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Class Action Roundup

Winter 2016

Where the (Class) Action Is

This issue of *Roundup* wraps up 2015 with another slate of interesting cases spanning industries and subject matter. The running theme of ascertainability is now stretching into antitrust in a recent decision involving the egg industry, demonstrating that this issue continues to be at the core of many class certification arguments. The banking industry is experiencing varying decisions on certification, and consumer protection cases continue to heat up on the same issue.

The topic of worker classification was again addressed in the last quarter with cases involving everything from Uber drivers in California to strippers in South Florida. Air quality and ground contamination were hot issues across several environmental cases, and the TCPA and hacking concerns dominate the privacy arena.

This past quarter witnessed the approval of a $275 million settlement in the polyurethane foam antitrust MDL and a $360 million settlement in the air cargo shipping antitrust MDL. Still, judges were just as quick to reject some settlements and not allow opt-out defendants to change their minds when a ruling is not to their liking.

We hope that 2016 is off to a good start for you. We appreciate your thoughts and invite you to send any feedback you have about the *Roundup*. Enjoy!

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Antitrust

- **No Egg-ception: Ascertainability Requires Objective Criteria**

  In re Processed Egg Products Antitrust Litigation, No. 08-md-2002 (E.D. Pa.) (Nov. 10, 2015). Judge Pratter. Denying class certification.

  Domestic egg purchasers sued egg producers and trade groups, alleging that they suppressed the supply of eggs to fix egg prices. The plaintiffs could produce no objective records to prove who purchased the price-fixed eggs, but argued that class members could be readily identified with class members' affidavits that they fall within the class definition. Judge Pratter disagreed because affidavits alone—without objective proof of purchase—are insufficient to identify class members.

- **Individualized Injuries Grind Truck Transmission Suit to a Halt**

  In re Class 8 Transmission Indirect Purchaser Antitrust Litigation, No. 11-00009 (D. Del.) (Oct. 21, 2015). Judge Robinson. Denying class certification and dismissing case.

  Truck purchasers sued transmission manufacturers and suppliers, alleging that they entered into long-term agreements to maintain artificially high transmission prices in violation of state antitrust laws. Judge Robinson declined to certify a class of truck purchasers because they were indirect purchasers of transmissions and could not prove through common evidence that (1) the transmission manufacturer overcharged all of the transmission suppliers; and (2) those overcharges were passed all the way down the supply chain to the truck purchasers. ■

CLASS-IFIED INFORMATION

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Banking & Financial Services

ING Customers Win Partial Certification for Annuities' Undisclosed Derivative Structure

Abbit v. ING USA Annuity & Life Ins. Co., No. 13-cv-2310 (S.D. Cal.) (Nov. 16, 2015). Judge Curiel. Granting in part motion for class certification.

Judge Curiel certified two classes of senior citizens against ING USA Annuity and Life Insurance Co. He certified a multistate breach of contract class (and a California statutory law class), finding sufficient common evidence that the contract values were below the minimum amounts ING guaranteed due to the low prices of the undisclosed derivatives structure. He refused to certify claims that ING failed to calculate and compound interest daily, which would require extrinsic evidence and individualized determinations as to the annuitants' knowledge and understanding of the contract language.

The judge also denied certification on common law claims for breach of implied covenant of good faith and fair dealing, breach of fiduciary duty, and fraudulent concealment. The judge also denied certification under the fraudulent prong of California's Unfair Competition Law because the plaintiff had no evidence that any uniform materials were provided to class members or that independent agents made any representations regarding the practices at issue.

Pursing RICO Allegations, Court Certifies Narrow Class of Wells Fargo Borrowers

Bias v. Wells Fargo & Co., No. 12-cv-00664 (N.D. Cal.) (Dec. 17, 2015). Judge Gonzalez Rogers. Granting in part motion for class certification.

