

CLASS ACTION LAW MONITOR

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News & Filings

Telemarketers win \$4 million wage settlement

Sutherland Global Services Inc. has agreed to pay \$4 million to resolve allegations that it did not pay owed overtime to its telemarketers.

According to the lawsuit, which was filed in 2005, Sutherland failed to pay employees who regularly worked more than 40 hours per week overtime pay. Sutherland denied the allegations in the complaint, which alleged violations of the Fair Labor Standards Act and the New York Labor Law, and accused the company of manually altering the time records of employees.

In addition to the \$4 million settlement fund, the court also approved attorneys' fees of \$1.13 million and a \$70,000 incentive award to the named lead plaintiff.

Sherrill v. Sutherland Global Servs. Inc., No. 05-6537 (W.D.N.Y. *final approval granted* Oct. 19, 2011)

Counsel for plaintiffs: Stanley J. Matusz, 585-271-5460, Ithaca, N.Y.

Counsel for Sutherland: Daniel J. Moore, Roy R. Galewski, Harris Beach L.L.P., 585-419-8626, Pittsford, N.Y.; Linda T. Prestegaard, Phillips Lytle L.L.P., 585-238-2029, Rochester, N.Y.

Facebook sued for using personal information of subscribers

A lawsuit alleges that Facebook Inc. uses private information on individual sites in order to target advertising.

Facebook allegedly tracks and collects subscribers' electronic communications and Internet browsing history, even when users were not logged into Facebook. The lawsuit alleges Facebook then uses the information for advertising purposes to increase revenue.

The lawsuit alleges privacy violations and breach of contract. The suit seeks monetary damages and attorney fees.

Rutledge v. Facebook Inc., No. 11-0133 (N.D. Miss. *complaint filed* Oct. 12, 2011)

Counsel for Rutledge: David Shelton, 662-281-1212, Oxford, Miss.

Trade group accuses Visa and MasterCard of antitrust violations

The National ATM Council has filed a lawsuit against Visa Inc. and MasterCard International alleging the credit card issuers conspired to fix prices for ATM fees.

The lawsuit claims that Visa and MasterCard established and enforced uniform agreements with virtually every card issuing bank in the United States to fix fees for using ATMs. As a result, the lawsuit claims providers of ATM services cannot exercise autonomous business judgment in setting their charges for ATM services. The lawsuit alleges that MasterCard and Visa are violating antitrust laws.

The lawsuit seeks class action status and requests injunctive relief, attorney fees and compensatory damages.

Nat'l ATM Council v. Visa Inc., No. 11-1803 (D.D.C. *complaint filed* Oct. 12, 2011)

Counsel for ATM Council: Jonathan L. Rubin, Rubin P.L.L.C., 202-776-7763, Washington; Brooks E. Harlow, David A. LaFuria, Lukas Nace Gutierrez & Sachs L.L.P., 703-584-8678, McLean, Va.

Alabama DA accused of striking black jurors

An Alabama district attorney is the defendant in a lawsuit that alleges he purposefully strikes qualified black jurors from felony cases.

Houston and Henry County District Attorney Douglas Albert Valeska and his staff have allegedly made a practice of using peremptory challenges to eliminate black jurors. The lawsuit was filed by several black residents who were called for jury duty and subsequently excluded from serving.

The lawsuit alleges the practice typically occurs in capital felony cases being tried in Houston and Henry counties, counties in which blacks make up 23% and 29%, respectively, of the population.

Hall v. Valeska, No. 11-0894 (M.D. Ala. *complaint filed* Oct. 19, 2011)

Counsel for plaintiffs: Bryan A. Stevenson, Angela L. Setzer, Alicia A. D'Addario, Equal Justice Initiative, 334-269-1803, Montgomery, Ala.; Gerald S. Hartman, Drinker Biddle & Reath L.L.P., 202-842-8800, Washington; Paul G. Nittoly, Lauren D. Godfrey, Drinker Biddle & Reath L.L.P., 973-549-7180, Florham Park, N.J.

