BakerHostetler 2014 Year-End Review of Class Actions

(*and what to expect in 2015)*

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The *BakerHostetler 2014 Year-End Review of Class Actions* offers a summary of some of the key developments in class action litigation during the past year. The *2014 Year-End Review* is a joint project of the firm's Class Action Defense, Securities, Antitrust, Data Privacy, Appellate, and Employment Class Action practice teams and is the fruit of collaborative efforts of numerous attorneys from across the firm. For updates throughout the year, please be sure to visit the blogs sponsored by each of these practice teams: *Class Action Lawsuit Defense*, *Antitrust Advocate*, *Data Privacy Monitor*, and *Employment Class Action*.

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Contents

I. Introduction

What are the limits of class litigation? That was the unspoken question lurking behind the most important class action cases in 2014, many of which we discuss in the following pages.

Courts wrestled to resolve issues such as the appropriate scope of class settlements, the viability of class certification based on statistical sampling, and the ability to evade a class action waiver in special circumstances. Indeed, after the Supreme Court spent the previous four years putting its gloss on class action doctrine, 2014 featured lower federal courts and state courts diving deep into the nuances of the aggregate litigation principles to fashion new law and new rules.

Unlike in previous editions of this *Review*, we do not have a large—or even particularly influential—body of Supreme Court law to light our path. Instead, in 2014 we had to wade through the district court dockets, the appeals court decisions, and the Supreme Court certiorari petitions to stay abreast of which trends were having the most impact in the class action arena.

We found, for instance, that California state courts are taking the lead on articulating precise class certification principles. We found—as we expected—that data privacy class actions are red-hot as courts struggle to determine which ones are viable and which ones do not qualify for class treatment. We found that debate over class waivers in arbitration agreements is not as settled as we once thought it was. It turns out the National Labor Relations Board disagrees with federal courts on the enforcement of class action waivers—and it's not going to back down until (and unless) the Supreme Court tells it to. Exploration of each of these issues—and all the others discussed below—necessarily involves probing for the class litigation boundaries. That is what courts encountered in 2014. And that is likely what they will have to spend much of 2015 continuing to resolve.

II. Developments in Class Action Procedure and Jurisdiction

A. Evolving Class Certification Standards

1. California Clamps Down on Trial by Formula

The California Supreme Court Leads the Way in 2014 on Class Procedure

Recent years provided so much U.S. Supreme Court class action case law to analyze, debate, and study that we tended to overlook what was happening in the state courts. Practically this made sense because the Class Action Fairness Act of 2005 made removal to federal court demonstrably easier and because the wheelhouse of employment class actions arises under the federal Fair Labor Standards Act, thereby satisfying federal-question jurisdiction.

But in 2014, the California Supreme Court stood shoulder to shoulder with the feds in issuing landmark class decisions. With two decisions sure to have significant impacts going forward (unless one of them is reversed by the U.S. Supreme Court), the California Supreme Court emerged as a significant adjudicator of class action practice and procedure. *Iskanian v. CLS Transp.*, *LA, LLC*, is discussed in further detail in Section II.B regarding its startling conclusion about the enforceability, or lack thereof, of class waivers in arbitration agreements vis-à-vis class claims brought under California's Private Attorney General Act. As it currently stands, the decision upends four years of U.S. Supreme Court law giving full support to Federal Arbitration Act policy in favor of enforcing arbitration agreements by creating a path around U.S. Supreme Court precedent for PAGA claims. On Jan. 20, 2015, the U.S. Supreme Court denied certiorari review, leaving the California Supreme Court's decision in place and setting up an intriguing federal-state divide in at least California.

Far more certain is the impact of *Duran v. U.S. Bank National Association*,[1] the most notable class action case of 2014. Indeed, when it comes to class certification procedure, *Duran* may be the most important case, period, since 2011's *Wal-Mart v. Dukes* or the U.S. Supreme Court's *Comcast Corp. v. Behrend* decision of 2013. Simply put, in *Duran*, the California Supreme Court issued a 51-page opinion that spells out why class certification in one of the most influential jurisdictions must cross a high bar that only the most truly cohesive classes are likely to clear.

In *Duran*, plaintiff loan officers alleged they were misclassified as outside salespersons under state law. The problems that led to the California Supreme Court's decision began in the trial court. First, the trial court certified a class of 260 plaintiffs. Then, the trial court bifurcated the trial between liability and damages. And then, the court further limited testimony to a sampling of the class. Eventually, the trial court found for the plaintiffs on the misclassification issue and delivered a verdict of approximately $15 million. The court of appeals reversed, and naturally the plaintiffs sought review by the California Supreme Court.

Much like the U.S. Supreme Court's *Wal-Mart* decision, *Duran* is full of insightful points of law regarding class procedure. Among them:

- Regarding manageability—"Trial courts deciding whether to certify a class must consider not just whether common questions exist, but also whether it will be feasible to try the case as a class action."[2]

[1] 325 P.3d 916.
[2] *Id*. at 930.

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- And "[i]n considering whether a class action is a superior device for resolving a controversy, the manageability of individual issues is just as important as the existence of common questions uniting the proposed class."[3]
- On recognizing a defendant's due process rights—"a class action trial management plan may not foreclose the litigation of relevant affirmative defenses, even when these defenses turn on individual questions."[4]
- And on misclassification claims in general—"a misclassification claim has the potential to raise numerous individual questions that may be difficult, or even impossible, to litigate on a classwide basis."[5]

That these arguments came from the California Supreme Court in an employment class action underscored the significance of the opinion. Remarkably, the California Supreme Court relied very little on *Wal-Mart*, at least not directly. *Wal-Mart* is cited substantively once in support of the now bedrock premise that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims."[6]

As much as *Duran* offers on general class procedure, its innovative effect may be on how the case influences the use of statistics to establish class liability. In rejecting the trial court's class certification methods, the California Supreme Court expressed open hostility toward the use of flawed statistical methodology, small sampling size, improper selection criteria, and poor control for nonresponsive plaintiffs. Indeed, the court explained that "[i]f statistical methods are ultimately incompatible with the nature of the plaintiffs' claims or the defendant's defenses, resort to statistical proof may not be appropriate. Procedural innovation must conform to the substantive rights of the parties."[7]

And as for misclassification claims, the court all but prohibited the use of representative sampling to prove liability in the way that might be appropriate for securities fraud or mass torts: "This rationale for aggregate proof simply has no application in wage and hour litigation alleging misclassification. . . . Liability to one employee is in no way excused or established by the employer's classification of other employees."[8]

The court didn't stop there, noting further that "[i]f trial proceeds with a statistical model of proof, a defendant accused of misclassification must be given a chance to impeach

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[3] *Id*. at 932.
[4] *Id.* at 935.
[5] *Id.* at 930.
[6] *Id.* at 935 (quoting *Wal-Mart*, 131 S. Ct. at 2561).
[7] *Id.* at 939.
[8] *Id.* at 936-37.

that model or otherwise show that its liability is reduced because some plaintiffs were properly classified as exempt."[9]

Unsurprisingly, the California Supreme Court found significant flaws in the trial court's certification of the class in affirming the appeals court reversal.[10] Four years ago, the U.S. Supreme Court changed the way parties and courts assess class certification when it confirmed the necessity of using a rigorous analysis to ensure that Rule 23 requirements were met to certify a class for aggregate litigation. In 2014, with *Duran*, the California Supreme Court followed in those footsteps by establishing a rigorous analysis sort of test for statistical sampling used to certify classes. Just as *Wal-Mart* has become a hallmark of briefs and class certification opinions, it is likely too that *Duran* will find its way into those same publications. Thus, understanding the nuance of *Duran*'s discussion of statistics will be a useful asset for class action practitioners.

Sampling to Establish Liability Remains a Viable Tactic Even After **Wal-Mart** ***and*** **Duran**

As noted, *Duran* did not categorically hold that statistical sampling may never be used to establish liability. But it did express significant doubt about the veracity of statistical sampling where careful measures were not taken to ensure that proper sampling methods truly assessed appropriate liability.

That message resonated for the Ninth Circuit Court of Appeals in *Jimenez v. Allstate Ins. Co.* in September, when it affirmed certification of a class of insurance claims adjusters who alleged they worked unpaid, off-the-clock overtime in violation of California law.[11]

Statistical sampling, the Ninth Circuit held, can be used to certify a class within the confines of *Wal-Mart*, *Comcast*, and *Duran* when the sample accurately measures narrowly defined liability and is strenuously tested. Moreover, the court pointed out that since *Wal-Mart* and *Comcast*, "circuit courts including this one have consistently held that statistical sampling and representative testimony are acceptable ways to determine liability so long as the use of these techniques is not expanded into the realm of damages."[12]

In *Jimenez*, the Ninth Circuit approved of the district court's procedure, which included preserving "Allstate's opportunity to raise any individualized defense it might have at the damages phase" and rejection of "plaintiffs' motion to use representative testimony and

[9] *Id.* at 937.
[10] Incidentally, the California Supreme Court remanded to the trial court to "start anew by assessing whether there is a trial plan that can properly address both common and individual issues if the case were to proceed as a class action." *Id.* at 951 (Liu, J., concurring).
[11] 765 F.3d 1161.
[12] *Id.* at 1167.

sampling at the damages phase." "This split preserved both Allstate's due process right to present individualized defenses to damages claims and the plaintiffs' ability to pursue class certification on liability issues based on the common questions of whether Allstate's practices or informal policies violated California labor law."[13]

The Ninth Circuit did not directly address the difficulty of using statistical sampling where liability and damages are inextricably woven together, as they often are in overtime cases. Because an employer may have no liability for any individual plaintiff until and unless the plaintiff can demonstrate damages, using sampling to gauge liability may still pose due process risks upon the defendant or class members. Reflecting on this, the court pointed to other circuit courts that certified classes as to liability by examining whether plaintiffs were harmed by the same conduct of the defendant despite disparate amounts of damage.[14] The court's position was that while sampling could be used to establish whether Allstate violated the law on a class-wide basis—in theory—then Allstate could still enjoy a due process right of individually challenging damages. The case stands as a noteworthy example of a court willing to accept narrow sampling to establish class liability if the plaintiff can convincingly show that a defendant's due process rights will be maintained. Trial by formula is not permitted. But trial by carefully curtailed sampling may be the certification method of the near future.

2. Certifying Classes in a Post-*Comcast* Environment

In 2015, we saw further development of class certification procedures stemming from the Supreme Court's *Comcast* decision.

The Supreme Court handed down a landmark decision in *Comcast Corp. v. Behrend* in 2013.[15] In *Comcast*, the district court certified a liability and damages class. The plaintiffs' damages model, however, measured damages flowing from four different theories of liability, only one of which the district court had certified. The Supreme Court reversed class certification because the plaintiffs' damages model did not reflect their sole liability theory. "[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory."[16] Because the plaintiffs' model included damages unrelated to the defendant's liability, the district court would be overwhelmed by individual damages calculations in smoking out the damages attributable to the lone liability theory. Accordingly, the plaintiffs had not shown predominance under Federal Rule of Civil Procedure 23(b)(3).

In *Comcast*'s wake, lower courts have had to decide whether Rule 23 requires

[13] *Id.* at 1168.

[14] *Id.* ("So long as the plaintiffs were harmed by the same conduct, disparities in how or by how much they were harmed did not defeat class certification.")

[15] 133 S. Ct. 1426 (2013).

[16] *Id*. at 1433.

predominance in damage calculations; that is, whether plaintiffs must show a class-wide damages methodology or whether individualized class damages are permissible. Generally speaking, *Comcast* has not had the seismic effect the class action defense bar anticipated. Some courts have indeed denied certification based on the plaintiffs' failure to provide a class-wide damages methodology. The majority of courts, however, have minimized *Comcast*, concluding that it requires only a class-wide injury, or have sidestepped the damages question by certifying liability-only classes.

In early 2014, the Supreme Court denied writs of certiorari in two class actions involving moldy washing machines.[17] At the appellate-court level, the Sixth and Seventh Circuits both held that *Comcast* required only a class-wide *injury*, not class-wide *damages*. Without the prospect of Supreme Court review of these decisions, many courts have embraced their interpretations of *Comcast*. In 2014, the Seventh and Ninth Circuits issued decisions reaffirming the class-wide injury view,[18] and the Fifth Circuit has now joined them.[19] In *In re Deepwater Horizon*, the Fifth Circuit concluded that "nothing in *Comcast* mandates a formula for [class-wide] measurement of damages in all cases."[20] Other district courts have followed suit, rejecting the class-wide-damages view of *Comcast* in favor of the class-wide-injury view.[21]

In addition to employing the class-wide-injury view, lower courts have minimized *Comcast* by bifurcating class actions into liability and damages phases. Federal Rule of Civil Procedure 23(c)(4) allows courts to certify class actions "with respect to particular issues." Courts have used Rule 23(c)(4) to certify liability-only classes, while leaving questions of damages for individualized determinations following the liability phase.[22] In *Gomez v. PNC Bank, National Association*, the District of Northern Illinois described the ways it could resolve individualized damages following the liability phase: "appoint[] a magistrate judge or special master to preside over individual damages proceedings or provid[e] notice to class members concerning how they may proceed to prove damages."[23] Because bifurcation respects *Comcast*'s predominance concerns but does

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[17] *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 798 (7th Cir. 2013) *cert. denied*, 134 S. Ct. 1277 (2014).
[18] *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014).
[19] 739 F.3d 790 (5th Cir. 2014).
[20] *Id*. at 815.
[21] *See,* e.g., *Starr v. Chicago Cut Steakhouse, LLC,* -- F. Supp. 3d --, 2014 WL 7146061, at *11 (N.D. Ill. Dec. 15, 2014) (quoting *Butler*, 727 F.3d at 799).
[22] *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014) (affirming class certification when district court "preserved Allstate's opportunity to raise any individualized defense it might have at the damages phase").
[23] *See,* e.g., *Gomez v. PNC Bank, Nat'l Ass'n*, -- F.R.D. --, 2014 WL 3640798, at *10 (N.D. Ill. July 24, 2014) (citation and quotation marks omitted).

not require plaintiffs to present a class-wide damages model at the certification stage, it has become quite popular in the lower courts.[24] In *Fort Worth Employees' Retirement Fund v. J.P. Morgan Chase & Co.*, for example, the plaintiff maintained that it *could* produce a class-wide damages model, but had not done so at the class certification stage. While this precluded the plaintiff from certifying a damages class, the court used the bifurcation method rather than denying class certification outright. It certified a liability-only class, leaving damages calculations for another day.[25]

Cases in which the plaintiffs can in fact provide a class-wide damages methodology form a special subset of post-*Comcast* decisions.[26] In these cases, the district court need not determine whether the damages methodology is a prerequisite for class certification. For example, in *Ramirez v. Riverbay Corp.*, the plaintiffs alleged that their employer required them to clock in before their scheduled shifts, but did not compensate them for the pre-shift, clocked-in work periods.[27] The employer argued that individualized damages calculations would predominate over the common questions in the case. The court noted that while "[t]he relevance of the holding in *Comcast* outside the antitrust context is not yet clear," it posed no bar to certification in the case. Computing damages would be a mechanical, arithmetical affair, based on the employer's records.[28] In short, the court did not need to determine whether the plaintiffs *had to* present a class-wide damages methodology because the plaintiffs actually presented one.[29]

Finally, some district courts have concluded that *Comcast* does require a class-wide damages methodology at the certification stage, and they have denied certification to plaintiffs who could not produce one.[30] For example, in *Slapikas v. First American Title*

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[24] *Cohen v. Trump*, -- F.R.D. --, 2014 WL 5454460 (S.D. Cal. Oct. 27, 2014); *Nieberding v. Barrette Outdoor Living, Inc.,* 302 F.R.D. 600 (D. Kan. 2014); *Gomez v. PNC Bank, Nat'l Ass'n*, -- F.R.D. --, 2014 WL 3640798 (N.D. Ill. July 24, 2014); *Brand v. Comcast Corp., Inc.,* 302 F.R.D. 201 (N.D. Ill. 2014); *Fort Worth Emps. Ret. Fund v. J.P. Morgan Chase & Co.*, 301 F.R.D. 116 (S.D.N.Y. 2014).

[25] 301 F.R.D. at 142.

[26] *Schear v. Food Scope Am., Inc.,* 297 F.R.D. 114, 126 (S.D.N.Y. 2014) (Damages would be based on mechanical redistribution of tips paid to ineligible employees.); *Brooks v. GAF Materials Corp.*, 301 F.R.D. 229, 234 (D.S.C. 2014) (Damages were based on the squares of defective shingles each plaintiff purchased.); *Cromeans v. Morgan Keenan & Co., Inc.,* -- F.R.D. --, 2014 WL 4722217, at *14 (W.D. Mo. Sept. 23, 2014) (damages for class action involving sale of worthless bonds based on mechanical calculation of sales records).

[27] -- F. Supp. 2d --, 2014 WL 3800886, at *1 (S.D.N.Y. Aug. 1, 2014).

[28] *Id*. at *10.

[29] *Id*.

[30] *Randolph v. J.M. Smucker Co.,* -- F.R.D. --, 2014 WL 7330430, at *16 (S.D. Fla. Dec. 23, 2014) (denying certification when plaintiffs did not "present sufficient evidence of a viable damages model capable of estimating damages on a class-wide basis"); *Daniel F. v. Blue Shield of Cal.*, -- F. Supp. 2d --, 2014 WL 3907150, at *14–15 (N.D. Cal. Aug. 11, 2014) (same).

