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January 2015 – January 2016

Supreme Court Activity

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Supreme Court's *Amgen* Order Confirms That *Fifth Third Bancorp's* ERISA Stock-Drop Pleading Standard Has Teeth

January 29, 2016 by Michael A. Valerio

In a recent *per curiam* order granting the plan fiduciaries' petition for certiorari and reversing the Ninth Circuit, the United States Supreme Court made clear that it expects lower courts to faithfully apply the pleading requirements for ERISA "stock-drop" cases as articulated in the Court's earlier opinion in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). This is welcome news for stock-drop defendants, who should still have a meaningful opportunity to defeat specious cases at the motion-to-dismiss stage.

The Supreme Court's January 25 *per curiam* ruling in *Harris v. Amgen* marks the second time the Court rejected a Ninth Circuit ruling reviving the *Amgen* plaintiffs' putative class action complaint against plan fiduciaries responsible for overseeing the Amgen employee stock fund. The first time, in June 2014, the Supreme Court vacated the Ninth Circuit's reversal of a district court order that dismissed the plan participants' complaint based in part on the so-called "presumption of prudence" (or "*Moench* presumption"). (In specified circumstances, this presumption had effectively protected employee stock ownership plan (ESOP) fiduciaries from ERISA liability in price decline cases for nearly two decades prior to the *Fifth Third* decision.) The Court then remanded the case to the Ninth Circuit with instructions to revisit the plaintiffs' complaint allegations in light of the new pleading guidance set out in *Fifth Third*, which had just been decided. On remand, the Ninth Circuit again upheld the viability of the complaint, which claimed that the fiduciary defendants improperly allowed the plan to continue to purchase and hold Amgen stock while knowing that the stock price was artificially inflated. In doing so, the Ninth Circuit explained that its original opinion "had already assumed" the standards for pleading ERISA fiduciary liability that the Supreme Court subsequently introduced in *Fifth Third*.

In its latest *Amgen* ruling, the Supreme Court unambiguously expressed its view that the Ninth Circuit did not diligently follow the Court's June 2014 remand instructions. The Court first held that "the Ninth Circuit failed to properly evaluate the complaint," which the Court found did *not* contain "sufficient facts and allegations" to state a claim against the plan fiduciaries. The Court then determined it would "leave[] to the District Court in the first instance whether the stockholders may amend [the complaint] in order to adequately plead a claim for breach of the duty of prudence guided by the standards provided in *Fifth Third*." *Amgen Inc. v. Harris*, No. 15-0278 (Jan. 25, 2016 slip op., at 3-4). Thus, the Court's *Amgen* message is clear: the *Fifth Third* pleading standard has substantive teeth and must be rigorously applied by the lower courts when evaluating a fiduciary defendant's motion to dismiss in an ERISA stock-drop case.

To fully appreciate the significance of the Court's *Amgen* order, we must return briefly to the Court's opinion in *Fifth Third*. As a threshold matter, the *Fifth Third* Court ruled that the long-followed presumption of prudence in favor of ESOP fiduciaries' stock purchase and hold activities has no support under ERISA. According to the Court, no such presumption should be applied at the pleading stage or otherwise in ERISA stock-drop cases. *Fifth Third*, 134 S. Ct. at 2467 ("In our view, the law does not create a special presumption favoring ESOP fiduciaries."). "Instead, ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets." *Id*. at 2463 (citing 29 U.S.C. § 1104(a)(2)). Moreover, the Court stated, ERISA "makes clear that the duty of prudence trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary." *Id*. at 2468 (citing 29 U.S.C. §§ 1104(a)(1)(D),1110(a)).

With the presumption jettisoned, the *Fifth Third* Court turned to a discussion of the stock-drop plaintiff's affirmative pleading obligations. The Court laid out several important "considerations" for the lower courts to take into account when applying the *Twombly*/*Iqbal* "plausibility" standard to a duty-of-prudence claim in a stock-drop case. The guidance that would prove most important to the recent outcome in *Amgen* related to the plaintiffs' claim that Fifth Third's ESOP fiduciaries failed to act prudently based on nonpublic information that was allegedly available to them because they were Fifth Third insiders. The Court observed:

> To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.

Fifth Third, 134 S. Ct. at 2472 (emphasis added). In this respect, the Court further advised that lower courts should evaluate whether the complaint has plausibly alleged that a prudent fiduciary could *not* have concluded that "stopping purchases – which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment – or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund." *Id.*

Like the plaintiffs in *Fifth Third,* the *Amgen* plaintiffs allege a "nonpublic information" or "insider" fiduciary claim. Thus, the *Amgen* plaintiffs must overcome the "[no] more harm than good" pleading hurdle to sustain their complaint. The Supreme Court has already ruled, contrary to the Ninth Circuit, that the plaintiffs failed to satisfy this hurdle in their current complaint. Based on the Supreme Court's latest directive, it will be up to the district court to decide whether the *Amgen* plaintiffs will get another opportunity to do so through an amended complaint.

Amgen Inc. v. Harris, No. 15-278 (U.S. Jan. 25, 2016).

Supreme Court Rules Unaccepted Rule 68 Offer of Judgment Cannot Moot Class Action

January 20, 2016 by D. Matthew Allen and Jaret J. Fuente

A divided Supreme Court ruled today in *Campbell-Ewald Co. v. Gomez*, No. 14-857, that an unaccepted Rule 68 offer of judgment by a defendant cannot moot a putative class action. The decision settles a reserved question from *Genesis HealthCare Corp. v. Symczyk* and resolves a circuit split on the issue. Justice Ginsburg's majority opinion holds that an unaccepted Rule 68 settlement offer "has no force" and like other unaccepted contract offers, "creates no lasting right or obligation."

Campbell-Ewald arose in the context of a Telephone Consumer Protection Act (TCPA) lawsuit. The defendant was hired to send text messages to young adults recruiting them to join the Navy, but only if they had opted-in to receive such messages. The plaintiff, who was nearly 40 years old and had not opted-in or otherwise consented, received a text message. After the plaintiff filed a class action, but before the class certification motion deadline, the defendant filed a Rule 68 offer of judgment for $1,503 per message ($3 more than the maximum plaintiff could recover per text, under the TCPA) plus costs (excluding attorney's fees). The plaintiff did not accept the offer.

The defendant then argued that the court lacked subject matter jurisdiction because the offer mooted the plaintiff's individual claim, and that because the plaintiff had not yet moved for class certification, the class claims were mooted as well. The defendant relied on the Supreme Court majority's opinion in *Genesis Health* that an unaccepted offer of judgment mooted Fair Labor Standards Act collective action claims.

In *Genesis Health*, Justice Kagan in dissent argued that an unaccepted offer cannot moot a case because "[a]s every first-year law student learns, the recipient's rejection of an offer 'leaves the matter as if no offer had ever been made.'" The majority in *Campbell-Ewald* adopted that analysis.

The three dissenting justices in *Campbell-Ewald* opined that the majority's decision transfers authority from the federal courts and "hands it to the plaintiff," reasoning that once the defendant offered to fully remedy the plaintiff's injury, there was no longer any necessity for the court to adjudicate the case as a matter of Article III standing, irrespective of the result under contract law. The majority responded that, to the contrary, the dissent approach "would place the defendant in the driver's seat" because the defendant "sought to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid [the plaintiff] declined to accept."

The majority did reserve the question of whether the result would differ if the defendant had deposited the full amount of the plaintiff's individual claim into an account payable to the plaintiff and the trial court had entered judgment for the plaintiff in that amount. In the case before the court, that question was "hypothetical." This reservation appears to address Justice Thomas's concurrence that the law of tenders should govern the case rather than the law of contracts, such that an actual tender of the full amount of the named plaintiff's individual claim (as opposed to a mere contract offer, evidencing an intent to pay) would moot the claim.

Thus, there remains an open question whether an actual tender of payment by certified check to the court's registry, rather than a Rule 68 offer of judgment, would moot the individual claims and class claims as well.

Campbell-Ewald Co. v. Gomez, No. 14-857 (U.S. Jan. 20, 2016).

Supreme Court to Consider "Trial by Formula" and Standing of Non-Injured Class Members in *Tyson Foods*

June 12, 2015 by Ben V. Seessel and Clifton R. Gruhn

The Supreme Court recently granted Tyson Foods' petition for certiorari which presents to the Court two important class action issues:

1. Whether differences among individual class members may be ignored and a class action certified under Federal Rule of Civil Procedure 23(b)(3), or a collective action certified under the Fair Labor Standards Act, where liability and damages will be determined with statistical techniques that presume all class members are identical to the average observed in a sample; and
2. whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

Plaintiffs, employees in a Tyson pork processing plant, filed an action in Iowa federal district court asserting claims under the Iowa Wage Payment Collection Law ("IWPCL") and the Fair Labor Standards Act ("FLSA"). Plaintiffs alleged that Tyson failed to pay them overtime wages for time spent "donning" and "doffing" protective equipment and walking to and from their work stations.

