



2016 Class Action Year-End Review

A Summary of Class Action Litigation in 2016

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I. Introduction

I. Introduction

Written by Dustin M. Dow

If you were paying attention to class actions in 2016, you already know the answers to the big questions. Generally speaking, unaccepted offers of judgment to named plaintiffs will not foreclose class claims (with some exceptions). And standing to assert class claims requires more than just a statutory violation – a plaintiff must establish some concrete, particularized injury that does more than recite a statute. Those edicts came down from the Supreme Court in *Campbell-Ewald Co. v. Gomez* and *Spokeo v. Robins* – the two most prominent class action decisions of 2016. Discussed in depth below, *Campbell-Ewald* and *Spokeo* wielded significant influence throughout the year and will continue to do so throughout 2017 and beyond.

But if you found your way here to BakerHostetler's 2016 edition of the Class Action Year-End Review, you didn't need us to tell you about *Campbell-Ewald* and *Spokeo*. You may not, however, know about the i e loophole exception to *Campbell-Ewald* or the different applications of *Spokeo* throughout the class action arena. More the point, 2016 was about a lot more than just a couple of Supreme Court cases. The doctrine of ascertainability, which has gone back and forth the past several years, shifted again in favor of lower standards for certification. And attorneys' fees provisions in class settlements continue to gum up class resolution, a rising trend that has been discussed before in these pages and is updated here with new information.

The story of 2016 is also about 2017. Late in the year, the Supreme Court granted certiorari review of three consolidated cases involving class action waivers in arbitration agreements in the employment sector. Oral arguments are set for October, but the ramifications and potential impact are already being debated by observers and lower courts.

As in previous years, the nuances of class action procedure are in a continuous state of change. In 2016, we saw these changes in a wide variety of areas, including how the courts deal with ascertainability, standing, class-action waivers, and certification standards. This Year-End Review provides you with the necessary overview and insight to make sense of it all and to understand where it's going in 2017.



II. Developments in Class Action Procedure

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Written by Sam Camardo

The Supreme Court was poised to answer burning class action procedure questions in 2016. *Spokeo* dealt with the extent to which alleging that the defendant violated a federal statute – absent any independent injury – sufficed to allege injury in fact. *Campbell-Ewald* addressed whether a defendant could moot a putative class action through a pre-class certification offer of judgment. Those decisions were issued but left much open to interpretation.

Spokeo reaffirmed the principle that an injury must be “concrete” in addition to being particularized. But the Court offered little in terms of guidance on when a statutory violation one suffers is a concrete injury. *Campbell-Ewald* held that an unaccepted offer of judgment does not moot a putative class action. But it left open the impact of a defendant’s actual tender of compensation to the plaintiff – say, a cashier’s check – on the mootness question.

This review discusses these decisions, the lower courts’ reaction to them and more.

II. Developments in Class
Action Procedure

A. Class Standing Issues

Written by Sam Camardo

The centerpiece of class action standing in 2016 was the Supreme Court's decision in *Robins v. Spokeo*, 136 S. Ct. 1540 (2016). The Court considered what, exactly, the requirement that an alleged "invasion of a legally protected interest" be "concrete and particularized" means. Unfortunately, the Court's decision in *Spokeo* was not a model of clarity, so much so that both sides counted the case as a win.¹

Spokeo Inc. operates an online "people search engine." After the plaintiff, Robins, learned that inaccurate information about him was available on Spokeo, he sued the company for Fair Credit Reporting Act (FCRA) violations on behalf of a putative class. The district court dismissed this claim, holding that Robins merely alleged that Spokeo violated FCRA without any injury to him. That, the district court held, was insufficient to allege standing under Article III.² The Ninth Circuit disagreed. That court held that Robins alleged that "Spokeo violated *his* statutory rights."³ According to the panel, Robins's "personal interests in the handling of his credit information are individualized," and thus sufficient to confer Article III standing.

In a much-anticipated opinion, the Supreme Court vacated and reversed the Ninth Circuit's ruling. The problem was the Ninth Circuit's failure to analyze the "concreteness" requirement of an injury in fact. The panel instead hinged its decision on only the particularized nature of Robins's alleged statutory violation. Particularity, the Court explained, was "necessary to establish injury in fact, but it is not sufficient."⁴ An alleged injury must also be "concrete."

But the Court frustratingly declined to determine whether Robins's allegations sufficed, opting to remand for the lower courts to sort out that question. The Court provided only general observations: "A 'concrete' injury," Justice Alito explained, "must be 'de facto'; that is, it must actually exist." But "concrete" is not "synonymous with 'tangible,'" and Congress may identify and elevate intangible injuries to compensable ones. Yet "Congress's role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. ... Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."

¹ See <http://blogs.reuters.com/alison-frankel/2016/05/16/brace-for-more-class-action-challenges-post-spokeo/>.

² *Robins v. Spokeo, Inc.*, 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011).

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

⁴ *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

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Needless to say, *Spokeo* left much open to interpretation. And the courts have already diverged about what the decision meant. Some circuits have sided with defendants, agreeing that something more than a technical statutory violation must be alleged. The Seventh Circuit in *Meyers v. Nicolet Restaurant of De Pere, LLC*,⁵ held that *Spokeo* requires a plaintiff to “allege a concrete injury that resulted from the violation in his case.” Unlike the Supreme Court, the Seventh Circuit clarified: “In other words, Congress’ judgment that there should be a legal remedy for the violation of a statute does not mean each statutory violation creates an Article III injury.” And so it was in *Meyers*: The mere fact that Congress decided receiving a credit card receipt with more than four digits is an injury was not enough for the plaintiff to sue.

Several other circuits have likewise come down against plaintiffs seeking to sue based solely on statutory violations, even if personal to the plaintiff. In *Hancock v. Urban Outfitters, Inc.*,⁶ the D.C. Circuit held that the plaintiffs failed to allege standing based on a department store clerk asking for their ZIP codes, a violation of a District of Columbia consumer protection statute. The Fifth Circuit in *Lee v. Verizon Communications, Inc.*,⁷ rejected a plaintiff’s claim that the breach of an ERISA duty – mismanagement of the pension plan – alone was sufficient to confer standing. A plaintiff’s allegation that a cable company retained personal information about him for more than 30 days, which violates the Cable Communications Policy Act, was not enough to confer standing for the Eighth Circuit.⁸ And the Eleventh Circuit held that a defendant’s failure to record a satisfaction of a mortgage within the required 30 days under state statute, absent harm flowing from that failure, was insufficient.⁹

But the Ninth Circuit and Third Circuit, however, arguably read *Spokeo* more broadly. In two privacy class actions – *In re Nickelodeon Consumer Privacy Litigation*¹⁰ and *In re Horizon Healthcare Services Inc. Data Breach Litigation*¹¹ – the Third Circuit sketched a broad view of the “concreteness” requirement, holding that “we do not believe that the Court [] intended to change the traditional standard for the establishment of standing.” And thus, so long as “Congress has expressed an intent to make an injury redressable,” it is “concrete” for Article III purposes. The Third Circuit acknowledged, however, that *Spokeo* places some limits on Congress’s right to elevate “procedural” injuries to the level of “concrete.” But the Third Circuit determined that neither *Nickelodeon* nor *Horizon* required it to consider that limitation.

The Ninth Circuit, too, held that Congress has wide latitude to establish that an intangible harm is “concrete.” In *Van Patten v. Vertical Fitness Grp., LLC*,¹² the panel held that the plaintiff had standing to sue for violations of the Telephone Consumer Protection Act (TCPA), regardless of any additional harm. According to the Ninth Circuit, “[t]he TCPA establishes the substantive right to be free from certain types of phone calls and texts absent consumer consent,” and “Congress identified unsolicited contact as a concrete harm, and gave consumers a means to redress this harm.” That privacy interest, the court held, is concrete, and a plaintiff “need not allege any *additional* harm beyond the one Congress has identified.” (Emphasis in original.)

5 843 F.3d 724, 727 (7th Cir. 2016).

6 830 F.3d 511, 514 (D.C. Cir. 2016).

7 837 F.3d 523, 529–30 (5th Cir. 2016).

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

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

10 827 F.3d 262 (3d Cir. 2016).

11 846 F.3d 625 (3d Cir. 2017).

12 847 F.3d 1037 (9th Cir. 2017).

**II. Developments in Class
Action Procedure**

Arguably, these cases can be harmonized by looking at the particular statutory right at issue. Privacy interests, which are at the core of the TCPA and FCRA provisions at issue in *Van Patten*, *Horizon* and *Nickelodeon*, are akin to traditional intangible injuries recognized at common law. But privacy was also the interest behind FACTA, the statute prohibiting businesses from printing more than four digits of a credit card number on a receipt. And how does receiving a receipt violating that statute result in any more or less harm than receiving an unwanted text message (*Van Patten*) or having one's information on a lost computer with no indication it has been viewed by anyone (*Horizon*)?

The only thing certain about *Spokeo* is that courts will continue to struggle with what, exactly, a "concrete" injury is.

II. Developments in Class
Action Procedure

B. Offers of Judgment

Written by Blythe Golay

Over the years, the courts have addressed the issue of whether—and, if so, under what circumstances—an unaccepted offer of judgment can moot a class action complaint. The issue typically arises when defendants, seeking to avoid class action litigation, attempt to pick off putative class representatives at the outset of the case via Rule 68 offers of judgment providing full relief on the individual claims. Such defendants seek to prevent class certification, on the theory that, if the named plaintiffs have no active claims, then there can be no class action. And thus, the defendants pay only a small fraction of their potential exposure.¹³

In 2016, the U.S. Supreme Court settled a long-standing split among federal appellate courts over the issue of whether a lead plaintiff who rejects a complete settlement offer still has standing to proceed with his or her class claim. In *Campbell-Ewald Co. v. Gomez*¹⁴, the Court held that “an unaccepted settlement offer or offer of judgment does not moot a plaintiff’s case.”

Campbell-Ewald arose out of plaintiff Jose Gomez’s allegation that the advertising giant had violated the Telephone Consumer Protection Act (TCPA) when it sent mass text messages to prospective U.S. Navy recruits. After Gomez rejected Campbell-Ewald’s offer of \$1,503 per violation, plus reasonable costs,¹⁵ Campbell-Ewald filed a motion to dismiss, arguing that Gomez’s rejection of an offer for complete relief mooted his personal and the class’ claims. The Supreme Court disagreed, concluding that “[a]n unaccepted settlement offer – like any unaccepted contract offer – is a legal nullity, with no operative effect,” leaving both parties with the same stake in the litigation that they had at the outset.

Nonetheless, the majority in *Campbell-Ewald* did not address “whether the result would be different if a defendant deposits the full amount of the plaintiff’s individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount.”¹⁶ Despite the *Campbell-Ewald*’s majority’s reluctance to confront the issue of actual payment, the dissenting Justices made clear that such a measure would moot the issue in controversy.¹⁷ Not surprisingly, savvy class-action defendants seeking to avoid *Campbell-Ewald*’s adverse effects have shifted their strategy to utilize the gap left open by the decision—by tendering checks contemporaneously with an offer of judgment (e.g., with a stipulated injunction, etc.) and contending that the act of tendering complete relief moots the individual claims.

13 See *Deposit Guar. Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 339 (1980) (“Requiring multiple plaintiffs to bring separate actions, which effectively could be ‘picked off’ by a defendant’s tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions . . .”).

14 136 S. Ct. 663, 672 (2016).

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

16 *Id.* at 672.

17 *E.g., id.* at 684 (Alito, J., dissenting) (“I am heartened that the Court appears to endorse the proposition that a plaintiff’s claim is moot once he has ‘received full redress’ from the defendant for the injuries he has asserted.”).

II. Developments in Class Action Procedure

Although *Campbell-Ewald* is a recent decision, some, but not all, of the federal appellate courts have already had the opportunity to address the payment hypothetical, and the issue is working its way through the district courts. As discussed below, courts are split on whether a defendant's Rule 68 offer accompanied by a tender of the full amount of damages (or more) by check (or depositing the amount with the court) is sufficient to moot the case. The trend, however, appears to favor denying defendants' attempts to use a Rule 68 deposit to compel a finding of mootness.

First Circuit

Although the First Circuit has yet to address the payment hypothetical left open by *Campbell-Ewald*, the district courts in this circuit have. For example, in *S. Orange Chiropractic Ctr., LLC v. Cayan LLC*¹⁸, the plaintiff rejected the defendant's tender of a check with its Rule 68 offer of statutory damages and costs and offer to have judgment entered against the defendant and to be enjoined from sending unsolicited fax advertisements in violation of the TCPA.¹⁹ The plaintiff disputed that tendering the check mooted its individual claims.²⁰ In deciding the issue of whether backing up an offer with a check constitutes actual payment of the disputed sum, the district court noted a split of authority among courts in other districts following *Campbell-Ewald*. The court then concluded that, "[o]n this record, . . . this named plaintiff no longer has the requisite 'live claim' because Defendant has offered to deposit a check with the court, to satisfy all of Plaintiff's individual claims (and more), and to have the district court enter judgment in Plaintiff's favor."²¹

Second Circuit

Like the First Circuit, the Second Circuit has yet to address the payment hypothetical, although district courts in the circuit have done so. For example, in *Perez-White v. Advanced Dermatology of N.Y. P.C.*²², the district court found that the defendants' offer of judgment did not offer full monetary relief because, in the months after the defendants served their offer, they offered Plaintiffs larger amounts. The defendants also failed to state their consent to having judgment entered against them and failed to acknowledge the plaintiffs' claim for attorneys' fees and costs—thus, the offer did not provide full relief. In contrast, in *Leyse v. Lifetime Entm't Servs., LLC*²³, the amount was not in dispute, as the defendant had offered to pay more than the maximum statutory amount, plus costs. The district court found that, "[a]s here, a defendant's deposit of a full settlement with the court, and consent to entry of judgment against it, will eliminate the live controversy before a court."²⁴

18 No. CV 15-13069-PBS, 2016 WL 1441791 (D. Mass. Apr. 12, 2016).

19 *Id.* at *1.

20 *Id.* at *4.

21 *Id.* at *5. *But see Bais Yaakov of Spring Valley v. ACT, Inc.*, 186 F. Supp. 3d 70, 74 (D. Mass. 2016) (motion to deposit amount with court, coupled with mailing of certified check to plaintiff's counsel, were insufficient to constitute payment, as there remained a live controversy over the measure of damages).

22 No. 15 CIV. 4858 (PGG), 2016 WL 4681221, at *5 (S.D.N.Y. Sept. 7, 2016).

23 171 F. Supp. 3d 153, 154 (S.D.N.Y. 2016).

24 *Id.* at 156.

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Third Circuit

In *Weitzner v. Sanofi Pasteur, Inc.*²⁵, the Third Circuit followed *Campbell-Ewald* and held that the decision overruled its prior holding in *Weiss v. Regal Collections*²⁶, that “[a]n offer of complete relief will generally moot the plaintiff’s claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.”²⁷ But, in *Weitzner*, the Third Circuit specifically “decline[d] to elaborate on the implications of *Campbell-Ewald* on [its] other holdings in *Weiss*.”²⁸

In *Jarzyna v. Home Properties, L.P.*²⁹, the defendant filed a motion for leave to deposit pursuant to Rule 67.³⁰ The district court found that the motion was “undoubtedly inspired by the question expressly left open by the Supreme Court’s recent decision in *Campbell-Ewald* . . .”³¹ The district court then noted that “the majority of courts to confront Rule 67 motions used to compel findings of mootness have denied them.” Accordingly, because the defendant had “failed to provide any reason why its motion comports with the purpose of Rule 67—namely, that the funds it seeks to deposit are the basis of the dispute or it seeks to relieve itself of the burden of administering an asset—the Court finds that the application of this procedural mechanism is inappropriate.”³²

Fourth Circuit

Like the First and Second Circuits, the district courts in the Fourth Circuit have held that, under appropriate circumstances, tender in connection with a Rule 68 offer may moot the case. For example, in *Gray v. Kern*³³, the defendant made a Rule 68 offer in the amount of \$200,000, which was, according to the defendant, the maximum amount the plaintiffs could recover by law (as liability of a local government was capped at that amount). After the plaintiffs rejected the offer, the defendant filed a motion to dismiss for lack of jurisdiction.³⁴ The district court found that, if the defendant, upon court order, deposited the full amount recoverable with the clerk of the court, and the court then entered judgment in that amount, the case would be moot.³⁵ The court then had to determine whether the plaintiffs could recover more than \$200,000 and held they could not. The court concluded: “Kern should deposit the full amount recoverable, \$200,000, with the Clerk of the Court. Upon receipt of proof of that deposit, the Court will enter judgment in that amount in favor of Plaintiffs and against Defendant. At that time, Defendant Kern’s Motion to Dismiss [citation] will be granted and this case will be dismissed as moot.”³⁶

25 819 F.3d 61, 64 (3d Cir. 2016).

26 385 F.3d 337 (3d Cir. 2004).

27 *Weiss*, 385 F.3d at 340.

28 *Weitzner*, 819 F.3d at 64.

29 No. CV 10-4191, 2016 WL 4417277, at *4 (E.D. Pa. Aug. 18, 2016).

30 Rule 67(a) provides: “If any part of the relief sought is a money judgment or the disposition of a sum of money or some other deliverable thing, a party--on notice to every other party and by leave of court--may deposit with the court all or part of the money or thing, whether or not that party claims any of it. The depositing party must deliver to the clerk a copy of the order permitting deposit.”

31 *Id.* at *3.

32 *Id.* at *4.

33 143 F. Supp. 3d 363, 366 (D. Md. 2016).

34 *Id.*

35 *Id.* at 367.

36 *Id.* at 370.

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Fifth Circuit

In *Sandoz v. Cingular Wireless, L.L.C.*³⁷, the Fifth Circuit held that the Court's decision in *Campbell-Ewald* required reversal of the district court's order dismissing the plaintiff's individual claim. But, the Fifth Circuit did not comment upon the payment hypothetical.

However, in *Pankowski v. Bluenrgy Group Limited*³⁸, the district court found that the defendant's tender of a cashier's check for the maximum amount of the plaintiff's damages was insufficient to moot the case. The court reasoned:

[T]his court sees no reason to find that the actual tender of settlement is any more binding on the other party than an offer of settlement in contract law. It is a distinction without a difference in outcome. [Plaintiff] rejected the settlement tender, returning the check to the Underwriter Defendants and alleging he has a fiduciary duty . . . to fully litigate the claims of his class. [citation] Therefore, the court finds that [plaintiff]'s rejection of the tender of the settlement means he still has a live controversy.³⁹

Sixth Circuit

In *Conway v. Portfolio Recovery Assocs., LLC*⁴⁰, the Sixth Circuit set aside a dismissal and judgment, reasoning that "[t]he Supreme Court has now made clear that an unaccepted offer of settlement or judgment, like the one [defendant] made to [plaintiff], generally does not moot a case, even if the offer would fully satisfy the plaintiff's demands for relief."⁴¹ The Sixth Circuit, however, expressly declined to address the hypothetical left open by *Campbell-Ewald* because the defendant had conceded that its unaccepted tender to the plaintiff did not fully satisfy the plaintiff's claim for relief.⁴²

Following *Conway*, the Sixth Circuit had the opportunity, in *Mey v. N. Am. Bancard, LLC*⁴³, to discuss the parameters of the payment hypothetical. There, the defendant argued that its act of sending the plaintiff a cashier's check constituted a tender that mooted the plaintiff's claims. The Sixth Circuit rejected this because it was not clear whether the tender satisfied the plaintiff's demand for relief, as there was a factual question as to how many marketing calls the defendant made to the plaintiff's cell phone (i.e., the amount of statutory damages available under the TCPA).⁴⁴ The court noted: "On the record before us, we cannot conclude that NAB's tender provides Mey everything that she asked for as an individual plaintiff, which means that Mey's individual claims are not moot and can proceed in the district court."⁴⁵

37 No. 15-30576, -- Fed. Appx. --, 2017 WL 150486 (Jan. 13, 2017).

38 No. CV H-15-1668, 2016 WL 7179122, at *1 (S.D. Tex. Dec. 9, 2016).

39 *Id.* at *3.