Judge Gonzalez Rogers granted partial certification for Wells Fargo home mortgage loan borrowers on claims that the bank overcharged them for third-party home appraisals, finding common proof that Wells Fargo never disclosed the appraisal charge to customers. The court limited the certification to RICO claims for customers whose loans were serviced by Wells Fargo and who actually paid for a broker's price opinion (BPO) in the four-year limitations period. Judge Gonzalez Rogers declined to certify a class of borrowers who were charged for, but never paid for, a BPO. She also denied the motion as to claims for unjust enrichment, fraud, and California's Unfair Competition Law, in part, based on a conflicts of law analysis.

Upon Further Inspection, Homeowners Cannot Gain Certification of Claims Against Citi and Chase

Stitt v. Citibank, N.A. No. 12-cv-3892 (N.D. Cal.) (Dec. 17, 2015). *Ellis v. J.P. Morgan Chase & Co.*, No. 12-cv-3897 (N.D. Cal.) (Dec. 17, 2015). Judge Gonzalez Rogers. Denying motions for certification.

In two separate suits against Citibank and JPMorgan Chase, homeowners alleged that each bank charged unnecessary property inspection fees when borrowers defaulted on their loans. In two orders issued the same day, the court denied separate class certification motions – for different reasons. Judge Gonzalez Rogers denied the Citi plaintiffs' class because determining which class members were entitled to relief would require too much individualized inquiry. The plaintiffs' claims required proof that class members relied on alleged misrepresentations in their loan agreements. The court rejected the plaintiffs' argument that it could rule whether Citi's practice was unlawful as to the entire class because

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all putative class members were subject to the same policy of charging homeowners for mandatory property inspections.

The court denied the Chase class, which potentially included more than 1.5 million homeowners nationwide, because that class would contain homeowners with mortgages from other banks, with different internal policies for ordering inspections. The court held that the Chase plaintiffs could not show that the bank applied its automated system for ordering property inspections in a uniform manner to the putative class over the 10-year class period.

▪ Individual Causation Inquiries Do Not Doom Certification Bid for FDCPA Claims

McMahon v. LVNV Funding, LLC, No. 15-8018 (7th Cir.) (Dec. 8, 2015). Vacating order denying class certification.

A putative class of one-time debt holders who received outdated collection letters from LVNV Funding, LLC, got another chance to gain class certification. The Seventh Circuit vacated an order denying a class certification motion because of individual causation. The Seventh Circuit said that was "erroneous" for several reasons. First, it did not take into account the possibility of bifurcating the case into a liability phase and a damages phase. Second, it was internally inconsistent: the district court found that the amount of each class member's actual damages was "capable of ministerial determination," but that the causation issue was not, even though a plaintiff must prove causation to establish actual damages. Finally, proof of causation is irrelevant to determining class membership because the FDCPA is a strict-liability statute. ■

Consumer Protection

In the End, Standing Comes at the Beginning

Madanat v. First Data Corp., No. 14-4316 (2d Cir.) (November 3, 2015). Vacating and remanding judgment.

The Second Circuit has reversed a district court decision that a class plaintiff can lose standing during the pendency of the lawsuit. In a contract dispute, the district court had certified a Rule 23(b)(2) class, but dismissed the lead plaintiff's individual and class claims because he lacked standing to sue First Data, which was no longer attempting to enforce the clause against him. The district court concluded that "the only reason this case is going on" is for an award of attorneys' fees to class counsel.

The Second Circuit vacated the district court's judgment because a standing determination is made "as of the commencement of suit." Even if First Data's eventual decision not to seek payment might have mooted Madanat's individual claims, that decision had no bearing on whether Madanat had standing at the outset of the lawsuit. The Second Circuit's decision is consistent with the Supreme Court decision in *Campbell-Ewald Co. v. Gomez* that a settlement offer or offer of judgment does not moot a class plaintiff's individual case.

Burn: Court Nixes Sunscreen Classes

Nathan Dapeer v. Neutrogena Corporation, No. 14-22113 (S.D. Fla.) (Dec. 1, 2015). Judge Cooke. Denying class certification motion.

