



2017 Class Action Review

BakerHostetler

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I. Introduction

I. Introduction

By Dustin M. Dow

If you read any of last year's Review, you're not going to be surprised that we discuss *Robins v. Spokeo* again in this year's edition. Indeed, if 2016 was the year that *Spokeo* dominated class-action jurisprudence, then 2017 was the aftermath. In the year after the Supreme Court rearticulated the concrete nature of an injury to establish statutory standing, lower courts consistently differed on what the Supreme Court actually meant.

You probably also won't be surprised that the circuit split regarding ascertainability for class certification appears to be growing. This is an issue we've been following for several years, and for just as long, there's been significant divergence on what ascertainability means and how to assess it. How those differences manifested in 2017 is reflected below.

There were also a couple of surprises, among them the focus on personal jurisdiction, which occupied the Supreme Court's interest in two cases. Both decisions, turning on specific and general jurisdiction respectively, have already significantly affected where certain class actions may be maintained depending on the location of the defendant and the putative or actual class members.

Finally, 2017 was the year of waiting – for the set of consolidated cases regarding class-action waivers to make their way onto the Supreme Court's docket for oral argument. After bumping the cases from the 2016 to the 2017 term, the Supreme Court heard oral argument in October, but not before the delay enabled other circuits to weigh in on the scope of employee rights under the National Labor Relations Act vis-à-vis class waivers in individual arbitration agreements. In May, the Court gave us the answer that many expected: the class waivers must be enforced as written. Fortunately, 2018 presents an opportunity for lower-court interpretation of that decision (and its four-justice dissent) which, of course, we'll be reviewing in detail when this Review comes around the bend again.



II. Developments in Class Action Procedure

II. Developments in Class Action Procedure

By Sam Camardo

2017 saw the Courts of Appeals struggle to define the meaning of two prominent 2016 Supreme Court decisions. In 2016, the Supreme Court in *Spokeo* held that an injury must be “concrete” in addition to being particularized, but it offered little guidance on when a statutory violation one suffers is a concrete injury. And the Supreme Court in *Campbell-Ewald* held that an unaccepted offer of judgment does not moot a putative class action, but left open the effect of a defendant’s actual tender of compensation to the plaintiff – say, a cashier’s check – on the mootness question.

Unsurprisingly, the Courts of Appeals diverge on the effect of these decisions. On remand in *Spokeo*, the Ninth Circuit reaffirmed its prior decision finding that the plaintiff had standing, despite the Supreme Court’s concreteness requirement. And defendants have tried many different angles – such as depositing a check with the court under Rule 67 – to avoid *Campbell-Ewald*’s holding.

These cases, and more, are discussed below.

II. Developments in
Class Action Procedure

II.A. Standing Issues

By Sam Camardo

Two standing issues dominated 2017 class action litigation: When does the risk of future harm following the theft of a plaintiff's data provide standing, and when is a statutory violation "concrete" enough under the Supreme Court's 2016 decision in *Spokeo*? This section also notes a recent Ninth Circuit decision expanding the ability of false-advertising plaintiffs to sue for injunctive relief.

Risk of future harm cases

The rift among the U.S. Courts of Appeals grew significantly in 2017. The Eighth and Fourth Circuits sided with the Third Circuit in holding that the mere risk of future harm following a data theft is insufficient to confer standing, while the D.C. Circuit sided with the Seventh and Ninth Circuits in holding the opposite. These cases follow the significant 2013 United States Supreme Court decision *Clapper v. Amnesty International USA*, which held that the plaintiff must demonstrate that the threatened injury is "certainly impending" or there is a "substantial risk" that the harm will occur.

The divide about the meaning of *Clapper* will likely continue to deepen, as the U.S. Supreme Court denied review in early 2018 of the D.C. Circuit's decision in *Attias v. Carefirst, Inc.*¹

SuperValu and Beck. *In re SuperValu, Inc.*,² the Eighth Circuit considered whether grocery store shoppers had standing to sue the grocer who allegedly allowed hackers to steal the plaintiffs' credit and debit card information. The stolen information included defendants' customers, including their names, credit or debit card account numbers, expiration dates, card verification codes, and personal identification numbers.

Based on the theft, plaintiffs alleged that they were therefore subject "to an imminent and real possibility of identity theft" and forced to spend time monitoring their accounts for illegal activity. But one plaintiff (David Holmes) specifically alleged that a fraudulent charge appeared on his credit card statement. The district court dismissed the complaint on the basis that the plaintiffs had failed to allege an injury in fact sufficient for Article III standing. On appeal, the Eighth Circuit reversed in part, concluding that although the other plaintiffs did not have Article III standing, Holmes did.

The Eighth Circuit found that the allegedly stolen information did not include any personally identifying information (e.g., Social Security numbers, birth dates or driver's license numbers) and thus "there is little to no risk that anyone will use the Card Information stolen in these data breaches to open unauthorized accounts in the plaintiffs' names, which is 'the type of identity theft generally considered to have a more harmful direct effect on consumers.'"³ The court then concluded that the risk that the information could be used to commit credit or debit card fraud was speculative or hypothetical.

1 865 F.3d 620 (D.C. Cir. 2017).

2 870 F.3d 763 (8th Cir. 2017).

3 *Id.* at 770 (quotation omitted).

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Similarly, the court rejected the plaintiffs' claim that they suffered injury by incurring costs to mitigate their risk of identity theft. "Because plaintiffs have not alleged a substantial risk of future identity theft, the time they spent protecting themselves against this speculative threat cannot create an injury."⁴

The Fourth Circuit in *Beck v. McDonald*⁵ addressed whether the plaintiffs – patients who received care at a Veterans Affairs hospital – had Article III standing based on harm from embarrassment, mental distress, increased risk of future identity theft and mitigation costs after a laptop containing their personal information was stolen and four boxes with pathology reports went missing. The Fourth Circuit, like the Eighth Circuit in *SuperValu*, affirmed the dismissal for lack of subject matter jurisdiction based on the plaintiffs' failure to establish standing.

The court began its analysis by noting that "while it is true 'that threatened rather than actual injury can satisfy Article III standing requirements,' ... not all threatened injuries constitute an injury-in-fact. Rather, ... an injury-in-fact 'must be concrete in both a qualitative and temporal sense.'"⁶ The court then noted that the "circuits are divided on whether a plaintiff may establish an Article III injury-in-fact based on an increased risk of future identity theft."⁷

The Fourth Circuit, although stating that it would not officially take a side, held that plaintiffs' specific allegations had not "push[ed] the threatened injury of future identity theft beyond the speculative to the sufficiently imminent."⁸ In fact, the court noted, even after "extensive discovery," the plaintiffs had uncovered no evidence that the stolen information had been accessed or misused. Moreover, the court noted, "as the breaches fade further into the past,' the Plaintiffs' threatened injuries become more and more speculative."⁹ Thus, the Fourth Circuit joined the line of cases rejecting standing in data breach cases absent an actual present injury.

CareFirst. In contrast, the D.C. Circuit easily distinguished *Clapper* in concluding that a group of plaintiffs had standing to sue following the alleged theft of their medical information – which included Social Security numbers – during a cyberattack. The court framed the question as "whether the plaintiffs have plausibly alleged a risk of future injury that is substantial enough to create Article III standing."¹⁰ The court answered this question in the affirmative.

According to the court, when "an unauthorized party has already accessed personally identifying data on CareFirst's servers, [] it is much less speculative – at the very least, it is plausible – to infer that this party has both the intent and the ability to use that data for ill."¹¹ Quoting the Seventh Circuit's influential decision in *Remijas v. Neiman Marcus*, the court rhetorically asked: "Why else would hackers break into a ... database and steal consumers' private information? Presumably, the purpose of the hack is, sooner or later, to make fraudulent charges or assume those consumers'

4 *Id.* at 771.

5 848 F.3d 262 (4th Cir. 2017).

6 *Id.* at 271 (citations omitted).

7 *Id.* at 273.

8 *Id.* at 274.

9 *Id.* at 275 (citation omitted).

10 *Id.* at 626.

11 *Id.* at 628.

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identities.”¹² Ultimately, the court held that “by virtue of the hack and the nature of the data that the plaintiffs allege was taken,” the “risk is much more substantial than the risk presented to the *Clapper* court, and satisfies the requirement of an injury in fact.”¹³

Statutory standing cases

Dominating class action standing issues in 2016 was the U.S. Supreme Court’s decision in *Robins v. Spokeo, Inc.*, 136 S. Ct. 1540 (2016). There, the Court considered what, exactly, the requirement that an alleged “invasion of a legally protected interest” be “concrete and particularized” means. As noted in last year’s review, *Spokeo* was such an unclear decision that both sides counted it as a win.¹⁴

The defendant in *Spokeo*, Spokeo Inc., operates an online “people search engine.” After the plaintiff, Robins, learned that inaccurate information about him was available on Spokeo, he sued the company for Fair Credit Reporting Act (FCRA) violations on behalf of a putative class. The district court dismissed this claim, holding that Robins merely alleged that Spokeo violated FCRA without any injury to him. That, the district court held, was insufficient to allege standing under Article III.¹⁵ The Ninth Circuit disagreed. That court held that Robins alleged that “Spokeo violated *his* statutory rights.”¹⁶ According to the panel, Robins’ “personal interests in the handling of his credit information are individualized,” and thus sufficient to confer Article III standing.

In a much-anticipated opinion, the Supreme Court vacated and reversed the Ninth Circuit’s ruling. The problem was the Ninth Circuit’s failure to analyze the “concreteness” requirement of an injury in fact. The panel instead hinged its decision on only the particularized nature of Robins’ alleged statutory violation. Particularity, the Court explained, was “necessary to establish injury in fact, but it is not sufficient.”¹⁷ An alleged injury must also be “concrete.” But beyond this holding, the Court offered little guidance for the lower courts to decide when an injury is concrete.

Unsurprisingly, the Courts of Appeals have diverged on the level of concreteness required. For its part, the Ninth Circuit in *Spokeo* held that the plaintiff had standing under the Supreme Court’s decision. The Ninth Circuit interpreted *Spokeo* as requiring a court to decide two questions: “(1) whether the statutory provisions at issue were established to protect his concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests.”¹⁸

The court had “little difficulty concluding that the [] interests protected by FCRA’s procedural requirements are ‘real,’ rather than purely legal creations.”¹⁹ The court explained that “Congress found that in too many instances agencies were reporting inaccurate information that was adversely affecting the ability of individuals to obtain employment. In this context, it makes sense that Congress might choose to protect against such harms without requiring any additional showing of injury.”²⁰

12 *Id.* at 628-29 (quoting *Remijas v. Neiman Marcus Grp.*, 794 F.3d 688, 693 (7th Cir. 2015)).

13 *Id.* at 629.

14 See <http://blogs.reuters.com/alison-frankel/2016/05/16/brace-for-more-class-action-challenges-post-spokeo/>.

15 *Robins v. Spokeo, Inc.*, 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011).

16 *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014) (emphasis in original).

17 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

18 *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017).

19 *Id.* at 1114.

20 *Id.*

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The court also found that the reputational interests FCRA protects bear a close similarity to interests historically protected by common law torts such as defamation and libel. The court explained: “Just as Congress’s judgment about an intangible harm is important to our concreteness analysis, so is the fact that the interest Congress identified is similar to others that traditionally have been protected. . . . In short, guided by both Congress’s judgment and historical practice, we conclude that the FCRA procedures at issue in this case were crafted to protect consumers’ (like Robins’s) concrete interest in accurate credit reporting about themselves.”²¹

Having concluded that FCRA protects concrete interest, the court still had to consider whether the plaintiff alleged a violation of those interests. This means that the plaintiff must “allege more than a bare procedural violation of the statute that is ‘divorced from’ the real harms that FCRA is designed to prevent.”²² Some statutory violations will not affect the consumer’s interest – such as those that do “not result in the creation or dissemination of an inaccurate consumer report.” And even in those situations, some “trivial” inaccuracies may not be complete, such as an inaccurate ZIP code listed on a credit report. But for the Ninth Circuit, “[i]t is clear to us that Robins’s allegations relate facts that are substantially more likely to harm his concrete interests than the Supreme Court’s example of an incorrect zip code.”²³ This is because Robins alleged that the report contained incorrect substantive information about him, which could be considered by prospective employers – regardless of whether any employer actually ever considers this information.

The Ninth Circuit’s opinion on remand thus falls on the side of cases holding that *Spokeo* creates a low bar for alleging a “concrete” harm. The Second, Third, Fourth and Sixth Circuits agree with the Ninth Circuit’s formulation.²⁴

For example, the Third Circuit in *In re Horizon Healthcare Services Inc. Data Breach Litigation* held that the alleged violation of customers’ statutory rights under the FCRA was a de facto injury that satisfied concreteness requirements for standing. This case arose when two laptops containing sensitive personal information were stolen from health insurer Horizon Healthcare Services Inc. The plaintiffs alleged that Horizon was a consumer reporting agency that acted willfully and negligently in failing to adequately protect their information.

