



## 2015 Class Action Year-End Review

**BakerHostetler**

*The BakerHostetler 2015 Class Action Year-End Review* offers a summary of some of the key developments in class-action litigation during the past year. The *2015 Year-End Review* is a joint project of the firm's Class Action Defense, Securities, Antitrust, Data Privacy, Appellate, and Employment Class Action practice teams and is the fruit of collaborative efforts of numerous attorneys from across the firm. For updates throughout the year, please be sure to visit the blogs sponsored by each of these practice teams: *Class Action Lawsuit Defense Blog*, *Antitrust Advocate*, *Data Privacy Monitor*, and *Employment Class Action Blog*.

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## Introduction

In theory, individual calendar years should not reflect any sort of class-action doctrine identity. Court dockets, after all, operate at their own pace, not necessarily in sync with one another. But every so often, doctrinal questions simmer and percolate in the lower courts long enough that a bubbling over happens all at once. And so it was in 2015. After the relative quiet of 2014, numerous important class-action issues emerged at the forefront in 2015, dominating doctrinal analysis and setting the stage for an equally active 2016.

For years, lower courts have wrestled with standing issues in class actions, diverging on the extent to which class members had to maintain standing and whether a named plaintiff could establish standing based only on statutory – but not actual – damages. The U.S. Supreme Court granted certiorari review and heard oral arguments in two relevant cases in 2015, creating potential for much-needed clarification.

In *Spokeo, Inc. v. Robins*, the Court will determine whether statutory damages alone under the Fair Credit Reporting Act are sufficient to create Article III standing in a putative class action. The case has important ramifications for other class-action hot corners such as the Telephone Consumer Protection Act, which also contains statutory damage provisions that incentivize class actions.

In *Tyson Foods, Inc. v. Bouaphakeo*, the Court will explore whether class members who have not suffered harm can be included in a properly

certified class. As a class action certified under Rule 23 and the Fair Labor Standards Act, *Tyson* offers the potential to settle ongoing questions about relying on statistical analysis of class damages after 2011's landmark *Wal-Mart v. Dukes* decision.

In early 2016, the Court answered the third case-or-controversy question that it teed up in 2015, holding that a putative class action does not become moot when a named plaintiff leaves a defendant's Rule 68 offer of judgment unaccepted. The Court's 6-3 opinion in *Campbell-Ewald Company v. Gomez* reaffirmed the Court's apparent endorsement of class litigation as a viable means for resolving many disputes that feature low dollar amounts on an individual level.

The circuit courts also played an active role in 2015. The Seventh and Sixth Circuits, for instance, both rejected the Third Circuit's rationale regarding the importance of ascertainability in class litigation, setting up a possible Supreme Court showdown in the coming years. And the Ninth Circuit in a surprising move adopted the stance of the California Supreme Court in holding that class-action waivers do not apply to waive Private Attorneys General Act actions under state law. Because the holding creates potential conflict with recent U.S. Supreme Court law, further attention in 2016 is necessary to identify the precise boundaries.

Indeed, the high rate of class-action activity in 2015 suggests strongly that even more notable outcomes lie ahead in 2016.



## Developments in Class-Action Procedure

## A. POTENTIAL CHANGES TO RULE 23

The Federal Rules Advisory Committee continues to move on potential changes to Rule 23, crystallizing its proposals into nine potential topics and issuing alternative proposals for the potential amendments to the rules.<sup>1</sup> These potential changes are still very preliminary, with any finalized proposals having to be issued for public comment before being submitted to the Supreme Court for approval. Nevertheless, the proposals being discussed are worth understanding, as they would have a significant impact on class-action procedure.

There are seven “topics” on which the Rule 23 Subcommittee is currently focusing its immediate attention, and one other issue that the Subcommittee plans to put before the full Committee but without a recommendation.

*Topic 1: Frontloading.* The Subcommittee’s current drafts would amend Rule 23 to require that courts get more information about proposed class settlements earlier in the process, and direct notice to the class members of this information. Initially, the Subcommittee proposed a “laundry list” approach, which was received with considerable disapproval. So in the most recent draft, the Subcommittee has proposed requiring the parties to provide “relevant” or “sufficient” information about the proposed settlement prior

to notice being directed.

*Topic 2: Appellate rights for preliminary approval.* The Subcommittee has proposed amending Rule 23(f) to clarify that an order preliminarily approving a class action settlement is not subject to immediate appeal.

*Topic 3: Clarifying the trigger of the opt-out period.* The Subcommittee has proposed to clarify Rule 23(c)(2)(B) to state that notice must be directed to a class proposed to be certified.

*Topic 4: Updated notice to expressly allow for electronic means.* The Subcommittee has proposed a modification to the rule that is intended to make clear that the “best notice practicable” may include notice by email or other electronic means. This is intended to remedy a perceived issue that the courts are reluctant to endorse electronic notice as a substitute for first class mail due to statements in the Supreme Court’s now 40-year-old decision in *Eisen v. Carlisle & Jacquelin*<sup>2</sup> that the best notice practicable is first class mail, when feasible.

*Topic 5: Objectors.* The Subcommittee is also considering two requirements for objectors. First, the revised Rule 23(e)(5) would require objectors to state the grounds for the objection, with failure to do so being grounds for rejecting the objection. The second proposal would attempt to regulate, and thus reduce, the “pay off” objection. In addition to bolstering the requirement that withdrawals

of objections be approved, the Subcommittee is considering requiring the court to approve any payment made to an objector for withdrawing his or her objection.

*Topic 6: Settlement approval criteria.* The Subcommittee is also proposing to provide more specific criteria in the rule about what the trial court must consider in giving final approval to a settlement. Many of the circuits have adopted their own tests for what must be considered, and though the factors to be considered tend to be similar, they are not identical from circuit to circuit. One justification for a possible rule change would be to bring national uniformity to the process. Currently, the Subcommittee is considering – and is somewhat divided on – whether to keep the “fair, reasonable, and adequate” language as a “catch all” or to delete it, and require the consideration of only the new specific factors.

*Topic 7: Settlement classes.* The Subcommittee was also considering adopting a rule addressing the certification of settlement classes. The Supreme Court held in *Amchem Products, Inc. v. Windsor*<sup>3</sup> that class certification for settlement purposes was subject to the same requirements as certification for litigation purposes. Since that decision, courts have routinely certified settlement classes in cases in which certification would have been doubtful if it had been presented in the contested context. Recognizing this practical reality, the Subcommittee was considering changes to Rule 23 that would

<sup>1</sup> See <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/civil-rule-23>.

<sup>2</sup> 417 U.S. 156 (1974).

<sup>3</sup> 521 U.S. 591 (1997).

expressly permit settlement class certification in situations where the settlement would be superior to other methods of adjudicating the controversy and the court otherwise finds the settlement is fair, reasonable, and adequate, without the need to establish that the other elements of Rule 23(b) (3) (in particular, predominance). But after much consideration, the Subcommittee decided that the difficulties presented in proceeding with this approach outweighed the benefits, so it will not recommend this proposal. But given the complex issues involved, the Subcommittee decided to bring the matter before the full Committee for consideration.

In addition to these current proposals, the Subcommittee put “on hold” two items it had been considering – specific ascertainability requirements and Rule 68 “pick off” offers of judgment.

*Ascertainability.* The Subcommittee was considering adding a section describing the requirements for defining a class and determining whether the class is ascertainable. This is an active issue in the courts, and one on which the circuits are split (as discussed in the following section). Several possibilities have been discussed, including: (1) whether the class is defined in such a way that class members would know whether they are in the class, (2) whether the class members can be identified using objective criteria, (3) whether the identification of class members is administratively feasible, and (4) whether the specific members of the class can be both identified and located. After

reviewing these proposals, and noting the continued development of the unsettled law, the Subcommittee concluded that “it is not prepared at present to advance a rule provision that would helpfully address this set of issues.”

*Pick-Off and Rule 68.* The Subcommittee was considering amending Rule 68 to state that it does not apply to class actions brought under Rule 23, in an effort to put an end to the tactic of picking off putative class representatives by attempting to moot their individual claims with an offer of judgment. The Subcommittee put this issue on hold in light of the Supreme Court’s consideration of the same issue in *Campbell-Ewald Company v. Gomez*.

Finally, the Subcommittee decided to drop two prior proposals related to *cy pres* distributions and issue class certification. On the latter, the Subcommittee concluded that expressly addressing issue classes would “create rather than solve” problems.

## B. ASCERTAINABILITY

Courts continue to fracture on what exactly it means that a class must be “ascertainable.” In 2015, several circuits weighed in on the Third Circuit’s influential opinions of *Marcus v. BMW of N. Am., LLC*<sup>4</sup> and *Carrera v. Bayer Corp.*,<sup>5</sup> which imposed what Judge Hamilton of the Seventh Circuit called a “heightened ascertainability requirement.” In *Marcus*, *Carrera*, and several cases since, the Third Circuit has ruled that Rule 23

<sup>4</sup> 687 F.3d 583 (3d Cir. 2012).

<sup>5</sup> 727 F.3d 300 (3d Cir. 2013).

imposes an implicit requirement on damages classes that the “method of determining whether someone is in the class [ ] be administratively feasible.”<sup>6</sup> That requirement, as even Judge Hamilton acknowledged, “sounds sensible.” After all, who “could reasonably argue that a plaintiff should be allowed to certify a class whose members are impossible to identify?”

Despite that concession, in *Mullins v. Direct Digital, LLC*,<sup>7</sup> Judge Hamilton reviewed in depth and resoundingly rejected the Third Circuit’s formulation of ascertainability. Similarly, Judge Moore of the Sixth Circuit saw “no reason to follow *Carrera*, particularly given the strong criticism it has attracted from other courts,” citing *Mullins*.<sup>8</sup>

In *Mullins*, the Seventh Circuit spent several pages dissecting the various bases other courts have cited to require more than the definitional version of ascertainability. But, in the end, the court’s problem was that the “stringent version of ascertainability effectively bars low-value consumer class actions[.]”

<sup>6</sup> 727 F.3d at 307. See also *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 184–85 (3d Cir. 2014); *Shelton v. Bledsoe*, 775 F.3d 554, 559–63 (3d Cir. 2015); *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 161–71 (3d Cir. 2015).

<sup>7</sup> 795 F.3d 654, 657 (7th Cir. 2015).

<sup>8</sup> *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015). The First and Eleventh Circuits cited *Carrera* with approval, but did not critically analyze the issue. See *Karhu v. Vital Pharm., Inc.*, 621 F. App’x 945, 948 (11th Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015).

And because Judge Hamilton also thought that the Third Circuit’s rule did “not further any interest of Rule 23 that is not already adequately protected by the Rule’s explicit requirements,” the court declined to require named plaintiffs in the Seventh Circuit to show that the class could, in fact, be reliably and feasibly identified.

First, the Seventh Circuit stated that the “administrative inconvenience is better addressed by the explicit requirements of Rule 23(b)(3),” which, “unlike the freestanding ascertainability requirement, is comparative: the court must assess efficiency with an eye toward ‘other available methods.’” Problematic for defense lawyers, the court urged district judges to take a “wait and see” approach to looming ascertainability problems because the district judge can decertify the class if the ascertainability problem comes to light. (Judge Hamilton did not show any concern for the costs such an approach imposes on defendants in the interim.)

Next, Judge Hamilton thought little of the class-member fairness concerns cited by courts in support of the so-called “heightened ascertainability requirement.” As to absent class members, the court said that these people don’t have the right to actual notice anyway, and probably wouldn’t recover anything without the class-action device. So when “it comes to protecting the interests of absent class members, courts should not let the perfect become the enemy of the good.” As to bona fide class members whose claims are diluted if true class members cannot be

identified, the court said these concerns are trumped up – “in practice, the risk of dilution based on fraudulent or mistaken claims seems low, perhaps to the point of being negligible.”

Finally, Judge Hamilton rejected the due process concerns that animated the Third Circuit’s decision in *Carrera*. The court recognized that the defendant no doubt has the right to challenge each class member’s claim. But those concerns, said Judge Hamilton, “are protected by other features of the class device and ordinary civil procedure,” like bifurcating the liability and damages phases of the case. “As long as the defendant is given the opportunity to challenge each class member’s claim to recovery during the damages phase, the defendant’s due process rights are protected.”

At bottom, the *Mullins* decision was a ringing endorsement for the class-action device, and gave rather short shrift to the serious concerns certifying illegitimate class actions imposed on defendants. Most corporate defendants will choose settlement instead of hoping that the case will be decertified later, or going through the massive expense of mini-trials to protect its rights. In Judge Hamilton’s view, those concerns paled in comparison to “the significant harm caused by immunizing corporate misconduct.”

After *Mullins*, there is a rather clear circuit split. As of this writing, the Supreme Court is currently considering whether to take up the question of what, exactly, it means that the class must be “ascertainable.”<sup>9</sup>

<sup>9</sup> See <http://www.scotusblog.com/case-files/cases/direct-digital-llc-v-mullins/>.

## C. CLASS-ACTION WAIVERS

### PAGA Exception to Concepcion Persists

Since the federal Supreme Court clarified the supremacy of the Federal Arbitration Act vis-à-vis the right to pursue class litigation in 2011 in the *Concepcion* case,<sup>10</sup> the boundaries of that decision have been continuously explored.

In the summer of 2014, for instance, the California Supreme Court ruled that Private Attorneys General Act (“PAGA”) waivers in arbitration agreements were unenforceable under California law.<sup>11</sup> We detailed *Iskanian* in last year’s edition of the *Review*, explaining how the *Iskanian* court concluded that PAGA actions in the face of class-action waivers did not contravene the Federal Arbitration Act (“FAA”). We also explained how several California district court decisions rejected the *Iskanian* rule as preempted by the FAA and enforced an employee’s right to waive his or her ability to pursue a representative PAGA claim.

In 2015, however, the federal-court tide shifted in favor of employees. In *Sakkab v. Luxottica Retail North America, Inc.*,<sup>12</sup> the Ninth Circuit ruled that an eyewear retailer violated the *Iskanian* rule by forcing its employees to waive representative PAGA claims in its arbitration agreements. Sakkab, a former employee of Lenscrafters (owned by defendant Luxottica), filed a putative class action against

<sup>10</sup> *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

<sup>11</sup> *Iskanian v. CLS Trans. Los Angeles, Inc.*, 59 Cal. 4th 348 (2014).

<sup>12</sup> *Sakkab v. Luxottica Retail North America, Inc.*, No. 13-55184 (9th Cir.).



Luxottica, alleging misclassification in violation of overtime, meal, and rest break laws. Sakkab included a representative PAGA claim among his causes of action. The district court rejected Sakkab's argument that the *Iskanian* opinion mandates that a representative PAGA claim is unwaivable under California law.

The Ninth Circuit, however, relied on *Iskanian* for guidance, and held that the FAA does not preempt the state rule because it is generally applicable to all contracts and does not stand as an obstacle to the accomplishment of the FAA's objectives. The 2-1 majority rejected Luxottica's argument that the *Iskanian* rule is preempted by the FAA in the same way the California state rule prohibiting class arbitration waivers was rejected by the U.S. Supreme Court in *Concepcion*.

Indeed, the Ninth Circuit purported to adhere to both *Concepcion* and *Iskanian*, finding that the *Iskanian* rule complies with the FAA's prohibition on singling out arbitration agreements. Instead, "the rule bars any waiver of PAGA claims, regardless of whether the waiver appears in an arbitration agreement or a non-arbitration agreement."

The court distinguished PAGA claims from class actions and determined that "because representative PAGA claims do not require any special procedures [unlike class actions], prohibiting waiver of such claims does not diminish parties' freedom to select the arbitration procedures that best suit their needs." The *Iskanian* rule, according to the majority, "does not conflict with the FAA, because it leaves parties free to adopt the kinds

of informal procedures normally available in arbitration" and only prohibits the parties from "opting out of the central features of the PAGA's private enforcement scheme – the right to act as a private attorney general to recover the full measure of penalties the state could never recover."

It did not take long for the Ninth Circuit's *Sakkab* ruling to begin to influence class certification procedures in district courts. In *O'Connor v. Uber Technologies, Inc.*,<sup>13</sup> for instance, a group of 160,000 current and former drivers contended that they were Uber's employees rather than independent contractors and hence entitled to protections provided by the California Labor Code. Specifically, the plaintiffs raised claims for expense reimbursement and converted tips under the California Labor Code.

In mid-December, the court granted in part and denied in part the plaintiff employees' Supplemental Motion for Class Certification. One notable component of the Order was the determination that Uber's arbitration agreements with PAGA waivers were unenforceable as a matter of public policy.