The district court certified the FLSA claim as a collective action and the IWPCL claim as a Rule 23(b)(3) class action and denied Tyson's decertification motion. At trial, plaintiffs proved liability and damages by using individual time sheets and an average "donning," "doffing," and walking time calculated by plaintiff's expert based on hundreds of employee observations. A second plaintiff's expert calculated classwide damages through use of this average time in connection with Tyson's time records and a computer algorithm. The damages expert conceded that, even using the average time (which Tyson claimed was excessive and inappropriate), over 200 class members were not entitled to overtime pay. The jury returned a verdict in plaintiffs' favor and the district court entered judgment. Tyson appealed to the Eighth Circuit, where a divided panel affirmed.

Tyson argued in its petition for certiorari that the district court improperly allowed plaintiffs to ignore individual differences as to the actual time spent "donning" and "doffing" equipment, in favor of allowing plaintiffs to prove classwide liability and damages based on a fictional "average" employee developed by plaintiffs' expert. Tyson contended that such a method of proof evades Rule 23(b)(3)'s predominance requirement and violates both the Rules Enabling Act, by using Rule 23 to alter class members' substantive rights, and the Due Process Clause, by denying Tyson the opportunity to present individual defenses to class members' claims. Tyson also argued that *Wal-Mart* and *Comcast* put an end to the "Trial by Formula" and that *Comcast* precludes damage models that ignore the basis of a defendant's putative liability to each class member. Tyson further asserted that the inclusion of individuals who suffered no injury as class members was contrary to Article III. It noted a significant split of authority among the Courts of Appeals on both the Trial by Formula and Article III class member standing issues.

The Court will take up the case in its October term, along with two other matters involving important class action issues. In the first, *Campbell-Ewald Company v. Gomez*, the Court will address whether a case becomes moot, and beyond Article III judicial power, when a plaintiff receives an offer of complete relief on his or her claim, and, further, whether the answer to this question is different in the context of a putative class action before a class is certified. In *Spokeo v. Robins*, the Court will consider whether "Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." Please see our prior posts for a further discussion of *Spokeo*.

Tyson Foods, Inc. v. Bouaphekeo, No. 12-3753, slip op. (8th Cir. Aug. 25, 2014), *cert. granted*, No. 14-1146 (U.S. Jun. 8, 2015).

SCOTUS Accepts Certiorari to Address Article III Standing in "No-Injury" FCRA Class Action

May 4, 2015 by Jaret J. Fuente, D. Matthew Allen, Gary M. Pappas and Kristin Ann Shepard

On April 27, the Supreme Court accepted certiorari review in *Spokeo, Inc. v. Robins*, 13-1339, to address whether consumers can establish Article III standing without actual harm or injury, by alleging a violation of a federal statute.

"Spokeo is a people search engine that organizes White Page listings, Public Records and Social Network information to help you safely find and learn about people." Robins filed a putative class action against Spokeo, alleging it is a consumer reporting agency and issues consumer reports in violation of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq*., because the Spokeo search results associated with his name were inaccurate. The district court dismissed the complaint, finding Robins had not alleged any actual or imminent harm and therefore lacked Article III standing.

Robins filed an amended complaint, alleging Spokeo's search results had caused actual harm to his employment prospects and that his continued unemployment caused anxiety, stress, concern, and/or worry about diminished employment prospects. Although it initially found Robins had alleged an injury-in-fact, the district court reconsidered and dismissed the amended complaint, this time with prejudice, again reasoning Robins lacked Article III standing.

The Ninth Circuit reversed, and held the "creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right" and that "the violation of a statutory right is usually a sufficient injury in fact to confer standing." It held Robins had established Article III standing because "he allege[d] that Spokeo violated his statutory rights."

In its petition for writ of certiorari, Spokeo presented the question, "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a violation of a federal statute." The Supreme Court's decision could affect a wide range of so-called "no-injury" class actions. As Spokeo noted in its petition, the same issue exists with respect to the TILA, FDCPA, TCPA, ERISA, RESPA, FHA, and the Lanham Act.

Spokeo, Inc. v. Robins, cert. granted, No. 13-1339 (U.S. Apr. 27, 2015).

Before the Supreme Court reached its decision in Gomez, Classified blogged about mootness decisions in the Fifth and Seventh Circuits, which served as precursors to the Supreme Court's holding in Campbell-Ewald that a mere unaccepted offer of judgment cannot moot the claims of a class representative and deprive a federal district court of subject matter jurisdiction over a putative class action.

Fifth Circuit Holds Unaccepted Rule 68 Offer of Judgment Cannot Moot a Named Plaintiff's Claim in a Putative Class Action

August 28, 2015 by Jaret J. Fuente and David L. Luck

The defendant in a putative class action brought pursuant to the Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693, *et seq.*, tendered a Rule 68 offer of judgment to the named plaintiff before class certification briefing occurred. The defendant proposed to settle with the named plaintiff for the maximum allowable statutory damages for his individual claim, and to pay costs accrued and reasonable and necessary attorney fees, through the date of acceptance of the offer, as agreed by the parties, or to be determined by the court if agreement could not be reached.

Plaintiff moved to strike the offer, which the court denied, and moved to extend the deadline to move for class certification, which the court granted. Plaintiff then moved for class certification, and defendant moved to dismiss for lack of subject matter jurisdiction. The court certified the class and denied the motion to dismiss as moot.

Defendant then filed a second motion to dismiss for lack of subject matter jurisdiction, arguing the plaintiff's individual claim and the class action suit were mooted by the unaccepted Rule 68 offer, which the court granted, vacating its prior order.

The Fifth Circuit noted that the Supreme Court in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528-29 (2013), declined to resolve a circuit split over "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot" when a Fair Labor Standards Act class has not yet been certified, because that court had concluded the parties had waived the issue.

But the Fifth Circuit cited Justice Kagan's dissent in that case, and held that "an unaccepted offer of judgment to a named plaintiff in a class action 'is a legal nullity, with no operative effect.'"

The court stated "it is hornbook law that the rejection of an offer nullifies the offer," and "nothing in Rule 68 alters that basic principle" such that "giving controlling effect to an unaccepted Rule 68 offer … is flatly inconsistent with the rule." It explained that "the court is not deprived of the ability to enter relief—and thus the claim is not mooted—when a named plaintiff in a putative class action rejects a settlement offer from the defendant." Additionally, the court stated that "a plaintiff seeking to represent a class should be permitted to accept an offer of judgment on her individual claims under Rule 68, receive her requested relief, and have the case dismissed, or reject the offer and proceed with the class action," and that "a contrary ruling would serve to allow defendants to unilaterally moot named-plaintiffs' claims in the class action context—even though the plaintiff, having turned the offer down, would receive no actual relief."

By its holding, the Fifth Circuit joined the Second, Ninth, and Eleventh Circuits, and as we reported last week, the Seventh Circuit recently ruled the same way. As the Fifth Circuit further noted in its decision, this issue is presently before the Supreme Court in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015).

Hooks v. Landmark Indus., Inc., No. 14-20496 (5th Cir. August 12, 2015).

Seventh Circuit Cleans Up the Law; Holds Rule 68 Offer of Complete Relief Does Not Render Litigation Moot

August 18, 2015 by Amy Lane Hurwitz and Jaret J. Fuente

In a case that began as a putative class action, the Seventh Circuit held that a Rule 68 offer of complete relief does not render litigation moot. Plaintiff in *Chapman v. First Index* filed a "junk-fax" suit pursuant to the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 *et seq.*, after allegedly receiving two unsolicited and unauthorized faxes from First Index. He demanded $3,000 plus an injunction under § 227(b)(3)(A).

Plaintiff proposed to represent a class of persons who received faxes from First Index despite having not given consent. First Index argued it always had consent, though sometimes verbal. The district court declined to certify the class, ruling that the difficulty of deciding who had provided oral consent made it infeasible to determine who is in the class. Plaintiff then proposed a class of persons whose faxes from First Index either lacked an opt-out notice or contained a notice plaintiff believed violated the FCC's regulations. The district court declined to certify that class as well, but because the plaintiff proposed it too late in the litigation, more than 18 months after discovery had closed.

While class certification was pending, however, First Index made a Rule 68 offer of judgment for $3,002, an injunction, and costs. Realizing plaintiff could not accept the offer while class certification was pending, as that would amount to abandonment of the class he sought to represent, but not wanting to leave the offer open indefinitely, First Index stated in the offer that it would expire 14 days after the class certification decision. The offer lapsed, and the district court then granted First Index's motion to dismiss the claim as moot.