The Third Circuit agreed with the plaintiffs’ argument that “the violation of their statutory right to have their personal information secured against unauthorized disclosure constitutes, in and of itself, an injury in fact.”²⁵ The court explained that “when it comes to laws that protect privacy, a focus on economic loss is misplaced”; “[i]nstead, ‘the unlawful disclosure of legally protected information’ constituted ‘a clear *de facto* injury.’”²⁶ The court concluded that because the FCRA gives consumers a private cause of action to sue a consumer reporting agency that engages in certain prohibited conduct, and because plaintiffs alleged that Horizon was a consumer reporting agency that engaged in this prohibited conduct with their information, the consumers had standing.

21 *Id.* at 1115.

22 *Id.*

23 *Id.* at 1117.

24 See *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016); *In re Horizon Healthcare Services Inc. Data Breach Litigation*, 846 F.3d 625 (3d Cir. 2017); *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017); *Lyshe v. Levy*, 854 F.3d 855, 859 (6th Cir. 2017).

25 846 F.3d at 634.

26 *Id.* at 636 (quotation omitted).

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Other circuits have given *Spokeo* a more robust reading, agreeing that something more than a technical statutory violation must be alleged. The Seventh Circuit, in *Meyers v. Nicolet Restaurant of De Pere, LLC*,²⁷ held that *Spokeo* requires a plaintiff to “allege a concrete injury that resulted from the violation in his case.” Unlike the Supreme Court, the Seventh Circuit clarified: “In other words, Congress’ judgment that there should be a legal remedy for the violation of a statute does not mean each statutory violation creates an Article III injury.” And so it was in *Meyers*: The mere fact that Congress decided that receiving a credit card receipt with more than four digits is an injury was not enough for the plaintiff to sue.

Similarly, in *Hancock v. Urban Outfitters, Inc.*,²⁸ the D.C. Circuit held that the plaintiffs failed to allege standing based on a department store clerk asking for their ZIP codes, a violation of a District of Columbia consumer protection statute. The Fifth Circuit in *Lee v. Verizon Communications, Inc.*,²⁹ rejected a plaintiff’s claim that the breach of an ERISA duty – mismanagement of the pension plan – alone was sufficient to confer standing. A plaintiff’s allegation that a cable company retained personal information about him for more than 30 days, which violates the Cable Communications Policy Act, was not enough to confer standing for the Eighth Circuit.³⁰ And the Eleventh Circuit held that a defendant’s failure to record a satisfaction of a mortgage within the required 30 days under state statute, absent harm flowing from that failure, was insufficient.³¹

In light of the varying circuit interpretations and the legion of federal consumer protection statutes that provide consumer remedies, the Supreme Court’s 2016 decision in *Spokeo* is likely to spawn arguments for years to come.

Injunctive relief

For those practicing on the West Coast, the Ninth Circuit’s decision in *Davidson v. Kimberly-Clark Corporation*³² is a must read. There, the Ninth Circuit resolved, in favor of consumers, a district court split over Article III standing for injunctive relief in deceptive advertising cases. The court, taking a pro-consumer stance, held that a plaintiff’s knowledge of the advertising’s falsity or deceptiveness does not preclude injunctive relief.

In *Davidson*, the plaintiff alleged that she paid extra for premoistened wipes manufactured and sold by the defendant, in part because they were advertised as “flushable.” She alleged that although she stopped purchasing the wipes, she would do so in the future “if it were possible to determine prior to purchase if the wipes were suitable to be flushed.”³³ The district court granted with prejudice the defendant’s motion to dismiss based in part on its finding that the plaintiff lacked Article III standing to seek injunctive relief because she was unlikely to purchase the wipes in the future.

27 843 F.3d 724, 727 (7th Cir. 2016).

28 830 F.3d 511, 514 (D.C. Cir. 2016).

29 837 F.3d 523, 529-30 (5th Cir. 2016).

30 *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016).

31 *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002-03 (11th Cir. 2016).

32 873 F.3d 1103 (9th Cir. 2017).

33 *Id.* at 1108.

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In reversing the district court's decision, the Ninth Circuit rejected the district court's reasoning that a "previously-deceived-but-now-enlightened plaintiff" consumer lacks Article III standing to pursue injunctive relief because he or she cannot be deceived again. The court reasoned that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm." This is because "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." For example, "the threat of future harm may be the consumer's plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved."³⁴

The court explained that "anomalies" would result from an opposite holding, i.e., a defendant could undermine California's consumer protection statutes and defeat injunctive relief simply by removing the case from state court. The court concluded, "[B]y finding that these plaintiffs fail to allege Article III standing for injunctive relief, we risk creating a 'perpetual loop' of plaintiffs filing their state law consumer protection claims in California state court, defendants removing the case to federal court, and the federal court dismissing the injunctive relief claims for failure to meet Article III's standing requirements. On our Article III standing analysis this 'perpetual loop' will not occur."³⁵

Because injunctive relief is often the only available remedy to consumers who bring class actions for false advertising, *Davidson* is a clear win for consumers.

³⁴ *Id.* at 1115 (citations omitted).

³⁵ *Id.* at 1116.

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II.B. Offers of Judgment

By Blythe G. Kochsiek

By now, it is settled that an unaccepted offer of judgment does not itself moot a case of controversy. This is true even where the offer affords the plaintiff complete relief, as an unaccepted Rule 68 offer of judgment is a legal nullity. But what if the defendant actually pays money to the plaintiff or deposits it with the court? In 2017, courts diverged over whether this suffices to moot a claim.

In *Leyse v. Lifetime Entm't Servs., LLC*,³⁶ the Second Circuit directly addressed the question left open by *Campbell-Ewald* of whether a case would be moot if a defendant deposited the full amount of the plaintiff's individual claim and the court entered judgment for the plaintiff in that amount. In *Leyse*, the defendant tendered complete relief, and the district court entered judgment on the plaintiff's individual claim under the Telephone Consumer Protection Act (TCPA). The plaintiff argued that the district court erred in entering judgment because he had not accepted the Rule 68 offer of judgment. The appellate court rejected this argument, noting that a Rule 68 offer of judgment, "if rejected, may nonetheless permit a court to enter a judgment in the plaintiff's favor."³⁷ Thus, under the circumstances, the district court was permitted to enter judgment on the plaintiff's individual claim.

Relatedly, in *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*,³⁸ another TCPA case, the district court allowed the defendant to deposit a total of \$20,000 with the court clerk, an amount "far exceeding" what the plaintiff could recover under the statute. The district court noted that this extinguished the plaintiff's personal stake in pursuing a claim, and the defendant could therefore "make a cognizable, good-faith argument that this case should be terminated."³⁹ The court added, "The relevant law will no longer be that of contract, offer and acceptance, or Rule 68; it will be the Constitutional requirement of a case or controversy."

But in *Fulton Dental, LLC v. Bisco, Inc.*,⁴⁰ another TCPA case, the Seventh Circuit held that a defendant cannot use Rule 67, which allows a party to deposit a payment with the court, to avoid *Campbell-Ewald's* holding. In this case, the defendant made an offer of judgment pursuant to Rule 68 two days before the Supreme Court decided *Campbell-Ewald*. The defendant then tried another tactic by moving for leave to deposit with the district court, under Rule 67, the maximum possible damages the plaintiff could receive. The Seventh Circuit rejected this tactic, noting the following:

"[W]e see no principled distinction between attempting to force a settlement on an unwilling party through Rule 68, as in *Campbell-Ewald*, and attempting to force a settlement on an unwilling party through Rule 67. In either case, all that exists is an unaccepted contract offer, and as the Supreme Court recognized [in *Campbell-Ewald*], an unaccepted offer is not binding on the offeree."

36 679 Fed.Appx. 44 (2d Cir. 2017).

37 *Id.* at 48 (citing *Tanasi v. New Alliance Bank*, 786 F.3d 195, 200 (2d Cir. 2015)).

38 268 F. Supp. 3d 599 (S.D.N.Y. 2017).

39 *Id.* at 605.

40 860 F.3d 541 (7th Cir. 2017).

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And in *Laurens v. Volvo Cars of North America, LLC*, which arose out of a purchaser's claim that the defendant's misleading advertising caused the purchaser and class members to pay extra money for the hybrid version of a car, the Seventh Circuit rejected the defendant's argument that its unaccepted, prelitigation offer to refund the entire purchase price of the car to the purchaser mooted the purchaser's claim. The appellate court noted the following.⁴¹

"The only salient differences between this case and *Campbell-Ewald* are that Volvo made its offer before Khadija sued, and it communicated the offer through a generic letter instead of Rule 68's more formal process. Neither distinction matters. Nothing about *Campbell-Ewald's* reasoning is confined to Rule 68, which is precisely why we extended its holding to Rule 67 in *Fulton Dental*, 860 F.3d 541."

The court concluded that just as with Rules 67 and 68, a party cannot force a contract on an unwilling party.

⁴¹ 868 F.3d 622 (7th Cir. 2017).

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II.C. Ascertainability

By James R. Morrison

2017 saw more developments in the ongoing circuit split regarding Rule 23's implicit ascertainability requirement. In a series of cases starting in 2012, the Third Circuit created a heightened ascertainability requirement that in order for a class to be ascertainable, it must be administratively feasible to determine the identity of class members.⁴² This is in contrast to other circuits that only require the class definition to reference objective criteria. In 2015, the First and Eleventh Circuits appeared to follow the Third Circuit's lead, requiring administrative feasibility but with little analysis on the topic.⁴³

That same year, the Seventh Circuit, in *Mullins v. Direct Digital, LLC*, rejected the Third Circuit's heightened ascertainability requirement, holding that the class definition need only reference objective criteria.⁴⁴ The Sixth and Eighth Circuits then appeared to join the Seventh Circuit in rejecting the heightened ascertainability requirement.⁴⁵

Unfortunately for class action defendants, the general trend in 2017 was for circuit courts to reject or loosen the Third Circuit's heightened ascertainability requirement, with the Ninth Circuit and the Second Circuit firmly rejecting the heightened standard. In *Briseno v. ConAgra Foods, Inc.*,⁴⁶ the Ninth Circuit disagreed with the Third Circuit's four reasons why a heightened ascertainability requirement is necessary, specifically: (1) the heightened standard is a necessary tool to ensure that the class will actually function as a class; (2) the heightened standard protects absent class members and shields bona fide claimants from fraudulent claims; (3) the heightened standard prevents individuals from submitting illegitimate claims and diluting the recovery of legitimate claimants; and (4) the heightened standard is necessary to protect the due process rights of defendants to raise individual challenges and defenses to claims.⁴⁷ The Ninth Circuit addressed each rationale, finding them unsupportive of a heightened standard.

First, the Ninth Circuit held that Rule 23(b)(3)'s requirement that a class action be "superior to other available methods for fairly and effectively adjudicating the controversy" already provides Rule 23 with a manageability requirement.⁴⁸ This would make the heightened ascertainability requirement duplicative and unnecessary.

Second, the court stated that neither Rule 23 nor the Due Process clause requires notice to each individual class member.⁴⁹ In the court's view, this means there is no need for an administratively feasible manner to determine the identity of class members, a process which the court believed might bar low-cost consumer class actions because consumers generally do not keep receipts or other records of low-cost purchases.⁵⁰

42 *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583 (3d Cir. 2012); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 166 (3d Cir. 2015).

43 *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *Karhu v. Vital Pharm., Inc.*, 621 Fed.Appx. 945, 947 (11th Cir. 2015).

44 795 F.3d 654, 657 (7th Cir. 2015).

45 *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016).

46 844 F.3d 1121 (9th Cir. Jan. 3, 2017).

47 *Id.* at 1126-31 (discussing *Byrd* and *Carrera*).

48 *Id.* at 1127-28.

49 *Id.* at 1128-29.

50 *See id.*

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Third, the court stated that the risk of fraudulent or mistaken claims is low, perhaps to the point of being negligible, lessening the need for an additional ascertainability requirement.⁵¹

Finally, the Ninth Circuit stated that defendants have other mechanisms available to raise individual challenges and defenses, such as challenging the class representatives' standing and through the claims administration process.⁵²

Later in the year, the Second Circuit clarified a prior ruling that seemingly supported the Third Circuit's position. Specifically, in *Brecher v. Republic of Argentina*,⁵³ the Second Circuit had stated that "the touchstone of ascertainability is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.'"⁵⁴ But on July 7, 2017, the Second Circuit reversed course and firmly rejected the heightened ascertainability requirement in *In re Petrobras Securities*, noting a "general consensus" that was emerging in the circuit courts rejecting the heightened standard.⁵⁵

Days later, on July 11, 2017, in *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare Inc.*,⁵⁶ the Sixth Circuit declined to weigh in on whether it would require a heightened ascertainability requirement, stating: "We see no need to add our own opinion to this debate." Some had previously considered the Sixth Circuit to be against the heightened standard, based on its ruling in *Rikos v. Procter & Gamble Co.*,⁵⁷ where it had stated: "The court must be able to resolve the question of whether class members are included or excluded from the class by reference to objective criteria."⁵⁸ The *Sandusky* decision places the Sixth Circuit in the "undecided" category.