Nathan Dapeer claimed that Neutrogena misled consumers about the relative benefits of higher-level SPF protection in its suntan lotion. The court found a predominant common question, but denied the motion for lack of no ascertainability and typicality. Long portions of Dapeer's deposition transcript showed he was "unable to recall details crucial to his claim," such as where he bought the product, for how much, and when. The court noted "[t]his is obviously quite troubling because, if the representative plaintiff who was offended enough to bring suit cannot remember these important details, it is unlikely that many putative class members will remember either." It was unclear how plaintiffs intended to locate and identify potential class members. Dapeer also lacked standing because he could not even prove he had made a purchase. Without standing, he could not be a typical plaintiff. The court also denied class certification on an unjust enrichment claim because state law variations created a "plethora" of conflicts to defeat predominance.

Not-so-Instant Class for Coffee Buyers

Suchanek v. Sturm Foods, Inc., and Treehouse Foods, Inc., No. 11-cv-565 (S.D. Ill.) (Nov. 3, 2015). Judge Rosenstengel. Denying motion for reconsideration of class certification.

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CLASS-IFIED INFORMATION

Cari Dawson

Cari Dawson will answer the question "Is This CAFA or Kafka? Multistate Actions in a Time of Metamorphosis" at the ABA Section of Litigation Annual Conference in Chicago, April 13–16.

Coffee buyers have finally obtained certification in a 2011 class action alleging that Sturm Foods used the term "soluble and microground" to hide that their coffee pods contained 95 percent instant coffee. The case made a trip to the Seventh Circuit, which revived the suit after certification denial and summary judgment. (That detailed decision, *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750 (7th Cir. 2014), will guide class certifications in the Seventh Circuit for the foreseeable future.) On remand, the district court issued a 50-page order analyzing and admitting damages and consumer survey expert testimony and granting class certification.

Following *Comcast v. Behrend*, the court conducted a searching analysis of damages proof and found, consistent with *Comcast*, that the plaintiffs' two damages models—full refund and partial refund—both tracked the liability theory that consumers would not have purchased the product but for the allegedly deceptive labeling. The court also held that the plaintiffs proved predominance and superiority because the central liability question—whether the labeling was likely to deceive a reasonable consumer—was appropriate for classwide resolution, even though proximate cause and reliance may require individualized proof. And following a 2015 Seventh Circuit decision, the court rejected the defendants' attempt to impose heightened ascertainability requirements.

- **A Specific Misrepresentation Must Be Made to All Class Members**

  Cabral v. Supple LLC, No. 5:12-cv-00085 (C.D. Cal.) (Jan. 7, 2016). Judge Fitzgerald. Denying plaintiff's request to renew motion for class certification

  Arlene Cabral alleged that Supple LLC falsely promoted its nutritional drinks in infomercials as effective for treating joint pain. After the district court certified a class of all Californians who bought that product, the Ninth Circuit reversed on the principle that "it is critical that the misrepresentation in question be made to all of the class members." On remand, Cabral limited her proposed class to those who called a designated 800 number after viewing Supple's allegedly false infomercial.

  The district court rejected the renewed motion to certify because Cabral again had failed to identify any specifically worded false statement to tie together a class who viewed Supple's infomercials. At most, Cabral insinuated a common, underlying false message, as opposed to specific representations, precisely what the Ninth Circuit rejected. The district court also rejected a proposed injunctive relief class because Cabral did not allege that she planned to purchase Supple in the future and, based on her expressed disappointment with the product, was not likely to be harmed again. ■

Employment

Third Circuit Joins Sister Circuits with Predominate Benefit Test

Babcock v. Butler County, No. 14-1467 (3d Cir.) (Nov. 24, 2015). Affirming the order granting defendant's motion to dismiss.

The Third Circuit affirmed the dismissal of a lawsuit claiming that time allotted for the Butler County Prison corrections officers' meal periods was compensable under the Fair Labor Standards Act (FLSA). Noting that nothing in the FLSA directly addresses compensation for meal periods, the court adopted the "predominant benefit" test, which applies in all but two circuits (Ninth and Eleventh). Under that totality of the circumstances test, the court held that the plaintiffs received the primary benefit of their agreed-upon 15-minute lunch break and were not entitled to compensation for that period under the FLSA.

