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Class Action Roundup

Spring 2016

Where the (Class) Action Is

Welcome to the second 2016 edition of *Class Action Roundup*! The first quarter of the year witnessed a few key Supreme Court decisions, even with the passing of Justice Scalia, and several settlement cases decided. The issue of class certification was closely examined in a number of cases with the decisions hinging on issues ranging from commonality of the class in a case concerning milk retailers to the alleged damages in cases involving mortgage loans and users of green tea products.

Consumer protection issues were also hot last quarter, notably in cases involving purchases of Super Bowl tickets and printer cartridges. Issues of overtime pay, unpaid wages for "work" time, and joint employer definitions were central to a number of matters, showing that these issues continue to dominate in the labor and employment field. The Telephone Consumer Protection Act (TCPA) was a key factor in a number of privacy and security cases, including the issue of implied or direct consent.

The last quarter also featured cases in products liability, securities and environmental topics in courts throughout the country. We hope you enjoy this issue of *Roundup* and invite you to send us your feedback or questions.

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Antitrust

Milking Economic Differences for All They're Worth

Food Lion LLC v. Dean Foods Company, No. 07-cv-188 (E.D. Tenn.) (Jan. 25, 2016). Judge Greer. Denying class certification.

Processed-milk retailers unsuccessfully sought class certification against milk processors for entering into anticompetitive agreements. Judge Greer held that the retailers failed to satisfy the typicality, adequacy, and predominance requirements because of the "tremendous diversity" among the retailers, including differences in their sizes, national reach, bargaining power, and pricing methods, and the competitive conditions they faced.

Optical Disk Drive Plaintiffs Win Class Cert in Second Go-Round

In re Optical Disk Drive Antitrust Litigation, No. 10-md-2143 (N.D. Cal.) (Feb. 8, 2016). Judge Seeborg. Granting class certification.

After initially refusing to certify a class of indirect purchasers of allegedly price-fixed optical disk drives, Judge Seeborg granted the plaintiffs' renewed class certification motion. In his prior ruling, Judge Seeborg found that the plaintiffs had not presented a plausible methodology for establishing classwide antitrust injury or impact. Judge Seeborg reversed course after the plaintiffs' expert revised his regression analysis sufficiently to convince the court that damages could be calculated on a classwide basis.

CLASS-IFIED INFORMATION

Leaders in client service: Alston & Bird among the *BTI Most Recommended Law Firms* for the sixth consecutive year.

Court Sacks Class Action Against NCAA

Rock v. National Collegiate Athletic Association, No. 12-cv-1019 (S.D. Ind.) (Mar. 31, 2016). Judge Pratt. Denying class certification.

A former college football player attempted to certify a class to challenge the NCAA's rules limiting the length of scholarships to one year. The proposed class definition included individuals "recruited" by NCAA schools. Judge Pratt refused to certify the class in part because whether or not a student-athlete was "recruited" by a particular school was "too vague and subjective." ■

Banking & Financial Services

Class Hampered by Court's Skepticism

Esquivel v. Bank of America N.A., No. 12-2502 (E.D. Cal.) (Jan. 7, 2016). Judge Burrell. Denying class certification.

A California district court refused to certify a class of mortgage borrowers who claimed that Bank of America breached the terms of their loan modification agreements under the new Home Affordable Modification Program (HAMP). In the court's view, the claims were just too individual: To establish liability, the case would necessarily devolve into a series of mini-trials over whether the contractual conditions were met for each individual FHA-HAMP loan. The court also doubted that the plaintiffs could establish damages on a classwide basis.

Payday Lender Pays for "Integral" Arbitration Agreement

Flagg v. First Premier Bank, No. 15-14052 (11th Cir.) (Feb. 23, 2016). Affirming order denying arbitration.