40 840 F.3d 333, 335 (6th Cir. 2016).

41 *Id.*

42 *Id.* at 335 n.1.

43 655 Fed. Appx. 332, 335-36 (6th Cir. 2016)

44 *Id.* at 336.

45 *Id.* at 337; see also *APB Assocs., Inc. v. Bronco's Saloon, Inc.*, 315 F.R.D. 200, 209 (E.D. Mich. 2016) ("This Court does not read [*Campbell-Ewald*] as supporting Defendants' argument that Plaintiff's claim was mooted because Defendants tendered a check to plaintiff in the amount of the judgment.").

II. Developments in Class Action Procedure

Seventh Circuit

In *Fauley v. Royal Canin U.S.A., Inc.*⁴⁶, the district court denied the defendants' motion styled "to modify stay," wherein the "defendants profess[ed] their intent to 'exercise the option left open by the Supreme Court and pay Plaintiff the entire amount of individual relief he seeks in the Complaint' in hopes of mooting his individual claim, thus, presumably, incapacitating the class action."⁴⁷ The court held that decisions from other district courts finding that a proper tender will moot a plaintiff's claim "are inconsistent with the Court's refusal, in *Campbell-Ewald*, to 'place the defendant in the driver's seat' of the litigation with a 'gambit' designed to 'avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than' the payment it proposes to make in plaintiff's favor."⁴⁸ Nonetheless, the Seventh Circuit has yet to address this issue.

Eighth Circuit

In *Radha Giesmann, MD, P.C. v. Am. Homepatient, Inc.*⁴⁹, the district court denied the defendant's motion to deposit funds, relying on a decision by the District Court for the Southern District of Iowa, *Tegtmeier v. PJ Iowa, L.C.*⁵⁰, and other courts, wherein those courts, reasoning that where there is no purpose for a deposit other than to moot a case and unless a plaintiff has had a fair opportunity to show that class certification is warranted, the courts should deny a motion to deposit money pursuant to Rule 67. In *Radha Giesmann, MD*, the court noted:

Defendant fails to provide any reason why its motion comports with the purpose of Rule 67 or with Eighth Circuit precedent. Defendant does not allege that the fund is in dispute or that it seeks to deposit the money to relieve itself of the burden of administering an asset. To the contrary, Defendant asserts that it "seeks to deposit \$15,000.00 with the Court for the purpose of tendering full and complete relief for Plaintiff's alleged claims". . . . [citation] In addition, . . . while the Eighth Circuit has not squarely ruled on the issue of whether a tender and rejection of an offer of judgment to a named plaintiff prior to ruling on a motion for class certification renders a class action moot, it has held that "[j]udgment would be entered against a putative class representative on a defendant's offer of payment only where class certification has been properly denied and the offer satisfies the representative's entire demand for injuries and costs of the suit."⁵¹

Thus, the Eighth Circuit is unlikely to allow a defendant to have "control" over a putative class action by tendering the amount solely to moot a case.⁵²

46 143 F. Supp. 3d 763 (N.D. Ill. 2016).

47 *Id.* at 764-65.

48 *Id.* at 765 (citing *Campbell-Ewald*, 136 S. Ct. at 672).

49 No. 4:14CV1538 RLW, 2016 WL 3407815, at *1 (E.D. Mo. June 16, 2016).

50 189 F. Supp. 3d 811 (2016).

51 *Id.* at *3 (citation omitted).

52 *See also Yaakov v. Varitronics, LLC*, -- F. Supp. 3d --, 2016 WL 4068358 (D. Minn. July 28, 2016) (holding recipient's rejection of certified check meant to provide unconditional payment of complete relief for individual claims pursuant to Rule 68 did not render action moot); *Ung v. Universal Acceptance Corp.*, 190 F. Supp. 3d 855, 863 (D. Minn. 2016) ("The law does not countenance the use of individual offers to thwart class litigation, because the class-action device is designed to allow 'similarly situated plaintiffs to aggregate smaller claims, promoting judicial efficiency.' (citation omitted)).

II. Developments in Class Action Procedure

Ninth Circuit

In *Chen v. Allstate Ins. Co.*, 819 F.3d 1136 (9th 2016), Allstate, “[t]aking a cue from” *Campbell-Ewald*, deposited \$20,000 in full settlement of the plaintiff’s individual monetary claims in an escrow account “pending entry of a final District Court order or judgment directing the escrow agent to pay the tendered funds to [plaintiff], requiring Allstate to stop sending non-emergency telephone calls and short message service messages to [plaintiff] in the future and dismissing this action as moot.” *Id.* at 1138. Allstate also agreed to an injunction on the plaintiff’s individual injunctive relief claim.

The Ninth Circuit nevertheless rejected Allstate’s argument that the district court should have granted its motion to dismiss for lack of subject matter jurisdiction. The court noted: “Where, as here, injunctive relief has been offered, and funds have been deposited in an escrow account, relief has been offered, but it has not been received.” *Id.* The court reasoned that the plaintiff had not actually “received any relief on his individual claims for damages or injunctive relief.” *Id.* at 1145 (emphasis in original). The court concluded that, because the plaintiff’s claims were not moot and a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted, the district court was not required to enter judgment on the plaintiff’s individual claims before the plaintiff had a fair opportunity to move for class certification. *Id.* at 1148-49.

Tenth Circuit

The Tenth Circuit and its district courts have not addressed this issue.

Eleventh Circuit

In *Family Med. Pharmacy, LLC v. Perfumania Holdings, Inc.*⁵³, the district court noted that “[t]houghtful, well-reasoned decisions have emerged on both sides of the issue; however, there appears to be an emerging consensus *against* a finding of mootness.”⁵⁴ The court in *Family Med.* also noted that, “in a TCPA case in which the defendant used Rule 68 offers of judgment to attempt to moot a putative class action, the Eleventh Circuit has held that even if such offers were successful in extinguishing the named plaintiffs’ claims, ‘the class claims remain live, and the named plaintiffs retain the ability to pursue them.’”⁵⁵ Thus, the court denied the defendants’ motion to dismiss “insofar as it is predicated on the theory that this action has been rendered moot by defendants’ Rule 68 offer of judgment and accompanying tender of full relief on [plaintiff]’s individual claims, which tender was promptly and emphatically rejected.”⁵⁶

D.C. Circuit

The D.C. Circuit and its district court have not addressed this issue.

53 No. CV 15-0563-WS-C, 2016 WL 3676601, at *5 (S.D. Ala. July 5, 2016).

54 *Id.* (emphasis added).

55 *Id.* at *7 (citation omitted).

56 *Id.* at *8.

II. Developments in Class Action Procedure

Conclusion

Although the circuits are split, the trend seems to be to foreclose offers of judgment before the plaintiff is accorded a fair opportunity to show that certification is warranted, so as to avoid frustrating the objectives of class actions. In any event, it is clear that *Campbell-Ewald* will not be the last word on offers of judgment in class actions.

II. Developments in Class
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C. Ascertainability

Written by Sam Camardo

2016 saw the rift continue to grow in the courts of appeals on the meaning of Rule 23's implicit ascertainability requirement. The disagreement boils down to whether "ascertainable" means that it must be administratively feasible to determine the identity of class members, or whether Rule 23 only requires the class definition to reference objective criteria.

Last year, the Seventh Circuit in *Mullins v. Direct Digital, LLC*⁵⁷ held that only the latter is required, rejecting outright the Third Circuit's influential decisions of *Marcus v. BMW of N. Am., LLC*⁵⁸ and *Carrera v. Bayer Corp.*⁵⁹ After *Mullins*, the Sixth and Seventh Circuits joined in rejecting the Third Circuit's so-called heightened ascertainability requirement.⁶⁰ The Eleventh and First Circuits appeared to follow *Carrera*, albeit with little analysis.⁶¹

Since then, the Eighth and Ninth Circuits have joined the Sixth and Seventh in rejecting the Third Circuit's view, agreeing with the holding in *Mullins* that a "class may be ascertainable when its members may be identified by reference to objective criteria."⁶²

In *Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*,⁶³ the Eighth Circuit described the circuit split while noting that "[t]his court, unlike most other courts of appeals, has not outlined a requirement of ascertainability." Instead, "this court adheres to a rigorous analysis of the Rule 23 requirements, which includes that a class 'must be adequately defined and clearly ascertainable.'"

In practice, however, the Eighth Circuit's holding essentially aligns with *Mullins*. *Sandusky* involved a putative class alleging violations of the Telephone Consumer Protection Act. The District Court denied certification "because it would take individualized discovery to determine the threshold issue of who was 'sent' each of the thousands of faxes at issue."⁶⁴ The Eighth Circuit disagreed. While "the subscriber to the fax number may not be the recipient of the fax," the "fax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable."⁶⁵ Thus, under *Sandusky*, the question is whether the class is defined with reference to objective criteria, regardless of whether the administrative difficulties would plague an actual trial of the class action.

The Ninth Circuit in *Briseno v. ConAgra Foods, Inc.*⁶⁶ more directly addressed — and rejected — the Third Circuit's administratively feasible requirement. The court concluded "that Rule 23's enumerated criteria already address the interests that motivated the Third Circuit and, therefore, that an independent administrative feasibility requirement is unnecessary."

57 795 F.3d 654, 657 (7th Cir. 2015).

58 687 F.3d 583 (3d Cir. 2012).

59 727 F.3d 300 (3d Cir. 2013).

60 *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015).

61 See *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 948 (11th Cir. 2015); *In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015).

62 *McKeage v. TMBC, LLC*, No. 15-3191, 2017 WL 562456, at *3 (8th Cir. Feb. 13, 2017); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 (9th Cir. 2017).

63 821 F.3d 992, 996 (8th Cir. 2016).

64 *Sandusky Wellness Ctr. LLC v. Medtox Sci., Inc.*, No. CIV. 12-2066 DSD/SER, 2014 WL 3846037, at *4 (D. Minn. Aug. 5, 2014), *rev'd*, 821 F.3d 992 (8th Cir. 2016).

65 *Sandusky Wellness Ctr.*, 821 F.3d at 997.

66 844 F.3d 1121, 1126 (9th Cir. 2017).

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First, the Ninth Circuit held that the requirement that it be administratively feasible to find class members “conflicts with the well-settled presumption that courts should not refuse to certify a class merely on the basis of manageability concerns.” Instead of refusing class certification, the Ninth Circuit held that district courts should use subclasses or certify only particular issues.

The Ninth Circuit also rejected the Third Circuit’s concern about the rights of absent class members, who may not ever receive notice that they are giving up a claim. Essentially, the Ninth Circuit imposed its judgment that absent class members are better served through liberal use of the class action mechanism: “Practically speaking, a separate administrative feasibility requirement would protect a purely theoretical interest of absent class members at the expense of any possible recovery for all class members — in precisely those cases that depend most on the class mechanism.”

And finally, the Ninth Circuit thought little of a defendant’s due process rights, endorsing the use of mini-trials. The court held that “Rule 23 specifically contemplates the need for such individualized claim determinations after a finding of liability.” This happens rarely in practice, given that it is typically more cost-effective to settle than to move forward with thousands of mini-trials. But that did not concern the Ninth Circuit: “[T]here is no due process right to a *cost-effective* procedure for challenging every individual claim to class membership.” (Emphasis in original.)

So it is safe to chalk up 2016 as a loss for defendants in terms of using the ascertainability requirement to defeat certification. Only in the Third Circuit has the requirement been safely entrenched. In most other parts of the country, ascertainability is a rather hollow requirement.

In other ascertainability news, the Sixth Circuit joined the Third, First and Tenth Circuits in holding that “ascertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief.”⁶⁷

⁶⁷ *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016); see also *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015); *Shook v. El Paso Cnty.*, 386 F.3d 963 (10th Cir. 2004); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

D. Class Settlements

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It's Not What You Can Get, It's What You Can Keep

2016 saw courts scrutinizing class settlements more carefully than in years past and requiring substantial modifications, or outright denying approval, where the courts have found a lack of substantive relief to class members, inadequate notice or disproportionate attorneys' fees.

Claims-Made Settlements

Claims-made settlements have recently come under scrutiny. For example, courts are less amenable to claims-made settlement agreements with "kicker provisions," meaning the remainder of the common fund reverts to the defendant if an insufficient number of class members submit claims to exhaust the settlement fund. But a California federal district court approved a claims-made settlement over objections where the remainder of the class fund was to be distributed on a *pro rata* basis.⁶⁸ Likewise, a recent Illinois federal district court discussed its two prior denials of a preliminary approval based, in part, on a provision addressing reversion to the defendant to reimburse it for the cost of notice and administration.⁶⁹ When the court granted the third motion for final approval, it focused on the fact that the defendant would no longer be reimbursed for the notice costs. In addition, courts increasingly question the inclusion of "clear sailing provisions" in which the defendant agrees not to object to a fee award up to a specified amount.

When deciding whether to craft a claims-made settlement agreement, counsel should consider whether the class members will have sufficient incentive to submit claims forms. If class members must actually travel or spend money to submit their claims, courts are less apt to approve the settlement. In *Horosny v. Burlington Coat Factory of California, LLC*, the court rejected the proposed settlement agreement three times, commenting on the fact that the "Merchandise Certificates," which were redeemable for up to \$7.50 in credit at the defendant's stores, excluded telephonic and online orders.⁷⁰ Specifically, the court reasoned that the defendant "does not anticipate a significant number of Class Members coming to Burlington's physical stores to redeem the Merchandise Certificates, finding \$7.50 in savings not worth the effort."⁷¹ The court also considered whether the Merchandise Certificates constituted coupons, but it determined that they did not because Burlington carried several items valued below \$7.50.

Likewise, a court recently determined that a settlement providing \$20 gift cards to those who submitted claims was actually a coupon settlement because the least-expensive item in the store was \$58.80 and the average price was \$205, meaning the class member would have to spend money out of his or her own pocket to take advantage of the settlement.⁷² Thus, the "coupons" had, at most, a 34 percent value. Further, the "gift cards" were nontransferable. Because the

68 See, e.g., *Ebarle v. Lifelock, Inc.*, No. 15-CV-00258-HSG, 2016 WL 5076203, *11 (N.D. Cal. Sept. 20, 2016).

69 *Kaufman v. Am. Express Travel Related Servs., Co.*, No. 07-CV-1707, 2016 WL 806546, *1 (N.D. Ill. Mar. 2, 2016).

70 Case No. 2:15-cv-05005-SJO-MRWx (Oct. 27, 2016).

71 *Id.*

72 Janet J. Fuente and D. Matthew Allen, *Southern District of California Rejects Coupon Class Settlement*, Classified, available at <http://classifiedclassaction.com/southern-district-of-california-rejects-coupon-class-settlement/>.

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defendant stood to experience a net benefit from the arrangement, the court concluded that the settlement was inadequate. The court was also concerned that the missions of the charities identified for the *cy pres* award were not related to consumer protection.⁷³ Moreover, the court indicated that the clear sailing provision created a danger of collusion.

While substantial potential awards provide class members with incentives to submit claims, courts may strongly question the use of a claims-made settlement if the response rate is low.⁷⁴ In such a case, the court may require further outreach efforts. Claims-made settlements are most appropriate where the class member must choose the form of relief he or she desires. For example, where the parties proposed a settlement structure giving claimants the choice between cash or a 10 percent discount on future vehicle rentals, a New Jersey federal district court approved the agreement over objections.⁷⁵

And it is not just courts that are scrutinizing claims-made settlements. In the fall of 2016, the Federal Trade Commission issued to eight claim settlement administrators an order to produce a special report under Section 6 of the FTC Act requiring the settlement administrators to compile and produce vast amounts of information regarding claims-made settlements.⁷⁶ The information requested covers the years 2013 through 2015 and includes forms of notice; participation rates; the median, mean, minimum and maximum payments; number of checks sent versus number cashed; redemption rates for gift cards or coupons; and much more. This is part of the FTC's "Class Action Fairness Project," through which it also files amicus briefs or intervenes in class actions; advises state, federal and private groups and seeks suggestions on matters that merit FTC attention; and monitors legislation and class action rule changes.⁷⁷

Notice

Another difficult objection for litigants to overcome in class settlement approval has been inadequate notice. The Northern District of Illinois, for example, denied a motion for preliminary approval when it discovered that the defendant actually had more customer-identifying information than it originally admitted.⁷⁸ Moreover, the notice did not comply with Rule 23(h) because it did not notify the class of the counsel's petition for attorneys' fees. Consequently, the court ordered another round of notice.⁷⁹ If litigants propose multiple forms of notice, courts are far more likely to approve their proposed agreements. In *Horosny*, the preliminarily approved agreement contained five forms of notice: email, postcard, summary in-store, class and summary publication.⁸⁰

⁷³ *Id.*

⁷⁴ *Alexander v. FedEx Ground Package Sys., Inc.*, No. 05-CV-00038-EMC, 2016 WL 1427358, *2 (N.D. Cal. Apr. 12, 2016).

⁷⁵ *Schwartz v. Avis Rent a Car Sys., LLC*, No. CV 11-4052 (JLL), 2016 WL 3457160, *1 (D.N.J. June 21, 2016).

⁷⁶ Class Action Notice Consumer Perception Study, 80 Fed. Reg. 25676 (May 5, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-seeks-study-class-action-settlements>.

⁷⁷ *Id.*

⁷⁸ *Kaufman*, 2016 WL 806546, at *3.

⁷⁹ *Id.* at *6.

⁸⁰ Case No. 2:15-cv-05005-SJO-MRW (Jan. 26, 2017).