The Seventh Circuit did not disturb the district court's class certification decision, but took the opportunity "to clean up the law" in the circuit on whether a Rule 68 offer of complete relief renders litigation moot, and held it does not. In doing so, it "overrule[d] *Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011); *Thorogood v. Sears Roebuck & Co.*, 595 F.3d 750, 752 (7th Cir. 2010), and *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991), and similar decisions to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy."

Citing *Knox v. Service Employees Int'l Union*, 123 S. Ct. 2277, 2287 (2012), the Seventh Circuit explained "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party," and because the district court could have awarded damages and entered an injunction, the offer did not render the litigation moot. The court further explained:

> If an offer to satisfy all of a plaintiff's demands really moots a case, then it self-destructs. Rule 68 is captioned "Offer of Judgment." But a district court cannot enter a judgment in a moot case. All it can do is dismiss for lack of a case or controversy. So if the $3,002 offer made this case moot, then even if [the Plaintiff] had accepted it the district court could not have ordered First Index to pay. It could have done nothing but dismiss the suit. Likewise with First Index's offer to have the district court enter an injunction. As soon as the offer was made, the case would have gone up in smoke, and the court would have lost the power to enter the decree. Yet no one thinks (or should think) that a defendant's offer to have the court enter a consent decree renders the litigation moot and thus prevents the injunction's entry.

The Seventh Circuit acknowledged it had previously applied the label "moot" when a plaintiff declines an offer that would satisfy his entire demand, but agreed with Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532-37 (2013), which the court explained shows that an expired (and unaccepted) offer of a judgment does not satisfy the court's definition of mootness, because relief remains possible. It noted the Second and Ninth Circuits have agreed, and that the issue is presently before the Supreme Court in *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015).

Chapman v. First Index, Inc., No. 14-2773 & 14-2775 (7th Cir. Aug. 6, 2015).

Seventh Circuit Applies "Weak" Ascertainability Requirement, Splits From Third and Eleventh Circuits

August 12, 2015 by Ben V. Seessel and Michael A. Greenfield

A panel from the Seventh Circuit split from the Third and Eleventh Circuits and rejected what it described to be a "heightened" ascertainability requirement under Rule 23(b)(3). In *Mullins v. Direct Digital, LLC*, plaintiff filed a class action complaint alleging that defendant had misrepresented, in marketing materials and on product labels, the purported health benefits of a glucosamine supplement in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act and similar laws in nine other states. In certifying the class, the district court rejected defendant's argument that plaintiff's motion for class certification should be denied unless plaintiff could demonstrate a reliable and administratively feasible way to determine class membership and, furthermore, that affidavits from putative class members are insufficient as a matter of law to satisfy this requirement. The Seventh Circuit granted 23(f) review in order to "facilitate the development of the law" on ascertainability, and affirmed the district court's order certifying the class.

The panel began its analysis by stating that the law in the Seventh Circuit on ascertainability is that a class must be "defined clearly and based on objective criteria," *i.e.*, that there is no requirement to demonstrate "administrative feasibility" like there is under the purported "heightened" ascertainability requirement in the Third and Eleventh Circuits. It stated that this "'weak' version of ascertainability" is the "well-established" law in the Seventh Circuit and, further, suggested that a misinterpretation of the requirement had led to a "doctrinal drift" with respect to the law on ascertainability, including decisions by district courts within the Seventh Circuit.

The panel then described the three ways in which a plaintiff might run afoul of the "weak" ascertainability requirement: (1) failing to clearly define a class; (2) defining the class on subjective criteria; and (3) defining class membership based on success on the merits—a "fail safe" class whereby a plaintiff who succeeds on the merits would be included in the class but one who does not would be excluded and thus not bound by the judgment. In the panel's view, the proposed class definition in this case, which simply included purchasers of Direct Digital's product within the applicable statute of limitations periods, was sufficient and satisfied the ascertainability requirement, notwithstanding that Direct Digital may have no records with respect to its retail customers and most purchasers likely would not have kept their receipts.

The panel was particularly concerned with the effect of the Third and Eleventh Circuit's application of the ascertainability requirement on cases involving low cost goods or services, where consumers are not likely to retain proof of purchase. In this regard, the court was critical of these courts' rejection of the use of class member affidavits to determine class membership.

The panel further addressed four policy concerns identified by courts employing a "heightened" ascertainability requirement: (1) administrative convenience, which the court stated is more appropriately addressed in assessing superiority, where it will be measured against the benefits of employing the class action device; (2) unfairness to absent class members because they may be bound by the judgment without receiving notice, to which the court responded by stating that class action notice is the best notice practicable and, further, that absent class members would have no real way of recovering on low value claims without the class action mechanism; (3) that it is unfair to *bona fide* class members whose claims will be diluted, to which the court responded that claims rates are low, such that the funds to be recovered by other class members will not be diluted by any fraudulent claims, merely the unclaimed residuary will be diminished and, furthermore, that administrative processes could be put in place to weed out fraudulent or mistaken claims; and (4) due process to defendants, to which the court responded that defendants could present individual defenses to class members' claims at other stages of the litigation, including the damages phase.

The Seventh Circuit's decision is in direct conflict with the law in the Third Circuit (under *Carrera v. Bayer Corp.*, *Marcus v. BMW of North America, LLC.*, and other cases) and the Eleventh Circuit, which require that the feasibility of ascertaining class membership be analyzed at the class certification stage (the Third Circuit, moreover, made clear in *Carrera* that this analysis must be "rigorous"). As we reported, the Eleventh Circuit, in *Karhu v. Vital Pharmaceuticals, Inc.*, recently held that ascertainability requires plaintiff to demonstrate that a class definition "contains objective criteria that allows for class members to be identified in an administratively feasible way" and affirmed the denial of class certification where plaintiff had "failed to propose a realistic method of identifying" individuals in the class.

Mullins v. Direct Digital, LLC, No. 15-1776 (7th Cir. July 28, 2015).

Update: On February 29, 2016, the Supreme Court denied Direct Digital's petition for a writ of certiorari, leaving the Circuit split on ascertainability unreviewed and unresolved for now.

Direct Digital, LLC v. Mullins, No. 15-549 (U.S. Apr. 29, 2016).

All About That Base: Claim Against Fat Loss Supplement Maker Fails For Lack of Ascertainability

June 24, 2015 by David E. Cannella and Gary M. Pappas

Adam Karhu bought a dietary supplement called VPX Meltdown Fat Incinerator ("Meltdown") in reliance on advertising by Vital Pharmaceuticals, Inc. (VPX) that Meltdown would result in fat loss. Concerned that Meltdown did not in fact result in loss of girth "in all the right places,"[1] if at all, Karhu filed a class action suit in the Southern District of Florida alleging that Meltdown's advertising was false. Karhu's motion for class certification was denied because he could not show that the class itself could be defined in a precise and manageable way—the base upon which any class action claim is constructed.

Karhu proposed a nationwide class for purchasers of Meltdown and a subclass for New York purchasers. The Southern District denied the motion for class certification because Karhu could not set forth an appropriate method for ascertaining the class. A class is not ascertainable unless the class definition contains objective criteria that allows for class members to be identified in an administratively feasible way.

In his motion for class certification, Karhu proposed that the class members be identified by use of VPX sales data and/or by self-identification by affidavits from prospective class members. As to sales data, VPX sells to retailers and distributors, not to consumers. As such, use of VPX data would not produce an ascertainable class because it would not sufficiently identify consumers who purchased Meltdown from retailers. With respect to self-identification, the Southern District found that Karhu failed to offer a specific proposal as to how such identification would operate and not implicate the problems inherent in such a method. Specifically, VPX's due process rights and those of the legitimate class would be implicated by accepting any affidavits at face value. Attempts to check the veracity of self-identifying affidavits would result in "mini-trials," rendering this method of ascertaining the class administratively unfeasible. The Southern District denied the motion for class certification.

Karhu moved the Southern District for reconsideration in which he set forth, for the first time, a three-step process in which the Meltdown class could be certified by the use of VPX sales data. Specifically, Karhu proposed in this motion for reconsideration that he would (1) use the VPX retail data to identify retailers; (2) then subpoena the third-party retailers and (3) use the documents received from the retailers to identify individual consumers. The Southern District found that this "new" method was not based on new evidence. In other words, Karhu could—and should—have employed the method of issuing third-party subpoenas to retailers and determined consumer identity before he moved for class certification. The Southern District denied the motion for reconsideration.

On appeal, the Eleventh Circuit Court of Appeals affirmed the denial of class certification for lack of ascertainability and the motion for reconsideration. The court held that a defendant's sales records alone are not a sufficient basis for the plaintiff to establish the ascertainability requirement unless the plaintiff also demonstrates that (1) the sales records are useful for identification purposes and (2) the use of such records is administratively feasible. With respect to self-identification as a means to define the class, the plaintiff proposing self-identification must establish that such a method is administratively feasible and not otherwise problematic.