Citing *Sakkab* and *Iskanian*, the court held a PAGA waiver is void based on public policy and that the *Iskanian* rule was not preempted by the FAA. But the court additionally found that the PAGA waiver could not be severed "without completely undermining arbitration." So the unenforceable PAGA waiver could not be severed from the rest of the agreement. Moreover, in the interest of equity,

severance was not appropriate because any drivers reviewing the arbitration agreements would be "misled into believing that they had no right to bring a PAGA claim" as the language specifically forecloses representative actions but also states all claims will be arbitrated on an individual basis. Thus, arbitration agreements with non-severable PAGA waivers were unenforceable as a matter of public policy.

On December 9, Uber filed its Notice of Appeal from the District Court's Order.

### **NLRB Holds Firm on Class Waiver Unenforceability**

As expected in 2015, the National Labor Relations Board continued its trend of applying its own view of Section 7 National Labor Relations Act ("NLRA") rights. Even though every Circuit Court of Appeals to examine the issue has concluded that the FAA prevails in conflicts with Section 7, the NLRB persists in ruling that employees cannot waive their rights to pursue collective relief as it is guaranteed by Section 7. Thus, according to the NLRB, class waivers are unenforceable under Section 7.

The latest manifestation of the NLRB's position occurred on December 24, 2015, in *SolarCity Corp.*, holding that the previous Board decisions *D.R. Horton, Inc.*, and *Murphy Oil USA, Inc.*, remain valid until and unless they are overturned by the Supreme Court, notwithstanding unanimous rejection by every circuit court to consider the issue.<sup>14</sup>

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<sup>14</sup> 363 NLRB No. 83.

<sup>13</sup> N.D. Cal. No. 3:13-cv-03826 (Dec. 9, 2015).

In the meantime, the NLRB is expected to continue to dig in its heels until and unless the U.S. Supreme Court rules against it. But unless a circuit split occurs, Supreme Court review is unlikely because the NLRB has not shown interest in seeking Supreme Court review.

### Court Reaffirms *Concepcion*

In December, the Supreme Court reaffirmed what it said in *Concepcion*, that class-action waivers in arbitration agreements are enforceable under the FAA, despite contrary state law. In *DirecTV, Inc. v. Imburgia*,<sup>15</sup> the operative class-action waiver in the consumer arbitration agreement stated that it would be unenforceable if the waiver was contrary to the “law of your state.” The California appeals court, applying California law that holds such waivers to be unconscionable, found the waiver provision to be unenforceable. The Supreme Court reversed, pointing out the invalidity of the California “unconscionable” rule in light of *Concepcion*.

## D. CLASS STANDING ISSUES

### Injury-in-Fact vs. Injury-in-Law: Spokeo Sets the Stage

On November 2, 2015, the U.S. Supreme Court heard oral argument in *Spokeo, Inc. v. Robins*<sup>16</sup> – a case that commentators call a critical turning point in class-action

litigation.<sup>17</sup> The issue presented to the Court was “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.”<sup>18</sup> To have Article III standing to bring a claim in federal court, a plaintiff must demonstrate he or she suffered an injury-in-fact. The injury must be concrete and particularized, and actual or imminent, not hypothetical.<sup>19</sup>

Spokeo, Inc., operates a data-gathering website that offers users information about other people, including, for example, address, marital status, income level, religious affiliation, and creditworthiness. Thomas Robins filed a putative class action against Spokeo in 2010, alleging the website disseminated inaccurate information about his educational background and income status, which made it more difficult

for him to find employment. Robins alleged that Spokeo’s conduct violated the Fair Credit Reporting Act (“FCRA”), a federal statute which establishes required procedures for consumer reporting agencies.<sup>20</sup> In January 2011, a federal district court in California dismissed the case, holding that Robins did not have Article III standing to invoke the jurisdiction of the federal court because he failed to allege that he suffered an injury-in-fact as a result of Spokeo’s alleged conduct.<sup>21</sup> Citing Supreme Court authority for the notion that an injury-in-fact must be “actual or imminent and not conjectural or hypothetical,”<sup>22</sup> the district court concluded that Robins did not suffer an injury-in-fact because he failed to allege that Spokeo caused him actual or imminent harm. Rather, Robins merely alleged “that he had been unsuccessful in seeking employment, and that he is concerned that the inaccuracies in his report will affect his ability to obtain credit, employment, insurance and the like.”<sup>23</sup> According to the court, such allegations of possible future injury were insufficient to confer standing.<sup>24</sup>

On appeal in February 2014, the Ninth Circuit disagreed and reversed the lower court decision. The court opined that when Congress creates a private right of action to enforce a statute, then it can be implied that

<sup>15</sup> No. 14-462, 577 U.S. \_\_\_\_, 2015 WL 8546242 (2015).

<sup>16</sup> No. 13-1339.

<sup>17</sup> See, e.g., Alison Frankel, *Class Actions Face Crucible in Next Supreme Court Term*, REUTERS: ON THE CASE (June 9, 2015), <http://blogs.reuters.com/alison-frankel/2015/06/09/class-actions-face-crucible-in-next-supreme-court-term> (describing the case as “enormously consequential”); Jacob Gershman, *Supreme Court Weighs Right to Sue in Spokeo Case*, WALL ST. J.: L. BLOG (Apr. 27, 2015, 3:22 PM), <http://blogs.wsj.com/law/2015/04/27/supreme-court-weighs-right-to-sue-in-spokeo-case> (noting the case’s “huge implications”); Paul A. Scudato et al., *No Injury? No Problem. – Spokeo v. Robins*, NAT’L L. REV. (May 31, 2015), <http://www.natlawreview.com/article/no-injury-no-problem-spokeo-v-robins> (describing Spokeo as “a case that has the potential to redefine standing in federal court”).

<sup>18</sup> No. 13-1339, question presented.

<sup>19</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>20</sup> 15 U.S.C. § 1681.

<sup>21</sup> No. CV10-05306 ODW (AGRx), 2011 WL 597867, \* 1 (C.D. Cal. Jan. 27, 2011).

<sup>22</sup> *Id.* at \* 1, quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Congress intended for that statutory provision to create a statutory right. And violation of that statutory right is a sufficient injury to confer Article III standing.<sup>25</sup> The court explained that the FCRA, which provides a private right of action, does not require a showing of actual harm to establish liability for willful violations.<sup>26</sup> Therefore, Robins' allegations that Spokeo violated his statutory rights under the FCRA when it intentionally published inaccurate personal information established an injury sufficient to confer Article III standing because "the statutory cause of action does not require proof of actual damages, [so Robins] can suffer a violation of the statutory right without suffering actual damages."<sup>27</sup>

The recent death of Associate Justice Antonin Scalia could loom large over this case. Traditionally, Scalia articulated a narrow view regarding standing doctrine and in fact wrote the seminal opinion on standing in *Lujan v. Defenders of Wildlife*.<sup>28</sup> With his place on the bench temporarily vacated, a 4-4 result is possible, which would leave the Ninth Circuit's decision in place.

### Circuit Split Primes the Issue for Supreme Court Review

#### Leading up to the Ninth Circuit

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<sup>25</sup> *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014), cert. granted, No. 13-1339.

<sup>26</sup> *Id.* at 412, citing § 1681n(a) of the FCRA, which provides "any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to . . . damages of not less than \$100 and not more than \$1,000 . . . ."

<sup>27</sup> *Id.* at 413.

<sup>28</sup> 504 U.S. 555 (1992).

decision in *Spokeo*, lower court decisions demonstrated that federal circuit courts were split over whether a statutory violation, without concrete injury, was sufficient to invoke Article III standing.

The Sixth and Seventh Circuits have concluded that plaintiffs can pursue a cause of action under the FCRA without having to prove any injury.<sup>29</sup> In *Beaudry v. TeleCheck*, the Sixth Circuit reversed a federal district court decision granting dismissal of an FCRA class-action complaint on the grounds that the plaintiff lacked Article III standing because she alleged no injury-in-fact. Beaudry alleged that TeleCheck, a check-verification services provider, inaccurately portrayed her and other consumers as first-time check writers. The plaintiff contended that TeleCheck willfully violated the FCRA. TeleCheck countered that the FCRA requires a showing of some form of damages and that Beaudry failed to establish actual harm because none of her check transactions were adversely affected as a result of TeleCheck's conduct. The Sixth Circuit rejected TeleCheck's argument, noting that the FCRA "imposes no such hurdle on willfulness claimants."<sup>30</sup> Rather, the FCRA permits recovery of statutory damages as set forth by Congress for willful violations

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<sup>29</sup> See *Beaudry v. TeleCheck Serves., Inc.*, 579 F.3d 702 (6th Cir. 2009) (discussed *infra*); *Murray v. GMAC Mort. Corp.*, 434 F.3d 948, 952-3 (7th Cir. 2006) (although the *Murray* court did not mention Article III standing in ruling that the FCRA provides damages without proof of injury, Seventh Circuit district courts have concluded that *Murray* controls the Article III inquiry).

<sup>30</sup> *Id.* at 705 (emphasis in original).

without any showing of actual injury. In a similarly reasoned Article III standing case involving the Electronic Funds Transfer Act, the Eighth Circuit held that being denied a statutory right is a sufficient injury to confer standing, even if the injury is only "informational" and does not include any economic damages.<sup>31</sup> In so holding, the Eighth Circuit reversed the lower court, which had dismissed ATM "fee notice sticker" class actions for lack of standing, concluding that the plaintiff failed to allege actual injury from the absence of the required "fee notice sticker" on ATMs.<sup>32</sup>

In contrast, the Second and Fourth Circuits have rejected the argument that mere deprivation of a statutory right constitutes an injury-in-fact sufficient to establish Article III standing. In *Kendall v. Employees Retirement Plan of Avon Products*,<sup>33</sup> the Second Circuit affirmed the lower court's dismissal on grounds that the plaintiff lacked Article III standing to bring an ERISA claim against her former employer. Kendall brought a class-action suit claiming that Avon breached its fiduciary duty to retirement plan participants. Avon sought dismissal of the complaint, contending that Kendall lacked standing because she failed to demonstrate an injury-in-fact. Kendall countered that ERISA

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<sup>31</sup> *Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819 (8th Cir. 2013), cert. denied, 134 S. Ct. 1515 (2014).

<sup>32</sup> *Charvat v. First Nat'l Bank of Wahoo*, No. 8:12 CV 97, 2012 WL 2016184, at \*3 (D. Neb. June 4, 2012); see also Order to Show Cause 4, No. 8:12 CV 11, ECF No. 22 (reaching same conclusion in Charvat's suit against Mutual First).

<sup>33</sup> 561 F.3d 112 (2d Cir. 2009).

conferred standing and did not require a showing of actual injury. The Second Circuit disagreed with Kendall, holding that her argument was a clear misstatement of the law. According to the court, although ERISA places a statutory duty on plan fiduciaries to comply with the act, a plan participant does not have a cause of action for breach of that duty without also “alleg[ing] some injury or deprivation of a specific right that arose from violation of that duty in order to meet the injury-in-fact requirement.”<sup>34</sup> In *David v. Alphin*, the Fourth Circuit similarly affirmed the dismissal of putative class claims alleging the defendant violated ERISA on the grounds that the plaintiffs failed to identify any injury under the pension plan – and therefore lacked Article III standing.<sup>35</sup>

The Third Circuit has gone both ways. The court twice ruled that plaintiffs must allege actual injury to establish Article III standing in false advertising cases.<sup>36</sup> On the other hand, the Third Circuit held that a plaintiff could establish Article III standing under the Real Estate Settlement Procedures Act without demonstrating that he or she suffered actual damages.<sup>37</sup>

### Potential Consequences of the Supreme Court’s Decision

The Supreme Court’s Article III standing decision in *Spokeo* will likely be published in late spring 2016. The

<sup>34</sup> *Id.* at 121.

<sup>35</sup> 704 F.3d 327 (4th Cir. 2013).

<sup>36</sup> *Joint Stock Sac’s v. UDIC N. Am., Inc.*, 266 F.3d 164 (3d Cir. 2001); *Fair Housing Council v. Main Line Times*, 141 F.3d 439 (3d Cir. 1998).

<sup>37</sup> *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753 (3d Cir. 2009).

*Spokeo* outcome will be significant for the future of class litigation under several federal consumer protection statutes that rely on similar enforcement schemes to the FCRA – the Telephone Consumer Protection Act, the Truth in Lending Act, the Fair Debt Collection Practices Acts, the Video Privacy Protection Act, and the Copyright Act.<sup>38</sup> These statutes have been long-standing targets for putative class members and a potential kiss of death for defendants because of the lucrative statutory damages they offer. Indeed, tech giants eBay, Google, Facebook, and Yahoo! were among the more than one dozen entities that filed *amici* briefs in *Spokeo* contending that statutory damages are not a valid substitute for actual damages to confer Article III standing. There is no doubt that if the Supreme Court finds that the FCRA and similar statutes confer Article III standing upon a plaintiff who suffers no concrete harm, class litigation will continue to increase, and perhaps challenge the sustainability of leading companies like Facebook that are “uniquely vulnerable to baseless and abusive litigation” under these statutes.<sup>39</sup>

## E. OFFERS OF JUDGMENT AND CASE-OR-CONTROVERSY REQUIREMENT

In another major class action argued before and recently resolved by

<sup>38</sup> See, e.g., Telephone Consumer Protection Act, 47 U.S.C. § 227; Truth in Lending Act, 15 U.S.C. § 1611; Fair Debt Collection Practices Act, 15 U.S.C. § 1692k; Video Privacy Protection Act, 18 U.S.C. § 2710; and Copyright Act, 17 U.S.C. § 504(c).

<sup>39</sup> Brief for eBay Inc. et al. as Amici Curiae Supporting Petitioner, *Spokeo, Inc. v. Robins*, No. 13-1339, 2015 WL 4148654 (U.S. July 9, 2015).

the U.S. Supreme Court this term, the Court rejected a defendant company’s contention that a plaintiff’s class-action claims were mooted by the defendant’s offer of complete relief pursuant to a Rule 68 offer of judgment. Issuing its 6-3 decision in *Campbell-Ewald Co. v. Gomez*<sup>40</sup> on January 20, 2016, the Court held that “an unaccepted settlement offer has no force. Like other unaccepted contract offers, it creates no lasting right or obligation. With the offer off the table, and the defendant’s continuing denial of liability, adversity between the parties persists.”<sup>41</sup> The Court’s decision settled a long-standing split among federal appellate courts over the issue.<sup>42</sup>

*Campbell-Ewald* originated when plaintiff Jose Gomez filed a putative class action against the advertising giant, alleging that it violated the Telephone Consumer Protection Act when it sent mass text messages to prospective U.S. Navy recruits. After the federal district court

<sup>40</sup> No. 14-857, --- S. Ct. ---, 2016 WL 22835 (Jan. 20, 2016).

<sup>41</sup> *Id.* at \* 3.

<sup>42</sup> Aside from the Ninth Circuit, only the Second and Eleventh Circuits have agreed that a lead plaintiff who rejects a complete settlement offer still has standing to proceed with his or her class claim. See, e.g., *McCauley v. Trans Union*, 402 F.3d 340 (2d Cir. 2005); *Stein v. Buccaneers LP*, 772 F.3d 698 (11th Cir. 2014). In contrast, the majority of the federal courts of appeals, including the Third, Fourth, Fifth, Sixth, and Seventh Circuits, have held that an offer for complete settlement of a plaintiff’s claim moots it. See, e.g., *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004); *Warren v. Sessions & Rogers, P.A.*, 676 F.3d 365, 371 (4th Cir. 2012); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 502 (5th Cir. 2005); *O’Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009); *Greisz v. Household Bank (Ill.)*, N.A., 176 F.3d 1012, 1015 (7th Cir. 1999).

denied a 12(b)(6) motion to dismiss, Campbell-Ewald tried to settle the case by offering Gomez \$1,503 per violation,<sup>43</sup> plus reasonable costs. Gomez rejected Campbell-Ewald's offer. Campbell-Ewald then filed a motion to dismiss, arguing that Gomez's rejection of an offer for complete relief mooted his personal and the class' claims. The district court denied the motion and granted summary judgment to Campbell-Ewald on other grounds.<sup>44</sup> But on appeal, the Ninth Circuit revived the class action, concluding that circuit precedent clearly resolved the issue of mootness in favor of the plaintiff—namely, that Campbell-Ewald's unaccepted Rule 68 offer renders neither Gomez's individual nor his class claim moot.<sup>45</sup>

The Supreme Court's resolution of this issue was a follow-up to its 2013 decision in *Genesis Healthcare Corp. v. Smyczyk*<sup>46</sup> and redemption for Justice Elena Kagan, who authored a scathing dissent in that case. The *Genesis* Court did not

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43 The Telephone Consumer Protection Act provides \$1000 in damages for willful violations of the act. 27 U.S.C. § 227(b)(3). Therefore Campbell-Ewald's offer of \$1,503 per violation plus costs constituted an offer of complete relief.