Insurance Co.,[31] a case involving title insurance overcharges in refinancing transactions, the district court granted a motion to decertify because the plaintiffs had not presented a viable damages model. To calculate each plaintiff's damages, each plaintiff would need to present "individual facts specifying which discounted rate they allege they were entitled to, and the corresponding monetary difference between the overcharge and their alleged entitled rate."[32] The court concluded that these individualized determinations would overwhelm questions common to the class.[33]

Thus far, the Supreme Court has allowed the class-wide damages issue to percolate in the lower courts. Given that the circuits have not yet split, we expect that trend to continue in 2015.

3. Ascertaining Class Members After *Carrera*

In 2013, the Third Circuit's *Carrera* decision equipped class action defendants with an effective defense: ascertainability. The *Carrera* court held that a plaintiff must demonstrate an administratively feasible means of identifying the class members to certify a class. The means cannot involve extensive and individualized fact-finding, cannot invite false claims, and has to allow defendants to challenge the claims. In *Carrera* the plaintiffs proposed using affidavits, in which consumers would attest that they purchased the product at issue. The court rejected the proposal, reasoning that it would invite false claims and preclude the defendants from contesting each member's claims. The *Carrera* decision foreshadowed a difficult time for class action plaintiffs, especially those with consumer claims regarding low-cost products, where parties rarely keep records.

In 2014, *Carrera* continued to have teeth but did not deliver the lethal bite to consumer class actions that some commentators foresaw. Some courts maintained the rigorous analysis, but others resisted the death sentence it appeared to deliver to consumer class actions.

In *EQT v. Prod. Co. v. Adair*,[34] the Fourth Circuit denied certification of a class of potential rights holders to coalbed methane gas royalties because identifying the rights holders would have required extensive and individualized analysis. The rights holders initiated the putative class action against well operators, seeking unpaid royalties. The putative class consisted of rights holders who would have to be identified through review of the local land records. The court held that this was too burdensome.[35] It explained that "resolving ownership based on land records can be a complicated and

[31] 298 F.R.D. 285 (W.D. Pa. 2014).
[32] *Id*. at 299.
[33] *Id*.
[34] 764 F.3d 347 (4th Cir. 2014).
[35] *Id.* at 359.

individualized process."[36] Thus, the process posed a "significant administrative barrier to ascertaining the ownership classes."[37]

Yet, the District Court of New Jersey—where *Carrera* is controlling law—was less daunted by public records in *In re Paulsboro Derailment Cases*.[38] Here, the potential classes consisted of individuals and businesses that lost income after a train derailment caused a chemical spill. The defendants argued that the classes were unascertainable under *Carrera* since there was "no complete, reliable record of all evacuees . . . nor [was] there an independent method of verifying whether individuals and business [sic] actually suffered lost income."[39] Thus, they argued, membership would have to rely on "the forbidden 'say-so' of class members."[40]

The district court rejected this argument as to the individual plaintiffs, explaining that the defendants overstated the *Carrera* standard. "The controlling requirement is not that *no* fact-finding be necessary, but that *extensive* individualized fact-finding cannot be required if a class is to be readily ascertainable."[41] The court reasoned that the affected zones had "well-defined geographical boundaries, and those who reside in those areas can be ascertained through public records such as tax and census records."[42] Further, the court reasoned that plaintiffs could prove lost income by requesting "at least one document showing out-of-pocket expenses or income loss."[43]

On the other hand, the court held that the class consisting of businesses was *not* ascertainable.[44] The court explained that plaintiffs did not propose "how to determine whether each of these business [sic] actually had physical operations in the evacuation or shelter-in-place zones, or of these, which ones actually suffered income loss."[45] The court expressed concern that lost income would vary depending on the type of business.[46] For example, a seasonal business in an affected zone might not have lost any income if it was not in season at the time.[47] Accordingly, the class was not ascertainable, since plaintiffs failed to offer an administratively feasible way to navigate this issue.[48]

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[36] *Id.*
[37] *Id.*
[38] 2014 WL 4162790 (D.N.J. Aug. 20, 2014).
[39] *Id.* at *6.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at *7.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

The fallout from *Carrera* had the most potential to affect consumer class actions involving low-cost products, since the parties involved do not typically keep records of the transaction. For example, in *Stewart v. Beam Global Spirits & Wine, Inc.*,[49] the District Court of New Jersey followed *Carrera* in rejecting the use of affidavits as the sole method for identifying class members.

In *Stewart*, the proposed class consisted of individuals who purchased Skinnygirl Margaritas. To quell one concern raised in *Carrera* about affidavits—false claims—plaintiffs proposed cross-checking the claims "against the known identities of individuals who have 'liked' Defendants' Facebook pages, commented about Skinnygirl Margarita on social media and contacted Defendants directly through e-mail." But the court rejected this idea, because "[a]t best, it appears this cross-checking can only be used to screen a modest percentage of the affidavits that would be submitted."[50] The court denied certification, explaining that "relying on affidavits of putative class members to as [sic] the primary method of ascertaining the members of the class is not a prudent course of action for a district court and is generally insufficient to meet the requirements of Rule 23."[51]

Yet, district courts in the Ninth Circuit have given hope to consumer class actions despite the rigorous *Carrera* standard. Indeed, in *McCrary v. Elations Co., LLC*,[52] the Central District of California flatly rejected *Carrera*. There, consumers who purchased a supplement beverage brought a putative class action alleging that the beverage's label made false claims. The plaintiffs proposed that class members self-identify their inclusion through affidavits, and the defendants argued that this rendered the class unascertainable, citing *Carrera*. The court cautioned that if it refused to accept affidavits, "there would be no such thing as a consumer class action."[53]

The court addressed defendant's concerns regarding the affidavits: that they deprived it of its due process right to defend against claims of membership and that people might make false claims of membership. First, in analyzing whether accepting affidavits violated the defendant's due process rights, the court took on *Carrera*. The court rebuked the decision, claiming that "*Carrera* eviscerates low purchase price consumer class actions in the Third Circuit."[54] And it clarified that *Carrera* is not controlling. "While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit."[55] In so doing, it set out the law in the Ninth Circuit. "In this Circuit, it is enough that the class definition describes a set of common characteristics sufficient to allow a

[49] 2014 WL 2920806 (D. N.J. June 27, 2014).
[50] *Id.* at *13.
[51] *Id.*
[52] 2014 WL 1779243 (C.D. Cal. Jan. 13, 2014).
[53] *Id.* at *7 (quotation omitted).
[54] *Id.* at *8.
[55] *Id.*

prospective plaintiff to identify himself or herself as having a right to recover based on the description."[56]

Second, the court shrugged off the defendant's concern that affidavits might invite false claims of membership. In short, the court reasoned that "sufficient notice can cure confusion and these issues may be addressed later in the litigation."[57] It also pointed out factors that would decrease the likelihood that consumers would be confused about what product they purchased. For example, the court indicated that there were not many similar competitors in the market and that the defendant could identify the retailers that sold the product.[58]

Ultimately, the court certified the class, holding that the "class definition is sufficiently definite so that it is administratively feasible to determine whether a particular person is a class member."[59]

Similarly, in *Lilly v. Jamba Juice Co.*,[60] the Northern District of California declined to follow *Carrera*. In *Lilly*, consumers alleged that Jamba Juice mislabeled certain products as "all natural." Again, plaintiffs faced the problem of missing records, as purchasers of smoothies do not typically keep the receipt. Yet, the court was not fazed.

Like its sister court, the Northern District feared the effects of precluding class actions on such a broad basis. It explained that "[a]dopting the *Carrera* approach would have significant negative ramifications for the ability to obtain redress for consumer injuries."[61] Namely, "[i]n the absence of a class action, the injury would go unredressed."[62]

Nevertheless, the court considered the Third Circuit's reasoning in *Carrera*. First, it accepted that not all class members might receive notice and relief. But it explained that the law requires only the best notice practicable under the circumstances. It held that the plaintiffs' detailed plan was sufficient.[63]

Second, the court acknowledged that some plaintiffs would have to use affidavits to claim membership. But the court did not see this as a due process issue, since the affidavits would not establish liability. Rather, it explained that the notice process "is a way to deliver class members their relief." The court ensured that defendants' liability would "be proven by admissible evidence submitted at summary judgment or at trial."[64]

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56 *Id.*
57 *Id.*
58 *Id.*
59 *Id.* at *7.
60 2014 WL 4652283 (N.D. Cal. Sep. 18, 2014).
61 *Id.* at *4.
62 *Id.*
63 *Id.* at *5.
64 *Id.*

Finally, the court was not satisfied with the Third Circuit's solution to its own concerns that fraudulent claims would dilute the legitimate claims. It explained that "[i]f the problem is that some absent class members may get less relief than they are entitled to, it would be a strange solution to deprive absent class members of any relief at all."[65]

In sum, *Carrera* has established ascertainability as a necessary step on the way to class certification in 2014. Yet, courts—at least in the Ninth Circuit—tended to soften its blow on consumer class actions—stopping short of the death sentence that *Carrera* foreshadowed.

B. Class Waiver Developments

A (Not So) Golden State for Class Action Waivers

From a business defendant's perspective, few corners of class action litigation have produced as much success in recent years as the class action waiver doctrine. Typically contained in arbitration agreements, class action waivers have received an effective unconditional blessing from the U.S. Supreme Court since 2009, when the Court began to amplify the force and importance of the Federal Arbitration Act. Indeed, in *AT&T Mobility LLC v. Concepcion*,[66] the Court held that the FAA's policy of enforcing arbitration agreements preempted a California rule requiring class arbitration to be available.

But last summer, the California Supreme Court began to push back. In *Iskanian v. CLS Transp.*, *LA, LLC*,[67] the California Supreme Court agreed that after *Concepcion*, class action waivers are generally enforceable. A few paragraphs later, however, the court held that *Concepcion* did not require individual arbitration of a claim brought under the state's Private Attorney General Act, in which an individual litigant can represent a class on behalf of the state government. In a PAGA claim, the court said, the state is the real party in interest, and thus a "PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship."

As the most significant decision to depart from *Concepcion*'s otherwise black-letter rule of class waiver enforcement, *Iskanian* not surprisingly has attracted substantial attention—particularly in California. Multiple federal district courts within the state have refused to follow *Iskanian*'s lead. In *Langston v. 20/20 Companies*,[68] for instance, the Central District of California held that *Concepcion* does require enforcement of an employment arbitration agreement, even if that means compelling individual arbitration

[65] *Id.* at *6.
[66] 131 S. Ct. 1740 (2011).
[67] 327 P.3d 129 (Cal. 2014).
[68] Case No. EDCV 14-1360 JGB (C.D. Cal. Oct. 17, 2014).

of PAGA claims. The *Langston* judge explained that *Concepcion* instructed that an arbitration agreement cannot be invalidated by impermissible application of a policy "in a fashion that disfavors arbitration." Nevertheless, the *Iskanian* court held PAGA waivers in arbitration agreements to be unconscionable, even though it acknowledged that an employee could choose on his or her own to waive the government's right to bring a PAGA claim. The district judge seized on this apparent illogic that he interpreted to be in conflict with *Concepcion*: "That inconsistency illuminates the fact that, it is not the individual's ability to waive the government's right that drives the [*Iskanian*] court's rule, but rather the court's general disfavor for pre-existing agreements to arbitrate such claims individually." *Langston* joined several California federal district courts[69] in upholding the enforceability of an agreement to individually arbitrate, despite the presence of PAGA claims.[70]

The U.S. Supreme Court declined to resolve the division *Iskanian* has drawn between California's state and federal courts. A certiorari petition was denied on Jan. 20, 2015, leaving in place the significant loophole in *Concepcion*'s firm rule of enforcing class waivers contained in arbitration agreements.[71] Thus, a new doctrine of PAGA class claims could be poised to develop within the California state courts.

Supreme Court Silence Suggests No Nonwaivable Right to Class Procedures

The Supreme Court's denial of certiorari last summer suggested that class action waivers will continue to withstand challenges where plaintiffs allege they have a statutory right to proceed collectively. In *Walthour v. Chipio Windshield Repair LLC*,[72] the Eleventh Circuit held that §16(b) of the Fair Labor Standards Act, which permits collective actions, did not give a class of employees the right to proceed with a class action where they had individually signed arbitration agreements waiving class action rights. The court relied significantly on the Supreme Court's 2013 blockbuster, *American Express v. Italian Colors*, which held that the "effective vindication" doctrine did not override the FAA policy favoring enforcement of arbitration agreements. Thus, the Eleventh Circuit concluded that despite § 16(b)'s express permission to bring class actions, it "does not contain the requisite contrary congressional command sufficient to override the FAA."

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[69] *See Ortiz v. Hobby Lobby Stores, Inc.*, No. 2:13-cv-01619 (E.D. Cal. Oct. 1, 2014); *Mill v. Kmart Corp.*, No. 14-CV-02749-KA-W, 2014 WL 6706017 (N.D. Cal. Nov. 26, 2014); *Chico v. Hilton Worldwide, Inc.*, No. CV 14-5750-JFW SSX, 2014 WL 5088240 (C.D. Cal. Oct. 7, 2014); *Lucero v. Sears Holdings Mgt. Corp.*, No. 14-cv-1620 AJB (S.D. Cal. Dec. 2, 2014); and *Fardig v. Hobby Lobby Stores, Inc.*, No. SACV 14-00561 JVS (C.D. Car. Aug. 11, 2014).

[70] One federal court has followed the California Supreme Court. In *Martinez v. Leslie's Poolmart, Inc.*, No. 8:14-cv-01481, 2014 WL 5604974 (C.D. Cal. Nov. 3, 2014), the court concluded that the *Iskanian* court had settled the issue, and that "the FAA does not preempt" a PAGA claim.

[71] *CLS Transp., L.A. LLC v. Iskanian*, certiorari petition, No. 14-341 (U.S. 2014).

[72] 745 F.3d 1326, 1336 (11th Cir. 2014).

The plaintiffs petitioned for certiorari, perhaps hoping that the distinctive nature of §16(b)'s opt-in requirement would attract the Court's attention. It didn't, leaving the Eleventh Circuit holding in place.

Outside Arbitration, Class Waivers Are Vulnerable

The reason that much of the class waiver doctrine has grown up in the context of arbitration agreements is that the FAA's policy of enforcement of the agreement gives bite to the waiver when it is in conflict with a less vigorous policy of promoting class actions. Generally, the FAA policy wins, at least as far as federal courts are concerned.

Outside the arbitration context, however, a policy favoring agreement enforcement may not always prevail. In July, the Sixth Circuit Court of Appeals illustrated that when the FAA is not in play, class waivers may not be worth the paper they're written on. In *Killion v. KeHE Distributors, LLC*,[73] a food distribution company laid off about 70 of its sales employees. As part of the layoff, the company offered the employees "retention" agreements that provided for $2,000 in exchange for an additional month's work and an agreement not to sue on a class basis. Crucially, these retention agreements did not contain an arbitration provision. The court explained that a class waiver could be enforceable as part of a collective bargaining agreement but only if the waiver were integrated into an arbitration agreement, thereby receiving the policy boost of the FAA. Without an arbitration agreement in *Killion*, the Sixth Circuit held the class waivers to be unenforceable.

National Labor Relations Board Squares Off Against Federal Appeals Courts

For two years, federal circuit courts rejected the bold position taken by the National Labor Relations Board, which clung to its view that class waivers in arbitration agreements violated employees' rights to act in concert under Section 7 of the National Labor Relations Act. In 2014, the NLRB responded to those appellate losses by essentially ignoring them. Employers must continue to beware that their employment arbitration agreements barring class claims may still be found unenforceable by the NLRB despite volumes of federal case law holding otherwise. The Supreme Court has not yet weighed in, because the NLRB—always on the losing side, thus far—hasn't asked it to.

The NLRB's aggressive stance was reflected in its October 2014 decision, *Murphy Oil, USA, Inc. and Sheila M. Hobson*,[74] in which the NLRB vociferously said it is refusing to yield from the position it staked out in its 2012 *D.R. Horton* decision. In *D.R. Horton*, the NLRB held a class action waiver to be unenforceable, despite a Federal Arbitration Act policy favoring arbitration, because Section 7 of the NLRA protects employees' rights to

[73] 761 F.3d 574 (6th Cir. 2014).
[74] 361 NLRB No. 72, 2014 WL 5465454 (N.L.R.B. Oct. 28, 2014).

act concertedly, including pursuing class claims. Since then, rejection has been harsh and unanimous. The Fifth Circuit directly overturned the *D.R. Horton* decision,[75] and other circuits, including the Second, Eighth, and Ninth, held it to be unpersuasive considering the U.S. Supreme Court's edict that as a matter of FAA policy, arbitration agreements are to be enforced according to their terms.

But the NLRB isn't giving up. Perhaps angling for an appeals court willing to take its side (and thus creating a circuit split for more favorable Supreme Court review), the NLRB used *Murphy Oil* to fire heavy criticism at the Fifth Circuit's legal reasoning in *D.R. Horton*, accusing the appeals court of failing to understand the policy ramifications of the NLRA. "The court's first step was to determine that the pursuit of claims concertedly is not a substantive right under section 7 of the NLRA. We cannot accept that conclusion; it violates the long-established understanding of the Act and national labor policy. . . . [T]he right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA."

Not only that, but the NLRB also accused the circuit courts of misunderstanding the principle of federal preemption upon which the *Concepcion* decision was based. In *Concepcion*,[76] the Supreme Court held that the FAA policy favoring arbitration preempted contrary California state common law barring class action waivers. In *D.R. Horton* and *Murphy Oil*, the NLRB argues, federal preemption is not an issue. Rather, the issue is how to reconcile two federal statutes, one of which (the NLRA), according to the NLRB, creates a nonwaivable right to collective action, while the other (the FAA) favors enforcing arbitration agreements, even if they contain class action waivers. *Concepcion* does not answer that question. However, the NLRB sidestepped the Court's 2013 follow-up to *Concepcion*, *American Express v. Italian Colors Restaurant*.[77] In *Italian Colors*, the Court noted that *Concepcion*'s principle "holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been 'overridden by a contrary congressional command.'"