The Eleventh Circuit rejected Karhu's argument that a strict ascertainability requirement conflicted with *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271-72

(11th Cir. 2004). The Eleventh Circuit explained *Klay* stands for the proposition that a concern about case manageability regarding individualized issues of reliance, causation, and damages should not a *priori* preclude class certification. However, the manageability concerns addressed in *Klay* related to concerns a court may face after the class members have been identified. "Ascertainability, by contrast, addresses whether the class members can be identified at all, at least in any administratively feasible (or manageable) way," explained the Eleventh Circuit. "Put differently," the Eleventh Circuit continued, "the manageability concern at the heart of the ascertainablity requirement is prior to, hence more fundamental than, the manageability concern addressed in *Klay*."

The Eleventh Circuit affirmed the denial of class certification and the motion for reconsideration.

In his concurring opinion, Judge Martin agreed with the result reached by the majority but cautioned that the holding should be limited to the facts presented here where the plaintiff failed to set forth an appropriate method for determining the class until after his motion for certification was denied. Had Karhu set forth the adequacy of using third-party subpoenas to ascertain members of the class and addressed the concerns inherent in self-identifying affidavits in his motion for class certification, then Judge Martin wrote that Karhu could have adequately argued that the class was ascertainable. Judge Martin cautioned that the holding in this case does not constitute the rejection of affidavits as a legitimate means of class identification in every case.

Adam Karhu v. Vital Pharmaceuticals, Inc. (11th Cir. June 9, 2015).

[1] Meghan Trainor, "All About That Bass (No Treble)"(2014).

"Game Over": *Aliens* vs. Consumer Class Action

May 28, 2015 by David E. Cannella and Gary M. Pappas

Two video game enthusiasts brought a consumer class action suit against Sega of America, Inc. ("Sega") and Gearbox Software, LLC ("Gearbox") for their alleged disappointment in the quality of the video game "Aliens: Colonial Marines"("ACM"). ACM was marketed as "the canon sequel" to the film *Aliens*, the 1986 classic blockbuster in which Bill Paxton's character famously exclaimed, "Game over, man, now what are we supposed to do?" after the dropship meant to rescue the expedition team was destroyed.

In this case, the plaintiffs, self-described avid fans of the *Aliens* franchise, pre-ordered the ACM game based on a non-retail version that they saw at various videogame conventions. The complaint alleged that videogame industry critics and even the president of Gearbox acknowledged the discrepancies between the demo version of ACM and the final retail version, in which critics and Gearbox expressed disappointment and surprise following the public release of the game. The gist of the complaint was that purchasers of the game prior to release date were victims of a "bait and switch" because the consumers believed that the retail version of ACM would be the same as the demo non-retail version. Plaintiffs sought relief on behalf of themselves and a class of persons who purchased the ACM game prior to its February 12, 2013 release date. Plaintiffs later sought to narrow this definition to "persons who viewed an advertisement for ACM incorporating the Demoed Version."

The central issue for the court was the ascertainability of the class. The court noted that Rule 23 has an implied requirement that a class must be sufficiently definite and that the party seeking certification of a class must demonstrate that an identifiable and ascertainable class exists. The court explained that any class definition must be clear in its applicability so that it will be clear later on whose rights are merged into the judgment.

The court explained that the record in the case showed why "ascertainability is a pipe dream." There were no common questions of fact because the purported class members were exposed to disparate information concerning the ACM game. The claims were not based on a single misrepresentation, but rather the non-retail version of the ACM game that was allegedly presented to the public through a series of gameplay demonstrations. The gameplay demonstrations were different than the trailers and commercials for the game, which showed only the final retail version of the ACM game. The parties agreed that there was no reliable method to differentiate which consumers saw the gameplay demonstrations of the non-retail version of the ACM game from those who viewed commercials that showed only the retail version of the game.

Plaintiffs proposed that that the class could be ascertainable by having class members submit an affidavit and claim form in which they identified the specific video or trailer for ACM that they viewed prior to placing a pre-order for the game at issue. The court rejected such self-identification through affidavits because they would be highly unreliable and embody a selective memory problem. As for selective memory, the plaintiffs themselves were unable to identify with certainty the commercials and trailers they saw for the ACM game. Furthermore, the "memory problem" would be compounded by incentives individuals would have to associate with a successful class or dissociate from an unsuccessful one.

On the basis of lack of ascertainability, the court denied plaintiffs' motion for class certification.

Game over.

Damion Perrine v. Sega of America, Inc. (N.D. Ca. May 12, 2015).

District Court Strikes Homeowners Policyholders' Class Action Allegations

February 16, 2015 by Michael A. Greenfield and Ben V. Seessel

The United States District Court for the Southern District of Ohio granted defendant State Auto's motion to strike plaintiffs' class allegations, holding that the complaint itself demonstrated that the proposed class was not ascertainable and could not satisfy Rule 23(a)'s commonality and typicality requirements, nor the predominance and superiority requirements of Rule 23(b). The complaint alleged that State Auto committed fraud, breached the duty of good faith and fair dealing, and violated the Ohio Deceptive Trade Practices Act in connection with a "Defender Endorsement" in some of its homeowners policies. State Auto allegedly marketed the Defender Endorsement as providing "100% replacement cost coverage," with an additional bonus of up to 25% of policy limits if losses exceeded limit limits. Plaintiffs' alleged that this language created a mistaken impression that the Endorsement was required in order for a policyholder to be adequately insured. In addition, plaintiffs alleged that State Auto was able to increase policy limits through the Defender Endorsement, which resulted in higher premiums and eliminated any chance that State Auto would need to pay the 25% bonus. Further, plaintiffs alleged that they were charged for a benefit that they would never need nor realize due to State Auto's intentional overstatement of the costs to rebuild homes. Plaintiffs sought to certify a class of persons who purchased a policy with a Defender Endorsement, "and subsequently had their policy limits and premiums unilaterally increased … under the guise of providing adequate replacement cost coverage."

The court held that the class was not ascertainable because individual inquiries on a property-by-property basis were required to determine class membership. Similarly, the court held that the commonality requirement of Rule 23(a) and the predominance requirement of Rule 23(b) could not be satisfied. The court found that individual issues regarding replacement costs and appropriate coverage limits would ultimately overwhelm any common questions because State Auto's liability would hinge on a home-by-home analysis. Additionally, the court rejected plaintiffs' argument that reliance could be presumed or inferred for purposes of the fraud claims. Thus, an individual policyholder inquiry would be required in order to determine whether a particular policyholder paid inflated premiums based on consultations and conversations regarding the characteristics and value of their homes.

Finally, because the court found that the predominance and commonality requirements could not be satisfied, the court held that the superiority and typicality requirements for class certification would likewise fail. Accordingly, the court struck plaintiffs' class allegations.

Schumacher v. State Auto. Mut. Ins. Co., No. 13-00232 (S.D. Ohio Feb. 2, 2015).

2015 Year in Review and 2016 Preview

December 15, 2015 by Kristin Ann Shepard

As 2015 draws to a close, questions over standing in data breach class actions remain. Earlier this year, the Seventh Circuit denied retailer Neiman Marcus petition for rehearing *en banc* of a panel opinion holding that plaintiffs whose credit card information was stolen in a data breach had standing to sue under Article III of the United States Constitution based on alleged fear of future identity theft; in so doing, the Seventh Circuit confirmed that the circuit split on standing in data breach class actions survives *Clapper*. The retailer's petition for writ of certiorari is due January 15, 2016.

The Supreme Court has already heard oral argument on the scope of Article III standing in two cases that may be of interest to those monitoring data breach class actions. In *Spokeo*, the Court has been asked to address: "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute." In *Tyson Foods*, the Court was petitioned to resolve the question of "whether a class action may be certified or maintained under Rule 23(b)(3) … when the class contains hundreds of members who were not injured and have no legal right to any damages." A ruling narrowly construing the Article III standing requirement in these cases would bode well for the defense bar, as well as be a blow to class counsel – who have sought to distinguish the Court's precedent in *Clapper* as factually inapposite to class actions.

Given the current circuit split on standing in data breach class actions, many cases have settled. In early December 2015, Target received preliminary approval of a class settlement of the remaining financial institution class claims for approximately $39 million – of which $20.25 million will go to directly to the settlement class ($19.75 million to the settlement class escrow account, and $500,000 to cover settlement notice and administration) and of which $19.1 million will cover MasterCard's final account data card recovery assessment. This payment followed the court's order certifying claims of the financial services class and is in addition to a reported $67 million that the retailer had already agreed to pay to settle claims by banks that issued Visa cards compromised in the breach.