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In fact, the recent trend is toward online notice.⁸¹ In past cases, such as *Jermyn v. Best Buy Stores, L.P.*, courts denied notice via Twitter, text messaging and email.⁸² But now that litigants are ensuring that online notice is targeted – for example, by identifying websites consumers tend to use – courts are more accepting of the benefits of online notice. In *Mark v. Gawker Media, LLC*, the court initially rejected a proposal to post notices on Reddit and Tumblr pages such as “OccupyWallStreet” and “r/Progressive” because they were not specifically targeted to class members.⁸³ However, the court approved a new social media plan using Twitter, Facebook and LinkedIn tailored to reaching “known former Gawker interns.”⁸⁴

In *In re Netflix Privacy*, the court determined that a notice plan including an email with a link to the settlement website, a publication notice via People and a Facebook advertisement linked to the website were appropriate because of the nature of Netflix’s business.⁸⁵ Similarly, in *In re Google Inc.*, the court permitted notice through online advertisements on the Audience Network and Pulpo Media networks, as well as through Facebook, to reach the “broadest possible audience of potential Apple Safari and Microsoft Internet Explorer web browsers.”⁸⁶ However, with online notice, defendants should consider whether it might be overinclusive and bad for business.⁸⁷ Further, they should consider privacy implications, such as how information is transferred to the administrator and to the class members and what information will be viewed by the public.

Conflicts and Adequate and Reasonable Representation

A representative party must fairly and adequately protect the interests of the class.⁸⁸ And a representative cannot fairly and adequately protect the interests of the class if he or she has a conflict of interest with other class members or class counsel.⁸⁹ Minor conflicts will not necessarily defeat class certification. However, fundamental conflicts, such as differences between claims for relief, can stand in the way of class certification or block the approval of a class action settlement agreement.⁹⁰

For example, the Second Circuit recently rejected a class settlement agreement 10 years in the making after finding the class’ representation was inadequate and unreasonable. In *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, plaintiff merchants brought an anti-trust class action against defendants Visa, MasterCard and various banks, challenging several of the defendants’ fees and rules.⁹¹ After 10 years of litigation, the parties reached a settlement that was approved by the district court. Under the settlement agreement, the plaintiffs were divided into

81 Kashmir Hill, *Yes, That Legal Notice You Got From Facebook Is Real*, Forbes (Jan. 26, 2013).

82 No. 08Civ00214(CM), 2010 WL 5187746, *6–8 (Dec. 6, 2010).

83 No. 13-cv-4347, 2015 WL 2330079, *1 (S.D.N.Y. Mar. 5, 2015).

84 *Mark v. Gawker Media, LLC*, No. 13-cv-4347, 2015 WL 2330274, *1 (S.D.N.Y. Apr. 10, 2015).

85 No. 5:11-cv-00379, 2013 WL 1120801, *9 (N.D. Cal. Mar. 18, 2013).

86 No. CV 12-MD-2358 (SLR), 2017 WL 446121, *3 (D. Del. Feb. 2, 2017).

87 Natalie Bennett, Casie Collignon, Carla Peak, *Class Action Notice Requirements: Leveraging Traditional and Emerging Media to Reach Class Members* (April 6, 2016).

88 Fed. R. Civ. P. 23(a)(4).

89 Newberg on Class Actions § 3:58 (5th ed.).

90 *Id.* at § 3:59.

91 827 F.3d 223, 228 (2d Cir. 2016).

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two classes: a “Rule 23(b)(3) class” and a “Rule 23(b)(2) class.” The Rule 23(b)(3)⁹² class covered merchants that accepted Visa and/or MasterCard from 2004 to 2012 and was eligible for up to \$7.25 billion in monetary relief, and members could opt out.⁹³ The Rule 23(b)(2)⁹⁴ class covered merchants that accepted or will accept Visa and/or MasterCard from 2012 “onwards forever,” and the class would get injunctive relief but members could not opt out.⁹⁵ Both of the classes had the same representation. An appeal followed.

The Second Circuit found that “the unitary representation of these plaintiffs was inadequate. Class members had interests antagonistic to those of some of the members they were representing. The fault lines were glaring as to matters of fundamental importance.”⁹⁶ The court was concerned with the adequacy and reasonableness of the representation because the Rule 23(b)(3) plaintiffs wanted to maximize their cash payment, while the Rule 23(b)(2) plaintiffs wanted to maximize their future injunctive relief.⁹⁷ Furthermore, the settlement required potential future claimants to give up any future relief, claims and damages – regardless of the class to which they would belong. The court found that the “unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement.”⁹⁸ Ultimately, the court held that while broad class action settlements may be common, “the benefits of litigation peace do not outweigh class members’ due process right to adequate representation.”⁹⁹

As seen above, conflicts of interest between subclasses are problematic. But dividing a class into subclasses is not necessarily the source of a conflict. Rather, problems arise when conflicts or potential conflicts between subclasses or between class members and representatives remain unaddressed. For example, the Eighth Circuit recently remanded a settlement class certification because of a potential conflict with class representation.¹⁰⁰ Under the terms of the proposed settlement, members with documented losses were paid first, members with undocumented losses received the remaining balance of the settlement fund, and members who suffered no loss received nothing. All members belonged to one class and were represented only by class members who were entitled to payment. The court remanded with instructions for the district court to undertake a “rigorous analysis” to determine (1) whether there was a conflict; (2) if so, whether it prevented the class representatives from “fairly and adequately protecting the interests of all the class members”; and (3) if the class was conflicted, whether the conflict was fundamental and required certification of one or more subclasses with independent representation.¹⁰¹

92 Under Federal Rule of Civil Procedure 23(b)(3), a class action may be maintained if “the claims or defenses of the representative parties are typical of the claims or defenses of the class” and “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”

93 *Id.*

94 Under Federal Rule of Civil Procedure 23(b)(2), a class action may be maintained if “the claims or defenses of the representative parties are typical of the claims or defenses of the class” and “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”

95 827 F.3d at 230.

96 *Id.* at 233.

97 *Id.*

98 827 F.3d at 234.

99 *Id.* at 240.

100 *In re Target Corp. Customer Data Security Breach Litigation*, 2017 WL 429261, at *1 (8th Cir. Feb. 1, 2017).

101 *Id.* at *3.

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On the other hand, where conflicts are addressed and steps are taken to minimize the conflict, it is more likely that the representation will be adequate. For example, in *In re National Football League Players Concussion Injury Litigation*, the Third Circuit upheld a settlement agreement between the National Football League and several retired football players that provides relief for concussion-related injuries and diseases.¹⁰² Under the settlement, eligible players will receive a monetary reward, and subclasses were created to avoid conflicts of interest within the class between present and future claims. The court found that each subclass was adequately represented because class counsel used the subclass structure to “protect the sometimes divergent interests” of the players.¹⁰³ The court also noted that “the subclasses were represented in the negotiations by separate class representatives with separate class counsel . . . [where] each was an adequate representative.”¹⁰⁴ The court found that these steps alone were a significant structural protection for the class.

Because minor conflicts will not necessarily defeat class certification, there were few conflicts with class representatives that tore apart certifications or settlements last year. But the cases above demonstrate that monitoring conflicts is an increasingly important element in class action litigation because if dealt with appropriately, they will be less likely to stand in the way of a class certification or a class action settlement agreement.

Attorneys’ Fees

Attorneys’ fees are becoming a larger roadblock in getting court approval for class action settlements, as they are facing increased scrutiny from the bench.

One aspect of a fee award that is gaining more attention is the way fees are calculated after a common fund is established. Thus, getting court approval continues to depend on the court and which fee calculation it uses – the lodestar method, a percentage-of-the-fund method or a combination of the two, a “lodestar cross-check.”

For example, in the Eleventh Circuit, attorneys’ fees are calculated and awarded using only the percentage-of-the-fund method.¹⁰⁵ A Florida federal district court recently granted a \$2.1 million fee award, which was 33 percent of the settlement fund.¹⁰⁶ The court reaffirmed that the “controlling law in the Eleventh Circuit on attorney fee awards in class action settlements involving a common fund is a reasonable percentage of the fund established for the benefit of the class” and that “courts in the Eleventh Circuit regularly award fees based on a percentage of the recovery without discussing lodestar at all.” And here, instead of using a lodestar cross-check, the court measured the resulting fee against the market rate in class actions.

On the other hand, some district courts are gaining more discretion in calculating attorneys’ fees. For example, the Eighth Circuit recently upheld a district court’s \$2.8 million fee award, finding that the lower court did not abuse its “significant discretion” in choosing the percentage-of-the-fund method to calculate the fee and then using a lodestar cross-check.¹⁰⁷ The court closely examined the lower court’s approach and held that the lower court completed a thorough analysis and its findings were “amply supported.”

¹⁰² 821 F.3d 410 (3d Cir. 2016).

¹⁰³ *Id.* at *432.

¹⁰⁴ *Id.*

¹⁰⁵ See *Muransky v. Godiva Chocolatier Inc.*, Case No. 0:15-cv-60716 (S.D. Fla. 2016).

¹⁰⁶ *Id.*

¹⁰⁷ *Thut v. Life Time Fitness Inc.*, No. 15-3976 (8th Cir. Feb. 2, 2017).

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Notably, the Eighth Circuit also held that it will leave to the district court's discretion the decision of whether to include administrative costs as a part of the "benefit" when calculating the percentage-of-the-fund amount. The court sided with the Ninth Circuit in choosing this approach, finding that it keeps with "the deference our court affords district courts in awarding attorneys' fees." The court compared this approach with that of the Seventh Circuit, which has indicated that district courts should "scrutinize administrative costs to determine whether they really confer a benefit on the class before including them in fee-calculations."¹⁰⁸ Similarly, the Eleventh Circuit adds administrative costs and other indirect benefits to the class to the total valuation of the settlement fund.¹⁰⁹

While a district court may have the discretion to choose a calculation method, some circuit courts are increasingly requiring additional justification if a fee is raised based on a lodestar cross-check or multiplier. For example, the Third Circuit vacated a \$1.1 million fee award after finding that the lower court did not sufficiently explain why it used a lodestar multiplier to almost quadruple the award.¹¹⁰ Because the lower court relied on the plaintiff's fee recommendation without an explanation of why the case presented "rare" and "exceptional" circumstances to enhance the lodestar rate, the court rejected the fee.¹¹¹

Overall, most federal circuits continue to give the district court discretion in picking which fee method to use and whether to use a lodestar cross-check. None of them, however, require the lodestar method or forbid a lodestar cross-check.¹¹² But even after a method is chosen, calculations are completed and a fee is proposed, there is no guarantee the fee will withstand the scrutiny of a circuit court's review. Another hurdle is whether the fund established *actually benefits* the class and whether the fee awarded therefrom is proportional to that benefit.

For example, in *Koby v. ARS National Service Inc.*, three plaintiffs received debt collection voicemails that did not comply with the requirements of the Fair Debt Collections Practices Act (FDCPA), and they brought a class action against the defendant debt collection agency on behalf of all individuals who received similar voicemails; the class amounted to approximately four million people nationwide.¹¹³ Eventually, the parties reached a settlement; the defendant agreed to pay each named plaintiff \$1,000, make a \$35,000 *cy pres*¹¹⁴ award to a local charity and continue to use a new voicemail message. The defendant agreed to pay the class counsel \$67,000 in fees.¹¹⁵ The other class members received no monetary compensation but were considered the beneficiaries of the resulting injunction. The class members also gave up their right to seek damages from the defendant as a part of any future class action, but they could pursue individual damages.¹¹⁶ The court approved the settlement and its terms, including the attorneys' fees.¹¹⁷ An appeal followed.

108 *Id.* See *Redman v. RadioShack Corp.*, 768 F.3d 622, 630 (7th Cir. 2014).

109 See *Poertner v. The Gillette Co.*, No 14-13882 (11th Cir. July 16, 2015)(unpublished).

110 *Dungee v. Davison Design & Development Inc.*, No. 16-1486, 2017 WL 65549 (3d Cir. Nov. 8, 2016)(unpublished).

111 *Id.* at *3.

112 Newberg on Class Actions § 15:66 (5th ed.).

113 Case No. 13-56964 at *1-2 (9th Cir. 2017).

114 A "cy pres" award allows a court to distribute a class action settlement fund to the "next best" class of beneficiaries, typically a charity or organization.

115 Case No. 13-56964 at *1-2.

116 *Id.*

117 *Id.*

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The Ninth Circuit found that the attorneys' fee awarded was improper because it was not proportional to the benefit the class received; "the named plaintiffs and class counsel got exactly what they wanted but the remaining four million class members got worthless injunctive relief."¹¹⁸ Ultimately, notwithstanding the small amount of the awards, the court held that "the fact that class members were required to give up anything at all in exchange for worthless injunctive relief precluded approval of the settlement as fair, reasonable and adequate under Rule 23(e)(2)" and reversed the lower court's holding.¹¹⁹

The benefit to the class does not always have to be monetary, but there does have to be a valuable benefit to the class to make a settlement and the accompanying attorneys' fees fair, reasonable and adequate. For example, in *In re Walgreen Co. Stockholder Litigation*, the plaintiff shareholders filed a class action challenging defendant Walgreens' upcoming reorganization.¹²⁰ The parties agreed to settle; the agreement required the defendant to issue six supplemental disclosures to the shareholders and authorized the class counsel to ask for \$370,000 in attorneys' fees.¹²¹ The court was not amused by the settlement terms after it compared the size of the fee with the minimal benefit the shareholders received; the court held that this type of class action – "the class action that yields fees for class counsel and nothing for the class – is no better than a racket. It must end. No class action settlement that yields zero benefit for the class should be approved, and a class action that seeks only worthless benefits for the class should be dismissed out of hand."¹²² Further, the court continued, a class representative who proposes high attorneys' fees at the class members' expense is not adequately protecting the class members' interests.¹²³ Ultimately, the court reversed the settlement and remanded, instructing the district court to give "serious consideration" to either finding new class counsel or dismissing the suit.

On the other hand, small monetary settlements or settlements offering injunctive relief to class members coupled with a larger fee award may not automatically be deemed unreasonable; again, the fee award must be proportional to the benefit the class receives. For example, in *In re Subway Footlong Sandwich Marketing and Sales Practices Litigation*, the plaintiff consumers filed a class action against the defendant Subway franchisor alleging that the defendant engaged in deceptive marketing and sales practices.¹²⁴ Eventually the parties agreed on a proposed settlement – the settlement-only class would be an "injunction-only class" where the plaintiffs would move for \$520,000 in attorneys' fees. The defendants also agreed to adopt measures to prevent similar harm in the future.¹²⁵ Regarding the attorneys' fees, the court stated the facts in the case at hand required the reasonableness of the award to be "measured by the value of the injunctive relief in relation to what the class members have given up in exchange for the relief."¹²⁶ And under that standard, the court held that the fees were reasonable because the class counsel obtained an injunction that "will end the allegedly deceptive marketing and

118 *Id.* at *1.

119 *Id.* at *9.

120 832 F.3d 718, 721 (7th 2016).

121 *Id.* 721-722.

122 *Id.* a 724.

123 *Id.* at 725.

124 316 F.R.D. 240 (E.D. Wisconsin 2016) (appeal filed).

125 *Id.* at 243.

126 *Id.* at 252.

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sales practices challenged in this case.¹²⁷ Also, although the members could not opt out of the class, they did not give up any additional individual relief they might want to pursue.¹²⁸ Therefore, the court held that the \$520,000 fee was reasonable.¹²⁹ Looking forward, however, time will tell whether this approval and award can withstand the scrutiny of the Seventh Circuit, as this case has already been appealed.

The methods and cases cited above help show that attorneys' fees can make or break a class action settlement agreement; thus, fees remain an important part of a deal that should not be overlooked in 2017.

Offers of Judgment

On Jan. 20, 2016, the Supreme Court held that an unaccepted Rule 68 offer of judgment does not moot a class action.¹³⁰ In that case, the defendant offered the plaintiff, who had not yet filed a motion for class certification, an offer of judgment for \$3 more than the maximum the plaintiff could recover. The plaintiff did not accept the offer. The Court reasoned that the dissent's approach "would place the defendant in the driver's seat." Justice Thomas concurred, reasoning that the law of tenders should govern the case. Consequently, there is an open question regarding whether an actual tender of payment by certified check to the court's registry would moot the class claims.

After the Supreme Court's decision, the Ninth Circuit concluded that when a defendant offers a plaintiff complete relief on his individual claims before certification but fails to offer complete relief on the class claims, the court should not enter judgment on the individual claims before the plaintiff has a fair opportunity to move for class certification.¹³¹ The Sixth Circuit refused to answer the question in *Mey v. North American Bancard, LLC*, where the defendant actually tendered payment but failed to show that the payment would satisfy the plaintiff's demand for relief.¹³² A federal district court in Massachusetts held that a class action was mooted through tender.¹³³ But another case in that court highlighted that the result would be different if the plaintiff had filed a motion for class certification prior to the defendant's tendering payment.¹³⁴ Where defendants have filed Rule 67 motions to deposit funds purporting to moot a plaintiff's potential class claims, most have not permitted tenders intended to moot the class plaintiff's standing.¹³⁵ Other courts have permitted tenders of complete relief but have held that properly preserved class claims remain justiciable.¹³⁶ And still others have permitted tenders and held that where there is a pending motion for class certification, there is no live claim between the proposed class members and the defendant.¹³⁷ This issue appears likely to remain open until the Supreme Court takes it up again.

127 *Id.*

128 *Id.*

129 *Id.*

130 Janet J. Fuente and D. Matthew Allen, *Supreme Court Rules Unaccepted Rule 68 Offer of Judgment Cannot Moot Class Action*, Classified, available at <http://classifiedclassaction.com/supreme-court-rules-unaccepted-rule-68-offer-judgment-cannot-moot-class-action/>.

131 *Chen v. Allstate Ins. Co.*, 819 F.3d 1136, 1147 (9th Cir. 2016).

132 655 F. App'x 332, 336 (6th Cir. 2016).

133 *Demmler v. ACH Food Companies, Inc.*, No. 15-13556-LTS, 2016 WL 4703875, *8 (D. Mass. June 9, 2016).

134 *Johansen v. Liberty Mut. Grp., Inc.*, No. 1:15-CV-12920-ADB, 2016 WL 7173753,*7 (D. Mass. Dec. 8, 2016).

135 See, e.g., *Brady v. Basic Research, LLC*, 312 F.R.D. 304, 306 (E.D.N.Y. 2016); *Bais Yaakov of Spring Valley v. Varitronics, LLC*, No. 14-CV-5008, 2016 WL 806703, *1 (D. Minn. Mar. 1, 2016); *Bridging Communities, Inc. v. Top Flite Fin., Inc.*, No. 09-14971, 2016 WL 1388730, *4 (E.D. Mich. Apr. 6, 2016); *Tegtmeier v. PJ Iowa, L.C.*, No. 3:15-cv-00110-JEG, 2016 WL 3265711, *11 (S.D. Iowa May 18, 2016); *Radha Giesmann, MD, P.C. v. Am. Homepatient, Inc.*, No. 4:14CV1538 RLW, 2016 WL 3407815, *3 (E.D. Mo. June 16, 2016); *Jarzyna v. Home Properties, L.P.*, No. 10-4191, 2016 WL 4417277, *4 (E.D. Pa. Aug. 18, 2016).

136 See *South Orange Chiropractic Center LLC v. Cayan LLC*, No. 15-13069-PBS, 2016 WL 3064054, *3 (D. Mass. May 31, 2016).

137 *Fulton Dental, LLC v. Bisco, Inc.*, No. 15 C 11038, 2016 WL 4593825, *14 (N.D. Ill. Sept. 2, 2016).



