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Class Action Round-Up

Fall 2014

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Where the (Class) Action Is

During the third quarter of 2014, we again saw various federal courts interpret and apply *Comcast* with mixed results for class defendants. Some courts (like the Tenth Circuit) found that damages presented highly individualized issues precluding class-wide treatment, while others approved of proposed class-wide damages models. Arguments regarding inadequate representation were on the rise this quarter and posed hurdles for several putative classes.

Several interesting decisions came out of the class action settlement, ERISA, and TCPA contexts. Judge Posner issued the second installment of his ongoing effort to lead courts into heightened scrutiny of class action settlements. The Third Circuit weighed in on the hotly debated ERISA issue of when an insurer is a fiduciary, rejecting the argument that the insurer had become a "functional fiduciary." And the Ninth Circuit provided some much needed guidance on—and possibly limiting—the application of agency principles in TCPA cases.

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.

Authors & Editors

Cari K. Dawson
cari.dawson@alston.com
404.881.7766

Allison S. Thompson
allison.thompson@alston.com
404.881.4536

Kyle G.A. Wallace
kyle.wallace@alston.com
404.881.7808

Amanda Kelley
amanda.kelley@alston.com
214.922.3420

David R. Venderbush
david.venderbush@alston.com
212.210.9532

Lindsay G. Carlson
lindsay.carlson@alston.com
213.576.1038

Brian D. Boone
brian.boone@alston.com
704.444.1106

Geoff C. Rathgeber
geoff.rathgeber@alston.com
404.881.4974

Amanda M. Waide
amanda.waide@alston.com
404.881.4409

Ryan P. Ethridge
ryan.ethridge@alston.com
919.862.2283

David B. Carpenter
david.carpenter@alston.com
404.881.7881

Matthew D. Montaigne
matt.montaigne@alston.com
919.862.2232

Jonathan D. Parente
jonathan.parente@alston.com
404.881.7184

Meredith Jones Kingsley
meredith.kingsley@alston.com
404.881.4793

Jason Rottner
jason.rottner@alston.com
404.881.4527

Alex Akerman
alex.akerman@alston.com
213.576.1149

Bowen Shoemaker
bowen.shoemaker@alston.com
404.881.4979

James B. Cash, Jr.
james.cash@alston.com
404.881.4287

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Antitrust

Tenth Circuit Affirms Judgment in Antitrust Case

In re Urethane Antitrust Litigation, No. 13-3215 (10th Cir.) (Sept. 29, 2014). Affirming class certification.

A class of industrial purchasers of polyurethane products brought suit against Dow Chemical Company for fixing the prices of those products. After the district court certified the class, the jury returned a verdict against Dow. Dow appealed, arguing, among other things, that the district court abused its discretion in certifying the class. But the Tenth Circuit affirmed on all grounds.

On appeal, Dow argued that the individualized nature of the plaintiffs' injuries and damages precluded class certification. Although some plaintiffs might not have been injured by Dow's conduct, the Tenth Circuit ruled that the district court did not abuse its discretion in finding that both whether the conspiracy existed and how it impacted purchasers were issues capable of class-wide proof. In essence, it was enough that the price-fixing affected all market participants—which created an inference of class-wide impact—even when the prices were negotiated individually. The Tenth Circuit rejected Dow's argument that *Wal-Mart* and *Comcast* prohibited the district court from relying on the plaintiffs' damages expert's model, which extrapolated damages in order to approximate class-wide damages.

California District Court Delivers Groundbreaking Victory for College Athletes

O'Bannon v. National Collegiate Athletic Association, No. 4:09-cv-3229 (N.D. Cal.) (Aug. 8, 2014). Judge Wilken. Granting injunctive relief.

The NCAA's long-standing ban on college athletes receiving payment for the use of their names, images, and likenesses was ruled an unreasonable restraint of trade in violation of antitrust law by Judge Wilken after a non-jury trial. The suit arose after former UCLA basketball star Ed O'Bannon and 19 others sued the NCAA, claiming it violated antitrust laws by conspiring with the schools and conferences to block the athletes from getting a share of the revenues generated from the use of their images in broadcasts and videogames. The NCAA argued that its rules were pro-competitive and served to even out competition among schools. The court disagreed and enjoined the NCAA from continuing to impose rules that restrict athletes' compensation. The court also suggested that schools collect revenue from the use of athletes' likenesses and hold it in a trust for the athletes until graduation.

CLASS-IFIED INFORMATION

Cari Dawson

Law360's "Minority Powerbrokers" talked to Cari Dawson about her perspective on being a woman of color in the legal profession.

Cari Dawson explains "What Happened to the Injury?" at DRI's Product Liability Conference in Las Vegas February 4-6, 2015.

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California District Court Thins the Herd … Barely

Edwards v. National Milk Producers Federation, No. 4:11-cv-04766 (N.D. Cal.) (Sept. 16, 2014). Judge White. Granting class certification in part.

Purchasers of milk products in 15 states sought certification of statewide classes, alleging that, in an effort to limit the production of raw farm milk, the dairy farmer defendants agreed to destroy all of their dairy cows in violation of state antitrust laws.

After quickly refusing to exclude the plaintiffs' damages expert under *Daubert*, Judge White certified a class for every state except West Virginia, where he held that the plaintiffs lacked standing to sue because none of the class representatives were from West Virginia. Judge White held that the common key question was whether the dairy cow herd reduction plan violated the antitrust laws of the specific states, and he found that the plaintiffs' expert's damages model was sufficiently linked to the plaintiffs' theory of liability under *Comcast*—even though the expert's model is based on a nationwide conspiracy and the plaintiffs sought certification of statewide classes. ■

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Banking

- **Putative Class of Investors Can't Establish Numerosity in Hedge Fund Row**

  In re Parkcentral Global Litigation, No. 3:09-cv-00765 (N.D. Tex.) (Aug. 25, 2014). Judge Lynn. Denying class certification.

