ALSTON & BIRD LLP

SUMMER 2013

Where the (Class) Action Is

The second quarter brought a number of high-profile and potentially game-changing class action decisions. In *AMEX*, the Supreme Court settled that class action waivers in arbitration clauses are enforceable, but in *Oxford Health*, the Court reminded us that it's never safe to leave arbitration terms (such as a class waiver) to the arbitrator's imagination. In *Raskas* and *Roth*, the Eighth and Ninth Circuits cleared the way for more removals under CAFA.

We cover those and other cases in this edition of ***Where the (Class) Action Is***.

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Class Action Round-Up ■

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ANTITRUST

U.S. Supreme Court Deals Another Blow to Class Litigation

American Express Co. v. Italian Colors Restaurant, No. 12-133 (S. Ct.) (June 20, 2013)
Reversing by a 5-3 vote. Justice Scalia for the majority.

If you check your cell-phone contract or your bank-account agreement, you'll likely find an arbitration clause that includes a class-action waiver. Two years ago, in *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), the Supreme Court held that a class waiver in an arbitration clause is enforceable just like any other contractual provision. Last month, in *AMEX*, the Court confirmed that it meant what it said in Concepcion and held that a class waiver is enforceable even if the costs of litigating a claim individually outstrip the plaintiff's potential recovery.

AMEX included an arbitration clause and class waiver in its contracts with merchants. Undeterred, some of those merchants filed a class action against AMEX alleging that it violated the antitrust laws. In an effort to break up the putative class, AMEX moved to compel individual arbitrations. The district court granted AMEX's motion and dismissed the lawsuit. *In re American Express Merchants' Litig.*, 2006 WL 662341 (S.D.N.Y. Mar. 16, 2006).

After a whirlwind tour in the appellate courts—the case went up to the Second Circuit, then up to the Supreme Court, then back down to the Second Circuit—the Second Circuit reversed the district court, holding that the class waiver in AMEX's merchant agreement was unenforceable because it prevented merchants from "effectively vindicating" their statutory rights. *In re American Express Merchants' Litig.*, 667 F.3d 204 (2d Cir. 2012). No merchant had an incentive to pursue an individual antitrust claim in arbitration, the court reasoned, because the costs to pursue an individual claim far outweighed any possible recovery.

By a 5-3 vote (Justice Scalia for the majority), the Supreme Court reversed. The Court first rejected the merchants' argument that antitrust plaintiffs are entitled to class proceedings. Noting that Congress enacted the Sherman and Clayton Acts decades before the advent of the class action, the Court concluded that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."

The Court also rejected the merchants' argument that, without class proceedings, they could not effectively vindicate their statutory rights because the costs of pursuing an individual antitrust claim would dwarf any possible recovery: "[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue a remedy." Justice Thomas echoed this sentiment in his concurring opinion: "Italian Colors voluntarily entered into a contract containing a bilateral arbitration provision. It cannot now escape its obligations merely because the claim it wishes to bring might be economically infeasible."

Read "In *AMEX*, Supreme Court Deals Another Blow to Class Litigation," our full account of the Supreme Court's important ruling.

Silicon Valley Software Engineers Rebuffed . . . For Now

In re High-Tech Employee Antitrust Litigation, No. 11-CV-02509-LHK (N.D. Cal.) (April 5, 2013) Judge Koh. Denying class certification, but granting leave to amend.

Former software engineers from Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar sued those companies, alleging a conspiracy to fix employee compensation. The engineers contend that the defendants agreed with each other not to compete for employees.

Judge Koh denied class certification, holding that the plaintiffs failed to show that antitrust impact was susceptible to classwide proof. But because they came pretty close, the court granted the plaintiffs leave to amend and hinted that additional discovery could make the class certifiable.

CONSUMER FRAUD

Removal Just Got Easier in the Eighth Circuit

Raskas v. Johnson & Johnson, No. 12-1996 (8th Cir.) (June 26, 2013)
Reversing remand to state court.

In *Raskas*, three plaintiffs filed separate lawsuits against drug manufacturers Johnson & Johnson, McNeil-PPC, Pfizer, Inc., and Bayer Healthcare LLC alleging that each violated Missouri state consumer protection laws by conspiring with third parties to print premature expiration dates on medicines, so that patients would throw away perfectly safe medicines to buy more. Each defendant removed under CAFA based in part on evidence that total sales of the medications during the relevant period exceeded CAFA's $5 million jurisdictional threshold. The district court rejected the defendants' evidence and remanded the cases to state court because, in its view, the evidence of a manufacturer's total sales overstated the potential classwide damages.

The Eighth Circuit accepted the defendant's discretionary appeal of the remand order and reversed. Taking a broader view of "amount in controversy," the appellate court held that CAFA does not require a defendant to admit or prove that classwide damages "*are* greater" than $5 million, only that "a fact finder *might* legally conclude that they are"—and the manufacturers' evidence of total sales was proof enough of that possibility.

Also noteworthy: The Eight Circuit allowed the defendants to use hearsay evidence to establish the amount in controversy, reasoning that the $5 million threshold is "a pleading requirement, not a demand for proof."

For the full breakdown of these cases, see our advisory "CAFA Removal Just Got Easier (At Least in Some Courts)."

CAFA Removal? Anytime (Maybe)

Roth v. CHA Hollywood Medical Center, L.P., No. 13-55771 (9th Cir.) (June 27, 2013)
Reversing remand to state court.