III. Developments by Subject Matter

III. Developments by Subject Matter

Written by Dustin M. Dow

In the four major subject areas, 2016 was a robust year. The Supreme Court accepted review of three consolidated cases regarding class and collective actions waivers, which will make for one of the most anticipated decisions in the employment sector in several years. Increased Department of Justice activity regarding mergers made for interesting times in the antitrust field. *Spokeo* and its discussion of standing dominated the privacy sector. And consumer reliance took on greater importance in consumer protection cases.

Because these subject areas churn out so much class action law, understanding what drives them and courts' decisions is essential.

III. Developments by
Subject Matter

A. Employment and Waivers

Written by Dustin M. Dow and Carrie A. Valdez

Courts wrestle with the future of class-action waivers

For employers, few class-action topics in 2016 registered with as much influence as the scope of class-action waivers, and the extent to which they were enforceable, depending on the jurisdiction.

For several years, despite the National Labor Relations Board's position that class waivers violated Section 7 of the National Labor Relations Act, federal circuit courts continued to enforce the waivers as viable under the Federal Arbitration Act.

In 2016, however, two federal circuit court panels took the Board's side, prompting the U.S. Supreme Court to wade into the fray by granting certiorari review. Specifically, the Court will decide whether class and collective action waivers in employment arbitration agreements are enforceable even in the face of the NLRA's provision protecting "concerted activity" engaged in by employees.

The Court's resolution of the conflict will have profound implications for employers nationwide and their ability to resolve employment disputes on individualized bases pursuant to arbitration agreements. Since 2012, the Board has posited that arbitration agreements with class or collective action waivers not only deprive employees of their rights under Section 7 of the NLRA but also cannot be relied upon by employers in defense of a class or collective action. The Board articulated that position in *D.R. Horton, Inc.*,¹³⁸ which was eventually overturned by the Fifth Circuit. Notably, the Board's position in *D.R. Horton*, and subsequently reiterated in numerous Board decisions including *Murphy Oil, Inc.*,¹³⁹ reflected a 180-degree reversal. In 2010, the Board's general counsel issued a memorandum explaining that despite Section 7, employers could defend against a class or collective action by asserting the existence of a class waiver in an arbitration agreement.¹⁴⁰ Nevertheless, the *D.R. Horton* rule quickly became the Board's standard position even as federal circuit courts initially rebuked it, generally construing the FAA's pro-arbitration mandate to override any right to collective actions under the NLRA. In fact, federal circuit courts in the Second, Eighth, Ninth and Fifth circuits rejected the *D.R. Horton/Murphy Oil* construction by the Board four separate times in 2013, with varying degrees of analysis. In 2014, the Eleventh Circuit expressed agreement with those circuits in dicta, as did the California Supreme Court in 2014 and the Nevada Supreme Court in 2015. The Board, however, opted not to pursue Supreme Court review, a decision which proved to be strategically correct, as a number of federal district courts followed its lead in cases not directly involving the Board. Absent Supreme Court review, the persuasive effect of the *D.R. Horton* rule remained, even as circuit court after circuit court overturned its decisions.

138 357 N.L.R.B. No. 184 (2012).

139 361 N.L.R.B. No. 72 (2014).

140 See Memorandum GC 10-06, June 16, 2010 from General Counsel Ronald Meisburg.

III. Developments by Subject Matter

In May 2016, the Board's losing streak in the federal courts of appeals ended. Writing for a three-judge Seventh Circuit panel in *Lewis v. Epic Systems Corp.*,¹⁴¹ Judge Diane Wood held that an arbitration agreement precluding collective arbitration or collective action violates Section 7 of the NLRA, 29 U.S.C. § 157, and is unenforceable under the FAA, 9 U.S.C. §§ 1 et seq. *D.R. Horton*, Judge Wood wrote, reflected Supreme Court precedent that "concerted activities" under Section 7 included "collective, representative, and class legal proceedings."¹⁴² Not only that, she wrote, but when an employer's arbitration agreement violates the NLRA by precluding class or collective litigation, it is unenforceable under the FAA, which has a saving clause which precludes enforcement "upon such grounds as exist at law or in equity for the revocation of any contract."¹⁴³ In other words, according to *Epic Systems*, an employment contract that is "illegal" under the NLRA because it bars class procedures cannot be saved by the FAA's pro-enforcement policy. That conclusion, the first to agree with *D.R. Horton*, put the Seventh Circuit squarely at odds with the five circuits that had previously held or indicated that the FAA's policy of favoring arbitration overrides any concerted activity rights employees have to class or collective remedies.

Following Judge Wood's lead, in August, a Ninth Circuit panel joined the Seventh Circuit and held in *Morris v. Ernst & Young U.S. LLP*,¹⁴⁴ that despite the FAA, under Section 7, employees have substantive rights to pursue collective relief that cannot be waived in an arbitration agreement. Casting the right to proceed collectively as substantive rather than procedural, the Ninth Circuit immunized the NLRA's class litigation rights from the FAA: "The FAA does not mandate the enforcement of contract terms that waive substantive federal rights. Thus, when an arbitration contract professes the waiver of a substantive federal right, the FAA's saving clause prevents a conflict between the statutes by causing the FAA's enforcement mandate to yield."¹⁴⁵

During September 2016, certiorari petitions were filed in *Epic Systems* and *Morris*, as well as in *NLRB v. Murphy Oil*, the follow-up case to *D.R. Horton*, in which the Board sought review for the Fifth Circuit's holding that Section 7 rights did not override the FAA's arbitration enforcement command.

On Jan. 13, 2017, the Supreme Court granted certiorari in all three cases and consolidated them. Subsequently, however, the Court ordered that oral argument will be heard in the October 2017 term, when a full bench of nine Justices is likely to be sitting. Before the Court will be the scope of its 2011 holding in *AT&T Mobility LLC v. Concepcion*,¹⁴⁶ a nonemployment case that employers have nevertheless relied upon to require that disputes be resolved through individual arbitration. And doctrinally, the court may be compelled to address its prior holding (articulated in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)) that statutory employment claims providing for collective treatment were subject to mandatory arbitration.

141 823 F.3d 1147 (7th Cir. 2016).

142 *Epic Systems*, 823 F.3d at 1155.

143 *Id.* at 1157.

144 834 F.3d 975 (9th Cir. 2016).

145 *Id.* (citing *Epic Systems*, 823 F.3d at 1159).

146 563 U.S. 333 (2011).

III. Developments by Subject Matter

While the cases are pending before the Court, the issue continues to simmer among lower courts. In August, a District of Massachusetts court expressly disagreed with *Epic Systems* and enforced a collective action and class waiver in an arbitration agreement regardless of Section 7. In *Bekele v. Lyft, Inc.*,¹⁴⁷ Judge Dennis Saylor IV provided a point-by-point counterargument to *Epic Systems* using a statutory construction approach that explained why “concerted activity” under the NLRA could not refer to class or collective litigation. The case is currently before the First Circuit on appeal.

Interestingly, on Jan. 26, 2017, the Board’s Office of General Counsel issued Memorandum DM 17-11, declaring that:

In light of the grant of certiorari and the fact that this significant issue is now before the Supreme Court, the General Counsel has re-evaluated his prior position of proceeding on these matters. Thus, in cases alleging that the employer is either maintaining and/or enforcing an agreement prohibited by *Murphy Oil*, Regions, after determining the case has merit, are directed to propose that the parties enter informal settlement agreements conditioned on the Agency prevailing before the Supreme Court in *Murphy/Epic/Ernst & Young*.

The Board seems confident of the outcome of the pending cases. But agreements with opt-in/opt-out clauses are not included. As to those agreements, the Memorandum provides:

In situations involving opt-in/opt-out clauses in mandatory arbitration agreements or where it is argued that some other feature of these agreements renders them distinguishable from *Murphy Oil*, Regions are directed to hold such cases in abeyance.

So, even though the Board maintains that opt-out provisions cannot save an arbitration agreement from illegality, it apparently believes that issue will not be addressed in any resulting Supreme Court opinions. District courts generally have taken that approach, drawing a direct distinction between cases involving opt-out provisions and those now before the Supreme Court.¹⁴⁸

Much hangs in the balance for employers that have relied on the enforceability of class and collective-action waivers, particularly since *Concepcion*, to require individual arbitration.

The procedural v. substantive divide

Closely related to the consolidated class-waiver cases pending before the Supreme Court is the issue of whether the Fair Labor Standards Act provides either a procedural right to class litigation or a substantive right.

This issue also came up in 2016 when the Third Circuit had to decide whether former opt-in FLSA plaintiffs had standing to appeal a denial of conditional certification under the FLSA. In *Halle v. West Penn Allegheny Health System, Inc.*,¹⁴⁹ the plaintiffs sought to bring two separate collective actions against various hospitals for work they claimed they performed during their unpaid meal periods. In 2009, the district courts conditionally certified the two cases, and a total of nearly 3,800 employees opted in to the two cases. Following two years of discovery, the courts in both

147 --- F. Supp.3d ---, 2016 WL 4203412 (D. Mass. 2016).

148 See, e.g., *Bruster v. Uber Techs. Inc.*, 15-2653, 2016 U.S. Dist. LEXIS 101312, at *5 (N.D. Ohio Aug. 2, 2016).

149 842 F.3d 215 (3d Cir. 2016).

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cases decertified the actions because of multiple differences among the class members relating to individual supervisors, job duties and experiences. In an effort to obtain an appeal, the individual plaintiffs dismissed their own claims under Rule 41(a) to create a final, appealable order, and then appealed. That effort failed because the Third Circuit found that the dismissal of the plaintiffs' claims extinguished their right to represent the class as well.

But that wasn't the end of story. The same plaintiffs' counsel then filed two brand-new cases with two of the former class members, with slightly different proposed class definitions. They again sought conditional certification, and while that motion was pending, submitted 250 opt-in forms in one of the cases, before the court concluded that the matter was essentially the same as the originals and should not proceed as a collective action. The district court dismissed the attempted opt-ins' claims without prejudice. Three of the individuals who had tried to opt in to the first case appealed.

But did they have standing? That was the question the Third Circuit had to resolve. And fundamentally, it had to address whether a collective action under the FLSA is a procedural vehicle to remedying substantive rights or a substantive right by itself. The Third Circuit held the opt-in plaintiffs did not have standing, aligning with the significant body of federal circuits that have held that the collective rights under the FLSA are procedural rather than substantive. Instead, like unsuccessful defendants, they had to await the conclusion of the litigation and appeal then if they chose.¹⁵⁰ Specifically, the court indicated that only procedural rights were at stake by noting, "When the opt-in plaintiffs were dismissed without prejudice, they did not suffer an adverse judgment on the merits of any claim. They lost nothing but the ability to proceed in Halle's case."¹⁵¹

80-20 rule clarification

Hospitality and restaurant industry employers are no doubt familiar with the Department of Labor's "80-20 rule" by which tipped employees may be compensated less than minimum wage under the FLSA with the expectation that tips will make up the difference. It goes without saying, however, that the system raises questions, such as how to pay a tipped employee when he or she performs nontipped functions at work.

That issue came before the Seventh Circuit, which provided some clarity in July 2016 in *Schaefer v. Walker Bros. Enterprises*.¹⁵² Schaefer involved two classes of Original Pancake House servers. The first class claimed that the restaurants were required to pay them the minimum wage rate for the time they spent performing nontipped duties. The second class argued that the disclosures provided by the restaurants regarding compensation of tipped employees failed to meet federal requirements.

In addition to performing normal server tasks like taking orders and delivering food, the servers in this case were obligated to spend about 10 to 45 minutes during each shift performing tasks they argued were completely unrelated to traditional server functions. For example, they were required

150 The Third Circuit explained that treatment of collective actions frequently looks a lot like Rule 23 actions, which are undeniably procedural:

The FLSA provides a vehicle for managing claims of multiple employees against a single employer. By permitting employees to proceed collectively, the FLSA provides employees the advantages of pooling resources and lowering individual costs so that those with relatively small claims may pursue relief where individual litigation might otherwise be cost-prohibitive. It also yields efficiencies for the judicial system through resolution in one proceeding of common issues arising from the same allegedly wrongful activity affecting numerous individuals.

Id. at 223.

151 Id. at 230.

152 , — F.3d —, 2016 WL 3874171 (7th Cir. July 15, 2016),

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to wash and cut fruits and vegetables; prepare applesauce, jellies and salsas; restock bread bins and replenish condiment dispensers; fill ice buckets; brew hot drinks; clean toasters, burners and woodwork; and dust picture frames. The servers argued that the restaurants should not be allowed to use the tip-credit rate for the time they spent performing these functions because they are unrelated to tipped tasks. The Seventh Circuit disagreed.

The court highlighted the DOL's 80-20 regulation that distinguishes between dual jobs and "related duties" that may be performed by a tipped employee without requiring the employer to pay the full cash wage. The regulation notes that there are times when a server spends part of his or her time "cleaning tables, toasting bread, making coffee and occasionally washing dishes or glasses . . . Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips."¹⁵³ Section 30d00(e) of the DOL's Field Operations Handbook further provides that no tip-credit rate can be used when a tipped employee spends "a substantial amount of time (in excess of 20 percent)" performing general preparation or maintenance work.

The Seventh Circuit concluded that it was appropriate for the restaurants to use the tip-credit rate because the majority of the tasks were related to tipped functions and the time spent on unrelated tasks failed to meet the 20 percent threshold. The court relied on the Eighth Circuit's opinion in *Fast v. Applebee's International, Inc.*,¹⁵⁴ for the proposition that preparing small amounts of food and cleaning objects used in that process are related to a server's tipped functions. It also determined that the 10 to 45 minutes a day for nontipped activities was well under 20 percent of an eight-hour shift (10 minutes is 2 percent and 45 minutes is 9.4 percent). While the court noted that cleaning burners and woodwork and dusting picture frames was problematic, the time spent was negligible and not enough to recharacterize the majority of time the servers spent on their tipped and related assignments.¹⁵⁵

The decision made it clear that courts, at least in the Seventh and Eighth Circuits, will focus their analysis on whether the nontipped tasks are incidental to tipped work and whether the nontipped tasks comprise more than 20 percent of the employee's time. Of course, this is hardly an issue that is going away, even within the relevant jurisdictions. Courts within the Seventh Circuit, for instance, have since relied on *Schaefer* to deny motions to dismiss where plaintiffs make dual role allegations.¹⁵⁶

As well as adding clarification to the question of when the tip credit can be used, the *Schaefer* court examined disclosure issues. Section 203(m) of the FLSA requires employers utilizing the tip-credit rate to make certain disclosures to its tipped employees. It specifically requires the employer to explain (a) that the employer will pay less than the minimum wage in anticipation of tips, (b) how much the cash wage will fall short of the current minimum wage and (c) that the employer will make up the difference if tips plus the cash wage do not at least match the current minimum wage. Here, the servers argued that their employee handbooks did not contain an adequate disclosure because the handbooks failed to explain that the restaurants would make up the difference if their tips plus the cash wage did not meet or exceed the minimum wage.

¹⁵³ 29 C.F.R. § 531.56(e).

¹⁵⁴ 638 F.3d 872 (8th Cir. 2011).

¹⁵⁵ See *Sandifer v. United States Steel Corp.*, 134 S. Ct. 870 (2014).

¹⁵⁶ *Stokes v. Wings Inv., LLC*, No. 115CV01932RLYDKL, 2016 WL 5650021, at *3 (S.D. Ind. Sept. 30, 2016) (explaining that the "Seventh Circuit implicitly recognized that minimum wage claims may be brought based upon a tipped employee's performance of unrelated non-tipped duties (a dual job) and excessive related non-tipped duties.") (citing *Schaefer*, 829 F.3d 551, -----, 2016 WL 3874171 at *1-2, 2016 U.S. App. LEXIS 12985 at *4-6 (7th Cir. 2016)).

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The Seventh Circuit agreed that the handbooks alone were inadequate. However, the restaurants furnished the missing information separately. Each restaurant put up at least one poster provided by the DOL explaining that:

Employers of “tipped employees” must pay a cash wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee’s tips combined with the employee’s cash wage of at least \$2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions apply.

Although the Seventh Circuit noted its preference of having all the information in an employment handbook, the FLSA does not require the information to be in one document. As the court explained, “It would be hard to fault an employer for providing exactly the information the Department of Labor then required, in the Department’s own words.”

Statistical sampling gets Supreme Court nod

Last year, the Supreme Court updated a decades-old FLSA precedent, opening the door a little wider for collective action plaintiffs to rely on statistical sampling to prove classwide liability and damages. At the same time, however, the Court highlighted opportunities for employers to poke holes in flawed statistics.

In 1946, the Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*¹⁵⁷ amplified the collective action power of the FLSA by holding that employees, after establishing classwide liability, were entitled to a reasonable inference based upon representative sampling to compute class member damages. In response, Congress amended Section 16(b) in 1947 to establish more rigorous requirements for collective actions, including the opt-in requirement.¹⁵⁸

As FLSA collective action litigation bubbled over in the past decade, citations to *Mt. Clemens* followed. But the rule remained that the plaintiffs first had to establish the existence of classwide liability, and only then did *Mt. Clemens* permit a just and reasonable inference regarding damages.

That long-standing rule received a contemporary update in 2016 when the Supreme Court decided *Tyson Foods, Inc. v. Bouaphakeo*.¹⁵⁹ For the first time, the Court condoned relying on *Mt. Clemens*’ reasonable inference to use statistical sampling to establish liability as well as damages in an FLSA collective action.

In *Tyson Foods*, a group of workers brought a proposed Rule 23(b)(3) class action against their employer for unpaid overtime in violation of Iowa state wage-and-hour law as well as a putative collective action under the FLSA. The presence of the FLSA claim alongside the state law claim substantially influenced the Court’s legal reasoning regarding statistical proof of classwide liability. The workers claimed Tyson did not compensate them for the total time they spent “donning” and “doffing” protective and sanitary equipment at Tyson’s facility. The plaintiffs argued that Tyson violated the FLSA by not providing overtime pay to those employees whose donning and doffing time combined with their regular hours exceeded 40 hours in a given week.

157 328 U.S. 680 (1946).

158 See *Hoffman-LaRoche Inc.*, 493 U.S. 165, 173 (1989).

159 577 U.S. __ (2016).

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The key issue the Court addressed in *Tyson Foods* was whether the plaintiffs could use statistical evidence to prove that, inclusive of donning and doffing time, Tyson workers were working more than 40 hours per week without overtime pay. Tyson argued that the times spent donning and doffing varied significantly among the individual plaintiffs – even within departments, each worker wore different combinations of gear, requiring different amounts of time to don and doff. Because of that, it was not possible to establish classwide liability without representative sampling, which Tyson argued was not permitted under *Mt. Clemens*.