44 The district court found Campbell-Ewald was immune from liability under the doctrine of derivative sovereign immunity. *Gomez v. Campbell-Ewald Co.*, No. CV 10-02007 DMG (CWx), 2013 WL 655237 (C.D. Cal. Feb. 22, 2013) *vacated*, 768 F.3d 871 (9th Cir. 2014).

45 See *Diaz v. First American Home Buyers Protection Corporation*, 732 F.3d 948 (9th Cir. 2013) and *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011), where the Ninth Circuit held that unaccepted Rule 68 offers are insufficient to render individual claims or class claims moot.

46 133 S. Ct. 1523, 185 L. Ed. 2d 636 (2013).

rule on the question of whether full settlement offers shut down class actions because the plaintiff in that case did not dispute that the offer mooted her claims. Invoking first-year law school contract principles in her derisive dissent, Justice Kagan opined that an unaccepted offer cannot moot a case because “the recipient's rejection of an offer leaves the matter as if no offer had ever been made.”<sup>47</sup> Adopting Justice Kagan's offer-and-acceptance position, the *Campbell-Ewald* majority concluded that Gomez's failure to accept Campbell-Ewald's offer left Gomez empty-handed. And “an unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect,”<sup>48</sup> leaving both parties with the same stake in the litigation that they had at the outset.

*Campbell-Ewald* has important implications for class-action lawyers. The opinion, however, ultimately did not address whether mootness of the named plaintiff's claim also moots a class action, because the Court held that the named plaintiff's claim was not moot: “We hold today, in accord with Rule 68 of the Federal Rules of Civil Procedure, that an unaccepted settlement offer has no force.” 2016 WL 228345, at \*3. The Court reasoned:

Under basic principles of contract law, Campbell's settlement bid and Rule 68 offer of judgment, once rejected, had no continuing efficacy. Absent Gomez's

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47 *Id.* at 1533.

48 *Campbell-Ewald*, 2016 WL 22835, at \* 3, quoting *Genesis Healthcare*, 133 S. Ct. at 1533 (Kagan J., dissenting).

acceptance, Campbell's settlement offer remained only a proposal, binding neither Campbell nor Gomez. Having rejected Campbell's settlement bid, and given Campbell's continuing denial of liability, Gomez gained no entitlement to the relief Campbell previously offered. In short, with no settlement offer still operative, the parties remained adverse; both retained the same stake in the litigation they had at the outset.

*Id.* at \*7 (internal citations omitted).

The Court distinguished the situation before it – in which a defendant merely had *offered* payment – from cases in which a defendant actually had provided payment or the plaintiff had “in fact received all the relief they could claim.” *Id.* at \*7 & n.5 (collecting authorities). The majority explicitly left open the possibility that actually providing a plaintiff with everything he requests – in other words, actually paying the plaintiff – is sufficient to moot a claim. *Id.* at \*8. Dissents by Justices Roberts and Alito highlighted this open issue and endorsed the idea that payment of complete relief is sufficient to moot a claim. See *id.* at \*18 (Roberts, C.J., dissenting) (“The majority holds that an *offer* of complete relief is insufficient to moot a case. The majority does not say that *payment* of complete relief leads to the same result.”); *id.* at \*20 (Alito, J., dissenting) (“Today's decision thus does not prevent a defendant who actually pays complete relief – either directly to the plaintiff or to a

trusted intermediary – from seeking dismissal on mootness grounds.”<sup>49</sup>

Below we provide a brief overview of the state of the law in each circuit prior to *Campbell-Ewald*. These courts will now have to decide whether to accept *Campbell-Ewald*'s invitation to distinguish between a mere offer of relief and an actual payment of any disputed sum.

### First Circuit

The most recent circuit to rule on whether an unaccepted Rule 68 offer moots a plaintiff's claim in a putative class action is the First Circuit on August 21, 2015, in *Bais Yaahov of Spring Valley v. ACT, Inc.*, 798 F.3d 46 (1st Cir. 2015). The plaintiff in *Bais Yaahov* filed claims under the Telephone Consumer Protection Act. *Id.* at 47. The court elected to follow the Second, Fifth, Seventh, Ninth, and Eleventh Circuits, holding that an unaccepted Rule 68 offer cannot, by itself, moot a plaintiff's

claim because a rejected offer under Rule 68 does not provide any relief. *Id.* at 52. Rather, it deems the offer “withdrawn.” *Id.*

### Second Circuit

In May 2015, the Second Circuit found “it necessary . . . to clarify and reiterate the established law of this Circuit that a ‘rejected settlement offer [under Rule 68], by itself, [cannot render] moot[] [a] case.’” *Tanasi v. New Alliance Bank*, 786 F.3d 195, 199–200 (2d Cir. 2015) (quoting *McCauley v. Trans Union, LLC*, 402 F.3d 340, 342 (2d Cir. 2005)). The basis for the court's ruling was that the plaintiff's unaccepted Rule 68 offer for damages from defendants' purported improper assessment of overdraft fees was not a judgment that would divest the district court of Article III subject matter jurisdiction. *Id.* at 197.

### Third Circuit

The Third Circuit recognized in *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004) that an unaccepted Rule 68 offer for full relief is generally sufficient to moot a plaintiff's individual claim. Nonetheless, the court held that the defendant's Rule 68 offer for complete relief did not render moot the putative class. *Id.* at 345. The court held that the plaintiff could file a motion for class certification that would relate back to the filing of the complaint. *Id.* at 348.

### Fourth Circuit

The Fourth Circuit recognized a Rule 68 offer for full relief to a plaintiff in a putative class action moots the claim. *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 371 (4th Cir. 2012). Nevertheless, the plaintiff's claim in *Warren* was not mooted by

the defendant's unaccepted offer. The court held that even though the defendant's offer contemplated the maximum recovery in statutory damages to the plaintiff under the FDCPA, it did not meet the cap for actual damages to the plaintiff for the defendant's alleged knowing and willing violations of the statute. *Id.* at 372.

### Fifth Circuit

On August 12, 2015, the Fifth Circuit held that “an unaccepted offer of judgment to a named plaintiff in a class action ‘is a legal nullity, with no operative effect.’” *Hooks v. Landmark Indus., Inc.*, 797 F.3d 309, 315 (5th Cir. 2015). In *Hooks*, the plaintiff filed a claim under the Electronic Funds Transfer Act. The defendant offered the full statutory damages allowed, and “costs accrued and reasonable and necessary attorney fees.” *Id.* at 311. The court noted that the offer may not have been complete, but that had no effect on its ruling. *Id.* at 313. The court held that because an unaccepted offer does not deprive the court of the ability to enter relief, “the claim is not mooted.” *Id.* at 315.

### Sixth Circuit

The Sixth Circuit held that an offer that “give[s] the plaintiff *everything* he has asked for as an individual” moots the individual plaintiff's claims. *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567 (6th Cir. 2013). For mootness to occur, the defendant must offer “every form of individual relief the claimant seeks in the complaint,” not only “the relief the *defendant* believes is appropriate.” *Id.* at 567-78. It remains an open issue whether mooting the plaintiff's individual claims would also moot the class claims. *Id.* at 567.

<sup>49</sup> Mootness can be avoided, however, through “certification of a class prior to expiration of the named plaintiff's personal claim.” *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980). Some circuits have extended *Geraghty* and declined to dismiss on mootness grounds while class certification is pending. See *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 869–71 (7th Cir. 1978) (case not moot when class certification motion was pending before district court at the time named plaintiffs were tendered damages); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1051 (5th Cir. July 1981) (a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims when a timely filed and diligently pursued motion for class certification is pending before the district court); see also *Lusardi v. Xerox Corp.*, 975 F.2d 964, 975 (3d Cir. 1992) (noting the exception to the general mootness rule where a certification motion which the district court did not have a reasonable opportunity to decide was filed before the plaintiff's claim expired).

### Seventh Circuit

The Seventh Circuit last year overruled its previous 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.” *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015). In so doing, the Court explained that “[r]ejecting a fully compensatory offer may have consequences other than mootness, however. As we put it in *Greisz v. Household Bank*, 176 F.3d 1012, 1015 (7th Cir. 1999), ‘[y]ou cannot persist in suing after you’ve won.’” *Chapman*, 796 F.3d at 787.

### Eighth Circuit

The Eighth Circuit has not addressed the issue.

### Ninth Circuit

In the case that ultimately led to the Supreme Court’s *Campbell-Ewald* decision, the Ninth Circuit reaffirmed its earlier holdings that an unaccepted offer of complete relief to a named plaintiff does not moot the plaintiff’s individual claims or the class claims. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 874-75 (9th Cir. 2014). The Ninth Circuit declined the defendant’s invitation to revisit this position in light of *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), a case that addressed mootness issues in the context of collective actions brought under the Fair Labor Standards Act. The court held that *Genesis* was inapplicable to Rule 23 class actions. *Gomez*, 768 F.3d at 875-76.

### Tenth Circuit

In *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239

(10th Cir. 2011), the Tenth Circuit addressed “whether a class-action complaint must be dismissed for mootness upon the tender of a Fed. R. Civ. P. 68 offer of judgment for the full amount of the individual Plaintiff’s monetary claim in the absence of undue delay in filing a motion for class certification.” *Id.* at 1240. But the court held that “Article III jurisdiction to hear the motion for class certification is not extinguished by the Rule 68 offer of judgment to an individual plaintiff” because “the personal stake of the class inheres prior to certification.” *Id.* at 1249. In so holding, the Tenth Circuit explicitly noted that “[w]e need not and do not decide the impact of a Rule 68 offer of judgment made in a collective, or ‘opt-in’ action.” *Id.* at 1250.

### Eleventh Circuit

The Eleventh Circuit held that a Rule 68 offer of complete relief to a named plaintiff does not moot the plaintiff’s individual claim or the putative class claims. *Stein v. Buccaneers Ltd. P’ship*, 772 F.3d 698 (11th Cir. 2014). The court reasoned that the consequences of rejecting a fully compensatory Rule 68 offer are that the plaintiff will have to pay the defendant’s costs incurred after the offer, not that the case becomes moot. *Id.* at 702. The court also found it significant that the defendant’s offer specified that it “would have no effect – would not even be filed – unless accepted or in a proceeding to determine costs.” *Id.* at 704.

### D.C. Circuit

The D.C. Circuit has not addressed the issue.

## F. SETTLEMENTS

Chief Justice Roberts may finally get his wish to review the doctrine of *cy pres* and consider settlements where the majority of benefits go to nonprofit organizations rather than directly to class members.

In late 2013, Chief Justice Roberts essentially invited future cert petitions related to *cy pres* awards in class-action settlements when denying review of *Marek v. Lane*, 571 U.S. \_\_\_, 134 S. Ct. 8 (2013). In *Marek*, the Supreme Court declined certiorari because Marek’s objections were too focused on the particular features of the *cy pres* award at issue. But Chief Justice Roberts issued a rare statement along with the decision indicating the Court’s interest in hearing future *cy pres* cases that could address “fundamental concerns” surrounding the use of class-action *cy pres* awards, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on.

Now the Supreme Court has two more opportunities to consider such settlements and the proper formulation of *cy pres* remedies.

First, in November 2015, a group of ex-NFL players petitioned the Court to overturn the Eighth Circuit’s approval of a settlement agreement relating to the use of the players’

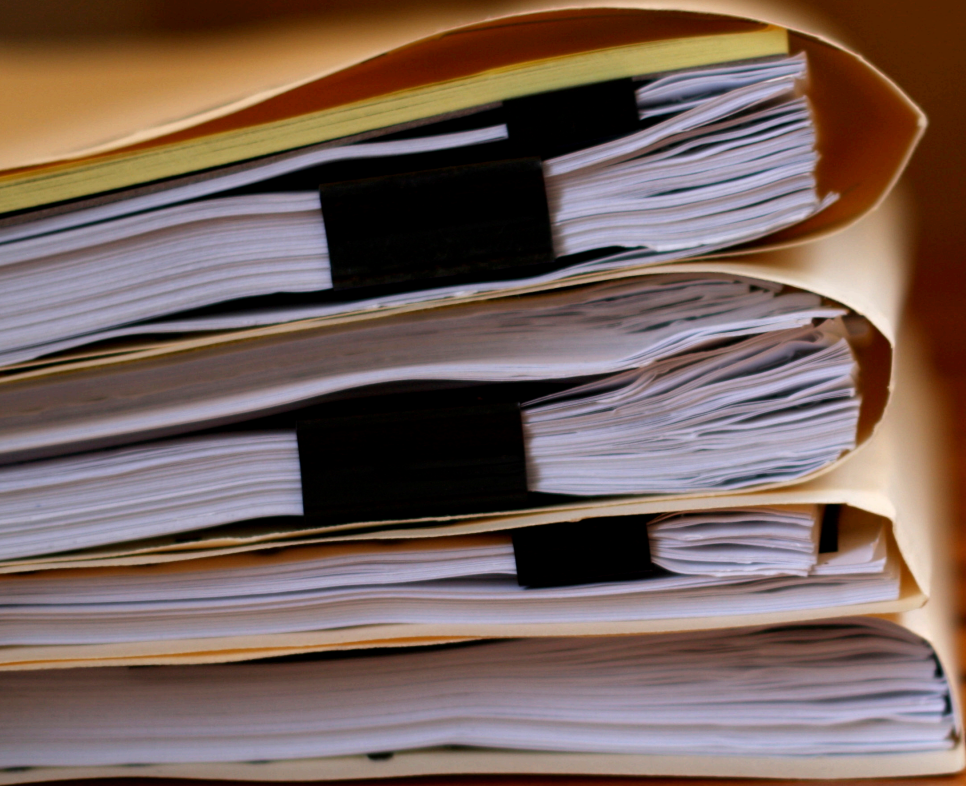
“likenesses and identities” in promotional films. *Marshall v. Nat’l Football League*, 787 F.3d 502 (8th Cir. 2015). In *Marshall*, the settlement agreement did not award money directly to class members, but rather (1) established a licensing agency to assist former players in marketing their publicity rights, and (2) provided for up to \$42 million to create the “Common Good Entity,” a nonprofit that in turn would disburse money to third-party charitable organizations “for the benefit of class members,” including medical research, mental health programs, and career transition assistance. In return, the NFL retained a perpetual license to the players’ publicity rights. In their petition, the players claim that the distribution of settlement funds “directly to third parties without first attempting to compensate class members violates fundamental principles of aggregate litigation.” And in their view, “[t]his case presents the fundamental concerns identified by Chief Justice Roberts in *Marek* . . . .”

Second, in December, the Competitive Enterprise Institute filed a petition for certiorari to review a settlement with Gillette, the maker of Duracell batteries. *Poertner v. Gillette Co.*, 618 F. App’x 624 (11th Cir. 2015). In *Gillette*, the Eleventh Circuit approved a settlement that purported to give nearly \$50 million in direct benefits to class members who bought Duracell batteries, but the class members’ actual recovery was less than \$350,000. Under the settlement, Duracell also agreed to donate \$6 million worth of batteries to charities, such as Toys for Tots. Premised on both the potential recovery by class members and the

charitable donation, class counsel was awarded \$5.6 million in fees. According to petitioners, beyond the fee-calculation question, this case also “embraces the related *cy pres* question of when it is appropriate to direct recoveries to charity rather than the actual class plaintiffs . . . .”

Both cases provide Chief Justice Roberts and the Supreme Court a potential avenue to decide the “fundamental concerns” highlighted in *Marek*, namely, how best to compensate hard-to-reach class members without rewarding attorney manipulation seeking exorbitant fees.





## Developments by Subject Matter

## A. EMPLOYMENT

### Mt. Clemens to Be Revisited?

In November, the Supreme Court heard oral arguments in what might not end up being a groundbreaking Rule 23 case, but what could create new certification rules for Fair Labor Standards Act collective actions.

*Tyson Foods, Inc. v. Bouaphakeo* presents a combined Rule 23 and FLSA Section 16(b) case to the Court, which is deciding whether the plaintiffs' statistical expert testimony on employees' donning and doffing time is sufficient to bind together a class.