Presumably, the NLRB construes the NLRA as containing a congressional command contrary to the FAA's pro-arbitration policy. Dissenting NLRB member Harry Johnson III, however, suggested that the NLRB's combative stance is going to result in a painful lesson. Criticizing the majority, he wrote "that both *D.R. Horton* and today's decision are steering the agency on a collision course with the Supreme Court. . . . [T]his unfortunate conflict will almost certainly end with the inevitable reaffirmation by the Supreme Court that the Act, too, must yield to the federal policy of enforcing arbitration agreements according to their terms."

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[75] *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013).
[76] 131 S. Ct. 1740 (2011).
[77] 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013).

As the year came to a close, the NLRB demonstrated little interest in petitioning for Supreme Court review—at least not until it has at least one appeals court decision in its favor to validate its position. Until then, *Murphy Oil* reconfirms that the NLRB will continue to aggressively pursue Section 7 collective action rights for employees when employers compel individual arbitration.

Federal Court Support for* D.R. Horton*? Maybe

Generally, federal courts have been hostile to the NLRB's stance that Section 7 of the NLRA overrides class waivers in arbitration agreements that are otherwise enforceable under the FAA. But then in June, a Ninth Circuit panel issued an opinion suggesting that if the facts were favorable, it might be willing to agree with the NLRB's position. In *Johnmohammadi v. Bloomingdale's, Inc.*,[78] an employee argued that Section 7 of the NLRA granted her a substantive right to pursue class relief despite the class waiver she signed as part of an arbitration agreement. The Ninth Circuit, in apparent agreement with the NLRB, said "[t]here is some judicial support for her position." The problem for the plaintiff was that she had the option to opt out of the class waiver but failed to timely exercise that option. But in different circumstances, the court clearly left the impression that it would be willing to agree with the NLRB's argument on class waivers when juxtaposed with Section 7 of the NLRA.

The Availability of Class Arbitration Is a Gateway Issue

On multiple recent occasions, the Supreme Court has come close to deciding whether the availability of class-wide arbitration is a gateway issue to be decided by courts or whether it is proper for an arbitrator to make such a determination.[79] But on each occasion, the Court has stopped short of making a binding call one way or the other. Indeed, in *Oxford Health* in 2013, the Court expressly noted that it had not yet decided the issue.[80]

In 2014, the Third Circuit became the second federal appeals court to hold that the availability of class arbitration is a gateway issue that must be decided by district courts—not arbitrators. In *Opalinski v. Robert Half Int'l, Inc.*, the court joined the Sixth Circuit in determining that "because of the fundamental differences between classwide and bilateral arbitration, and the consequences of proceeding with one rather than the other, the availability of classwide arbitrability is a substantive gateway question rather than a procedural one."[81] Thus, where an arbitration agreement is silent on whether class arbitration is available, the district court rather than the arbitrator must make the

[78] 755 F.3d 1072 (9th Cir. 2014).
[79] *See,* e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662 (2010); and *Oxford Health Plans LLC v. Sutter* --- U.S. ---, 133, S. Ct. 2064 (2013).
[80] *Oxford Health*, 133 S. Ct. at 2069 n.2.
[81] 761 F.3d 326, 335 (3d Cir. 2014).

determination in the Sixth and Third Circuits, which to date are the only jurisdictions to expressly decide the issue.

C. Class Action Fairness Act

1. Burden of Proof

Seventh Circuit Requires Evidence—Not Just Assumptions—to Establish "Home State" Exception to CAFA Jurisdiction

Despite the wide opening the Class Action Fairness Act created for removal to federal court, plaintiffs' attorneys continue to explore exceptions to federal jurisdiction under CAFA. As a result, case law continues to evolve regarding the scope of CAFA exceptions. Refusing to "infer" the citizenship of proposed class members, the Seventh Circuit held in *Myrick v. Wellpoint, Inc.*[82] that evidence is required to invoke CAFA's "home state" exception to federal jurisdiction.

The *Myrick* plaintiffs were former policyholders of a health insurer that exited the Illinois market and thereby canceled the plaintiffs' policies. Claiming that the cancellation violated Illinois law, the plaintiffs filed suit in Illinois state court and sought to certify a class of all former policyholders. The defendants removed to federal court under CAFA.

The plaintiffs moved to remand under CAFA's home state exception to federal jurisdiction. Under that exception, federal courts must "decline to exercise" jurisdiction if two conditions exist. First, at least two-thirds of the proposed class members must be citizens (not simply residents) of the state in which the suit began. Second, at least one defendant from which "significant relief" is sought must be a citizen of the same state.[83]

To establish the first condition, the plaintiffs estimated that about 87 percent of the proposed class members were Illinois residents. This estimate was based on the fact that the insurer offered the canceled policy only to persons who represented that they lived in Illinois (or to employers who represented that most beneficiaries of their group plans lived in Illinois), and on the assumption that former policyholders moved out of Illinois at the census-average rate of 2 percent per year. But the plaintiffs offered no evidence in support of their estimate.

The district court denied the motion for remand, and the Seventh Circuit affirmed. Writing for the Seventh Circuit, Judge Easterbrook explained that the plaintiffs had failed to establish the home state exception because they "needed to produce some evidence that would allow the court to determine the class members' citizenships on the date the case was removed. Yet they provided none."[84]

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[82] 764 F.3d 662 (7th Cir. 2014).
[83] 28 U.S.C. § 1332(d)(4).
[84] 764 F.3d at 665.

Rejecting the plaintiffs' argument that providing evidence would have been too expensive, the court warned that class action plaintiffs and counsel "must be prepared to meet" their expenses "or be deemed inadequate [class] representatives."[85] Judge Easterbrook recommended statistical sampling as an alternative to determining the citizenship of every policyholder.

2. Removal Jurisdiction

Supreme Court Requires Only a Plausible Allegation—Not Evidence—in Notice of Removal

Though plaintiffs asserting CAFA exceptions are required to produce evidence under *Myrick*, the same is not true for removing defendants. In *Dart Cherokee Basin Operating Co., LLC v. Owens*,[86] the Supreme Court held that "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold; the notice need not contain evidentiary submissions."

Dart Cherokee began in Kansas state court, where the plaintiff sought to represent a class of royalty owners who were allegedly underpaid under certain oil and gas leases. The defendant removed, stating that the amount in controversy was $8.2 million. But the district court granted the plaintiff's motion to remand because the defendant provided no proof of the amount in controversy in its notice of removal. The Tenth Circuit twice refused to reconsider the district court's remand order, first by denying the defendant's petition for permission to appeal and then by denying the defendant's petition for en banc review.

The Supreme Court granted review and clarified CAFA's removal procedure. Observing that the removal statute "tracks the general pleading requirement stated in Rule 8(a) of the Federal Rules of Civil Procedure," the Court held that "the defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court."[87] "Evidence establishing the amount" in controversy, the Court explained, "is required . . . only when the plaintiff contests, or the court questions, the defendant's allegation."[88] At that time, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied."[89]

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[85] *Id.*
[86] No. 13-719, 2014 U.S. LEXIS 8435 (Dec. 15, 2014).
[87] *Id.* at *11.
[88] *Id.* at *14.
[89] *Id.* at *2-3.

Amount in Controversy Includes Potential Damages From Good-Faith Yet "Facially Deficient" Claims, Eleventh Circuit Holds

In *McDaniel v. Fifth Third Bank*,[90] the Eleventh Circuit reaffirmed the principle that courts should not conduct a merits inquiry when evaluating subject-matter jurisdiction under CAFA. The *McDaniel* plaintiff alleged that the defendant bank violated Florida law by charging the proposed class of non-account-holders a $4 check-cashing fee. The bank removed the case to federal court under CAFA, but the district court granted the plaintiff's motion to remand.

The district court found CAFA jurisdiction lacking because the bank failed to establish that the amount in controversy exceeded $5 million.[91] Had the district court included punitive damages for fraud in the amount in controversy, the $5 million threshold would have been met. But it excluded those damages because the plaintiff's fraud claims were "deficient on their face."[92]

The Eleventh Circuit reversed, warning that it was an error to consider the merits of the plaintiff's claims before deciding whether jurisdiction existed. As long as a plaintiff's allegations are not made in bad faith, the court explained, the potential damages from those claims must be considered in the amount-in-controversy determination. So a defendant removing a case under CAFA need only establish that more than $5 million in damages "*could* be awarded"—not that it *would* be awarded.[93]

First Circuit Adopts Broad Interpretation of "Other Paper" for Purposes of Removal Time Limits

Generally, a defendant removing a case under CAFA must file a notice of removal within 30 days of service of the complaint.[94] But if the case is not removable when filed, then the defendant may remove "within thirty days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."[95] In *Romulus v. CVS Pharmacy, Inc.*,[96] the First Circuit clarified when removability "may first be ascertained" and what constitutes an "other paper."

Romulus was a wage-and-hour class action originally filed in Massachusetts state court. The plaintiffs sought to recover unpaid wages for shift supervisors who were required to stay on duty during their scheduled break time. The defendant filed a notice of removal within 30 days of service of the complaint, but the district court rejected the defendant's

[90] 568 F. App'x 729 (11th Cir. 2014).
[91] *See* 28 U.S.C. § 1332(d)(2).
[92] 568 F. App'x at 730.
[93] *Id.* at 731.
[94] 28 U.S.C. § 1446(b)(1).
[95] 28 U.S.C. § 1446(b)(3).
[96] 770 F.3d 67 (1st Cir. 2014).

amount-in-controversy estimate and granted the plaintiffs' motion to remand. In the district court's view, the defendant's estimate was flawed because it assumed that "all shift supervisors lost their break each day of their employment during the class period while the complaint clearly states that the circumstances leading to such loss occurred 'sometimes.'"[97]

The First Circuit reversed, rejecting the plaintiffs' argument that their email was not an "other paper" because it was based on information provided by the defendant. As the court observed, the removal statute focuses solely on when the plaintiff's papers reveal removability, and CAFA's legislative history favors a broad interpretation of "other paper." The court added that an "other paper" reveals removability, thus triggering the 30-day removal period, if the paper "includes a clear statement of the damages sought" or "sets forth sufficient facts from which the amount in controversy can easily be ascertained by the defendant by simple calculation." Under this standard, the defendant has no duty to investigate "or to supply facts outside of those provided by the plaintiff."[98]

D. *American Pipe* Tolling

The scope and nature of "*American Pipe* tolling" was a frequent source of dispute in 2014. Under *American Pipe & Construction Co. v. Utah*,[99] the statute of limitations for absent class members' federal claims can be tolled from the time a putative class action is filed until the time a motion for class certification is granted or denied, or until the action otherwise ceases to proceed as a class action.

American Pipe and Statutes of Repose

This past year's *American Pipe* litigation was perhaps most notable for what did *not* happen: Supreme Court review of the interaction of *American Pipe* and statutes of repose.[100] Statutes of repose are limitations that typically run from the date of the event at issue, while statutes of limitations typically run from the date a cause of action accrues.[101] And unlike statutes of limitations, statutes of repose are not subject to equitable tolling.[102] The Supreme Court was set to resolve a circuit split in reviewing the Second Circuit's holding that *American Pipe* did not toll the statute of repose in the Securities Act of 1933.[103] The Second Circuit so held because the statute of repose

[97] *Id.* at 70.
[98] *Id.* at 75.
[99] 414 U.S. 538 (1974).
[100] On a similar note, as of this writing, the Sixth Circuit has not decided the fate of the smaller regional class actions filed in the Middle District of Tennessee following the Supreme Court's decertification of the famous *Dukes v. Wal-Mart Stores, Inc.* action, which was noted in the *2013 Year-End Review*. *See Phipps v. Wal-Mart Stores, Inc.* 925 F. Supp. 2d 875 (M.D. Tenn. 2013), *appeal docketed*, No. 13-503 (6th Cir. 2013).
[101] *See,* e.g., *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011).
[102] *See,* e.g., *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360, 363 (1991).
[103] *See Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.,* 721 F.3d 95, 109 (2d Cir. 2013),

creates or limits a substantive right that would be altered in violation of the Rules Enabling Act if *American Pipe* extended that statutory period.[104] That holding and the question of whether *American Pipe* tolling is legal or equitable in nature were ripe for review. But shortly before oral argument the Court dismissed the grant of certiorari as improvidently granted. *See* 135 S. Ct. 42 (2014). The very next day, class action plaintiffs received another boost when a district court in Texas sided against the Second Circuit, dismissing concerns about the Rules Enabling Act on the grounds that the effect of *American Pipe* is to treat all class members' claims as if filed with the original filing, not actually to toll the statutory period—contrary to the doctrine's name.[105]

Timing of Complaints That Rely on American Pipe Tolling for Timeliness

That same Texas district judge, in the same decision in the *BP p.l.c. Securities Litigation*, also weighed in on another deepening circuit split: whether plaintiffs invoking *American Pipe* can rely on a prior putative class action for tolling but still file before a decision on class certification.[106] As the *BP* court acknowledged, historically the majority of courts held if a plaintiff filed his own complaint before class issues were resolved, he forfeited the right to rely on *American Pipe*.[107] The *BP* court, however, viewed the tide as turning against that view, and permitted the plaintiffs to rely on the pending class action while opting out of it with their own action.[108] By contrast, the Southern District of Ohio rejected the plaintiffs' attempt to narrow the Sixth Circuit's recognition of the forfeiture rule.[109] There, the plaintiffs argued that *American Pipe* applied because the class action on which they relied had eventually been dismissed. But the plaintiffs had filed their complaint while the motion to dismiss that class action was pending, not—as required—after the order of dismissal that foreclosed a Rule 23 motion.[110]

Interaction of State and Federal Courts and Causes of Action

Courts also continued to recognize the caution with which federal courts recognize state law equivalents of *American Pipe* tolling, including cross-jurisdictional tolling—in which a class action filed in one court system tolls the limitation period for an action filed in another. For example, the *BP* court recognized that federal courts generally do not predict that state courts would accept cross-jurisdictional tolling, and so rejected the application of *American Pipe* to a Texas law claim based on a class action filed in

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cert. granted, 134 S. Ct. 1515 (2014).
[104] *See id.*
[105] *In re BP p.l.c. Sec. Litig.*, No. 13-CV-1393, 2014 WL 4923749, at *4-5 (S.D. Tex. Sept. 30, 2014).
[106] *See id.* at *3-4.
[107] *See id.* at *3.
[108] *See id.* at *3-4.
[109] *See W. & S. Life Ins. Co. v. JPMorgan Chase Bank, N.A.*, No. 11-CV-495, 2014 WL 5308422, at *17-18 (S.D. Ohio Oct. 16, 2014) (following *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 568-69 [6th Cir. 2005]).
[110] *See id.*

federal court.[111] Other courts have reached similar conclusions concerning other states.[112] Another federal district court, however, permitted tolling of California law claims based on a class action filed in federal court.[113] But that court relied in part on the cursory nature of the defendant's argument against tolling and its "sandbagging" tactics, and the court did not address the cross-jurisdictional issue—likely because the defendant did not argue that although both actions were filed in federal court, the question for California law claims was whether *California courts* would toll the statute based on the filing of the earlier action in federal court.[114] Finally, the Eastern District of Michigan permitted cross-jurisdictional tolling, but on the grounds that the claims at issue were federal claims, which the court viewed as controlling under the reasoning of the Seventh Circuit.[115]

Subsequent Class Actions

The same Michigan federal court also chipped away at the general rule that *American Pipe* tolls the statute of limitations for individual actions, not class actions.[116] The plaintiff's claims had been amended out of the class definition in the prior action, and so because their claims were not included in the denial of class certification in the prior action, the court found the bar on invoking *American Pipe* for a class action was inapplicable.[117] A District of Nevada case exemplifies both this exception to the bar on class actions and the importance of procedural details of the prior action for the extent of tolling.[118] There, the court similarly reasoned that *American Pipe* tolling applied to a subsequent class action because there had been no decision on whether the plaintiff's claims could be adjudicated as class claims, as the prior named plaintiff never moved for class certification.[119] But the court found that the tolling extended only until the date appointed for the motion for class certification in the prior action—after which point putative class members were on notice that it was not proceeding as a class action.[120]

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[111] *See In re BP p.l.c. Sec. Litig.*, --- F. Supp. 3d ---, No. 4:12-CV-3621, 2014 WL 4925263, at *5-6 (S.D. Tex. Sept. 30, 2014).

[112] *See,* e.g., *Coe v. Philips Oral Healthcare Inc.*, No. C13-518 MJP, 2014 WL 5162912, at *5 (W.D. Wash. Oct. 14, 2014) (New York); and *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C 07-5944 SC, 2014 WL 1092293, at *4 (N.D. Cal. Mar. 13, 2014) (California, Florida, New Jersey, New York, and Tennessee).

[113] *See Natan v. Citimortgage, Inc.*, No. CV 14-5779 DSF, 2014 WL 4923091, at *1-2 (C.D. Cal. Oct. 1, 2014).

[114] *See id.*

[115] *Machesney v. Ramsgate Ins., Inc.*, No. 2:13-CV-11804, 2014 WL 2605479, at *3-4 (E.D. Mich. June 10, 2014) (citing *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 562–63 (7th Cir. 2011).

[116] *See id.* at *4-5 (distinguishing *Andrews v. Orr,* 851 F.2d 146, 149 [6th Cir. 1988]).

[117] *See id.* at *5.

[118] *See McDonagh v. Harrah's Las Vegas, Inc.*, No. 2:13-CV-1744 JCM, 2014 WL 2742874, (D. Nev. June 17, 2014).

[119] *See id.* at *2-3.