Drawing a rebuke from dissenting Justices Clarence Thomas and Samuel Alito, a 6-2 majority opinion written by Justice Anthony Kennedy held that there is no bar to relying on representative sampling to establish liability:

Whether a representative sample may be used to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action. In FLSA actions, inferring the hours an employee has worked from a study such as [the industrial relations expert's] has been permitted by the court so long as the study is otherwise admissible.¹⁶⁰

As a result, it may no longer be sufficient for FLSA defendants to argue categorically that the *Mt. Clemens* reasonable inference is inapplicable to liability. Rather, the lesson from *Tyson Foods* appears to be that class action battles in such cases will focus on the quality of the representative sample as it applies to the class, regardless of liability or damages.

¹⁶⁰ *Id.* (Citing *Mt. Clemens* at 687.)

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B. Antitrust

Written by Anthony B. Ponikvar

2016 proved to be another busy year in the antitrust field. This was in large part thanks to the efforts of both the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) that touch upon a wide variety of antitrust issues. This brief overview aims to provide a summary of the most relevant developments. First, federal agencies' aggressive approach to stopping potentially improper mergers is discussed. Second, this report looks at the agencies' investigations into non-price collusion, and in particular at investigations into marketing efforts. Finally, noteworthy criminal prosecutions for antitrust violations throughout the year are highlighted. Each section primarily looks at 2016 and the year that was; however, potential trends and issues for 2017 are also noted.

Mergers and Acquisitions

The Hart-Scott-Rodino Act's notification requirements

The Hart-Scott-Rodino Act (HSR) established the federal premerger notification program. HSR requires parties to certain proposed transactions to notify both the FTC and the DOJ. The parties may not close their deal until either (a) the waiting period has passed or (b) the government has granted early termination of the waiting period.¹⁶¹

2016 saw an increase in complaints filed by the FTC and the DOJ for failure to file HSR notifications in required transactions. Many of these complaints focused on improper use of the "investment-only" exemption. This exemption removes the notification requirements in transactions where (1) the acquirer holds less than 10 percent of the voting securities of a corporation; (2) the acquisition is solely for the purpose of investment; and (3) the investor has no intention of participating in the "formulation, determination, or direction of the basic business decisions of the issuer."¹⁶²

Perhaps the most notable complaint filed by the DOJ in this regard arose out of ValueAct Capital's acquisition of shares in both Baker Hughes and Halliburton.¹⁶³ ValueAct's actions subjected it to HSR notification requirements; however, ValueAct did not provide the required notification as it relied on the "investment-only" exemption.

The DOJ filed a complaint alleging that ValueAct did not qualify for the investment-only exemption because it used its access to senior executives at both Halliburton and Baker Hughes to formulate merger strategies.¹⁶⁴ In July 2016, ValueAct agreed to settle the claim for \$11 million, which represents the highest fine paid for an HSR violation.¹⁶⁵

¹⁶¹ *Premerger Notification Program*, FTC, <https://www.ftc.gov/enforcement/premerger-notification-program>.

¹⁶² Rule 801.1(i)(1).

¹⁶³ *Justice Department Sues ValueAct for Violating Premerger Notification Requirements*, DEPT. OF JUSTICE (April 4, 2016), <https://www.justice.gov/opa/pr/justice-department-sues-valueact-violating-premerger-notification-requirements>.

¹⁶⁴ *Id.* (noting how ValueAct allegedly "used its position to influence decision-making at both companies").

¹⁶⁵ *Justice Department Obtains Record Fine and Injunctive Relief against Activist Investor for Violating Premerger Notification Requirements*, DEPT. OF JUSTICE (July 12, 2016), <https://www.justice.gov/opa/pr/justice-department-obtains-record-fine-and-injunctive-relief-against-activist-investor>.

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The antitrust agencies are not afraid to use litigation to stop problematic mergers

During 2016, the DOJ appeared more willing to litigate over potential mergers and more skeptical about the promise of the competitive benefits of mergers. This skepticism showed in the agencies' unwillingness to take merging parties' word that (a) the efficiencies generated by the merger will offset competitive harms and (b) new firms entering the market, and current firms expanding, will replace any lost competition.

The agencies' skepticism toward these efficiency-based arguments is exemplified in the Staples-Office Depot litigation. The two office supplies retailers agreed to a deal where Staples would purchase Office Depot for more than \$6 billion.¹⁶⁶ The FTC challenged this transaction, citing a reduction of competition in the office supplies market.¹⁶⁷

In an attempt to defend their transaction, the merging companies claimed that the transaction would result in a more efficient entity as close to \$1 billion would be saved due to cutting duplicative expenditures.¹⁶⁸ The FTC was not persuaded, however, claiming that these savings could be achieved without the merger, were speculative in nature and were unlikely to be passed on to consumers.¹⁶⁹

Furthermore, the merging entities also attempted to argue that other sellers of office supplies, such as W.B. Mason and Amazon, could replace any competition lost as a result of the merger. This argument was also rejected by the FTC, and its decision highlights the agency's recent trend toward discounting such "entry and expansion" arguments.¹⁷⁰

Looking forward

Antitrust enforcement and investigations were a priority throughout the Obama administration. In 2016 alone, the DOJ and the FTC successfully challenged 32 mergers. However, we do not expect this trend to continue into 2017 under the Trump administration.¹⁷¹

While antitrust enforcement may not be as much of a priority, this does not mean that any proposed merger will be pushed through without scrutiny. Entities seeking mergers under the Trump administration should expect problematic deals to be carefully considered by the agencies. However, under the new administration, the agencies may be more open to remedies that solve competition problems, such as divestiture packages, than they have been during the past eight years.

166 *Staples, Inc., Announces Acquisition of Office Depot, Inc.*, OFFICE DEPOT, <http://news.officedepot.com/press-release/corporatefinancial-news/staples-inc-announces-acquisition-office-depot-inc>.

167 See *Staples/Office Depot, In the Matter of*, FTC, <https://www.ftc.gov/enforcement/cases-proceedings/151-0065/staplesoffice-depot-matter>.

168 See *Staples, Inc.*, *supra* note 6.

169 *FTC v. Staples, Inc.*, 1:15-cv-02115-EGS, Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction, *available at* <https://www.ftc.gov/system/files/documents/cases/160219staplespimemo.pdf>.

170 See also *United States v. AB Electrolux*, 1:15-cv-01039, United States' Pretrial Memorandum, *available at* <https://www.justice.gov/atr/file/801726/download> (DOJ rejected parties' arguments that expansion from other firms was likely to fix competitive concerns in successfully blocking AB Electrolux's bid to acquire GE's appliance business).

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Investigations arising from Companies' Marketing Efforts

While 2016 saw increased litigation to stop problematic mergers, it also saw an increase in investigations in non-merger settings. For example, both the FTC and the DOJ showed a willingness to investigate new types of collusion. Perhaps the most important demonstration in 2016 of that willingness came in the form of an expanded focus on marketing restrictions. These cases are significant because they show that the agencies are prepared to go beyond the price-fixing contexts and push the traditional enforcement boundaries in the name of consumer protection.

1-800 Contacts

In August 2016, the FTC filed suit against contact lens seller 1-800 Contacts. The suit alleged that the company had orchestrated a series of agreements between numerous vendors in which they all promised not to advertise on each other's search keywords.¹⁷² The complaint alleged that 1-800 Contacts entered into agreements with at least 14 competitors, which essentially eliminated competition in auctions to place advertisements on search engines such as Google.¹⁷³ The FTC averred that these bidding agreements unreasonably restrained price competition in keyword auctions and restricted truthful and non-misleading advertising to consumers.

This case is scheduled to be heard in early 2017 and is significant because it is one of the first to touch specifically on keyword advertising, an increasingly important means of advertising, as a venue for anticompetitive collusion.

The West Virginia consent decree

Affirming its position that marketing is an important tool that entities use to compete for customers, the DOJ also targeted non-price collusion in the healthcare sector.

In April, the DOJ entered into a consent decree with two West Virginia systems, Charleston Area Medical Center and St. Mary's.¹⁷⁴ The complaint was initially brought by the DOJ because the two hospital systems had allegedly entered into a "gentlemen's agreement" not to advertise in each other's geographic territories, in violation of the Sherman Act.¹⁷⁵ While the healthcare sector has been subject to much antitrust litigation in recent years, this case shows that the agencies will look at non-price collusion and are willing to litigate on those grounds.

Looking ahead

As stated above, with the changing of administrations it is unlikely that the FTC and the DOJ will devote as much time and resources to non-price collusion as they have in recent years. However, especially when it comes to marketing practices, all entities should be aware of the possibility of investigation for troublesome non-price collusion practices.

¹⁷² *FTC Sues 1-800 Contacts, Charging that It Harms Competition in Online Search Advertising Auctions and Restricts Truthful Advertising to Consumers*, FTC (Aug. 8, 2016), <https://www.ftc.gov/news-events/press-releases/2016/08/ftc-sues-1-800-contacts-charging-it-harms-competition-online>.

¹⁷³ To more clearly articulate what is going on here, some background information may be helpful. Companies can pay search engines to have their websites appear at the top of search results. This is commonly done through the use of keywords. So if a Google user searches "1-800 Contacts," for example, and 1-800 Contacts has included its name as a keyword, the 1-800 Contacts page may appear at the top of the search results. These keywords are sometimes given out via a bidding process. Therefore, a competitor of 1-800 Contacts could be the high bidder for the "1-800 Contacts" keyword. Under this scenario, if a Google user searches "1-800 Contacts," it will be the competitor's page, not 1-800 Contacts' page, that will appear at the top. The agreements allegedly orchestrated by 1-800 Contacts ensured that no competitors would bid up their competitors' keywords.

¹⁷⁴ *See U.S. v. Charleston Area Medical Center, Inc.*, Final Judgment No. 16-cv-03664 (S.D. W.Va. April 14, 2016), available at <https://www.justice.gov/atr/case-document/file/904506/download>.

¹⁷⁵ *Id.*, Complaint, available at <https://www.justice.gov/atr/file/841556/download>.

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One major case to be watched in 2017 is the ongoing investigation of airlines. In 2015, the DOJ launched an investigation into the advertising practices of multiple airlines, including Delta, American, United and others.¹⁷⁶ As of the writing of this report, the DOJ has not taken further action, and many are wondering how the Trump administration will proceed with this case.

Criminal Prosecutions of Corporations and Individuals

The DOJ did not hesitate to prosecute corporations or individuals from a wide range of industries in 2016. A sampling of some of the more notable enforcement actions is included below.

- In March, Omron Automotive agreed to pay more than \$4.5 million for conspiring to rig bids on power window switches.¹⁷⁷
- In June, Tokai Kogyo Co. and Maruyasu Industries Co. were indicted in the Southern District of Ohio for fixing prices on automotive sealing products and rigging bids on steel tubing.¹⁷⁸
- In June, the DOJ secured a \$5 million fine and a guilty plea from GEO Specialty Chemicals Inc. for conspiring to fix prices for water treatment chemicals.¹⁷⁹
- In July, the DOJ reached a plea deal with Wallenius Wilhelmsen Logistics, a Norwegian shipping company that included a criminal fine of \$98.9 million for its involvement in a conspiracy to fix international ocean shipping costs.¹⁸⁰

Prosecutions have not been limited to large corporations. Both smaller markets and individuals were also subject to DOJ prosecution extensively in 2016. In fact, more than 50 individuals were prosecuted in 2016. Some of the highlights are included below.

- In the “online wall décor” industry, Trod Ltd. pleaded guilty to conspiring to stabilize prices through the use of specific pricing algorithms.¹⁸¹
- The DOJ filed suit against Kemp & Associates Inc. and its co-owner and vice president alleging a conspiracy with a competitor to suppress and eliminate competition by agreeing to allocate customers of heir location services.¹⁸²
- More than 20 individuals were indicted as a result of an investigation into bid-rigging and fraud at public foreclosure auctions throughout Alabama, California and Georgia. Of these, 10 real estate agents received prison sentences of up to seven months and were ordered to pay upward of \$1 million in fines.¹⁸³

176 See Jack Nicas, Brent Kendall & Susan Carey, *Justice Department Probes Airlines for Collusion*, WSJ (July 1, 2015), <https://www.wsj.com/articles/justice-department-probes-airlines-for-collusion-1435775547>.

177 *Omron Automotive Electronics Co. Ltd. to Pay \$4.55 Million for Bid Rigging on Power Window Switches*, DEPT. OF JUSTICE (March 17, 2016), <https://www.justice.gov/opa/pr/omron-automotive-electronics-co-ltd-pay-455-million-bid-rigging-power-window-switches>.

178 *Two Japanese Auto Parts Companies, U.S. Subsidiaries, and Five Executives Indicted for Rigging Automotive Parts Bids*, DEPT. OF JUSTICE (June 15, 2016), <https://www.justice.gov/opa/pr/two-japanese-auto-parts-companies-us-subsidiaries-and-five-executives-indicted-rigging>. This and the action highlighted in note 17 show that the DOJ has continued to rigorously investigate the automotive parts industry. In 2016, the DOJ earned more than \$250 million in fines from this industry alone.

179 *Water Treatment Chemicals Manufacturer Pleads Guilty in Conspiracy Aimed at Eliminating Competition*, DEPT. OF JUSTICE (June 16, 2016), <https://www.justice.gov/opa/pr/water-treatment-chemicals-manufacturer-pleads-guilty-conspiracy-aimed-eliminating-competition>.

180 *WWL to Pay \$98.9 Million for Fixing Prices of Ocean Shipping Services for Cars and Trucks*, DEPT. OF JUSTICE (July 13, 2016), <https://www.justice.gov/opa/pr/wwl-pay-989-million-fixing-prices-ocean-shipping-services-cars-and-trucks>.

181 *U.S. v. Trod Limt.*, No. CR 15-0419 WHO, Plea Agreement (Aug. 11, 2016), available at <https://www.justice.gov/atr/file/887196/download>.

182 *Heir Location Services Company and Co-Owner Charged with Customer Allocation Scheme*, DEPT. OF JUSTICE (Aug. 17, 2016), <https://www.justice.gov/opa/pr/heir-location-services-company-and-co-owner-charged-customer-allocation-scheme>.

183 See, e.g., *Ten Eastern California Real Estate Investors Sentenced for Roles in Bid-Rigging and Mail-Fraud Conspiracies Involving Real Estate Purchased at Public Foreclosure Auctions*, DEPT. OF JUSTICE (Sept. 13, 2016), <https://www.justice.gov/opa/pr/ten-eastern-california-real-estate-investors-sentenced-roles-bid-rigging-and-mail-fraud>.

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While prosecution may not be as much of a priority under the Trump administration as it has been in recent years, we do not expect a major downturn in litigation. Corporations of all sizes without regard to the industry in which they work, as well as their officials and other implicated individuals, should be sure to stay up to date on all relevant rules and regulations and ensure compliance therewith to limit exposure to possible prosecution.

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C. Privacy

Edited by Zachariah J. DeMeola

Article III Standing Based on Increased Risk of Identity Theft in Data Breach Cases

Written by Zachariah J. DeMeola, edited by Paul G. Karlsgodt

The failure to allege any actual injury-in-fact in the form of a present or imminent financial or other cognizable loss has been the end of numerous data breach class actions for lack of standing under Federal Rule of Civil Procedure 12(b)(1), and consequently, this is typically the first line of defense for such cases. Many federal courts that dismissed data breach cases for lack of standing have applied *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), which held that standing could not be established if the speculative danger of possible future acts was not “certainly impending,” to conclude that a data breach alone does not constitute an injury and evidence regarding the potential future misuse of data is often too attenuated. However, recent decisions by the Sixth, Seventh and Ninth Circuit Courts of Appeals found that the likelihood of future identity theft can be enough to support standing, at least in some circumstances, even for plaintiffs who cannot allege that their identities have actually been misused.

For instance, in *Lewert v. P.F. Chang's China Bistro, Inc.*, involving allegations by two plaintiffs that nearly 7 million payment cards used to make purchases at 33 P.F. Chang's restaurants were compromised due to a breach, the Seventh Circuit held that the plaintiffs sufficiently alleged an injury-in-fact for Article III standing, even though one of the plaintiffs did not allege any attempt to make unauthorized charges on his account, while the other alleged that there were four attempts to make fraudulent charges on his account, which were declined by his bank, and he was promptly issued a new payment card.¹⁸⁴ Although both plaintiffs made purchases at the defendant's restaurants, neither plaintiff alleged that they dined at the 33 restaurants involved in the breach. The *Lewert* decision affirmed the Seventh Circuit's *Remijas v. Neiman Marcus Group, LLC*, decision, which also held that plaintiffs may have standing without alleging actual misuse of their stolen data.¹⁸⁵

¹⁸⁴ *Lewert v. P.F. Chang's China Bistro, Inc.*, 919 F.3d 963 (2016).

¹⁸⁵ See *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688 (7th Cir. 2015). In *Remijas*, hackers allegedly gained access to payment card data for 350,000 Neiman Marcus customers, 9,200 of whom experienced fraudulent charges on their payment cards (all were reimbursed). The Seventh Circuit reversed the district court's order dismissing the case for lack of standing, determining that the theft of data necessarily implied harm because the misuse of data was the only plausible explanation for the data breach. Moreover, the court used the fact that Neiman Marcus purchased credit monitoring or identity-theft protection services for affected customers to support this conclusion, noting that Neiman Marcus would not have done so if the risk could be disregarded. And so, *Remijas* concluded, the purchase of mitigation services for those who had not yet alleged unauthorized charges was not “speculative” but was sufficiently concrete to confer standing.

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These cases and their progeny employ a similar analysis to reach their conclusions.¹⁸⁶ To these courts, it was sufficient that the alleged theft had targeted specific information and had already occurred, which made it reasonable to expect plaintiffs would inevitably experience identity theft or fraudulent charges in the future without requiring them to allege that their identities had actually been misused.¹⁸⁷ Under this paradigm, time and money expended in efforts by the plaintiffs to mitigate their exposure or resolve fraudulent charges, such as freezing credit, monitoring credit reports or canceling debit cards, constituted injury-in-fact for purposes of Article III standing, regardless of whether the plaintiffs alleged actual misuse of their personal information or if any fraudulent charges on debit or credit cards had already been reimbursed.¹⁸⁸ And these courts also tend to use the notices by defendants of a data security incident, which typically include recommendations to ensure personal and financial security and offers of paid-for credit report monitoring, as implicit acknowledgments by defendants of the imminent risk of future harm.¹⁸⁹ Notably, the Seventh Circuit also determined that because P.F. Chang's sent its initial notice about its data breach to all customers who dined at its restaurants but later revised its analysis to conclude only 33 locations were affected, there was a factual dispute about the scope of the breach that did not affect standing for the plaintiffs in that case, even though neither had alleged that they dined at any of the 33 affected locations.