First Premier Bank of South Dakota must defend RICO class claims in the Northern District of Georgia after the Eleventh Circuit denied arbitration for claims that the bank facilitated illegal online payday lending. The named plaintiff's arbitration agreement, signed in 2012, designated the National Arbitration Forum for arbitration, even though the NAF had stopped accepting consumer arbitration cases more than three years earlier. Concluding that the NAF designation was "integral" to the agreement, the court refused to "step[ ] in to appoint a different arbitral forum" and found the agreement unenforceable. ■

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Not mandatory: The Consumer Financial Protection Bureau Looks to Prohibit Mandatory Arbitration.

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Consumer Protection

- **Campbell-Ewald Moots Defendants' Offer-of-Judgment Strategy**

  Campbell-Ewald Co. v. Gomez, No. 14-857 (U.S.) (Jan. 20, 2016). Affirming Ninth Circuit's vacation of district court's grant of motion for summary judgment.

  In a closely watched Telephone Consumer Protection Act (TCPA) case, the U.S. Supreme Court held that defendant Campbell-Ewald's offer to settle the named plaintiff's individual claim before class certification did not moot the action. According to the Court, the "basic principles of contract law" dictate that a "settlement bid and Rule 68 offer of judgment, once rejected, [have] no continuing efficacy." Rather, an action becomes moot only when "it is impossible for a court to grant any effectual relief … to the prevailing party" and that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." Furthermore, "when a contractor violates both federal law and the Government's explicit instructions," as was alleged in this case, "no 'derivative immunity' shields the contractor from suit by persons adversely affected by the violation."

- **The 2014 Broncos Weren't the Only Super Bowl Losers: Fans Lack Standing on Ticket Prices**

  Josh Finkelman v. National Football League, No. 15-1435 (3rd Cir.) (Jan. 14, 2016). Affirming in part and reversing in part district court's grant of motion to dismiss.

CLASS-IFIED INFORMATION

Derin Dickerson

No concrete harm, no foul: Derin Dickerson talks *Spokeo* with *Corporate Counsel*.

Finkelman bought a ticket on the re-sale market for the 2014 Super Bowl in New Jersey. In his later lawsuit, Finkelman alleged that the NFL restricted the ticket supply by holding back too many seats and thus drove up the price he had to pay on the resale market. The district court suggested that Finkelman had "standing issues" but permitted the case to go forward.

The Third Circuit reversed the lower court, concluding that he did not have standing. First, the court noted that the NFL had maintained a ticket lottery that Finkelman refused to use. He thus created his own zero percent chance of obtaining a face-price ticket. By going directly to the secondary market, and not attempting to buy directly from the NFL, he lacked standing. Second, Finkelman had to guess whether more tickets being made available to the public would have reduced prices. Given the intense demand for tickets to this elite sporting event, this was nothing more than a "bald assertion." As the court put it, "We can only speculate—and speculation is not enough to sustain Article III standing."

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Ninth Circuit Affirms the Obvious in Epson Class Action

Rogers v. Epson America Inc., No. 11-57016 (9th Cir.) (Apr. 19, 2016). Affirming district court's denial of motion for class certification.

Rogers accused Epson of misleading printer purchasers. She claimed that Epson misrepresented the need to replace color cartridges and that she did not know that if any color cartridge was empty, the printer would not produce black and white copies.

The district court held that that failed to establish predominance because the evidence did show that all class members saw or otherwise received the misrepresentations regarding color-cartridge replacement. Some class members may have bought their printers from websites that did not publish the alleged misrepresentation.

Damages Theories Rejected in Bigelow Labeling Case

Alex Khasin v. R.C. Bigelow Inc., No. 12-cv-02204 (N.D. Cal.) (Mar. 29, 2016). Judge Orrick. Denying motion for class certification.