  Investors in $2.5 billion hedge fund Parkcentral Global LP initially sued Ross Perot's company, Perot Investments, Inc., and its affiliated entities, alleging that their misrepresentations led to the fund's collapse. The district court previously pared down the lawsuit, leaving only claims that Parkcentral's managers breached their fiduciary duties by misrepresenting the risks involved in investing heavily in commercial mortgage-backed securities.

  The district court denied class certification. The putative class did not satisfy Rule 23's numerosity requirement because the class consisted of only about 130 potential class members who were all located in Dallas and who all had substantial means to litigate individually. The court also held that individual issues of reliance predominated over common issues.

- **Investors Win Partial Class Certification in MBS Suit Against JPMorgan**

  Fort Worth Employees' Retirement Fund v. JPMorgan Chase & Co., No. 1:09-cv-3701 (S.D.N.Y.) (Sept. 30, 2014). Judge Oetken. Granting partial class certification.

  The district court certified a liability-only class of investors accusing JPMorgan Chase of falsely representing the quality of $10 billion worth of mortgage-backed securities. The court rejected JPMorgan's argument that because over 8,000 different investment guidelines applied to the offering, liability could not be established without a loan-by-loan analysis. According to the court, it was "far from clear" that all the thousands of guidelines would play a role in determining liability and that, in any event, the investors' contention that the underwriters abandoned the guidelines was subject to common proof.

  The court rejected the investors' argument that damages were susceptible to class-wide proof, concluding that the complexity and relative illiquidity of the mortgage-backed securities made common damages unlikely. ■

CLASS-IFIED INFORMATION

Ryan Ethridge

Frank Hirsch

Ryan Ethridge and Frank Hirsch say the Third Circuit has given class action defendants a new weapon to wield in "Rule 23's Ascertainability Requirement: A Powerful Defense to Class Certification," published by the International Association of Defense Counsel.

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Consumer Protection

Ninth Circuit Closes the Book on Attempt to Compel Arbitration

Nguyen v. Barnes & Noble, Inc., No. 12-56628 (9th Cir.) (Aug. 18, 2014). Affirming denial of motion to compel arbitration.

The Barnes & Noble website's terms of use are available in a hyperlink located in the bottom left-hand corner of every page. Plaintiff stated that he never clicked on the hyperlink and never actually read the terms of use, which contained an arbitration provision along with language that the user is deemed to have accepted the terms of use by visiting the website. The district court held that the plaintiff could not be bound by the arbitration provision because he neither had notice of nor assented to the website's terms of use.

The Ninth Circuit affirmed, holding that "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice." Had there been any evidence that the plaintiff had "actual notice of the Terms of Use," or was required to affirmatively "acknowledge" them, the outcome may have been different.

CLASS-IFIED INFORMATION

Lindsay Carlson

Lindsay Carlson answers the question "Retail Outlets: A Steal or Not for Real?" for the *Los Angeles Daily Journal*.

Not Suited for Court: Seventh Circuit Boots Jos. A Bank Consumer Fraud Class Action

Camasta v. Jos. A. Bank Clothiers, Inc., No. 13-2831 (7th Cir.) (Aug. 1, 2014). Affirming dismissal for failure to state a claim.

Plaintiff purchased defendant's clothing at "sale prices" only to later learn that the advertised "sale" was not actually a reduced price. Plaintiff asserted that without the representation that the sale was a limited time offer, he would not have made the purchases. The district court dismissed the plaintiff's complaint with prejudice.

The Seventh Circuit affirmed, holding that the plaintiff failed to meet Federal Rule of Civil Procedure 9(b) for fraud pleading. While the plaintiff tried to cloak his allegations in terms of unfairness rather than fraud, the court applied the stricter Rule 9(b) standard because the consumer fraud statutory claims were "clearly premised upon the primary claim that [Jos. A. Bank] utilized a fraudulent sales technique." The court also agreed with the district court that the plaintiff's damages allegations were "speculative" given his failure to assert that he was able to find the same items for lower prices.

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Ignoring Forum Selection Clauses: What Happens in California Stays in California

Bayol v. Zipcar, Inc., No. 3:14-cv-02483 (N.D. Cal.) (Sept. 25, 2014). Judge Henderson. Denying defendant's motion to transfer venue.

Plaintiffs claimed that Zipcar's late fees are illegal liquidated damages provisions under California's consumer protection laws. In response, Zipcar sought to enforce clauses in its membership agreement providing for the application of Massachusetts substantive law and for all disputes to be resolved in the state or federal courts of Massachusetts.

The district court denied Zipcar's motion to transfer venue, finding that the clause contravenes California policy. As a threshold matter, the court held that federal courts are required to invalidate such clauses if enforcement would result in the waiver of an unwaivable right. Here, California Civil Code Section 1671 protects consumers against liquidated damages clauses.

Hidden Fees Exposed by New Jersey Federal Court

Schwartz v. Avis Rent A Car System, LLC, No. 2:11-cv-4052 (D.N.J.) (Aug. 28, 2014). Judge Linares. Granting class certification.

Plaintiff filed a class action against Avis over a $0.75 surcharge for earning frequent-flyer miles and other rewards through participation in Avis's Travel Partner Program. The reservation confirmation did not show the surcharge, but it was printed on the final receipt issued when returning the car.

The court rejected Avis's argument that individual issues predominated because the surcharge was disclosed in "several ways" and many customers knew it existed. The class included only cars rented through the Avis website, which did not sufficiently disclose the fee. The court also rejected the argument that each individual contract would have to be examined to determine causation and damages. The contract terms were "substantially similar" for all class members, and whether Avis included a hidden surcharge "is a question that will be answered equally for all members of the class."