However, the circuits are not in agreement on this point. Most federal courts continue to construe *Clapper* as precluding standing in data breach cases for plaintiffs who assert arguments based on a theory of increased risk of identity theft. In 2016, federal district courts in the Fourth Circuit, Fifth Circuit, Eighth Circuit and Eleventh Circuit all reaffirmed the view that plaintiffs did not properly allege an injury-in-fact for Article III standing when they do not provide actual examples of the misuse of stolen data or a clear indication that the theft was intended for using the plaintiffs' stolen

186 With the *Remijas/Lewert* line of decisions, the Seventh joined the Ninth Circuit in providing a legal basis for plaintiffs to prevail in a standing challenge under a *Clapper* analysis through the theory of increased risk of identity theft. In *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), which involved the theft of a laptop from Starbucks containing the names, addresses, and Social Security numbers of roughly 97,000 Starbucks employees, the Ninth Circuit Court of Appeals found that the "possibility of future injury may be sufficient to confer standing" if the plaintiff is "immediately in danger of sustaining some direct injury as the result of the challenged conduct." A number of federal district courts in the Ninth Circuit have since relied on *Krottner* to find standing for plaintiffs they consider to be in immediate danger due to a data intrusion, even though the same plaintiffs fail to allege any actual identity theft. One such case, decided after *Clapper*, is *In re Adobe Systems Inc. Privacy Litigation*, 66 F. Supp. 3d 1197 (N.D. Cal. 2014), in which hackers infiltrated Adobe's networks in 2013, stealing the personal information of 38 million customers. Plaintiffs filed suit in the Northern District of California but did not allege that their information had actually been misused. Rather, they argued that they had standing based solely on the increased risk of future harm resulting from the breach. Judge Koh agreed with plaintiffs, finding that the risk that the hackers might misuse the data stolen from Adobe's systems is "immediate and very real" because the hackers had spent weeks inside Adobe's networks and deliberately collected consumers' information.

187 The Seventh Circuit has proclaimed, "Why else would hackers break into a store's database and steal consumers' private information? Presumably the purpose of the hack is, sooner or later, to make a fraudulent charge or assume those consumers' identities." *Remijas*, 794 F.3d at 693.

188 In *Lewert*, the Seventh Circuit stated that "[e]ven if those fraudulent charges did not result in injury to [the plaintiff's] wallet (he stated that his bank stopped the charges before they went through), he has spent time and effort resolving them." *Lewert*, 919 F.3d at 967.

189 See *Remijas*, 794 F.3d at 694 ("It is telling [] that Neiman Marcus offered one year of credit monitoring and identity-theft protection to all customers for whom it had contact information and who had shopped at their stores. . . . It is unlikely that it did so because the risk is so ephemeral that it can safely be disregarded."); *Lewert*, 919 F.3d at 967 ("P.F. Chang's itself implicitly acknowledged [the risk of future identity theft] in its August press release" where "P.F. Chang's encouraged consumers to monitor their credit reports.").

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data.¹⁹⁰ These courts take a more exacting view of the facts plaintiffs must allege to establish standing, and they also examine the type of data stolen and the number of people alleging attempted fraud to determine whether allegations of attempted fraud were “fairly traceable” to the data security incident and not some other, separate identity theft.

Indeed, factual differences between the cases on both sides of the split illustrate the fact-specific nature of the imminence inquiry. While the existence of an alleged data breach combined with an offer by defendants to pay for some form of credit monitoring or identity-theft prevention may be sufficient in the Sixth, Seventh or Ninth Circuits, other courts require much more from plaintiffs to establish that the danger of possible future acts is certainly impending. For instance, most courts require plaintiffs to allege some type of misuse or fraudulent use of their information before considering whether plaintiffs may have Article III standing. In some instances, such an allegation is only one of many factors to consider and may not be dispositive on its own. In these cases, even if a plaintiff alleges fraudulent charges, if those charges are reimbursed, the plaintiff has no out-of-pocket expenses and therefore no injury for standing purposes. These courts often look for allegations of deliberate, targeted theft of data and are less likely to side with plaintiffs when the details of the breach were uncertain or it was unclear whether the hacker or thief was even able to access the stolen data. Many of these courts also often scrutinize the type of data at issue, finding that when hackers allegedly acquire only names, addresses or birth dates without more sensitive information, such as Social Security numbers, plaintiffs fail to meet *Clapper*’s requirements for standing.

The Effects of Spokeo in Standing for Data Breach Cases

Written by David M. McMillan, edited by Zachariah J. DeMeola

Another aspect of standing featured in many data breach cases is whether a bare procedural statutory violation – absent allegations of concrete injury – is sufficient to establish the requisite injury-in-fact for Article III standing, an issue that the Supreme Court answered in the negative when it decided *Spokeo v. Robins* in May 2016.¹⁹¹ Decisions in the lower federal courts interpreting *Spokeo* have been mixed, and the outcome in most cases has been dependent on an analysis of the specific harms Congress or a state legislature intended to protect against in passing the statute at issue and on whether it intended to create a remedy for those harms.

¹⁹⁰ See, e.g., *Torres v. Wendy’s Co.*, ---F. Supp. 3d ---, 2016 WL 7104257, at *4-*5 (M.D. Fla. July 15, 2016) (distinguishing *Remijas* and finding no standing despite the fact that plaintiff alleged two fraudulent charges to a debit card that were reimbursed by his credit union because such allegations could not establish out-of-pocket monetary damages); *Attias v. CareFirst, Inc.*, ---F. Supp. 3d ---, 2016 WL 4250232, at *3-*4 (D.D.C. Aug. 10, 2016) (distinguishing *Remijas* and finding that plaintiffs’ “theory of injury is still too speculative to satisfy *Clapper*,” even though some plaintiffs alleged tax-refund fraud, because the alleged injury was not “fairly traceable to the challenged action”); *In re Supervalu, Inc.*, No. 14-MD-2586, 2016 WL 1588105, at *2 (D. Minn. Apr. 20, 2016) (stating that the “Court is unpersuaded by the rationale” used in *Remijas* and its progeny “to change its conclusion that plaintiffs failed to meet the burden of establishing an injury in fact for purposes of Article III standing”). These courts join the First and Third Circuits in rejecting such allegations. See *Katz v. Pershing, LLC*, 672 F.3d 64, 80 (1st Cir. 2012) and *Reilly v. Ceridian Corp.*, 664 F.3d 38, 40, 44 (3d Cir. 2011). Moreover, in 2017 the Fourth Circuit joined in this reaffirmation in *Beck v. McDonald*, No. 15-1395, No. 15-1715, 2017 WL 477781, at * (Feb. 6, 2017), holding that the increased risk of future identity theft and the costs of protecting against the same did not confer Article III standing to plaintiffs.

¹⁹¹ *Spokeo v. Robins*, No. 13-1339, 2016 WL 28442447 (May 16, 2016).

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In some cases, courts have found that pure procedural violations, such as a failure to give statutorily required notice, are still concrete enough to satisfy *Spokeo*.¹⁹² For example, in *Fraser v. Wal-Mart Stores, Inc.*, a California federal judge held that plaintiffs had standing to pursue claims under the Song-Beverly Credit Card Act of 1971 against Wal-Mart stemming from the store's unauthorized collection of shoppers' ZIP codes. Seizing on *Spokeo*'s language that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact[,]" the court found that the mere *risk* of exposure to unwanted marketing and fear of unwanted identity theft were sufficiently concrete injury.¹⁹³ In other cases, the lower courts have found that *Spokeo* bars standing to pursue statutory damages for alleged procedural violations of statute.¹⁹⁴ In *Hancock et al. v. Urban Outfitters Inc. et al.*,¹⁹⁵ the D.C. Circuit dismissed a suit against Urban Outfitters and Anthropologie alleging violations of two District of Columbia consumer protection statutes, stemming from the stores' requests for consumers' ZIP codes. In a decision that appears to contradict *Fraser v. Wal-Mart Stores, Inc.*, the court sided with the defendants in holding that under *Spokeo*, plaintiffs lacked standing because they failed to allege that the stores' requests for ZIP codes caused them actual, concrete harm.

The *Spokeo* fallout has also spilled over into the data privacy arena, with both plaintiffs and defendants seizing on the decision to bolster their positions. Some courts have relied on *Spokeo* in the data breach context as an additional authority to reject allegations by plaintiffs that are too hypothetical to sufficiently state concrete injury. For example, in *Attias v. CareFirst, Inc.*, after finding that the plaintiffs' alleged harms were too speculative to confer standing under *Clapper*, the court cited *Spokeo* to hold that a violation of the D.C. Consumer Protection Procedures Act does not confer standing on its own without a concrete injury.¹⁹⁶ On the other hand, plaintiffs in *Storm v. Paytime*, a putative class action stemming from a data breach at Paytime Inc. that compromised the personal information of workers whose employers contracted with the payroll firm, asked the Third Circuit in June 2016 to reverse a lower court's dismissal of their claim on standing grounds. The court had found that plaintiffs lacked standing because they failed to allege that the data breach led to any misuse of their personal data. But plaintiffs appealed to the Third Circuit seeking reversal, arguing that after *Spokeo*, it is sufficient that their data was stolen and that they face an imminent risk of harm in the form of identity theft.¹⁹⁷ A decision from the Third Circuit is pending.

Although its ultimate impact as a defense in data privacy class actions is likely to be case-dependent, *Spokeo* has the potential to offer defendants an argument in support of dismissal early in the case through attacks on plaintiffs' injury allegations when plaintiffs seek statutory rather than actual damages, but future decisions will better define its application in the data breach context.

192 See, e.g., *Booth v. Appstack, Inc.*, No. C13-1533JLR, 2016 WL 3030256, at *1 (W.D. Wash. May 25, 2016) (finding Article III standing; time wasted answering or addressing robocalls was sufficiently concrete injury under the Telephone Consumer Protection Act); *Stokes v. Realpage, Inc.*, No. CV 15-1520, 2016 WL 6095810, at *7 (E.D. Pa. Oct. 19, 2016) (holding that the dissemination of inaccurate information about a consumer, together with a failure to disclose the source of that information to the consumer, was sufficiently concrete injury under the Fair Credit Reporting Act).

193 *Fraser v. Wal-Mart Stores, Inc.*, No. 2:13-CV-00520-TLN-DB, 2016 WL 6094512, at *3 (E.D. Cal. Oct. 18, 2016).

194 See, e.g., *Sartin v. EKf Diagnostics, Inc.*, No. CV 16-1816, 2016 WL 3598297, at *1 (E.D. La. July 5, 2016) (dismissing action where allegations showed only a bare violation of the Telephone Consumer Protection Act with no allegations of concrete harm); *Caudill v. Wells Fargo Home Mortg., Inc.*, No. CV 5: 16-066-DCR, 2016 WL 3820195, at *1 (E.D. Ky. July 11, 2016) (finding allegations of purely procedural violations insufficient, but permitting plaintiff to cure the deficiency by amending the complaint).

195 *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511 (D.C. Cir. 2016).

196 *Attias v. CareFirst, Inc.*, No. 15-CV-00882 (CRC), 2016 WL 4250232, at *5 (D.D.C. Aug. 10, 2016).

197 *Storm et al. v. Paytime Inc.*, 15-3690 (3d. Cir. 2015).

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Strategic Issues Regarding Standing and Jurisdiction

Written by Samantha J. Tillotson, edited by Paul G. Karlsgodt

Whatever the jurisdiction, a challenge by defendants based on standing is not the only line of defense. Defendants may still prevail on a failure to state a claim argument even if standing is not in their favor. And there are certain circumstances when a challenge based on standing may not be strategically beneficial.

In cases that were originally removed to federal court under the Class Action Fairness Act (CAFA), federal courts are increasingly taking the view that a plaintiff's failure to allege injury sufficient to satisfy Article III standing means that the case should be remanded to state court rather than dismissed.¹⁹⁸ Thus, while a win on a Rule 12(b)(1) motion to dismiss for lack of Article III standing is certainly a procedural victory for data incident defendants, such a victory may also have a pyrrhic quality that allows plaintiffs to make an end-run around CAFA protections if a defendant isn't also using its standing victory to achieve a dismissal on the merits. Because Article III standing is a jurisdictional issue, it is sometimes impossible to avoid this problem, but there are various factors to consider in developing an early motion strategy. First, a challenge by defendants based on standing is not the only line of defense in attacking data breach allegations where the plaintiffs do not claim any present injury, so a defendant may decide to avoid making a standing challenge and instead attack merits, or make both arguments in the same motion. Most common law causes of action, as well as most states' consumer protection statutes, require proof of injury as an element of the cause of action itself. Second, even though the trial court may not reach the merits arguments and dismiss solely on standing, making both arguments in the same initial motion may bolster a defendant's position should the case go to appellate court, and the merits arguments may in fact be necessary to preserve issues on appeal. Finally, even the force of a dismissal on standing grounds is often useful if the case is remanded to state court, because the state court judge, in ruling on the merits, will often find persuasive a federal court's previous finding that the plaintiffs had not alleged an Article III injury. There is no magic formula for how to decide which standing and merits arguments to raise in all cases, but defendants should weigh the advantages and potential disadvantages that may come from filing a standing challenge and plan accordingly.

Common Legal Issues: Creative Allegations Diminished Value of Personal Information and Invasion of Privacy

Written by Douglas L. Shively, edited by Zachariah J. DeMeola

Plaintiffs often argue that data breaches cause injury by depriving them of the value of their confidential information. Under this theory, a plaintiff's confidential information has monetary value, as evidenced by criminals' willingness to pay for the information on the black market. Plaintiffs argue that the unauthorized disclosure of their information effectively robs them of this monetary value.

¹⁹⁸ See, e.g., *Patton v. Experian Data Corp.*, No. SACV 15-1871, 2016 WL 2626801, at * 6 (C.D. Cal. May 6, 2016) and *Bradix v. Advance Stores Co., Inc.*, No. 16-4902, 2016 WL 3617717, at * 5 (E.D. La. July 6, 2016).

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This theory has not fared well in the courts. Most courts have concluded that allegations of diminished value of confidential information do not establish an injury sufficient to establish Article III standing.¹⁹⁹ These courts often find it determinative that plaintiffs do not allege that they intended to capitalize on the alleged value of the confidential information or that the data breach prevented them from doing so.²⁰⁰ Absent such allegations, courts have generally found it implausible that plaintiffs could be deprived of the value of their confidential information by the occurrence of a data breach.²⁰¹

Plaintiffs also often argue that data breaches cause them to suffer an invasion of privacy. These plaintiffs typically argue that they have a privacy interest in their confidential information and that they are therefore injured by its unauthorized disclosure.

This theory has also been rejected by most courts. The courts that have considered this theory have generally held that absent other allegations of injury, an alleged loss of privacy is “too abstract” to constitute a concrete harm.²⁰² In addition, most common law or statutory rights to privacy also require some intentional, affirmative disclosure of information on the part of the defendant, which plaintiffs are rarely able to allege in cases involving a data security incident.²⁰³

Unjust Enrichment and Contract Claims in Data Breach Cases

Written by James R. Morrison, edited by Zachariah J. DeMeola

In 2012, the Eleventh Circuit, applying Florida law, approved a novel unjust enrichment theory of recovery in data breach cases in *Resnick v. AvMed, Inc.*²⁰⁴ There, the defendant, AvMed, was a Florida corporation that delivers health care services through health plans and government-sponsored managed-care plans.²⁰⁵ In 2009, two laptop computers were stolen from AvMed’s corporate office.²⁰⁶ These laptops contained AvMed’s customers’ sensitive information, which included protected health information, Social Security numbers, names, addresses and phone numbers.²⁰⁷ AvMed did not take care to secure these laptops, so when they were stolen, the information was readily accessible.²⁰⁸ The plaintiffs in *Resnick* were AvMed health care plan members who suffered identity theft after the laptops were stolen.²⁰⁹

199 See, e.g., *Duqum v. Scottrade, Inc.*, No. 4:15-CV-1537-SPM, 2016 WL 3683001, at *7 (E.D. Mo. July 12, 2016) (collecting cases); *Khan v. Children’s Nat’l Health Sys.*, --- F. Supp. 3d ---, No. TDC-15-2125, 2016 WL 2946165, at *6 (D. Md. May 19, 2016); *In re SuperValu, Inc.*, No. 14-MD-2586 ADM/TNL, 2016 WL 81792, at *7 (D. Minn. Jan. 7, 2016) (collecting cases).

200 *Id.*

201 *Id.*

202 See, e.g., *Duqum v. Scottrade, Inc.*, No. 4:15-CV-1537-SPM, 2016 WL 3683001, at *8 (E.D. Mo. July 12, 2016) (collecting cases); *Khan v. Children’s Nat’l Health Sys.*, --- F. Supp. 3d ---, No. TDC-15-2125, 2016 WL 2946165, at *6 (D. Md. May 19, 2016); *In re Zappos.com, Inc.*, 108 F. Supp. 3d 949, 962 n.5 (D. Nev. 2015); *In re SuperValu, Inc.*, No. 14-MD-2586 ADM/TNL, 2016 WL 81792, at *8 (D. Minn. Jan. 7, 2016).

203 See, e.g., *Purrelli v. State Farm Fire & Cas. Co.*, 698 So. 2d 618, 620 (Fla. Dist. Ct. App. 1997) (“[I]nvasion of privacy can only be actionable if done intentionally.”); see also *Burton v. MAPCO Exp., Inc.*, 47 F. Supp. 3d 1279, 1288 (N.D. Ala. 2014) (“Even if the defendants were negligent, as alleged, in safeguarding Mr. Burton’s account information, such negligence does not morph into an intentional act of divulging his confidential information.”).

204 693 F.3d 1317, 1328 (2012).

205 *Id.* at 1322.

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

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The plaintiffs alleged unjust enrichment, claiming that they conferred a monetary benefit on AvMed in the form of monthly premiums, AvMed appreciated or had knowledge of such benefit, AvMed used the premiums to pay for the administrative costs of data management and security, and AvMed should not be permitted to retain the money belonging to the plaintiffs because AvMed failed to implement the data management and security measures that are mandated by industry standards.²¹⁰

Since *Resnick*, plaintiffs in data breach cases are increasingly alleging unjust enrichment. The general premise of this theory is that plaintiffs have overpaid for whatever it is they are purchasing because a portion of what they pay should go to data security measures. Plaintiffs also have contended that if they had been aware of a breach, they would not have given business to the company with lax data security measures.

Although unjust enrichment has become a staple for some plaintiffs' attorneys in data breach cases, not all courts have been receptive to the theory.²¹¹ Courts have rejected these claims at the motion-to-dismiss level because often the plaintiffs fail to allege any facts to establish what portions of their alleged payments were allocated for data security or exceeded the value of the costs of services they received.²¹² In addition, some courts have also rejected unjust enrichment claims in data breach cases involving payment card information on the basis that a defendant charged the same prices to purchasers paying with or without a card, making it implausible that the defendant was unjustly enriched by payments from cardholders who were impacted by the breach.²¹³

In addition, plaintiffs in these cases increasingly allege some form of breach of contract. Unless there is actually an express contract plaintiffs can point to, many have attempted to repurpose privacy notices into a contract. However, courts have found that notices and policy statements are insufficient to create a binding contract because they lack the basic elements of a contract, including an offer, acceptance, consideration and sufficient specification of the essential terms.²¹⁴ Courts have also found that a promise to pay for something that a party is already under a legal duty to do, such as provide security for individuals' PII/PHI under HIPAA, is not a binding contract because it lacks consideration.²¹⁵

²¹⁰ *Id.* at 1328.