Khasin alleged that Bigelow misrepresented the antioxidant, nutrient content, and health labeling claims of its green tea. But the district court denied Khasin's class certification bid because the proposed damage theories didn't work and future harm was unlikely. The court rejected Khasin's claim that the tea was "legally worthless" as labeled and thus damages could be based on the full retail price of the tea. Judge Orrick wrote: "Attributing a value of $0 to the Green Tea Products assumes that consumers gain no benefit in the form of enjoyment, nutrition, caffeine intake, or hydration from consuming the teas. This is too implausible to accept." The court also held that Khasin had yet to prove any actual damages occurred that would entitle him to penalty awards under California's Consumers Legal Remedies Act (CLRA), nor had he identified any duty, let alone a breach of duty, on the part of Bigelow that would allow him and the proposed class to collect nominal damages under the CLRA. The court also rejected injunctive relief. Khasin lacked standing because he had not plausibly alleged an intent to purchase Bigelow products in the future. ■

CLASS-IFIED INFORMATION

Frank Hirsch

Lenders & servicers, class action & settlement trends, Frank Hirsch & you at ACI's 26th National Conference on Consumer Finance Class Actions & Litigation.

Employment

- **Defendants Won't Chicken Out on Challenging Experts After Tyson Foods**

  Tyson Foods Inc. v. Bouaphakeo, No. 14-1146, (U.S.) (Mar. 22, 2016). Affirming judgment for the plaintiffs.

  In a much-anticipated decision, the Supreme Court rejected a blanket rule against proving damages in a class action by statistical sampling. The Court observed that statistical sampling, like all evidence, is simply a means that parties can rely on in appropriate cases to establish a fact. Therefore, the question of when and whether statistical evidence can be used to establish classwide issues of fact is a case-specific inquiry.

- **Personal Trainers' Class Certification Bid Not Strong Enough**

  Steger v. Life Time Fitness Inc., No. 14-cv-6056 (N.D. Ill.) (Jan. 21, 2016). Judge Coleman. Denying motion for conditional certification.

  Judge Coleman denied class certification to Life Time Fitness personal trainers who brought suit under the FLSA. The trainers claimed they were pressured to work off-the-clock, for which they did not receive appropriate overtime pay. The court held that individual questions of each trainer's pressure to underreport hours predominated over any common questions.

- **Subcontracted Security Guards Receive Trial for Unpaid Wages**

  Grenawalt v. AT&T Mobility LLC, No. 15-cv-00949 (2nd Cir.) (Mar. 14, 2016). Vacating summary judgment order and remanding for trial.

CLASS-IFIED INFORMATION

Jim Evans

Practical Law calls on Jim Evans for an "Expert Q&A on the Impact of California's Fair Pay Act."

Security guards appealed an April 2013 order granting AT&T's summary judgment motion. The guards claimed that AT&T illegally withheld wages. AT&T won summary judgment by arguing that AT&T, which contracted the security guards through third-party firms, was not the plaintiffs' joint employer under the FLSA. But the Second Circuit disagreed. Applying a six-factor "nonexclusive and overlapping" test, the appellate court found factual issues as to whether AT&T was the guards' joint employer.

- **Zillow Employees Win Class Cert for Overtime Wage Claims**

  Freeman v. Zillow Inc., No. 14-cv-1843 (C.D. Cal.) (Feb. 26, 2016). Judge Staton. Certifying class of putative employees.

  A California district court recently certified a class of current and former Zillow "inside sales consultants." The court found that the named plaintiff's eight causes of action presented two common questions to support class certification: (1) whether Zillow employed an automatic timekeeping system that did not log class members' actual work hours and that Zillow then refused to allow class members to alter these recorded hours to accurately reflect the length of their workdays; and (2) whether Zillow had a uniform corporate policy and practice of requiring class members to perform work duties during meal breaks and to discourage class members from taking rest breaks mandated by law. Those common questions supported class certification. ■

Environmental

Tenth Circuit Sets High Bar for Class Claims in Environmental Cases

Reece v. AES Corp., No. 14-7010 (10th Cir.) (Feb. 9, 2016). Affirming dismissal of proposed class claims.