The federal removal statute provides that a defendant can remove a case to federal court either within 30 days after the filing of a complaint or within 30 days after the defendant receives some other document containing facts supporting removal. 28 U.S.C. §§ 1446(b)(1), (b)(3). Other courts have held that those two 30-day periods are the only two windows for removal.

That's no longer true in the Ninth Circuit. In *Roth*, the Ninth Circuit accepted an appeal of the remand order and held that so long as a defendant has not "run afoul" of the two prescribed 30-day removal periods, the defendant can remove outside those 30-day periods if it discovers facts or information supporting removal.

The facts in *Roth* show how this could work. There, the defendants sought removal to federal court. When the plaintiffs moved to remand to state court, the defendant submitted (among other things) three declarations, one from a member of the putative class establishing the minimal diversity of citizenship needed under CAFA and two others from defendant CHA's president of human resources and general counsel attesting that the wages at issue were more than $5 million. The district court rejected the defendants' evidence, interpreting 28 U.S.C. § 1446 to permit removal only within the two prescribed 30-day periods and based only on information that a defendant receives from the *plaintiff*.

The Ninth Circuit disagreed, holding that the two 30-day periods in § 1446(b) apply only when the *plaintiff* has put a defendant on notice that a case is removable, not when a defendant seeks removal based on its own information.

Under *Roth*, a defendant may remove at any time, based on its own information, so long as it has not "run afoul" of the two statutory 30-day periods by failing to remove within 30 days after being put on notice of removability through information received from the plaintiff.

Uncontested Declarations Enough for CAFA Removal

Watkins v. Vital Pharmaceuticals, Inc., No. 13-55755 (9th Cir.) (July 2, 2013)
Reversing remand to state court.

Purchasers of Vital's ZERO IMPACT protein bars allege that Vital falsely labeled the bars as having no impact on blood sugar. Vital removed under CAFA, submitting two declarations to show that the litigation met CAFA's $5 million amount-in-controversy requirement. The district court remanded to state court because, in its view, Vital merely "averred in its Notice of Removal that total sales of the Subject Bars in the last four years exceeded $5 million."

The Ninth Circuit accepted the appeal of the remand order and reversed, concluding that the uncontested declarations were enough for CAFA jurisdiction.

Road Runner Plaintiffs Unable to Pull a Fast One on Second Circuit

Fink v. Time Warner Cable, No. 12-0299 (2d Cir.) (May 6, 2013)
Affirming dismissal of putative class action.

Time Warner Cable customers sued the media company alleging that it falsely advertised its Road Runner Internet service as being faster than it really is. The district court granted Time Warner's motion to dismiss.

The Second Circuit affirmed. At oral argument, the court noted that the record didn't contain the allegedly deceptive advertisements, so the court asked the plaintiffs to produce them. When the plaintiffs couldn't come up with the "false" ads, the court kicked the case: "A plaintiff who alleges that he was deceived by an advertisement may not misquote or misleadingly excerpt the language of the advertisement in his pleadings and expect his action to survive a motion to dismiss or, indeed, to escape admonishment."

You Can't Sue About Things That You Didn't Buy

Major v. Ocean Spray Cranberries, Inc., No. 5:12-cv-3067 (N.D. Cal.) (June 10, 2013)
Judge Davila. Denying motion for class certification.

A consumer of Ocean Spray drinks sued the drink-maker, alleging that several of its products contained false or misleading labels ("No Sugar Added," "free from artificial colors, flavors, or preservatives," and the like).

Judge Davila denied class certification, concluding that the plaintiff had failed to show typicality, primarily because she proposed classes "so broad and indefinite that they encompass products that she herself did not purchase."

Plaintiffs Claiming Damaged Hair Can't Prove Damages through Classwide Evidence

Guido v. L'Oreal, USA, Inc., No. 2:11-cv-1067, No. 2:11-cv-5465 (C.D. Cal.) (July 1, 2013)
Judge Snyder. Granting in part and denying in part class certification.

Purchasers of L'Oreal's Serum hairstyling products sued the beauty products magnet alleging that the products were flammable and thus worth less than L'Oreal's advertisements suggested. The plaintiffs sought certification of California and New York classes of Serum purchasers.

Judge Snyder denied certification of the California class because individual damages issues predominated over any common questions. According to the court, because the plaintiffs failed to submit expert testimony showing a "gap between the true market price of Serum and its historical market price," they couldn't show injury through classwide proof.

The court certified the New York class because the New York plaintiffs sought statutory (not actual) damages.

CONTRACT

Note to Businesses: Silence Is Not the Same Thing as a Class-Action Waiver

Oxford Health Plans LLC v. Sutter, No. 12-135 (S. Ct.) (June 10, 2013)
Affirming denial of motion to vacate. Justice Kagan for a unanimous Court.

A New Jersey pediatrician filed a class action against Oxford Health Plans alleging that Oxford failed to pay for services in accordance with its provider contracts. The plaintiff's agreement with Oxford contained an arbitration clause, so the state court granted Oxford's motion to compel arbitration. The agreement left it to the arbitrator to decide the scope of the clause. The arbitrator did just that, concluding that the arbitration clause *permitted* class arbitration. Oxford moved under Federal Arbitration Act §10(a)(4) to vacate the arbitrator's decision. That provision allows a court to vacate an arbitral award only when the arbitrator exceeds his arbitral powers.