In late November, the court granted final approval of Target's settlement of the consumer class claims; an objector has filed a notice of appeal to the Eighth Circuit. Home Depot has also reportedly reached a tentative settlement with MasterCard and issuers comprising over 80 percent of the MasterCard branded payment cards potentially impacted by the breach; the settlement is said to "provide[] for payment of an amount equal to the full amount these banks could recover as a result of [MasterCard's] assessment [of payments attributable to the breach] plus a 10% premium, provided that banks accounting for at least 65% of the potentially affected M[aster]C[ard] issued accounts opt into the settlement and release their claims against Home Depot."

What will happen in 2016? Will we see more cases filed? More settlements? Will anticipated Supreme Court rulings be a boon for the plaintiffs' bar or for the defense? Stay tuned for more developments.

Circuit Split on Standing in Data Breach Class Actions Survives *Clapper*

September 22, 2015 by Kristin Ann Shepard

On September 17, the Seventh Circuit Court of Appeals denied a retailer's petition for rehearing *en banc* of a three-judge panel opinion holding that plaintiffs whose credit card information was stolen in a data breach had standing to sue under Article III of the United States Constitution based on alleged fear of future identity theft. As we previously reported, the litigation arose from a cyberattack on luxury retailer Neiman Marcus over the 2013 holiday shopping season in which hackers may have gained access to 350,000 credit and debit cards; plaintiffs, all of whom made credit or debit card purchases from the retailer during the relevant time period, filed a putative class action lawsuit on behalf of themselves and all other customers whose card information may have been compromised. Neiman Marcus moved to dismiss for lack of standing; the district court granted that motion.

In finding that the plaintiffs' alleged future injuries satisfied Article III, the Seventh Circuit panel opinion first considered the injury in fact requirement—starting with the acknowledgment that the Supreme Court's 2013 holding in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), requires that any alleged "future harm" be "certainly impending" and that "allegations of possible future injury are not sufficient." Taking issue with the lower court and other district courts that dismissed putative data breach class actions for lack of standing under *Clapper*, the Seventh Circuit panel found that "*Clapper* does not … foreclose any use whatsoever of future injuries to support Article III standing." In so holding, the court specifically distinguished the facts of the data breach class action from those in *Clapper*, finding that the plaintiffs here had shown a substantial risk of harm from the data breach because there was no dispute that various customers' card information had been stolen and because "the purpose of [a] hack is, sooner or later, to make fraudulent charges or assume those customers' identities." Indeed, 9,200 of the cards had already incurred fraudulent charges; further, the panel noted that the retailer's offer of free credit monitoring services tacitly acknowledged the likelihood of future unauthorized charges.

The Seventh Circuit opinion is troubling for businesses, which are also the victims in cyberattacks and had hoped, in the wake of *Clapper*, to receive some judicial relief from putative data breach class actions where the plaintiffs were admittedly offered free credit monitoring and were reimbursed for fraudulent charges (if any) allegedly incurred as a result of the breach. Indeed, the opinion's lenient view of Article III's standing requirement, coupled with a recent circuit opinion rejecting a "heightened" ascertainability requirement, may mark the Seventh Circuit as an emerging venue of choice for the plaintiffs' class action bar. However, there may yet be a silver lining for corporate defendants, as the panel remanded the case to the lower court to consider the retailer's pending motion to dismiss for failure to state a claim. *See, e.g.*, *Moyer v. Michaels Stores, Inc.*, No. 14c561 (N.D. Ill. July 14, 2014) (finding Article III's standing requirement was met in a putative data breach class action notwithstanding *Clapper*, but granting motion to dismiss because the plaintiffs failed to allege actual monetary damages—a required element of their claims—as neither an increased risk of identity theft nor the purchase of credit monitoring services constitute cognizable monetary damages).

In denying the retailer's petition for rehearing *en banc*, the Seventh Circuit has confirmed that the circuit split on the issue of standing in data breach class actions survives *Clapper*. In 2012, the Supreme Court denied a petition for writ of certiorari to address the question of standing in data breach cases, *Reilly v. Ceridian Corp.*, 664 F.3d 38 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2395 (2012). Will the Supreme Court be asked to revisit this issue soon? Stay tuned to *Classified* for more updates!

Remijas v. Neiman Marcus Group, LLC, No. 14-3122 (7th Cir. July 20, 2015), *reh'g denied*, (Sept. 17, 2015).

Portions of this post previously appeared in an article by the author in the ABA Section of Litigation's Class Actions & Derivative Suits Newsletter.

Still a Target: Court Certifies Bank Class Claims Against Retailer Following Data Breach

September 25, 2015 by Kristin Ann Shepard

Although Target has tentatively settled consumer data breach class action claims, the retailer remains in the crosshairs of the plaintiffs' class action bar. On September 15, a Minnesota federal district court certified a class of "[a]ll entities in the United States and its Territories that issued payment cards compromised in the payment card data breach that was publicly disclosed by Target on December 19, 2013." Rejecting the Minnesota-based retailer's argument that variations in state law precluded certification, the court held that Minnesota law applied to the claims of all class members. The court also found that plaintiffs' claims for negligence, violation of Minnesota's Plastic Card Security Act, and negligence *per se* were susceptible to common proof, holding that "[w]hether particular actions – reissuance [of credit and debit cards], blocking accounts, reimbursing fraudulent charges, paying for customers' fraud monitoring – are reasonable actions in the face of a data breach can be determined class-wide and need not be examined with respect to each financial institution individually." Questions of individualized damages calculations also failed to defeat certification; the court noted that "[s]hould classwide damages ultimately prove unworkable, a damages class can be decertified and damages questions stayed for determination after the liability phase concludes."

To date, the banking claims have already proven a greater expense to the retailer than the consumer class claims. Whereas Target's consumer class settlement creates a $10 million claims fund, the retailer has already agreed to pay $67 million to settle claims by banks that issued Visa cards compromised in the breach. In addition to the certified banking class claims, Target is facing pending shareholder derivative litigation in Minnesota federal district court.

In re Target Corp. Customer Data Security Breach Litig., MDL No. 14-2522 (D. Minn. Sept. 15, 2015).

Will 2015 Be The Year of the Data Breach Class Action? Target Data Breach Claims Survive Motions to Dismiss

January 13, 2015 by Kristin Ann Shepard and Marty J. Solomon

Various media outlets dubbed 2014 "the Year of the Data Breach." Unfortunately for businesses, breach of their secure systems by hackers may be only the beginning of the bad news – which often culminates in class action lawsuits. Although 2014 started favorably for data breach defendants, with several federal district courts granting motions to dismiss such claims, December ended on a high note for the plaintiff's bar, with two Minnesota federal district decisions holding that most of the claims asserted by putative classes of consumer and financial institution plaintiffs against Target survived the retailer's motions to dismiss. In the wake of these decisions, federal district courts in Minnesota – along with federal district courts in California, which have long been a hotspot for class action litigation – may emerge as a venue of choice for high-stakes data breach litigation.

The litigation against Target followed a data breach at the retailer over the 2013 holiday shopping season. At the request of the retailer, the Judicial Panel for Multidistrict Litigation consolidated all pending federal court litigation against it as a result of the data breach in Minnesota federal district court, where plaintiffs filed two consolidated putative class action complaints – one on behalf of consumers and the other on behalf of financial institutions.

In denying Target's motion to dismiss the consumer class action, the Court rejected the retailer's argument that the 114 named plaintiffs lacked standing to sue under Article III of the United States Constitution because they failed to allege any concrete, certainly impending injury as a result of the alleged disclosure of their financial information from Target's payment systems. In so holding, the Court declined to conduct a plaintiff-by-plaintiff assessment of standing, summarily concluding that the standing requirement was met because *some* plaintiffs alleged injuries that included "unlawful charges, restricted or blocked access to bank accounts, inability to pay other bills, and late payment charges or new card fees." The Court thus failed to address plaintiffs' more controversial assertion that even those plaintiffs who alleged only the compromise – as opposed to any actual misuse – of their financial information had standing to sue. In addition, the Court denied Target's motion to dismiss claims under the laws of Delaware, Maine, Rhode Island, Wyoming, and the District of Columbia, despite the undisputed fact that none of the 114 named plaintiffs hailed from those jurisdictions; instead, the Court indicated that Target could re-assert this argument at the class certification stage.