New Roadblocks for Uber in California Class Action

O'Connor v. Uber Technologies, Inc., No. 13-cv-3826 (N.D. Cal.) (Dec. 9, 2015). Judge Chen. Granting in part and denying in part supplemental class certification.

California's Uber driver class action is back in the spotlight, this time with new class members and claims. The court certified a subclass of drivers by invalidating Uber's arbitration agreements with Private Attorneys General Act (PAGA) waivers. Judge Chen's order permits possibly thousands of Uber drivers to join the class action—drivers whose claims would have otherwise been forced into individual arbitration. Class members can also now proceed with their expense reimbursement and tipping claims, which seek damages for transportation and cell phone costs and all tips.

Miami Strippers Stripped of Lawful Wages

Espinoza v. Galardi South Enterprises, Inc., No. 14-21244 (S.D. Fla.) (Jan. 11, 2016). Judge Goodman. Granting in part motion for class certification.

The district court certified a minimum wage violations class of dancers working at the King of Diamonds Miami strip club. Whether the strip club treated all dancers as independent contractors was common to all class members. The court excluded from the class all dancers who had

CLASS-IFIED INFORMATION

David Carpenter

Micah Moon

Read on to find out why the Supreme Court decided "In the Beginning There Was *Genesis*, But *Campbell* Made It Moot" in *Corporate Counsel*.

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previously settled federal wage claims against the strip club in separate litigation because it would be improper to pursue federal claims in one suit and then state law claims in a subsequent one.

▪ Judge Marks Down Certification in J.C. Penney Vacation Pay Suit

Tschudy v. J.C. Penney Corp, Inc., No. 11-cv-1011 (S.D. Cal.) (Dec. 9, 2015). Judge Miller. Granting motion to decertify class.

Last year, a class of 65,000 J.C. Penney employees obtained class certification in a vacation pay lawsuit. After discovery, the court determined that the inclusion of former management, former non-management, and current employees was "unworkable" and failed the typicality and adequacy requirements. Many of the former non-management employees were never entitled to the vacation pay, and the current employees had no standing because they were still with the company. Overall, the class lacked commonality. The court had no choice but to decertify the action. ■

Environmental

Pipeline Defendants Allowed in Federal Court, for Now

Robertson v. Chevron, No. 15-30920 (5th Cir.) (Dec. 31, 2015). Reversing remand to state court.

The Fifth Circuit reversed a Louisiana district court's remand of this proposed mass action by contractors and landowners against several oil companies for radioactive contamination from oil pipeline cleaning. The oil companies removed the case with the district court's finding under the Class Action Fairness Act (CAFA). The Fifth Circuit disagreed that no plaintiff's claim exceeded CAFA's individual $75,000 amount-in-controversy. The appellate court declined to address whether the pipeline companies had met CAFA's other requirements for federal jurisdiction. The case returns to the district court, where the parties will resume their battle over CAFA jurisdiction.

Steel Mining Company Cannot Escape Private Nuisance and Trespass Claims

Maroz v. ArcelorMittal Monessen LLC, No. 2:15-cv-770 (W.D. Pa.) (Oct. 15, 2015). Judge Schwab. Denying motion to dismiss proposed class action.

Judge Schwab denied ArcelorMittal's bid to dismiss a proposed class action. Local residents claim one of ArcelorMittal's steel mining plants is polluting their land with foul odors and particulates. Judge Schwab threw out the residents' public nuisance and punitive damages claims due to a lack of communitywide harm or egregious conduct on the part of the steel titan. But he allowed the amended negligence, trespass, and private nuisance claims to move forward, despite acknowledging the underlying facts to be meager at best.

WV Chemical Spill Class Moves Forward, Partially

Good v. American Water Works Company, Inc., No. 14-1374 (S.D. W.Va) (Oct. 8, 2015). Judge Copenhaver. Certifying the liability class but denying the damages class.

Judge Copenhaver split the baby in the dispute concerning the well-publicized January 2014 chemical spill in West Virginia that left 300,000 without drinking water. The vast majority of class members are individuals who lost residential water, employees who lost wages, and businesses that lost revenue due to interrupted water supply.