The Supreme Court affirmed the lower courts' refusal to vacate the arbitration award. Emphasizing that the FAA contemplates only narrowly circumscribed judicial review of arbitral awards, the Court upheld the arbitrator's award even though it strongly suggested that it wouldn't have done so on *de novo* review.

LABOR & EMPLOYMENT

If You Give an FLSA Plaintiff What They Ask For, Their Claim Is Moot

Genesis Healthcare Corp. v. Symczyk, No. 11-1059 (S. Ct.) (April 16, 2013)
Reversing Third Circuit's denial of motion to dismiss.

A former employee of Genesis sued the health care company alleging that it violated the Fair Labor Standards Act (FLSA) by deducting 30 minutes of time per shift for meal breaks even when employees worked during their breaks. When Genesis answered the complaint, it served an offer of judgment that would fully satisfy the plaintiff's individual claim. The nurse didn't respond to the offer, so Genesis moved to dismiss her claim, arguing that the offer made the plaintiff's claim moot. The district court agreed, but the Third Circuit reversed, concluding that the plaintiffs still had standing to represent a class despite the offer.

The Supreme Court reversed, holding that the plaintiff could not maintain a collective action because the offer of judgment mooted her claim.

Ninth Circuit: Individual Damages Calculations Alone Won't Stop Class

Leyva v. Medline Industries Inc., No. 11-56849 (9th Cir.) (May 28, 2013)
Reversing denial of class certification.

A former employee sued Medline, alleging that it undercompensated hourly warehouse workers by improperly rounding minutes worked. The district court denied certification, concluding that individual damages issues predominated.

The Ninth Circuit disagreed. The only individualized issue that the district court spotted was the varying amount of pay that each employee was short-changed. But, the panel explained, "[i]n this circuit, . . . damage calculations alone cannot defeat certification."

Dukes Sounds Death Knell for Another Class Action

Davis v. Cintas Corp., No. 10-1662 (6th Cir.) (May 30, 2013).
Affirming denial of class certification.

A female job applicant filed a Title VII class action against Cintas after the company twice rejected her application. The case mirrored *Dukes*: The allegedly discriminatory employment decisions were based on a male-centric corporate culture, individual managers had broad discretion over the challenged practices, and the plaintiff relied on limited statistics and anecdotal evidence. So the Sixth Circuit followed *Dukes*: It held that there was no commonality because the alleged discriminatory hiring stemmed from the subjective preferences of countless managers—not a biased testing procedure or across-the-board policy.

To brush up on the *Dukes* ruling, see the Alston & Bird Labor Group advisory "Supreme Court Reverses Class Action Certification of Nationwide Class of 1.5 Million Female Workers."

Second Circuit to District Court: Rigorous Analysis Means Rigorous Analysis

Cuevas v. Citizens Financial Group, Inc., No. 12-2832 (2d Cir.) (May 29, 2013)
Reversing class certification.

The Second Circuit vacated and remanded an order from the Eastern District of New York certifying a class of assistant bank managers at Citizen Bank locations in New York who claimed that the bank violated New York labor laws by not paying them overtime. The problem with the district court's order? No rigorous analysis of the evidence relevant to the Rule 23 factors. The Second Circuit vacated and remanded to the district court for it to rigorously analyze and resolve the material factual disputes bearing on Rule 23's commonality and predominance requirements.

Class Conflict Dooms Union-Dues Class

Schlaud v. Snyder, No. 12-1105 (6th Cir.) (May 22, 2013)
Affirming denial of class certification.

A putative class of home childcare providers sued the Governor of Michigan and the Michigan Department of Human Services (among others), arguing that the state agencies' deduction of union dues from their paychecks violated the First Amendment.

The Sixth Circuit affirmed the denial of class certification, concluding that there was a lack of adequacy of representation based on an intractable conflict among class members where a substantial number of them *wanted* union dues deducted from their paycheck.

Furniture Company Employees' Class Action Put to Bed

Hernandez v. Ashley Furniture Industries, Inc., No. 5:10-cv-05459 (E.D. Pa.) (May 22, 2013)
Judge Schiller. Denying class certification.

A group of Ashley Furniture employees sued the furniture company claiming that it didn't pay them for all the hours that they worked. They pressed claims under Pennsylvania's wage laws.

Judge Schiller denied class certification. Questions about the number of hours each employee worked and whether employees worked overtime without compensation required individualized inquiries that predominated over any common questions.

Game, Set, Match: Tennis Umpires Score Class Certification

Meyer v. United States Tennis Association, No. 1:11-cv-06268 (S.D.N.Y.) (April 25, 2013).
Judge Carter. Granting class certification.

A group of U.S. Open tennis umpires sued the U.S. Tennis Association claiming that it misclassified them as independent contractors and cheated them out of overtime pay. The umpires argued that they were not independent contractors because they didn't dictate their own hours and didn't negotiate their own pay.

Judge Carter granted the umpires class certification, concluding that the Association's uniform

classification of umpires as independent contractors, uniform description of the umpires' duties, and the shortness of the timespan during which the U.S. Open took place were enough to sustain the class.

No Seats, a Class Problem: Court Certifies (Limited) Kmart Cashier Class

Delbridge v. Kmart Corp., No. 3:11-cv-02575 (N.D. Cal.) (June 11, 2013)
Judge Alsup. Granting class certification.

Judge Alsup certified a class of Kmart cashiers who allege that the department-store chain violated California wage laws by failing to provide them seats at checkout stands. Here's the catch: The certified class includes only cashiers at the Kmart in Redlands, California, where the named plaintiff works.