In addressing the consumer plaintiffs' substantive claims, the court allowed plaintiffs to proceed with their consumer protection claims under the laws of all states except Alabama, Georgia, Kentucky, Louisiana, Mississippi, Montana, South Carolina, Tennessee, and Utah – where the applicable consumer protection statutes expressly prohibited class actions. The court also declined to dismiss plaintiffs' allegations under most state data-breach notice statutes; however, the court dismissed claims under the notification statutes of Florida, Oklahoma, Utah, Arkansas, Connecticut, Idaho, Massachusetts, Minnesota, Nebraska, Nevada, Texas, and Rhode Island because those statutes do not provide a private right of action. The court found that plaintiffs' negligence claims under the laws of Alaska, California, Illinois, Iowa, and Massachusetts were barred by the economic loss rule, but allowed the remainder of the negligence claims to proceed. The court dismissed plaintiffs' bailment claims because plaintiffs failed to allege that Target had agreed to return any personal financial information to plaintiffs. Plaintiffs had two theories to support their unjust enrichment claim: (1) an "overcharge" theory that prices at Target included a "premium" for adequate data security, and (2) a "would not have shopped" theory that plaintiffs would not have shopped at the retailer if it had timely disclosed the breach. Although the court found that the overcharge theory had no merit, it allowed plaintiffs to proceed with the unjust enrichment count on the "would not have shopped" theory. The court also allowed plaintiffs to proceed with their claim for breach of implied contract, but dismissed the claim for breach of express contract without prejudice and with leave to file an amended complaint alleging the required elements of the claim within 30 days.

With regard to the claims of the putative financial services institutions class, the court held that plaintiffs could proceed with their claims for negligence, negligence *per se*, and violation of Minnesota's Plastic Card Security Act – which the court held was applicable to the retailer's transactions outside the state of Minnesota. However, the court granted the motion to dismiss the claim for negligent misrepresentation by omission because plaintiffs failed to plead reliance; the court stated that the dismissal was without prejudice and with leave for plaintiffs to file within 30 days an amended complaint that sufficiently alleged the reliance element.

Given the receptiveness of California and Minnesota federal district courts to putative data breach class action claims, one may wonder: "Will 2015 be the year of the data breach class action?" Stay tuned to the *Classified* blog for more updates.

In re Target Corp. Customer Data Security Breach Litig., MDL No. 14-2522 (PAM/JJK) (D. Minn. Dec. 18, 2014).

In re Target Corp. Customer Data Security Breach Litig., MDL No. 14-2522 (PAM/JJK) (D. Minn. Dec. 2, 2014).

Eleventh Circuit Holds Rule 23 Trumps State Law Precluding Private Class Actions

July 29, 2015 by Jaret J. Fuente

The Alabama Deceptive Trade Practices Act's (ADTPA) restriction on private class actions does not apply in federal court. Federal Rule 23 controls. That's what the Eleventh Circuit recently held, relying on *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010).

Plaintiff contracted for installation of a wood fence. The manufacturer warranted that the wood was treated and would remain free from rot, fungal decay, and termite attacks for at least 15 years. However, the plaintiff's fence posts rotted within three years of installation, and the installer reported that other customers experienced similar problems.

Plaintiff filed a class action in federal court (pursuant to CAFA jurisdiction) against the manufacturer on behalf of all purchasers of the defectively treated wood. Plaintiff asserted claims under Alabama law for violating the ADTPA and for breach of express warranty. The manufacturer moved to dismiss arguing, in relevant part, that the ADTPA does not authorize private class actions. Although the ADTPA creates a private right of action in favor of a consumer against a person who violates the statute, it does not allow private class actions and instead provides that only the Alabama Attorney General or a district attorney may bring class actions.

The district court dismissed the action, and the plaintiff appealed. The Eleventh Circuit addressed the conflict between Federal Rule 23, which authorizes class actions, including for consumer claims like the plaintiff's, and the ADTPA, and reversed, holding Federal Rule 23 controls. In doing so, the court relied on *Shady Grove* where the Supreme Court explained that the Federal Rules Enabling Act authorizes the adoption of rules of practice and procedure that apply not only in cases arising under federal law but also in cases in which state law supplies the rule of decision. The Act provides:

a. The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

b. Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. § 2072. Under the Act, a federal rule applies in any federal lawsuit, and thus displaces any conflicting state provision, so long as the federal rule does not abridge, enlarge, or modify any substantive right—a right that inheres in the rules of decision by which the court will adjudicate the petitioner's rights.

The manufacturer's substantive obligation was to comply with the ADTPA—to make only accurate representations about its product, and the plaintiff's substantive right was to obtain wood that complied with the manufacturer's representations. The court concluded that those are the rules of decision that govern the ADTPA claim, and that Rule 23 does not alter those substantive rights and obligations. The court explained that the disputed issue is not whether the class is entitled to redress for any misrepresentation, they are, but whether they may seek redress in one action or must instead bring separate actions. Thus, the court concluded Rule 23 does not "abridge, enlarge or modify any substantive right," and, therefore, controls.

Lisk v. Lumber One Wood Preserving, LLC., No. 14-11714 (11th Cir. July 10, 2015).

Eleventh Circuit Denies Petition For Rehearing In *Lisk v. Lumber One*

September 21, 2015 by Jaret J. Fuente

The Eleventh Circuit Court of Appeals denied a petition for rehearing *en banc* in the *Lisk v. Lumber One Wood Preserving, LLC* matter, where last month it held that the Alabama Deceptive Trade Practices Act's restriction on private class actions does not apply in federal court; rather, federal rule 23 controls. See our prior post about that opinion.

Lisk v. Lumber One Wood Preserving, LLC., No. 14-11714 (11th Cir. September 15, 2015).

A Message From the Eighth Circuit Regarding the TCPA

June 25, 2015 by Amy Lane Hurwitz and Jaret J. Fuente

The *purpose* of a telephone solicitation, rather than its *content*, determines whether it is prohibited telemarketing under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 *et seq*. That is what the Eighth Circuit determined in a case arising from unsolicited telephone calls with prerecorded messages initiated for the purpose of promoting the motion picture, *Last Ounce of Courage*.

The Golan family, who were registered on federal and state "do not call" lists, received two such messages on their home telephone answering machine, each of which stated only: "*Liberty. This is a public survey call. We may call back later*." The motion picture *Last Ounce of Courage* opened nationwide two days later.

Those behind the calls had created two prerecorded messages promoting the film. A shorter message, which the Golans received, was left on answering machines if a live person did not answer. The following longer message was played when a live person answered the call:

> Hello, this is Governor Mike Huckabee, with a 45-second survey. Do you believe in American freedom and liberty? … Would you, like me, Mike Huckabee, like to see Hollywood respect and promote traditional American values? I am an enthusiastic supporter of a new movie called *Last Ounce of Courage*. It is a film about faith, freedom, and taking a stand for American values. May I tell you more about why I recommend that you … see the movie *Last Ounce of Courage*? (Please note that only "yes" responses go to [the next segment of the script].)
>
> Thank you for your interest. *Last Ounce of Courage* opens in theaters on Friday, September 14, [2012]. *Last Ounce of Courage* will inspire you and your loved ones to celebrate our nation and the sacrifices made to protect our liberties. It is a great story about taking a stand for religious freedom. The film is a timely reminder of all that is worth defending in our nation. Experience the *Last Ounce of Courage* trailer and see audience reactions at www.lastouncethemovie.com, that's last ounce the movie dot com. Would you like to hear this information again? (Please note that only "yes" responses [repeat this segment of the script and] all other responses go to [the next segment of the script].)
>
> Thank you for your answers so far. I have just [one] more question[] for demographic purposes. Do you own a smart phone?

Four million residential phone lines were called, and over one million live responses were detected. The Golans sought to certify a class of "persons in the United States to whom [defendants] within four years of October 3, 2012, initiated one or more telephone calls to such persons' residential telephone lines using the recorded voice of Mike Huckabee to deliver a message as part of the above-mentioned campaign regarding the movie *Last Ounce of Courage*," in violation of the TCPA.

The district court concluded the Golans had not suffered an injury in fact because the messages they received did not contain "an advertisement, telemarketing message, or telephone solicitation," in violation of the TCPA, and that they were inadequate class representatives because unlike most putative class members who heard the longer message, the Golans heard only the shorter message on their answering machine and, therefore, were subject to a "unique defense" and could not establish typicality.

The Eighth Circuit reversed, and held that "while the content of the calls controlled whether they were 'advertisements,' their purpose controlled whether they were 'telemarketing.'" It found that the context of the calls at issue indicated that they were initiated for the purpose of promoting *Last Ounce of Courage*. As a result, the calls qualified as "telemarketing" even though the messages never referenced the film, and the Golans, therefore, had alleged an injury in fact sufficient to confer Article III standing.

For the same reason—the purpose of the calls—the Eighth Circuit further held that the Golans were not subject to a unique defense and had not suffered a different injury than class members who heard the entire message. What matters for all class members, the Eighth Circuit held, is that each call was initiated for the purpose of promoting *Last Ounce of Courage*.

Golan v. Veritas Entertainment, LLC et al., No. 14-2484 (8th Cir. June 8, 2015).