Cleaning up the Class Cert Mess in Clorox Cat Litter MDL

In re Clorox Consumer Litigation, No. 3:12-cv-00280 (N.D. Cal.) (July 28, 2014). Judge Conti. Denying class certification.

Plaintiffs brought a putative class action against The Clorox Company over its marketing of Fresh Step cat litter as more effective at eliminating cat odors "than products that do not contain carbon." Plaintiffs alleged that this statement is false, misleading, and contradicted by scientific studies.

The court denied plaintiffs' class certification motion on two main grounds. First, citing the Third Circuit's *Carrera* opinion, the court held that the plaintiffs' evidence demonstrated "no administratively feasible method for ascertaining the plaintiff classes." The court explained that consumers do not remember when they purchased litter or how much they bought, and only two of the 16 retailers plaintiffs contacted can help identify any substantial number of plaintiffs. Second, there was "powerful evidence that most members of the proposed classes probably never saw the allegedly misleading statements." Notwithstanding the presumption of reliance under certain state consumer protection laws, "a plaintiff can only reasonably be presumed to rely upon information he actually received." ■

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Employment

- **FedEx Flops: Ninth Circuit Holds Oregon FedEx Drivers Are Employees as a Matter of Law**

  Slayman v. FedEx Ground Package System Inc., Nos. 12-35525, 12-35559 (9th Cir.) (Aug. 27, 2014). Reversing summary judgment for FedEx and decertifying plaintiff classes only on prospective relief claims.

  This decision arises out of the FedEx multidistrict litigation in which drivers from about 40 states are challenging FedEx's treatment of the drivers as independent contractors rather than as employees. The two relevant class actions, *Slayman* and *Leighter*, involved Oregon drivers. The Ninth Circuit reversed the MDL Court's grant of summary judgment for FedEx because the FedEx drivers were employees under Oregon's right-to-control and economic realities tests. Thus, the drivers were entitled to partial summary judgment on employment status. The court decertified both classes as to prospective relief because the named plaintiffs no longer worked at FedEx. But the court left the classes in place, rejecting the argument that the drivers' damages claims relied on individualized evidence.

- **FedEx II Controls Its Drivers, They're Employees—Notwithstanding Entrepreneurial Opportunities Afforded Them**

  Alexander v. FedEx, No. 12-17458 (9th Cir.) (Aug. 27, 2014). Reversing summary judgment for FedEx.

  The same panel that decided *Slayman/Leighter* ruled that FedEx drivers are employees under California law and reversed the FedEx MDL court's summary judgment for FedEx on that issue. FedEx failed California's "right-to-control test" because FedEx's operating agreement (OA) gave FedEx a broad right to control (1) the appearance of its drivers and their vehicles, (2) the times its drivers could work, and (3) aspects of how and when drivers delivered their packages. The OA's labeling of the drivers as independent contractors did not make them so. The court rejected FedEx's attempt to apply the D.C. Circuit's "entrepreneurial-opportunities test" to the facts of the case. The Ninth Circuit remanded with instructions to enter partial summary judgment for the employees on the question of employment status.

- **Allstate Adjusters Win Class Certification**

  Jimenez v. Allstate Insurance Company, No. 12-56112 (9th Cir.) (Sept. 3, 2014). Affirming trial court's grant of class certification.

  A group of Allstate claims adjusters alleged that the insurance company illegally failed to pay for overtime and missed meal breaks. They claimed that Allstate had a practice or unofficial policy that required adjusters to work unpaid off-the-clock overtime. The Ninth Circuit affirmed the district court's certification. The appellate panel rejected Allstate's argument that the common questions identified by the district court would not resolve class-wide liability issues.

CLASS-IFIED INFORMATION

James Evans

James Evans gives you "10 Principles for How and When to Use Mediation" in *Corporate Counsel*.

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More interestingly, the court rejected Allstate's due process argument based on *Dukes*. The court surveyed recent Fifth, Sixth, Seventh, and Ninth Circuit decisions on the permissibility of individualized damages issues in a certified class. The court held that by rejecting the use of representative testimony and sampling at the damages phase and by bifurcating the proceedings, the district court preserved Allstate's opportunity to raise any individualized issues it might have at the damages phase.

CLASS-IFIED INFORMATION

Powerful tool: Our Employment Arbitration Agreement services offer employers a comprehensive solution for adopting, implementing, and enforcing employee arbitration agreements, including class action waivers.

▪ Are We "Common" Yet? District Judge Denies Certification of Groupon Account Representatives

Dailey v. Groupon, Inc., No. 1:11–cv-05685 (N.D. Ill.) (Aug. 27, 2014). Judge Chang. Denying motion for class certification.

The district court denied certification without prejudice for a putative class of Groupon account representatives who alleged that Groupon's policy of not paying overtime to account representatives violated the Fair Labor Standards Act (FLSA). Plaintiffs failed to establish the commonality and predominance requirements of Rule 23(b)(3). Although account representatives shared the same title, training, performance criteria, policies, and general duties and responsibilities, variation in their actual day-to-day job duties and levels of independence and discretion meant that whether account representatives fell within the "administrative exception" to the overtime standards of the FLSA would have to be determined on an individualized basis. The class also could not be certified because of the individualized nature of damages calculations, primarily because, in the court's words, "Plaintiffs here propose no method for calculating their individualized damages other than having hundreds or even thousands of hearings." The court encouraged the putative class to file a renewed motion for certification if they cured those deficiencies by narrowing the class definition.

▪ California Appellate Court Delivers Victory for Cell Phone Reimbursement Employee Class

Cochran v. Schwan's Home Service, Inc., No. BC449547 (Cal. Ct. App. [2d Dist.]) (Aug. 12, 2014). Reversing trial court's denial of class certification.