Just weeks later, the Third Circuit appeared to slightly lessen its heightened ascertainability requirement by holding that affidavits, in combination with records or other reliable and administratively feasible means, can meet the ascertainability standard in *City Select Auto Sales Inc. v. BMW Bank of N. Am. Inc.*⁵⁹ The use of affidavits as a means of determining class members is a hot-button issue on ascertainability where the Ninth Circuit allowed use of affidavits,⁶⁰ while the Sixth Circuit rejected that approach in its two ascertainability-related decisions this past year.⁶¹

Unfortunately, the United States Supreme Court does not appear eager to resolve this debate anytime soon, as the Court rejected ConAgra's petition for writ of certiorari of the Ninth Circuit's decision in October 2017.⁶² The defendant in *In re Petrobras Securities* recently filed its own petition for certiorari on Nov. 3, 2017, so the Supreme Court will have another opportunity to consider this issue in the future.

51 *Id.* at 1129-30.

52 *Id.* at 1131-32.

53 806 F.3d 22, 24 (2d Cir. 2015).

54 (Quoting 7A Charles Alan Wright & Arthur R. Miller et al., *Federal Practice & Procedure* § 1760 (3d ed. 1998)).

55 862 F.3d 250, 265 (2d Cir. 2017).

56 863 F.3d 460, 472 (6th Cir. 2017).

57 799 F.3d 497, 525 (6th Cir. 2015).

58 *See In re Petrobras Securities*, 862 F.3d 250, 265 (2d Cir. 2017) (describing the Sixth Circuit as part of the growing consensus rejecting the heightened ascertainability requirement).

59 867 F.3d 434, 441-42 (3d Cir. 2017).

60 *Briseno* 844 F.3d 1121.

61 *Sandusky Wellness Center*, 863 F.3d 460.

62 138 S. Ct. 313 (Mem), 199 L.Ed.2d 206, 86 USLW 3172, 86 USLW 3176.

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II.D. Personal Jurisdiction

By Dustin M. Dow

The Supreme Court issued two decisions in 2017 that, at first glance, appeared to have a significant effect on where class actions could be brought when putative class members are residents of different states.

In *Bristol-Myers Squibb Co. v. Sup. Ct. of Calif., San Francisco Cty.*⁶³ and *BNSF Ry. Co. v. Tyrrell*,⁶⁴ the Supreme Court took on the issue of personal jurisdiction. By itself, personal jurisdiction is not a class-related issue, but both *Bristol-Myers Squibb* and *Tyrrell* articulated concepts that could alter the way attorneys make venue decisions in class actions.

General jurisdiction

In *Tyrrell*, the Court addressed the general jurisdiction prong of personal jurisdiction. Recall from civil procedure class that “[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”⁶⁵ The “at home” forums for a corporate defendant “are the corporation’s place of incorporation and its principal place of business.”⁶⁶ In “an exceptional case,” a corporate defendant’s operations in another forum “may be so substantial and of such a nature as to render the corporation at home in that State.”⁶⁷

Maintaining even extensive operations within a state, however, does not alone satisfy the exceptional case exception to general jurisdiction. In *Tyrrell*, the Court held that even though BNSF operated one of its automotive facilities in Montana and had more than 2,000 Montana employees and more than 2,000 miles of Montana railroad tracks, BNSF was not subject to general jurisdiction in Montana.⁶⁸ “BNSF, we repeat,” Justice Ruth Bader Ginsburg wrote for the 8-1 majority, “is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana ‘as to render [it] essentially at home’ in that State.”⁶⁹ After all, “[a] corporation that operates in many places can scarcely be deemed at home in all of them.”⁷⁰

Tyrrell, accordingly, has potential application for class actions because it clarifies that, insofar as general jurisdiction is concerned, reliance on the named plaintiffs’ residence may not be sufficient to establish general jurisdiction if the defendant corporation is not otherwise at home in that venue. The Court issued the *Tyrrell* opinion in May, with Justice Sonia Sotomayor dissenting. Since

63 137 S. Ct. 1773 (2017).

64 137 S. Ct. 1549 (2017).

65 *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. ---, ---, 134 S. Ct. 746, 760 [2014]).

66 *Id.* (quoting *Daimler*, 134 S. Ct. at 760).

67 *Id.* (quoting *Daimler*, 134 S. Ct. at 761, n.19).

68 *Tyrrell*, 137 S. Ct. at 1559.

69 *Id.* (quoting *Daimler*, 134 S. Ct. at 761).

70 *Id.*

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then, several courts have relied on *Tyrrell* to dismiss class actions based on a lack of personal jurisdiction, in particular general jurisdiction.⁷¹

Specific jurisdiction

Less than a month after *Tyrrell*, the Court decided *Bristol-Myers Squibb*, on June 19. In an 8-1 opinion, again with Sotomayor dissenting, the Court held that insofar as specific jurisdiction is concerned, out-of-state mass tort plaintiffs could not rely on the in-state plaintiffs' contacts with a defendant to establish specific jurisdiction. That is, for a court to exercise specific jurisdiction, "the suit' must aris[e] out of or relat[e] to the defendant's contact with the *forum*."⁷² "For this reason, specific jurisdiction is confined to adjudication of issues driving from, or connected with, the very controversy that establishes jurisdiction." In *Bristol-Myers Squibb*, the Supreme Court held that where a group of plaintiffs – consisting of 86 California residents and 592 residents from 33 other states – filed eight separate complaints in a California court, there was no specific jurisdiction as to the non-California plaintiffs. Justice Samuel Alito wrote, "The mere fact *other* plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims."⁷³ As Alito explained, what matters "is a connection between the forum and the specific claims at issue."⁷⁴

Indeed, since *Bristol-Myers Squibb*, numerous courts have held that, in multi-plaintiff actions, specific jurisdiction does not extend to party plaintiffs whose allegations do not arise from conduct that occurred within the forum state.⁷⁵

At the same time, courts have also found means of distinguishing *Bristol-Myers Squibb* by noting that it was not a Rule 23 class action and thus has no application in the Rule 23 arena. In October, an Eastern District of Kentucky court explained that *Bristol-Myers Squibb* did not control personal jurisdiction in a Rule 23 class action because "the inquiry for personal jurisdiction lies with the named parties of the suit asserting their various claims against the defendant, not the unnamed proposed class members."⁷⁶ An Eastern District of Louisiana court held similarly in an eight-year-old products liability action, drawing a contrast with *Bristol-Myers Squibb* because "citizenship of the unnamed plaintiffs is not taken into account for personal jurisdiction purposes."⁷⁷ And in September, a Northern District of California court articulated the difference between mass tort

71 See *Blakes v. Dyncorp Int'l, LLC.*, No. CV 17-00001-BAJ-EWD, 2017 WL 4706891, at *2 (M.D. La. Oct. 19, 2017); State ex rel. *Bayer Corp. v. Moriarty*, No. SC 96189, 2017 WL 6460354, at *4 (Mo. Dec. 19, 2017) ("Bayer's contacts with Missouri do not give rise to general personal jurisdiction. Bayer is not incorporated in nor does it have its principal place of business in Missouri. And although Plaintiffs allege Bayer does substantial business in the state, Daimler, BNSF, and Norfolk held this insufficient to provide general jurisdiction in Missouri; it is simply not enough to render Bayer 'at home' here."); *Jordan v. Bayer Corp.*, No. 4:17-CV-865 (CEJ), 2017 WL 3006993, at *3 (E.D. Mo. July 14, 2017), reconsideration denied, No. 4:17-CV-00865-AGF, 2018 WL 339305 (E.D. Mo. Jan. 8, 2018).

72 *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780 (quoting *Daimler*, 134 S. Ct. at 760) (emphasis in original).

73 *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1781 (emphasis in original).

74 *Id.*

75 See, e.g., *Jordan v. Bayer Corp.*, No. 4:17-CV-865 (CEJ), 2017 WL 3006993, at *4 (E.D. Mo. July 14, 2017) ("With respect to the other non-Missouri plaintiffs, under *Bristol-Myers*, there is no personal jurisdiction as to their claims because there is no 'connection between the forum and the specific claims at issue.'"); *Spratley v. FCA US LLC*, No. 3:17CV0062MADDEP, 2017 WL 4023348, at *7 (N.D.N.Y. Sept. 12, 2017) (the "out-of-state Plaintiffs have shown no connection between their claims and Chrysler's contacts with New York, therefore, the Court lacks specific jurisdiction over the out-of-state Plaintiffs' claims."); *In re Dental Supplies Antitrust Litig.*, No. 16CIV696BMCGRB, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017) (dismissing class antitrust claims due to lack of personal jurisdiction under *Bristol-Myers Squibb*).

76 *Day v. Air Methods Corp.*, 2017 U.S. Dist. LEXIS 174693, *5-6 (E.D. Ky. Oct. 23, 2017).

77 *In re Chinese-Manufactured Drywall Prods. Liab. Lit.*, No. 09-2047, 2017 U.S. Dist. LEXIS 197612, at *31 (E.D. La. Nov. 28, 2017).

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actions and class actions in holding that *Bristol-Myers Squibb* applied to mass torts where “each plaintiff was a real party in interest” but not to class actions where “the ‘named plaintiffs’ are the only plaintiffs actually named in the complaint.”⁷⁸

Consequently, the varying types of treatment afforded to *Bristol-Myers Squibb* leave unclear so far the extent to which its specific jurisdiction treatment affects class actions. At one extreme, courts could read it to limit nationwide class action jurisdiction to only those forums where the defendant is at home to be subject to general jurisdiction. At the other end, courts could interpret the case to apply only in the limited setting of mass torts, with little to no influence over the jurisdictional boundaries in class actions. The year ahead could offer additional guidance.

⁷⁸ *Fitzhenry-Russell v. Dr. Pepper Snapple Grp., Inc.*, No. 17-CV-00564 NC, 2017 WL 4224723, at *5 (N.D. Cal. Sept. 22, 2017).

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II.E. Settlements

By Jessica L. Greenberg

This section explores the past, present and future of certain developments within class action settlements. First, it explores the effect of a Supreme Court case from 2016 and how it plays out today. Second, it looks at a current class action settlement agreement and its potential effect on future class actions. And third, it examines pending legislation, outlining a bill that, if passed, will impact how class action settlement funds and payments are distributed in the future.

Offers of judgment

You may remember a Supreme Court decision that addressed a defendant's attempt to moot a class action plaintiff's claims pursuant to Rule 68. Although the Court resolved a circuit split in that 2016 case, the Court's holding only went so far, as it raised – but did not answer – a hypothetical settlement route that *could* work to moot a plaintiff's claims. Defendants have since presented new arguments and strategies in hopes of satisfying the Court's hypothetical road map. Other courts were still split on the issue into 2017, and several of those unsuccessful attempts illustrate that these efforts will likely continue until the Supreme Court again takes up the issue.

But before diving into some of the unsuccessful attempts of 2017, we provide below a refresher of the decision that sparked these new attempts.

As mentioned above, in 2016, the Supreme Court resolved a circuit split over whether an “unaccepted offer to satisfy [a] named plaintiff's individual claim is sufficient to render a case moot when the complaint seeks relief on behalf of the plaintiff and a class of persons similarly situated.”⁷⁹ In *Campbell-Ewald Co. v. Gomez*, the plaintiff filed a class action against the defendant, alleging violations of the Telephone Consumer Protection Act.⁸⁰ Before the deadline for class certification, the defendant proposed to settle the plaintiff's individual claims and filed an offer of judgment under Federal Rule of Civil Procedure 68.⁸¹ The defendant offered to pay the plaintiff's damages (excluding fees) and to follow a stipulated injunction.⁸² The plaintiff, however, did not accept the settlement offer and let the Rule 68 submission lapse.⁸³ After discussing basic principles of contract law and analyzing the applicable rules, the Court found that the “plaintiff's complaint was not effaced by [the defendant's] unaccepted offer to satisfy his individual claim.”⁸⁴ And the Court held that the unaccepted settlement offer had no force.

79 *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667, 669 (2016).

80 *Id.* at 667.

81 *Id.* at 668; Federal Rule of Civil Procedure 68 states: “At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.” Fed. R. Civ. P. 68(a). Further, under the rule, “an unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.” Fed. R. Civ. P. 68(b).

