future misuse of their personally identifiable information and a heightened risk of further identity theft, requiring plaintiffs to pay for ongoing credit monitoring services. Judge Collyer concluded that the plaintiffs' allegations did not establish sufficient injury-in-fact to confer standing because "the likelihood that any plaintiff will suffer additional harm remains entirely speculative."

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CareCentrix Loses Bid to Dismiss Data Breach Suit

Hapka v. CareCentrix Inc., No. 16-cv-02372 (D. Kan.) (Dec. 19, 2016). Judge Murguia. Denying motion to dismiss.

Judge Murguia denied CareCentrix's motion to dismiss, rejecting the home health care coordination company's argument that the plaintiff had suffered only de minimus and speculative injuries from the data breach that exposed 2,000 current and former employees' Form W-2s. His decision turned on the "key fact" that the plaintiff had suffered an actual, concrete injury: an individual used her personal information to file a fraudulent tax return shortly after the data breach. While Judge Murguia acknowledged that the plaintiff may not be able to recover for some of her alleged injuries, he permitted her negligence claim to proceed.

AllSaints Goes Marching In – To State Court Again

Mocek v. AllSaints USA Ltd., No. 16-cv-08484 (N.D. Ill.) (Dec. 7, 2016). Judge Bucklo. Denying motion to dismiss and granting motion to remand.

Judge Bucklo denied AllSaints's motion to dismiss and remanded the case back to state court, giving consumers another opportunity to pursue their putative class action alleging that the fashion retailer recklessly printed too many credit card digits on its customers' receipts in violation of the Fair and Accurate Credit Transaction Act (FACTA). After AllSaints removed the case to the Northern District of Illinois, it moved to dismiss, arguing that the plaintiff failed to satisfy the *Spokeo* test for Article III standing because she did not suffer a concrete injury. The court agreed and remanded the case to state court, recognizing that the *Spokeo* test has no bearing on state court standing.

Target and TD Bank Chip Away at Robocall Class Action

Martinez v. TD Bank USA N.A., No. 15-cv-07712 (D.N.J.) (Dec. 20, 2016). Judge Simandle. Granting in part and denying in part motion to dismiss.

Judge Simandle granted in part and denied in part Target and TD Bank's motion to dismiss a class action alleging that TD Bank made numerous debt collection calls to the plaintiff's cell phone related to her Target credit card without her consent. Judge Simandle dismissed the plaintiff's California Unfair Competition Law (UCL) because the plaintiff failed to allege conduct sufficient for injunctive relief or restitution under the UCL. But the plaintiff sufficiently pleaded harassing conduct related to debt collection, so her Rosenthal Fair Debt Collection Practices Act could proceed. ■

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Products Liability

Ninth Circuit Decertifies Jeep Liberty Window Defect Class

Doyle v. Chrysler Group LLC, No. 15-55107 (9th Cir.) (Oct. 24, 2016). Reversing order granting motion for class certification.

The Ninth Circuit held that certification of a class of Jeep Liberty owners was improper because the plaintiff's proposed reimbursement-based damages model could not be applied on a classwide basis. The plaintiff filed suit against Chrysler Group LLC (now known as FCA US LLC), seeking partial reimbursement for replacing an allegedly defective window part in his Jeep Liberty. In October 2014, the district court certified a class of California residents who own or lease model year 2002 to 2007 Jeep Liberty vehicles and purchased certain replacement parts between 2009 and 2011. In reversing, the Ninth Circuit noted that because some members paid for replacement window regulators while others did not, the plaintiff's claim is not typical of the entire class and he does not adequately represent the interests of class members who have not incurred any expenses. The panel suggested that the plaintiff would be better off with a lawsuit oriented toward future repairs.

Costco Can't Escape Tainted Berries Class Action

Petersen v. Costco Wholesale Co., No. 13-cv-01292 (C.D. Cal.) (Nov. 15, 2016). Judge Carter. Denying motion for class decertification.

A federal judge in California rejected Costco's argument that the leaders of a class of consumers of frozen berries contaminated with hepatitis A do not adequately represent the group as a whole. In January 2016, the judge certified nine state subclasses to determine whether Costco is strictly liable for producing and selling tainted berries and reserved the issue of damages for the second phase of trial. Costco moved for class decertification because many of the class representatives were not injured by the infection and did not suffer the same lost wages, medical expenses, or other costs as the rest of the group. The judge held that the class representatives met the typicality requirement because they risked exposure by consuming potentially infected berries, even if they were not actually exposed to the virus. Class representatives do not have to show that they are "immune from any possible defense," but they must demonstrate that they are "not subject to a defense that is not typical of the defenses which may be raised against other members of the proposed class."

Ford Steering Failure Class Action Comes to a Stop

Philips v. Ford Motor Co., No. 14-cv-02989 (N.D. Cal.) (Dec. 22, 2016). Judge Koh. Denying motion for class certification.

Citing lack of commonality, a federal judge in California refused to certify classes of drivers who accuse Ford of failing to disclose issues with the electronic power assisted steering systems in certain Focus and Fusion models. The judge found that class members were not subject to uniform representations of steering functionality by Ford because some may have read the portion of the owner's manuals that warned of a potential fault in the system. Because the drivers were exposed to different information about the steering system, it would be difficult to determine whether class members suffered actual harm from any alleged concealment. Individual issues related to reliance would predominate over common issues. ■

CLASS-IFIED INFORMATION

Todd Benoff

Todd Benoff will make sense of driverless vehicles and "Insurance and Liability" at the AutoSens in Detroit conference May 22–25.

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Settlements

- **Judge Approves Gucci Consumer Suit but Slashes Attorneys' Fees**

Manner v. Gucci America Inc., et al., No. 15-cv-00045 (S.D. Cal) (Oct. 13, 2016). Judge Bashant. Granting final settlement approval.