If a grocery delivery service employee makes a work-related call on her own cell phone, does that constitute "necessary expenditures or losses" requiring reimbursement under California law? The trial court said not necessarily and denied class certification because determining whether the cell phone charges were "expenditures" involved too many individual questions. The California 2nd District Court of Appeal disagreed, holding that reimbursement is always required; otherwise, the employer would realize a windfall by passing operating expenses to its employees. Because all calls are expenditures, individual questions cited by the trial court on that liability issue were irrelevant to the class analysis. The appellate court did caution that "[d]amages, of course, raise issues that are more complicated."

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To State Plausible FLSA Overtime Claim, Plaintiffs Must Allege 40 Hours of Work in a *Given* Workweek *as Well as* Uncompensated Time in Excess of 40 Hours

Davis v. Abington Memorial Hospital, No. 12-3512 (3d Cir.) (Aug. 26, 2014). Affirming trial court's dismissal of FLSA claims.

Health care workers alleged that employer hospitals implemented timekeeping and pay policies that failed to compensate them for all hours worked in violation of the FLSA and Pennsylvania law. The district court granted the defendants' motion to dismiss because the plaintiffs had failed to allege a specific instance in which a named plaintiff worked overtime and was not compensated. The Third Circuit affirmed, expressly adopting the Second Circuit's "middle-ground approach" for FLSA overtime claims requiring a plaintiff to allege 40 hours of work in a *given* workweek *as well as* some uncompensated time in excess of the 40 hours. The court underscored, however, that it was not holding that "a plaintiff must identify the exact dates and times she worked overtime."

Third Circuit Specifies What Constitutes Investment Advice Fiduciary under ERISA

Santomenno v. John Hancock Life Insurance Co., No. 13-3467 (3d Cir.) (Sept. 26, 2014). Affirming district court's dismissal of ERISA claims.

Participants in employer-sponsored 401(k) benefit plans alleged that the plan administrator charged excessive fees on annuity insurance contracts offered to participants. The district court granted the administrator's motion to dismiss. The Third Circuit affirmed, rejecting the plaintiffs' argument that the administrator was a "fiduciary" under ERISA because of (1) selection of investment options and accompanying fee structure, (2) monitoring of performance of investment options and relaying that information to plan trustees, or (3) retention of authority to change options offered to plan trustees and alter the fees it charged. Although the administrator was a fiduciary with regard to its alleged failure to substitute less expensive share classes in funds made available to plan participants, the plaintiffs' allegations were insufficient to state a claim that the administrator breached its fiduciary duty under ERISA. The plaintiffs failed to allege that the administrator rendered investment advice under a mutual agreement, arrangement, or understanding.

Availability of Class-Wide Arbitration Is a Court Question in the Third Circuit

Opalinski v. Robert Half International, Inc., No. 12-1444 (3d Cir.) (July 30, 2014). Reversing denial of motion to vacate.

In a question of first impression, the Third Circuit held that the availability of class-wide arbitration is a "question of arbitrability" to be decided by the district court rather than an arbitrator (unless the contract clearly provides otherwise). The court noted that the Supreme Court has explicitly not decided the issue. The availability of class arbitration is a threshold question for the court because it implicates whose claim the arbitrator may resolve and the type of controversy submitted to arbitration. The court remanded for the district court to decide the abitrability question.

Dubious Class Representative Precludes Certification

Santos v. TWC Administration LLC, No. 2:13-cv-04799 (C.D. Cal.) (Aug. 4, 2014). Judge Morrow. Denying motion for class certification.

The district court denied certification for a class of customer service employees who allegedly received inaccurate wage statements and did not receive sufficient overtime. The named plaintiff was not typical because she allegedly falsified documents used to determine commissions, thus setting up a unique defense against her claim. The court also held that the named plaintiff lacked standing to assert her claims because she alleged only a *de minimis* injury: incorrect payment rate to the sixth decimal place.

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▪ District Judge Approves Rest Period Class for Restaurant Employees

Romo v. GMRI, Inc., No. 5:12-cv-00715 (C.D. Cal.) (Aug. 12, 2014). Judge Quackenbush. Granting in part class certification.

Judge Quackenbush gave the green light to a subclass of California Olive Garden employees alleging that the restaurant violated state labor laws by giving them just one 10-minute rest period per shift lasting 7.5 hours. But in the same order, the court refused to certify a proposed meal-period subclass. The plaintiffs offered only anecdotal evidence that there was a general, company-wide policy of interrupting employees' meal periods and pressuring them to work off the clock. That led to commonality and predominance problems: fact-specific inquiry would be needed to answer questions such as whether an employee's meal period was interrupted and why the interruption wasn't recorded in Olive Garden's timekeeping system. ■

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Environmental

Emitters Beware: Clean Air Act's Savings Clause Wins Again

Little v. Louisville Gas & Electric Co., No. 3:13-cv-1214 (W.D. Ky.) (July 17, 2014). Judge McKinley. Disfavoring Clean Air Act preemption of state claims.

Kentuckians living near a coal-fired power plant brought suit against the plant alleging that dust and ash covered their property in violation of the Resource Conservation and Recovery Act (RCRA), the Clean Air Act, and several state laws. The court dismissed most of the federal claims on technical grounds, including inadequate pre-suit notice and standing, but it allowed the state law nuisance and trespass claims to proceed. The court relied on recent Third and Sixth Circuit holdings that the Clean Air Act's savings clause allows plaintiffs to file state-based tort claims against emitters. This interpretation of the savings clause keeps the door open for future air-based class actions.

Exxon Can't Snuff Pipeline Suit

Webb v. Exxon Mobil Corp., No. 4:13-cv-232 (E.D. Ark.) (Aug. 12, 2014). Judge Miller. Narrowing but certifying a class of landowners.