[120] *See id.* at *3; *see also A & L Indus., Inc. v. P. Cipollini, Inc.*, No. CIV.A. 12-07598 (SRC), 2014 WL

Identical Claims

Finally, class action defendants received a boost in the *Cathode Ray Tube* litigation in the Northern District of California. The court, in parsing conflicting signs from the Supreme Court, held that *American Pipe* tolls "only later-filed claims that are identical to those asserted in the earlier-filed class actions," not those that are "substantive[ly] similar[]."[121] The court rejected arguments that the notice that the earlier class action provides is sufficient if it concerns the same facts, and found that the Supreme Court required that the causes of action be identical because of concerns about potential abuses of the tolling doctrine.[122]

E. Class Action Settlements

Fairness Considerations in Class Settlements Take Center Stage

At the end of 2013, Chief Justice Roberts signaled interest in reviewing fairness considerations related to *cy pres* awards in class action settlements when declining review of the Ninth Circuit's decision in *Marek v. Lane*, 571 U.S. ___, 134 S. Ct. 8 (2013). Marek, an objector to the settlement reached in a class action against Facebook regarding its Beacon program, asked the court to review the propriety of a *cy pres* award forming part of the settlement. In this case, the $6.5 million allocated for damages to class members was not distributed to class members at all, but was instead used, via a *cy pres* award, to create a charitable foundation that would educate the public about online privacy.

The Supreme Court declined certiorari because Marek's objections were too focused on the particular features of the *cy pres* award at issue. But Chief Justice Roberts also issued a rare statement along with the decision indicating the Court's interest in hearing future *cy pres* cases that could address "fundamental concerns" surrounding the use of class action *cy pres* awards, including

> when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a cy pres remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on.

This concern regarding *cy pres* awards in class action settlements is but one aspect of the many fairness considerations that have been front and center at the class

3619880, at *3-5 (D.N.J. July 22, 2014) (Tolling ended when putative class representative withdrew motion for class certification.).

[121] *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C 07-5944 SC, 2014 WL 1092293, at *3 (N.D. Cal. Mar. 13, 2014).

[122] *Id.*

settlement approval phase over the past year. Disproportionate attorneys' fees are another issue that has received increased attention recently. Increasingly, courts are focused on the actual value received by the class, as opposed to theoretical benefits that might be available to the class given ideal conditions. Counsel on both sides of class action litigation can expect their settlement agreements to undergo close review by the court to ensure the settlement is fair not just to counsel but also to the class.

Judge Posner of the Seventh Circuit has been especially vocal regarding fairness in class action settlements this year, providing guides in *Eubanks v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014); *Redman v. Radioshack Corp.*, 768 F.3d 622 (7th Cir. 2014); and *Pearson v. NBTY, Inc.*, Nos. 14–1198, 14–1227, 12–1245, 14–1389 (7th Cir. Nov. 19, 2014) about what *not* to do. In all three cases, the Seventh Circuit found an abuse of discretion on the part of the district courts in approving settlements that were highly beneficial to class counsel and the defendants but allowed for little in the way of actual relief to the class.

In all three cases, the foundation of Judge Posner's analysis was that class settlements do not reflect the arms' length bargained-for exchange of a typical contract, and that they therefore require substantial scrutiny prior to approval. In *Pearson*, Judge Posner went so far as to distance the current court from its 1980 opinion in *Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 315, which stated, "[b]ecause settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." Class counsel in *Pearson* had quoted this language in seeking settlement approval, but Judge Posner pointed out that in the 34 years since *Armstrong* was issued, the courts had accrued much more experience with class settlements and it had become clear they are not just like any other arms' length contract.

Given these conflict-of-interest concerns, Judge Posner had serious misgivings about the actual benefit received by the class in *Redman*. The parties argued that the value of the settlement to the class was $830,000—the face value of $10 coupons that would be distributed to each of the approximately 83,000 class members who submitted a claim. Discussing the marketing value to the defendant of issuing coupons, however, the court was "confident" that its worth to the class was less than the face value, "doubtless considerably so." Judge Posner similarly disapproved of the value received by the class in *Eubanks* (class counsel estimated the benefit to the class at up to $90 million; after examining the settlement and the submitted claims, Judge Posner placed it closer to $1 million) and in *Pearson* (Judge Posner found that the $20.2 million estimate by the district court of benefit to the class had "barely any connection to the settlement's value to the class” and in reality the value to the class was closer to $1 million).

Because the benefits to the class had been so substantially inflated, Judge Posner was also dissatisfied by the correspondingly inflated attorneys’ fees in each of these three cases. In *Redman*, the court spelled out the proper ratio for assessing attorneys’ fees: (1) the fee to (2) the fee plus the value *received by the class*. In both *Redman* and *Eubanks*, Judge Posner was critical of the failure by the parties and the district court to attempt any more nuanced analysis of the actual value to the class, suggesting that expert testimony would have aided the court.

Judge Posner also echoed Chief Justice Roberts’ wariness of *cy pres* awards in *Pearson*. The claims in *Pearson* centered on allegedly misleading advertising for glucosamine pills, which are dietary supplements designed to help people with joint disorders. The settlement called for $865,000 in $3-to-$5 awards to the 30,000 class members who submitted claims (out of 4.72 million class members who received notice via postcard), as well as $1.13 million as a *cy pres* award to the Orthopedic Research and Education Foundation. The court pointed out that while an award to an orthopedic research foundation was consistent with *cy pres* principals, there was no basis for a *cy pres* award in this case. *Cy pres* awards are appropriate only where direct compensation to the class is not feasible. Here, 4.72 million class members had been identified and provided with notice; given the small amounts to which each class member was entitled, there was no reason to require a claims process at all—the defendants could have simply mailed $3 checks to the same 4.72 million class members it had already identified.

The laundry list of fairness considerations mentioned by Judge Posner in *Eubanks*, *Redman*, and *Pearson* also included “clear sailing” clauses (in which a defendant agrees not to oppose class counsel’s request for attorneys’ fees), including administrative fees in the calculation of the benefit received by the class (because administrative costs of notice and distribution of settlement funds also benefit class counsel and the defendant); coupon settlements (because coupons are worth significantly less than face value to consumers and also confer marketing and sales benefits on the defendant issuing the coupons); waiting to seek approval of attorneys’ fees until after the deadline to object to the settlement has passed (precluding class members from objecting to the fee award itself); close, personal relationships between the named plaintiffs and class counsel (Mr. Redman worked for a law firm at which a class counsel once worked, and Mr. Eubanks was the father-in-law of the principal class counsel); and “kicker” clauses (providing that the benefit of any reduction of attorneys’ fees by the court would revert to the defendant rather than inuring to the benefit of the class).

The Ninth Circuit also reversed approval of a class settlement in *In re Magsafe Apple Power Adapter Litig.*, 571 F. App’x 560 (9th Cir. 2014). There, the court was dissatisfied with the district court's review of the settlement, where it failed to consider indications of collusion between the defendants and the class counsel. The district court accepted the lodestar amount of fees sought by class counsel without reviewing it for reasonable hourly rates and sound billing practices, and it did not cross-check the amount sought against the percentage of the recovery to ensure reasonableness. The Ninth Circuit emphasized that the discretion to approve class settlement remains with the district courts, but they must offer some kind of explanation of why a particular settlement agreement or fee award is reasonable.

The theme of all these cases comes down to the benefit obtained by class counsel that is *actually received* by the class. As Judge Posner wrote in *Redman*, "The central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation." Class counsel—and defense counsel negotiating class settlements—should be mindful of these cautionary words.

III. Developments by Subject Matter

A. Consumer Class Actions

1. Insurance

Intersection of CAFA Removal and Insurance Declaratory Judgment Action

In *South Florida Wellness, Inc. v. Allstate Insurance Co.*, the Eleventh Circuit Court of Appeals was asked "whether the Class Action Fairness Act's $5,000,000 amount-in-controversy requirement can be satisfied if the plaintiff seeks only declaratory relief."[123] While the district court held "that a pure declaratory judgment action could not carry the required jurisdictional freight," the Eleventh Circuit reversed, finding that certain declaratory judgment actions "can be up to the task."[124]

South Florida Wellness claimed that Allstate underpaid on a personal injury protection policy, which Florida law generally requires to cover 80 percent of all reasonable costs. Insurers can opt out of this general requirement by "clearly and unambiguously" indicating so in the insurance policy. Wellness sought the 80 percent as provided for by the general law, the same amount it had billed the patient, but Allstate paid only 80 percent of certain amounts set out in a statutory fee schedule.[125] Wellness sought no monetary damages, but rather "only a declaration that the form language Allstate used . . . did not clearly and unambiguously indicate that payments would be limited to the levels provided for in" the statutory fee schedule.[126]

[123] 745 F.3d 1312, 1313 (11th Cir. 2014).
[124] *Id.*
[125] *Id.* at 1313–14; Fla. Stat. § 627.736(5)(a).
[126] *S. Florida Wellness, Inc.* at 1314.

Allstate removed the case to federal court under the Class Action Fairness Act. In support of jurisdiction, Allstate submitted an affidavit that the amount in controversy was more than $68 million based on "the additional amount of benefits the putative class members would be eligible to recover in the event that they received the declaratory judgment."[127] The district court found that CAFA's amount-in-controversy requirement was not met because "the value of the declaratory relief was too speculative."[128]

The Eleventh Circuit reversed. The court noted that Wellness failed to rebut Allstate's affidavit and calculation of the $68 million figure. Accordingly, "[t]hat is the amount in controversy . . . and it is far above the $5 million threshold set by CAFA."[129]

The court rejected Wellness's argument that the amount was too speculative, noting that "class members armed with a declaratory judgment" would naturally seek out the money owed them.[130] The court stated that "[a]lthough the putative class members might have to take an extra step or two" before recovering their money from Allstate, that does not make determining the amount "too speculative of a task."[131] The court indicated that determinations of the amount in controversy need not be overly precise: "Estimating the amount in controversy is not nuclear science; it does not demand decimal-point precision."[132]

Travelers Indem. Co. of Conn. v. P.F. Chang's China Bistro, Inc.

In response to P.F. Chang's recent reports that it suffered a credit and debit card data breach at 33 locations, three putative class actions have been filed against the restaurant.[133] Not surprisingly, Travelers Indemnity Company filed a declaratory judgment action seeking a declaration that it is not obligated to defend or indemnify P.F. Chang's under two commercial general liability insurance policies.[134]

In general, the class action plaintiffs allege that P.F. Chang's failed to properly safeguard its customers' financial information against hackers who were able to access the restaurant's computer systems from September 2013 through June 2014.[135] The complaints assert that the hackers were able to use the credit and debit card financial information to exploit and injure consumers across the United States.[136] Further, the

[127] *Id.*
[128] *Id.* at 1315.
[129] *Id.* at 1316.
[130] *Id.*
[131] *Id.* at 1316–17.
[132] *Id.* at 1317.
[133] Declaratory Judgment Complaint at ¶ 3, *Travelers Indem. Co. of Conn. v. P.F. Chang's China Bistro, Inc.*, No. 3:14-cv-01458-VLB (D.Conn. Oct. 2, 2014) (hereinafter *Complaint*).
[134] *Id.* at ¶¶ 2–3.
[135] *See Lovell v. P.F. Chang's China Bistro, Inc.*, No. 2:14-cv-01152-RS (W.D. Wash. July 30, 2014); *Kosner v. P.F. Chang's China Bistro, Inc.*, No. 1:14-cv-04923 (N.D. Ill. June 30, 2014); and *Lewert v. P.F. Chang's China Bistro, Inc.*, No. 1:14-cv-04787 (N.D. Ill. June 25, 2014).
[136] *Id.*

plaintiffs contend that P.F. Chang's failed to disclose the extent of the breach and notify its affected customers in a timely manner, thus exposing them to further harm.[137]

Travelers' declaratory judgment complaint comprises four counts. Counts one and two allege that Travelers has no duty to defend or indemnify P.F. Chang's because the "lawsuits fail to trigger coverage under the policies because they do not allege 'bodily injury' or 'property damage' caused by an 'occurrence,' nor do they allege 'advertising injury' or 'personal injury' as the policies expressly and unambiguously define those terms."[138] Counts three and four allege that even if coverage were triggered, Travelers does not owe a duty to defend or indemnify because the policies exclude coverage for violations of consumer financial protection laws.[139]

Further, Travelers claims that the policies each have a "Liability Self-Funded Retentions Endorsement," which "modifies the CGL coverage part and which provides a Self-Funded Retention of $250,000 applicable to Each CGL."[140] Thus, Travelers maintains that even if coverage is owed under the CGL policies, it does not owe any defense obligation, as this endorsement requires P.F. Chang's to first exhaust $250,000 in legal expenses for each occurrence.

Finally, Travelers asserts that P.F. Chang's has "separate cyber liability insurance" not issued by Travelers, indicating those policies provide the appropriate insurance against the class action lawsuits.[141] Resolution on Travelers' duty to defend these class action suits could happen in late 2015, with the discovery deadline currently set for August 1.

2. Consumer Protection Statutes

State Law Limitations on Class Procedure Will Not Protect TCPA Defendants

Unsuspecting defendants can quickly run up a big liability bill under the Telephone Consumer Protection Act, a strict liability statute that permits a minimum recovery of $500 per every unsolicited fax sent by a company. In some states, such as Michigan, it might have appeared that state laws precluding class actions under such no-injury statutes would save defendants from crippling judgments. But in July, the Sixth Circuit clarified that those state laws offer no relief under the Erie doctrine if a plaintiff can certify a class under Rule 23.

In *American Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*,[142] the defendant, which had sent more than 10,000 unsolicited fax advertisements, tried to argue that class liability under the TCPA was forbidden by a Michigan statute. The state law

137 *Id.*
138 *Id.* at ¶¶ 43–46.
139 *Id.* at ¶¶ 48–53.
140 *Complaint*, *supra* note 52, at ¶¶ 19, 27, 35.
141 *See,* e.g., *id.* at ¶ 35.
142 757 F.2d 540 (6th Cir. 2014).

provided that "[a]n action for a penalty of minimum amount of recovery without regard to actual damages imposed or authorized by statute may not be maintained as a class action unless the statute specifically authorizes its recovery in a class action." The TCPA, of course, does not require proof of actual damages, and it does not specifically authorize class actions. So it would seem that the Michigan law precluded class liability, right? Wrong.

Following in the Supreme Court's footsteps, the Sixth Circuit held that just because Michigan law does not permit TCPA class actions does not mean that plaintiffs still can't certify a Rule 23 TCPA class. The court pointed out that in 2012, the Supreme Court held that federal courts have federal-question jurisdiction over TCPA suits, meaning that the federal procedural rules apply.[143] Those procedural rules include Rule 23's class certification procedures. The court further acknowledged that its holding would prompt forum shopping in that plaintiffs would always choose to bring TCPA claims in Michigan federal courts as opposed to state court. But again, the Supreme Court had already determined in 2010 that a "Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping."[144]

TCPA Statutory Damages Are Not Punitive

In 2013, the Illinois Supreme Court held that statutory damages of $500 per occurrence for violations of the TCPA were not punitive, allowing insurance policies to potentially cover such penalties.[145] The Illinois Supreme Court remanded the case for consideration of the other issues, and in January 2014, in *Standard Mutual Insurance Co. v. Lay*, the appellate court held that the insurer must cover the settlement in the underlying TCPA class action.[146]

In 2006, the Ted Lay Real Estate Agency sent out a blast fax advertisement to Locklear Electric and others, violating the TCPA.[147] Locklear, as class representative, sued Lay on behalf of all who received the faxes, and Lay tendered defense to Standard Mutual Insurance Company, which undertook the defense under a reservation of rights.[148] Standard also filed a declaratory judgment action to determine its liability for the TCPA violations under the policy.