On liability, the court held the class was appropriate because the claims arose from "singular factual circumstances." But the court rejected the attempt to prove classwide damages using expert reports that employed faulty methodologies and "shaky economic averages." Though the experts said the spill caused $77 million in damages to businesses and $51 million to residents, the court ultimately found that the experts' aggregated damages analysis failed to account for each class member's actual losses in the days after the spill. For businesses and wage earners, proof of lost profits generally requires an individualized inquiry. And for individuals, measuring damages from the loss of residential water is "tied up in individual factors unique to each household." The reports failed to account for those individualized factors.

Now, the monster class—224,000 members—moves forward. Potentially followed by a tidal wave of individual damage claims.

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▪ Iowa Homeowners Win Class Certification in Milling Pollution Case

Freeman v. Grain Processing Corp., No. LACV021232 (D. Iowa) (Oct. 28, 2015). Judge Reidel. Granting class certification of state law nuisance claim.

Judge Reidel certified a class of 4,000 homeowners who brought claims of nuisance and trespass against a nearby corn mill because of pollutants and odors. The court concluded that, because Iowa law measures the existence of a nuisance objectively, individual issues were immaterial and the claims were well-suited for class certification. The homeowners acknowledged that individuals living close to the plant likely suffered different injuries than those living farther away. Judge Reidel avoided potentially individualized issues by creating two subclasses based on mill proximity. The court also hinted that it will allow homeowners to seek formulaic damages calculations, rather than requiring individualized, property-by-property analysis. ■

Privacy

Third Circuit Gets Google Suit Going Again

In re Google Inc. Cookie Placement Consumer Privacy Litigation, No. 13-4300 (3d Cir.) (Nov. 10, 2015). Affirming and vacating in part district court's dismissal.

The Third Circuit affirmed in part and vacated in part a Delaware district court's dismissal of allegations that Google bypassed Internet browser settings and placed tracking cookies on the plaintiffs' web browsers, overriding cookie blockers and contravening Google's own public statements regarding its privacy practices. The Third Circuit held that the district court should not have dismissed the plaintiffs' California law privacy claims because Google's alleged activity evidenced the "serious invasion of privacy contemplated by California law." The panel affirmed dismissal of other claims, finding that: (1) the plaintiffs' personal computing devices are not "facilities" under the Stored Communications Act, which only protects systems "through which an electronic communication service is provided"; and (2) the plaintiffs did not plead cognizable losses under the Computer Fraud and Abuse Act from Google's alleged actions.

TCPA Covers Roommates Too

Mark Leyse v. Bank of America NA, No. 14-4073 (3d Cir.) (Oct. 14, 2015). Vacating district court's dismissal and remanding.

The Third Circuit vacated a New Jersey district court's dismissal of a putative class action alleging that Bank of America ("BofA") violated the Telephone Consumer Protection Act (TCPA) by placing prerecorded telemarketing calls intended for Leyse's roommate to a phone they shared. The district court granted BofA's motion to dismiss in 2012 and again in 2014, holding that Leyse could not be considered a "called party" under the TCPA. The Third Circuit disagreed because the legislative history of the TCPA indicates a congressional intent to protect both intended and unintended recipients from unwanted calls and Leyse's status as a "regular user of the phone line and occupant of the residence" afforded Leyse the same TCPA protection as his roommate.

Maybe It Is an "Autodialer," Third Circuit Says

Dominguez v. Yahoo, Inc., No. 14-1751 (3d Cir.) (Oct. 23, 2015). Reversing and remanding district court's grant of summary judgement.

The Third Circuit revived a proposed TCPA class action in the Eastern District of Pennsylvania that accused Yahoo of sending unsolicited text messages to the plaintiff's cellular phone, citing an FCC declaratory ruling that expanded the definition of an automatic telephone dialing system ("autodialer") under the TCPA. The plaintiff had alleged that Yahoo violated the TCPA by sending him approximately 54 unsolicited text messages per day – a total of 27,809 texts over 17 months – via an autodialer system. The Third Circuit remanded the case for the district court to address whether Yahoo's system qualified as a system that is "able to store or produce numbers that themselves are randomly or sequentially generated even if the autodialer is not presently used for that purpose."