The proposed state-wide class couldn't satisfy Rule 23's commonality or typicality requirements. The configurations for cashier checkout stands—including the placement of registers, use of conveyor belts, and presence of bagging carousels—varied widely from store to store.

Unpaid Interns Should Have Been Classified as Paid Employees

Eric Glatt v. Fox Searchlight Pictures, Inc., No. 1:11-cv-6784 (S.D.N.Y.) (June 11, 2013).
Judge Pauley. Granting and denying in part plaintiffs' and defendants' motions for summary judgment and granting plaintiffs' motion for class certification.

The plaintiffs, unpaid interns who worked either on the set of Fox Searchlight Films or in its corporate offices in New York City, allege that Searchlight violated the FLSA and New York labor laws by classifying them as unpaid interns instead of paid employees. The court agreed, holding that Searchlight had "employed" the plaintiffs within the meaning of the FLSA and New York laws because it exercised "formal control" over them (even if it had not exercised "functional control" over them) and because the interns were not "trainees." The court certified a class of interns, concluding that several common questions predominated over any individual issues.

Another Wage Class Denied

Ginsburg v. Comcast Cable Communications Management LLC, No. 2:11-cv-1959 (W.D. Wash.) (April 17, 2012)
Judge Jones. Denying class certification.

The plaintiffs sued Comcast on behalf of a putative class of former Comcast customer account executives (CAEs) alleging that Comcast violated Washington law by failing to pay overtime for unpaid time spent working before a shift began. The court denied plaintiffs' motion for class certification, holding that questions common to the class did not predominate over individualized class members. In particular, the court held that plaintiffs could not demonstrate that Comcast supervisors had a uniform policy requiring CAEs to perform unpaid pre-shift work. For example, there was evidence that CAEs perform some pre-shift work voluntarily, aware that Comcast strictly forbids them from working before their shift begins.

Not So Fast: California Court of Appeals Orders Trial Court to Certify Truckers Class

Bluford v. Safeway Stores, Inc., No. C066074 (Cal. Ct. App.) (May 8, 2013)
Reversing denial of class certification.

Truck drivers for Safeway sued their employer, claiming that it violated the California Labor Code by failing to provide paid rest periods, meal periods, and itemized wage statements. The trial court denied class certification because resolving whether each driver was paid for a rest or meal period would require individualized inquiries.

The California Court of Appeals reversed, concluding that the truck drivers all worked under the same Safeway policies, which was enough to support class certification.

An Exception to *Concepcion*?

Brown v. The Superior Court of Santa Ana, No. H037271 (Cal. Ct. App.) (June 4, 2013)
Reversing grant of motion to compel arbitration.

Employees of Morgan Tire & Auto sued the company alleging violations of California's wage-and-hour laws. In addition to restitution and damages, the employees sought civil penalties under the Private Attorney General Act (PAGA). The employees had signed an arbitration agreement that included a class-action waiver. The trial court, citing *Concepcion*, granted the company's motion to compel individual arbitration on all claims.

The Court of Appeals reversed in part. The appellate court refused to compel arbitration of the PAGA claims because, in its view, that would prevent plaintiffs from vindicating a statutory right meant to protect the public.

It's unclear whether the California court would reach the same conclusion in the wake of the Supreme Court's recent *AMEX* decision.

FINANCIAL SERVICES

Court Certifies Mortgage Tax Class

Dolfo v. Bank of America, N.A., No. 3:11-cv-2828 (S.D. Cal.) (June 3, 2013)
Judge Sabraw. Granting class certification.

Mortgage customers sued Bank of America alleging that the bank's escrow-analysis program violated California law. The bank created a mock impound account for paying customers' property taxes and homeowners insurance. The plaintiffs claim that they were unaware of the impound account and that it caused them to default on loans.

The district court certified a class under Rule 23(b)(2), concluding that the legal question whether the program violated California law was susceptible to common proof and classwide injunctive relief.

Northern District of Illinois Grants Preemptive Strike on Class Allegations

Hill v. Wells Fargo Bank, N.A., No. 1:12-cv-7240 (N.D. Ill.) (May 24, 2013)
Judge Feinerman. Granting motion to strike class allegations.

Mortgage customers sued Wells Fargo and its agent, LPS Services, alleging that when the customers fell behind on mortgage payments, Wells Fargo had LPS make unauthorized entries onto their property to engage in improper tactics before foreclosure. The plaintiffs asserted claims under the Fair Debt Collection Practices Act (FDCPA) and the Illinois Consumer Fraud and Deceptive Practices Act and sought to represent a putative class.

Judge Feinerman granted Wells Fargo's motion to strike the class allegations on the pleadings. The court recognized that, although not the norm, rejecting class certification at the pleading stage is proper when "the issues are plain enough from the pleadings . . . to conclude that no class can be certified." Reviewing the allegations, the court concluded that the individualized issues of fact and law made it clear that no class could be certified and no amount of discovery or time would provide any hope of altering that conclusion.

PRIVACY

Update to Spring 2013 Class Action Round-Up (Click Here for Class Action: Illinois Court Gives the Green Light to Huge Internet Privacy Class)

In re comScore, Inc. No. 13-8007 (7th Cir.) (June 11, 2013)
Denying 23(f) petition.