The underlying TCPA claim against Lay "was a potential multimillion dollar claim that would bankrupt the agency if a verdict were entered against it and it was not covered by

[143] *Mims v. Arrow Fin. Servs., LLC* --- U.S. ---, 132 S. Ct. 740 (2012).
[144] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010).
[145] *Standard Mutual Ins. Co. v. Lay*, 2013 IL 114617 (2013).
[146] *Std. Mut. Ins. Co. v. Lay,* 2014 IL App (4th) 110527-B, ¶ 1 (Ill. App.) *appeal denied*, 2014 WL 1382416 (Mar. 26, 2014).
[147] *Id.*
[148] *Id.*

insurance."[149] To avoid this result, Lay opted for independent counsel and settled the claim for $1.7 million "in exchange for a promise by the class not to execute on any of Lay's property or assets other than the insurance policies with Standard."[150]

On remand, Standard argued that two of the three policies covered only liability stemming from particular leased property, and not the real estate business operations.[151] Standard argued that the faxes were not covered by either the property damage or advertising injury provisions, and, even if they were covered, they were excluded as an intentional act or professional service.[152]

The court rejected Standard's arguments that the policies covering the leased properties did not provide coverage because the policies did not include "designated premises" limitations.[153] Further, the third policy specifically covered Lay's real estate business.[154] Thus, the policies covered Lay's blast fax and resulting TCPA violations.[155]

The court went on to find that the professional services exclusion did not except coverage because the claim was not related to professional services, but rather "was based on Lay's tortious conduct ancillary to the performance of real estate services."[156] Next, the court rejected Standard's interpretation of the intentional acts exclusion, finding that although technically intentional, Lay thought it had permission to send the faxes, negating any intent to injure and making Lay's conduct merely negligent.[157] The court found that the advertising injury coverage applied to the blast faxes, sent without the recipient's permission, because they "violated the fax recipient's right to privacy."[158]

Finally, the court held that Standard forfeited its right to control the settlement. "When an insurer surrenders control of the defense, it also surrenders its right to control the settlement of the action and to rely on a policy provision requiring consent to settle."[159] Accordingly, "Standard had no right to require Lay to obtain permission to settle the underlying suit or to object to it itself."[160]

Notably, the court warned that its decision may have undesirable consequences. "By allowing liability for telemarketing abuses to be covered by insurance, the company responsible for the abuses, in this case Lay, has no incentive to stop the abuses from

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149 *Id.* at ¶ 2.
150 *Id.*
151 *Id*. at ¶ 22.
152 *Id.*
153 *Id.* at ¶ 25.
154 *Id.*
155 *Id.*
156 *Id.* at ¶ 28.
157 *Id.* at ¶ 31.
158 *Id.* at ¶ 33.
159 *Id*. at ¶ 35.
160 *Id.*

occurring in the future and the purpose of the Telephone Act is unfulfilled."[161]

Offers of Judgment May Not Moot After All

Although the Supreme Court in 2013 held that an unaccepted offer of full judgment to the named plaintiff may moot a proposed class action prior to certification,[162] the doctrine has had a limited effect, particularly outside the Fair Labor Standards Act context in which that case was decided. Those limits were reflected in a recent decision from the District of Connecticut in which the court refused to dismiss a TCPA class action after the defendant tendered a Rule 68 offer to the named plaintiff.[163] The court, distinguishing the Rule 23 class action from the Section 16(b) action in *Genesis*, noted that the named plaintiff moved for class certification contemporaneously with filing the complaint *and* substantial discovery regarding the class had occurred when the Rule 68 offer was made.[164]

"Moreover," the court continued, "Ms. Mey seeks not only statutory damages but also injunctive relief for herself and the proposed class. In contrast, the plaintiff in *Genesis* sought only statutory damages for herself and the 'collective' of similarly situated employees she proposed to represent. . . . If a corporate defendant was allowed to forestall a class-wide injunction that would require changes in nationwide company practices by 'picking off' a named plaintiff with an offer to cease its conduct only with respect to her, then not only the policies of Rule 23 but the policies of the underlying statutes creating the legal rights at issue—here the TCPA—would go unredressed."[165]

3. Banking

U.S. Bank Settlement

On June 30, 2014, the Department of Justice announced that U.S. Bank would "pay the United States $200 million to resolve allegations that it violated the False Claims Act by knowingly originating and underwriting mortgage loans insured by the Federal Housing Administration (FHA) that did not meet applicable requirements."[166]

According to the Justice Department, U.S. Bank "misus[ed] government programs designed to maintain and expand homeownership," wasting taxpayer money and harming homeowners and the housing market.[167]

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[161] *Id.* at ¶ 23.
[162] *Genesis Healthcare Corp., v. Symczyk,* 133 S. Ct. 1523 (2013).
[163] *Mey v. Frontier Commc'ns Corp*., No. 3:13-CV-01191-MPS, 2014 WL 6977746 (D. Conn. Dec. 9, 2014).
[164] *Id.* at *5.
[165] *Id.*
[166] Press release, U.S. Department of Justice, Office of Public Affairs, http://www.justice.gov/opa/pr/us-bank-pay-200-million-resolve-alleged-fha-mortgage-lending-violations (June 30, 2014).
[167] *Id.*, quoting Stuart F. Delery, assistant attorney general for the Justice Department's Civil Division.

The settlement, praised by the DOJ as evidence of its dedication to hold lenders accountable for irresponsible lending practices, covers certain loans for single-family residential mortgages made from 2006 through 2011. This is how the DOJ explained the problem and U.S. Bank's admissions of guilt.

> U.S. Bank was a direct endorsement lender (DEL) in the FHA insurance program. A DEL has the authority to originate, underwrite, and certify mortgages for FHA insurance. If a loan certified for FHA insurance later defaults, the holder of the loan may submit an insurance claim to the U.S. Department of Housing and Urban Development (HUD), FHA's parent agency, for the losses resulting from the defaulted loan. Because FHA does not review a loan before it is endorsed for FHA insurance, FHA requires a DEL to follow program rules designed to ensure that the DEL is properly underwriting and submitting mortgages for FHA insurance.
>
> As part of the settlement, U.S. Bank admitted that, from 2006 through 2011, it repeatedly certified for FHA insurance mortgage loans that did not meet HUD underwriting requirements. U.S. Bank also admitted that its quality control program did not meet FHA requirements, and as a result, it failed to identify deficiencies in many of the loans it had certified for FHA insurance, failed to self-report many deficient loans to HUD, and failed to take the corrective action required under the program. U.S. Bank further acknowledged that its conduct caused FHA to insure thousands of loans that were not eligible for insurance and that the FHA suffered substantial losses when it later paid insurance claims on those loans.[168]

While the agreement resolves "potential violations of federal law," it "does not prevent state and federal authorities from pursuing enforcement actions for other origination conduct by U.S. Bank."[169]

EFTA Litigation

A 2012 amendment to the Electronic Fund Transfer Act, eliminating a requirement that ATMs post notices of the associated fees on the exterior of the machine, will not prevent a class action from moving forward in 2015. Even if "it may be inferred that Congress enacted [the amendment] to reduce frivolous litigation."[170]

In June 2012, Jarek Charvat brought a putative class action against a First National Bank of Wahoo, seeking statutory damages for the bank's alleged violation of the Electronic Fund Transfer Act's on-machine notice requirement that the ATM fee be posted on the machine's exterior.[171] Charvat did not assert that he failed to receive the on-screen notice, only the exterior notice.

[168] DOJ Press Release, *supra* note 61.
[169] *Id.*
[170] *Charvat v. First Nat. Bank of Wahoo*, 2014 WL 2894995, *4 (June 26, 2014).
[171] *Id.* at *1("Charvat brought this action against FNBW alleging violations of the EFTA, 15 U.S.C. §§ 1693–1693r.").

The district court dismissed the complaint "because Charvat suffered no injury-in-fact and, therefore, lacked standing to bring his claim."[172] On appeal, the Eighth Circuit reversed the district court's ruling and remanded for further proceedings.[173] The U.S. Supreme Court denied certiorari.

Meanwhile, in December 2012, Congress amended the EFTA and eliminated the on-machine notice requirement. Thus, on remand, the District Court for the District of Nebraska had to decide whether the EFTA amendment, removing the on-machine notice requirement, should be retroactively applied to Charvat. If the amendment had retroactive effect, Charvat's claim would be barred. Citing "the traditional presumption against retroactive application of statutes," and finding no express intent by Congress to apply the amendment retroactively, the court held that the amendment did not bar Charvat's claim.

The court found that Congress neither expressly directed—nor intended for—the amendment to apply retroactively.[174] Instead, at the time of the transactions, Charvat had a right under the EFTA "to a particular form of notice before an ATM transaction fee could be levied."[175] Further, Eighth Circuit precedent held that a plaintiff's right under the EFTA vested at the time of the transaction.[176]

The court concluded that if the amendment "were applied to transactions pre-dating the amendment's enactment, it would have a 'retroactive effect,' because it would impair rights individuals possessed when they acted."[177] Accordingly, the amendment did not bar the putative class members' claims either. Thus, the court denied FNBW's motion to dismiss.

Force-Placed Insurance Commissions and the TCPA: Two Traps That Can Be Avoided

Plaintiffs' class action lawyers have recently shifted their focus to targeting lender-placed insurance and automated phone calls by banks. And they have been relatively successful. Each of these practices has recently resulted in banks' paying significant settlement amounts; JPMorgan Chase and Citibank agreed to pay $300 million and $110 million, respectively, to resolve claims that they illegally granted an insurer the exclusive right to force place insurance on their borrowers in exchange for kickbacks,[178] and Capital One and HSBC Bank agreed to pay $75 million and $40 million,

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[172] *Id.*
[173] *Id.*; *see Charvat v. Mutual First Federal Credit Union*, 725 F.3d 819 (8th Cir. 2013).
[174] *Id.* at *2–5.
[175] *Id.* at *3.
[176] *Id.* at *3–4.
[177] *Id.* at *5.
[178] *Casey v. Citibank, N.A.*, N.D.N.Y. Case No. 5:12-cv-820, Dkt. No. 144-4; *Saccoccio v. JPMorgan Chase, N.A.*, 297 F.R.D. 683 (S.D. Fla. 2014).

respectively, to settle claims that they autodialed customers and used prerecorded voices without the customers' consent.[179]

The former group of cases grew out of the common practice of forcing mortgage borrowers to pay for hazard insurance if they failed to attain adequate insurance on their own.[180] Nothing is wrong with this practice generally—federal law requires the insurance, and a uniform clause in mortgage contracts permits it.

But how banks choose the insurance is where the trouble lies. Often, a bank and insurer will enter into an exclusive agreement that plaintiffs allege "artificially inflates the premiums charged to borrowers, resulting in premiums up to ten times greater than those available to consumers in the open market."[181] What makes matters worse is these arrangements will sometimes provide for what plaintiffs term "kickbacks" to the bank. As one judge in the Southern District of Florida explained, these suits "allege that lenders and their insurance providers have colluded together to create a nefarious scheme of kickbacks that artificially inflate [lender-placed insurance] rates."[182]

Lenders have had some success in defeating these cases. In particular, where the plaintiffs have failed to adequately allege a kickback scheme and where state law is favorable, defendants sometimes convince the court to dismiss the case on the pleadings. Two recent decisions from the Seventh and Eleventh Circuits exemplify this thread of cases.[183] But better alleged cases in less favorable jurisdictions continue to proceed past Rule 12[184] and, as noted above, have resulted in titanic settlements.

Another practice that is frequently challenged in force-placed insurance cases is the practice of "backdating," or charging the borrower for insurance for a time period that has already passed.[185] At its essence, this theory says that the bank is charging the borrower for worthless insurance because the risk of loss has already passed—that is, a flood will not go back in time and damage a home; it will only do so in the future. It has

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[179] *In re Capital One Telephone Consumer Protection Act Litigation*, N.D. Ill. Case No. 1:12-cv-10064, Dkt. No. 123-1, Ex. A; *Wilkins v. HSBC Bank Nevada, N.A.*, Case No. 14-cv-190, Dkt. No. 53, Ex. A.

[180] *See Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098 (2014) (describing force-placed insurance practices and affirming the trial court's ruling that the bank's requirement that the borrower include more insurance than federal law required did not breach the borrower and bank's contract).

[181] *Persaud v. Bank of Am., N.A.*, No. 14-21819-CIV, 2014 WL 4260853, at *3 (S.D. Fla. Aug. 28, 2014).

[182] *Montoya v. PNC Bank, N.A.*, No. 14-20474-CIV, 2014 WL 4248208, at *1 (S.D. Fla. Aug. 27, 2014).

[183] *See Feaz*, 745 F.3d at 1111 ("We agree with the Seventh Circuit that 'simply calling a commission a kickback doesn't make it one.'" quoting *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 611 [7th Cir. 2013]).

[184] *See,* e.g., *Hamilton v. Suntrust Mortgage Inc.*, 6 F. Supp. 3d 1300, 1310–11 (S.D. Fla. Mar. 25, 2014) (distinguishing *Cohen* and *Feaz*); *Xi Chen Lauren v. PNC Bank*, N.A., No. CIV.A. 13-762, 2013 WL 6123084, at *2 (W.D. Pa. Nov. 21, 2013) ("*Cohen* did not involve either Ohio law or a fiduciary duty claim.").

[185] *See,* e.g., *Smith v. SunTrust Mortgage Inc.*, No. SACV 13-0739 AG JPRX, 2013 WL 5305651, at *3 (C.D. Cal. Sept. 16, 2013) ("SunTrust and QBE conspired to backdate FPI policies unnecessarily. . . . For example, when SunTrust purchased FPI for Smith in September 2009, it backdated the policy to July 2009, even though SunTrust presumably knew nothing had happened to the property since July 2009.").

had mixed degrees of success.[186] Moreover, the Consumer Financial Protection Bureau recently opined that backdating is generally permissible, subject to certain protections.[187] This rule likely makes backdating claims—unless they are tied to some other inappropriate conduct, such as failing to give the borrower adequate notice—less attractive to plaintiffs' lawyers.

In sum, what convinces courts to keep these cases and likewise drives the large settlement values is the extent to which the lender, in fact, received what could reasonably be seen as a kickback from the insurer. How much the insurance premiums exceed those for sale on the open market also plays a role. So the safest bet is to not take commissions for force-placed insurance. But, at a minimum, any such arrangement should be fully disclosed to the borrower in advance.

In the latter group of cases, banks have become the newest target defendant for consumer class actions under the Telephone Consumer Protection Act.[188] The TCPA generally prohibits autodialing or texting cell phones and calling a cell phone using an artificial or prerecorded voice, unless the person has consented to receive the call or text message.[189] In the context of a creditor/debtor relationship, the FCC has held that a debtor consents to a call "if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed."[190]

While that standard seems clear, ambiguity exists around when, precisely, does the "transaction that resulted in the debt owed" occur? The Second Circuit recently took a narrow view in *Nigro v. Mercantile Adjustment Bureau, LLC*.[191] There, a son-in-law called to cancel his mother-in-law's electricity, and in the course of the call provided his cell phone number to the creditor. Because there was a $68 balance on the account, the power company used that number to autodial the son-in-law to attempt to collect the debt. The Second Circuit held that there was no consent, in part because the son-in-law "provided his number long after the debt was incurred."

This view potentially creates an issue for banks that frequently issue debt to their

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[186] *See,* e.g., *Decambaliza v. QBE Holdings, Inc.*, No. 13-CV-286-BBC, 2013 WL 5777294, at *9 (W.D. Wis. Oct. 25, 2013) (Rejecting claim because backdating was permitted by the contract, and further noting that "[c]ontrary to plaintiff's assertions, the backdated insurance was not worthless or unreasonable. At the time it was purchased, a claim still could have been made with respect to some unknown damage to the property.").

[187] *See* 12 C.F.R., pt. 24, Supp. I § 37(c)(1)(i).1 ("Subject to the requirements of § 1024.37(c)(1)(i) through (iii), if not prohibited by State or other applicable law, a servicer may charge a borrower for force-placed insurance the servicer purchased, retroactive to the first day of any period of time in which the borrower did not have hazard insurance in place.") (Effective January 2014).

[188] *See supra,* note 2.

[189] 47 U.S.C. § 227(b)(1)(A)(iii).

[190] *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 564-65 (2008).

[191] 769 F.3d 804 (2d Cir. 2014).

established customers—who may have provided their cell phone numbers to the bank at a different time when a particular obligation was created. And the issue is magnified because the TCPA provides for lucrative, uncapped damages: $500 per violation, and $1,500 for each willful violation. This is likely what convinced Capital One—facing a potential class of 21.2 million—to pay a seemingly monstrous settlement of $75 million to a class of persons who likely suffered little, if any, actual damages.

So when requesting a cell phone number, a bank should ask the customer for his or her express consent to call that number in the event the customer owes any delinquent debt to the bank. And the bank should be sure to memorialize this consent, because it is the creditor's obligation to prove consent.[192]

B. Data Privacy Class Actions

Looming large in the 2014 world of data privacy class actions was the Supreme Court's 2013 decision in *Clapper v. Amnesty International USA* that a plaintiff may not sue based on a risk of future harm unless that harm is "certainly impending." Courts are split over whether *Clapper* dooms data-breach claims based on the increased risk of identity theft. Several courts of appeals also weighed in on standing based solely on a statutory violation—uniformly allowing such claims. And as in years past, 2014 brought several novel theories of liability seeking to create damages following a data breach, including RICO's first appearance and a greater focus on "overpayment" theories of liability. These and the other issues outlined below made 2014 a big year for data privacy class actions.

1. Article III Standing

Clapper and the "Increased Risk of Identity Theft"

In 2013, the Supreme Court decided *Clapper v. Amnesty International USA*.[193] Though *Clapper* was not a data-breach case, the holding—reiterating the Court's well-established but often overlooked standard that "threatened injury must be *certainly impending* to constitute injury in fact"—would reverberate through data-breach cases. Before *Clapper*, a majority of the three courts of appeal to consider the issue held that an increased risk of identity theft established Article III standing. But *Clapper* allowed defendants in these jurisdictions—the Seventh and Ninth Circuits—to retry these arguments, and bolstered defendants' positions in circuits that had not considered the issue. The success has been mixed, but a majority agreed that *Clapper* bars plaintiffs from pointing only to an alleged increased risk of identity theft to establish their standing to sue in federal court.

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[192] 23 F.C.C. Rcd. at 565.
[193] 133 S. Ct. 1138 (2013).

Notably, several district judges in the Seventh Circuit have parted with that court's precedent—*Pisciotta v. Old National Bancorp*[194]—in holding that standing cannot be established through an increased risk of identity theft. Courts in *Strautins v. Trustwave Holdings, Inc*.;[195] *Tierney v. Advocate Health & Hospitals Corp*.;[196] *Remijas v. Neiman Marcus Grp., LLC*;[197] and *Lewert v. P.F. Chang's China Bistro, Inc.*[198] held that *Clapper* compels rejection of claims that an increased risk of identity theft is sufficient to satisfy the injury-in-fact requirement for standing. These decisions followed on the heels of Judge John W. Darrah's 2013 decision in *In re Barnes & Noble Pin Pad Litigation*.[199]

Tierney, *Barnes & Noble*, and *P.F. Chang's* cited *Clapper* without reference to *Pisciotta*. But Judges Tharpe and Zagel in *Strautins* and *Remijas*, respectively, addressed the continuing vitality of *Pisciotta* in light of *Clapper*'s certainly impending standard.