Adding to the limited case law involving fracking, the Tenth Circuit recently affirmed a dismissal of a putative class action against multiple companies accused of involvement in fly ash contamination, fracking fluid waste, and coal combustion waste. The companies removed the case under the Class Action Fairness Act (CAFA), and the proposed class sought remand under the "local controversy" exception. Applying a rigorous evidentiary burden, the Tenth Circuit agreed that the proposed class failed to plead the citizenship of class members and also failed to provide substantive evidence that greater than two-thirds of the members were citizens of Oklahoma.

The Tenth Circuit went on to affirm the dismissal of class claims based on the plaintiffs' mere "concern" about health risks and future injury from exposure to a harmful substance. The Tenth Circuit joins a growing number of courts that prohibit "fear of contamination and injury" claims in environmental cases.

CLASS-IFIED INFORMATION

Peter Masaitis

Grab some popcorn and coffee with Peter Masaitis in *ECig Intelligence* and "How Big Is the Risk of Diacetyl Litigation?"

Chocolatiers Escape So-Called Sustainability Class Actions

Hodsdon v. Mars, No. 15-4450 (N.D. Cal.) (Feb. 17, 2016); *McCoy v. Nestle USA Inc.*, No. 15-4451 (N.D. Cal.) (Mar. 29, 2016); *Dana v. The Hershey Company*, No. 15-4453 (N.D. Cal.) (Mar. 29, 2016). Judges Seeborg and Spero. Dismissing proposed class actions.

Chocolate titans Mars, Nestle, and Hershey were all hit with a proposed class action alleging they failed to disclose that their cocoa beans were harvested using child slave labor in Côte d'Ivoire (Ivory Coast). Judges Seeborg and Spero of the Northern District of California dismissed the actions because the companies had no duty to make such disclosures.

The holdings deal a blow to the so-called "sustainability" litigation percolating in federal courts. Sustainability litigation's rise stems from recent regulatory efforts that require companies to disclose the company's efforts to rid its supply chain of goods and services obtained through forced labor. Consumer lawsuits have gone one step further, demanding that companies disclose any potential taint of forced labor on their products' labels.

The bottom line? Though these suits have yet to gain traction, one successful suit could spur a windfall of litigation—and ugly headlines to boot. As corporate and international sustainability initiatives grow, keep an eye on these suits and theories. ■

Privacy

CLASS-IFIED INFORMATION

Jim Evans

MarketWatch tracked down Jim Evans for his take on Uber's monitoring program.

Seventh Circuit Appeal "Un-Welcome" in Yahoo! Texting Class Action

Johnson v. Yahoo! Inc., No. 14-cv-02028 (N.D. Ill.) (Jan. 4, 2016). Judge Shah. Granting class certification. *Yahoo! Inc. v. Johnson*, No. 16-8001 (7th Cir.) (Feb. 3, 2016). Denying permission to appeal.

The Seventh Circuit denied Yahoo! Inc.'s petition to appeal an order by Illinois District Judge Manish S. Shah certifying a subclass of Sprint customers who alleged TCPA violations from receiving unsolicited "welcome" text messages from Yahoo! every time they received a message on their cell phone from someone using Yahoo! Messenger. Judge Shah rejected Yahoo!'s argument that the named Sprint-subscriber plaintiff had consented to receipt of the messages through an intermediary because her consent was not conveyed to Yahoo! But Judge Shah denied certification to a subclass of T-Mobile customers because the class representative had consented to receipt of the texts through Yahoo!'s terms of service.

Attention SuperValu Shoppers: Future Injury Does Not Constitute Harm

In re Supervalu Inc. Customer Data Security Breach Litigation, No. 14-md-02586 (D. Minn.) (Jan. 7, 2016). Judge Montgomery. Granting motion to dismiss without prejudice.