²¹¹ See, e.g., *In re Science Apps. Int'l Corp. (SAIC) Backup Tape Data Theft Litig.*, 45 F. Supp. 3d 14, 30 (D.D.C. 2014) ("To the extent that Plaintiffs claim that some indeterminate part of their premiums went toward paying for security measures, such a claim is too flimsy to support standing."); *Silva v. Act, Inc.*, 807 F.3d 169, 174-75 (7th Cir. 2015) (rejecting standing based on claimed overpayment where plaintiffs did not adequately plead "they lost anything of value as a result of the alleged misconduct."). Other courts, however, have recently accepted the unjust enrichment theory in data breach cases. See, e.g., *In re Target Corp. Data Sec. Breach Litig.*, 66 F. Supp. 3d 1154, 1178 (D. Minn. 2014) (rejecting unjust enrichment on theory of overpayment but accepting unjust enrichment on theory that plaintiffs may not have shopped at Target had they known about its data breach); *Weinberg v. Adv. Data Processing, Inc.*, No. 15-cv-61598, 2015 WL 8098555, at *6 (S.D. Fla. Nov. 17, 2015).

²¹² *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 912 (8th Cir. 2016).

²¹³ *Community Bank of Trenton v. Schnuck Markets, Inc.*, No. 15-CV-01125-MJR, 2016 WL 5409014 (S.D. Ill. Sept. 28, 2016).

²¹⁴ See, e.g., *Frezza v. Google, Inc.*, No. 12-CV-00237-RMW, 2012 WL 5877587, at *4 (N.D. Cal. Nov. 20, 2012) (rejecting implied contract claim where plaintiffs did not "sufficiently plead that Google agreed to and then breached a specific obligation" to comply with data security standards).

²¹⁵ See, e.g., *In re Maple*, 434 B.R. at 371 (holding that HIPAA privacy policy did not constitute a "legally enforceable agreement between the parties upon which Plaintiffs purport to rely"); *Sleit v. Ricoh Corp.*, No. 807-CV-724T-23TBM, 2007 WL 2565967, at *1 (M.D. Fla. Aug. 31, 2007) (a policy statement is a unilateral promise that does not create a contract).

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Preemptive Data Security Vulnerability Cases

Written by Doug Shively

Recently, a number of plaintiffs have filed lawsuits alleging they have discovered vulnerabilities in defendants' data security.²¹⁶ In these cases, plaintiffs typically claim that while no data breach has yet occurred, the alleged vulnerability puts their confidential information at risk of unauthorized disclosure. The plaintiffs often seek immediate injunctive relief requiring the defendant to remediate the alleged vulnerability, as well as monetary damages on the theory that plaintiffs have not received the benefit of an alleged bargain for industry-standard data security.²¹⁷

These cases – including one currently defended by BakerHostetler – are typically filed under seal to avoid disclosing alleged existing security vulnerabilities. Although it appears that only one such case has yet been unsealed,²¹⁸ it is likely that more will be unsealed in coming months.

Because the majority of these cases remain sealed, it is difficult to determine how (or whether) courts have ruled on the merits of the plaintiffs' claims. However, in light of developments in data security and privacy law generally, it appears that these plaintiffs will have difficulty establishing that they have suffered an actual injury sufficient to support Article III standing (for cases brought in federal court) or their claims on the merits, at least in the absence of allegations that plaintiffs specifically bargained and paid for data security.

California's Confidentiality of Medical Information Act

Written by Matthew D. Pearson, edited by Zachariah J. DeMeola

California's Confidentiality of Medical Information Act (CMIA) has become one of the most litigated statutes in the state, and it is increasingly being alleged in class action cases in federal courts across the country.²¹⁹

This explosion in litigation is a result, at least in part, of the CMIA's relatively easy-to-meet statutory standard of proof. To establish a cause of action for a CMIA violation, a plaintiff must show that the defendant negligently created, maintained, preserved, stored, abandoned, destroyed or disposed of the plaintiff's medical information.²²⁰ Moreover, while the plaintiff can offer evidence of and collect his or her actual damages, he or she is not required to. Under the CMIA, a provider who "negligently release[s] confidential information or records" concerning a patient is liable for \$1,000 in nominal damages.²²¹

216 *See, e.g.*, <https://bol.bna.com/class-action-suit-targeting-law-firm-privacy-protections-could-be-sealed/> (last visited January 10, 2017).

217 *See, e.g.*, *Shore et al v. Johnson & Bell, Ltd*, Case No. 1:16-cv-04363 (N.D. Ill.).

218 *See Id.* In *Shore*, the court granted the plaintiff's motion to unseal the docket after the defendant remediated the alleged the vulnerabilities.

219 Confidentiality of Medical Information Act, Cal. Civ. Code § 56 *et seq.*; *See In re: 21st Century Oncology*, Docket No. 8:16-md-02737 (M.D. Fla. 2016); *Premiera Blue Cross Customer Data Security Breach Litig.*, Docket No. 3:15-md-02633 (D. Or. 2015); *Escalera v. Sharp Healthcare, et al.*, Case No. 37-2016-00017392-CU-PO-CTL (Cal. Sup. Ct. 2016); *Delkener v. Cottage Health System, et al.*, Case No. 30-2016-00847934-CU-NP-CXC (Cal. Sup. Ct. 2016); *Doe v. Southerland Healthcare Solutions, Inc., et al.* (*Southerland*), Case No. BC539436 (Sup. Ct. Cal. 2014).

220 Cal. Civ. Code, § 56.101(a).

221 *Id.* at § 56.36(b).

III. Developments by Subject Matter

Despite the relatively lax standard of proof imposed by the CMIA, courts have, over time, increased the plaintiff's burden by, among other things, requiring the plaintiff to (1) establish that the records released constituted "medical information" and (2) prove that an unauthorized person actually viewed the plaintiff's medical records.

"Medical Information" Redefined

In *Eisenhower Medical Center v. Superior Court*, the California Court of Appeal refined the definition of "medical information" as used in the CMIA.²²² To constitute medical information, the court held, the records released must include both "individually-identifiable information" and "a patient's medical history, mental or physical condition, or treatment."²²³ Therefore, "the mere fact that a person may have been a patient at the hospital is not sufficient" for a CMIA claim.²²⁴

Similarly, in *Garrett v. Young*, the California Court of Appeal imposed an additional requirement on plaintiffs alleging a CMIA violation.²²⁵ Under *Garrett*, not only must the plaintiff demonstrate that the records released constituted medical information but also that the medical information was confidential.²²⁶

Actual Viewing Required

In *Sutter Health v. Superior Court*²²⁷ and in *The Regents of the University of Southern California v. Superior Court*,²²⁸ the California Court of Appeal made clear that a "release" of medical information was, in and of itself, insufficient to establish a CMIA claim. The plaintiff must plead and prove that the medical information "ha[s] been exposed to the view of an unauthorized person."²²⁹

These holdings have opened the door for defense counsel to attack CMIA allegations both during and after the pleading phase. This year alone, BakerHostetler has filed or joined in two demurrers – California's version of a motion to dismiss – arguing that the plaintiffs had failed to plead sufficient facts to demonstrate (1) that the records released were indeed medical information and contained confidential information and/or (2) that the records were actually viewed by an unauthorized person.²³⁰

Attacking CMIA claims at the pleading stage accomplishes two goals. First, it provides the client with the opportunity to defeat the claim early in the litigation, thereby avoiding the costs associated with protracted litigation.²³¹ Second, it educates the court on the specific issues to be litigated (*i.e.*, lack of actual viewing). Indeed, BakerHostetler has used this tactic in *Southerland*, bringing a motion for summary judgment after having briefed the issues in its demurrer.

222 See 226 Cal. App. 4th 430, 435 (2014).

223 See *Id.*

224 *Id.*

225 109 Cal. App. 4th 1393 (Cal. Sup. Ct. 2003).

226 *Id.* at 1408 ("The fact that the patient has openly discussed information about his or her medical condition with third parties is appropriately seen as a waiver of rights in a lawsuit against a medical provider for violation of the CMIA.")

227 227 Cal. App. 4th 1546 (Cal. Sup. Ct. 2014), review denied (Oct. 15, 2014).

228 220 Cal. App. 4th 549 (Cal. Sup. Ct. 2013), as modified on denial of reh'g (Nov. 13, 2013).

229 *Sutter Health*, 227 Cal. App. 4th at 1558.

230 *Delkener*, Case No. 30-2016-00847934-CU-NP-CXC; *Southerland*, Case No. BC539436.

231 *Regents*, 220 Cal. App. 4th at 570, fn. 15 (holding that court must sustain a demurrer without leave to amend where plaintiff has not shown that there is a reasonable possibility that plaintiff can amend the complaint to allege breach of confidentiality).

III. Developments by Subject Matter

Looking Forward

The final obstacle to surmount in defending CMIA claims is demonstrating to courts that the CMIA was never intended to give rise to class action lawsuits. Under the CMIA, “any *individual* may bring an action against any person or entity who has negligently released confidential information *concerning him or her* in violation of this part . . .”²³² This language, which under well-established California law is not surplusage and cannot be ignored, makes clear that lawsuits alleging CMIA violations are inherently individual and not suited for class treatment.²³³

The CMIA’s legislative history supports this interpretation. The legislative history of the bill establishes that the Legislature understood that this language would give rise to, and to only, individual actions due to a negligent release of medical information concerning the individual.²³⁴ While convincing courts to deviate from a long history of allowing CMIA class actions is an uphill battle, doing so would likely result in a complete elimination of CMIA claims. Plaintiffs’ counsel would no longer have a financial incentive to bring CMIA claims.

Maximizing Privilege and Work Product Protections in Post-Breach Investigations

Written by Xakema L. Henderson

The recent decision in *In re Target Corp. Customer Data Security Breach Litigation*²³⁵ has led privacy litigation leaders such as BakerHostetler to focus on best practices clients can adopt to protect certain communications with vendors and the work product they generate during post-breach investigations.

In *Target*, the District Court of Minnesota partially granted the plaintiffs’ motion to compel allegedly privileged and work-product documents from Target and the internal and external groups that investigated its security breach.²³⁶ Specifically, Target’s in-house counsel retained outside counsel and hired a third-party vendor, Verizon, to investigate the breach shortly after it occurred.²³⁷ Target divided its own personnel and Verizon into two-team tracks to investigate the suspected breach.²³⁸

Track one, a team of Target employees, conducted an internal ordinary-course investigation, while a Verizon team conducted a nonprivileged investigation on behalf of the credit card companies.²³⁹ On track two, another team of Target employees formed the “Data Breach Task Force” (Task Force), and a second Verizon team conducted a privileged investigation to educate in-house and outside counsel about the breach to assist them with providing legal advice to Target and preparing a defense for Target in the resulting litigation.²⁴⁰

232 Cal. Civ. Code § 56.36(b) (emphasis added).

233 Cal. Code of Civ. Pro. § 1858 (in construing a statute, the judge must “ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted”)

234 Dept. of Finance Bill Summary (“This bill would make health care service plans, contractors of such plans, and contractors of health care providers subject to the Confidentiality of Medical Information Act and allow individual legal actions and establish specified penalties for violations and prohibitions.”); Dept. of Finance Bill Analysis: (“[Amendment will] [a]llow individuals to take legal action for \$1,000. . . .”); Assembly Republican Bill Analysis: (“[T]his bill was amended to allow an individual to bring an action”).

235 No. 14-2522 (D. Minn. Oct. 23, 2015).

236 *Id.* at 4.

237 *Id.* at 1.

238 *Id.* at 3.

239 *Id.*

240 *Id.*

III. Developments by Subject Matter

- During discovery, Target asserted attorney-client privilege and work product claims for the communications and documents generated only by the two teams on track two,²⁴¹ and the plaintiffs moved to compel this information. The court partially granted the motion, holding:
- redacted emails from Target's CEO to the board of directors were neither privileged nor work product protected because they "merely update[d]" the board on Target's business-related interests concerning the breach;
- emails from the Task Force to counsel were privileged and work product because they "inform[ed] Target's in-house and outside counsel about the breach so that Target's attorneys could provide the company legal advice and prepare to defend the company in litigation that was already pending and reasonably expected to follow," *Id.* at 6, and the work product doctrine applied to the Task Force's work product presumably cited or attached therein, *Id.*; and
- emails from Target's in-house counsel to Target employees were privileged, and the employees' work product presumably cited or attached therein were protected because they were "made for the purpose of obtaining legal advice and made in anticipation of litigation."²⁴²

As *Target* shows, the most prudent first step is to engage outside counsel, which, in turn, will hire any third-party vendors. This arrangement establishes the vendors as outside counsel's agents for the purposes of attorney-client privilege and helps limit the discovery into the vendors' investigations.²⁴³ Generally, if one of the "primary purposes" of the communication between outside counsel and the vendor is to assist counsel in providing legal advice, then attorney-client privilege attaches to the communication.²⁴⁴ (This remains true regardless of whether the vendor conducts the investigation before or after the suspected breach and whether the attorneys are in-house or outside counsel.²⁴⁵)

Second, every effort should be made to implement and enforce procedures for distinguishing between tasks, activities and communications that are routine after a security incident and those generated to assist counsel in providing legal advice – implementing multitrack investigation teams is one way to accomplish this goal.

Maximizing work product protections requires similar efforts. First, a vendor's mere collection of evidence "without any creative or analytic input by an attorney or his agent, does not qualify as work product."²⁴⁶ Similarly, a vendor cannot be retained to conduct an investigation for merely any purpose but must do so with the express intent of assisting counsel in preparing defenses and protecting the client's interests in anticipated litigation.

Just as with their communications, vendors must distinguish between routinely created documents and those generated in anticipation of litigation. Again, multitrack investigation teams make implementing this distinction more feasible.

²⁴¹ *Id.* at 1.

²⁴² *Id.* at 5-7.

²⁴³ See, e.g., *Andritz Sprout-Bauer, Inc. v. Beazer E., Inc.*, 174 F.R.D. 609, 632 (M.D. Pa. 1997) ("The privilege attaches to agents and representatives of counsel whose services are necessary for effective representation of the client's interests.")

²⁴⁴ See, e.g., *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014) *cert. denied sub nom. U.S. ex rel. Barko v. Kellogg Brown & Root, Inc.*, 135 S. Ct. 1163 (2015).

²⁴⁵ See *Kellogg*, 756 F.3d at 760.

²⁴⁶ *Riddell Sports Inc. v. Brooks*, 158 F.R.D. 555, 559 (S.D.N.Y. 1994).

III. Developments by Subject Matter

While these issues with attorney-client privilege and work product protections concerning third-party vendors did not arise in any notable cases in 2016, these issues continue to arise in the context of general investigation procedures.²⁴⁷ Still, with the upward trend in privacy class actions, every data breach incidence response plan must include an action item to prepare processes and procedures to maximize protections for privilege and work product with any third-party vendors hired to investigate the breach.

2016 Data Breach Class Certification Motions

Written by Josephine Tung, edited by Zachariah J. DeMeola

Last year continued the trend of consumer data breach class action defendants settling or achieving dismissal before the class certification stage. To date, no consumer data breach class action has ever achieved class certification. In 2016, only two motions for class certification in consumer data breach class actions were decided. Both motions for class certification were denied. Although both opinions were unreported and sparse in their reasoning, both opinions suggest that class certification remains a challenge for class action plaintiffs in the data breach sector.

The first case, *Baum v. Keystone Mercy Health Plan*, concerned two insurers' loss of a flash drive containing personal data from 285,691 subscribers.²⁴⁸ The named plaintiff brought suit on behalf of his minor daughter and a putative class of 285,690 other subscribers. The plaintiff argued that KeyStone Mercy Health Plan and Amerihealth Mercy Health Plan violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law (UTPCPL) by promising to safeguard subscribers' personal information and subsequently losing an unencrypted flash drive containing member identification numbers, clinical health screening information, names, addresses and, in 808 cases, partial or complete Social Security numbers. The trial court denied the motion for class certification, and the appellate court affirmed.

Both the trial court and the appellate court in *Baum* turned in part on the fact that neither the named plaintiff's daughter's name nor her Social Security number nor her address was exposed. Without an injury, the named plaintiff could not represent any class of persons who *did* lose personal identifying data – *i.e.*, even if the class had standing, he lacked personal standing and failed to meet the requirements of typicality and adequacy of representation. The *Baum* decision suggests that standing is a potent defense at the class certification stage as well as at the motion-to-dismiss stage – particularly when data breaches do not uniformly affect victims.

The second case, *Abdale v. North Shore-Long Island Jewish Health System, Inc.*, similarly involved the inadvertent disclosure of personal identifying and health care information.²⁴⁹ The named plaintiffs were 13 patients who received medical services at medical facilities owned by the four defendants. Between 2010 and 2012, information pertaining to the 13 named plaintiffs and approximately 300 others was stolen and/or misappropriated from the four defendants. Although the plaintiffs initially set forth 11 original causes of action, the trial court dismissed all of these causes except for negligence.

²⁴⁷ See, e.g., *Enslin v. Coca-Cola Co.*, No. 2:14-CV-06476, 2016 WL 7042206, at *7 (E.D. Pa. June 8, 2016) ("That Coke chose to involve other lawyers in its investigation of the loss of PII [personal identifying information] does not insulate the facts uncovered from discovery.")

²⁴⁸ No. 1250 EDA 2015, 2016 WL 1658057 (Pa. Super. Ct. April 26, 2016)

²⁴⁹ No. 2367/13, 2016 WL 3045440 (N.Y. Sup. Ct. May 26, 2016)

III. Developments by Subject Matter

The plaintiffs then moved to certify their sole surviving claim for common law negligence. The court denied the motion for class certification on two grounds: commonality and superiority. First, the court noted that the plaintiffs alleged breaches which did not “involve a single instance of the theft of data” but rather three separate breaches, in 2010, 2011 and 2012.²⁵⁰ Second, the court held that each plaintiff would need to show that his or her personal data was stolen due to alleged negligence on behalf of the defendants, and that he or she suffered physical or emotional damages or financial loss as a result of the theft or misappropriation. Given that these findings necessitated “a myriad of mini trials,” the court held that common questions of law or fact did not predominate. Last, the court’s concern over the plaintiffs’ varied damages also proved fatal on the “superiority” requirement for class certification. The court held that the plaintiffs also failed to meet the superiority test of class action certification because “the nature of injuries allegedly sustained by the named plaintiffs are extremely varied and personal in nature.”²⁵¹ Like the *Baum* case, *Abdale* seems to signal that courts’ continuing struggles with damages in consumer data breach class actions do not end at the class certification stage.