82 136 S. Ct. at 667-8.

83 *Id.* at 668.

84 136 S. Ct. at 670-72.

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Although the Court held that “an unaccepted settlement offer or offer of judgment does not moot a plaintiff’s case,” it did not, however, address the result of a different, hypothetical scenario: it left open the possibility of mootness where “a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.”⁸⁵

Other courts have since addressed other attempts to satisfy this hypothetical, and have continued to do so throughout 2017. For example, in *Fulton Dental LLC v. Bisco Inc.*, the defendant extended the plaintiff a settlement offer pursuant to Rule 67 rather than Rule 68.⁸⁶ Through its offer, the defendant moved for leave to deposit full relief – providing the plaintiff with the maximum amount of possible damages – with the district court under Rule 67.⁸⁷ But the court was not persuaded with this alternate route for settlement under Rule 67. While the court noted that the “core purpose” of Rule 67 “is to relieve a party who holds a contested fund from responsibility for disbursement of that fund amount to those claiming some entitlement thereto,”⁸⁸ it distinguished that “Rule 67 is *not* a vehicle for determining ownership” of the funds deposited in the court’s registry fund.⁸⁹ Further, the court highlighted that a court’s registry fund is not an account payable to the plaintiff and is not similar to a bank account in the plaintiff’s name.⁹⁰ Ultimately, the court found “no principled distinction between attempting to force a settlement on an unwilling party through Rule 68 ... and attempting to force a settlement on an unwilling party through Rule 67”; and that, in either scenario, an “unaccepted offer is not binding on the offeree” and cannot moot a case.⁹¹

In addition, while some courts have held that tendering a check can moot a plaintiff’s claims,⁹² others have denied defendants’ attempts to tender a check to the plaintiff.⁹³ For example, in *Fast v. Cash Depot Ltd.*, the plaintiff brought a collective action⁹⁴ against the defendant, alleging violations of the Fair Labor Standards Act.⁹⁵ Soon thereafter, the defendant realized its miscalculations and sent current and former employees checks for the money it owed. Importantly, the defendant sent the plaintiff the money it owed him, in addition to the relevant attorneys’ fees and costs associated with the plaintiff’s lawsuit. After issuing these payments, the defendant argued that the case was moot because it paid the plaintiff the full amount of possible recovery. On the other hand, the plaintiff argued that the case was not moot because he did not cash or deposit the check.

85 *Id.* at 672; 1 Newberg on Class Actions § 2:15 (5th ed.).

86 860 F.3d 541, 542-3 (7th Cir. 2017). Under Federal Rule of Civil Procedure Rule 67, “If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party – on notice to every other party and by leave of court – may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.” Fed. R. Civ. P. 67(a). Further, “[m]oney paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 and any like statute. The money must be deposited in an interest-bearing account or invested in a court-approved, interest-bearing instrument.” Fed. R. Civ. P. 67(b).

87 860 F.3d at 543.

88 *Id.* at 545 (citing *Alston Caribe Inc. v. George P. Reintjes Co.*, 484 F.3d 106, 113 (1st Cir. 2007)).

89 *Id.* (emphasis in original).

90 *Id.*

91 *Id.*; see also *Conrad v. Boiron Inc.*, 869 F.3d 536 (7th Cir. 2017) (remanding to the district court because an unaccepted offer of settlement cannot moot a case).

92 See *Demmler v. ACH Food Companies, Inc.*, No. 15-13556, 2016 WL 4703875, *4, *8 (D. Mass. June 9, 2016) (finding that the defendant’s actual tender of full relief without restrictions was sufficient to moot the plaintiff’s claims).

93 *Stromberg v. Ocwen Loan Servicing LLC*, No. 15-cv-04719, 2017 WL 2686540, *8 (N.D. Cal. June 22, 2017) (holding that the plaintiff’s individual claims were not moot because the plaintiff rejected the defendant’s check and thus did not receive complete relief for her claims); *Fast v. Cash Depot Ltd.*, No. 16-C-1637, 2017 WL 5158693, *5 (E.D. Wis. Nov. 6, 2017).

94 Courts have applied the *Campbell-Ewald* reasoning to collective actions. 7 Newberg on Class Actions § 23:43 (5th ed.).

95 2017 WL 5158693, *1.

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The court noted that “a defendant may not force a settlement on an unwilling party” and that the plaintiff believed that the case was about more than the damages and sought other relief.⁹⁶ Ultimately, the court held that the offer did not moot the plaintiff’s claims because the plaintiff did not cash the check, or “otherwise indicate an intent to accept” such settlement offer.⁹⁷

Similarly, some courts have held that a direct deposit into a plaintiff’s account may not be sufficient to moot a case where the payment does not provide the complete relief sought.⁹⁸ For example, in *Luman v. NAC Marketing*, the plaintiff filed a class action seeking relief for various allegations against the defendants for the products it offered.⁹⁹ The defendants refunded the plaintiff for its purchases, and the court examined whether the plaintiff’s individual claims for monetary relief were rendered moot. Although the defendant “did more than simply offer to repay” the plaintiff, the court held that the claims were not moot because the defendant did not agree to the plaintiff’s requested injunctive relief. Therefore, because the defendant did not afford the plaintiff the complete relief requested, the court found that the claims were not moot.

The aforementioned cases demonstrate that this issue is still one to watch, and one that will likely persist until the Court definitively answers and outlines the hypothetical it raised in 2016.

Data breaches

Data breaches have affected companies and individuals across the United States. And as the number of data breaches increases, so do the costs.¹⁰⁰ This is because data breaches pose a serious threat to sensitive and personal information and can cause serious harm to their victims. Moreover, such exposures typically result in litigation. As you can imagine, the expense of navigating these post-breach waters can be significant, and the class action settlements paid in 2017 show that these costs keep climbing.

Notably, among the several different categories of information at risk for a breach, healthcare data arguably stole the 2017 spotlight. This is in part because of the preliminary approval of a settlement of a class action involving a 2015 data breach of health insurer Anthem Inc. Not only is the settlement amount the largest in a data breach case to date, but if approved, it will likely impact future data breaches in the healthcare arena and elsewhere.

In 2015, Anthem acknowledged that it had been subject to a cyberattack that exposed various sensitive information of approximately 78 million people. After about two years of litigation – including “two rounds of motions to dismiss, extensive fact and expert discovery, and briefing on the plaintiffs’ motion for class certification and the parties’ motions to exclude expert testimony” – the parties presented a proposed settlement to the court.¹⁰¹

96 *Id.* at *5.

97 *Id.*

98 *Luman v. NAC Marketing Company LLC*, No. 2:13-cv-00656, 2017 WL 3394117, *3 (E.D. Cal. Aug. 8, 2017); *but cf. S. Orange Chiropractic Ctr., LLC v. Cayan LLC*, No. 15-13069, 2016 WL 1441791, *5 (D. Mass. April 12, 2016), motion to certify appeal denied, 2016 WL 3064054 (May 31, 2016) (concluding that the defendant’s offer to deposit a check with the court and satisfy all of the plaintiff’s claims mooted the plaintiff’s individual claims).

99 2017 WL 3394117, *3.

100 Kirstin Ann Shepard, Christine A. Stoddard, *Class Action and Regulatory Settlements Reflect the Rising Cost of Data Breaches*, ClassifiedClassAction.com (July 11, 2017) <http://classifiedclassaction.com/class-action-regulatory-settlements-reflect-rising-cost-data-breaches>.

101 *In re Anthem Data Breach Litigation*, No. 15-MD-02617, 2017 WL 3730912, *1 (N.D. Cal. Aug. 25, 2017).

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Under the terms of the settlement, Anthem must establish a \$115 million settlement fund.¹⁰² The fund will be used to purchase credit monitoring services for the class members, in an attempt to protect class members from future fraud and promptly detect any identity theft.¹⁰³ Alternatively, class members who already have credit monitoring may choose to receive up to \$50 instead.¹⁰⁴ Moreover, a portion of the fund will also be used to pay out-of-pocket expenses incurred as a result of the breach.¹⁰⁵ In addition, Anthem must upgrade its data security practices and programs to significantly increase and improve its data monitoring practices.¹⁰⁶

In granting preliminary approval, the court found that the terms of the settlement appeared “to be the result of serious, informed, noncollusive negotiations conducted ... over the course of nearly three months.”¹⁰⁷

Importantly, if approved, the Anthem settlement may arguably make it possible for plaintiffs in future cases to argue that they were harmed from a data breach that exposed their personal information.¹⁰⁸

But the fate of the settlement is uncertain, as several objections have been filed challenging, among other things, the requested attorneys’ fees. Multiple settlement hearings in 2018 have been postponed, and it is expected that the court may not rule on the motion for final approval of the settlement until June.

The Fairness in Class Action Litigation Act of 2017

In the early spring of 2017, House Judiciary Committee Chairman Bob Goodlatte introduced the Fairness in Class Action Litigation Act of 2017.¹⁰⁹ The Act proposes several significant changes to class action practice and is currently awaiting its fate in the Senate. Of the several areas facing changes, class action settlements are among those that would be affected by the Act.

For example, the Act would change the requirements for calculating and paying attorneys’ fees in class action settlements. Regarding calculations, the Act would limit the amount of attorneys’ fees to a reasonable percentage of payments actually distributed to and received by class members. This means that the amount of attorneys’ fees would not be permitted to exceed the total amount of funds distributed to the class. Moreover, no attorneys’ fees would be permitted to be calculated or “paid until any distribution of the monetary recovery to class members has been completed.”¹¹⁰

Further, the Act would require class counsel to submit settlement data reports. Under the Act, class counsel would have to submit an accounting disclosure to the director of the Federal Judicial Center and the director of the Administrative Office of U.S. Courts. Included in the accounting

102 *In re Anthem Data Breach Litigation*, No. 15-MD-02617, 2017 WL 3699869 (N.D. Cal. June 23, 2017).

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 2017 WL 3730912 at *1.

108 Jeff Stone, *What Anthem’s Settlement Reveals About Future Data Breach Suits*, Wall St. J. (July 3, 2017, 7:10 AM) <https://www.wsj.com/articles/what-anthems-settlement-reveals-about-future-data-breach-suits-1499080223>.

109 H.R. 985, 115th Cong. (2017).

110 H.R. 985, 115th Cong., § 103 (2017).

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would be the following: (1) the total amount paid directly to all class members; (2) the number of class members who received payments; (3) the actual or approximate total number of class members; (4) the average amount paid directly to class members; (5) the largest and smallest amounts paid to class members; and (6) each amount paid to any other person, including class counsel, and the purpose of the payment. Notably, the payment calculations would not include any cy pres payments or reversionary funds in a claims-made settlement.

The Judicial Conference would then use this data to create an annual report for Congress and the public. The report would summarize the distribution of funds paid in class action settlements, and permit Congress to further analyze trends in class action settlements.

The Act remains pending in the Senate before the Senate Judiciary Committee.

A SUMMARY OF CLASS ACTION LITIGATION IN 2017

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By Dustin M. Dow

2017 offered significant development in the bread-and-butter class-action practice areas. In the employment sector, for instance, the viability of class-action waivers remains the topic de jour, in large part because of the consolidated cases recently decided by the Supreme Court. In the antitrust arena, the Department of Justice displayed surprising activity under the Trump administration that will require significant monitoring throughout 2018 and beyond. And on the consumer products front, “reliance” emerged as the next frontier for class-litigation battles, with many lines yet to be drawn.



III. Developments by Subject Matter

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III.A. Employment and Waivers

By *Dustin M. Dow*

In the past year, substantial uncertainty has swirled around employment class actions. When, for instance, can arbitration agreements provide employers protection from class-wide claims, and when will those types of agreements be struck down as invalid? How much authority does the Department of Labor have to set salary thresholds for Fair Labor Standards Act exemptions? And what kinds of off-the-clock policies will help protect against class claims when employees intentionally work off the clock? Some of those questions were answered in the past year.

Supreme Court set to rule on validity of class action waivers in arbitration agreements

In October, the Supreme Court heard oral arguments in a series of consolidated cases that posed the question of whether Section 7 of the National Labor Relations Act supplants the Federal Arbitration Act in cases where employees pursue class-wide relief for employment claims despite the presence of arbitration agreements with class action waivers. In May, the Court clarified that the NLRA does not override the FAA, and the agreements must be enforced.