Judge Montgomery dismissed for lack of standing a putative class action against SuperValu brought by shoppers who alleged harm from the breach of the supermarket chain's payment systems. The shoppers failed to show any concrete injury and instead relied on claims of speculative future injuries. The plaintiffs identified only one unauthorized charge on a named plaintiff's credit card since the SuperValu breach, and even that charge could not be fairly traced to the breach. Judge Montgomery contrasted that lack of harm to other recent data-breach cases based on significantly more evidence of customer-data misuse and credit fraud. The plaintiffs' credit-monitoring costs in mitigating potential future harm were not injuries sufficient to confer standing.

Judge Likes Facebook Jurisdiction Argument, Dismisses Biometric Photo-Tagging Lawsuit

Gullen v. Facebook Inc., No. 15-cv-07681 (N.D. Ill.) (Jan. 21, 2016). Judge Alonso. Granting motion to dismiss with prejudice.

Judge Alonso granted Facebook's motion to dismiss for lack of personal jurisdiction a putative class action alleging that Facebook violated the Illinois Biometric Information Privacy Act (BIPA) by using facial recognition software to obtain biometric data about the named plaintiff Facebook user, an Illinois resident, without his consent. Facebook's business registration and sales and advertising office in Illinois were not relevant to establishing minimum contacts relating to Facebook's collection of biometric data in a specific jurisdiction analysis. Nor

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does Facebook's use of facial recognition software on Illinois member residents provide sufficient minimum contacts because Facebook "simply … operates an interactive website available to Illinois residents" and does not specifically target Illinois residents.

▪ Sixth Circuit Finds "Consent" in TCPA Hospital Debt Collection Action

Baisden v. Credit Adjustments Inc., No. 15-3411 (6th Cir.) (Feb. 12, 2016). Affirming district court's grant of summary judgment.

The Sixth Circuit affirmed the Southern District of Ohio's grant of summary judgment for Credit Adjustments, finding that plaintiffs provided their "prior express consent" under the TCPA to receive calls from a physician's group affiliated with the hospital where they received medical care and to whom they provided their cell phone numbers. The plaintiffs not only signed acknowledgment forms upon admittance to the hospital, but also signed consent forms that authorized the hospital to release their contact information in certain situations, including for billing and payment. The Sixth Circuit held that the relationship among the physician's group, hospital, and plaintiffs and the debts owed by the plaintiffs fit comfortably within the FCC's guidance in prior declaratory rulings on what constitutes prior express consent under the TCPA.

▪ TCPA Liability Only Goes So Far, Says Seventh Circuit

Bridgeview Health Care Center Ltd. v. Jerry Clark d/b/a Affordable Digital Hearing, No. 14-3728 (7th Cir.) (Mar. 21, 2016). Affirming district court's grant of partial summary judgment.

The Seventh Circuit affirmed a district court's grant of partial summary judgment for Affordable Digital Hearing on TCPA claims brought by a purported class of plaintiffs who received unsolicited faxes from a third party, Business to Business Solutions (B2B), on behalf of Affordable. Affordable authorized B2B to send only 100 faxes to entities within a 20-mile radius of Affordable's location, but B2B sent approximately 5,000 faxes, across three states, including to the plaintiffs. The district court reasoned that those were not sent "on behalf of" Affordable, who never gave B2B authority to act on its behalf. Only claims for the allegedly unauthorized faxes sent to plaintiff fax recipients within the 20-mile authorized radius survived. ■

Products Liability

- **Consumers of Hepatitis-Tainted Berries Allowed to Proceed with Strict Liability Class Action**

  Petersen v. Costco Wholesale Co., No. 13-cv-01292 (C.D. Cal.) (Jan. 25, 2016). Judge Carter. Granting motion for class certification.