The jury returned a large verdict against the employer and in favor of the class. The Eighth Circuit, in a 2:1 decision, upheld that verdict, rejecting arguments by the employer that (1) the case should never have been certified given differences in time spent among the class, and (2) the use of statistics was improper and constituted "Trial by Formula" in violation of the teachings of *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

During the Supreme Court's oral argument session, however, much of the discussion focused on whether the 1946 case, *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), paved the way for statistical proof of damages in an FLSA case.

In *Mt. Clemens*, a group of pottery employees sued their employer, alleging that they were deprived of compensation for the time they spent walking to their workstations and preparing for work.<sup>50</sup> The Court

held such time to be compensable for all employees. Because it was undisputed that the employer did not provide compensation for those activities, the Court could "assum[e] that the employee has proved that he has performed work and has not been paid in accordance with the statute." In other words, there was no question that all of the employees had been injured in the same fashion.

The uncertainty in *Mt. Clemens* was "in the amount of damages arising from the statutory violation by the employer" based on the class-wide liability that had already been proven. *Id.* The Court resolved that problem by reasoning that, in the event liability is evident but the employer's records are inadequate to precisely calculate damages, an employee may "produce[] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." In particular, the employees' evidence, although aggregate in certain respects, showed that they were all required to perform the same preliminary and postliminary activities, in the same period of time, for which they were not compensated. *See id.* at 690, 693–94 (discussing employees' evidence). Thus, *Mt. Clemens* stood for the modest principle that, when liability has been shown and the employer's records are inadequate, identically situated employers may prove damages on a class-wide basis. Because the employees were identically situated, this is, in effect, identical to the *Dukes* "one stroke" standard.<sup>51</sup>

In *Tyson*, the Court's questioning suggested that it may be willing

to revisit *Mt. Clemens* and apply the reasonable inference test to damages when liability is not necessarily certain for class members across the board. Answering that question, whether in the affirmative or negative, would enable the Court to issue a narrow decision rather than engage in the messier question of whether the certification was permissible under Rule 23.

As with *Spokeo*, Justice Scalia's death could play an important role if the eight remaining justices deadlock at 4-4, thereby leaving the Eighth Circuit's opinion as the status quo.

### Companies Find Rare Success at the Conditional-Certification Stage

In the context of Fair Labor Standards Act ("FLSA") claims, federal courts continue to apply the familiar two-stage process for certifying a class under the FLSA. The first stage occurs before the close of discovery and requires a modest factual showing to establish that the putative class members are similarly situated. If the plaintiff meets this low threshold, the court conditionally certifies the class and allows notice to be sent to potential opt-in plaintiffs. The second stage occurs after the close of discovery, and requires the court to conduct a more rigorous exam of the class to determine if the opt-ins are similarly situated to the named plaintiffs.

In past years, the conditional certification stage was a foregone conclusion – if the named plaintiff had pled that the class was similarly situated, the class would be conditionally certified. But recently,

<sup>50</sup> 328 U.S. at 684.

<sup>51</sup> *See* 131 S. Ct. at 2551.

some courts have denied<sup>52</sup> or significantly narrowed<sup>53</sup> conditional certification when the only evidence supporting the motion is the plaintiff's personal knowledge that the class is similarly situated.

In *Mata v. Foodbridge LLC*, the plaintiff worked as a nonexempt pizza counterperson for a restaurant and alleged that he was not paid overtime. The plaintiff's sole support for his motion for conditional certification was a 10-paragraph declaration that claimed "through observations of and conversations with other employees, he learned that they were subject to similar violations of the FLSA."<sup>54</sup> The plaintiff's employer opposed the motion, arguing that the plaintiff only submitted "conclusory allegations" as proof.<sup>55</sup> In denying conditional certification, the court stated that the plaintiff merely summarized the FLSA violations "that he allegedly suffered in the course of his own employment" and claimed that other employees were similarly situated.<sup>56</sup>

Similarly, in *Anjum v. J.C. Penney Co.*, the court significantly narrowed conditional certification of a class because the plaintiffs did not present "firsthand evidence" of FLSA violations in the defendant's other 45 New York stores.<sup>57</sup> In this case, the plaintiffs submitted the

employer's time guide to corroborate their own affidavits about working off-the-clock. The court found that the employer's time guide did not establish that violations of the FLSA occurred throughout the company, even when coupled with the plaintiff's firsthand accounts of FLSA violations. So, the court limited conditional certification to the two stores at which the named plaintiffs worked.

*Mata* and *Anjum* show that employers should continue to challenge FLSA claims at the conditional certification stage, especially when plaintiffs cannot allege firsthand knowledge of a systemic FLSA violation.

#### **Courts Decertify Nationwide Classes in Absence of Evidence of Unlawful Company Policy**

Just as conditional certification trends favor employee classes, employers continue to find more success on the decertification front. In *Ruiz v. Citibank*, a Southern District of New York court denied class certification for the plaintiff's state law claims and decertified the collective action for the plaintiff's FLSA claims. In doing so, the court stated that the Rule 23 commonality standard and the FLSA similarly situated standard are almost the same at the decertification stage of an FLSA collective action. Because the plaintiffs were unable to show that the defendant bank had an overarching unlawful company policy and because the bank's individual branches had varying policies, the court decertified the nationwide collective action.<sup>58</sup>

<sup>58</sup> *Ruiz v. Citibank N.A.*, 2015 WL 1254820 (S.D.N.Y. Mar. 19, 2015).

#### **Compensable Time**

When the FLSA was enacted, it required employers to pay minimum wage and overtime to employees. While all employers must comply with the FLSA, the FLSA grants the Department of Labor the power to exempt certain classes of employees from these requirements. So, the DOL promulgated the white-collar exemption, which allows employers to refrain from paying overtime to employees who meet wage and duty requirements. Currently, an employee must earn \$455 per week to qualify under the FLSA's wage requirement.

Following President Obama's plea to remodel overtime regulations, the DOL released a proposed rule that will increase the white-collar exemption wage requirement to \$970 per week – more than double the current wage requirement. The proposed rule will move to the notice and comment stage of the rulemaking process, where interested parties can submit their comments on the proposed wage increase. After the notice and comment stage is finished, the DOL will issue a final rule. It is unclear whether the final rule will be substantially similar to the DOL's current proposal. Solicitor of Labor Patricia Smith said in November that the final rule is unlikely to be issued until "late 2016."

#### **Exempt versus Nonexempt: Employers and Courts Struggle with the Distinction**

Companies and courts have long struggled with whether certain categories of employees are exempt or nonexempt under the FLSA. It was the same in 2015, which may be why the Supreme Court agreed in early 2016 to resolve some of the confusion.

<sup>52</sup> *Mata v. Foodbridge LLC*, 2015 WL 3457293 (S.D.N.Y. June 1, 2015).

<sup>53</sup> *Anjum v. J.C. Penney Co.*, 2015 WL 3603973 (E.D.N.Y. June 5, 2015).

<sup>54</sup> *Mata*, 2015 WL 3457293 at \*8.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 11.

<sup>57</sup> *Anjum*, 2015 WL 3603973 at \*6.

On January 15, 2016, the Court granted certiorari in *Encino Motorcars LLC v. Navarro, et al.*<sup>59</sup> to determine whether car-dealership service advisors are exempt under the FLSA or entitled to overtime pay.

Leading up to the Supreme Court's certiorari grant in *Encino Motorcars*, the Ninth Circuit deferred to the DOL's 2011 regulatory definitions to hold that automobile service advisors are nonexempt salesmen under the FLSA.<sup>60</sup> But the Fourth and Fifth Circuits previously held the contrary – service advisors are exempt salesmen.<sup>61</sup>

So, the same exemption in the FLSA resulted in different overtime obligations between states. Car dealerships in California must pay service advisors overtime, while car dealerships in Maryland need not. For nationwide employers, *Navarro*, and circuit splits more generally, creates an added layer of complexity when determining if employees are exempt or nonexempt.

The Supreme Court's presence in the arena should – in theory – resolve the dispute. Oral arguments are expected in the spring.

### **Employee Break Times Are Not Compensable in the Sixth Circuit**

In 1984, the Sixth Circuit held that an employer must compensate its employees for their break times if the employees spend that time predominantly for the employer's

benefit.<sup>62</sup> This year, the Sixth Circuit revisited that holding in *Ruffin v. MotorCity Casino*.

In *Ruffin*, the plaintiffs were employed as security guards by MotorCity Casino. The security guards and the casino reached a collective bargaining agreement, which provided a paid, 30-minute lunch break to each security guard. As part of their job duties, the plaintiffs were required to monitor their radios during their lunch breaks. The plaintiffs sued MotorCity, alleging that the casino should have paid overtime to them because their lunch breaks were compensable working time under the FLSA. Without including their lunch breaks, the plaintiffs did not exceed 40 hours of working time per week.

In its opinion, the Sixth Circuit reaffirmed that the test for determining work time is whether the time is spent predominantly for the employer's benefit. In holding that these lunch breaks were not working time under the FLSA, the Sixth Circuit considered whether (1) "the employee is engaged in the performance of any substantial duties during the meal period,"<sup>63</sup> (2) "the employer's business regularly interrupts the employee's meal period,"<sup>64</sup> (3) "the employee is unable to leave the employer's property during meal breaks," and<sup>65</sup> (4) the DOL has issued an advisory opinion letter in similar situations.

### **Private FLSA Settlements**

Until recently, courts did not enforce settlements for FLSA claims without court or DOL approval. In 2012, however, the Fifth Circuit broke from that tradition in *Martin v. Spring Break '83 Prods.* by enforcing a private settlement agreement. In *Martin*, the Fifth Circuit held that a private settlement is an "enforceable resolution of those FLSA claims predicated on a bona fide dispute about time worked and not as a compromise of guaranteed FLSA substantive rights themselves."<sup>66</sup>

Recently, the Fifth Circuit clarified the scope of this holding in *Bodle v. TXL Mortgage Corp.* In *Bodle*, the parties agreed to a private settlement for all claims that arose from the plaintiffs' employment. After the settlement was reached, the plaintiffs sued their employer for unpaid overtime under the FLSA. The employer argued that *Martin* applied to bar the plaintiffs' claims because the plaintiffs were aware of their FLSA claims at the time they entered into the agreement and chose not to carve the FLSA claims out of the settlement agreement. The district court agreed, and found that the plaintiffs' FLSA claims were barred by the prior settlement.

The Fifth Circuit reversed. In its opinion, the Fifth Circuit held that the "general rule establishes that FLSA claims (for unpaid overtime, in this case) cannot be waived."<sup>67</sup> Further, the court stated that *Martin's* holding is a limited exception that does not

59 Case No. 15-415.

60 *Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1273 (9th Cir. 2015).

61 *Walton v. Greenbrier Ford, Inc.*, 370 F.3d 446 (4th Cir. 2004); *Brennan v. Deel Motors, Inc.*, 475 F.2d 1095 (5th Cir. 1973).

62 *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984).

63 *Ruffin v. MotorCity Casino*, 775 F.3d 807, 811 (6th Cir. 2015).

64 *Id.* at 813.

65 *Id.* at 814.

66 *Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247, 255 (5th Cir. 2012).

67 *Bodle v. TXL Mortgage Corp.*, ---F.3d---, 2015 WL 3478146, \*4 (5th Cir. 2015).

apply in “the absence of any mention or factual development of any claim for [FLSA] compensation in the state court settlement negotiations.”<sup>68</sup>

So, courts in the Fifth Circuit will only find a bona fide dispute on FLSA liability if the parties mentioned the claim in the private settlement negotiations or settlement agreement. If no bona fide dispute exists, the private settlement will not be enforced in the Fifth Circuit. Still, employers should be wary of private settlement agreements because most courts outside of the Fifth Circuit will only enforce agreements that are approved by a court or the DOL.

## B. ANTITRUST

Since it was issued in 2013, lower courts have struggled with interpreting and applying the Supreme Court’s holding in *Comcast Corp. v. Behrend*.<sup>69</sup> In *Comcast*, the district court certified an antitrust plaintiffs’ class for liability and damages. The plaintiffs’ motion to certify offered four different theories of antitrust impact for which common questions would predominate over individual questions, and offered a model to calculate damages. The district court rejected three of the four theories of antitrust impact, but certified the class based on the fourth theory.

In a 5-4 decision, the Supreme Court reversed the certification because the plaintiffs’ damages model did not separate damages by the sole certified theory: “a model purporting to serve as evidence

<sup>68</sup> *Id.* at 12.

<sup>69</sup> 133 S. Ct. 1426 (2013).

of damages must measure only those damages attributable to that theory.”<sup>70</sup> Accordingly, questions of individual damage calculations would overwhelm common questions.

After *Comcast*, courts and commentators debated the extent to which *Comcast* altered the standards for showing that common questions predominate for antitrust injury, damages, or both. Although *Comcast* did not have the wide-reaching effect that some originally expected – or feared – courts are still working through the exact holding of *Comcast* and its effect, particularly in antitrust actions.

### Uninjured Class Members: In re Nexium Antitrust Litigation

In *In re Nexium Antitrust Litigation*,<sup>71</sup> the First Circuit addressed the extent to which *Comcast* permitted a trial court to certify a class that includes members who suffered no injury.

The plaintiffs alleged that the defendants’ settlement agreement resolving a Hatch-Waxman patent dispute violated Section 1 of the Sherman Act. Under the agreement, the patentee, AstraZeneca, paid three generic drug manufacturers to drop their challenge to the validity of two disputed patents, and to delay introducing generic alternatives to AstraZeneca’s prescription heartburn medication Nexium until the disputed patents expired.<sup>72</sup> The plaintiffs

<sup>70</sup> *Id.* at 1433.

<sup>71</sup> 777 F.3d 9 (1st Cir. 2015).

<sup>72</sup> The Supreme Court found that such reverse settlements, or “pay for delay” settlements, are subject to rule of reason analysis under the Sherman Act. *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

alleged that AstraZeneca’s patents were likely invalid and, if challenged, the generic drug manufacturers would have introduced generic alternatives to Nexium. Thus, the defendants’ settlement agreement constituted an agreement not to compete.

The district court granted the plaintiffs’ motion to certify a class of indirect purchasers of Nexium or a generic equivalent, comprising “[a]ll persons or entities ... who purchased or paid for some or all of the purchase price for Nexium or its AB-rated generic equivalents.”<sup>73</sup> The district court certified the class over the defendants’ objection that the proposed class was overbroad because it included members that suffered no injury. The district court conceded that “certain class members were not actually injured, including more than a *de minimis* number of [third-party payers] and consumers.”<sup>74</sup> After a thorough analysis, however, the district court found that neither *Wal-Mart* nor *Comcast* precluded certifying a class that includes uninjured class members.<sup>75</sup> The district court found the holding of *Comcast* to be rather limited: “*Comcast* has not changed

<sup>73</sup> See *In re Nexium*, 777 F.3d at 14. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-48 (1977), the Supreme Court held that indirect purchasers lack standing to pursue an antitrust claim under federal law. In response, 24 states passed statutes – *Illinois Brick* repealer statutes – giving indirect purchasers standing to pursue claims under state law. See *In re Nexium*, 777 F.3d at 25-26.

<sup>74</sup> 297 F.R.D. at 177-78; see also *id.* at 180 (“[I]t is likewise reasonably clear, however, that a number of the proposed class members suffered no actual injury whatsoever.”).

<sup>75</sup> *Id.* at 180-83

the rule on what is required for damages models in establishing Rule 23(b)(3) predominance.<sup>76</sup>

In a 2-1 decision, the First Circuit affirmed the district court. On appeal, the defendants argued that the district court erred by certifying a class that included members that did not suffer any injury.<sup>77</sup> Alternatively, the defendants argued that the class contained more than a *de minimis* number of uninjured class members and therefore individual questions of injury and damages would overwhelm common ones.

The majority began its analysis by identifying three principles to determine whether a class can include uninjured members, only the third of which was at issue: “Third, where an individual claims process is conducted at the liability and damages stage of the litigation, the payout of the amount for which the defendants were held liable must be limited to injured parties.”<sup>78</sup> Specifically, the defendants argued that the plaintiffs failed to meet the third requirement because the class included some “brand loyal” customers who would continue to use branded Nexium even after a competing generic entered the market, and thus suffered no injury.<sup>79</sup>

The majority rejected the defendants’ argument that *Comcast*, or any other precedent, categorically precluded certifying a class that included uninjured class members. Like the district court, the First Circuit

<sup>76</sup> *Id.* at 183.

<sup>77</sup> *In re Nexium*, 777 F.3d at 17.

<sup>78</sup> *Id.* at 19.