In *Epic Systems Corp. v. Lewis*,¹¹¹ which was been consolidated with *Ernst & Young LLP v. Morris*¹¹² and *National Labor Relations Board v. Murphy Oil USA*,¹¹³ the Court considered whether employees' rights to engage in "concerted activities" for "mutual aid or protection" as provided by Section 7 displaced an arbitration agreement that requires individual resolution of employment disputes. The consolidated cases had a lengthy history. In 2016, the U.S. Court of Appeals for the Seventh Circuit created a circuit split with its decision in *Lewis v. Epic Systems Corp.*,¹¹⁴ which held that an arbitration agreement precluding collective arbitration or collective action violates Section 7 of the NLRA, 29 U.S.C. § 157, and is unenforceable under the FAA, 9 U.S.C. §§ 1 et seq. That put the Seventh Circuit squarely at odds with the Second, Fifth, Eighth, Ninth and Eleventh circuits, which had previously held that the FAA's policy of favoring arbitration overrides any concerted activity rights employees have to class or collective remedies.

In August 2016, however, the Ninth Circuit joined the Seventh Circuit and held, in *Morris v. Ernst & Young U.S. LLP*,¹¹⁵ that despite the FAA, under Section 7 employees have substantive rights to pursue collective relief that cannot be waived in an arbitration agreement.

The Supreme Court initially granted certiorari in January 2017, and in June, the Department of Justice changed its position, coming down on the side of employers, in direct contrast to the NLRB, explaining, "We do not believe that the Board in its prior unfair-labor-practice proceedings, or the government's certiorari petition in *Murphy Oil*, gave adequate weight to the congressional policy favoring enforcement of arbitration agreements that is reflected in the FAA." In the interim, the Sixth Circuit issued a decision that aligned with the Seventh and Ninth circuits, holding that an

111 S. Ct. Case No. 16-285.

112 S. Ct. Case No. 16-300.

113 S. Ct. Case No. 16-307.

114 823 F.3d 1147 (7th Cir. 2016).

115 834 F.3d 975 (9th Cir. 2016).

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arbitration agreement requiring employees to individually arbitrate their claims violates the NLRA's protection of the right to engage in concerted activity, which includes a guaranteed right to pursue collective action.¹¹⁶

While the DOJ switched positions under the Trump administration, the NLRB did not. In its August 2017 brief, the NLRB made clear that it would not follow the DOJ, by declaring, "The Employers, recently joined by the Acting Solicitor General, insist on a narrow construction of Section 157 [Section 7] inconsistent with this Court's NLRA precedent."

In May, in a 5-4 majority opinion authored by Justice Gorsuch, the Court delivered an unmistakable conclusion that the NLRA does not contain a class action right that trumps the FAA: "This Court has never read a right to class actions into the NLRA – and for three quarters of a century neither did the National Labor Relations Board. Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful."¹¹⁷

Consequently, employers may continue to rely on the enforceability of class and collective action waivers.

Overtime rule struck down

In August, an Eastern District of Texas court issued a summary judgment order in favor of a group of 21 states, striking down a May 2016 Department of Labor rule that would have drastically increased the minimum salary to qualify for a Fair Labor Standards Act exemption. Originally scheduled for a Dec. 1, 2016, effective date, the rule would have changed the salary threshold from \$24,660 to \$47,476 per year.¹¹⁸

The district court judge, Amos Mazzant, initially issued a nationwide preliminary injunction on Nov. 22, 2016. In entirely striking down the rule in August, he explained that the DOL essentially and without authority eliminated the FLSA's duties test for determining exemptions by setting the salary threshold so high. Following the summary judgment ruling, the DOL dropped its appeal of the preliminary injunction order.

Yard-man inference is just that – an inference

Recently, the Supreme Court clarified for the second time in a matter of years that in retiree benefit cases – which are usually class actions – the "inferences" in favor of vesting are not controlling presumptions.¹¹⁹ Such inferences, known as Yard-Man inferences due to their origin in the 1983 case, *UAW v. Yard-Man Inc.*,¹²⁰ were rejected by the Court in 2015 when it directed the Sixth Circuit to decide retiree health insurance benefit cases using ordinary contract principles.¹²¹

However, some Sixth Circuit panels, while paying lip service to the majority opinion in *M&G Polymers USA LLC v. Tackett*, continued to find for the retirees based on arguments having no

¹¹⁶ *National Labor Relations Board v. Alternative Entertainment Inc.*, [No. 16-1385 \(May 26, 2017\)](#).

¹¹⁷ *Epic Systems Corp. v. Lewis*, 584 U.S. ____, ____ (2018).

¹¹⁸ *Nevada, et al. v. U.S. Department of Labor*, No. 4:16-cv-00731 (E.D. Tex.).

¹¹⁹ *CNH Industrial N.V., et al. v. Reese, et al.*, 583 U.S. ____ (2018) (per curiam).

¹²⁰ 716 F.2d 1476 (6th Cir. 1983).

¹²¹ In *M&G Polymers USA LLC v. Tackett*, 574 U.S. ____ (2015).

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basis in contract law. Fractures soon appeared in the post-*Tackett* case law, with ever more obvious splits within the circuit itself, and different outcomes in factually indistinguishable cases. These splits seemed to reach their zenith on April 20, 2017, when the Sixth Circuit issued three conflicting decisions *on the same day*, applying different laws and having different outcomes.¹²²

Not surprisingly, rehearing en banc was sought, but what followed was even more remarkable. In one opinion denying review, a concurring judge commented, “[A]n intra-circuit split accompanied by an inter-circuit divide followed by lack of conformity to a Supreme Court decision normally warranted en banc review,” but that en banc review would be pointless because there wasn’t a majority of judges ascribing to any one view of the law. In a separate opinion, the dissent noted that “[o]ur post-*Tackett* case law is a mess” Three petitions for certiorari followed. In *Cole v. Meritor Inc.*, in which the employer prevailed, review was denied. In the *Reese* case, however, the Supreme Court reversed and found that the Sixth Circuit had erred in finding for the retirees. The Court was again required to state that *Yard-Man* was not good law and that the Sixth Circuit had simply resurrected the *Yard-Man* analysis in a new form. The Court specifically rejected the repackaged *Yard-Man* analysis, including:

When a contract is silent on the issue of vesting, it does not vest benefits for life.

The general durational clause should be applied when the agreement “does not specify a duration for health care benefits in particular.”

“If the parties had meant to vest health care benefits for life, they easily could have said so in the text.”

The prior Sixth Circuit case law purporting to “tie” health benefits to pension benefits was wrong.

The Supreme Court remanded the case for further consideration due to that case’s procedural posture, but it’s not clear what would happen on remand – other than a dismissal – given the Court’s strong pronouncement on these issues.

Off-the-clock policies can be useful collective-action defenses

The unending proliferation of smartphones throughout the global workplace has led to growing concern about compensable time when hourly employees use such devices for work while off duty. Many employers have tried to address the need to pay for such time, and to avoid litigation, by promulgating procedures for such employees to record and be paid for the hours they work on mobile devices. Litigation, however, persists when employees, for their own reasons, choose not to follow those procedures or choose to put in for the additional time.

Whether and to what extent the employer should be responsible for compensating the employee for such time was the issue in *Allen v. City of Chicago*.¹²³ In that case, the city of Chicago provided BlackBerry devices for officers working in its organized-crime division. Officers who used the BlackBerrys when off duty, a frequent occurrence due to the nature of their work, could submit “time due slips” to their supervisors to be paid for that time. Often, however, the officers simply did not submit those slips and thus were never paid for the time they had spent on their mobile devices during off hours. Following a six-day bench trial, the trial court entered judgment against the class.

¹²² *Reese v. CNH Indus., N.V.*, 854 F.3d 877 (6th Cir. 2017) (retirees prevailed); *UAW v. Kelsey-Hayes*, 854 F.3d 862 (6th Cir. 2017) (retirees prevailed); and *Cole v. Meritor Inc.*, 855 F.3d 695 (6th Cir. 2017) (employer prevailed).

¹²³ No. 16-1029 (7th Cir. Aug. 3, 2017).

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The Seventh Circuit affirmed. It noted that the police department had a reasonable system in place for the submission of time and was not responsible if the officers chose not to use it. It distinguished the case from instances in which employees might have been discouraged from submitting time or where no procedure was in place. It rejected the notion that the department's pressure on supervisors to reduce overtime or the concern of officers about the "culture" constituted a violation.

The court found that the city's policies were not airtight, and it was particularly concerned about certain of the department's policies that were not FLSA-compliant, but the case demonstrates that having a reasonable procedure can provide a defense for an employer in off-the-clock cases.

Ninth Circuit provides clarity in certain PAGA situations

In 2017, employers, plaintiffs and courts continued to grapple with the difficult issue of the interplay between the California Private Attorneys General Act and arbitration agreements.

In *Aviles v. Quik Pick Express, LLC*,¹²⁴ the Ninth Circuit panel vacated and remanded a district court order denying Quik Pick Express LLC's motion to compel arbitration in a case when PAGA was just one of several claims brought.

Aviles, a Quik Pick driver, claimed that Quik Pick misclassified him as an independent contractor instead of an employee, causing him to suffer loss of wages and benefits. Based on this foundation, Aviles alleged "a smorgasbord of claims ranging from a failure to keep accurate time records to infliction of emotion [sic] distress" and brought the claims "as an individual and putative class representative, as a private attorney general, and as all three, depending on the claim." But Aviles' contract compelled him to submit claims to individual arbitration and to waive representative claims. California public policy, however, prohibits PAGA claims from being waived in an arbitration agreement.

The Ninth Circuit noted that the California Court of Appeals confronted a similar situation in *Franco v. Arakelian Enterprises, Inc.*,¹²⁵ and maintained the parties' "contractual expectations as much as possible by simply restricting the arbitration provision from applying to PAGA claims." Following *Franco*'s lead, the Ninth Circuit ordered the *Aviles* case remanded with the following directives:

- Grant the motion to compel arbitration on an individual basis with regard to any claim Aviles "brings on his own behalf (regardless of whether he also putatively represents class members)."
- Enforce the representative-action waiver except for PAGA claims.
- Decline to permit Aviles "to represent any other individual, as a class representative or otherwise."
- Stay Aviles' PAGA claims during the arbitration.
- Finally, if the arbitration of Aviles' individual claims determines he is an "aggrieved individual" pursuant to Cal. Lab. Code § 2699, he then can litigate his PAGA claims in court.

So, unlike some earlier decisions, the Ninth Circuit provided an analytical framework for resolving claims subject to individual arbitration and, at the same time, a means to resolve a viable PAGA claim in court. Given the continuing uncertainty in this area, having at least a framework may prove helpful in crafting a manageable case management plan in PAGA/arbitration disputes.

124 No. 15-56951 (9th Cir. Nov. 24, 2017).

125 234 Cal. App. 4th 947, 952-53, 965 (2015).

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Subject Matter

III.B. Antitrust

By Anthony B. Ponikvar

Antitrust law in 2017

A recent analysis shows that 600 antitrust suits were filed in federal court in 2017.¹²⁶ This is the lowest number since 2011. *Id.* Despite these numbers, 2017 brought with it a series of high-profile cases and important developments in the antitrust field.

Successful Government Challenges in 2017

EnergySolutions, Inc.

The DOJ successfully challenged the recent merger attempt between EnergySolutions, Inc., and Waste Control Specialists LLC, two major players in the nuclear-waste-processing market.¹²⁷

At trial, Waste Control Specialists argued that if the acquisition were blocked, the company would need to be liquidated. However, the U.S. District Court for the District of Delaware was not impressed, and enjoined the merger. This injunction follows the recent trend of courts prohibiting companies from relying on the “failing firm” defense.

Additionally, this case (Case No. 1:16-cv-01056) may have a lasting impact because of the court’s analysis of Waste Control Specialists’ efforts to find a buyer other than EnergySolutions. In essence, the court found that Waste Control Specialists and its parent company had not tried hard enough to find other buyers for the flailing company. The opinion notes that the parent company talked with only one other potential buyer but did not even obtain a bid.

This ruling could have long-lasting effects because it points to courts requiring that floundering companies, before they are sold, be seriously shopped around to a spectrum of potential buyers. This could be catastrophic to companies that do not have the time or resources to undertake such efforts.

Two Major Wins in the Healthcare Industry

The DOJ started 2017 off with a bang in successfully blocking two megamergers in the healthcare industry. First, in January, a \$37 billion deal between Aetna Inc. and Humana Inc. was enjoined by a federal judge, who found that the merger would substantially reduce competition for Medicare Advantage Plans in over 350 counties around the country. The deal was subsequently tabled by both parties.¹²⁸

Following up on its win in January, the DOJ concluded a successful challenge to Anthem’s deal worth over \$50 billion to acquire Cigna.¹²⁹

126 Brian Howard, Lex Machina Q4 2017 End of the Year Litigation Update (Lex Machina Jan. 16, 2018), <https://lexmachina.com/lex-machina-q4-litigation-update/>.

127 *U.S. District Court Blocks EnergySolutions’ Acquisition of Waste Control Specialists*. (DOJ June 21, 2017), <https://www.justice.gov/opa/pr/us-district-court-blocks-energysolutions-acquisition-waste-control-specialists>.