Property owners sued Exxon after a pipeline spill in 2012 caused the "worst" oil and tar sands spill in Arkansas history. The landowners sought specific performance: rescission of the pipeline's easements and either the pipeline's removal or replacement. Exxon argued that the putative class representatives lacked standing and that the class could not be certified because of the individual nature of the easements across each property. The court disagreed, certifying a narrowed class of individuals who had both an easement and the pipeline on their land. The court stressed that, unlike many environmental contamination cases, the class here was both definable and ascertainable due to the easements and the presence of the pipeline on all members' properties.

CLASS-IFIED INFORMATION

Renew your knowledge with our new Environmental, Land Development & Climate Change Blog.

Georgia Supreme Court: Commonality Demands Class-Wide Resolution

Georgia-Pacific Consumer Products LP v. Ratner, No. S13G1723 (Ga.) (July 11, 2014). Decertifying a class of landowners.

Landowners near Savannah alleged that noxious odors from Georgia Pacific's sludge fields had trespassed onto their land and created a nuisance, impacting their property values. The trial court certified a class of 67 landowners, and a divided Court of Appeals affirmed.

But the Georgia Supreme Court reversed. Echoing *Dukes*, the court chastised the lower courts' treatment of commonality. Commonality, it wrote, requires more than a common question: it demands an exacting showing that class members had suffered the same injury capable of class-wide resolution. The opinion warns lower courts that the record must contain evidence of a contaminated class area prior to certification.

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Fifth Circuit Rejects Gaming of CAFA Removal

Cedar Lodge Plantation LLC v. CSHV Fairway View I LLC, No. 14-30735 (5th Cir.) (Sept. 26, 2014). Reversing the district court's remand to state court.

A class of apartment tenants sued out-of-state, corporate entities in Louisiana state court alleging that ruptured sewage lines at their apartment complex exposed them to raw sewage and other hazardous substances. The defendants removed their case to federal court. The plaintiffs subsequently added a Louisiana-based sewer contractor as a party and asked the court to remand the case under the Class Action Fairness Act's (CAFA) local controversy exception. The district court obliged. On review, the Fifth Circuit reversed because the time-of-removal rule prevented post-removal party additions from destroying jurisdiction. The court emphasized that reaching the alternative outcome would undermine the broad federal jurisdiction that Congress intended with CAFA.

Eleventh Circuit to District Court: No *Lone Pine* Motions to Dismiss

Adinolfe v. United Techs. Corp., No. 12-16396 (11th Cir.) (Oct. 6, 2014). Reinstating the claims of a putative class of landowners.

Palm Beach residents claimed UTC's aviation manufacturing facility had contaminated an aquifer under their property. UTC asked the court to dismiss the complaint and subsequently asked for an order requiring the residents to provide evidence and expert testimony to support their claims before discovery (a "*Lone Pine* order"). After such evidence had been received, the district court dismissed the complaint for failure to allege contamination and causation.

The Eleventh Circuit reinstated the cases, holding that the lower court had improperly mixed arguments on the legal sufficiency of the pleadings with facts and evidence attained through the *Lone Pine* order. In essence, that "schizophrenic" review had converted the motion to dismiss into a motion for summary judgment without formal discovery. To prevent such confusion from happening in the future, the Eleventh Circuit cautioned lower courts about issuing *Lone Pine* orders prior to ruling on motions to dismiss.

Cautionary Tale: Site Remediation Decisions Have Long-Term Consequences

Ebert v. General Mills, Inc., No. 13-cv-3341 (D. Minn.) (Sept. 4, 2014). Judge Frank. Denying motion to dismiss.

Landowners in a Minnesota neighborhood alleged that toxic vapors from a nearby General Mills facility had migrated inside their homes—a problem that General Mills had been working on with the Minnesota Pollution Control Agency and the U.S. Environmental Protection Agency (EPA) since the 1980s. Because of General Mills's work on the clean-up site, it argued in part that the plaintiffs' claims were barred because the court could not interfere with a planned Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) remedy.

The court disagreed. Documents revealed that the Minnesota state government—not the EPA—oversaw the cleanup efforts. Thus, there was no planned CERCLA remedy, and the court had jurisdiction. *Ebert* is a cautionary tale for an entity facing potential site remediation with the prospect of toxic tort claims from neighboring property owners. The decisions made about which agency and laws control a remediation can have long-term implications. ■

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Privacy

No Mas Vicarious Liability under TCPA

Thomas v. Taco Bell Corp., No. 12-56458 (9th Cir.) (July 25, 2014). Affirming dismissal of TCPA claims against Taco Bell.

In an unpublished, but potentially influential, opinion, the Ninth Circuit limited Taco Bell's vicarious liability under the Telephone Consumer Protection Act (TCPA) for alleged unsolicited texts advertising Taco Bell products. The texts came from an independent contractor hired by a Chicago-based Taco Bell owners' association.

The Ninth Circuit agreed with the lower court's finding that Taco Bell did not exert sufficient control over the owners' association or the contractor to support a traditional agency theory of TCPA liability. The court also held that the plaintiffs failed to establish detrimental reliance or any apparent authority that Taco Bell conferred on the owners' association or its contractor.

Google, Viacom Child Web Tracking Suit Tossed

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

Judge Chesler dismissed with prejudice a putative class action alleging that Viacom and Google violated the Wiretap Act, Stored Communications Act, Electronic Communications Privacy Act, and various state privacy laws by tracking the Internet use and video viewing habits of children. A subset of the class also alleged a Video Privacy Protection Act (VPPA) claim against Viacom and Google.

The court held that Google was not a "video provider" under the VPPA and that the information that Google and Viacom collected—including IP addresses, browser settings, and URL requests—could not be used to identify any particular child. Nevertheless, the court permitted plaintiffs to re-plead their VPPA claim against Viacom and related state claims against both parties.