Judge Bashant approved Gucci's $3.4 million settlement to resolve claims that the fashion giant improperly requested personal information from California shoppers during credit card transactions. However, the settlement included less than one-third of the $440,000 in attorneys' fees sought by class counsel. Judge Bashant opined that class counsel did not undertake significant risk in the case, which casts doubt on the billed hours' value to the class. She also criticized the high number of hours spent on internal discussion between co-counsel. Gucci objected to the attorneys' fees request from the very start of settlement discussions, arguing that they were grossly inflated. It appears that the court agreed.

- **Consumers Score Big in NFL-Reebok Antitrust Suit**

Villa v. San Francisco Forty Niners Ltd., et al., No. 12-cv-05481 (N.D. Cal) (Oct. 13, 2016). Judge Davila. Granting final settlement approval.

NFL team apparel buyers filed suit against the NFL and Reebok, alleging that a 2000 licensing deal that gave Reebok sole permission to sell apparel bearing NFL team logos drove up prices for merchandise in violation of antitrust laws. Consumers pointed to the price of fitted caps increasing from $19.99 to $30, and the price of jerseys rising from $40 to $65 shortly after the exclusive deal was made. Judge Davila approved the $4.75 million settlement, which will compensate customers according to the type of team apparel they purchased between 2008 and 2012.

CLASS-IFIED INFORMATION

Emily Costin

Emily Costin warns *Plan Sponsor* of astronomical fees in "On Guard: Increased Litigation Leads Plan Sponsors to Take a Defensive Stance in Monitoring and Evaluating Fees."

- **District Judge to Wal-Mart: Pay Money, Live Better**

Cote v. Wal-Mart Stores Inc., No. 15-cv-12945 (D. Mass) (Dec. 16, 2016). Judge Young. Granting preliminary settlement approval.

Wal-Mart employees claimed the retail giant violated Title VII of the Civil Rights Act because they were denied benefits for their same-sex spouses from Jan. 1, 2011, to Dec. 31, 2013. Judge Young granted preliminary approval of the $7.5 million settlement, calling it "exemplary" despite his intention to change the attorneys' fees.

Filed shortly after the U.S. Supreme Court's same-sex marriage decision, this was the first class action brought by employees alleging Title VII violations relating to employee benefits for same-sex spouses. The settlement will allow, at minimum, full recovery for class members who can show out-of-pocket medical expenses for their same-sex spouses during the class period. Class members who are unable to show exact expenses will recover on a pro rata basis.

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Judge Approves Historic Settlement against HSBC

Jaffe v. Household International Inc., et al., No. 02-cv-05893 (N.D. Ill.) (Oct. 20, 2016). Judge Alonso. Granting final approval.

Judge Alonso granted final approval to a record-breaking $1.575 billion settlement between Household International Inc. (a unit of HSBC) and a plaintiff class of investors. The class alleged that Household lied about its lending practices and financial accounting, amounting to nearly $400 million of overstated revenue over a specified time period.

The judge's stamp of approval makes the settlement the Seventh Circuit's largest ever for securities fraud cases and the seventh-largest such settlement ever recorded. This settlement was reached after a judgment for $2.4 billion had been vacated by the Seventh Circuit last year, and it ends litigation that began in 2002.

Settlement Agreements Trump Post-settlement Changes in the Law

William Whitlock, et al. v. FSL Management LLC, et al., No. 16-5086 (6th Cir.) (Dec. 14, 2016). Affirming settlement.

The Sixth Circuit unanimously held that a federal class action settlement is not invalidated by an intervening change in state substantive law. Shortly after the parties reached a settlement agreement on their Kentucky state law claims, the Kentucky Court of Appeals ruled that class actions were not available under the state's wage-and-hour law.

The appellants, four companies that employed the class members, argued that Rule 23(e) requires federal courts to defer to state substantive law, which would require decertification of the class. The circuit court's decision affirmed the district court's determination that a settlement agreement is tantamount to a binding contract, where "finality, not modifiability, is the rule" and that Rule 23(e) does not allow courts to disturb contracts. The court refused to employ Rule 23 as a means to "rescue a litigating party from a bargain poorly struck."

Judge Refuses to Accept Delivery Company Settlement for the Second Time

Mejia v. DHL Express USA Inc., et al., No. 15-cv-00890 (C.D. Cal.) (Oct. 3, 2016). Judge King. Denying second motion for preliminary approval.

Judge King denied the parties' second motion for preliminary approval of a $1.45 million settlement because the settlement release was too broad and "simply not legal." He noted the agreement could be understood to waive class members' rights under the Fair Labor Standards Act, which must be done "on an opt-in basis" rather than through an opt-out agreement.

The class alleged that DHL policies did not provide for meal breaks for shifts that lasted longer than 10 hours and that the company timekeeping system shortchanged their hours. Each class member would have received roughly $750 as a result of the agreement.

Background Check Company Stretches Too Far—Judge Denies Settlement Agreement

Hawkins v. S2Verify, et al., No. 15-cv-03502 (N.D. Cal.) (Oct. 17, 2016). Judge Aslup. Denying preliminary approval.

A plaintiff class that alleged violations of the Fair Credit Reporting Act (FCRA) by a background check company must now go back to square one after Judge Aslup ruled their settlement agreement is "overbroad." Class members would each receive $250 for settling claims that S2Verify submitted background checks to prospective employers that included arrests, charges, and indictments that either did not result in conviction or were more than seven years old. Rather than releasing the claims as outlined in the complaint, the proposed settlement release was expanded to include "any and all claims under the FCRA … arising out of [the] consumer reports prepared by S2Verify"—a release far too broad in Judge Aslup's view, despite the parties' claim that the expansion wasn't a problem.