128 *U.S. District Court Blocks Aetna’s Acquisition of Humana* (DOJ Jan. 23, 2017), <https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana>.

129 *U.S. District Court Blocks Anthem’s Acquisition of Cigna* (DOJ Feb. 8, 2017), <https://www.justice.gov/opa/pr/us-district-court-blocks-anthem-s-acquisition-cigna>.

III. Developments by Subject Matter

Looking to 2018

With Trump's promises of removing regulations and generally decreasing the role of government as a whole, the Trump administration was predicted by many to play a less active role in mergers. However, this was not the case in 2017, and based on what we already know, it does not appear to be the case for 2018 either. Both the DOJ and the FTC enter 2018 with a full slate of action.

The DOJ has publicly stated that it hopes to cut down the time necessary for merger review. Currently, a review takes the DOJ an average of 11 months to complete, up from seven months in 2011.¹³⁰ If the review process is in fact revamped and made more efficient in the coming years, the strategies and tactics involved in the merger and acquisition market may be implicated and should be analyzed by all participants in the industry. In addition to this logistical change, the government has a number of high-profile cases on its dockets for the upcoming year.

What to watch

The Supreme Court and the Rule of Reason

In 2010, the Department of Justice and 17 states sued American Express. The complaints alleged that American Express's anti-steering provisions in its contracts with merchants, which prohibit the merchants from offering discounts to customers who use other credit cards, was an unreasonable strain on trade.

While the district court agreed with the plaintiffs, the Second Circuit, in *Ohio v. American Express*, reversed the lower court's decision. This reversal was based largely on an error made in the lower court in evaluating American Express's conduct in the two-side market. According to the Second Circuit, the district court improperly looked only at the effects in the merchant market, and did not adequately consider the market for cardholders. This, according to the court, "ignores the two markets' independence" and led to a misapplication of the rule of reason. Under the Second Circuit's analysis, the district court failed to consider whether a price increase to merchants would be used to fund benefits for the cardholders in some way. Because the anti-steering provisions "affect compensation for cardholders as well as merchants, the plaintiffs' initial burden . . . was to show that the [provisions] made all AmEx customers on both sides of the platform – i.e., both merchants and cardholders – worse off overall."

The states sought cert from the Supreme Court, arguing that the Second Circuit improperly merged two distinct markets into one. This, arguably, is contrary to Supreme Court precedent, which requires the different sides of a two-sided platform to be considered as separate markets for antitrust purposes.

Guidance from the Supreme Court will bring clarity to the application of the rule of reason to two-sided markets. This decision could potentially affect a wide variety of industries, including credit cards, finance, healthcare and more.

¹³⁰ Melissa Lipman, *DOJ Aims to Speed Merger Review Under Trump, Deputy Says* (Law360), <https://www.law360.com/articles/986235>.

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Tronox-Cristal

Acting in line with recent history, the DOJ recently filed suit to stop Tronox's \$2.2 billion acquisition of Cristal, a chemical mining and processing company.¹³¹ Much like other recent challenges, the DOJ's complaint focuses on a relatively narrow market (formulation of titanium dioxide) and argues that bringing together two of three players in that particular market would be harmful to competition. This approach is consistent with the approach taken in recent actions such as the Sysco-US Foods and Staples-Office Depot actions.

In addition to the acquisition challenges outlined above, the government has numerous other pending suits that may have major implications on the field of antitrust law.

Qualcomm

In January, the Federal Trade Commission sued Qualcomm, alleging the company improperly exerted its dominance over the semiconductor market to receive higher royalties and anti-competitive licensing terms from cellphone makers.¹³²

At the center of the FTC's theory, and of particular import for industry at large, is how the courts will treat Qualcomm's licensing policy. Under this policy, Qualcomm has refused to sell its processors to anybody that does not also agree to the company's licensing terms. These licensing terms require customers to pay a separate patent license fee, and pay royalties on devices that use rival semiconductor chips. This practice is, according to the complaint, not used by any other participants in the industry, and amounts to an anti-competitive tax being levied on cellphone makers looking to use non-Qualcomm processors.

Similar actions and investigations have been brought in China, South Korea and Europe, and Japan is also reportedly investigating Qualcomm's licensing practices.

Domestic Air Providers

Stemming from a case originally filed in 2009, the multidistrict litigation in the District Court for the District of Columbia filed against several prominent airlines is likely to make significant progress in 2018. The suit claims the airlines conspired to limit the number of domestic flights in the country and thus hike prices for consumers. Given the recent consolidation in the airline industry, this case is sure to be closely watched, and may have broad implications for airline travel and other consolidating industries in the future.

¹³¹ FTC Challenges Proposed Merger of Major Titanium Dioxide Companies (FTC Dec. 5, 2017), <https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-proposed-merger-major-titanium-dioxide-companies>.

¹³² FTC Charges Qualcomm With Monopolizing Key Semiconductor Device Used in Cell Phones (FTC Jan. 17, 2017), <https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used>. The case is currently pending before the Northern District of California (Case No. 5:17-cv-00220).

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Subject Matter

III.C. Privacy

Standing Developments

By James R. Morrison

Continued Spokeo Fallout in 2017

Plaintiffs' standing to bring suit for increased risk of identity theft and other future harm following a data incident continued to be a significant debate among federal courts in 2017, particularly following the United States Supreme Court's May 2016 ruling in *Spokeo, Inc. v. Robins*.¹³³ Article III standing in federal courts requires a plaintiff to (1) have suffered an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by a favorable juridical decision.¹³⁴ For years, federal courts analyzing data privacy cases have regularly debated whether an intangible increased risk of future harm such as a risk of identity theft is an injury in fact sufficient to give a plaintiff Article III standing.¹³⁵

Although *Spokeo* was not a data privacy case, the Supreme Court clarified the standing requirements for intangible injuries, a topic of considerable interest in data privacy matters, which frequently involve an alleged increased risk of identity theft. In *Spokeo*, plaintiff Robins alleged that the consumer reporting agency Spokeo Inc. had generated a profile containing inaccurate information about Robins, in violation of the Fair Credit Reporting Act (FCRA).¹³⁶ The district court dismissed Robins' case, holding that he had not pled injury in fact sufficient for Article III standing. The Ninth Circuit reversed, holding that Robins had pled sufficient injury in fact based on his allegation that Spokeo violated his statutory rights and that Robins' personal interests in the handling of his credit information are individualized.¹³⁷

The Supreme Court reversed. Specifically, the Court reiterated that for a plaintiff to have pled an injury in fact, the plaintiff must allege an injury that is both concrete and particularized.¹³⁸ While the Ninth Circuit had found that Robins' injury was particularized,¹³⁹ it failed to analyze whether his injury was "concrete."¹⁴⁰ In the process, the Supreme Court articulated new guidelines for how to determine when an injury is concrete.

Spokeo Fueled Both Sides in Debate Over Standing for Increased Identity Theft Risk.

Spokeo's articulated requirements for what makes an injury concrete gave fuel to both sides of the debate over whether an increased risk of identity theft is an injury in fact. On the one hand, the Supreme Court stated that a concrete injury must be "de facto," "must actually exist" and must be

133 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).

134 *Id.* at 1547.

135 Compare, e.g., *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142-43 (9th Cir. 2010) (increased risk of future identity theft sufficient for Article III standing); *Katz v. Pershing, LLC*, 672 F.3d 64, 80 (1st Cir. 2012) (increased risk of identity theft insufficient for Article III standing).

136 *Id.* at 1544.

137 *Id.* at 1544-45.

138 *Id.* at 1545.

139 A particularized injury must affect the plaintiff in a personal and individual way. *Id.*

140 *Id.*

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“real” and not “abstract.”¹⁴¹ Further, Article III standing requires a concrete injury even in the context of a statutory violation.¹⁴² These statements help defendants seeking to require a plaintiff to allege more than a merely speculative injury.

On the other hand, the Supreme Court clarified that “[c]oncrete” is not, however, necessarily synonymous with “tangible.”¹⁴³ The Court stated, in addressing whether an intangible injury is sufficient to provide standing, “It is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”¹⁴⁴ Likewise, Congress’ judgment is also instructive and important.¹⁴⁵ The Court also clarified that risk of real harm can, in some cases, satisfy the requirement of concreteness.¹⁴⁶ These statements help plaintiffs seeking redress from increased risk of future harm.

After *Spokeo*, Circuit Courts Remain Divided Regarding Whether Increased Identity Theft Risk Is a Concrete Injury.

When applied to data privacy cases, *Spokeo* has not led to a consensus among the circuit courts that have since addressed whether an intangible risk of future identity theft is an injury in fact. Five circuit courts addressed this issue in 2017, and reached varying results. Specifically, the Third and D.C. circuits held that an increased risk of identity theft following a data incident was a sufficient injury in fact.¹⁴⁷ In contrast, the Second, Fourth and Eighth circuit courts held that an increased risk of identity theft was not an injury in fact sufficient for Article III standing.¹⁴⁸

The Circuits Holding Increased Risk of Identity Theft Is Injury in Fact

In *In re Horizon Healthcare Services Inc. Data Breach Litigation*, the Third Circuit held that plaintiffs had alleged an injury in fact in a putative class action against a health insurer after its laptops containing personal information of more than 839,000 individuals were stolen.¹⁴⁹ In particular, the Third Circuit held that an alleged statutory violation of the FCRA, the same statute applied in *Spokeo*, was a sufficiently concrete injury without any additional harm.¹⁵⁰ The Third Circuit reasoned that Congress enacted the FCRA to prevent the unauthorized dissemination of private information and a violation of the FCRA alone was a concrete injury.¹⁵¹

The other two circuits that held data incident victims had standing after *Spokeo* focused not on *Spokeo*’s proclamations regarding statutory violations, but rather on whether the plaintiffs had

141 *Id.* at 1458 quoting *Black’s Law Dictionary* 479 (9th ed. 2009), *Webster’s Third New International Dictionary* 472 (1971), *Random House Dictionary of the English Language* 305 (1967).

142 *Id.* at 1549.

143 *Id.*

144 *Id.*

145 *Id.*

146 *Id.*

147 *In re Horizon Healthcare Services Inc. Data Breach Litigation*, 856 F.3d 625 (3d Cir. 2017); *Attias v. Carefirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017).

148 *Beck v. McDonald*, 848 F.3d 262 (8th Cir. 2017); *Whalen v. Michaels Stores, Inc.*, 689 Fed.Appx. 89 (2d Cir. 2017); *In re SuperValu, Inc.*, 870 F.3d 763 (8th Cir. 2017).

149 856 F.3d at 629-30.

150 *Id.* at 640-41.

151 *Id.*

III. Developments by Subject Matter

alleged a “substantial risk of harm” of future identity theft.¹⁵² The D.C. Circuit found standing where hackers had breached an insurer’s computer system and stolen personal information.¹⁵³ That court stated in *Attias v. Carefirst*, “Here, ... an unauthorized party has already accessed personally identifying data on Carefirst’s servers, and it is much less speculative – at the very least, it is plausible – to infer that this party has both the intent and the ability to use that data for ill. ... [A] substantial risk of harm exists already, simply by virtue of the hack and the nature of the data that the plaintiffs allege was taken.”¹⁵⁴

The Circuits Holding Increased Risk of Identity Theft Is Not Injury in Fact

In contrast, the Second, Fourth and Eighth circuits held that an increased risk of identity theft was insufficient to be an injury in fact. For example, in *In re SuperValu, Inc.*, the Eighth Circuit held that plaintiffs whose credit- and debit-card data was stolen by hackers of the defendant’s grocery store computer network had not alleged an injury in fact.¹⁵⁵ The Eighth Circuit focused on the fact that none of the plaintiffs had alleged that their card information had been misused, card information is less likely to be used in a harmful manner than is other personal information such as a Social Security number, and most breaches have not resulted in detected incidents of identity theft.¹⁵⁶ Unlike in *Attias*, the mere fact that data had been stolen was insufficient to provide a concrete injury under the Eighth Circuit’s analysis. The Second Circuit similarly found no concrete injury in *Whalen v. Michaels Stores*, where the plaintiff’s credit card had been compromised by hackers at Michaels Stores but no fraudulent charges were actually incurred on her account before she canceled her compromised card.¹⁵⁷

In *Beck v. McDonald*, the Fourth Circuit drew a distinction between when a thief intentionally targets personal information compromised in data breaches and when a thief steals a laptop that happens to contain personal information but there is no evidence the thief ever used or intended to use the personal information.¹⁵⁸ In *Beck*, a Veterans Affairs (VA) Medical Center laptop containing unencrypted personal information was stolen in 2013 and boxes of patient records went missing in 2014.¹⁵⁹ Plaintiffs whose information was compromised brought suit against the VA secretary, claiming that they had suffered an enhanced risk of identity theft.¹⁶⁰ The Eighth Circuit held that their risk of future identity theft was too speculative, noting that the passage of time with no reported identity theft made their claim more and more speculative.¹⁶¹

Conclusion

As seen in the five 2017 circuit court cases addressing whether the increased risk of identity theft is an injury in fact, data incidents can be fact specific, which may impact whether the increased

152 *Attias v. Carefirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017).