CLASS-IFIED INFORMATION

Brett Coburn

Brett Coburn will discuss OFCCP compliance issues in a webinar sponsored by The Knowledge Group on December 11, 2014.

Brett Coburn offers practical tips for minimizing risk and liability in FCRA cases in "Five Steps for Employers to Comply with the Fair Credit Reporting Act," published in *Smart Business*.

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Ninth Circuit: No Hiding Behind Third-Party Vendors in TCPA Suits

Gomez v. Campbell-Ewald Co., No. 13-55486 (9th Cir.) (Sept. 19, 2014) Reversing grant of summary judgment to Campbell-Ewald.

Gomez alleged that Campbell-Ewald, a U.S. Navy contractor, violated the TCPA when it sent him (and allegedly 100,000 other individuals) an unsolicited Navy recruitment text in 2006. Campbell-Ewald, which had engaged MindMatics LLC to send the text messages, argued unsuccessfully that the recruitment texts did not violate the TCPA because the texts were protected under the First Amendment as government speech. Campbell-Ewald also argued that it was not liable because it outsourced the dialing.

The Ninth Circuit rejected all of Campbell-Ewald's arguments. The appellate court presumed that Congress intended to apply the traditional standards of vicarious liability under the TCPA and concluded that Campbell-Ewald may be held vicariously liable for MindMatics LLC's conduct because of the agency relationship between the parties.

Eleventh Circuit: Beware What Others Sign on Your Behalf

Mais v. Gulf Coast Collection Bureau, Inc., No. 13-14008 (11th Cir.) (Sept. 29, 2014). Reversing district court's denial of summary judgment.

After Mr. Mais was admitted into the hospital, his wife signed forms on his behalf—one of which made clear that his telephone number could be given to third-party collection agencies. Not surprisingly, when Mais failed to pay his medical bills, Gulf Coast Collection Bureau started calling. In response, Mais sued the collection agency under the TCPA. Gulf Coast moved for summary judgment, pointing to a 2008 FCC declaratory ruling that providing a cell phone number to a creditor is proof of consent to later collection calls. The district court ignored the FCC ruling and denied Gulf Coast's motion.

The Eleventh Circuit reversed and admonished the district court for ignoring the FCC ruling. ■

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Product Liability

- **Certification Goes Through the Roof in Shingles Case**

  In the Matter of IKO Roofing Shingle Products Liability Litigation, No. 14-1532 (7th Cir.) (July 2, 2014). Reversing the district court and remanding the case after certifying a class of purchasers.

  Purchasers of organic asphalt roofing shingles filed suit against defendants, alleging that the defendants falsely represented to customers that the shingles at issue met certain industry standards. The district court declined to certify a class based on a disparate damages analysis for the putative class. The Seventh Circuit, however, found that varying damages should not prevent certification of a class, stating that if the district court's analysis was correct, then "class actions about consumer products are impossible." The Seventh Circuit held that to require commonality of damages was an error and remanded the case to the district court for a determination of whether class certification was appropriate in light of the appellate decision.

- **Whirlpool Moldy Washer Class Action Survives Summary Judgment, but Claims Go Down the Drain in Class Trial**

  In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation, No. 1:08-wp-65000 (N.D. Ohio) (Sept. 19, 2014)

  Judge Boyko. Granting in part and denying Whirlpool's motion for summary judgment and denying purchaser's motion for summary judgment.

  In this carefully watched class action that went to the U.S. Supreme Court, purchasers of allegedly defective washing machines survived Whirlpool's motion for summary judgment on their design defect claim, but then lost in a rare class action trial. Plaintiffs claimed that the front-loading washers were not properly designed and could produce smelly mold. At summary judgment, the district court rejected attempts to import California law requirements of "an unreasonable safety hazard," ruling that Ohio law does not restrict design defect claims to safety flaws. The court did dismiss the failure-to-warn claims based on a lack of duty.

  At trial, the federal jury issued an October 30, 2014, verdict that the machines were not negligently designed and Whirlpool did not breach its warranties. Lead counsel for plaintiffs announced their intention to appeal. ■

CLASS-IFIED INFORMATION

Scott Elder

Jenny Mendelsohn

Bloomberg BNA offers *Insight* from Scott Elder and Jenny Mendelsohn in their article "All You Can Eat: Food and Beverage Class Actions in 2014."

Inconsistency in class certification decisions remains the norm, report Scott Elder and Jenny Mendelsohn in their *Law360* article "Food for Thought? Chew on These Class Action Trends."

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RICO

- **Inadequate Representation Results in Denial of Certification in Arizona**

  Galas v. Lending Co., Inc., No. 2:12-cv-1265 (D. Ariz.) (Aug. 15, 2014). Judge McNamee. Denying class certification.

  A homeowner moved to certify a putative class alleging that her mortgage lender and broker (the Lending Company) misrepresented the interest rate on her mortgage. The district court denied the plaintiff's motion for class certification because the homeowner's ex-husband—and not the homeowner herself—obtained the loan, and thus the homeowner was not a proper class representative. Aside from a lack of proper representation, the homeowner also failed to establish predominance because individualized inquiries into the terms of each loan transaction and whether each class member relied on the allegedly fraudulent scheme were necessary.

- **Another District Court Finds Inadequate Representation Fatal to Class Certification**

  Crissen v. Gupta, No. 2:12-cv-355 (S.D. Ind.) (Aug. 19, 2014). Judge Magnus-Stinson. Denying class certification.

  An Indiana plaintiff sought to represent a class of property owners whose properties were auctioned due to delinquent taxes, bought by the defendant-corporation, and later redeemed by the property owners at an artificially inflated price. The plaintiff alleged that the defendant-corporation artificially inflated the redemption price by falsely claiming that they incurred notification and title costs when purchasing the property at auction.