The Seventh Circuit denied without opinion comScore's Rule 23(f) petition to appeal Judge Holderman's certification (in part) of a class of consumers who downloaded and installed comScore's software, which tracks consumers' online behavior. The Seventh Circuit's order leaves intact what is believed to be the largest-ever Internet privacy class.

Be More Personal: Generic Texts Sustain Alleged TCPA Violation

Maier v. J.C. Penney Corporation, Inc., No. 12-cv-0163 (S.D. Cal.) (June 13, 2013)
Judge Gonzales. Denying motion to dismiss.

In *Maier*, a J.C. Penney customer who received an unsolicited text message on her cellphone after submitting her number to J.C. Penney's online rewards program website was given the green light to maintain a class action against the retailer. The generic and impersonal text message, which asked her to confirm if she wanted to receive further messages about sales and other events, was enough to support a reasonable inference that J.C. Penney used an automatic telephone dialing system, which violates the TCPA.

Alston & Bird's Privacy Group has recently released its Cyber-Risk Legal Package, a comprehensive, customized suite of cybersecurity legal services.

PRODUCTS LIABILITY

High Court to Seventh Circuit: Add *Comcast*. Rinse. Repeat.

Sears, Roebuck and Co. v. Butler, No. 12-1067 (S. Ct.) (June 3, 2013)
Vacating and remanding.

Last November, the Seventh Circuit affirmed the certification of two class actions against Sears in which purchasers of Whirlpool washing machines claim that the machines produce mold and bad odors rather than clean clothes. The Seventh Circuit certified the classes shortly after the Sixth Circuit affirmed class certification in a nearly identical case against Whirlpool, *Whirlpool v. Glazer*. Last quarter, we reported that the Supreme Court vacated and remanded Glazer for further proceedings in light of the Court's decision in *Comcast Corp. v. Behrend*, 569 U.S. ___ (2013). The Court has now done the same with *Sears v. Butler*.

Doubling Down on Class Certification, Sixth Circuit Says that *Comcast v. Behrend* Has Only "Limited Application" to Liability Issues

Glazer v. Whirlpool Corp., No. 10-4188 (6th Cir.) (July 18, 2013).
Affirming class certification.

In April, the Supreme Court vacated the Sixth Circuit's 2012 decision in *Whirlpool v. Glazer* and remanded to the circuit court for further proceedings in light of *Comcast Corp. v. Behrend*, 569 U.S. ___ (2013). The Sixth Circuit had affirmed certification of a class of purchasers of allegedly defective Whirlpool front-loading washing machines.

On remand, the Sixth Circuit stuck to its guns, affirming class certification again. Writing for the court, Judge Stranch sidestepped *Comcast*, reasoning that the decision is mostly confined to damages issues and has only "limited application" to "liability issues."

Something tells us to expect another trip to the Supreme Court before laundry day is done on this one.

Ship Sails on Carnival Cruise's Creative Efforts to Establish CAFA Jurisdiction over Two Related "Mass Actions"

Scimone v. Carnival Corp., No. 13-12291 (11th Cir.) (July 1, 2013)
Affirming remand to state court.

Following the wreck of the Carnival cruise ship *Costa Concordia*, which resulted in 32 deaths, a lawsuit was filed in Florida state court alleging claims for negligence, professional negligence by the ship's architect, and various and intentional torts. When the number of plaintiffs who wanted to join the lawsuit grew to more than 100, the plaintiffs voluntarily dismissed the original action, split the plaintiffs into two groups, and filed two new separate complaints in Florida state court. One complaint covered 48 plaintiffs, the other 56. The plaintiffs never filed a single complaint naming 100 or more plaintiffs and never moved for consolidation or a joint trial of the two separate

actions. Nevertheless, Carnival removed both cases to federal court under CAFA's mass-action provision. The district court remanded the cases to state court.

After accepting the appeal of the remand order, the Eleventh Circuit affirmed, rejecting Carnival's argument that the two lawsuits, containing more than 100 plaintiffs between them but not separately, constituted a "mass action" under CAFA, which is defined as a civil action in which "claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). Although plaintiffs can propose a joint trial by naming 100 or more plaintiffs in a single complaint or by collaborating across multiple complaints, a defendant cannot create CAFA jurisdiction by cobbling together suits that otherwise would not support federal jurisdiction. The Eleventh Circuit applied the plain letter of the statute, and in doing so, rejected Carnival's arguments for treating the two actions as one to prevent plaintiffs from structuring lawsuits to avoid CAFA jurisdiction.

Adjunct reading: "In *Comcast Corp. v. Behrend*, the Supreme Court Makes Clear that Rule 23's 'Rigorous Analysis' Applies to Damages Issues"

Judge Denies Certification to Vehicle Class Comprised of Just About Everyone Except the Class Rep

Martin v. Ford Motor Co., No. 2:10-cv-2203 (E.D. Pa.) (July 2, 2013)
Judge Slomsky. Denying class certification.

A Pennsylvania man purchased a used 2001 Ford Windstar with 16,000 miles from a family friend. He thought this was a "great deal" until the rear axle fractured. So (of course) he sued Ford, asserting claims for breach of express and implied warranty, violations of various consumer protection laws, and unjust enrichment. In a scheme to ensure certification of the largest multistate classes possible, the plaintiff claimed to include for each class only those states with similar laws. Problem one: For the express warranty and consumer protection law classes, the plaintiff left out Pennsylvania (his home state), so he didn't belong to the class that he proposed to represent. Problem two: For all four classes, individual injury and damages issues predominated.