  Judge Carter certified three subclasses of consumers from nine western states who were allegedly exposed to hepatitis A from frozen berries manufactured by Townsend Farms Inc. and sold by Costco. The court found that the consumers had established predominance because the question of whether the recalled berries were defective could be reasonably answered with the same evidence classwide, and subclasses would account for differences in state strict liability laws. In addition, the consumers overcame individual differences in economic and emotional damages by agreeing to reserve the issue of damages for the second phase of trial.

- **Class Action Remains on Track Despite Recall of the Defective Automobiles**

  Philips v. Ford Motor Co., No. 14-cv-02989 (N.D. Cal.) (Feb. 22, 2016). Judge Koh. Denying motion to dismiss for mootness and lack of standing.

  Judge Koh rejected an automaker's mootness defense because the recall at issue did not provide automobile owners with adequate relief. Ford Motor Company moved to dismiss a class action complaint alleging fraudulent concealment of a power steering defect in certain Focus and Fusion models for mootness and lack of standing. The court held that the California plaintiffs' request for relief exceeded the scope of the recall and that there is a "cognizable danger" that the recall may not be implemented in an efficient and effective manner.

CLASS-IFIED INFORMATION

Amanda Waide

David Carpenter

Amanda Waide and David Carpenter investigate why "*Tyson* Shouldn't Affect Automotive Class Actions" in *Law360*.

- **Consumers of Moldy Washing Machines Cannot Prove Causation on a Classwide Basis**

  Brown v. Electrolux Home Products Inc., No. 15-11455 (11th Cir.) (Mar. 21, 2016). Reversing class certification.

  The Eleventh Circuit reversed the certification of a class of consumers claiming that front-loading Electrolux washing machines are defectively designed and grow mold. The three-judge panel concluded that the district court abused its discretion in finding that the plaintiffs satisfied the predominance requirement. Without proof that the class members actually saw or relied on the same advertisements before purchasing their washing machines, the plaintiffs cannot show causation on a classwide basis.

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▪ Conair Brings Individualized Questions to Light in Hair Dryer Class Action

Czuhaj v. Conair Corp., No. 13-cv-01901 (S.D. Cal.) (Mar. 30, 2016). Judge Benitez. Granting in part motion to decertify nationwide class.

Judge Benitez decertified a nationwide class of consumers who claimed that Conair breached its implied warranty by selling hair dryers that catch fire. Conair successfully argued that the predominance and superiority requirements of Rule 23(b)(3) cannot be satisfied because of material differences in state implied-warranty laws and statutes of limitations. For example, some states require privity between the consumer and manufacturer or a manifestation of the defect, while others do not. "In light of the application of each state law," the court found that "answering the couple common questions would only be the beginning of this case's resolution, as a slew of individualized questions follow." ■

CLASS-IFIED INFORMATION

Cari Dawson

What are your options for attacking before and after certification? Ask Cari Dawson at the DRI Class Action Seminar in Washington, D.C. July 21–22.

Securities

District Court Grants Certification to Class of Petrobas Shareholders

In re Petrobras Securities Litigation, No. 14-cv-09662 (S.D.N.Y.) (Feb. 1, 2016). Judge Rakoff. Granting motion to certify class.

A group of Petróleo Brasileiro SA investors won class certification after claiming that the Brazilian oil giant hid billions in bribes and kickbacks. Petrobras opposed certification on the grounds that the plaintiffs were highly sophisticated actors and there were already too many direct actions. Despite Petrobras's objections, the court permitted two new groups of investors to proceed with the opt-out plaintiffs and noted that the nearly 400 individual actions accentuated the need for class certification.

Shareholders Win Class Certification Against Urban Outfitters

In re Urban Outfitters Inc. Securities Litigation, No. 13-5978 (E.D. Pa.) (Feb. 29, 2016). Judge Restrepo. Granting motion to certify class.

A federal judge certified a class of investors that brought suit against Urban Outfitters, claiming that the clothing company issued false and misleading statements regarding failed product assortments and subsequent sales deceleration in 2014. In granting certification, the court determined that the lead plaintiff was an adequate representative and that certification would avoid hundreds of individual suits.