  At class certification, the plaintiff argued that he was a proper class representative, but the court disagreed based on problems with plaintiff's counsel. Not only was the property owner's counsel the main business competitor of the defendant-corporation, but the counsel had also engaged in several acts of misconduct during the litigation. These factors hampered the counsel's ability to fairly and adequately represent the interests of the putative class. ■

CLASS-IFIED INFORMATION

Kyle Wallace

Jason Rottner

Kyle Wallace and Jason Rottner discuss defending against and affirmatively attacking the use of customer complaints in "Customer Complaints Are Not Evidence of a Defect," published by *Law360*.

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Securities

- **Exclusion of Experts Results in Denial of Certification: Putative Class Stumbles with "Fraud on the Market" Theory**

  Larry Brown v. China Integrated Energy Inc., 2:11-cv-02559 (C.D. Cal.) (Aug. 4, 2014). Judge O'Connell. Denying motion for class certification and granting defendants' motion to exclude expert declarations.

  Stockholders sued China Integrated Energy Corporation (CIEC) for allegedly misleading financial reports and a significant stock drop when private analyst firms reported alternative information. Citing the Ninth Circuit precedent in *Ellis v. Costco*, the district court performed a full Rule 702 analysis of the two market efficiency expert witnesses offered in support of the class certification motion.

  The court struck one of the experts as not qualified, holding that the expert did not have specific expertise in market efficiency. "[A] n MBA and significant experience as an expert witness in the past is insufficient to qualify as an expert witness now." The court highlighted the expert's weak answers in deposition and hearing testimony. The court struck the other expert because his event-study methodology was flawed by excessive subjectivity in determining which events to examine. Without proof of market efficiency, the plaintiffs could not establish the "fraud on the market" theory of reliance, and thus could not meet their burden to show predominance of common issues. The court denied the class certification motion without prejudice.

CLASS-IFIED INFORMATION

Jessica Corley

David Gouzoules

Jessica Corley and David Gouzoules discuss why appraisal proceedings are more popular in their *Review of Securities & Commodities Regulation* article "Developments in Appraisal Litigation."

- **Xerox Has Said Enough: Second Circuit Limits Corporate Disclosure Duties**

  Dalberth v. Xerox Corp., No. 13-1658 (2d Cir.) (Sept. 8, 2014) Affirming summary judgment for defendant.

  Stockholders sued Xerox for allegedly making insufficient disclosures about the successes and failures of one component of its worldwide restructuring initiative. The Second Circuit affirmed summary judgment for Xerox. The appellate court found that there was no genuine dispute about the truthfulness of relevant public statements or about the sufficiency of the relevant disclosures. At most, the plaintiffs were arguing that more information should have been provided and with greater urgency, but that is not required under the securities laws.

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Ninth Circuit Says Loss Causation Requires Fire, Not Just Smoke

Loos v. Immersion Corp., No. 12-15100 (9th Cir.) (Aug. 7, 2014) Affirming dismissal of securities fraud class action.

Stockholders sued Immersion because when the company publicly announced an internal investigation into revenue recognition practices, the price of its stock declined 23 percent. The Ninth Circuit affirmed dismissal for failure to allege loss causation, holding as a matter of first impression, "the announcement of an investigation, standing alone, is insufficient to establish loss causation." It noted that any decline in a corporation's share price following an announcement of an investigation could only be attributed to market speculation about whether fraud occurred. The court also held that disappointing quarterly earnings were insufficient to show loss causation as a matter of law because, standing alone, the earnings report did not suggest the company had engaged in fraudulent accounting practices.

Trial Plan That Ignores Affirmative Defenses Doesn't Cut It in Texas

Brigham Exploration Co. v. Boytim, No. 03-13-00191 (Tex. Ct. App.) (Aug. 15, 2014). Decertifying class.

Shareholders filed suit against individual board members of a publicly traded company alleging that the board members breached their fiduciary duty in connection with the sale of the company. The trial court certified the class. The Texas Court of Appeals decertified for two reasons. First, the trial court adopted a trial plan that failed to meaningfully address the defendants' affirmative defenses, as explicitly required by state law. Second, without analyzing the defenses, the trial court failed to conduct the required rigorous analysis.

Court Certifies Class in Best Buy Stockholder Suit

IBEW Local 98 Pension Fund v. Best Buy Co., No. 0:11-cv-00429 (D. Minn.) (Aug. 6, 2014). Judge Frank. Granting motion to certify.

The court certified a class of Best Buy stockholders who alleged misleading fiscal year projections. The court held that plaintiffs sufficiently showed a relationship between the alleged misstatements and the company's stock price and that defendants failed to present sufficient evidence to rebut a presumption of reliance. The court also rejected defendant's *Comcast* argument based on a potential time gap in damages, holding that the time gap went to whether some plaintiffs were entitled to damages, not the relevant question of whether damages can be proven on a class-wide basis.

S.D.N.Y. Certifies Liability Class in $10 Billion Mortgage-Backed Security Case Against JP Morgan

Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co., No. 09-cv-3701 (S.D.N.Y.) (Sept. 30, 2014). Judge Oetken. Granting in part class certification.

Judge Oetken certified a bifurcated class of investors claiming that JP Morgan misled them about the quality of mortgage-backed securities they purchased leading up to the financial crisis. The court rejected the bank's predominance arguments that highlighted individualized *liability* issues from the varied and complex underwriting procedures, the degree of knowledge possessed by sophisticated investors, and the securities' rapid evolution throughout the class period. But joining a growing trend in the wake of *Comcast*, Judge Oetken denied (without prejudice) certification as to *damages* because the investors' expert failed to offer an adequate model for calculating damages across the class. ■

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Settlements

Judge Posner Continues His Assault on Class Action Settlements

Redman v. RadioShack Corp., Nos. 14-1407, 14-1471, 14-1658, 14-1320 (7th Cir.) (Sept. 19, 2014). Reversing approval of class action settlement.