Judge Tharpe in *Strautins* took the sharpest view. He could not square *Pisciotta*, which failed to address whether the plaintiffs' injuries were certainly impending, or even acknowledge that this standard applied, with the Supreme Court's "emphatic reiteration in *Clapper* of the 'certainly impending' standard for assessing the sufficiency of probabilistic harm to confer standing." Judge Tharpe felt he was "duty bound to apply that standard in this case notwithstanding seemingly inconsistent Seventh Circuit precedent that predates *Clapper*." And because Amber Strautins failed to adequately allege any injury other than an increased risk of identity theft, but not one that was certainly impending, the court dismissed her claims for lack of Article III standing.

Judge Zagel took a more measured view. The court noted that though "it does not expressly say so, *Pisciotta* was constrained by the 'certainly impending' standard, first articulated 27 years earlier in *Babbit*, and I read that standard into the opinion." Judge Zagel then attributed the differing holdings in *Strautins*, *Barnes & Noble*, and *Pisciotta* to whether the plaintiff alleged that his or her information was actually accessed and stolen by a third party. Judge Zagel held that *Pisciotta*, while silent on the issue, assumed that the plaintiffs' information was actually stolen, making the harm more impending. In contrast, the plaintiffs in *Strautins* and *Barnes & Noble* could allege only that it might have been stolen, making the injury more remote and speculative. Judge Zagel held that most of the potential plaintiffs in the Neiman Marcus breach could not allege that their information was, in fact, stolen, so they could not allege a certainly impending risk of identity theft.

Outside the Seventh Circuit, judges in the Southern District of Ohio and District of

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[194] 499 F.2d 629, 634 (7th Cir. 2007).
[195] No. 12 C 09115, 2014 WL 960816 (N.D. Ill. Mar. 12, 2014).
[196] No. 13 CV 6237, 2014 WL 5783333 (N.D. Ill. Sept. 4, 2014).
[197] No. 14 C 1735, 2014 WL 4627893 (N.D. Ill. Sept. 16, 2014).
[198] No. 14-CV-4787, 2014 WL 7005097 (N.D. Ill. Dec. 10, 2014).
[199] 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013).

Columbia also found *Clapper* dispositive.[200] As Judge James E. Boasberg put it in *Science Applications International Corp.*, "an *increased risk* or *credible threat* of impending harm is plainly different from *certainly impending* harm, and certainly impending harm is what the Constitution and *Clapper* require."

But not all defendants were successful in citing *Clapper* to thwart increased-risk-of-identity-theft claims. Three companies failed to convince courts in the Ninth and Seventh Circuits that *Clapper* changed pre-existing circuit precedent.[201] And Target, whose MDL litigation is pending in Minnesota, likewise lost its bid to kill the consumer litigation based on standing.

The court in *Michaels Stores* distinguished *Clapper*, holding that it applied the "imminence requirement in an 'especially rigorous' fashion given that the merits of the case would have required the Court to decide whether the FISA Amendments Act of 2008 [] was unconstitutional." The court further noted that other Supreme Court precedent described the imminence requirement differently, including "injury risks that are not 'chimerical,' 'imaginary,' or 'wholly speculative' or, conversely, ones that are 'credible' and 'well-founded.'" These, according to the court, "sound less demanding than *Clapper*'s rigorous application of the 'certainly impending' standard." Applying the less-demanding standard it divined from looking at a broad spectrum of Supreme Court cases, the court concluded, consistent with *Pisciotta*, "that the elevated risk of identity theft stemming from the data breach at Michaels is sufficiently imminent to give Plaintiffs standing."

Adobe and *Sony* likewise refused to stray from Ninth Circuit precedent, *Krottner v. Starbucks*,[202] which like *Pisciotta* held that an alleged increased risk of identity following a data breach is sufficient to establish Article III standing. These courts noted that *Clapper* self-evidently did not change Article III standing law—it applied well-established principles, and said it was doing so. And while these cases acknowledged that *Krottner* did not use the certainly impending language, the courts did not find this difference in phraseology of the imminence requirement problematic.

The court in *Adobe* also went a step further, holding that even if *Clapper* changed or overruled the standard outlined in *Krottner*, the plaintiffs satisfied *Clapper*. The court held that given the nature of the hacking—"Not only did the hackers deliberately target Adobe's servers, but Plaintiffs allege that the hackers used Adobe's own systems to decrypt customer credit card numbers" and "the stolen data has already surfaced on the

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200 *Galaria v. Nationwide Mut. Ins. Co.*, 998 F. Supp. 2d 646 (S.D. Ohio 2014); *In re Sci. Applications Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, No. MDL 2360, 2014 WL 1858458 (D.D.C. May 9, 2014).
201 *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d 942; (S.D. Cal. 2014); In re Adobe Sys., Inc. Privacy Litig., No. 13-CV-05226-LHK, 2014 WL 4379916 (N.D. Cal. Sept. 4, 2014); *Moyer v. Michaels Stores, Inc.*, No. 14 C 561, 2014 WL 3511500 (N.D. Ill. July 14, 2014).
202 628 F.3d 1139 (9th Cir. 2010).

Internet, and other hackers have allegedly misused it to discover vulnerabilities in Adobe's products."—"the danger that Plaintiffs' stolen data will be subject to misuse can plausibly be described as 'certainly impending.'" The court also rejected the notion that a plaintiff should have to wait for misuse, because "to require Plaintiffs to wait until they actually suffer identity theft or credit card fraud in order to have standing would run counter to the well-established principle that harm need not have already occurred or be 'literally certain' in order to constitute injury-in-fact."

Finally, in the consumer litigation arising from Target's 2013 holiday breach, Judge Paul A. Magnuson summarily rejected Target's arguments that plaintiffs lacked standing, without so much as citing or discussing *Clapper*.[203] The court did not get into specifics, and instead simply held that "paragraphs 1.a through 1.g and 8 through 94 of the Complaint are a recitation of many of the individual named Plaintiffs' injuries, including unlawful charges, restricted or blocked access to bank accounts, inability to pay other bills, and late payment charges or new card fees." Unlike the decisions following *Barnes & Noble*, Judge Magnuson rejected Target's position that plaintiffs needed to plead that fraudulent charges were unreimbursed, stating that these "arguments gloss over the actual allegations made and set a too-high standard for Plaintiffs to meet at the motion-to-dismiss stage."

Next year promises to further clarify this threshold issue omnipresent in data privacy litigation. *Remijas*, *PF Chang's*, and *Tierney* are pending before the Seventh Circuit, so that court will have the opportunity to pass on its own precedent. And there are several high-profile data breaches still winding their way through the motion-to-dismiss stage, including breaches at Home Depot and Community Health Systems.

Standing Based on the "Invasion" of a Legal Right

Plaguing plaintiffs in privacy cases is often the inability to establish standing because of their lack of damages. So some plaintiffs in privacy cases also assert claims for statutory damages under various federal laws, often based on the Fair Credit Reporting Act, the Video Privacy Protection Act, and the Telephone Consumer Protection Act. These plaintiffs seek to establish standing by alleging that the violation of their statutory right is a sufficient injury in fact to confer standing. While this position is controversial, five circuits in 2014—the Fifth, Seventh, Eighth, Ninth, and Eleventh—agreed that alleging a statutory violation is sufficient,[204] largely following the Sixth Circuit's 2009

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[203] *In re Target Corp. Data Sec. Breach Litig.*, No. MDL 14-2522 PAM/JJK, 2014 WL 7192478 (D. Minn. Dec. 18, 2014).

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

opinion in *Beaudry v. Telecheck Servs., Inc.*[205]

For example, the Seventh Circuit in *Sterk v. Redbox Automated Retail, LLC*, held that plaintiffs had standing to pursue claims under the Video Privacy Protection Act because they alleged that Redbox "disclosed their [personal information] to Stream," which the plaintiffs argued violated the VPPA. While this was only a "technical violation," it was nevertheless "precisely what Congress sought to illegalize by enacting the VPPA." And because the court held that Congress may "enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute," the plaintiffs in *Sterk* could sue in federal court.

Similarly, a divided Eighth Circuit panel in *Hammer v. Sam's East, Inc.*, held that plaintiffs had standing to sue for violations of the Fair and Accurate Credit Transactions Act, despite their lack of injury. FACTA prohibits retailers from disclosing more than the last five numbers of a credit or debit card on a purchaser's receipt. The majority, like the Seventh Circuit in *Sterk*, held that because "Congress gave consumers a legal right to obtain a receipt at the point of sale showing no more than the last five digits of the consumer's credit and debit card number," and because plaintiffs alleged that they received a receipt violating this rule, plaintiffs had Article III standing. "It is of no consequence that [this] injury is dependent on the existence of the statute." The court did, however, recognize two limitations: (a) the plaintiff must be "among the injured"—that is, "that he alleges that defendants violated *his* statutory rights," and (b) the congressionally created injury must be "personal" and "individualized."

The Supreme Court has wavered on this issue, sometimes stating that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute,"[206] while other times stating that it "is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would otherwise not have standing."[207] Where Congress's authority stops and the Constitution kicks in is up for debate. Justice Scalia in *Lujan v. Defenders of Wildlife*[208] suggested that the broader statements simply mean that Congress may elevate to "legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." But Justices Kennedy and Souter took a more expansive view in their concurrence, stating that "Congress has the power to define

[205] 579 F.3d 702 (6th Cir. 2009).
[206] *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Warth v. Seldin*, 422 U.S. 490, 514 (1975) ("Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.").
[207] *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *see also Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (Congress may not "abrogate the Art. III minima."); and *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("The requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").
[208] 504 U.S. 555, 578 (1992).

injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." Nor did either justice "read the Court's opinion to suggest a contrary view."

The Supreme Court accepted certiorari in 2011 to consider this question but ultimately dismissed the case as improvidently granted.[209] But at oral argument, the chief justice suggested that Congress's power is more limited than the recent courts of appeal decisions allow.

MR. LAMKEN: I think our argument is that the invasion of your statutory right to a conflict-free service is itself an injury in fact . . .

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CHIEF JUSTICE ROBERTS: Can I . . . I'm sorry to interrupt you, and I want to pause on that question. You said violation of a statute is injury in fact. I would have thought that would be called injury in law. And when we say, as all our standing cases have, is that what is required is injury in fact, I understand that to be in contradistinction to injury in law. And when you tell me that you've got or all that you want to plead is violation of the statute, that doesn't sound like injury in fact.[210]

The Supreme Court is currently considering whether to grant review in *Robins v. Spokeo, Inc.*, to again consider this question, and recently called for the solicitor general's view in that case.[211]

2. Theories of Liability

2014 continued to expand and clarify the types of damages sought and legal theories pursued by those seeking to recover for alleged harm in the wake of data breaches.

Overpayment

The "overpayment" theory—that data security is baked into the cost of a product or service, and because the breached entity failed to provide that paid-for security, the plaintiffs are entitled to the amount they overpaid for the product or service, whether based on fraud, breach of contract, or unjust enrichment—continued to play a prominent role in data privacy litigation. At its core, this theory argues that customers were denied the benefit of their bargain with the defendant because the defendant's security was not as safe as either it should have been or as the defendant represented in a privacy policy or other disclosure. The oft-cited case justifying this theory is the Eleventh Circuit's 2012 decision in *Resnick v. AvMed, Inc.*, where that court allowed an unjust enrichment claim

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[209] *First Am. Fin. Corp. v. Edwards*, 132 S. Ct. 2536 (2012).

[210] Transcript of oral argument at 32-33, *First Am. Fin. Corp. v. Edwards*, No. 10-708 (Nov. 28, 2011), *dismissed as improvidently granted*, 132 S. Ct. 2536 (2012).

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

based on allegations that portions of the plaintiffs' insurance premiums were supposed to be used to provide data security.[212]

Despite this precedent, these claims are not always successful. In particular, several courts addressing retail credit- and debit-card breaches, including Judge Magnuson in *Target*, who allowed several of the plaintiffs' theories to stand, have rejected this theory.[213] Judges Magnuson and Darrah, of the Northern District of Illinois, each found this theory implausible because the retailers "charge[] all shoppers the same price for the goods they buy whether the customer pays with a credit card, debit card, or cash." So these courts have held that it is implausible that the price of data security somehow impacted the price of the goods the retailers sold. *Target* specifically distinguished *AvMed* on this basis.

The court in *Neiman Marcus* found a deeper problem, one that may extend beyond the retail setting. According to Judge Zagel, the problem with this claim is that "the deficiency complained of is extrinsic to the product being purchased," while "a vital limiting principle to this theory of injury is that the value-reducing deficiency is always intrinsic to the product at issue." The court thus concluded the plaintiffs' theory was unsound.

> To illustrate the problem this creates: suppose a retail store does not allocate a sufficient portion of its revenues to providing adequate in-store security. A customer who is assaulted in the parking lot after patronizing the store may well have a negligence claim against the store owner. But could he or she really argue that she overpaid for the products that she purchased? Or even more to the point: even if no physical injury actually befell the customer, under Plaintiffs' theory, the customer still suffered financial injury because he or she paid a premium for adequate store security, and the store security was not in fact adequate.

This theory is also winding itself through the courts in other types of privacy litigations, as well. In 2013, LinkedIn won a victory when, following a hacking incident affecting approximately 6.5 million users, the court rejected the plaintiffs' theory that they were denied the benefit of their bargain when the defendant did not provide the level of security that it had allegedly promised.[214] The court rejected the plaintiffs' theory in part because they failed to allege "that they actually read the alleged misrepresentation." But, after a plaintiff amended her consumer fraud claim to allege that she actually read and relied on the privacy policy, the court found she had alleged sufficient facts to state

[212] 693 F.3d 1317, 1327-28 (11th Cir. 2012).
[213] *See Lewert*, 2014 WL 7005097, at *2; *In re Target Corp. Data Sec. Breach Litig*., 2014 WL 7192478, at *22; and *Remijas*, 2014 WL 4627893, at *4.
[214] *In re LinkedIn User Privacy Litig.*, 932 F. Supp. 2d 1089 (N.D. Cal. 2013).

a claim.[215]

With an important caveat, the court in *In re Sony Gaming Networks & Customer Data Security Breach Litigation*[216] agreed that reliance is necessary to state a variety of California consumer fraud claims, and because plaintiffs received the representations after they purchased their consoles, they could not allege reliance. But the court went on to explain that these "arguments fail to address Plaintiffs' fraudulent omission contentions." Because "Plaintiffs have alleged that Sony omitted material information regarding the security of Sony Online Services, and that this information should have been disclosed to consumers at the time consumers purchased their Consoles, the Court finds Plaintiffs have sufficiently alleged a loss of money or property 'as a result' of Sony's alleged unfair business practices." Thus, the court denied Sony's motion to dismiss these claims insofar as they related to fraudulent omissions.

Breach of Confidentiality

A state appellate court decision arguably broadened the role of breach of fiduciary duty or confidentiality claims, particularly in medical information data breaches. The West Virginia Supreme Court, over a dissent that deemed the case a "frivolous class-action lawsuit," held that plaintiffs had standing to pursue claims for breach of the duty of confidentiality and invasion of privacy where a health care provider accidentally posted patient information on the Internet.[217] The court specifically found that discovery revealed no identity theft or other economic harm to the plaintiffs. Despite that lack of injury, the court found that plaintiffs could pursue claims for breach of the hospital's duty of confidentiality and invasion of privacy because "petitioners, as patients of CAMC, have a legal interest in having their medical information kept confidential," and when "a medical professional wrongfully violates this right, it is an invasion of the patient's legally protected interest."

Fair Credit Reporting Act

Plaintiffs alleging Fair Credit Reporting Act claims in the data-breach cases continue to struggle.[218] This is mainly because most breached entities are not consumer reporting agencies, which are those entities that "regularly engage[] in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties." For instance, Judge Norgle held in dismissing an FCRA claim against Advocate Health and Hospitals

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215 *In re LinkedIn User Privacy Litig.*, 2014 WL 1323713 (N.D. Cal. Mar. 28, 2014).
216 996 F. Supp. 2d 942 (S.D. Cal. 2014).
217 *Tabata v. Charleston Area Med. Ctr., Inc.*, 759 S.E.2d 459 (W. Va. 2014).
218 *See In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 996 F. Supp. 2d at 1010-11; *Strautins*, 2014 WL 960816, at *8; and *Tierney v. Advocate Health & Hospitals Corp.*, No. 13 CV 6237, 2014 WL 5783333, at *3 (N.D. Ill. Sept. 4, 2014).

Corporation that "Defendant—a health care provider—does not engage in such a practice." Additionally, in a case where data is stolen, courts have generally held that the plaintiffs cannot meet FCRA's "furnishing" requirement. The court in *Sony* echoed a 2012 Western District of Kentucky decision, *Holmes v. Countrywide Fin. Corp.*,[219] in explaining "No coherent understanding of the words 'furnished' or 'transmitted' would implicate [the defendant's] action under the FCRA." Judge Tharp in *Strautins* had the harshest words to say about this claim, dismissing it with leave but advising the plaintiff's counsel "that the assertion of the claim in the pending complaint raises, in the Court's view, concerns about compliance with the requirements of Rule 11."

California Confidentiality of Medical Information Act

Two California appellate courts issued decisions in 2014 limiting the scope of claims for statutory "nominal" damages under the California Confidentiality of Medical Information Act (CMIA). In each of these cases, the court interpreted specific statutory language in denying statutory damages in situations where there was no actual breach of medical privacy or where it was impossible to know whether any breach of confidentiality had even occurred. First, in *Sutter Health v. Superior Court*,[220] the court held that nominal damages were not available because the CMIA imposes liability only for an actual breach of confidentiality, not for merely increasing the risk of a confidentiality breach. And in *Eisenhower Medical Center v. Superior Court*,[221] the court found that "under the CMIA a prohibited release by a health care provider must include more than individually identifiable information but must also include information relating to medical history, mental or physical condition, or treatment of the individual."