<sup>79</sup> *Id.* at 20.

interpreted *Comcast*’s holding as relatively narrow: “*Comcast* did not require that plaintiffs show that all members of the putative class had suffered injury at the class certification stage – simply that at class certification, the damages calculation must reflect the liability theory.”<sup>80</sup> The court similarly rejected the defendants’ argument that the Supreme Court’s decision in *Wal-Mart* precluded certifying a class that included uninjured class members.<sup>81</sup> Instead, individual questions regarding injury to particular class members are permissible so long as those questions do not overwhelm common questions.<sup>82</sup>

The First Circuit acknowledged that the plaintiffs’ expert proposed no method to exclude “brand loyal” consumers and thereby, as required by *Comcast*, limit recovery only to injured parties.<sup>83</sup> But the court also noted that the “plaintiffs’ expert made no concession that such a mechanism could not be developed, nor did defendants’ expert say that it could not be developed.”<sup>84</sup> Further, the First Circuit suggested, without explicitly holding them valid, two methods by which the plaintiffs might establish whether individual

<sup>80</sup> *Id.* at 23.

<sup>81</sup> *Id.* at 23 (citing *Wal-Mart*, 131 S. Ct. at 2550-55) (“the *Wal-Mart* Court nowhere stated that at the class certification stage, every member of the class must establish that he, she or it was in fact injured by the common policy of discrimination”).

<sup>82</sup> *Id.* at 23-24.

<sup>83</sup> *Id.* (“plaintiffs’ expert made no concession that such a mechanism could not be developed, nor did defendants’ expert say that it could not be developed”).

<sup>84</sup> *Id.*

class members suffered injury. First, the plaintiffs could argue for a legal presumption as permitted in securities class actions under the Supreme Court’s decision in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014). Alternatively, the plaintiffs could introduce testimony from the consumer that, given the choice, he or she would have purchased the generic version of Nexium.<sup>85</sup> Thus, the court “expressed confidence that a mechanism would exist for establishing injury at the liability state of this case, compliant with the requirements of the Seventh Amendment and due process.”<sup>86</sup>

The majority, however, declined to decide whether a plaintiff may certify a class that includes more than a *de minimis* number of uninjured class members. Instead, the majority rejected the defendants’ argument that the certified class included more than a *de minimis* number of uninjured class members.

The court acknowledged that determining whether individual questions were *de minimis* is a fact-specific inquiry. Accordingly, the court defined *de minimis* in functional terms: “if common issues ‘truly predominate over individualized issues in a lawsuit, then the addition or subtraction of any of the plaintiffs to or from the class [should not] have a substantial effect on the substance or quantity of evidence offered.’”<sup>87</sup>

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 21.

<sup>87</sup> *Id.* at 30 (quoting *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270 (11th Cir. 2009)).

Despite the district court's finding that "more than a *de minimis* number of [third-party payers] and consumers"<sup>88</sup> suffered no injury, the majority stated that "it is difficult to determine exactly what findings the district court made" with respect to each category of class members that the defendants argued suffered no injury. Based on its own analysis, the majority found that the class included some "brand loyalists" who suffered no injury.<sup>89</sup> But the court credited the district court's finding, based on the plaintiffs' expert testimony, that only 5.8 percent of Nexium prescriptions would have been for branded Nexium, and determined a lesser percentage of consumers would have been brand loyalists who suffered no injury. Thus, the First Circuit declined to decide "whether it is ever permissible to define a proper class including more than a *de minimis* number of uninjured parties since we conclude that it has not been shown that the class here includes more than a *de minimis* number of uninjured parties."<sup>90</sup>

In dissent, Judge Kayatta argued that the plaintiffs failed to meet their burden to show common questions would predominate over individual ones. The dissent agreed with the majority's finding that "some of the members of the class have not suffered the antitrust injury upon which the entire case is predicated."<sup>91</sup> The dissent

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88 297 F.R.D. at 177-78; *see also id.* at 180 ("[I]t is likewise reasonably clear, however, that a number of the proposed class members suffered no actual injury whatsoever.")

89 777 F.3d at 27.

90 *Id.* at 25.

91 *Id.* at 33.

also agreed that the propriety of certifying a class with uninjured members hinges on "there being a method of identifying and removing [uninjured] consumers prior to entry of judgment" which plaintiffs failed to show.<sup>92</sup> But the majority merely speculated that such a method might be developed by the plaintiffs, either through a presumption or by use of affidavits from witnesses, which other courts have rejected. Even if less than 5.8 percent of the putative class members were not injured, that resulted in up to 24,000 uninjured class members, which the dissent considered more than *de minimis*. Individual questions regarding the injury, or lack thereof, suffered by those class members could easily overwhelm common questions. By failing to require the plaintiff to offer a specific method to account for the uninjured class members, the majority required "the defendants [to] bear the burden of demonstrating that [developing a method to identify uninjured class members] cannot be done."<sup>93</sup>

As reflected by the dissent's concerns, *In re Nexium* provides a lenient framework for a plaintiff to account for uninjured class members when showing predominance for antitrust injury or damages. The majority permits finding potentially tens of thousands of uninjured class members to be a *de minimis* amount, and declined to establish a rigorous standard for expert evidence to account for those uninjured members.

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92 *Id.* at 33.

93 *Id.* at 36.

## Examination of Expert Testimony

In *In re Blood Reagents*, the Third Circuit interpreted *Comcast* as imposing a more rigorous standard for expert testimony at the class certification stage.<sup>94</sup> In *In re Blood Reagents*, the plaintiffs alleged that the defendants fixed prices for traditional blood reagents.<sup>95</sup> In support of their motion to certify a direct purchaser class, the plaintiffs relied on expert testimony to show common questions of antitrust impact and damages predominate.<sup>96</sup> The district court certified the class over the defendants' challenge to the plaintiffs' damages model and ability to show class-wide antitrust impact. The district court acknowledged that the defendants' arguments "have some force, and may be persuasive at the summary judgment phase."<sup>97</sup> Regardless, applying the then-applicable Third Circuit precedent – the Third Circuit decision overturned by the Supreme Court in *Comcast* – the district court held that the defendants' challenges to the merits of the plaintiffs' expert model were irrelevant because they "neither implicate a need for individual proof nor convince the Court that [the] models could not 'evolve to become admissible evidence.'"<sup>98</sup>

On appeal, the Third Circuit vacated the district court's opinion and

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94 783 F.3d 183 (2015).

95 Traditional blood reagents test blood for compatibility between donors and recipients.

96 *Id.* at 186 (citing *In re Blood Reagents*, 283 F.R.D. 222, 240-41 (E.D. Pa. 2012)).

97 *Id.*

98 *In re Blood Reagents*, 283 F.R.D. 222, 240-41 (E.D. Pa. 2012) (quoting *Behrend v. Comcast Corp.*, 655 F.3d 182, 204 n. 13 (3d Cir. 2011)).

remanded for reconsideration in light of the Supreme Court's decision in *Comcast*.<sup>99</sup> The defendants, relying on *Comcast*, argued that the district court erred in refusing to scrutinize the plaintiffs' damages models and theory of proving class-wide impact.<sup>100</sup>

The Third Circuit agreed. The Third Circuit found that the standard relied upon by the district court to evaluate the plaintiffs' expert evidence – whether the expert testimony “could evolve into admissible evidence” – had been overturned by the Supreme Court in *Comcast*.<sup>101</sup> Accordingly, the Third Circuit “join[ed] certain of [its] sister courts to hold that a plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with Rule 23 unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in *Daubert*.”<sup>102</sup> The Third Circuit, therefore, vacated and remanded to the district court “to decide in the first instance which of [the defendant's] reliability attacks, if any, challenge those aspects of plaintiffs' expert testimony offered to satisfy Rule 23 and then, if necessary, to conduct a *Daubert* inquiry before assessing whether the requirements

of Rule 23 have been met.”<sup>103</sup>

Thus, the Third Circuit required a much more stringent analysis – a *Daubert* analysis – of the plaintiffs' expert evidence than the *In re Nexium* majority's affirmance based on “confidence that a mechanism would exist for establishing injury at the liability stage of this case.”<sup>104</sup> The different approaches taken by the courts in *In re Blood Reagents* and *In re Nexium* do nothing to resolve the split among circuit courts regarding the standard for evaluating expert evidence at the class certification stage.

## C. PRIVACY

There is a saying in data privacy: there are two types of businesses – those that have been hacked, and those that don't know they've been hacked. This was proven again in 2015, with businesses large and small suffering the aftermath of a data breach. Several important decisions also came out that will continue to shape this burgeoning area of the law.

### Article III Standing

2014 saw a number of district courts relying on *Clapper v. Amnesty International USA*<sup>105</sup> to avoid circuit-level precedent allowing standing

based solely on the increased risk of identity fraud following a data breach. *Clapper* reiterated the Supreme Court's standard that “threatened injury must be *certainly impending* to constitute injury in fact.” Most notable of these cases were the district court decisions in the Seventh Circuit of *Tierney v. Advocate Health & Hospitals Corp.*,<sup>106</sup> *Remijas v. Neiman Marcus Grp., LLC*,<sup>107</sup> and *Lewert v. P.F. Chang's China Bistro, Inc.*<sup>108</sup>

In many ways, 2015 continued this trend with courts in *Whalen v. Michael Stores Inc.*,<sup>109</sup> *In re Zappos.com, Inc.*,<sup>110</sup> *Fernandez v. Leidos, Inc.*,<sup>111</sup> *Green v. eBay, Inc.*,<sup>112</sup> *In re Horizon Healthcare Servs. Data Breach Litig.*,<sup>113</sup> *Storm v. Paytime, Inc.*,<sup>114</sup> and *Peters v. St. Josephs Corp.*,<sup>115</sup> rejecting standing based on an alleged increased risk of identity fraud. These courts held that the “failure to allege facts showing a misuse of data or that such misuse is

99 783 F.3d at 186.

100 *Id.*

101 *Id.* at 186-87.

102 *Id.* at 187. The Third Circuit noted that other circuits reached similar findings, citing *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012); *In re Zum Pex Plumbing Products Liability Litigation*, 644 F.3d 813, 815 (8th Cir. 2011); and *Ellix v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

103 *Id.* at 188.

104 777 F.3d at 21. In addition to the different standards set by the First Circuit and Third Circuit, the Eighth Circuit has held that a “conclusive *Daubert* inquiry . . . cannot be reconciled with the inherently preliminary nature of pretrial evidentiary and class certification rulings.” *In re Zum Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 612 (8th Cir. 2011).

105 133 S. Ct. 1138 (2013).

106 No. 13 CV 6237, 2014 WL 5783333 (N.D. Ill. Sept. 4, 2014).

107 No. 14 C 1735, 2014 WL 4627893 (N.D. Ill. Sept. 16, 2014).

108 No. 14 CV 4787, 2014 WL 7005097 (N.D. Ill. Dec. 10, 2014).

109 2015 WL 9462108, at \*5 (E.D.N.Y. Dec. 28, 2015).

110 108 F. Supp. 3d 949, at \*4 (D. Nev. 2015).

111 2015 WL 5095893, at \*7 (E.D. Cal. Aug. 28, 2015).

112 2015 WL 2066531, at \*3-6 (E.D. La. May 4, 2015).

113 2015 WL 1472483, at \*6 (D.N.J. Mar. 31, 2015).

114 90 F. Supp. 3d 359, 364-68 (M.D. Pa. 2015).

115 74 F. Supp. 3d 847, 854-56 (S.D. Tex. 2015).



imminent” required them to “dismiss Plaintiffs for lack of standing without too much hesitation,” noting that this “disposition is in line with the vast majority of courts who have reviewed data breach cases where no misuse was alleged post-*Clapper*.”<sup>116</sup>

But plaintiffs scored a huge victory on the standing front in *Remijas v. Neiman Marcus Grp., LLC*.<sup>117</sup> Chief Judge of the Seventh Circuit Diane Wood rejected Neiman Marcus’s argument that *Clapper* applied to bar claims of data-breach plaintiffs who do not allege their personal information has been misused. Judge Wood held that “*Clapper* does not, as the district court thought, foreclose any use whatsoever of future injuries to support Article III standing.” The Seventh Circuit then cited with approval the district court’s decision in *In re Adobe Sys., Inc. Privacy Litig.*,<sup>118</sup> and held that “it is plausible to infer that the plaintiffs have shown a substantial risk of harm from the Neiman Marcus data breach.”

Judge Wood also took it a step further, holding that mitigation expenses plaintiffs incurred also qualify as an injury, in fact, relying on the First Circuit’s 2011 decision in *Anderson v. Hannaford Bros. Co.*<sup>119</sup> Again rejecting the defendant’s reliance on *Clapper*, Judge Wood held it was reasonable for plaintiffs to purchase credit monitoring after being notified that their payment-card information was at risk. In so

holding, the court relied on Neiman Marcus’s offer of credit monitoring, noting that “[i]t is telling in this connection that Neiman Marcus offered one year of credit monitoring and identity-theft protection to all customers for whom it had contact information and who had shopped at their stores between January 2013 and January 2014.” How that holding will impact the sound business decision to offer credit monitoring after a data breach remains to be seen.

2016 will continue to sort out standing in data breach cases, with appeals pending in several high-profile breaches, including *Lewert v. P.F. Chang’s China Bistro, Inc.*, and *In re Horizon Healthcare Servs. Data Breach Litig.* Also influential this year will be the Supreme Court finally clarifying whether and to what extent a plaintiff may assert standing based on the invasion of a statutory right.

In 2015, the Court accepted certiorari and held argument in *Robins v. Spokeo, Inc.*<sup>120</sup> 2014 saw the Courts of Appeal fall in line to agree that alleging a statutory violation is sufficient to confer standing on a plaintiff.<sup>121</sup> For example, the Seventh Circuit in *Sterk v. Redbox Automated Retail, LLC*, held that plaintiffs had standing to pursue claims under the Video Privacy Protection Act (“VPPA”) because they alleged that

Redbox “disclosed their [personal information] to Stream,” which the plaintiffs argued violated the VPPA. And because the Court held that Congress may “enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute,” the plaintiffs in *Sterk* could sue in federal court.

The Supreme Court has wavered on this issue, sometimes stating that “Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute,”<sup>122</sup> while other times stating that it “is settled that Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would otherwise not have standing.”<sup>123</sup> Where Congress’s authority stops and the Constitution kicks in is up for debate. Justice Scalia, in *Lujan v. Defenders of Wildlife*,<sup>124</sup> suggested the broader statements simply mean that Congress may elevate to “legally cognizable injuries concrete, *de facto* injuries that were previously

116 *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359, 367 (M.D. Pa. 2015).

117 794 F.3d 688 (7th Cir. 2015).

118 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014).

119 659 F.3d 151, 162 (1st Cir. 2011).

120 See *Spokeo, Inc. v. Robins*, No. 13-1339, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1339.htm>.

121 See *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014); *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618 (7th Cir. 2014); *Hammer v. Sam’s East, Inc.*, 754 F.3d 492 (8th Cir. 2014); *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820 (5th Cir. 2014); *Palm Beach Golf Ctr. -Boca, Inc. v. Sarris*, 771 F.3d 1274 (11th Cir. 2014).

122 *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); see also *Warth v. Seldin*, 422 U.S. 490, 514 (1975) (“Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.”).

123 *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); see also *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (Congress may not “abrogate the Art. III minima”); *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (“the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute”).

124 504 U.S. 555, 578 (1992).

inadequate in law.” But Justices Kennedy and Souter took a more expansive view in their concurrence, stating that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” Nor did either justice “read the Court’s opinion to suggest a contrary view.”

The Court’s forthcoming decision in *Spokeo* should settle the matter, unless the eight Justices deadlock at 4-4 following Justice Scalia’s recent death. In *Spokeo*, the plaintiff alleged that Spokeo, which he described as an Internet “people search engine,” published inaccurate information about him. But does that conduct, which would violate the Fair Credit Reporting Act but did not factually injure Robins, give him standing to sue?

At the oral argument held in November 2015, the justices appeared divided on this issue. Justices Sonia Sotomayor and Ruth Bader Ginsburg appeared to agree with Robins. Justice Ginsburg questioned *Spokeo* that it would be “very strange” if the rule is that standing based on the invasion of a legal right, like a trespass, confers standing on “someone who has no out-of-pocket loss, if the common law says so, it’s okay, but if Congress says so, it’s not.”<sup>125</sup> In contrast, the Court’s conservative justices seemed to agree with *Spokeo*: “the difference is that this is dealing with the requirement of a case or controversy which has always been recognized as at the core of Article

III jurisdiction. And we have a legion of cases that say you have to have actual injury,” said the chief justice.<sup>126</sup>

### Theories of Liability

Plaintiffs’ alternative theories of standing and damages continued to suffer setbacks in 2015.