Arkansas District Court Blacks Out Flat-Screen TV Class

Jarrett v. Panasonic Corp. of North America, No. 4:12-cv-739 (E.D. Ark.) (June 21, 2013)
Judge Wright. Granting in part motion for judgment on the pleadings and denying class certification.

The plaintiff in *Jarrett* sued Panasonic, Sanyo, and Wal-Mart, alleging that they designed or sold defective flat-screen televisions that "flicker" and "lose picture." In her complaint, the plaintiff sought to represent a nationwide class and an Arkansas-only class and asserted claims for breach of implied warranty, deceptive trade practices, and unjust enrichment. The defendants jointly moved for judgment on the pleadings and to dismiss the plaintiff's class allegations.

Judge Wright agreed with the defendants. According to the court, the proposed classes were brimming with individual issues—ranging from the motivating factors for each putative class member's purchase to whether class members suffered any injury.

Beer Stein Class Tastes Flat to Pennsylvania District Court

Stoneback v. ArtsQuest, No. 5:12-cv-3287 (E.D. Pa.) (June 19, 2013)
Judge Gardner. Denying class certification.

Each year, ArtsQuest hosts a festival in Pennsylvania called Musikfest. Purchasers of souvenir beer steins and stoneware mugs sold at the festival sued ArtsQuest after learning that the steins and mugs were manufactured in China rather than in Germany (as ArtsQuest had advertised). The plaintiffs sought to certify claims under the federal RICO Act and Pennsylvania's consumer protections laws. ArtsQuest argued, among other things, that individual issues relating to whether proposed class members relied on the "made in Germany" representation barred class certification.

Judge Gardner agreed, holding that plaintiffs failed to establish predominance and explaining that "plaintiffs would have to show that each class member justifiably relied on defendants' alleged misrepresentation," and they "have not even established which class members were exposed to which misrepresentations."

Ford Focus Rear-Suspension Defect Class Fails at Class Cert. Judge Cites Varying Issues with Geometry

Daniel v. Ford Motor Co., No. 2:11-cv-2890 (E.D. Cal.) (June 17, 2013)
Judge Shubb. Denying class certification.

Purchasers of 2005-to-2011 Ford Focus vehicles sued Ford alleging that the vehicles have a "geometry defect" in their rear suspension that causes premature tire wear and, in turn, safety hazards such as handling, steering, and stability-control problems. The plaintiffs sought certification of Song-Beverly-Act and Magnuson-Moss-Warranty-Act classes comprised of all individuals who purchased or leased their Ford Focus in California.

Judge Shubb denied class certification, concluding that individual questions over whether a class member's vehicle was fit for its ordinary purpose, whether the alleged geometry defect arose within the warranty period, and whether it caused a proposed class member's injury all predominated over questions common to the class.

Volvo Owners Seeking Nationwide Class Learn That You Can't Ignore State-Law Differences

Cochran v. Volvo Group North America, LLC, No. 1:11-cv-927 (M.D.N.C.) (Apr. 22, 2013)
Judge Eagles. Denying class certification.

A group of Volvo truck owners sued Volvo, alleging that the company breached express and implied warranties by selling trucks with faulty engines. After reviewing the plaintiffs' motion to certify a nationwide warranty class, Judge Eagles asked the plaintiffs to file a supplemental brief addressing what a nationwide verdict form and jury instructions might look like if she granted their motion. The plaintiffs came up with some sample jury interrogatories but could not come up with sample nationwide jury instructions. As a result, the court denied the plaintiffs' motion, ruling that differences in state law "bedevil efforts to certify class actions on nationwide breach of warranty claims."

Oregon Appeals Court Reverses Denial of Cigarette Class

Pearson v. Philip Morris, Inc., No. A137297 (Or. Ct. App.) (June 19, 2013)
Reversing denial of class certification.

An Oregon appellate court reversed a trial court's denial of class certification and grant of summary judgment to Philip Morris in a case involving approximately 100,000 Marlboro Lights smokers who purchased those cigarettes in Oregon between 1971 and 2001.

In a divided decision, the majority first held that the federal Labeling Act did not preempt the plaintiffs' state law claims. Turning to class certification, the majority concluded that the question was whether "the putative class members were similarly situated or acted in a similar manner." The court's answer? Close enough.

Cari K. Dawson, chair of Alston & Bird's Class Action Group, has been named one of the "100 Most Influential Lawyers in America" by *The National Law Journal*.

RICO

Pfizer Suffers Relapse of RICO Class Action, Among Other Ailments

Harden Manufacturing Co. v. Pfizer, Inc., No. 11-1806 (1st Cir.) (Apr. 3, 2013)
Reversing denial of class certification.

Pfizer suffered multiple legal defeats when the First Circuit reviewed three district court rulings in a multidistrict litigation over the drug manufacturer's alleged false marketing of Neurontin, an anticonvulsant drug. In addition to upholding a $142 million jury verdict against Pfizer, the First Circuit reversed dismissals of two companion cases, disagreeing with the district court's decision that the plaintiffs had failed to provide enough evidence on causation and damages to support their RICO claims.

One of the two cases enjoying a second life is *Harden*, in which plaintiffs allege that Pfizer fraudulently marketed Neurontin for the treatment of bipolar disorder. The First Circuit held that the district court erred in denying class certification of a class of third-party payors.