Health Insurance Portability and Accountability Act

Also affecting medical information data breaches, the Connecticut Supreme Court released its opinion in *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*,[222] sanctioning state-law claims grounded in HIPAA violations. In *Byrne*, the defendant released the plaintiff's medical records to the father of her child in violation of HIPAA. The lower court restricted the plaintiff's ability to assert HIPAA-based negligence claims, finding that state law could not override HIPAA's lack of a private right of action. And because the plaintiff's claims were essentially HIPAA claims, they were preempted. The Connecticut Supreme Court reversed.

The court agreed "with the plaintiff and conclude[d] that such an action is not preempted by HIPAA and, further, that the HIPAA regulations may well inform the applicable standard of care in certain circumstances." The court dispelled the preemption

[219] No. 08–CV–00205, 2012 WL 2873892 (W.D. Ky. July 12, 2012).
[220] 174 Cal. Rptr. 3d 653, 658-61 (Cal. Ct. App. 2014).
[221] 172 Cal. Rptr. 3d 165, 170 (Cal. Ct. App. 2014), review denied (Aug. 13, 2014).
[222] 314 Conn. 433, 102 A.3d 32 (2014).

argument because “the regulatory history of the HIPAA demonstrates that neither HIPAA nor its implementing regulations were intended to preempt tort actions under state law arising out of the unauthorized release of a plaintiff’s medical records.” And instead of preempting state tort actions, the court concluded consistent with a majority of states to consider the issue that “HIPAA and its implementing regulations may be utilized to inform the standard of care,” and that the “availability of such private rights of action in state courts, to the extent that they exist as a matter of state law, do not preclude, conflict with, or complicate health care providers’ compliance with HIPAA. On the contrary, negligence claims in state courts support ‘at least one of HIPAA’s goals by establishing another disincentive to wrongfully disclose a patient’s health care record.’”

Racketeer Influenced Corrupt Organizations Act

For the first time, Racketeer Influenced Corrupt Organizations Act claims have made appearances in data-breach litigation—in cases arising from the hacking incidents at Community Health Systems and Target. The lead plaintiffs’ counsel in the MDL Target litigation opted to exclude the RICO claims being pursued by unselected plaintiffs’ counsel for certain issuing financial institutions, and Judge Magnuson rejected that attorney’s bid to represent a fourth “RICO track.”[223] While this attorney described his RICO theory as “cutting-edge,” Judge Magnuson expressed “serious doubts about the merits of these claims,” explaining that “RICO does not cover all instances of wrongdoing. Rather, it is a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity.” The proposed amended complaint “simply [did] not allege the type of activity that civil RICO prohibits.” The *Community Health Systems* litigation is in its nascent stage, but RICO claims have been asserted in one of the several cases arising from that hacking incident.[224] The court has yet to pass on these claims.

Derivative Claims

The District of New Jersey in 2014 dealt a victory to Wyndham Worldwide Corporation’s board of directors in *Palkon v. Holmes*.[225] The plaintiff filed a derivative action against several Wyndham officers for failing to protect the company from several cyber attacks. The board previously refused the plaintiff’s demand to pursue the litigation, so to sue derivatively the plaintiff had to show that this refusal was made in bad faith or based on an unreasonable investigation.

The court held that the plaintiff could show neither. The plaintiff attempted to show bad faith by arguing that Wyndham’s outside and inside counsels were conflicted, but

[223] Order, *In re Target Customer Data Security Breach Litigation*, 14-md-2522, Dkt. No. 146 (D. Minn.).
[224] Second Amended Class Action Complaint, *Alverson et al. v. Community Health Systems, Inc., et al.*, 2:14-cv-01629, Dkt. No. 12 (N.D. Ala.).
[225] No. 2:14-CV-01234 SRC, 2014 WL 5341880 (D.N.J. Oct. 20, 2014).

neither was the target of the derivative litigation or involved in data security. Nor did the court require Wyndham to conduct an exhaustive investigation of the plaintiff's claim, instead holding that "courts uphold even cursory investigations by boards refusing shareholder demands." And because the board "had a firm grasp of Plaintiff's demand when it determined that pursuing it was not in the corporation's best interest," this refusal was done after a reasonable investigation.

Negligence Claims by Issuing Financial Institutions

Judge Magnuson, who is handling the litigation stemming from Target's 2013 holiday breach, left largely intact claims by financial institutions seeking compensation for having to reimburse their consumers for fraudulent charges allegedly caused by the breach. These plaintiffs, known as "issuer banks," are the banks of customers who used their credit and debit cards to shop at Target. They do not have a direct relationship with the retailer, so Target argued that these banks' claims failed because it had no duty to protect them from loss. The court rejected this argument. "At this preliminary stage of the litigation, Plaintiffs have plausibly pled a general negligence case." Under Minnesota's multifactor test for imposing a duty, the court found that Target appropriately owed these banks a duty of care to not cause their losses. The court also specifically found that "[i]mposing a duty on Target in this case will aid Minnesota's policy of punishing companies that do not secure consumers' credit- and debit-card information."

3. Class Certification

Data privacy cases infrequently reach the class certification stage, either being dismissed for lack of standing or on the merits or settled. In 2014, however, Google defeated a class certification motion in massive litigation claiming it illegally captured data from Gmail messages in violation of the Wiretap Act and similar state laws.[226] The main obstacle preventing certification was "that individual issues of consent are likely to predominate over any common issues," and thus the plaintiffs could not satisfy Rule 23(b)(3)'s predominance requirement. This is because consent was the central issue in whether plaintiffs could state their claims under the Wiretap Act. And because "a broad swath of evidence that email users were notified of the interceptions, such as Google disclosures, third-party disclosures, and news articles, are relevant to the factual question of consent," the issue could not be determined with common evidence.

Judge Lucy H. Koh went on to distinguish and find "unpersuasive" *Harris v. comScore, Inc.*,[227] which found that consent was not an issue in a similar case because the parol evidence rule barred the defendant from introducing any of the varied evidence. "The

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[226] *In re Google Inc. Gmail Litigation*, 2014 WL 1102660 (N.D. Cal. Mar. 18, 2014).
[227] 292 F.R.D. 579 (N.D. Ill. 2013).

Harris court did not address the long line of cases that suggest a broader swath of materials is relevant to implied consent under the Wiretap Act." The court also distinguished *Harris* because some of the class members in *Google* had no actual contact with *Google*—e.g., those whose emails were through an educational institution—and in *Harris* there were "no potential other sources of disclosure, such as news articles, to which Class members in the instant litigation could have been exposed."

Judge Koh ultimately concluded that the question of consent, which would "likely be Google's principal affirmative defense," was "an intensely individualized" factual inquiry, which was "likely to overwhelm any common issues." "Therefore, the Court cannot conclude that Plaintiffs have met their burden of demonstrating that the proposed Classes satisfy the predominance requirement."

Omni Hotels did not fare so well in defending the plaintiffs' motion to certify a class accusing Omni of recording phone calls illegally under California law, which requires both parties' consent to do so.[228] Judge Christina A. Snyder did not find the implied consent issue a problem, distinguishing Judge Koh's analysis in *Google*. Essentially, the court held that the evidence Omni offered did not actually show that any caller consented; that "the Court does not find that evidence that some class members expected their calls to be recorded raises predominant issues of consent in the absence of any evidence that Omni—or anyone else—ever notified callers that Omni would record their calls before or at the outset of any call."

Finally, considering West Virginia's similar Rule 23, the West Virginia Supreme Court held that the plaintiffs in *Tabata v. Charleston Area Medical Center, Inc.,* could pursue their breach of confidentiality and invasion of privacy claims on a class basis.[229] The court deemed it an easy case, despite the seemingly individual nature of privacy and confidentiality claims. "Simply put, all of the proposed class members are in the same position. Their causes of action are the same and they arise from the same event." In fact, the court seemed to suggest that class treatment was appropriate *because of* the lack of individual harm—which noted above, the court did not require to state these claims; "[t]here is no evidence of unauthorized access of their personal and medical information, no evidence of actual identity theft, and no evidence of economic injury arising from the alleged wrongdoing. Rather, all of the proposed class members allege that their interests in confidentiality and privacy have been wrongfully invaded by the respondents." Thus, the court reversed the lower court's ruling that plaintiffs could not satisfy West Virginia's Rule 23.

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[228] *Steven Ades & Hart Woolery v. Omni Hotels Mgmt. Corp.*, No. 2:13-CV-02468-CAS, 2014 WL 4627271 (C.D. Cal. Sept. 8, 2014).
[229] *See Tabata*, 759 S.E.2d at 465-67.

C. Employment Discrimination and Wage and Hour

1. FLSA Certification Standards

Two-Step Procedure Remains Governing Standard but Can Be Updated With Early Discovery

The two-step procedure for certifying a class under the FLSA has long been the favored procedure of federal district courts, and nothing happened in 2014 to change that. It remains that at the first stage, plaintiffs need only clear a low evidentiary bar to establish that putative class members are similar enough to justify sending notification to the class. Then at the second stage, those class members who have opted into the action must pass a rigorous test to demonstrate that they are similarly situated so as to justify adjudicating their claims in the aggregate.

Every once in a while, however, a case comes along that blends the two standards at the conditional certification stage. In August, the Northern District of Ohio applied a higher standard at the conditional certification stage where the parties had already conducted "some discovery to determine whether a class of similarly situated plaintiffs may exist."[230]

In *Triggs*, former nonexempt sales specialists for Lowe's sought a nationwide FLSA collective action of approximately 200,000 employees and an Ohio state-law class under Rule 23. They alleged that Lowe's failed to compensate them, in violation of the FLSA, for time spent donning and doffing blue aprons that Lowe's associates wear on the sales floor. In assessing class certification, the court noted that because some discovery had occurred, it could apply an intermediate level of scrutiny, although one that took account of the disparate factual and employment setting of potential opt-ins as well as the various defenses available that pertain to individual class members—elements that often prompt decertification at the second stage.

Indeed, the limited discovery that had occurred revealed that even among just the six named and opt-in plaintiffs (all who worked at four Northeast Ohio stores), putative class members held different positions, some that did not even require wearing a blue apron. Forty-two declarants procured by Lowe's produced testimony showing disparate positions, departments, and stores, detailing an "array of employee experiences in Northeast Ohio with regard to clocking-in and clocking-out and the wearing and storing of uniforms."[231] Further, evidence produced by plaintiffs showed common policies, but it also showed "varying interpretations of policies by managers," making it "insufficient to

[230] *Triggs v. Lowe's Home Centers, Inc.*, 2014 WL 4162203, *2 (N.D. Ohio, Aug. 19, 2014).
[231] *Id.* at *3.

demonstrate that there is substantial similarity among the proposed opt-in plaintiffs."[232] Thus, even at the conditional certification stage, the court refused to certify the class for sending notice to potential opt-ins. [233]

Triggs, accordingly, reaffirms the potential usefulness of early discovery in FLSA cases where defendants do not necessarily have to concede that conditional certification is a foregone conclusion.

2. FLSA Pleading Standards

Third Circuit Confirms Heightened Pleading Standards Apply to FLSA Collective Actions

Several years after the Supreme Court ushered in the era of heightened pleading standards with *Twombly* (2007) and *Iqbal* (2009), the doctrine is finally gaining traction in the FLSA collective action arena.

In August, the Third Circuit acknowledged that federal courts remain divided—if not confused—over the "level of detail necessary to plead a FLSA overtime claim,"[234] the type of claim that is the bread and butter of wage-and-hour collective actions. Agreeing with the Second Circuit, the Third Circuit adopted what it described as the "middle ground"—that is, "a plaintiff must sufficiently allege [forty] hours in work in a given workweek as well as some uncompensated time in excess of the [forty] hours."[235]

What that means is that plaintiffs cannot just allege that they and class members "typically" or "frequently" worked unpaid overtime hours. Rather, they must allege with more specificity under *Twombly/Iqba*l to show that extra hours were worked during a typical workweek. The Third Circuit stopped short of requiring plaintiffs to allege precise weeks in which unpaid overtime occurred, but it did note that the allegations must provide enough factual support to meet the plausibility requirement under *Twombly/Iqbal*. Where the class allegations merely allege FLSA violations without providing sufficient factual support to indicate any employee actually suffered, courts will increasingly find dismissal to be appropriate.

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[232] *Id.* at *4.
[233] For the same reasons that the conditional certification failed under the FLSA, the court refused to find commonality to support the plaintiffs' proposed Rule 23 class for violating Ohio's minimum wage law.
[234] *Davis v. Abington Mem. Hosp*., 765 F.3d 236 (3d Cir. 2014).
[235] *Id.* at 242 (citing *Lundy v. Catholic Health System of Long Island, Inc*., 711 F.3d 106 (2d Cir. 2013).

3. Compensable Time

Supreme Court Unanimously Places Limits on Boundaries of Compensable Time

The Supreme Court began and ended 2014 by unanimously deciding two cases that respectively curtailed the scope of compensable time for which employees must be paid under the Fair Labor Standards Act. The decisions, *Sandifer v. U.S. Steel Corp*. and *Integrity Staffing Solutions, Inc. v. Busk*, featured interpretations of different provisions under the FLSA. But both cases profoundly impacted the type and scope of collective actions available under the statute going forward.

Changing Clothes Means Changing Clothes

In February 2014, the Supreme Court delved into the murky world of what it means to "change clothes." [236] Section 3(o) of the FLSA permits employees and employers to decide that as part of a collective bargaining agreement, "time spent in changing clothes . . . at the beginning or end of each workday" is non-compensable. The *Sandifer* plaintiffs were steelworkers who alleged that the 12 pieces of protective gear that they had to put on each day were not clothes. Under that theory, they were thus entitled to be compensated for the few minutes each day that they spent donning and doffing the gear. With an 800-member class, the potential scope of liability was quite large. Accordingly, the employer argued in response that the protective gear was clothing that fell within the definition of § 3(o), thus making the time non-compensable.

First, the Court sided with the employer on the clothing argument, determining essentially that clothing is clothing and that there is "no basis for the proposition that the unmodified term 'clothes' somehow omits protective clothing."[237]

Second, the Court expounded on the class action implications of the case, and in particular the difficulty in resolving class liability over such *de minimis* blocks of time. "Such 'trifles' as 'a few seconds or minutes of work beyond the scheduled working hours' may be disregarded," Justice Scalia's opinion noted.[238] Indeed, the opinion reflected the Court's growing concern with the manageability of class actions where liability hides behind intricate individualized questions. Rejecting the view that § 3(o) was intended "to convert federal judges into time-study professionals," the Court explained that its commonsense approach avoided "such relatively inconsequential judicial involvement in 'a morass of difficult, fact-specific determinations.'"[239]

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[236] *Sandifer v. U.S. Steel Corp*., 134 S. Ct. 870 (2014).
[237] *Id*. at 877.
[238] *Id*. at 880.
[239] *Id*. at 881 (quoting *Sepulveda v. Allen Family Foods, Inc*., 591 F.3d 209, 218 (4th Cir. 2009).

It was perhaps unsurprising that the tone of *Sandifer* conveyed hostility toward class actions that reflect such individualized characteristics. After all, Justice Scalia also authored the 2011 landmark case *Wal-Mart Stores, Inc. v. Dukes*, which stamped with approval the Court's rejection of "trial by formula" tactics to establishing class liability. In *Sandifer*, Justice Scalia—this time with the unanimous support of the Court—reaffirmed that principle in the FLSA context.

Security Screenings Are Not Compensable

Just before the Court recessed for the winter holiday season, it issued another unanimous decision affecting class liability for when employers have to pay employees and when they don't. In *Integrity Staffing*,[240] the Supreme Court reversed a Ninth Circuit holding that a putative class of employees must be compensated under the FLSA for time spent waiting in employer-mandated security checks at the end of the workday.

In 2013, the Ninth Circuit reversed a district court holding that the Portal-to-Portal Act did not require an employer to compensate employees for postliminary activities such as time spent in security checks. The Ninth Circuit's reversal was based primarily on the fact that the security checks were performed primarily for the employer's benefit—to prevent employees who handle merchandise from stealing that same merchandise from a warehouse. Thus, the appeals court holding established significant viability for class claims alleging FLSA violations for uncompensated security screening time.

All nine Supreme Court justices disagreed. Justice Thomas's opinion for the Court noted that the Portal-to-Portal Act amendments to the FLSA were designed to limit class actions against employers—not expand them. And under the act, the relevant question was whether the security screenings were "integral and indispensable" to the job duties of stacking warehouse merchandise. Because employees were hired to stock merchandise—and not undergo security screenings—the Court concluded that the act did not require compensation for the time spent in the security screenings. Although it may be too soon to tell, the *Integrity Staffing* holding is likely to stem what would otherwise have been a large tide of security screening class actions had the Ninth Circuit's opinion been upheld.

4. Offers of Judgment

Offers of Judgment Can Work When They're Done Right

Almost two years ago, the Supreme Court decided *Genesis Healthcare Corp. v. Symczyk*, holding that a defendant may moot an FLSA collective action by making a

[240] *Integrity Staffing Solutions, Inc. v. Busk*, No. 13-433, --- S. Ct. --- (2014).

Rule 68 offer of judgment to the named plaintiff before any other plaintiffs had opted into the case. Since Genesis, however, defendants have struggled to moot claims using tactics such as the inability to properly account for attorneys' fees and to ascertain the true amount of the claim.

In March, however, defendant Taco Burrito King 4, Inc., and other related defendants successfully mooted a collective action by offering a full judgment to an individual named plaintiff outside Rule 68.[241] In that case, the plaintiff alleged FLSA and Illinois minimum wage law violations, seeking overtime wages. Before the plaintiff sought conditional certification, the employer sent an offer letter, seeking to fully satisfy the individual plaintiff's claims. The letter offered full relief, including liquidated damages, costs, and reasonable attorneys' fees with a provision for additional compensation if the plaintiff could show additional damages.