CLASS-IFIED INFORMATION

Despite some creative navigation, the "Supreme Court Reiterates That the Federal Arbitration Act Preempts State Bans on Class Arbitration Waivers."

Securities Class Certification Granted for AMD Shareholders

Hatamian v. AMD, 14-cv-00226 (N.D. Cal.) (Mar. 16, 2016). Judge Rogers. Vacating summary judgment order and remanding for trial.

This case offers insight into how district courts are applying recent Supreme Court class-action decisions. A California district court recently certified a class of persons and entities that, during the period from April 4, 2011, through October 18, 2012, purchased or otherwise acquired shares of the publicly traded common stock of Advanced Micro Devices Inc. (AMD). The plaintiffs claimed that AMD, a California-based semiconductor manufacturer, issued false and misleading statements to investors regarding the viability of a new microprocessor known as "Llano."

In certifying the class, Judge Rogers referred to the Supreme Court's recent *Halliburton II* and *Comcast* decisions in deciding two key issues: (1) whether the plaintiffs were entitled to invoke a presumption of reliance under the "fraud-on-market" theory to show classwide reliance; and (2) whether the plaintiffs could show that a common damages methodology can be applied to all class members. ■

Settlements

Banking

Gehrich v. Chase Bank USA N.A., No. 12-cv-05510 (N.D. Ill.) (Mar. 2, 2016). Judge Feinerman. Approving class settlement and attorneys' fees.

Judge Feinerman approved a $34 million settlement of TCPA claims against JPMorgan Chase Bank on behalf of a 32 million member class alleging the bank placed automated calls regarding account updates or debt collection to their cell phones without their consent. The court granted the approval over objections from class members who complained that their payouts were much smaller than the amount the TCPA allows in fully litigated actions. Judge Feinerman highlighted the extreme risks banks face when sued under the TCPA, noting that a complete victory could result in $48.4 billion if the jury found the violations were knowing and willful. Thus, he stated, a "$52.50 recovery in the hand is better than a $500 or $1,500 recovery that must be chased through the bankruptcy courts."

Debt Collection

Gallego v. Northland Group Inc., No. 15-1666 (2nd Cir.) (Feb. 22, 2016). Affirming denial of class certification.

The Second Circuit ruled that the district court properly denied certification of a proposed settlement class resolving allegations that Northland Group violated the Fair Debt Collection Practices Act (FDCPA) by sending the plaintiff and other class members a debt collection letter that provided a call-back number but did not indicate the name of the person at the number. It found that Rule 23(b)(3)'s superiority requirement was not met because the cost of providing notice would be disproportionate to the benefit accruing to the class, where each member of the 100,000-person class would have received 16.5 cents. The plaintiff argued the 5% "probable participation rate" would result in a higher recovery for those who filed claims. The Second Circuit was not persuaded, finding "that the intended result of the settlement was 'mass indifference, a few profiteers, and a quick fee to clever lawyers.'" The court also found the interests of absentee class members would not be served by the settlement in light of the broad release of claims relative to the "meaningless" recovery.

The Second Circuit further held that the FDCPA claim was not so frivolous that it failed to raise a colorable federal question, even though it agreed with the lower court that the plaintiff's allegations did not state a claim under the FDCPA. Thus, the court vacated the portion of the lower court ruling finding no federal-question jurisdiction, based in part on the recent Supreme Court decision *Shapiro v. McManus*, 136 S.Ct. 450 (2015), which cautioned against collapsing the distinction "between failing to raise a substantial federal question for jurisdictional purposes … and failing to state a claim for relief on the merits."

Employment

Copeland-Stewart v. New York Life Insurance Co., No. 15-cv-00159 (M.D. Fla.) (Jan. 19, 2016). Judge Merryday. Rejecting settlement.