153 *Id.*

154 *Id.* at 628-29.

155 870 F.3d 763 (8th Cir. 2017).

156 *Id.* at 770-771.

157 689 Fed.Appx. 89, 89-91 (2d Cir. 2017).

158 848 F.3d 262, 274 (8th Cir. 2017).

159 *Id.* at 267.

160 *Id.*

161 *Id.* at 274.

III. Developments by Subject Matter

risk of identity theft moves beyond speculative and into the concrete injury required by *Spokeo*. Likewise, some circuit courts appear more willing than others to accept an increased risk of identity theft as being a concrete injury. One can expect that this issue will continue to be a significant debate in 2018 and beyond.

Merits Decisions

By Matthew D. Pearson

Even if the allegations in a complaint sufficiently allege an “injury in fact” for purposes of Article III standing, that does not mean the complaint has sufficiently alleged “cognizable injury,” an element of most state law claims.¹⁶² What is required to state a “cognizable injury,” however, often depends on the applicable state law. For example, in Illinois, courts “have repeatedly held that,” in data breach cases, “a cardholder’s mere allegation of an unauthorized charge, unaccompanied by an out-of-pocket loss, is not sufficient to state an actionable injury.”¹⁶³ In Iowa, “[t]he well-established general rule is that a plaintiff who has suffered only economic loss due to another’s negligence has not been injured in a manner which is legally cognizable or compensable.”¹⁶⁴

Based on these differences in standards, the Eighth Circuit in *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 718 (8th Cir. 2017), affirmed the dismissal of the plaintiff’s breach-of-contract claim, not because the plaintiff lacked Article III standing (indeed, the Eighth Circuit concluded he did), but because the plaintiff “failed to plausibly allege the actual damage that is an element of a breach of contract claim.”

For that reason, plaintiffs in 2017 continued to rely (or, in some cases, began relying) on novel damages theories, including (1) loss of value in PII, (2) mitigation expenses and (3) lost time, each with mixed results.

Value of PII

In 2017, courts continued to find Article III standing based on allegations that the PII disclosed necessarily lost a portion of its value as a result of being disclosed. Following the rationale set forth in *In re Anthem, Inc. Data Breach Litigation*, 2016 WL 3029783, at *14 (N.D. Cal. May 17, 2016), and *Svenson v. Google, Inc.*, 2015 WL 1503429, at *5 (N.D. Cal. April 1, 2015), the court in *In re Yahoo! Inc. Customer Data Sec. Breach Litig.* (“Yahoo”), No. 16-MD-02752-LHK, 2017 WL 3727318, at *14 (N.D. Cal. Aug. 30, 2017) held that “Plaintiffs’ allegations that their PII is a valuable commodity, that a market exists for Plaintiffs’ PII, that Plaintiffs’ PII is being sold by hackers on the dark web, and that Plaintiffs have lost the value of their PII as a result, are sufficient to plausibly allege injury arising from the Data Breaches.”

However, at least one court reached the opposite conclusion when determining whether the loss of value in one’s PII constitutes sufficient injury under a common-law negligence claim. In *Savidge v. Pharm-Save, Inc.*, No. 3:17-CV-00186-TBR, 2017 WL 5986972, at *4 (W.D. Ky. Dec. 1, 2017), the

¹⁶² *In re SuperValu, Inc., Customer Data Sec. Breach Litig.*, No. 14-MD-2586 ADM/TNL, 2018 WL 1189327, at *12 (D. Minn. March 7, 2018) (“Although this allegation is sufficient to allege an injury in fact for purposes of Article III standing, it does not provide a basis for the Court to draw a reasonable inference that Holmes suffered monetary loss and thus a cognizable injury as the result of the charge.”).

¹⁶³ *Id.* at *11.

¹⁶⁴ *Veridian Credit Union v. Eddie Bauer, LLC*, No. C17-0356JLR, 2017 WL 5194975, at *3 (W.D. Wash. Nov. 9, 2017).

III. Developments by Subject Matter

plaintiffs argued that “their PII ... constitutes property,” that their PII had been damaged “by losing the sales value of that information,” and that, as a result, they were “entitled to recover for any injury to their PII that they ... sustained because of Defendants’ unauthorized disclosure.” The court disagreed, finding that the plaintiffs had “not adequately allege[d] how the value of their PII has been diminished, nor that they would have attempted to sell their PII in the future.”¹⁶⁵

The differences in the rulings in *Yahoo* and *Savidge* suggest that any motion to dismiss filed by a defendant should argue that the plaintiff both (1) lacks Article III standing and (2) has failed to establish alleged cognizable injury under the relevant state-law claims.

Mitigation Measures

Some (but not all) courts remained skeptical of claims that, as a result of the breach, plaintiffs were forced to pay for credit monitoring services. For example, the Fourth Circuit in *Beck v. McDonald*, 848 F.3d 262, 276-77 (4th Cir.), cert. denied sub nom. *Beck v. Shulkin*, 137 S. Ct. 2307, 198 L. Ed. 2d 728 (2017), held that “these self-imposed harms cannot confer standing.”

However, mitigation measures can be sufficient to establish standing (or, in the case of state-law claims, “cognizable injury”) if they were taken in response to a “certainly impending” threat or one that had already occurred. *Remijas v. Neiman Marcus Grp.*, LLC, 794 F.3d 688, 694 (7th Cir. 2015) (“Mitigation expenses do not qualify as actual injuries where the harm is not imminent.”); see also *Savidge v. Pharm-Save, Inc.*, No. 3:17-CV-00186-TBR, 2017 WL 5986972, at *5 (W.D. Ky. Dec. 1, 2017) (“In recent years, a growing number of Courts have recognized that the purchase of credit monitoring services and the costs expended to deal with fraudulent activity following the theft of PII, **when spent with the knowledge that stolen information has already been misused**, can constitute cognizable injuries.” (emphasis added)).

In fact, in *Yahoo*, the court denied the defendant’s motion to dismiss for lack of standing on the grounds that mitigation expenses can constitute injury, and did so without even discussing whether the risk of identity theft was “imminent.”¹⁶⁶

Lost Time

Plaintiffs have also alleged that time spent monitoring their credit constitutes sufficient “cognizable injury.” However, in *Whalen v. Michaels Stores, Inc.*, 689 F. App’x 89, 91 (2d Cir. 2017), the Second Circuit upheld the dismissal of the plaintiff’s complaint because, among other reasons, the plaintiff “pleaded no specifics about any time or effort that she herself had spent monitoring her credit,” instead choosing to rely on the conclusory allegations that “consumers must expend considerable time on credit monitoring, and that she and the Class suffered additional damages based on the opportunity cost and value of time that [she] and the Class have been forced to expend to monitor their financial and bank accounts” (internal quotations omitted).

Causes of Action

Just as plaintiffs are trying out new theories on damages, they are asserting new causes of action in data breach cases.

¹⁶⁵ *Savidge*, 2017 WL 5986972, at *4.

¹⁶⁶ *Yahoo*, 2017 WL 3727318, at *16.

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Rise in Breach of an Implied Contract or an Implied Term in an Express Contract

As breach-of-contract claims are more frequently being dismissed at the pleading phase, plaintiffs' counsel are beginning to assert, in conjunction with their breach of contract claims, claims for (1) breach of an *implied* contract and (2) breach of an *implied* term in an express contract.

Breach of an implied contract has become prevalent in payment card breaches, where a customer purchases something from the defendant using his or her debit or credit card but never enters into a written agreement with the defendant, and in employment cases, where there is either no employment contract or one that does not discuss data security.¹⁶⁷

Implied contracts are "inferred from the facts and circumstances of the case," and often turn on the defendant's statements and conduct. *Torres v. Wendy's Int'l, LLC*, No. 616CV210ORL40DCI, 2017 WL 8780453, at *3 (M.D. Fla. March 21, 2017). For example, in the payment card arena, courts have found that where a defendant "invited its customers to pay for their purchases with credit cards containing confidential information," the defendant implicitly agreed "that [it would] protect its customers' confidential information as a reasonable and prudent merchant would." *Id.* Similarly, in the employment context, where the defendants collected the plaintiffs' "W-2 information ... so that [the] [d]efendants could verify [the plaintiffs'] identities, provide them with compensation, and ... complete records for tax purposes," the court found that the defendants "implicitly promised ... that they would take adequate measures to protect their sensitive and personal information." *Savidge v. Pharm-Save, Inc.*, No. 3:17-CV-00186-TBR, 2017 WL 5986972, at *9 (W.D. Ky. Dec. 1, 2017).

A claim for breach of an implied term in an express contract is similar to a claim for breach of an implied contract, except that a written contract between the plaintiff and the defendant already exists. Instead of alleging that the defendant's conduct and/or statements give rise to an implied contract for data security, the plaintiffs argue that the defendant's conduct and/or statements give rise to an implied term for data security that should be inserted into the pre-existing contract. See *In re Banner Health Data Breach Litig.*, Case No. 2:16-cv-02696-PHX-SRB (D. Ariz. 2016).

Unfortunately for defendants, both the terms of an implied contract and the duties imposed by an implied term are generally considered to be a question of fact. *Castillo v. Seagate Tech., LLC*, No. 16-CV-01958-RS, 2016 WL 9280242, at *8 (N.D. Cal. Sept. 14, 2016) ("The existence of an implied contract is an issue of fact."); *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 159 (1st Cir. 2011) (find that "[t]he existence of such an implied contract term is determined by the jury ..."). Therefore, defendants may face a more difficult time dismissing these claims at the pleading phase.

Negligence and the Economic Loss Doctrine

Although these are not new claims, plaintiffs are attempting to expand the scope of negligence claims where, in the past, they would rely on breach of contract. These claims, however, are being met with resistance, from both defendants and the court. Recently, the Seventh Circuit issued a ruling in *Cnty. Bank of Trenton v. Schnuck Markets, Inc.* ("*Schnuck*"), No. 17-2146, 2018 WL 1737126, at *7 (7th Cir. April 11, 2018), in which it upheld the dismissal of the issuing-bank plaintiffs' negligence claims under the "economic loss doctrine," despite the fact that the defendant never

¹⁶⁷ See, e.g., *In re SuperValu, Inc.*, 870 F.3d 763, 767 (8th Cir. 2017) (payment card case); *In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1157 (D. Minn. 2014) (same); *In re Michaels Stores Pin Pad Litig.*, 830 F. Supp. 2d 518, 522 (N.D. Ill. 2011) (same); *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 155 (1st Cir. 2011) (same); *Savidge v. Pharm-Save, Inc.*, No. 3:17-CV-00186-TBR, 2017 WL 5986972, at *9 (W.D. Ky. Dec. 1, 2017) (employment case); *Castillo v. Seagate Tech., LLC*, No. 16-CV-01958-RS, 2016 WL 9280242, at *2 (N.D. Cal. Sept. 14, 2016) (same).

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entered into an agreement with the issuing-bank plaintiffs. Analyzing both Illinois and Missouri law, the Seventh Circuit found that because “[t]he plaintiff banks and [defendant] all participate in a network of contracts that tie together all the participants in the card payment system,” that “network of contracts imposes the duties plaintiffs rely upon and provides contractual remedies for breaches of those duties.”¹⁶⁸ And, “in deciding to join the card payment system,” both the defendant and the issuing-bank plaintiffs agreed to a specified system of risk allocation and remedies.¹⁶⁹ Thus, according to the Seventh Circuit, the issuing-bank plaintiffs should not be permitted to “correct the purely economic defeated expectations of a commercial bargain” by imposing on the defendant tort liability.¹⁷⁰

Bailment Claims

Plaintiffs have also begun asserting claims for “bailment” in data breach cases. Generally, “a bailment claim requires either a contract of bailment or a bailment implied by law.”¹⁷¹ An implied bailment exists when a “person delivers personal property to another person or entity for a specific purpose with an implied agreement that the property shall be returned or accounted for when this special purpose is accomplished or retained until the bailor reclaims the property.”¹⁷² Therefore, similar to breach of an implied contract claim, plaintiffs argue, an “implied bailment” is created when PII, PHI or PCI is provided to the defendant.