The “overpayment” theory – that data security is baked into the cost of a product or service, and because the breached entity failed to provide that paid-for security, the plaintiffs are entitled to the amount they overpaid for the product or service, whether based on fraud, breach of contract, or unjust enrichment – continued to be alleged in most data breach cases. But courts have rejected the idea that “merely alleg[ing] that there is some difference between what he paid and what he received” is enough to assert a standing or damages.<sup>127</sup>

In *Carlsen v. GameStop, Inc.*, the plaintiff, as is common in data breach cases, alleged that he would not have paid as much for a subscription “if he had known how his PII would be handled and that the Privacy Policy was being violated.” That “general theory of overpayment” was insufficient because the plaintiff did not allege he paid anything in particular for the privacy policy or how the market value of his subscription was less than the amount he paid. Similarly, the Court in *In re Zappos, Inc.*, rejected this theory where plaintiffs did “not explain how the data breach impacted the value of the goods they

purchased” or “allege facts showing how the price they paid for such goods incorporated some particular sum that was understood by both parties to be allocated towards the protection of customer data.”<sup>128</sup>

Even the Seventh Circuit’s decision in *Remijas v. Neiman Marcus* expressed skepticism that the overpayment theory sufficiently alleged an injury. The panel was “dubious” that plaintiffs suffered financial injury or “overpaid for the products at Neiman Marcus because the store failed to invest in an adequate security system.” The panel explained that this theory stems from cases involving product liability claims, and would extend the idea from “a particular product to the operation of the entire store: plaintiffs allege that they would have shunned Neiman Marcus had they known that it did not take the necessary precautions to secure their personal and financial data.” Given that the court had already found standing, it did not issue any decision on this question.

After a helpful, albeit terse, Ninth Circuit opinion in 2014,<sup>129</sup> courts in 2015 continued to reject the idea that all personal information has some intrinsic value that is injured by a data breach. In *In re Facebook Internet Tracking Litigation*,<sup>130</sup> the court did not accept this theory as sufficient

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<sup>128</sup> *In re Zappos.com*, 108 F. Supp. 3d at \*11 n.5.

<sup>129</sup> *In re Facebook Privacy Litig.*, 572 F. App’x 494 (9th Cir. 2014) (holding that plaintiffs had standing because they alleged “that they were harmed both by the dissemination of their personal information and by losing the sales value of that information”).

<sup>130</sup> 2015 WL 6438744, at \*6 (N.D. Cal. Oct. 23, 2015).

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<sup>125</sup> Transcript of Oral Argument, *Robins v. Spokeo, Inc.*, No. 13–1339, at 7, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-1339\\_j5fl.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1339_j5fl.pdf).

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<sup>126</sup> *Id.* at 56.

<sup>127</sup> *Carlsen v. GameStop, Inc.*, 2015 WL 3538906, at \*6 (D. Minn. June 4, 2015).

to establish standing, because the plaintiffs did not show “that they personally lost the opportunity to sell their information or that the value of their information was somehow diminished after it was collected by Facebook.” The Court distinguished the Ninth Circuit’s prior decision because, while not discussed in the panel’s opinion, the underlying facts were that “Facebook was disclosing identifying information to third-party websites in referer headers.” The district court in *Svenson v. Google Inc.* likewise relied on underlying facts – that a market for the information was alleged – to reject the plaintiffs’ conclusory diminution in value theory.<sup>131</sup>

Another theory to take a hit in 2015 was the attempt to apply the Fair Credit Reporting Act to data breach cases. The Seventh Circuit affirmed the district court’s decision in *Tierney v. Advocate Health and Hospitals Corporation*, holding that “the plaintiffs did not plausibly allege that Advocate is a consumer reporting agency.”<sup>132</sup> The problem is that the hospital does not allege consumer information “for monetary fees,” as the FCRA requires for an entity to fall within its scope.<sup>133</sup> The panel explained that while the “complaint does allege that Advocate transmits patient information to insurance companies and government agencies (such as Medicare, presumably) in order to get paid,” the “payments Advocate receives are – in the complaint’s own words – “for health care services that its physicians have rendered

<sup>131</sup> 65 F. Supp. 3d 717, 725 (N.D. Cal. 2014).

<sup>132</sup> 797 F.3d 449, 453 (7th Cir. 2015).

<sup>133</sup> 15 U.S.C. § 1681a(f).

(emphasis added). Advocate is not getting paid for assembling patient information. After all, that is not its business. Advocate is, as the complaint acknowledges, a “network of affiliated doctors and hospitals that treat patients’ – not a credit or consumer reporting company.”

### Class Certification

Judge Magnuson dealt Target another blow in the litigation stemming from its massive 2013 holiday data breach, certifying a class of issuing banks in *In re Target Corp. Customer Data Sec. Breach Litigation*.<sup>134</sup>

The court rejected Target’s argument that “the Court must conduct a choice-of-law analysis with regard to each putative Plaintiff’s claim to determine which state’s negligence law applies,” which Target argued precluded the court from concluding that common questions of law predominate. The court sidestepped the issue by concluding that it could constitutionally apply Minnesota law to the claims of the entire class. Judge Magnuson found that it would be fair to Target because “Target is headquartered in Minnesota; its computer servers are located in Minnesota; the decisions regarding what steps to take or not take to thwart malware were made in large part in Minnesota.” “And applying Minnesota law undoubtedly comports with putative Plaintiffs’ expectations: when dealing with a Minnesota corporation such as Target, it is possible and in fact likely that Minnesota law will apply to those dealings.”

Target also argued “that the

<sup>134</sup> 309 F.R.D. 482 (D. Minn. 2015).

reissuance and fraud losses must be made on a bank-by-bank, loss-by-loss basis, making damages too individual for classwide determination.” The court did so for two reasons. First, “even if the damages alleged here – reissuance costs and fraud losses – cannot ultimately be calculated on a classwide basis, class certification is still appropriate if the other certification factors are met and there is no risk that individual damages issues outweigh the classwide issues.” The court also credited the plaintiffs’ expert report, holding that “Plaintiffs have established, through Dr. Cantor’s report, that it is possible to prove classwide common injury and to reliably compute classwide damages resulting from reissuance costs and fraud losses.”

## D. CONSUMER

### 1. INSURANCE

#### Lender-Placed Insurance

Almost all mortgages require borrowers to maintain adequate hazard insurance on their property in order to protect the lender’s interest. The mortgage documents inform borrowers that they are required to provide evidence of such insurance, and if they don’t, or if the insurance lapses or is canceled, the lender has the right to place insurance on the property sufficient to protect the lender’s interest. This product is often referred to in the industry as lender-placed insurance or LPI, and is usually labeled “force placed” insurance by the plaintiffs’ bar. Moreover, borrowers are usually informed that the cost of lender-placed insurance is significantly higher than a voluntary policy that they could obtain, in some

circumstances many times the premium for the borrower's prior homeowner's policy.

In the past four years, dozens of class-action lawsuits have been filed across the country challenging the lender-placed insurance practices of lenders, servicers, insurers, and insurance agents, claiming that the premiums charged are excessive and inflated to allow for "kickbacks" flowing between the various parties. The allegations of kickbacks have included commissions paid by the insurer to the lender/servicer, reinsurance arrangements with an affiliate of the lender/servicer, and low- or no-cost tracking or other outsourcing services provided by the insurer or agent. Often the allegations assert that kickbacks are disguised through payments to an affiliate of the lender or servicer. The plaintiffs assert claims against the lender or servicer for breach of contract, breach of fiduciary duty, and violation of various state consumer protection statutes. They also assert claims against the insurer for aiding and abetting a breach of fiduciary duty and unjust enrichment. Some plaintiffs also assert conspiracy and RICO claims.

In response, defendants have often asserted a defense under the filed-rate doctrine. The filed-rate doctrine provides that once a rate is filed and approved by a state regulatory or governing body, it is per se reasonable and cannot be challenged in a judicial proceeding. This applies to insurance rates filed with a state department of insurance. The doctrine is founded on the basis that courts should not undermine state agency rate-making authority

(the "nonjusticiability principle") and that litigation should not be a means for one insured to obtain a better rate than another (the "nondiscrimination principle"). Indeed, the insurer is generally required by law to charge a premium consistent with the filed rate in each particular jurisdiction.<sup>135</sup> The filed-rate doctrine also undermines the causation element of the plaintiffs' claims. If the lender/servicer merely passed on the exact charge for lender-placed insurance from the insurer and the insurer is required by law to charge that amount, then there is no link between the alleged scheme and the plaintiffs' damages.

In order to avoid the filed-rate defense, plaintiffs have been careful to argue that their claims aren't challenging the rate, but the defendants' conduct and scheme to inflate costs. A few courts have seen through this ruse, while others have not. Many courts have denied motions to dismiss, holding that they must accept the plaintiffs' allegations as true, that they are not challenging the rate. See *Simpkins v. Wells Fargo Bank, N.A.*, No. 12-cv-00768, 2013 U.S. Dist. LEXIS 120730, at \*40 (S.D. Ill. Aug. 26, 2013). ("[S]ome courts [find] not so much a challenge to the legal rates charged, but rather . . . a challenge to the manner in which the defendants select the insurers, the manipulation of the [lender-placed] insurance policy process, and the impermissible kickbacks included in the premiums."). Some courts, however, after denying motions to

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<sup>135</sup> One exception to this rule applies to surplus lines insurance, which is typically provided by out-of-state insurers to cover unusual risks. Surplus lines insurers are generally exempted from state rate-filing requirements.

dismiss, acknowledge that the filed rate doctrine is an issue that must be addressed eventually.

In July, the Second Circuit became the first federal appellate court to directly address the issue in the context of lender-placed insurance claims, holding that "a claim challenging a regulator-approved rate is subject to the filed rate doctrine whether or not the rate is passed through an intermediary" and barring the plaintiffs' claims challenging the charges for lender-placed insurance. *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256 (2d Cir. 2015). The Second Circuit concluded that the principle of nonjusticiability barred the plaintiffs' claims challenging lender-placed insurance practices:

"Plainly, Plaintiffs' claims would undermine the rate-making authority of the state insurance regulators who approved Balboa's LPI rates. The theory behind the claims is that Plaintiffs were overbilled when they were charged the full LPI rates (which were approved by regulators), instead of lower rates net of the value of loan tracking services provided by Newport. That theory can succeed only if the arrangement with Newport should have been treated as part and parcel of the LPI transaction and *reflected in the LPI rates*. But, under the nonjusticiability principle, it is squarely for the regulators to say what should or should not be included in a filed rate." *Id.* at 262.

Additionally, the court held that the plaintiffs' claims offend the nondiscrimination principle because, if allowed, such claims would operate like a rebate to give them preference over other borrowers who were charged for LPI, and this issue wasn't

obviated merely because they were pursuing claims as a class action. *Id.* at 263.

The plaintiffs had argued, and the district court agreed, that the filed-rate doctrine did not apply because it was limited to transactions where the ratepayer (i.e., the lender/servicer) directly paid the rate filer (the insurer), and here, the insurer charges the lender or servicer, which then passes those charges on to the borrower. *Id.* at 264.

The Second Circuit rejected that position, finding that “[t]he distinction between an ‘A-to-B’ transaction and an ‘A-to-B-to-C’ transaction is especially immaterial in the LPI context.” *Id.* at 265. Moreover, the plaintiffs’ argument that the lender/servicer does not have to pass on the full amount of the charges to the borrower was likewise rejected. As the court further indicated: “Plaintiffs do not explain how any such action by the lender could result in liability for the insurer, which would (under any such arrangement) still be legally compelled to charge the filed rate.” *Id.*

Whether other circuits will follow the holdings of the Second Circuit in *Rothstein* is yet to be determined. The Third Circuit recently declined to accept an interlocutory appeal on this issue. *Santos v. Carrington Mortg. Servs., LLC*, 3d Cir. No. 15-8089 (Nov. 5, 2015). If other circuits adopt the holding in *Rothstein*, though, LPI class actions against the insurers may be all but dead, at least when the named plaintiff was charged the filed rate. Whether the filed-rate doctrine likewise disposes of the claims against the lenders/servicers is also a matter of current

debate. See, e.g., *Trevathan v. Select Portfolio Servicing, Inc.*, No. 15-61175, 2015 U.S. Dist. LEXIS 152757, at \*8-9 (S.D. Fla. Nov. 6, 2015) (“The *Rothstein* court was considering only the claims against the insurer and the insurer’s affiliate, as Plaintiff’s claims against the servicer had already settled . . . . The Court extends *Rothstein*’s reasoning to the servicer, as failing to do so would contravene the purposes of the filed-rate doctrine.”).

Not many of these cases have resulted in contested class certification decisions. Many have settled prior to class certification proceedings. For those that have not settled, no court has certified a nationwide class, which is likely in part due to the differences among states’ laws on the plaintiffs’ claims. Those differences include variations in the elements of unjust enrichment and the applicability of the filed-rate doctrine. See, e.g., *Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-cv-81373, 2013 U.S. Dist. LEXIS 3962, at \*30-39 (S.D. Fla. Jan. 10, 2013). But given *Rothstein*’s potential to bar individual claims, class certification may seem distant to lender-placed insurance plaintiffs in 2016.

### Labor Depreciation

Recent labor depreciation class actions have focused on what insureds received in benefits under their insurance policies, specifically, how insurers calculate actual cash value when paying benefits under those policies. Insureds and insurers generally agree that actual cash value is calculated as the cost of replacing damaged property minus depreciation. They even agree that the cost of materials, such as

shingles, should be depreciated. But they disagree as to whether the cost of labor, such as the labor to install those shingles on a roof, should also be depreciated. In most cases, the insureds argue that depreciation of labor constitutes a breach of the insurance policy and unjust enrichment.

As it has been historically with other insurance issues, Arkansas has been a hotbed for these labor depreciation class actions. The current wave of labor depreciation class actions started in 2012 with *Adams v. Cameron Mutual Ins. Co.*, in which two Arkansas insureds sued their insurer in federal court on behalf of a putative class of Arkansas insureds who had labor depreciation deducted from their actual cash value payments. *Adams v. Cameron Mut. Ins. Co.*, W.D. Ark. No. 2:12-cv-02173. “Actual cash value” was undefined in the insureds’ policies. Finding no Arkansas authority on whether insurers may depreciate labor under these circumstances, the district court certified to the Arkansas Supreme Court the question of “[w]hether an insurer in determining the ‘actual cash value’ of a covered loss under an indemnity insurance policy may depreciate the costs of labor when the term ‘actual cash value’ is not defined in the policy.” *Adams v. Cameron Mut. Ins. Co.*, 430 S.W.3d 675, 676 (Ark. 2013). The Arkansas Supreme Court accepted the certified question and held that “the answer to this question is no, it may not.” *Id.*

The *Adams* court relied in part on an Arkansas Insurance Department bulletin, issued while the case was pending, which announced that “[l]

abor of any kind related to the repair, rebuild, or replacement of covered property cannot be depreciated.” *Id.* at 679 (quoting Ark. Ins. Dep’t Bulletin 13A-2013). And the court expressly declined to follow *Redcorn v. State Farm Fire & Cas. Co.*, 55 P.3d 1017 (Okla. 2002), a 2002 Oklahoma Supreme Court decision permitting labor depreciation. The *Redcorn* majority viewed a roof as a “single product consisting of both materials and labor,”<sup>136</sup> while the dissent saw “not an integrated product . . . but a combination of a product (shingles) and a service (labor to install the shingles).” *Id.* at 678. The *Adams* court found the *Redcorn* dissent “more convincing,” highlighting the dissent’s reasoning that labor is “not logically depreciable” because it does not “lose value due to wear and tear.” *Id.*

Both positions found support across the country in 2015. Federal courts applying Kentucky and Minnesota law followed *Adams* and held that labor is not depreciable. See *Bailey v. State Farm Fire & Cas. Co.*, No. 14-53, 2015 U.S. Dist. LEXIS 37568 (E.D. Ky. Mar. 25, 2015); *Wilcox v. State Farm Fire & Cas. Co.*, No. 14-2798, 2015 U.S. Dist. LEXIS 26924 (D. Minn. Mar. 4, 2015). But federal courts applying Pennsylvania and Kansas law followed *Redcorn* and held that labor is depreciable. *Papurello v. State Farm Fire & Cas. Co.*, No. 15-1005, 2015 U.S. Dist. LEXIS 154536 (W.D. Pa. Nov. 16, 2015); *Graves v. Am. Family Mut. Ins. Co.*, No. 14-2417, 2015 U.S. Dist. LEXIS 95127 (D. Kan. July 22, 2015),

<sup>136</sup> State governments often adopt this view when valuing buildings for purposes of property tax assessments, eminent domain, and real estate appraisals.