In a June 2014 Seventh Circuit decision, *Eubank v. Pella Corp.*, Judge Posner exposed some of the problems with class action settlements, in which class counsel "have an opportunity to maximize their attorneys' fees," and the defendant "cares only about the size of the settlement, not how it is divided between attorneys' fees and compensation for the class." That decision reversed an approved settlement that was "stacked against the class" and exhibited "almost every danger sign" that courts have warned about, including a fee award that was larger than any potential benefit to the class.

Judge Posner expanded on his themes in *Redman*, which also reversed an approved settlement. He explicitly called out "the built-in conflict of interest in class action suits" and the absence of true adversarial negotiating class settlements as an alternative to further litigation. Thus, "[t]he optimal settlement from the joint standpoint of class counsel and defendant … is therefore a sum of money moderate in amount but weighted in favor of attorneys' fees for class counsel."

Judge Posner held that the magistrate judge failed in her settlement approval duty under Rule 23(e), a "passive role," particularly on the size of attorneys' fees. Judge Posner instructed that the reasonableness of fees must be measured by the ratio of "(1) the fees to (2) the fee plus what the class members received." By that measure, the approved fees would have been 55 percent or more of the settlement. Judge Posner also questioned coupon settlements and reiterated that CAFA requires special scrutiny of coupon arrangements. Judge Posner also called out "clear sailing clauses," in which defendants agree not to challenge the request for attorneys' fees. The decision sent the settlement back to the district court to "shift some fraction of the exorbitant attorneys' fees" to the class members.

As this issue was going to print, Judge Posner issued yet another strongly worded opinion reversing a class action settlement because class counsel had tried "to connive" with the defendant to reduce the benefit to the class and increase the "excessive compensation" to class counsel. More on this emerging trilogy in our next advisory.

CLASS-IFIED INFORMATION

Brett Coburn

Kristen Fox

Brett Coburn and Kristen Fox warn of coming changes in "Obama's 'Year of Action' and What It Means for Employers," published by *Benefits Magazine*.

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Final Approval Granted in Truck Stop Dispute

Marchbanks Truck Service, Inc. v. Comdata Network, Inc., No. 2:07-cv-01078 (E.D. Pa.) (July 14, 2014). Judge Gardner. Approving $130 million settlement.

A group of independent truck stops and retail fueling facilities filed antitrust claims alleging that the defendant's payment cards, and the terms of the agreements relating to those cards, allowed the defendant to artificially inflate charges. The cash value of the settlement is $130 million. Additionally, the defendant agreed to modify or not enforce the challenged provisions. An economist valued this benefit to be worth an additional $260 million to $491 million.

Court Grants Preliminary Approval in Student-Athlete Likeness Cases

Keller v. National Collegiate Athletic Association, No. 4:09-cv-1967 (N.D. Cal.) (Sept. 3, 2014). Judge Wilken. Preliminarily approving separate $40 million and $20 million settlements.

In addition to the *O'Bannon* antitrust lawsuit based on NCAA policies reported above, another group of current and former student-athletes filed claims against the NCAA, a video game manufacturer, and a licensing company alleging that defendants violated antitrust laws by using the student-athletes' likenesses in video games without their consent. The student-athletes are limited to football and basketball players.

Judge Wilken granted preliminary approval of the $40 million settlement between the student-athletes and the video game manufacturer and the $20 million settlement between the student-athletes and the NCAA.

Bass Pro Agrees to Be on the Hook for $6 Million Settlement

McDonald v. Bass Pro Outdoor World, LLC, No. 3:13-cv-00889 (S.D. Cal.) (Aug. 5, 2014). Judge Bashant. Preliminarily approving $6 million settlement.

The court preliminarily approved a $6 million settlement between a class of customers and outdoor retailer Bass Pro Shops. This constitutes nearly $200 for each class member. Plaintiffs alleged that the retailer violated California privacy laws by regularly recording telephone communication with customers without notice. The settlement only applies to California customers who used a telephone with a California area code between March 14, 2012, and April 3, 2013.

Final Approval Granted in Largest-Ever TCPA Class Settlement

Rose v. Bank of America Corp., No. 5:11-cv-02390 (N.D. Cal.) (Aug. 29, 2014). Judge Davila. Approving $32 million settlement.

Customers alleged that the bank violated the Telephone Consumer Protection Act (TCPA) through a routine practice of calling or texting customers' cell phones through an automated dialing system or prerecorded voice system without their consent. The court approved a $32 million settlement, which the court described as the largest settlement ever obtained in a TCPA class action settlement. The settlement class of approximately 7 million members included all individuals who received unauthorized phone calls from the bank regarding loan and credit card accounts between 2007 and 2013 and individuals who received unauthorized texts in 2009 and 2010.

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▪ Court Approves Settlement in Real Estate Antitrust Case

Allan v. Realcomp II Ltd., No. 2:10-cv-14046 (E.D. Mich.) (Sept. 4, 2014). Judge Murphy. Approving $3.25 million settlement.

The court approved a $3.25 million settlement between a group of individual home sellers and a real estate association that was alleged to have violated antitrust laws by regulating listings on and membership in its listing service, which in turn blocked competition and caused commission rates to be artificially high. The Federal Trade Commission previously found that the association's rules constituted an illegal restraint of trade. The settlement calls for the establishment of a $3.25 million common fund. Class members who submit valid claims forms will be entitled to a share of the common fund based upon commission fees paid to a real estate broker, but no greater than 25 percent of the total commissions paid by the class member. ■