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- **Toyota, Ford, and GM Lock the Doors on Car-Hacking Class Action Claims**

  Helene Cahen v. Toyota Motor Corp., No. 15-cv-01104 (N.D. Cal.) (Nov. 25, 2015). Judge Orrick. Granting motion to dismiss.

  Toyota, Ford, and GM escaped a putative class action stemming from their cars' alleged vulnerabilities to hackers after Judge Orrick held that the plaintiffs failed to plead an injury-in-fact. Judge Orrick reasoned that purely speculative risks of falling victim to future hacking did not constitute plausible injuries in fact, especially in light of the plaintiffs' failure to allege that anybody outside of controlled testing conditions had ever been hacked, or that any actual, credible, or impending threat of harm or economic loss existed. Judge Orrick also found that the plaintiffs lacked standing to pursue California invasion of privacy claims against GM and Toyota related to the companies' geographic tracking and data collection practices for similar failures to allege actual harm or a credible threat of future harm. ■

Products Liability

Ford Exhausts Arguments Against Class Certification

Sanchez-Knutson v. Ford Motor Co., No. 14-cv-61344 (S.D. Fla.) (Oct. 6, 2015). Judge Dimitrouleas. Granting in part motion for class certification.

A Florida federal judge certified a class of all people who bought or leased certain Ford Explorer models from authorized dealers in Florida between 2011 and 2013. The plaintiffs alleged that Ford produced an entire product line with defective exhaust systems that exposed passengers to dangerous levels of carbon monoxide and other gases. The court held that the plaintiffs sufficiently tied their proposed economic damages model to their legal claim involving an entire product line. The court rejected the plaintiffs' attempt to certify an injunctive relief class because they earlier withdrew their judicial recall claim to avoid Ford's preemption and primary jurisdiction arguments.

Judge Finds Class Action Lawsuit to Be Catalyst for Ford's Vehicle Recall

MacDonald v. Ford Motor Co., No. 13-cv-02988 (N.D. Cal.) (Nov. 2, 2015). Judge Tigar. Awarding attorneys' fees to proposed class.

Ford lost its argument against class action attorneys' fees because the auto company could not prove that its own independent work, rather than a class action lawsuit, led to the recall of its allegedly defective hybrid crossover vehicles. The court found "significant holes" in Ford's story that the employee tasked with handling inquires about vehicle problems did not get around to the question of whether certain models had defective cooling pumps until after the company's motion to dismiss was denied in March 2014. Ford's recall notice to the National Highway Traffic Safety Administration (NHTSA) stated that it discovered in April 2014 the potential for cooling pump failure to cause sudden stalls. But the court concluded that "Ford's timeline relies too heavily on the power of coincidence." The court found evidence that the company had known about the defect since 2005 and created a department tasked with examining stalling trends in the NHTSA complaints, consumer reports, and lawsuits.

CLASS-IFIED INFORMATION

Colin Kelly

Sarah O'Donohue

Custom manufacturing — in 3-D! *Law360* asks "Are 'Casual' Auto Sellers Subject to Strict Liability?"

Judge Burns Through Product Liability Claims in Defective Hairdryer Class Action

Czuchaj v. Conair Corp., No. 13-cv-01901 (S.D. Cal.) (Nov. 12, 2015). Judge Benitez. Granting in part motion for class certification.

A California federal judge certified a nationwide class of Conair hair dryer purchasers. The court rejected a class for product liability claims

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for alleged personal injuries and property damage from hair dryers that caught fire and ejected hot coils because those claims "call for a disjointed class action." But the court held that whether the hair dryers were defective and whether Conair breached implied warranties were appropriate questions for a class action. The court also certified California and New York subclasses raising consumer protection claims, but denied a Pennsylvania subclass because the state's law requires proof of each individual plaintiff's justifiable reliance.