*appeal docketed*, 10th Cir. No. 15-3187. Labor depreciation litigation is also pending in Illinois, Louisiana, Missouri, and Nebraska, where courts may soon be forced to take a side.

In other words, the labor depreciation debate is far from over. Even in Arkansas, questions remained after *Adams*. Though *Adams* held that insurers may not depreciate labor when “actual cash value” is undefined in an insurance policy, it did not reach the question of whether labor may depreciate if the policy expressly defines “actual cash value” to provide for labor depreciation. But in December 2015, the Arkansas Supreme Court answered that question in the negative, holding that labor depreciation violates Arkansas law regardless of whether the policy expressly provides for labor depreciation. *Shelter Mut. Ins. Co. v. Goodner*, No. CV-15-111, 2015 Ark. LEXIS 658 (Dec. 10, 2015).

In late 2015, two more state supreme courts were invited to weigh in. Federal courts applying Kentucky and Minnesota law recently certified labor depreciation questions to those states’ supreme courts. *Brown v. Travelers Cas. Ins. Co.*, E.D. Ky. No. 7:15-cv-00050; *Wilcox*, D. Minn. No. 0:14-cv-02798. The Kentucky Supreme Court declined to answer the question of whether “an insurer, in determining the ‘actual cash value’ of damaged property under an indemnity insurance policy, [may] depreciate the cost of labor.” *Brown*, Ky. S. Ct. No. 2015-SC-000588. But the Minnesota Supreme Court accepted a similar question and held that “absent specific language in the insurance policy that

identifies a method of calculating actual cash value, the trier of fact must determine” whether labor depreciation was proper. *Wilcox v. State Farm Fire & Cas. Co.*, No. A15.0724, 2016 Minn. Lexis 50, at 3 (Feb. 10, 2016).

None of the cases challenging the practice of labor depreciation have gone to a contested class certification hearing, though class settlements have finally been approved in at least four Arkansas cases. In some cases, the parties did not settle until after class certification briefing. That briefing emphasized ascertainability and predominance as significant obstacles to class certification. On ascertainability, insurers have argued that their claims estimating systems can be used to globally determine whether labor depreciation was withheld from an insured’s payment, and thus identify class members, but only by individual review of claim files. On predominance, insurers have argued that differences among putative class members are likely to exist as to whether labor depreciation was actually deducted from an actual cash value payment, as opposed to merely being reflected on an estimate, and whether the insureds were later reimbursed for labor depreciation.

2016 may bring some welcome clarity to labor depreciation class actions. More state supreme courts will hopefully resolve the underlying substantive law, while trial courts may resolve class certification issues for the first time. The results could dictate the volume, location, and settlement probability of future labor depreciation class actions.

## 2. TELEPHONE CONSUMER PROTECTION ACT

Litigation surrounding the Telephone Consumer Protection Act (“TCPA”) bombarded federal court dockets in 2015. Originally passed by Congress in 1991, the TCPA was enacted to protect consumers from the increasing frequency of harassing telemarketing faxes and phone calls. As technological advancements in communications have made it easier for companies to communicate with existing and potential consumers, the TCPA has reemerged as a chief statutory cause of action for class-action lawsuits. Moreover, consumers are no longer only seeking relief under the TCPA for debt collection and telemarketing calls. Rather, lawsuits are being filed against companies across many industries, including sports franchises, pharmacies, travel and entertainment companies, online service providers, and social networking companies.<sup>137</sup>

As TCPA class-action litigation has grown over the past few years, concerned industry groups and businesses petitioned the FCC for clarification on the antiquated act.<sup>138</sup> Mounting petitions spurred the FCC to respond, and resulted in a

landmark FCC ruling in July.<sup>139</sup> The highly contested ruling has led to challenges being waged in federal courts regarding the expansive scope of the TCPA. According to the FCC, the new order “clos[ed] loopholes and strengthen[ed] consumer protections already on the books.”<sup>140</sup> The new order proved controversial even internally.<sup>141</sup> In a 3-2 ruling, the FCC order covers several highly contested areas, including: (1) an expanded definition of the type of equipment that satisfies the definition of “autodialer”; (2) time limits on the calls or text messages that are protected by the “prior express written consent” requirement; (3) an ability for call recipients to rescind previously granted consent by any reasonable means; and (4) liability to telemarketers for autodialed calls to reassigned or wrong numbers.

As TCPA litigants and concerned businesses anxiously await the resolution of lawsuits brought to

challenge the FCC’s July order,<sup>142</sup> federal courts – for the most part – have forged ahead and provide insight into the reach of the TCPA.

### Who Is an Intended Recipient

The TCPA makes it unlawful to “initiate a telephone call to any residential telephone line using an automated or prerecorded voice to deliver a message without the prior express consent of the *called party*.”<sup>143</sup> While many district courts have interpreted “called party” to mean the intended recipient of the telemarketing communication, the Third Circuit expanded this interpretation to include not only the intended recipient of the telemarketing call, but also any other person who occupies the same residence and regularly uses the telephone line.<sup>144</sup> Applying the “zone of interests” test, the court held that the roommate of the intended recipient, as well as the intended recipient, had standing to bring a TCPA claim against Bank of America when the roommate answered Bank of America’s telemarketing phone call. The court determined that “it is the actual recipient, intended or not, who suffers the nuisance and invasion of privacy,”<sup>145</sup> and it is that person who picks up the line who “undoubtedly has the sort of interest in privacy, peace, and quiet that Congress intended to protect.”<sup>146</sup>

<sup>142</sup> Pending appeals from over a dozen entities have been consolidated before the U.S. Court of Appeals for the D.C. Circuit.

<sup>143</sup> 47 U.S.C. § 227(B) (2012) (emphasis added).

<sup>144</sup> *Leyse v. Bank of Am. Nat’l Ass’n*, 804 F.3d 316 (3d Cir. Oct. 14, 2015).

<sup>145</sup> *Id.* at 326.

<sup>146</sup> *Id.* at 327.

<sup>139</sup> <https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order>.

<sup>140</sup> <https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts>.

<sup>141</sup> FCC Commissioner O’Rielly called the majority’s claim that the order offers greater consumer protections a “farce.” “Instead, the order penalizes businesses and institutions acting in good faith to reach their customers using modern technologies . . . [the] Commission’s unfathomable action today further expands the scope of the TCPA” and impermissibly prevents companies from communicating information that consumers may want or need. Oral Statement of Commissioner Michael O’Rielly, Dissenting in Part and Approving in Part, available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333993A6.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333993A6.pdf).

<sup>137</sup> See *Friedman v. LAC Basketball Club, Inc.*, No. 2:13-cv-00818 (N.D. Cal.); *Lowe v. CVS Pharmacy, Inc.*, No. 1:14-cv-03687 (N.D. Ill.); *Practice Mgmt. Support Servs. Inc. v. Cirque Du Soleil, Inc.*, 2015 WL 7008137 (N.D. Ill. Nov. 12, 2015); *Roberts v. PayPal*, 621 F. App’x 478 (9th Cir. Oct. 29, 2015); *Glauser v. GroupMe*, 2015 WL 475111 (N.D. Cal. Feb. 4, 2015).

<sup>138</sup> See, e.g., [http://www.kelleydrye.com/publications/client\\_advisories/0905](http://www.kelleydrye.com/publications/client_advisories/0905) (tracking active TCPA petitions before the FCC).

Despite such an expansive interpretation, the Third Circuit court noted that the TCPA is not without limitation. According to the court, TCPA protections would not be afforded to houseguests or visitors who happen to pick up the phone.<sup>147</sup>

### Uncertainty Encourages Early Resolution – at a Huge Price

The TCPA provides uncapped statutory damages for negligent and willful violations of \$500 and \$1,500, respectively, for each violation. With the FCC's order broadening the scope of the TCPA, many of these cases are settling to avoid costly litigation. Pharmaceutical company PharMerica and Pines Nursing Home reached a \$15 million settlement agreement over a blast fax campaign the pharmaceutical company launched in which it sent faxes to at least 11,000 nursing home facilities throughout the country to advertise its symposia to nursing home administrators.<sup>148</sup> Chase Bank USA, N.A., reached a \$34 million proposed class settlement with customers for alleged telemarketing calls and text messages, including collection calls and automatic alerts, relating to Chase credit card and bank accounts.<sup>149</sup> Bank of America settled TCPA claims brought by credit card and mortgage holders for \$32 million.<sup>150</sup> In the largest TCPA settlement to date, an Illinois federal

court granted final approval of a \$75.5 million settlement with Capital One Financial Corporation to settle consolidated TCPA class actions regarding unconsented-to debt-collection calls.<sup>151</sup>

Despite huge settlement figures, individual class members are not the ones collecting. Class lawyers often earn six and seven figures in TCPA settlements. In *In re Life Time Fitness, Inc., TCPA Litigation*,<sup>152</sup> defendant Life Time Fitness objected to the attorneys' fees requested in the \$10 million to \$15 million settlement of a 600,000-person TCPA class action. Per the settlement agreement, class members had their choice of a \$100 cash award, a free 3-month membership, or a \$250 credit applied to any new or existing membership. Class attorneys, on the other hand, requested \$3 million in fees. Class lawyers initially sought \$4.2 million but voluntarily reduced their award to \$3 million after a class member filed an objection to the proposal. Despite Life Time Fitness' challenges to the "coupon" settlement, the court exercised its discretion to use the percentage-of-the-benefit method to determine reasonable attorneys' fees, and ultimately concluded that the class lawyers were entitled to \$2.8 million in fees – 28 percent of the minimum total settlement payment of \$10 million.

With huge earning potential from TCPA class settlements, it is not surprising that plaintiffs' class lawyers are eager to bring these claims on behalf of enormous proposed classes. Some courts

have scrutinized class lawyers' attempts to "fish[] for a client."<sup>153</sup> In a TCPA class action against American Express for unauthorized telephone calls, plaintiffs sought to expand the class definition to include individuals whom American Express called directly, rather than only individuals who were contacted through a third-party marketing company. To that end, the plaintiffs' lawyers moved to compel American Express to produce its dialing records. The Illinois federal district court rejected the plaintiff counsel's request stating that "discovery is not to be used as a fishing expedition to discover a claim against a defendant," and the plaintiffs' counsel is not "entitled to fish in Amex's call data for a plaintiff to make their current class definition tenable."<sup>154</sup>

### Not All TCPA Claims Are Actionable Under the FCC Order

Despite expansive consumer protections afforded by the FCC's July order, not all TCPA actions have resulted in favorable rulings for the putative class. In *McKenna v. WhisperText, LLC*, 5:14-cv-00424 (N.D. Cal.), the secret-sharing app company avoided a class action despite the company generating automated text messages that were sent from its users' phones to the users' contact list. The court reasoned that because the messages could only be sent through human interaction – namely, a WhisperText user's decision to select and invite his or her contacts to use the app – the communications did not violate the TCPA even though

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147 *Id.* at 326.

148 *Pines Nursing Home (77), Inc. v. PharMerica Corp.*, 2015 WL 9269205 (S.D. Fla. Nov. 18, 2015).

149 *Gehrich v. Chase Bank USA, N.A.*, No. 1:12-cv-5510 (N.D. Ill.).

150 *Rose v. Bank of Am. Corp. et al.*, No. 5:11-cv-02390 (N.D. Cal.).

151 *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. Feb. 12, 2015).

152 2015 WL 7737335 (D. Minn. Dec. 1, 2015).

153 *Ossola et al. v. Am. Express Co. et al.*, 2015 WL 5158712 (N.D. Ill. Sept. 3, 2015).

154 *Id.* at \*8-9.



WhisperText used an automated telephone dialing system.<sup>155</sup>

A Michigan federal district court recently issued a precedential opinion when it held that the TCPA does not apply to telemarketing calls that donate a portion of the sales to charities as long as the charity collects first and maintains control over the transaction.<sup>156</sup> In *DialAmerica*, the telemarketing company initiated a magazine subscription program wherein telemarketers called to solicit magazine orders, while apportioning 12.5 percent of the magazine subscription proceeds to charity. The court ruled that the calls properly fell within the charity exemption of the TCPA because the charity had control over the telemarketing prompts and received the solicited payment first, before passing the money back to the telemarketer. Moreover, because the program permitted call recipients to donate directly to the charity via the telemarketer without purchasing a subscription, the calls were exempt from the TCPA rules.

Consented-to normal business communications also fall outside the protections of the TCPA. In *Roberts v. PayPal*, the Ninth Circuit rejected a TCPA class action brought by a PayPal user who claimed that the welcome text message PayPal sent to him after he provided his phone

number on its site violated the TCPA.<sup>157</sup> Ninth Circuit Judge Richard Clifton called the litigation over the text greeting “one of the silliest claims I’ve ever heard.”<sup>158</sup>

A California federal district court granted summary judgment to defendant Dun & Bradstreet (“D&B”) in a putative TCPA class action brought by a small business owner who claimed that D&B violated the TCPA when it placed calls to the plaintiff’s business.<sup>159</sup> D&B sells credits reports, marketing lists, and data services to businesses. In granting summary judgment in favor of D&B, the court found that D&B provided testimony from the actual agent who placed the calls to the plaintiff on behalf of D&B, which demonstrated that the calls were made manually rather than from an automated dialing system. Additionally, D&B provided evidence showing that the calls were made for the purposes of acquiring information about the plaintiff’s business and not for the purpose of marketing or selling anything to her. The plaintiff has appealed the district court’s decision to the Ninth Circuit.

### Unresolved TCPA Issues

The FCC’s July order fails to address the disparate application of direct and vicarious liability in different telemarketing contexts. In the robocall context, for example,

the Sixth Circuit applied agency principles to hold that a retailer was not vicariously liable where a subcontractor to the retailer’s marketing contractor sent text messages that the retailer was unaware of and which were expressly banned in the retailer’s agreement with its marketing company.<sup>160</sup> In contrast, in the blast fax context, the Eleventh Circuit concluded that companies can be directly liable for TCPA violations even without an agency relationship between the business and the third-party telemarketer.<sup>161</sup> Some district courts, however, have relied on agency principles to impose vicarious liability in the fax blast context.<sup>162</sup> The distinction between the theories and across different modes of telemarketing communication creates uncertainty for TCPA litigants, and the FCC has yet to provide clear guidance.

An important unresolved issue affecting TCPA class litigation involves Article III standing. As discussed earlier in this paper, Article III standing is required to invoke the jurisdiction of a federal court. The TCPA is one of approximately a dozen federal statutes that provide statutory damages to successful

155 *McKenna v. WhisperText*, 2014 WL 4905629 (N.D. Cal. Sept. 29, 2014), appealed by *McKenna v. WhisperText*, 9th Cir., Oct. 7, 2015; see also *Glauser v. GroupMe*, 2015 WL 475111 (N.D. Cal. Feb. 4, 2015) (concluding that texts sent by GroupMe had been initiated by its users).

156 *Wengle v. DialAmerica Mktg., Inc.*, 2015 WL 5595505 (E.D. Mich. Sept. 22, 2015).

157 *Roberts v. PayPal*, 621 F. App’x 478 (9th Cir. Oct. 29, 2015).

158 Statement by Judge Richard Clifton during summary judgment hearing in *Roberts v. PayPal*.

159 *Freyja v. Dun & Bradstreet, Inc.*, 2015 WL 6163590 (C.D. Cal. Oct. 14, 2015), appealed by *Freyja v. Dun & Bradstreet Inc. et al.*, 9th Cir., Nov. 17, 2015.