Third Circuit Reverses Denial of Class Certification in Complete Sham Telemarketing RICO Case

September 17, 2015 by David E. Cannella and Gary M. Pappas

The United States Court of Appeals for the Third Circuit reversed the denial of class certification in a case brought against a bank and its payment processors that allegedly engaged in a fraudulent scheme to cause unauthorized debits from consumer bank accounts. Reynaldo Reyes, as class representative, filed suit in the Eastern District of Pennsylvania under the Racketeer Influenced and Corrupt Organizations Act (RICO) against Zions First National Bank ("Zions Bank") and its payment-processor subsidiaries Netdeposit, LLC and MP Technologies. Reyes alleged telemarketers obtained bank account information from consumers that was used to make unauthorized debits from consumers' bank accounts. The telemarketers conveyed the bank account information to the payment processing entities. The payment processors then caused Zions Bank to initiate an Automated Clearing House ("ACH") debit of the consumers' bank accounts.

Reyes alleged that the defendants were operating a RICO enterprise that was a "complete sham." A complete sham is an entirely illegal and illegitimate activity masquerading as a legitimate business undertaking. Under the complete sham theory, the reviewing court can focus on the defendant's conduct as a whole to find proof of elements that normally require evidence about each plaintiff. In particular, the class members' participation or involvement with the defendant is sufficient evidence that each class member suffered damages, rendering analysis of individual transactions unnecessary.

Plaintiff's proof at the class certification stage included the inordinately high "return rates" of the telemarketers who engaged in the alleged scheme. "Return rates" refer to how often an ACH debit could not be completed. The record in this case demonstrated return rates in excess of 25 to 50 times the national average of 1.25 percent.

Plaintiff produced three experts who testified as to banking practices and fraudulent marketing practices. Plaintiff also relied on internal emails between Zions Bank and its payment processors in which the defendants discussed "staggering" return rates. Two of plaintiff's experts testified that return rates in excess of 10 percent are *prima facie* evidence of fraud. In this case, the return rates ranged from "30% to almost 90%." A third expert opined that the bank had to know that it was engaged in a fraudulent activity based on standard banking practices.

The district court denied class certification because it found that there were no issues common to the class and plaintiff could not satisfy either the commonality requirement of Rule 23(a) or the predominance requirement of Rule 23(b)(3). Focusing only on the return rates, the district court found that the abnormally high return rates did not provide "absolute proof" of fraud. The district court also noted commonality and predominance were not satisfied because Zions Bank and the payment processors contracted with different marketing firms to obtain consumers' bank account information.

The issues on appeal for the Third Circuit were whether the district court: (1) applied the proper standard for assessing commonality and predominance; (2) appropriately reviewed plaintiff's expert opinions; and (3) properly determined that commonality and predominance were not established based on the record presented. As to all three issues, the Third Circuit found that the district court erred in denying the motion to certify the class.

First, the district court held plaintiff to an incorrect burden of "absolute proof" at the class certification stage rather than the appropriate "preponderance of the evidence" standard. Next, the district court confused certain fact witnesses as experts and improperly ignored the testimony of plaintiff's actual expert witnesses that the high return rates supported a finding of fraud. Finally, as to commonality and predominance, the Third Circuit found that both were satisfied on the "complete sham" record in this case and distinguished telemarketing cases relied on by the district court because those cases involved legitimate business activities.

The Third Circuit explained that in a RICO class action, commonality and predominance are satisfied if each element of the alleged RICO violation involves common questions of law and fact capable of proof by evidence common to the class. The complete sham theory advanced by plaintiff relied on a common mode of behavior by defendants as to all members of the class and a general policy of fraud. While slight variations in the telemarketers' and defendants' conduct existed, none involved exercises of discretion that affected the class members' damages. The Third Circuit distinguished the Supreme Court's *Wal-Mart* decision, in which plaintiffs did not establish a national policy of employment discrimination and failed to demonstrate a common mode of exercising discretion that pervaded the entire company.

Finally, the Third Circuit observed that plaintiff's complete sham theory, if supported by an appropriate record, can satisfy Rule 23(b)(3)'s predominance requirement by focusing on the overarching material and defining aspects of a defendant's conduct. The court explained that predominance does not require the absence of variations in a defendant's conduct, but rather whether the defendant's conduct was common to all of the class members.

The Third Circuit vacated the order denying class certification and remanded the matter for proceedings consistent with its opinion.

Reynaldo Reyes v. NetDeposit, LLC, et. al., Case No. 14-1228, United States Court of Appeals for the Third Circuit (Sept. 2, 2015).

Don't Tip Just Yet: Uber Taxi Class Gets Limited Certification

January 5, 2016 by Zachary D. Ludens and Gary M. Pappas

A federal judge in San Francisco recently certified a limited class in a lawsuit against Uber under the California Unfair Competition Law (UCL) and the California Consumers Legal Remedies Act (CLRA). The plaintiff sought to certify a class of all Uber customers who used a traditional taxi from April 2012 to March 2013. However, after examining the claims under Rule 23 and both the UCL and CLRA, the court certified a class consisting of only those customers who received an allegedly misleading email from Uber and then took a traditional taxi ride through the Uber service.

Uber provides a software solution that connects riders with transportation providers via a smartphone app that allows riders to "summon, arrange, and pay for" their rides all in one place. Although in most cities Uber uses private drivers with normal automobiles, from April 2012 to March 2013, Uber had an option in five cities that allowed riders to select a traditional taxi. Through an email blast, their website, and a blog, Uber represented that the fee would be the metered charge plus a 20 percent "gratuity." In reality, about 12 percent of this surcharge went to Uber, and the remainder to the driver.

In examining class certification issues, the court spent most of its time considering the typicality and predominance factors. Under the UCL, "it is necessary only to show that *members of the public* are likely to be deceived." In contrast, the CLRA requires "at a minimum, that the class be exposed to the allegedly false advertising at issue." Given the three different channels of media used to advertise the allegedly false statement, the court had to determine whether class-wide exposure to the misrepresentations could be inferred. Plaintiffs did not allege that any misrepresentation existed in the Uber app itself.

To make this determination, the court examined a variety of factors, including the extensiveness of the advertising, the prominence of the alleged misrepresentation, and the amount of other information provided in the advertisement. The court found no evidence that it was "highly likely" that all members of the proposed class saw the blog and website such that class-wide knowledge could be inferred.

However, because the email was so specific and so targeted in promoting the taxi service, the court found that it was highly likely to have seen, and been exposed to, the alleged misrepresentation there. Even though the websites and blogs were not enough to establish class-wide knowledge under the UCL and the CLRA standing alone, the court did find that they enhanced the potential exposure of the email advertisement.

Ehret v. Uber Technologies, Inc., No. 14-cv-00113-EMC (N.D. Cal. Dec. 2, 2015).

Regulatory Settlement Proves Major Obstacle for Certification of Minor Class of Google In-App Purchases

April 23, 2015 by Paul G. Williams and Kristin Ann Shepard

Google sells apps on its Play Store that allow users to make in-app purchases, typically the buying of "currency" for use in app-based games. This putative class action alleged that the games were aimed at minor children and allowed them to make in-app purchases unobstructed for a period of 30 minutes after a password was entered.

As a result, minors were able to make one click, large-dollar-amount purchases without parental authorization. Prior to the filing of the complaint, however, Google had settled a dispute with the FTC over the same issue and paid out $30 million in reimbursements. In light of the FTC settlement, Google argued that the putative class failed the superiority and adequacy requirements.

The Northern District of California agreed with Google. Relying on *Kamm v. Cal. City Dev't Co.*, 509 F.2d 205 (9th Cir. 1975), the court found the putative class failed the superiority requirement, largely on the basis that the relief sought in the litigation – refunds of in-app purchases – was duplicative of relief already provided under the regulatory settlement, and that the litigation would be unduly costly to Google and the court.

The court rejected plaintiffs' argument that the superiority requirement was met because punitive damages were unavailable under the FTC settlement, and agreed with Google that the likelihood of recovering punitive damages in court was remote.

Imber-Gluck v. Google Inc., No. 5:14-cv-01070-RMW (N.D. Cal. Apr. 3, 2015).

Ninth Circuit Holds That State Court's Class Certification Order Creates New Occasion for CAFA Removal

April 14, 2015 by Clifton R. Gruhn and Ben V. Seessel

The Ninth Circuit held that a state court's certification order, under which CAFA's amount in controversy would be met, created a new basis for defendant to remove the case to federal court. The plaintiff had filed a putative class action against Dollar Tree in California Superior Court alleging violations of the California Labor Code and California Business and Professions Code, Section 17200, based on Dollar Tree's purported failure to provide required paid rest breaks to assistant managers. Dollar Tree initially removed the case in 2012, asserting CAFA jurisdiction. In arguing for remand, plaintiff asserted that the class only included assistant managers who had worked without another manager on duty, which took place on only one-third of the relevant shifts and placed less than $3 million in controversy. The district court agreed with the plaintiff, and remanded the action to California state court.