Using Rule 23’s Implicit Ascertainability Requirement to Defeat Class Actions

Written by Josephine Tung, edited by Zachariah J. DeMeola

Courts have increasingly recognized an implied but essential prerequisite for class actions: ascertainability. In order for a class action to survive, the class must be currently and readily ascertainable based on objective criteria.²⁵² Practically, this means if “class members are impossible to identify without extensive and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.”²⁵³ The ascertainability requirement is intended to relieve courts of “serious administrative burdens that are incongruous with the efficiencies expected in a class action.”²⁵⁴

Though often overlooked as a potential argument or defense, the ascertainability requirement may be particularly efficacious in consumer data breach class actions. First, it places a significant burden on plaintiffs’ counsel. As the Eleventh Circuit has held, it requires that the named plaintiff propose an administratively feasible method by which class members can be identified and precludes the plaintiff from simply “asserting that class members can be identified using the defendant’s records.”²⁵⁵ In data breach actions where the scope of a breach is often hard to determine even for the defendant, this burden can be nearly insurmountable. In fact, not only are class representatives prohibited from relying on the defendant to identify class members, but they are also prohibited from relying on self-identification. A proposal that class members simply self-identify through affidavits has been held to violate defendants’ due process rights, since defendants would be unable to challenge class membership.²⁵⁶

²⁵⁰ *Id.* at *4.

²⁵¹ *Id.* at *6.

²⁵² See *Marcus v. BMW of N. Am., LLC.*, 687 F.3d 583, 592-93 (3d Cir. 2012).

²⁵³ *Id.* at 593.

²⁵⁴ *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 446 (E.D. Penn. 2000).

²⁵⁵ *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed. Appx. 945, 948 (11th Cir. 2015).

²⁵⁶ *Id.*

III. Developments by Subject Matter

Second, the ascertainability requirement provides another method of challenging class actions where victim information is compromised through more than one channel. The District Court for the Middle District of Alabama recently recognized this possibility in deciding a defendant's ascertainability challenge to class allegations. In *Bohannan v. Innovak International, Inc.*, the defendant raised the issue of ascertainability at the motion-to-dismiss stage.²⁵⁷ Innovak International is an information technology company that serves employers such as school systems and other state agencies. Its software allows end users to access tax and payroll information remotely through an internet portal, and it consequently involves the storage of employees' personal private information. The plaintiffs were end users of Innovak's system who contended that Innovak suffered a security breach when hackers infiltrated the internet portal.

The plaintiffs sought to define a putative nationwide class of "all persons whose PPI was compromised as a direct and proximate result of the Innovak data breach."²⁵⁸ Innovak brought a motion to dismiss, arguing in part that the class complaint failed to satisfy Rule 23 because the class definition did not allow for class members to be identified in a manner that is administratively feasible without resorting to individual inquiry.²⁵⁹ The court disagreed. It acknowledged that a class is not ascertainable where "the proposed class definition requires the court to determine the merits of an individual class member's claims as a predicate to determining her membership in the class."²⁶⁰ However, here, the plaintiffs drafted their fail-safe class definition to avoid the need for legal conclusions as to any of the members of the class. Instead, the proposed class definition required only a determination of whether a given class member's information was compromised by Innovak.²⁶¹ Weighing the allegations in favor of the plaintiffs, the court noted the plaintiffs' allegation that Innovak maintained PPI in a centralized location and agreed that given that assumption, it was possible to ascertain whose data had been breached. Although the *Bohannan* court declined to dismiss on ascertainability grounds, it left the door open to a future challenge to ascertainability by suggesting that "[t]he discovery process will ultimately reveal whether Innovak's records provide a feasible means of identifying all end users whose PPI was compromised."²⁶²

Although the *Bohannan* decision ultimately denied the defendants' request to dismiss the putative class action on ascertainability grounds, the decision turned largely on the fact that the case was at the pleading stage. The case suggests that with the right set of facts and discovery, ascertainability can serve as an effective defense before certification. In other data breach cases where the facts or extent of the breach remains unknown, an argument can be made that the putative class members cannot be identified and the class fails the ascertainability requirement. Such an argument may be particularly potent where (1) the breached data is stolen from multiple locations or over multiple periods of time, (2) there is some doubt as to the identity of the breach victims, or (3) the class definition requires the court to perform individualized inquiries.

257 --- F.R.D. ---, No. 16 C 272, 2016 WL 4154937 (M.D. Ala. Aug. 4, 2016).

258 *Id.* at *2.

259 *Id.*

260 *Id.* at *3.

261 *Id.* at *4.

262 *Id.*

III. Developments by Subject Matter

Last, the ascertainability requirement's use in a defense may be particularly appropriate in actions where plaintiffs attempt to rely on a laundry list of purported damages in order to meet Article III's standing requirements. In those cases, plaintiffs' attempts to identify as many types of damages as possible may leave room for defendants to argue that the individualized findings of fact necessitated by these myriad damages preclude the certification of a class.

In *Lewert v. P.F. Chang's China Bistro, Inc.* (see also page 39), customers at a nationwide restaurant chain sued after the restaurant chain suffered a data breach resulting in theft of its customers' credit- and debit-card data.²⁶³ The district court granted the defendant's dismissal of the putative class complaint based on the named representatives' lack of standing, holding that the time and expense incurred by the customer to monitor for fraudulent charges were not concrete or particularized injuries sufficient to confer standing. The Seventh Circuit reversed. It noted that the plaintiffs suffered compensable injuries because they (1) spent time and effort resolving fraudulent charges, (2) purchased credit monitoring reports, (3) were unable to accrue points on their debit cards while waiting for replacement cards, and (4) potentially faced unreimbursed fraudulent charges.²⁶⁴ The court also noted that "all class members should have the chance to show that they spent time and resources tracking down the possible fraud, changing automatic charges, and replacing cards as a prophylactic measure."²⁶⁵

The Seventh Circuit's suggestion that class members will potentially need to submit evidence of the time and resources spent tracking down possible fraud seems to conjure up the exact type of individualized mini-trials anathematic to the idea of an ascertainable class. Although the *Lewert* plaintiffs may have avoided dismissal for lack of standing through their creative theories of injury, they also created potential weaknesses in the issue of ascertainability and/or class certification. Class action defendants who lose standing arguments early on should consider whether those losses can serve as the bases for ascertainability arguments later on.

²⁶³ 819 F.3d 963 (7th Cir. 2016).

²⁶⁴ *Id.* at 969.

²⁶⁵ *Id.*

III. Developments by
Subject Matter

D. Consumer

Written by Matthew D. Pearson

False Advertising

The defense of reliance becoming less reliable.

Reliance has been, and most likely will always be, one of the most contested issues in consumer protection class actions. Generally, a plaintiff must prove that the defendant's misrepresentation or failure to disclose a material fact caused or contributed to her decision to buy the product.

But demonstrating reliance proves difficult when the allegedly misleading statement is buried in prolix product manuals, short-lived online advertisements or in-store displays, or when the undisclosed fact relates to a product feature the plaintiff likely did not even know existed. Indeed, oftentimes the named plaintiff has difficulty remembering where she actually encountered the statement or what her understanding of the product's features was prior to the purchase.

Despite, or perhaps because of, these challenges, courts took a more liberal view in 2016 of what a plaintiff is actually required to show to establish reliance. In December, the California Court of Appeal in *Veera v. Banana Republic, LLC*²⁶⁶, review filed (Jan. 24, 2017), set forth a new "method" by which plaintiffs could prove reliance – "momentum to buy." There, the plaintiffs claimed that Banana Republic posted signs in its store windows that suggested that all items in the store were 40 percent off.²⁶⁷ However, when the plaintiffs approached the cash register to pay for the items, they were informed that the 40 percent off sale did not apply to the products they were attempting to purchase.²⁶⁸ Nevertheless, the plaintiffs purchased the products.²⁶⁹

Banana Republic moved for, and was granted, summary judgment on the grounds that the plaintiffs failed to establish any economic injury because they made their decisions to purchase the products after having been apprised of its actual cost.²⁷⁰ The California Court of Appeal disagreed.²⁷¹

The Court of Appeal stated that the plaintiffs had, indeed, offered sufficient facts to suggest that Banana Republic's advertising had caused them to suffer economic harm.²⁷² According to the Court of Appeal, the "question of reliance and causation does not rest as a matter of law on whether plaintiffs knew the actual price of the items they purchased at the moment money was exchanged."²⁷³ Instead, the Court of Appeal focused on the events leading up to the purchases and the impact the misleading advertisements had on the plaintiffs.²⁷⁴ The Court of Appeal stated: "the advertising led [the plaintiffs] to enter the store, to shop, to select items, to decide to purchase them,

266 6 Cal. App. 5th 907, 922 (Ct. App. 2016).

267 *Id.* at 911.

268 *Id.*

269 *Id.*

270 *Id.* at 913.

271 *Id.* at 922.

272 *Id.* at 916.

273 *Id.* at 920.

274 *Id.*

III. Developments by Subject Matter

and to stand in line to purchase them,” and when “they learned that the discount did not apply,” they were embarrassed, frustrated and pressured into making the purchases.²⁷⁵ This pressure, according to the Court of Appeal, created a “momentum to buy” the products, which was sufficient to demonstrate reliance on the advertisement and economic injury.²⁷⁶

The Court of Appeal’s decision was met with a vigorous dissent. The dissenting justice highlighted the fact that “to establish a fraud-based deceptive advertising claim, the consumer must still show that, although the deception was not the only reason she bought the sweater, she in part relied on the truth of the misrepresentation in consummating the transaction.”²⁷⁷ Thus, because the plaintiffs did not dispute that they were aware the products were not 40 percent off when they purchased them, the plaintiffs simply could not establish reliance.²⁷⁸

A California federal court followed suit in December, taking a very lenient stance on what is required to prove reliance. *Myers v. BMW North America, LLC*.²⁷⁹ There, a plaintiff brought suit against BMW of North America, LLC (BMW), alleging that BMW violated California’s Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA) by failing to disclose that BMW’s remote-locking feature could cause vehicles to unintentionally lock.²⁸⁰ The plaintiff did not allege, however, that she reviewed or relied upon any statements made by BMW.²⁸¹

BMW brought a motion to dismiss the plaintiff’s complaint based on the plaintiff’s failure to sufficiently allege facts demonstrating reliance.²⁸² The court agreed with BMW and dismissed the complaint without prejudice.²⁸³

The plaintiff then amended her complaint to include allegations that her husband (1) extensively researched the vehicle prior to her purchasing it, (2) would have discovered the defect in the remote-locking feature had BMW disclosed it and (3) would have relayed that information to the plaintiff.²⁸⁴ The plaintiff also alleged that had she known of the defect, she would not have purchased the car.²⁸⁵

Despite the seemingly endless “could haves” and “would haves” upon which the plaintiff built her reliance argument, the court found her allegations sufficient.²⁸⁶ In reaching its decision, the court cited and relied upon the Ninth Circuit’s decision in *Daniel v. Ford Motor Co.*²⁸⁷, which held that there are “various ways in which a plaintiff can demonstrate that she would have been aware of a defect, had disclosure been made.”²⁸⁸ According to the court in *Myers*, the plaintiff’s husband’s research was one of those “various ways.”²⁸⁹

275 *Id.* at 920.

276 *Id.* at 921.

277 *Id.* at 925 (Bigelow, P.J., dissenting).

278 *Id.*

279 Case No. 3:16-cv-00412-WHO, Dkt. No. 40.

280 *Id.* at p. 3.

281 *Id.* at pp. 4.

282 *Id.* at p. 4.

283 *Id.*

284 *Id.* at p. 5.

285 *Id.*

286 *Id.*

287 806 F.3d 1217, 1226 (9th Cir. 2015).

288 *Id.* at p. 6.

289 *Id.*

III. Developments by Subject Matter

Given the recency of the *Veera* and *Myers* decisions, it is unclear whether other courts will utilize their holdings to further expand the type of allegations sufficient to establish reliance. What is clear, however, is that reliance – once one of the most effective tools to defeat consumer protection claims early on in litigation – is becoming an easier and easier obstacle for plaintiffs to surmount.

Class certification when choice-of-law dictates application of multiple state laws

In 2012, the Ninth Circuit held in *Mazza v. American Honda Motor Co.*²⁹⁰, that California's choice-of-law principles compelled the court to apply to each putative class member the consumer protection law of his or her state of residence, which, in turn, caused the court to conclude that the common question of law and fact did not predominate.

In reaching its decision, the Ninth Circuit highlighted some of the material differences between California's consumer protection laws and the laws of the home states of some of the putative class members. For example, the court noted that California's consumer protection laws (the UCL, False Advertising Law (FAL) and CLRA) have no scienter requirement, whereas many other states' consumer protection statutes do require scienter.²⁹¹ Additionally, the Ninth Circuit found that California law requires the class members to demonstrate reliance. Other states' laws have no such requirement.²⁹² Finally, the Ninth Circuit recognized that the remedies provided by different states' consumer protection statutes differ. For example, in Michigan and New Jersey, the remedies available to plaintiffs vary based on the willfulness of the defendant's conduct. See Mich. Comp. Laws Ann. § 445.991(6) (limiting recovery to actual damages if the violation was a result of bona fide error) and N.J. Stat. Ann. § 56:8-19 (requiring treble damages and attorney's fees). These differences, according to the Ninth Circuit, prevented the certification of a nationwide class.

After it was decided, *Mazza* was cited as a significant win for defendants. Defense counsel opined that plaintiffs would no longer be able to impose nationwide liability on defendants for violations of a single state's laws.

However, *Mazza* has not been the unequivocal victory it was initially thought to be. *Mazza* has been heavily cited and discussed since it was decided. In 2016 alone, *Mazza* was cited in at least 100 different opinions and by courts in at least 11 different states.²⁹³ The various decisions have resulted in differing opinions as to the interpretation of *Mazza*, when it should be applied and what evidence is necessary to trigger its application.

For example, some courts have held that *Mazza* effectively precludes the certification of any nationwide class that alleges violations of California's UCL, FAL and CLRA. As in *Mazza*, the court in *Darisse v. Nest Labs, Inc.*²⁹⁴, detailed all the differences between California consumer protection laws and those of other states, including differences in (1) the applicable statute of limitations, (2) the reliance requirement, (3) what constitutes "actionable" conduct, (4) the available relief and (5) even whether class actions are permitted.²⁹⁵ The *Darisse* court then refused to certify the nationwide class

290 666 F.3d 581 (9th Cir. 2012).

291 Such states include Colorado (Colo.Rev.Stat. 6-1-105(1)(e), (g), (u) (knowingly)); New Jersey (N.J. Stat. Ann. § 56:9-2 (knowledge and intent for omissions)); and Pennsylvania (*Debbs v. Chrysler Corp.*, 810 A.2d 147, 155 (Pa.Super.2002) (knowledge and reckless disregard)).

292 Florida (*Egwuatu v. South Lubes, Inc.*, 976 So.2d 50, 53 (Fla.App.2008); New Jersey (*Dabush v. Mercedes-Benz USA, Inc.*, 378 N.J. Super. 105, 874 A.2d 1110, 1121 (App.2005)); and New York (*Stutman v. Chem. Bank*, 95 N.Y.2d 24 (2000)).

293 In 2016, *Mazza* was cited by courts sitting in California, Texas, Washington, Florida, New York, Montana, Oregon, Nevada, Pennsylvania, Georgia and Arizona.

294 No. 5:14-CV-01363-BLF, 2016 WL 4385849, at *10 (N.D. Cal. 2016).

295 *Id.* at *9-10.

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because certification would allow class members from different states to “participate in the class even though the laws of their own states” would prevent them from doing so.²⁹⁶

A similar result was reached in *Wolf v. Hewlett Packard Company*.²⁹⁷ There, the court refused to certify a nationwide class asserting violations of California’s CLRA because, as in *Darisse*, the differences in applicable state laws (*i.e.*, the laws of the states where the class members resided) effectively determined whether the defendant’s conduct was actionable. *Id.*²⁹⁸

Not all courts, however, have been so quick to deny certification under *Mazza*. Courts have questioned whether *Mazza* applies to all consumer protection claims or just those discussed in the decision. *Mullins v. Premier Nutrition Corp.*²⁹⁹ Others have refused to apply *Mazza* at the pleading stage.³⁰⁰ And others demand individualized proof of each state’s laws, why they conflict with California’s laws and whether the conflict is material, despite the fact that the analysis has been completed many times before.³⁰¹

Ultimately, *Mazza* was and remains a win for defendants; certifying a nationwide class based on violations of California law is more difficult today than it was before *Mazza*. But even after four years of cases citing and discussing *Mazza*, questions remain. Plaintiffs’ counsel will continue to argue that *Mazza*’s holding was intended to be narrow and limited to the facts of the case. Defense counsel will claim the opposite. At some point, courts will agree when and how *Mazza* applies, but if history is any indication, that time is not likely to be soon. In the interim, defendants should continue to cite *Mazza* in opposition to a motion for class certification of a nationwide class (not at the pleading phase) and provide the court with a detailed analysis of how the laws of each (or most) of the states where the putative class members reside conflict with California law.

296 *Id.* at *10.

297 No. CV1501221BROGJSX, 2016 WL 7743692, at *15 (C.D. Cal. 2016).

298 See also *Sandoval v. Pharmicare US, Inc.*, No. 15-CV-0120-H-JLB, 2016 WL 3554919, at *7 (S.D. Cal. 2016) (denying class certification under *Mazza*).

299 No. 13-CV-01271-RS, 2016 WL 1535057, at *10 (N.D. Cal. 2016) (“Did the Ninth Circuit conclude plaintiffs are categorically barred from pursuing UCL and CLRA claims on behalf of class members in all fifty states because some states include a scienter element?”).

300 *In re Clorox Consumer Litig.*, 894 F. Supp. 2d 1224, 1237 (N.D. Cal. 2012) (“Since the parties have yet to develop a factual record, it is unclear whether applying different state consumer protection statutes could have a material impact on the viability of Plaintiffs’ claims.”).

301 *Bruno v. Eckhart Corp.*, 280 F.R.D. 540, 550 (C.D. Cal. 2012) (“Defendants cannot profitably rely on the work of a different party in a different case with different facts – or on the Ninth Circuit finding error in a district court rejecting an argument Defendants did not themselves present to this Court – to correct their failure to show the law of other states conflicted with California law as applied to this particular case.”); see also *Forcellati v. Hyland’s, Inc.*, 876 F. Supp. 2d 1155, 1160-61 (C.D. Cal. 2012) (“Defendants can only meet [their] burden by engaging in an analytically rigorous discussion of each prong of California’s ‘government interests’ test based on the facts and circumstances of this case and this Plaintiff’s allegations.”).

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Conclusion

Written by Sam Camardo

The supposed hurdles in class action practice imposed in recent years by cases like *Dukes*, *Comcast* and the like have not deterred the plaintiffs' bar. More cases than ever are being pursued.

Privacy litigation continues to explode. 2016 added fuel to the fire, with more and more courts accepting the various theories of injury plaintiffs offer as sufficient at the pleading stage. And the Supreme Court's rejection of the "pickoff" strategy in *Campbell-Ewald* makes privacy statutes offering lucrative per-person damages more attractive than ever.

Employees likewise scored significant victories in two circuits that invalidated class action waivers, although those victories may be fleeting; the Supreme Court is poised to review them in 2017.

And as class actions proliferate, the courts are at the same time making these cases harder to settle, scrutinizing all aspects of putative class action settlements more than ever before.

As we said last year, class-action doctrine continually shifts. We will continue monitoring developments to ensure you are best prepared to make sense of this ever-developing area of the law.

For more information on BakerHostetler's Class Action Defense capabilities, we invite you to visit bakerlaw.com/ClassActionDefense.

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