The court rejected as premature a proposed $1.075 million agreement to settle Fair Labor Standards Act (FLSA) overtime claims between New York Life and a proposed class of sales agents and customer service representatives alleging that the insurer failed to pay complete overtime compensation. Eighteen current and former employees opted in, and the lead plaintiff filed a motion seeking certification of the action as a "collective action," approval of a proposed settlement, and approval of notice to be sent to the putative class members offering them the option to opt into the settlement. The court found that the motion

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ignores the typical two-stage procedure for certification of a collective action under the FLSA and puts the "proverbial cart before the horse." Because the motion fails to offer any information showing that the typical putative class member's "job requirements and pay provisions" are similarly situated to the lead plaintiff, the court found the parties did not meet the "fairly lenient" burden of showing a "'reasonable basis' for [the] claim that there are other similarly situated employees."

Dunn v. Teachers Insurance & Annuity Association of America, No. 13-cv-05456 (N.D. Cal.) (Jan. 13, 2016). Judge Gilliam. Denying settlement and request for attorneys' fees.

In an order signaling that courts are paying closer attention to details of proposed settlements, Judge Gilliam rejected a proposed $240,000 settlement to resolve unpaid overtime claims under the FLSA by four contract recruiters against the Teachers Insurance & Annuity Association of America (TIAA) and two staffing firms. The plaintiffs sought to abandon their class claims and reached a settlement with TIAA and Pride Technologies, LLC, to resolve their individual claims. The court found that the proposed monetary settlements were more than sufficient to settle the plaintiffs' individual claims, given that three of the four plaintiffs would receive amounts greatly exceeding their alleged unpaid overtime wages. It found the settlement agreements plainly unfair and unreasonable, however, because the scope of the negotiated releases—which released claims "from the start of time"—were "as broad as theoretically possible" and "not fairly or reasonably tethered to the consideration Plaintiffs are receiving based on their FLSA claims."

The court proceeded to address whether the proposed settlements would prejudice putative class members, anticipating a potential renewed motion for settlement approval. It held that the proposed settlement created serious potential risks of prejudice that would require class notice before approval was granted, based on two factors. First, putative class members faced an immediate risk of having their claims time-barred if they did not soon receive notice. Second, the settlement raised the possibility of collusion and that the named plaintiffs and their counsel put their own interests ahead of the putative class. The court noted that the defendants had a vested interest in overcompensating the named plaintiffs to secure their voluntary dismissal of the class claims before notice is given, and the parties admitted that they negotiated the settlement payments at the same time they negotiated attorneys' fees. Additionally, the plaintiffs' attorneys sought higher fees (35%) than the amount agreed to in the settlement (20%), and it appeared they were more focused on maximizing their own recovery than "considering the prejudicial effect that [their] tactics might have for putative class members." As a result, the court indicated that any future approval of an FLSA settlement would be conditioned on putative class notice.

Hyun v. Ippudo USA Holdings, No. 14-cv-08706 (S.D.N.Y.) (Mar. 24, 2016). Judge Nathan. Denying settlement and request for attorneys' fees.

Judge Nathan rejected a proposed $580,000 settlement to resolve claims by 53 current and former servers, bartenders, and bussers at Ippudo restaurants in New York City alleging the restaurant did not fully compensate them under the FLSA and state laws. The court found the settlement "largely fair and reasonable," but required the parties to narrow the scope of the named plaintiffs' release in order to obtain final approval. It found that the release for opt-in plaintiffs permissible because it was limited to wage-and-hour issues. The named plaintiffs, on the other hand, released any claim "arising out of, by reason of, or relating in any way whatsoever to any matter, cause or thing, from the beginning of the world through the effective date of this Agreement." The court found this release was "far too broad" because it purported to waive all possible claims against the defendants, including those having no relationship whatsoever to wage-and-hour issues. The court invited the parties to file a revised proposed settlement on or before April 8, 2016. ■