In state court, the plaintiff moved for class certification. The state court concluded that the proposed class of assistant managers who had worked without another manager on duty "would not be ascertainable" and, instead, certified a broader class "consisting of all assistant managers who did not receive proper breaks, regardless of whether they worked alone." Defendant removed the action again, asserting that the class actually certified placed over $5 million in controversy. The plaintiff again sought remand, and the district court held that the second removal "was untimely because it was based on the same class definition … that had been the subject of the first removal." The defendant appealed under CAFA, 28 U.S.C. § 1453(c).

On appeal, the plaintiff first argued that the second removal violated the prohibition against successive removals. Noting that successive removal petitions are permitted when the pleadings are amended to create federal subject matter jurisdiction for the first time, the Ninth Circuit held that, "[f]or removal purposes, the certification order is functionally indistinguishable from an order permitting the amendment of pleadings to alter the class definition, creating CAFA jurisdiction for the first time." Thus, the court held that the defendant's second removal based on the California Superior Court's class certification order was permissible.

The court also rejected the plaintiff's argument that the second removal was untimely. In so doing, the court explained that a defendant can properly remove an action within 30 days after receiving an "*order* or other paper from which it may first be ascertained that the case is one which is or has become removable." The court reasoned that, because the certification order "created a new amount in controversy not presented in the amended complaint," the defendant's receipt of that order started a new 30-day clock. The Ninth Circuit reversed the order remanding the case to state court and instructing the district court to assert jurisdiction.

Reyes v. Dollar Tree Stores, Inc., No. 15-55176 (9th Cir. Apr. 1, 2015).

Second Circuit Vacates Class Certification Order, Applying Various State's Laws Precludes Finding Of Predominance And Superiority

March 17, 2015 by Clifton R. Gruhn and Ben V. Seessel

The Second Circuit vacated a class certification order issued by the Southern District of New York, finding that Rule 23(b)(3)'s predominance and superiority requirements could not be met given the necessity of applying 27 states' laws to putative class claims for breach of fiduciary duty, legal malpractice and breach of contract. The case involved a "novel approach to dispute resolution that continues to provoke a debate among experts in legal ethics." The plaintiffs were 587 employees of Nextel Communications, Inc. ("Nextel"), hailing from 27 states, who entered into retainer agreements, most of them in writing, with the law firm Leeds, Morelli & Brown ("LMB") regarding their employment discrimination claims against Nextel. Rather than file suit, LMB arranged a dispute resolution process to settle the plaintiffs' claims *en masse* with Nextel, which, in turn, provided LMB certain monetary guarantees for resolving the plaintiffs' claims within a specified time. LMB obtained conflict of interest waivers from most of the plaintiffs during the process of settling with Nextel.

Following conclusion of the dispute resolution process, the plaintiffs, on behalf of all Nextel employees represented by LMB, brought suit against LMB and Nextel. The plaintiffs in the instant case, opt outs from other class action litigation that had settled, alleged that LMB breached its fiduciary duties to the class, committed malpractice, breached retainer agreements, and, further, that Nextel aided and abetted LMB's misconduct. In granting the plaintiffs' motion for class certification, the district court found that New York law applied to all the plaintiffs' claims. After the parties stipulated to dismissal with prejudice of claims against LMB, Nextel appealed.

The Second Circuit found that "there are undoubtedly common issues present in this case that will affect the liability determination for all members of the class" including the nature of the settlement agreement with plaintiffs and Nextel's role in negotiating and executing it. Applying the Restatement's "significant relationship" test, however, the court determined that the laws of each class member's home state needed to be applied to both the tort and contract claims. Given the need to apply 27 different state laws, the court held that "the case for finding the predominance of common issues and the superiority of trying this case as a class action diminishes to the vanishing point."

Regarding the tort claims for malpractice and breach of fiduciary duty, the law of some class members' home state allowed the plaintiffs to waive LMB's conflict, while the law of other class members' home state did not. Moreover, determining whether a waiver was legally effective in at least one state (where 25% of the class members resided) would involve a factually intensive inquiry with respect to each putative class member.

According to the court, such an inquiry was "so individualized and client-specific" that even creating a subclass for problematic states "would not achieve any economies of scale." The court further held that the waiver issue was also critical to resolving the plaintiffs' breach of retainer agreement claims given the law in the various states and, as a result, individualized issues would overwhelm common ones. The court thus concluded that common issues do not predominate and that resolution by a class action is not superior, vacated the district court's certification order and remanded the case for further proceedings.

Johnson v. Nextel Commc'ns, Inc., No. 14-454 (2d Cir. Mar. 4, 2015).

Florida District Court Rejects Motion To Strike But Allows Pre-Certification Standing Challenge In Snack Food Labeling Case

February 3, 2015 by Amy Lane Hurwitz and Gary M. Pappas

Before class certification hearings occur in the Southern District of Florida, defendants may not challenge plaintiff's class allegations via Rule 12(f) motions to strike but may challenge plaintiff's standing via motions to dismiss.

In *Bohlke v. Shearer's Foods, LLC*, plaintiff sought to represent a Florida class and alternative nationwide class of purchasers of five flavors of defendant's rice chips. Plaintiff alleged that defendant's "all natural" labels were false and misleading because the rice chips contained artificial ingredients. Plaintiff herself had purchased only three of the five rice chip flavors. Defendant moved to strike the nationwide class allegations due to the insurmountable obstacles under Rule 23 of applying the laws of 51 different jurisdictions to the putative class. Defendant also moved to dismiss because plaintiff lacked standing to pursue any claims involving the varieties she did not purchase. Plaintiff responded that both motions were premature until the certification hearing. Plaintiff added that the substantial similarity of the rice chip varieties was sufficient to defeat a standing challenge at this stage in the proceedings.

The district court refused to consider defendant's motion to strike the nationwide class allegations. While observing that district courts in other federal circuits allow such motions, the *Bohlke* court followed Southern District of Florida precedent and applied the requirements of Rule 12(f) strictly. Finding nothing in plaintiff's allegations that was "redundant, immaterial, impertinent, or scandalous," the court summarily denied defendant's motion. The court specifically noted that it was not opining on the merits of class certification and authorized defendant to re-raise the arguments if and when plaintiff moved to certify a nationwide class.

The district court reached a different result, however, on defendant's standing challenge. Again, while observing that district courts in other circuits have held that such issues are more properly raised at the certification stage, the court followed Eleventh Circuit precedent holding that a named plaintiff in a consumer class action cannot raise claims relating to products which she herself did not purchase. Furthermore, citing Southern District of Florida precedent, the court declined to apply the “sufficiently similar” test. Accordingly, the court granted defendant’s motion to dismiss, without prejudice, as to the two flavors of rice chips plaintiff herself had not purchased.

Bohlke v. Shearer’s Foods, LLC, Case No. 9:14-cv-80727-Rosenberg/Brannon (S.D. Fla. January 20, 2015).

Third Circuit to Plaintiffs’ Bar: Expert Testimony Necessary for Certification Must Satisfy *Daubert*

April 23, 2015 by Christine A. Stoddard and Kristin Ann Shepard

Plaintiff purchasers of traditional blood reagents, products that test the compatibility of donor blood with recipients, brought putative class actions claiming that two defendant companies conspired to fix prices in violation of antitrust law. Numerous lawsuits were consolidated in the Eastern District of Pennsylvania (and one of the defendants subsequently settled with the plaintiffs).

The district court found that plaintiffs had satisfied the requirements of Federal Rule of Civil Procedure 23 and granted their motion for class certification. In evaluating predominance under Rule 23(b)(3), the district court assessed plaintiffs’ expert testimony regarding antitrust impact and damages, rejected defendant’s challenges to the reliability of the evidence as irrelevant to certification, and found that the expert’s damages models “could evolve” into admissible evidence.

The remaining defendant appealed the certification decision under Rule 23(f).

On appeal, the Third Circuit vacated class certification and remanded for consideration in light of the Supreme Court’s decision in *Comcast Corp. v. Behrend*. The court noted that expert testimony is subject to the rigorous analysis required by *Dukes* and joined the Seventh, Eighth, and Ninth Circuits in holding that a plaintiff cannot rely on challenged expert testimony that is necessary to certification unless he can prove that the evidence satisfies the standards set forth in *Daubert*.

Because a plaintiff must affirmatively demonstrate that the class meets the requirements of Rule 23, expert testimony that falls short of the *Daubert* standard does not suffice to prove that the prerequisites of certification have been met. Thus, the court remanded for the district court to determine if the defendant’s challenges went to testimony critical to certification and then to conduct a *Daubert* inquiry before determining if plaintiffs had satisfied Rule 23.

In re Blood Reagents Antitrust Litig., No. 12-4067 (3d Cir. Apr. 8, 2015).

Additional Information

Classified: The Class Action Blog is written and edited by members of the Carlton Fields National Class Actions practice group, which is comprised of more than 70 class action attorneys. The blog provides class action news and practical summaries of key cases from around the country.

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