▪ Second Time's the Charm for HP Consumer Class Certification

Karim v. Hewlett-Packard Co., No. 12-cv-05240 (N.D. Cal.) (Dec. 18, 2015). Judge Hamilton. Granting motion for class certification.

After an earlier failed attempt to certify a nationwide class, the plaintiffs overcame their previous predominance issue by limiting the proposed class to California consumers who purchased customized HP computers online using an allegedly misleading "help me decide" feature. That feature allegedly promised wireless card bandwidth that the company did not deliver. The court relieved the plaintiffs from proving that HP customers actually read the statements in the "help me decide" section, so long as those statements were actually available. Although the attempt to defeat predominance at the certification stage failed, the court held that HP "undoubtedly retains the right to present evidence of its affirmative defense of non-exposure." ■

Securities

Students in College Exam Class Action Flunk Standing Test

Cathleen Silha v. ACT, Inc., No. 15-1083 (7th Cir.) (Nov. 18, 2015). Affirming dismissal.

The Seventh Circuit affirmed the dismissal of a putative class action brought by ACT and SAT test takers whose personal information was sold for profit by test-taking organizations ACT, Inc., and The College Board. The district court rejected the students' theories of alleged injury from the examination fees they paid, diminished value of their personal information, and fees that third parties paid to the defendants for the students' personal information. The Seventh Circuit affirmed the dismissal, finding that the students lacked injury sufficient to confer standing because they did not adequately allege harm from the defendants' profiting from the "information exchange programs" in which the students consented to participate or explain how the students' personal information was devalued by such sale.

Defunct SAC Capital Advisors Keeps Sinking

Kaplan v. SAC Capital Advisors, No. 12-cv-9350. *Birmingham Retirement and Relief System v. SAC Capital Advisors*, No. 13-cv-2459. (S.D.N.Y.) (Dec. 2, 2015). Judge Marrero. Certifying two classes.

Steven A. Cohen, who was recently barred from managing investor funds for two years, is facing numerous lawsuits relating to his now-defunct firm SAC Capital's insider trading. Elan Corporation brought a suit claiming that the insider trading scandal affected their trades of SAC's stock. Although SAC argued that the investors could not show that the classes relied on nonpublic information to make investment decisions, the court nevertheless granted class certification. According to the court, SAC's failure to disclose information was enough for the shareholders to make a preliminary showing of reliance on nonpublic information. The shareholders demonstrated the value of the information by pointing only to changes SAC's stock prices after the insider trades occurred. ■

Settlements

Antitrust

In re Polyurethane Foam Antitrust Litigation, No. 10-md-2196 (N.D. Ohio) (Nov. 19, 2015). Judge Zouhary. Approving $275.5 million settlement.

Judge Zouhary approved six settlements worth $275.5 million between foam manufacturers and direct-purchasers who alleged they had been sold price-fixed foam products. The court rejected the lone objection of Michael Narkin, "a serial objector, whose carbon-copy objections district courts frequently reject as baseless." The court reduced class counsel's fee from 30 percent of the settlement fund to 23.6 percent.

The court refused to let opt-out plaintiff Ashley Furniture rejoin the class. "Ashley is a sophisticated company" that took a "gamble," the court said. It "would prejudice the Class" to allow Ashley to reverse course now that it "has second thoughts" about its opt-out decision.

In re Comcast Corp. Set-Top Cable Television Box Antitrust Litigation, No. 09-md-2034 (E.D. Pa.) (Nov. 5, 2015). Judge Brody. Rejecting $15.5 million settlement.

Judge Brody rejected a $15.5 million antitrust class settlement between Comcast and current and former customers forced to rent set-top boxes to get premium cable. The settlement class would have included all premium cable subscribers from California, Washington, and West Virginia dating back to 2005. Judge Brody held that the settlement class was not ascertainable because the plaintiffs and Comcast—which had records reaching back only to 2005—had not identified a reliable method for identifying former subscribers.

CLASS-IFIED INFORMATION

Doug Arnold

Sarah Babcock

Nicole DeMoss

The *Toxics Law Reporter* circles back to common sense in "Finding Finality in CERCLA Settlements."