The plaintiff tried to argue that the offer letter did not constitute complete relief because it failed to account for a meal credit improperly taken by the employer and because it occurred outside Rule 68. The court, however, noted that the plaintiff never showed that he sought and was refused the alleged meal credit. Moreover, there was no reason to apply Rule 68 strictures to an offer made outside Rule 68. Thus, the court held the offer letter to completely satisfy the plaintiff's claim and granted the employer's motion to dismiss.

5. Employee/Independent Contractor Class Actions

The New Employment Class Action Hot Corner Turns on How Much Employers Retain the Right to Control Independent Contractors

Among the hottest topics in employment law is the question of who is and isn't an employee. That is, the distinction between independent contractors and employees is burgeoning into the employment issue du jour, what with the regulatory impact of classifying a worker as an employee versus an independent contractor. In the class action context, proper classification is essential because employers who misclassify large numbers of employees as independent contractors subject themselves to enormous liability under numerous federal and state statutes.

In 2014, high-profile independent contractor class actions focused on delivery drivers. And courts repeatedly found that drivers were employees, opening the door to class liability. The California Supreme Court affirmed certification of a class of newspaper delivery drivers in July, explaining that at the class certification stage, the trial court essentially needs to assess only the employer's right to control the class of delivery

[241] *Cisneros v. Taco Burrito King 4, Inc.*, No. 13-cv-6968, 2014 WL 1017040 (N.D. Ill. Mar. 14, 2014).

drivers.[242] If the newspaper maintains an expansive right to control how and under what conditions the drivers perform their work, then they are likely misclassified as independent contractors. The trial court had mistakenly denied certification, the California Supreme Court said, because it focused too much on individual variations among the class members as to whether the employers actually exercised control. "Certification of class claims based on the misclassification of common law employees as independent contractors generally does not depend upon deciding the actual scope of a hirer's right of control over its hires," the court wrote. "The relevant question is whether the scope of the right of control, whatever it might be, is susceptible to classwide proof."[243]

The right of control also informed a pair of appellate court decisions confirming that FedEx delivery drivers are employees rather than independent contractors for the purposes of misclassification class actions. Both the Kansas Supreme Court and the Ninth Circuit Court of Appeals concluded that because FedEx retains the right to control its drivers' job performance, it violates employment law by classifying them as independent contractors.[244] Although relying on slightly different analytical tests, both courts examined the various requirements FedEx has for its drivers—such as uniform vehicle appearance, work hours requirements, and package delivery standards, to name a few—to determine that FedEx exercised significant control in the relationship such that the class consisted of employee drivers rather than independent contractors.

Although misclassification may have a negligible impact on an individual basis, as a growing front for employment class litigation, the employee/independent contractor question is likely to occupy heightened importance for many companies in the years to come.

D. Securities

1. Slow Death of *Basic*—or Not?

Despite what you may have feared or anticipated (depending upon your loyalties), the Supreme Court didn't write the end of securities class actions in 2014. In *Halliburton Co. v. Erica P. John Fund, Inc., (Halliburton II)*,[245] the Court considered whether to do away with the long-standing securities presumption of reliance rule first articulated in *Basic Inc. v. Levinson* in 1988. Under *Basic*,[246] securities fraud plaintiffs may rely on a class-

[242] *Ayala v. Antelope Valley Newspapers, Inc*., 59 Cal. 4th 522, 537, 327 P.3d 165, 175 (2014).
[243] *Id.*
[244] *See Slayman v. FedEx Ground Package Sys., Inc*., 765 F.3d 1033 (9th Cir. 2014); and *Craig v. FedEx Ground Package Sys., Inc*., 335 P.3d 66 (Kan. 2014).
[245] 134 S. Ct. 2398 (2014).
[246] 485 U.S. 224 (1988).

wide presumption of reliance on material misrepresentations to achieve class certification. The Fifth Circuit followed *Basic* in Halliburton in affirming certification of a securities fraud class. Defendants had hoped that the Court would retire the *Basic* presumption—and effectively end securities fraud class actions as we know them.

Instead, the Court reaffirmed *Basic*'s presumption. But it did so in a way that gave defendants an additional tool with which to combat class certification. While acknowledging that plaintiffs may rely on a presumption of reliance, the Court adopted the defendant's alternative argument—that a defendant can put on direct evidence at the class certification stage showing that alleged misrepresentations have no impact on stock price.

As Chief Justice Roberts stated regarding the price-impact rule, "[I]f reliance is to be shown through the *Basic* presumption, the publicity and market efficiency prerequisites must be proved before class certification. Without proof of those prerequisites, the fraud-on-the-market theory underlying the presumption completely collapses, rendering class certification inappropriate."[247]

2. ERISA Stock-Drop

As it turned out, 2014 was a big year for presumptions in Supreme Court securities class actions. In *Fifth Third Bancorp. v. Dudenhoeffer*,[248] the Court unanimously held that there is no special presumption of prudence favoring ERISA fiduciaries of employee stock ownership plans.

However, while the Court denied such protection to ESOP fiduciaries, it raised the bar for plaintiffs seeking to challenge fiduciary decisions about employer stock. Specifically, the Court put in place a heightened pleading standard requiring plaintiffs to show that fiduciaries acted imprudently. This new standard requires plausible allegations of "special circumstances" under which fiduciaries should have known—on the basis of public information—that the stock was improperly valued.[249] Alternatively, for nonpublic information, plaintiffs must allege that fiduciaries should have taken appropriate and legal alternative action that would not have been more harmful.[250] As a result, the Court's rejection of the presumption of prudence may do little to increase the availability of ESOP stock-drop actions. With heightened pleading regimes in place, defendants likely will find dismissal to be a ready option.

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[247] *Halliburton II*, 134 S. Ct. at 2416.
[248] 134 S. Ct. 2459 (2014).
[249] *Id.* at 2471.
[250] In particular, this duty of prudence cannot require fiduciaries to violate federal securities laws. *Id.* at 2473.

E. Antitrust

The Uninjured Class Member: In re Nexium (Esomeprazole) Antitrust Litigation

One of the unofficial themes of class action law in the past few years, and in particular 2014, has been the extent to which plaintiffs may maintain classes with members who did not actually suffer injuries. That theme is notably present in antitrust class action as illustrated by the *In re Nexium (Esomeprazole) Antitrust Litigation* in the District Court of Massachusetts.

In that case, the district court certified an antitrust class action despite finding "a number of the proposed class members suffered no actual injury whatsoever."[251] In light of the *Comcast*[252] ruling, the court "first address[ed]" the "antitrust impact" question during the Rule 23(b)(3) predominance inquiry and found sufficient commonality in support of certification,[253] then further explained that *Wal-Mart v. Dukes*[254] does not prevent the certification of a class that includes uninjured members.[255] This raised the issue on appeal of whether classes containing uninjured members can be certified.

In 2013, the U.S. Supreme Court ruled that Hatch-Waxman Act patent settlements—which included "reverse payments"—could face antitrust scrutiny.[256] *In re Nexium* was one of the first in a series of "pay for delay" suits born of this ruling. In these pay-for-delay actions, the gravamen is consumers harmed by patent settlements wherein one party agrees to delay release of a competitive product in exchange for compensation because it allows a single party to purchase a monopoly on the market for a period of time.

In re Nexium was a pay-for-delay class action suit in which the plaintiffs' allegations originated out of AstraZeneca's patent infringement settlement regarding the heartburn drug Nexium. The settlement consisted of three generic manufacturers' agreeing to delay the release of generic versions of Nexium in exchange for payments from AstraZeneca. As a result, the named *Nexium* plaintiffs—10 union health and welfare funds—sought to certify a class of all customers and third-party payers who paid for Nexium in states that allow for antitrust actions by indirect purchasers.

On Nov. 14, 2013, the district court certified a class of individual consumers and other third-party payers who alleged that the defendant pharmaceutical companies engaged in anticompetitive practices resulting in overcharges for the drug Nexium.[257] The Nov.

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[251] *In re Nexium (Esomeprazole) Antitrust Litigation,* 297 F.R.D. 168, 180 (D. Mass. 2013).
[252] *Comcast Corp v. Behrend*, 133 S Ct 1426 (2013).
[253] *In re Nexium (Esomeprazole) Antitrust Litigation,* 297 F.R.D. at 181.
[254] *Wal-Mart Stores, Inc. v. Dukes*, 131 S Ct 2541 (2011).
[255] *In re Nexium,* 297 F.R.D. at 180.
[256] *See FTC v. Actavis, Inc.,* 133 S. Ct. 2223 (2013).
[257] This order was quickly followed by a Dec. 11, 2013, order, this time certifying a class of "Direct Purchaser" wholesalers and retailers that purchased Nexium directly from AstraZeneca. *In re Nexium*

14 order focused primarily on the Rule 23(b)(3) predominance requirement in order to address arguments raised regarding members that lacked any injury from the defendants' alleged conduct. The court defined the class as all persons or entities that paid for or were reimbursed for Nexium in 24 different states and the District of Columbia since April 2008.[258] The district court acknowledged that the class included "more than a *de minimis* number of TPPs and consumers who—through rebates, contracts, and brand-loyal purchasing—suffered no damages from the foreclosure of a generic version of Nexium to the market."[259] And further found that "a number of the proposed class members suffered no actual injury whatsoever."[260] Nonetheless, the court ultimately held that common questions of law and fact predominated over individual questions.[261]

In justifying its ruling, the court stated that the defendants had established only three groups of TPPs that could "potentially be uninjured," not "the actual existence of uninjured TPP groups."[262] Regardless, the court went on to reason that the number of uninjured class members was not significant: (1) only 5.8 percent of class members had insurance plans that excluded injury, (2) Nexium coupons accounted for only 2 to 4 percent of prescriptions, and (3) the total amount of coupons was relatively "trivial."[263] Therefore, the court found that the defendants offered "insufficient" evidence of uninjured class members to defeat class certification, and, even so, Supreme Court precedent did not prevent certifying classes containing uninjured members.[264]

The defendants appealed this order to the First Circuit, arguing that the predominance requirement under Rule 23(b)(3) prevents certification of a class where some members suffered no injuries.[265] The defendants relied heavily on *In re New Motor Vehicles*

(Esomeprazole) Antitrust Litig., 296 F.R.D. 47 (D. Mass. 2013). More notable than its treatment of predominance is the court's discussion of numerosity. The court's analysis started by acknowledging that the general rule is that classes exceeding 40 plaintiffs are deemed sufficient for Rule 23(a) purposes. *Id*. at 52. The court then accepted the defendants' proposed count of class members of 29 to 24, but noted that class size alone does not establish a "clear case for numerosity." *Id*. In support, the court cited *In re Prograf Antitrust Litig.*, No. 1:11-cv-10344-RWZ, 2013 WL 2395083 (D. Mass. Spr. 23, 2013) (certifying a class of 25 pharmaceutical wholesalers) and *In re Citigroup, Inc. Capital Accumulation Plan Litig.*, No. 00cv11912-NG, 2010 WL 9067986 (D. Mass. Jan. 6, 2010) (certifying a subclass of 20 participants in an employee stock compensation program). *Id.* Rather, the court identified several "non-numeric" factors that must be considered in determining whether joinder is impracticable, which include geographic location of the proposed class members, the nature of the action, and matters of judicial economy. *Id.* at 52-53. Defendants likewise sought review of this order, but the First Circuit rejected the petition.

258 *In re Nexium,* 297 F.R.D. at 184.

259 *Id.* at 177-178.

260 *Id.* at 180. The court did exclude pharmacy benefit managers from the class because they could not show that they had suffered any injury**.** *Id.* at 179.

261 *Id. at 184.*

262 *Id.* at 179.

263 *Id.*

264 *Id.*

265 The defendants also argued two related grounds on appeal: (1) class members who suffered no injuries lack standing, and (2) the certification of a class that includes uninjured members violates the

Canadian Export Antitrust Litigation,[266] wherein the First Circuit explained that the plaintiffs' damages theory "must include some means of determining that *each member of the class was in fact injured*, even if the amount of each individual injury could be determined in a separate proceeding."[267] The defendants directed the First Circuit's attention to similar cases from other circuits, arguing that those circuits also require injury to each class member.[268] The defendants argued that the district court faulted by certifying a class with a "more than *de minimis*" number of members who hadn't been injured.

Oral arguments were held in late July, with the panel voicing skepticism of the defendants' claim that a pay-for-delay case couldn't be certified as a class action if the class included any uninjured buyers. Meanwhile, the suit involving direct purchasers went to trial and resulted in a jury decision siding with the defendants on Dec. 5, 2014. Whereas the First Circuit seemed poised to decide the appeal on whether a class may include uninjured members, as opposed to whether actual injury existed, the defendants requested that the First Circuit dismiss their appeal before the First Circuit could reach a decision.

In re Nexium illustrates how plaintiffs can navigate around *Wal-Mart v. Duke* and *Comcast Corp. v. Behrend*. In *In re Nexium*, the plaintiffs were able certify a class that admittedly contained uninjured members by successfully focusing the court's attention on the somewhat vague concept of the "antitrust impact." The thrust of the argument is whereas the members of the class have no net damages, they still suffered the negative impact the antitrust violations had on the market.[269] Thus plaintiffs can argue that even if some members suffered no net damages, they still suffered the antitrust impact through elimination of competition, and there is no authority precluding certification of a class under such circumstances.

Had the First Circuit found that a class cannot be certified if it contains uninjured members, the decision would have an important effect on the class action landscape. It would make class certification in antitrust cases involving indirect purchasers and in certain health care cases especially difficult, and would have become a powerful weapon for defendants in all types of 23(b)(3) class actions. Defendants could

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Rules Enabling Act.
[266] 522 F.3d 6 (1st Cir. 2008).
[267] *Id.* at 28 (emphasis added).
[268] *See,* e.g., *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013). ("*Comcast* holds that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of the class-wide *injury* that the suit alleges."); and *Cole v. Gen. Motors Corp.*, 484 F.3d 717, 730 (5th Cir. 2007) (Plaintiffs cannot "carry their burden of showing that common issues of law predominate" if some class members' recovery is likely to be precluded.).
[269] This argument was echoed to the First Circuit, when plaintiffs argued the district court's ruling is distinguishable from *Wal-Mart* and *Comcast* because the court did not find that the *Nexium* class contains uninjured members, but rather that the class contained members who suffered no net damages.

potentially preclude certification with a simple showing of the existence of some small subset of members who suffered no injuries, while the reaction by plaintiffs to such a ruling would most likely result in more narrowly tailored class definitions to reduce the likelihood of a defendant being able to show uninjured class members. Conversely, if the ruling would have been permitted to stand, then plaintiffs could use this case to certify larger and less defined classes without fear of including uninjured parties. Such a strategy would threaten serious abuse in the form of coerced settlements unrelated to the underlying claims.

Therefore, although the First Circuit was unable to decide the issue this round, it is a near certainty that we will soon see this issue raised again.

F. International Class and Collective Litigation

Compared to the hotbed of activity in the United States, the international class action sector has remained relatively quiet. An increase may be on the way, however, after recent developments in France opening the country's judicial system to class litigation. In March, France passed its first law permitting collective litigation (Act No. 2014-344 of 17 March 2014). Like most European laws of its kind, the French law is much more limited than either Rule 23 or Section 16(b) of the FLSA, the primary American counterparts.

For one, individual litigants may not enforce the French law. Rather, because the law is designed to target consumer protection generally, the collective action proceeding may be enforced only by an approved consumer association. Second, class members must affirmatively opt into the class, a requirement the law shares with Section 16(b). Obviously, these limitations reduce the leverage of a putative class to force settlements or cause significant change in conduct through class litigation.

Belgium also joined the class action fray in 2014, enacting legislation similar to the French law, limiting enforcement to consumer associations or a federal consumer ombudsman. In this way, the Belgian law prohibits contingency fee litigation and compensates class counsel only for expenses. The Belgian law has a slight twist in that while opting in is the normal procedure, the court can decide whether an opt-out procedure should be used for claims seeking physical and/or pain and suffering damages.

IV. Looking Forward to 2015

Although precise contours are difficult to foresee, 2015 promises significant development in a number of class action arenas.

Certainly 2015 promises to be a big year for class waiver doctrine. The Supreme Court's denial of certiorari in *Iskanian* will allow PAGA class claims to proceed in California state courts despite the presence of class waivers in arbitration agreements. It will be useful to evaluate how those PAGA claims proceed as separate from the class certification standards of Rule 23. Additionally, the National Labor Relations Board's continued aggressive stance on class waivers—that they tend to violate Section 7 of the National Labor Relations Act—could set up yet another showdown at the appellate court level, if not in the Supreme Court.

On class certification, courts are increasingly showing skepticism about statistical methods of proof, a trend that is likely to continue now that the California Supreme Court has weighed in with its *Duran* decision. This is particularly relevant in the employment sector, where statistical proof and representative testimony have been mainstays of FLSA class actions. Similar concern exists regarding the propriety of class-wide settlement practices and procedure. Judge Posner, of the Seventh Circuit, has written multiple opinions articulating the pitfalls of class settlement. Expect those opinions to gain traction in 2015 as settlement objectors enjoy elevated status.

Finally, the explosive growth in the data privacy arena shows few signs of abating. District and appellate courts continue to iron out the viability of these actions, meaning issues such as standing and theories of liability that can be proven class-wide will continue to percolate.

Generally, the Supreme Court appears satisfied that its big-hitting class action cases of the previous several years (think *Concepcion*, *Wal-Mart*, and *Comcast*, to name a few) are doing the job of setting manageable boundaries on class litigation. But as we saw in 2014, there is much left to be resolved. As that process plays out in 2015, we will be there at every turn, analyzing the issues and understanding where class action law is headed next.