Class Action Group partners Cari Dawson and Kyle Wallace will be featured speakers at the 2013 Institute of Continuing Legal Education in Georgia Class Actions Seminar in Atlanta on September 6.


Cari Dawson


Kyle Wallace

SECURITIES

Fifth Circuit: After *Amgen*, No Need to Consider Price Impact at Certification Stage

Erica P. John Fund, Inc. v. Halliburton, Co., No. 12-10544 (5th Cir.) (April 30, 2013)
Affirming class certification.

In 2007, the plaintiffs moved to certify a class of shareholders purportedly defrauded by Halliburton's misrepresentations. The Fifth Circuit affirmed the district court's denial of class certification, but a unanimous Supreme Court reversed, concluding that the plaintiffs did not need to show loss causation at the class-certification stage.

On remand, Halliburton argued that the class still couldn't be certified because the alleged fraud had not affected the stock price—a fact that Halliburton contended rebutted any fraud-on-the-market presumption of reliance. The district court refused to consider Halliburton's evidence at class certification. The Fifth Circuit agreed, holding that a defendant in a securities fraud class action cannot rebut the fraud-on-the-market presumption at class certification by showing that the alleged misstatement did not affect stock price.

Second Circuit: American Pipe Tolling Rule Does Not Apply to Statutes of Repose

In re IndyMac Mortgage-Backed Securities Litigation, No. 11-2998 (2d. Cir.) (June 27, 2013)
Affirming district court's denial of putative class members' motion to intervene to revive dismissed claims.

After Section 13 of the Securities Act's three-year repose period ran, putative class members sought to revive dismissed claims by asserting that the tolling rule set forth in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), preserved their right to sue. The Second Circuit disagreed, holding that because a statute of repose (unlike a statute of limitations) creates a substantive right to be free from liability after a legislatively determined period of time, it is subject only to legislatively created exceptions, not to a court's equitable authority to toll limitations periods.

Class Certified after Diamond Foods Goes Nuts for Pringles

In re Diamond Foods, Inc. Securities Litigation, No. 3:11-cv-05386 (N.D. Cal.) (May 6, 2013)
Judge Alsup. Granting class certification.

Judge Alsup certified a class of investors alleging that Diamond Foods misled them by understating the costs of walnuts and improperly accounting for payments to walnut growers. According to the investors, Diamond did this in an effort to inflate its profit and share-price numbers because it was using its stock to buy the Pringles brand from Proctor & Gamble. The plaintiffs allege that, when the fraud was discovered, the Pringles deal fell through, and they lost money.

Judge Alsup certified the class, applying the fraud-on-the-market presumption.

SETTLEMENTS

ANTITRUST

In re Southeastern Milk Antitrust Litigation, No. 2:08-md-01000 (E.D. Tenn.) (May 17, 2013)
Judge Greer. Approving $158.6 million settlement.

Allegations: Members of Dairy Farmers of America sued milk processors, marketers, and distributors, alleging price-fixing and monopolistic practices in the fresh-milk market.

None of the 7,730 class members objected to the settlement.

Geoffrey Pecover v. Electronic Arts Inc., No. 4:08-cv-02820 (N.D. Cal.) (May 30, 2013)
Judge Wilken. Approving $27 million settlement.

Allegations: Purchasers of January 2005 to June 2012 versions of Madden NFL, NCAA Football, or Arena Football League videogames for non-mobile devices sued EA, alleging that it used exclusive licensing agreements to keep prices high and prevent competitors from entering the market.

EA agreed not to enter into an exclusive trademark license with Arena Football League for five years after the settlement. EA also agreed not to renew its trademark license with Collegiate Licensing Co., the NCAA, or any NCAA member institution covered by the license.

In re Flonase Antitrust Litigation, No. 2:08-cv-03301 (E.D. Pa.) (June 19, 2013)
Judge Brody. Approving $35 million settlement.

Allegations: Purchasers of nasal-spray Flonase sued GlaxoSmithKline alleging that the pharmaceutical manufacturer abused the FDA's citizens-petition process to prevent competitors from bringing generic versions of the spray to market.

CONSUMER AND FINANCIAL FRAUD

Radcliffe v. Experian Information Solutions Inc., No. 11-56386 (9th Cir.) (May 2, 2013)
Vacating $45 million settlement.

Allegations: Consumers alleged that Experian, TransUnion, and Equifax issued credit reports falsely stating that the plaintiffs were delinquent in making payments on debts that had been discharged in bankruptcy. The parties reached a $45 million settlement in 2009, which the district court approved.

The Ninth Circuit vacated the settlement because it included an incentive award for the named plaintiffs—accept the settlement and get $5,000, reject the settlement and get only $26—that put the named plaintiffs' interests at odds with those of other putative class members.

Garcia v. Allergan Inc., No. 11-09811 (C.D. Cal.) (Apr. 25, 2013)
Judge Gutierrez. Approving $7.75 million settlement.

Allegations: Health care providers who purchased Botox cosmetics from Allergan sued the company alleging that it falsely advertised that a certain type of Botox was approved for use despite knowing that the FDA has not approved the cosmetic and that the cosmetic was unsafe.

In re Skechers Toning Shoe Prods. Liability Litig., No. 11-2308 (W.D. Ky.) (May 13, 2013)
Judge Russell. Approving $45 million settlement.

Allegations: Consumers sued Skechers alleging that the shoe company falsely advertised the health benefits of its toning shoes (including its "Shape-up" line).