In re Air Cargo Shipping Services Antitrust Litigation, No. 06-md-1775 (E.D.N.Y.) (Oct. 13, 2015). Judge Gleeson. Approving $360 million settlement.

A $360 million antitrust settlement between several Asian airlines and companies that purchased air cargo services gained final court approval. Judge Gleeson held that the settlements were procedurally and substantively fair to the class of direct purchasers who paid price-hiked rates for air cargo services. The court also approved $73 million in attorneys' fees, which the court found was fair in view of the "hundreds of thousands of hours" the firms invested in the case.

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Consumer Protection

Berry v. LexisNexis Risk & Information Analytics Group Inc., Nos. 14-2006, 14-2050, 14-2101 (4th Cir.) (Dec. 4, 2015). Affirming injunctive class settlement.

The Fourth Circuit shot down arguments that a class settlement under the Fair Credit Reporting Act (FCRA) offering principally injunctive relief did not provide an adequate class remedy. According to the court, "[t]he objectors' exclusive focus" on monetary relief was legally unsupported and illogical because "there was no realistic prospect" that Lexis could "provide meaningful monetary relief to a class of 200 million people." The court also rejected the objectors' argument that the settlement was improper because injunctive relief was not provided under the FCRA. The court explained that "Lexis is free to agree to a settlement enforcing a contractual obligation that could not be imposed without its consent."

Banks v. Nissan North America Inc., No. 11-cv-2022 (N.D. Cal.) (Nov. 30, 2015). Judge Hamilton. Rejecting class settlement for excessive attorneys' fees.

Judge Hamilton halted a proposed class settlement in a suit alleging defective brakes in Nissan vehicles because class counsel's fee represented the lion's share ($3.43 million) of the $4.27 million settlement fund. According to the court, "where [only] 6.5% of the payout goes to class members, and 80.2% goes to the attorneys purporting to represent those class members, the tail is clearly wagging the dog." Noting that a significant percentage of the 1,500-member class would receive less than $20, the court said it would need to see a more "substantial benefit" to class members to justify such a large award to class counsel.

Tennille v. W. Union Co., No. 14-1432 (10th Cir.) (Nov. 17, 2015). Dismissing appeal.

The Tenth Circuit rejected Western Union's bid to challenge a $40 million fee award in a settlement of class claims alleging that Western Union unlawfully retained funds in failed wire transfers. Dismissing the appeal, the court held that Western Union lacked standing to challenge attorneys' fees that were "to be paid from the class recovery rather than the defendant's coffers." The court rejected as too speculative Western Union's argument that it had a "reversionary interest" in unclaimed funds that would be reduced by an excessive award.

Privacy

Davis v. Cole Haan Inc., No. 11-cv-01826 (N.D. Cal.) (Nov. 12, 2015). Judge White. Approving settlement with minimal attorneys' fees.

Judge White slashed attorneys' fees after holding that the parties had agreed to a "pure" coupon settlement. Class counsel had requested $125,000 in fees, but Judge White reduced the amount to $12,000 after only 336 class members used the coupons, representing savings of just $36,000. The court distinguished the case from the Ninth Circuit's opinion in *In re Online DVD-Rental Antitrust Litigation*, which held that an electronic gift card was not a coupon for purposes of the CAFA fee calculation requirements. Unlike the electronic gift cards, the Cole Haan "vouchers" had six-month expiration dates and no cash value—the "trappings" of a pure coupon settlement.

Securities

In Re Allied Healthcare Shareholder Litigation, No. 652188/2011 (N.Y. Sup. Ct.) (Oct. 23, 2015). Judge Ramos. Rejecting class settlement.

A New York State trial court refused to "rubber stamp" a disclosure-only securities class settlement, lambasting an emerging "culture" in derivative litigation to award fees for "relatively worthless settlements." The court's order was a culmination of repeated requests to counsel to justify why a disclosure-only settlement that offered general releases to officers and directors provided a significant benefit to shareholders. According to the court, the settlement offered "nothing to the shareholders except that attorneys they did not hire will receive a $375,000 fee and corporate officers who were accused of wrongdoing will receive general releases." ■