Liability on a bailment theory, however, rests on the bailee’s failure to return the bailed personal property as agreed, or to return it in an undamaged condition.¹⁷³ *Id.* The bailment theory, thus, requires a transfer of possession and custody of the bailed property.¹⁷⁴ *Id.*

In *Galaria*, the court held that the plaintiffs had failed to state a claim for bailment because they had “not alleged that they transferred control or custody of their personal identifiers to Defendant **with the expectation that Defendant would hold them for some purpose and then return them undamaged to Plaintiffs.**”¹⁷⁵ Indeed, in the data breach context, the likelihood that any plaintiff transferred her PII, PHI and/or PCI to the defendant with such an expectation is low, if not nonexistent. Therefore, courts are likely to continue dismissing such claims.¹⁷⁶

168 *Schnuck Markets, Inc.*, 2018 WL 1737126, at *7.

169 *Id.*

170 *Id.* at *9.

171 *Galaria v. Nationwide Mut. Ins. Co.*, No. 2:13-CV-118, 2017 WL 4918634, at *2 (S.D. Ohio Oct. 31, 2017), report and recommendation adopted, No. 2:13-CV-118, 2017 WL 6375803 (S.D. Ohio Dec. 13, 2017).

172 *Id.* (internal quotations omitted).

173 *Id.*

174 *Id.*

175 *Galaria*, No. 2:13-CV-118, 2017 WL 4918634, at *2 (emphasis added).

176 *See Target*, 66 F. Supp. 3d at 1177 (“Even if Plaintiffs are correct that intangible property such as their personal financial information can constitute property subject to bailment principles, they have not – and cannot – allege that they and Target agreed that Target would return the property to them.”).

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Data Breach Class Certification Developments

By Arielle L. Brown

2017 brought the first data breach class action to achieve class certification as well as the first time a Court of Appeals remanded a data breach class action settlement for reasons related to the sufficiency of the class.

In *Smith v. Triad of Alabama, LLC*, the district court concluded that plaintiffs had met the requirements for certification of their proposed class of all patients who'd had their blood drawn by a medical provider that sent it to be tested by Flowers Hospital (otherwise known as Triad of Alabama, LLC).¹⁷⁷ The lawsuit stemmed from a 2014 criminal case in which a phlebotomist employed by Flowers Hospital stole the personal information of patients and used it to file fraudulent tax returns. In granting the plaintiffs' motion for class certification, the court rejected the defendant's argument that the class was not ascertainable because it included persons whose identities were stolen but not affirmatively misappropriated. Ultimately, the court certified a pair of subclasses to distinguish between patients who had received the defendant's "notice of privacy practices" and those who had not.

In May of last year, the United States District Court for the District of Minnesota renewed a certification motion by a class of consumers stemming from the 2013 Target data breach.¹⁷⁸ The class initially certified by the district court was defined to include "[a]ll persons in the United States whose credit or debit card information and/or whose personal information was compromised as a result of the [2013 Target] data breach." Although no class members objected when the district court preliminarily certified the settlement class, between the district court's preliminary and final orders certifying the class and approving the settlement, a class member objected to the settlement class on the grounds that it did not meet the basic class prerequisites under Federal Rule of Civil Procedure 23(a). Specifically, the class member argued that class members like himself who were ineligible for monetary compensation made up a "zero-recovery subclass," and that because no named plaintiff belonged to this purported subclass, the court should certify a separate subclass with independent representation. The Eighth Circuit reversed the district court's class certification decision, finding that the district court had not sufficiently examined whether the lead plaintiff was an adequate representative for the putative class.¹⁷⁹ On remand, the Eighth Circuit specifically instructed the district court to consider "whether an intraclass conflict exists when class members who cannot claim money from a settlement fund are represented by class members who can." On May 17, 2017, the district court approved certification of the class action for a second time, stating that the required "rigorous analysis" confirmed the adequacy of class representation and revealed no intraclass conflict that would render the settlement unfair.

177 *Smith v. Triad of Alabama, LLC*, No. 1:14-CV-324-WKW, 2017 WL 3816722 (M.D. Ala. Aug. 31, 2017), *modified in part on reconsideration* 2017 WL 3816722 (M.D. Ala. Aug. 31, 2017) (modifying the class definition but otherwise denying the defendant hospital's motion to reconsider the class certification order).

178 *In re Target Corp. Customer Data Sec. Breach Litig.*, No. MDL 14-2522 (PAM), 2017 WL 2178306 (D. Minn. May 17, 2017).

179 *In re Target Corp. Customer Data Sec. Breach Litig.*, 847 F.3d 608, 612 (8th Cir. 2017).

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III.D. Consumer

By Matthew D. Pearson

“Momentum to buy” gains no momentum

Once a bastion of consumer class-action defense, “reliance” appears to be the next pleading requirement to fall under attack. In last year’s review, we discussed *Veera v. Banana Republic LLC*, 6 Cal. App. 5th 907 (Ct. App. 2016), review denied (March 29, 2017), a case in which the California Court of Appeal permitted the plaintiffs to pursue a consumer class action despite the fact that the plaintiffs did not allege, and could not allege, that they relied on any misrepresentation by the defendant – at least not under the standard that hundreds, if not thousands, of defendants had used to defeat consumer class actions in the past.

In *Veera*, the California Court of Appeal concocted a new “method” by which plaintiffs could prove reliance: “momentum to buy” (6 Cal. App. 5th at 922). The court found that although the plaintiffs were informed *before they made the purchase* that the product they were purchasing was not on sale, the “40 percent off” signs that were posted throughout the store created in the plaintiffs a “momentum to buy,” which was sufficient to establish both (1) reliance and (2) economic injury. (*Id.* at 920-921.)

Those following *Veera* were hopeful that the California Supreme Court would rectify the ruling and return “reliance” to its rightful place. They were wrong. On March 29, 2017, the California Supreme Court denied Banana Republic’s petition for review, establishing, for the time being, “momentum to buy” as an accepted way of proving reliance.

But has “momentum to buy” really become the death knell to reliance? The jury is still out. Since it was decided, *Veera* has been cited by only four cases, and by none for the proposition that “momentum to buy” is a viable method of establishing reliance.¹⁸⁰ Moreover, the term “momentum to buy” appears in no cases decided throughout the United States in 2017.

Retailers should not, however, take the relative dearth of “momentum to buy” cases as a sign of things to come. *Veera* is still in the throes of litigation. Should it result in a hefty verdict for the plaintiff, “momentum to buy” could become the next big trend in consumer class actions.

“Momentum to buy” in an online world

With a reported 40 percent of internet users in the United States stating that they purchased items online several times per month, and 20 percent claiming to have made online purchases on a weekly basis, it is only a matter of time before novel theories of reliance (like “momentum to buy”) make their way into the e-commerce realm.

180 The four cases are *1500 Viewsite Terrace LLC v. Pickford Escrow Inc.*, No. B256246, 2017 WL 4309755 (Cal. Ct. App. Sept. 28, 2017); *Delman v. J. Crew Grp. Inc.*, No. CV 16-9219-MWF (ASX), 2017 WL 3048657 (C.D. Cal. May 15, 2017); *Petkevicius v. NBTY Inc.*, No. 314CV02616CABRBB, 2017 WL 1113295 (S.D. Cal. March 24, 2017); and *In re FCA US LLC Monostable Elec. Gearshift Litig.*, No. 16-MD-02744, 2017 WL 5495091 (E.D. Mich. Nov. 15, 2017).

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Although not yet seen, the argument can be easily hypothesized. A consumer receives an email stating that all items on the website are on sale. The consumer navigates to the website, browses the available products, selects what he wants to purchase, begins the checkout process and then realizes that the item he selected is actually full price. Certainly, the consumer has built up at least some “momentum to buy.”

But *Veera* may suggest otherwise. The rationale set forth by the California Court of Appeal in *Veera* focused not only on the “momentum to buy” but also on the societal pressures associated with deciding not to buy something while standing at the checkout counter. As the dissent noted: “The majority opinion repeatedly states the plaintiffs raised a triable issue of fact on actual reliance because, even though they learned the 40 percent discount did not apply to their items, their embarrassment and frustration led to them feeling pressured to buy clothes at full price anyway.” (*Veera*, 6 Cal. App. 5th at 926.)

That same “pressure” is arguably not present in an online transaction. Assuming the consumer is shopping from his personal computer or his mobile phone, the likelihood of anyone knowing that he decided not to purchase the item because it was not on sale is slim to none. There is no cashier to judge him, nor are there other customers waiting in line behind him. For all intents and purposes, he alone knows why he chose not to purchase the item.

Again, whether the lack of “pressure” is sufficient to defeat the “momentum to buy” theory of reliance is yet to be seen. But given the frequency with which the *Veera* court cited the plaintiffs’ “embarrassment” and “frustration,” it certainly is a strong argument.

Online complaints and the “duty to disclose”

The internet provides an efficient and relatively cost-effective method for retailers to communicate directly with consumers. Consumers can research a retailer’s various products and make informed decisions. Consumers can post questions and receive answers about a product’s specifications and features. But they can also post complaints, and in 2017, at least one court imputed knowledge of those complaints to the retailers, whether the retailers saw them or not.

In *Borkman v. BMW of N. Am. LLC*, No. CV162225FMOMRWX, 2017 WL 4082420 (C.D. Cal. Aug. 28, 2017), the plaintiff sued BMW for, among other things, failing to disclose that her 2013 Mini Cooper S contained a defect in its oil filter housing. According to the plaintiff, although the “oil filter housing is located in an extremely high-temperature area of the engine,” its gaskets were “made of material that is prone to premature wear and deterioration when exposed to heat.” (*Id.* at *1.)

BMW moved to dismiss the plaintiff’s complaint based on, among other things, the plaintiff’s failure to allege that BMW knew or should have known of the defect prior to the plaintiff purchasing the vehicle. (*Id.* at *5.) The court disagreed. (*Id.*)

Citing eight consumer complaints that were posted on the National Highway Traffic Safety Administration (NHTSA) website and 12 consumer complaints that were posted on third-party websites – *only three of which actually predated the plaintiff’s purchase* – the court held that the plaintiff’s allegations “plausibly demonstrate that BMW knew of a defect at the time [the plaintiff] purchased her vehicle.” (*Id.*) Notably, the court never once mentioned whether BMW had actually seen or been made aware of the complaints. See also *Argabright v. Rheem Mfg. Co.*, 258 F. Supp.

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3d 470, 488 (D.N.J. 2017) (holding that online complaints from 2009 and early 2010 about the defendant's product, predating the plaintiffs' purchases, conceivably address the element of the defendant's knowledge).

Retailers may be tempted to see the silver lining in the holding of *Borkman*. If online complaints can be held to put a retailer on notice of an alleged defect (and, in turn, impose on it the duty to disclose), those same complaints could also put the consumer on notice of the defect. They should avoid that temptation.

In 2013, the Ninth Circuit in *Diaz v. First Am. Home Buyers Prot. Corp.*, 541 F. App'x 773 (9th Cir. 2013), refused to impute to the plaintiff knowledge of the allegedly concealed practices "by virtue of online consumer complaints." (*Id.* at 775.) According to the court, "[t]he fact that the complaints were in the public domain did not place [the plaintiff] on constructive notice." (*Id.*) And even if they did, the Ninth Circuit held, the plaintiff "would have been justified in treating them as the opinions of unhappy customers rather than assuming them to be true." (*Id.*)

As with most aspects of the law that involve the internet, the question of whether consumer complaints can be held to put a retailer on notice of an alleged product defect is still evolving. Obviously, where the complaints are posted, to whom they are made, the frequency with which they are made and their substance will all affect the answer. But as more and more consumers are turning to the internet to voice their grievances, retailers should be cognizant of the fact their duty to disclose could depend on online chatter.



IV. Conclusion

IV. Conclusion

By Sam Camardo

Class actions are alive and well. *Spokeo* has not been the bar to statutory standing theories that many portended it would be. Data-breach class actions continue to proliferate, and plaintiffs' persistence in bringing these cases, despite early standing and damages hurdles, has paid dividends. Now, a court is more likely than not to permit a consumer's complaint against a breached entity to proceed beyond the Rule 12 stage. And in a rare class-certification decision, an Alabama federal court held that a data-breach case was certifiable despite the individual causation and damage issues that would necessitate mini-trials. Similarly, defendants took a hit in California when the California Supreme Court declined to overrule the appellate court's "momentum to buy" holding, which allowed consumers to skirt the individualized issues of reliance that typically prevent certification of fraud-based claims.

But not all was bad for defendants in 2017. The Supreme Court handed down two personal jurisdiction cases – *Bristol-Myers Squibb* and *Tyrrell* – that should give defendants ammunition to break up multi-plaintiff cases brought in states where they are not headquartered. And while consumer data-breach cases have been going poorly for defendants, claims brought by issuing banks may be curtailed in light of the Seventh Circuit's holding that the economic loss rule is tailor-made to bar those claims.

Last year and the beginning of 2018 saw rapid development in class action jurisprudence. Given the continued rise of class action claims, we can expect the following year to be just as fruitful. We will continue monitoring these developments to ensure that you are best prepared to make sense of this ever-developing area of the law.