In re HP Inkjet Printer Litig., No. 11-16097 (9th Cir.) (May 15, 2013)
Vacating $1.5 million award of attorneys' fees.

Allegations: A national class of consumers of HP inkjet printers sued the company, alleging that it sold printers that prematurely indicated that ink cartridges were empty or expired, causing customers to buy new cartridges before they needed to. The district court approved a class settlement that included both coupon and injunctive relief and awarded attorneys' fees and costs.

The Ninth Circuit vacated the settlement, holding that when a settlement includes a coupon component, the amount of awarded attorneys' fees must be based on the coupons' *redemption* value, not on their potentially inflated *face* value.

In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liability Litig., No. 12-2761, No. 12-3179 (8th Cir.) (June 7, 2013).
Affirming settlement.

Allegations: Washington State residents sued affiliated companies Radiant and Uponor for negligence and fraud, alleging that the companies' brass plumbing fittings caused water leaks. Soon thereafter, similar suits popped up around the country. All those cases were consolidated in an MDL in the District of Minnesota. The district court approved the settlement agreement over the objections of certain class members. The Eighth Circuit affirmed.

ENVIRONMENTAL

Evans v. TIN Inc., No. 2:11-cv-02067 (E.D. La.) (July 7, 2013)
Judge Africk. Approving $13.5 million settlement.

Allegations: Residents of areas near the Pearl River in Louisiana sued Temple-Inland Inc., claiming that they were harmed when a Temple-Inland subsidiary spilled black liquor fluid from the company's pulp and paper manufacturing facility into the Pearl River.

LABOR AND EMPLOYMENT

Scott A. Chambers v. Merrill Lynch & Co. Inc., No. 1:10-cv-07109 (S.D.N.Y.) (April 26, 2013)
Judge Nathan. Approving $21 million settlement.

Allegations: Former Merrill Lynch financial advisors sued the investment giant for allegedly failing to pay them owed deferred compensation after Bank of America bought the firm.

Francine Friedman Griesing v. Greenberg Traurig LLP, No. 1:12-cv-08734 (S.D.N.Y.) (May 24, 2013); ***Greenberg Traurig LLP v. Griesing***, No. 2:12-cv-06718 (E.D. Pa.) (May 28, 2013)
Judge Pauley. Approving settlement. (Full information about the settlement is not available, but the parties agreed to settle all claims without attorneys' fees or costs.).

Allegations: Female shareholders at Greenberg Traurig filed a $200 million gender bias suit against the firm, alleging that it systematically paid women shareholders less than male shareholders, provided male shareholders greater business-generating opportunities, and blocked women from obtaining high-level managerial positions.

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Reyes v. AT&T Corp, No. 1:10-cv-20837 (S.D. Fla.) (June 21, 2013)
Judge Cooke. Approving $3.3 million settlement.

Allegations: Retail account executives sued AT&T, alleging wage and other work violations under the federal Fair Labor Standards Act and the California Business & Professions Code.

Rix v. Lockheed Martin Corp., No. 3:09-cv-02063 (S.D. Cal.) (July 5, 2013)
Judge Bencivengo. Approving settlement (terms confidential).

Allegations: Security workers alleged that Lockheed failed to pay them overtime.

PRIVACY

Ellison v. Steve Madden Ltd., No. 2:11-cv-05935 (C.D. Cal.) (May 7, 2013)
Judge Gutierrez. Approving $10 million settlement.

Allegations: Cellphone users sued shoe retailer Steve Madden Ltd. under the TCPA for sending unsolicited advertisements through text messages.

Sandra Landwehr v. AOL Inc., No. 1:11-cv-01014 (E.D. Va.) (May 24, 2013)
Judge Hilton. Approving $5 million settlement.

Allegations: AOL members sued the company, alleging that it violated privacy and consumer protection laws by publishing search queries and screen names of more than 650,000 members and users without their permission.

Kimberley Main v. Wal-Mart Stores Inc., No. 3:11-cv-01919 (N.D. Cal.) (May 24, 2013)
Judge White. Approving $1.1 million settlement.

Allegations: California consumers sued Wal-Mart under the Song-Beverly Credit Card Act, alleging that the department store giant illegally collected customers' zip codes from credit card purchases.

SECURITIES

McGee v. China Electric Motor Inc., No. 2:11-cv-02794 (C.D. Cal.) (June 3, 2013)
Judge Real. Approving $3.7 million settlement.

Allegations: Investors alleged that they suffered over $24 million in damages because of misleading statements that China Electric made in its IPO documents.

In re NYSE Specialists Securities Litigation, No. 1:03-cv-08264 (S.D.N.Y.) (June 10, 2013)
Judge Sweet. Approving $18.5 million settlement.

Allegations: A class of investors who submitted orders to buy or sell NYSE-listed securities accused seven specialty firms of fraudulently trading on the NYSE between 1999 and 2003 by conducting proprietary orders for their own firms to the disadvantage of public orders.

In re News Corp. Shareholder Derivative Litig., No. 6285 (Del. Ch. Ct.) (June 26, 2013)
Vice Chancellor Noble. Approving the largest-ever shareholder derivative settlement ($139 million).

Allegations: Shareholders sued News Corp., claiming that its purchase of Shine Group, a television production company that Rupert Murdoch's daughter owned, was a "sweetheart" deal. The plaintiffs also alleged that a lack of oversight at News Corp led to the high-profile phone hacking scandal at two London newspapers that caused News Corp.'s share price to suffer.