160 See *Keating v. Peterson’s Nelnet, LLC*, 615 F. App’x 365 (6th Cir. July 21, 2015).

161 See *Palm Beach Golf Center-Boca Inc. v. Sarris*, 781 F.3d 1245 (11th Cir. Mar. 9, 2015).

162 See, e.g., *Siding & Insulation Co. v. Alco Vending Inc.*, 2015 WL 1858935 (N.D. Ohio Apr. 22, 2015), appealed by *Siding & Insulation Co. v. Alco Vending Inc.*, 6th Cir., May 21, 2015.

plaintiffs.<sup>163</sup> Section 227(b)(3) of the act provides for statutory damages of \$500 per violation, and permits a court to award treble damages for knowing or willful violations.<sup>164</sup> This means that the TCPA is a strict liability statute – where a company is liable for unintentional violations of the act. This has permitted class lawyers to leverage significant statutory damages to produce large judgments and settlements for plaintiffs who often experience nothing more than inconvenience from receiving an unwanted phone call or text message – said differently, plaintiffs suffer no actual damages. The Supreme Court’s decision in *Spokeo, Inc. v. Robins* is anticipated to have huge consequences for the future of TCPA class litigation, as the Court will decide whether a plaintiff who suffers no actual harm has Article III standing to invoke the jurisdiction of a federal court. Some courts have stayed TCPA class proceedings until these federal courts receive Supreme Court instruction from *Spokeo*.<sup>165</sup> Some class plaintiffs seeking to avoid a stay have added allegations of actual harm to their complaints. There is no doubt that the Supreme Court’s anticipated decision in *Spokeo* will

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163 See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(A); Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681n(a); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a); Copyright Act, 17 U.S.C. § 504(c); Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2104(a)(3).

164 27 U.S.C. § 227(b)(3) (2012).

165 See, e.g., *Luster v. Jewelers*, 2015 U.S. Dist. LEXIS 169115, \* 5 (N.D. Ga. Dec. 17, 2015); *Tel. Sci. Corp. v. Hilton Grand Vacations Co., LLC*, 2015 U.S. Dist. LEXIS 159479 (M.D. Fla. Nov. 20, 2015); *Boise v. ACE USA, Inc.*, 2015 U.S. Dist. LEXIS 87200 (S.D. Fla. July 6, 2015).

shape the outcome of pending and future TCPA class litigation.

### 3. Retail/Consumer Products

In 2015, retailers were a frequent target of class-action complaints alleging that retailers are inducing customers to make purchases through advertising that overstates or fabricates the amount that a customer will save by purchasing an item. While allegations are tailored to a retailer’s particular pricing strategy (e.g., “30 percent off regular price,” “\$10 off,” or “Compare At”), the thrust of the allegations is the same – the represented savings was either overstated, misleading, or nonexistent.

Statutes and regulations prohibiting deceptive pricing are not new. The Federal Trade Commission issued guidelines for the use of deceptive pricing in the 1960s, e.g., 16 C.F.R. § 233 (1968). Indeed, in the 1950s and 1960s, the FTC was fairly aggressive in pursuing advertisers for what it perceived as deceptive pricing.<sup>166</sup> By the 1970s, though, the FTC significantly reduced its enforcement efforts due to a perception that it may be discouraging price competition because retailers became concerned about having to continually justify sale prices.<sup>167</sup>

In addition to the FTC guidelines, many state statutes regulate deceptive advertising. Such prohibitions are often found within a state’s consumer protection statutes and its associated regulations, though some states

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166 Timothy J. Muris, Economics and Consumer Protection, 60 Antitrust L.J. 103, 112 (1991).

167 *Id.* at 116-118.

have laws specifically addressing false advertising. Many states rely to varying degrees on case law regarding alleged violations of the Federal Trade Commission Act (15 U.S.C. § 45) and FTC guidance (16 C.F.R. Part 233) in determining whether an act violates the state’s laws (e.g., Fla. Stat. Ann. § 501.204). But while FTC rules provide general guidance, compliance with FTC rules does not guaranty compliance with a state’s laws.

To date, plaintiffs have filed the bulk of recent “deceptive” pricing putative class actions in California, presumably because of its plaintiff-friendly consumer protection laws,<sup>168</sup> but these cases have been filed across the United States. A notable “deceptive” advertising case is *Spann v. J.C. Penney*, No. 8:12-cv-00215 (C.D. Cal.). In *Spann*, the court certified a class of California J.C. Penney customers who had purchased items advertised as discounted from J.C. Penney’s “original” price for the same item. *Spann*, 307 F.R.D. 508, 533 (C.D. Cal. 2015). While the practice of comparing one’s own current price to one’s own previous price, or to the price of a competitor, is common, the plaintiff alleged that the vast majority of J.C. Penney branded merchandise, and merchandise “available only at J.C. Penney” advertised as “on sale,” was never actually sold at the purported higher, “original” price, and thus the purported “sale” prices were false or misleading. Notably, J.C.

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168 False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500; Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200; Cal. Consumer Legal Remedies Act (“CLRA”), Civ. Code § 1770.

Penney previously eliminated price comparisons from its advertising and aggressively advertised new, “square deal” pricing, and saw a corresponding precipitous drop in its sales volume. Approximately a year later, it reinstated sale price advertising comparisons to its own “original” prices. *Id.* at 514.

The *J.C. Penney* plaintiff brought claims under California’s consumer protection statutes, where injury may be established showing that the defendant’s conduct was “likely to deceive” consumers.<sup>169</sup> *Id.* at 518. In certifying the class, the court found that the issue of whether the advertising was misleading predominated over any individual issues. *Id.* at 521-29. The court rejected J.C. Penney’s argument that the “prevailing market price” would have to be separately established for each of its products by comparison to similar products sold by competitors, because the products at issue were either manufactured just for J.C. Penney or advertised as “available only at” J.C. Penney. *Id.* Thus, the court held, “prevailing market price” for each item should be determined by examining only J.C. Penney pricing data.

In support of her claim, the plaintiff referred to J.C. Penney’s internal pricing policies and records, and argued that few, if any, of the items were ever truly offered or sold at the “regular” or “original” price. The plaintiff also relied on J.C. Penney’s “Price Pacing Flow Charts,”

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<sup>169</sup> “To state a claim under the UCL or the FAL based on false advertising or promotional practices, it is necessary only to show that members of the public are likely to be deceived.” *Pulaski & Middleman, LLC v. Google Inc.*, 802 F.3d 979, 985 (9th Cir. 2015).

which showed that it “routinely set both a regular price, and an initial discounted price even in advance of each product’s first offering.” According to the plaintiff, these charts showed that very few of the items offered during the class period were ever offered at the advertised regular price, and those regular prices were offered for a very limited time.

The court also concluded that the plaintiff’s three alternative theories of damages – (1) complete restitution of the amount paid by class members; (2) restitution of the difference between the amount paid by class members and what they would have paid had J.C. Penney actually offered a discount from its regular price; and (3) restitution in the amount that J.C. Penney profited from sales of products based on the price comparisons – each allowed for class-wide proof without running afoul of the Supreme Court’s decision in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). *Spann*, 307 F.R.D. at 529-31.

Approximately six months after class certification, the plaintiff filed an unopposed motion for preliminary approval of class settlement. The proposed settlement terms call for J.C. Penney to pay \$50 million for the benefit of the class members, including attorneys’ fees and the costs of administration, without any possibility of reversion to J.C. Penney. The settlement also requires J.C. Penney to change its pricing practices and implement training and auditing programs to ensure J.C. Penney “complies with California’s price comparison advertising laws.”

Other courts have refused to certify

such claims, at least with respect to monetary relief. In *Russell v. Kohl’s Department Stores, Inc.*, in which the plaintiff alleged that the retailer made use of false and misleading “Original” or “Regular” price comparisons, the court certified a class seeking injunctive relief (requiring Kohl’s to refrain from the use of deceptive price comparisons in the future) under Rule 23(b)(1)(A) and 23(b)(2). No. 5:15-cv-01143, slip op. at 1 (C.D. Cal. Dec. 4, 2015). The court, however, denied the plaintiff’s request to include monetary relief in the form of restitution. *Id.* Citing the court’s statement in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) that claims for monetary relief may not be certified under Rule 23(b)(2) where the “monetary relief is not incidental to the injunctive relief,” the *Kohl’s* court found that the plaintiff’s claims for restitution were not appropriate because any award for restitution would “depend on the unique circumstances of the particular class member[.]” such as “whether a class member used coupons, how many products she purchased, which products she purchased, and the disparity between the stated and [actual retail price] on those specific products.” Slip. op. at 6. In short, the restitution inquiry was highly individualized and could not be certified under Rule 23(b)(2). *Id.*<sup>170</sup> Notably, the court pointed out that the plaintiff did not “specify how restitution is to be measured or calculated.” *Id.* at 5.

Courts have also dismissed deceptive advertising cases on the merits, specifically, because of a lack of injury. *Shaulis v. Nordstrom*

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<sup>170</sup> The plaintiff did not seek certification under Rule 23(b)(3).

*Inc.*, No. 15-10326, 2015 U.S. Dist. LEXIS 107293, at \*27 (D. Mass. Aug. 14, 2015) (“[P]laintiff may have been manipulated into purchasing [an item] because she believed she was getting a bargain[, but that] does not necessarily mean that she suffered economic harm”). In *Shaulis*, the plaintiff alleged the price tags of products, represented as “compare at” prices, did not represent a bona fide price at which Nordstrom formerly sold these products or at which these products were sold elsewhere. But the court dismissed the plaintiff’s claims because “plaintiff’s subjective belief that she did not receive a good value, without more, is not enough to establish the existence of an injury.” *Id.* at 30. The court noted that the “complaint d[id] not allege that the [product] was worth less than what plaintiff paid, or that plaintiff did not receive the benefit of the bargain.” *Id.* at \*36. Instead, “[b]y charging this agreed price in exchange for ownership of the clothing, [Nordstrom] gave the plaintiff[] the benefit of [her] bargain.” *Id.*, citing *Kim v. Carter’s Inc.*, 598 F.3d 362, 364 (7th Cir. 2010). The plaintiff “got exactly what she paid for, no more and no less.” *Id.* But see *People of the State of Calif. v. Overstock.com, Inc.*, No. RG10-546833 (Superior Court, Alameda County, Calif.) ¶¶ 138-139 (imposing a \$6.8 million fine on the retailer for misleading advertising, despite the retailer’s prices being “at or below that of its competitors”).

When advertising a “sale” or price comparison, a retailer should be prepared to substantiate that the item is actually on sale or that an actual comparison was performed to determine the comparison price.

Retailers should analyze their sale pricing strategy to help insulate themselves from potential lawsuits. For example, if a retailer uses a “compare at” strategy, then it should ensure that its comparison price is a legitimate, bona fide comparison price of the same or similar item that is sold in the same “trade area.”<sup>171</sup> Having a legitimate comparison price protocol may shift the issue from the retailer’s “compare at pricing is complete fiction” to a retailer’s comparison pricing efforts were somehow “not good enough.” Consequently, instead of merely demonstrating a company-wide policy of false or misleading “compare at” pricing, the existence of a legitimate “compare at” protocol may shift the inquiry to an item-to-item analysis of whether a particular comparison price was false or misleading. But it is harder to prove that a retailer’s comparison price somehow fell short with respect to a specific item(s) than to prove that the retailer made no effort at all or that the comparison pricing was systematically inflated. This shift may increase the number of individual issues and thus raise the bar on class certification and liability.

Plaintiffs face challenges certifying class actions alleging false or deceptive price advertising. The pace of such filings, however, is not slowing down – at least 48 have been filed in the last 27 months. Plaintiffs’ lawyers are advertising ongoing investigations into various retailers’ pricing strategies for evidence of “false or misleading” pricing. And

<sup>171</sup> This term has different definitions based on the jurisdiction. A “trade area” is defined by the FTC as the “area in which [the retailer] does business.” 16 C.F.R. Part 233.2(b).

courts, particularly in California, are becoming more receptive to arguments that consumers are deceived by comparisons to fictitious or unsupported reference prices. Recent settlements, such as the J.C. Penney settlement, will likely embolden additional lawsuits.

#### 4. RESPA Class Litigation

The Real Estate Settlement Procedures Act (“RESPA”) grants a private right of action for borrowers alleging Section 8 violation. Marketing schemes among settlement service providers continue to be a hot button issue among class-action plaintiffs and regulators.

In *Denise P. Edwards, individually and on behalf of all others similarly situated v. The First American Corporation*, a home purchaser brought a putative class action against a title insurer on grounds that it violated the anti-kickback provision in RESPA by engaging in a nationwide scheme in which the title insurer purchased minority interests in title agencies in exchange for their agreement to refer future title insurance business. The district court denied class certification, in part because common issues did not predominate over individual issues of reliance and causation for referrals.

On appeal, the Ninth Circuit reversed the district court’s decision on the grounds that the plaintiff’s argument warranted class adjudication. The court stated that the claim that the title insurer paid a thing of value in exchange for an agreement for exclusive referrals predominates over issues for individuals for certain class members. The Ninth Circuit declined

to ascertain the issue of whether a class action is a superior method of adjudication, whether the plaintiff and her counsel are adequate, and whether a putative class is ascertainable, instead deferring to the district court which is best suited to adjudicate the matter.

In addition to the class certification issue, *Edwards* is also significant because the Ninth Circuit declined to give any deference to the Consumer Financial Protection Bureau's ("CFPB's") RESPA interpretation in its amicus brief. Indeed, the court reasoned that the CFPB's RESPA authority is limited to rule-making authority and since the statutory language was at issue, no deference was warranted.

Going forward, it will be interesting to see if other courts follow the Ninth Circuit's lead in eschewing CFPB statutory interpretation outside of its rulemaking authority.

Most recently, a similar class action was filed in the Ninth Circuit. In *Timothy L. Strader Sr., individually and on behalf of all others similarly situated v. PHH Corp., et al.*, the plaintiff alleges that the defendants entered into a sham affiliated business arrangement as a means to disguise the payment of unlawful referral fees and kickbacks, as well as to secure referrals in violation of RESPA.

Importantly, in June 2015, the CFPB issued a decision requiring PHH to discharge over \$109 million in illegally charged fees for conduct similar to that alleged in *Strader*.

While it is unclear if the CFPB enforcement action instigated the

class action, an important takeaway from *Strader* is that regulatory enforcement leaves an entity vulnerable to private class actions.

### CFPB Enforcement

The CFPB continues to actively identify RESPA violations and, where applicable, bring an enforcement action. In January 2015, the CFPB identified a scheme between Wells Fargo Bank ("Wells Fargo"), JPMorgan Chase Bank, N.A. ("Chase"), and Genuine Title, LLC, in which the parties exchanged marketing services for referrals of settlement-service business in connection with consumers' home mortgage transactions. Under the scheme, the title company provided marketing services, among other things. Most notably, the title company purchased leads from an independent third-party vendor and provided the leads to Wells Fargo and Chase loan officers. In return, the loan officers referred loans for closing to the title company. Although individual loan officers worked out different arrangements in certain situations, the common factor was that the loan officers did not pay the full cost of the leads.

The CFPB assessed \$24 million in civil penalties against Wells Fargo, \$600,000 in civil penalties against Chase, and \$11 million in redress to consumers harmed by the scheme. In addition to taking action against some of the nation's largest banks, this enforcement action is significant because the CFPB named individual loan officers Todd Cohen and his wife, Elain Oliphant Cohen, and held them accountable for \$30,000.

Looking forward, enforcement actions will likely continue to name individuals where the CFPB identifies egregious conduct.

## E. DEVELOPMENTS IN INTERNATIONAL CLASS-ACTION LAW

The United Kingdom's Consumer Rights Act of 2015 took effect on October 1, 2015,<sup>172</sup> and several media accounts suggested the Act would usher an American form of class-action procedure into the UK. It is too soon to know the full influence of the Act on class actions, but the Act does provide for opt-in or opt-out collective actions before the Competition Appeal Tribunal. Opt-in proceedings were previously available, but with opt-out proceedings – where claimants are included automatically unless they opt out – class procedures may reflect something akin to Rule 23.

### Conclusion

As 2015 closed, it became evident that 2016 would likely offer even more class-action activity at the highest levels. The Supreme Court has already decided one major class-action case with at least two more to come in the current term. Not only that, but multiple issues are primed for potential Supreme Court review later this term or in the fall. Justice Scalia's recent death could throw the results of those cases into doubt, at least in the short term. But going forward, the issues will remain front-and-center, regardless of when the next Justice takes his or her place on the bench.

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<sup>172</sup> 2015 c. 15.

Indeed, it may be worth noting at this point that the bluster that accompanied the *Wal-Mart v. Dukes* decision five years ago about the end of class actions as we know them was little more than hot air. Abe Vigoda is no longer with us,<sup>173</sup> but class actions are alive and thriving. It has never been more important to stay abreast of class-action developments, which is what we will be doing throughout the coming year.

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173 See "Abe Vigoda, of 'Godfather' and 'Barney Miller,' Dies at 94," <http://www.nytimes.com/2016/01/27/arts/television/abe-vigoda-actor-of-godfather-fame-dies-at-94.html>.

For more information about the class-action law, or if you have questions about how class-action doctrine may impact your business, please contact the following BakerHostetler attorney or visit our website.

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