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Docket★Trak™ Federal Securities First Filings					
Company (defendants)	Industry	Plaintiff	Citation	Plaintiff Firm	Contact
Aeropostale Inc.	Retail (Apparel)	Arbuthnot	Arbuthnot v. Aeropostale Inc. , No. 11-CV-7132 (S.D.N.Y. filed 10/11/11)	Robbins Geller Rudman, Melville, N.Y.	Mario Alba Jr., 631-367-7100
Global Indus. Ltd.; Apollon Merger Sub B. Inc.	Oil Well Servs. & Equip.	Miller	Miller v. Global Indus. Ltd. , No. 11-CV-3625 (S.D. Tex. filed 10/11/11)	Brothers Sepulveda & Alvarado P.C., Houston	Annette M. Sepulveda, 713-337-0750
JinkoSolar Holding Co. Ltd., Credit Suisse Sec. (USA) L.L.C.; Oppenheimer & Co. Inc.; Roth Capital Ptrs. L.L.C.; Collins Stewart L.L.C.	Semi-conductors	Peters	Peters v. JinkoSolar Holding Co. Ltd. , No. 11-CV-7133 (SD.N.Y. filed 10/11/11)	Zamansky & Assocs. L.L.C., New York	Jacob H. Zamansky, 212-742-1414
Renaissance Learning Inc.; Permira Advisors L.L.C.; Raphael Holding Co.; Raphael Acquisition Corp.	Software & Programming	McDonald	McDonald v. Paul , No. 11-CV-0690 (W.D. Wis. filed 10/7/11)	O'Neil Cannon Hollman, Milwaukee	Patrick G. McBride, 414-276-5000
Stereotaxis Inc.	Med. Equip. & Supplies	Pound	Pound v. Sterotaxis Inc. , No. 11-CV-1752 (ED. Mo. filed 10/7/11)	Carey & Danis, Clayton, Mo.	James J. Rosemergy, 314-725-7700
Source: Securities Class Action Reporter research					

In The Supreme Court

BREACH OF CONTRACT

Landlord must pay \$5 million punitive damages award in dispute over security deposits

Thomas v. Alcoser, Nos. A124848, A125994, A126464 (Cal. Ct. App. 2011), *unpublished*, *cert. denied*, No. 11-308 (U.S. Oct. 31, 2011)

The U.S. Supreme Court declined to review a California Court of Appeal's decision affirming a jury's award of punitive damages to a class of renters in a class action alleging a landlord wrongfully refused to return the renters' security deposits.

The court of appeal held the plaintiffs were not required to bring each class member into court to testify that he read and relied upon the provision in the lease agreement regarding security deposits because to require the plaintiffs to do so would defeat the purpose of a class action, in which certain plaintiffs are chosen to represent a class.

Furthermore, the court held that the \$5.49 million punitive damages award was not constitutionally excessive. The court found that the landlord systematically committed intentional fraud against his tenants, many of whom were financially vulnerable and, therefore, the conduct was sufficiently reprehensible to support the punitive damages award.

ENVIRONMENT

Plaintiffs may not appeal denial of certification after dismissing individual claims

Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88 (4th Cir. 2011), *cert. denied*, No. 11-156 (U.S. Oct. 31, 2011)

The U.S. Supreme Court will not review a decision of the Fourth U.S. Circuit Court of Appeals affirming a district court's denial of class certification to plaintiffs seeking medical monitoring in a suit arising from a company's discharge of chemicals into the environment.

The district court denied certification after finding that individualized inquiries into whether the plaintiffs and putative class members satisfied the elements of a medical monitoring cause of action made the case unsuitable for class treatment. The plaintiffs then voluntarily dismissed their individual claims seeking medical monitoring in order to appeal the district court's ruling.

The Fourth Circuit held that it did not have jurisdiction to review the district court's denial of class certification of the plaintiffs' medical monitoring claims because the plaintiffs no longer had Article III standing. The Fourth Circuit found that when a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, there is no longer a "self-interested party advocating" for class treatment in the manner necessary to satisfy Article III standing requirements. (See 8 **Cl.Act.L.Mon.** 259, Sept. 30, 2008, for an earlier decision in this case.)

Certification

FLSA

Class of waiters challenging tip sharing requirement certified

Shahriar v. Smith & Wollensky Rest. Group, No. 10-1884 (2d Cir. Sept. 26, 2011)

The Second U.S. Circuit Court of Appeals affirmed the certification of employees' state law claims alleging violation of wage and overtime laws, finding that issues common to the class predominated over any individual issues. Additionally, there was no error in exercising supplemental jurisdiction over the state law claims where they and Fair Labor Standards Act (FLSA) claims arose from uniform compensation policies and practices.

Waiters employed by Smith & Wollensky Restaurant Group Inc., d/b/a Park Avenue Restaurant, sued the restaurant alleging violation of the FLSA and various provisions of the New York Labor Law (NYLL). Specifically, the complaint alleged that Park Avenue unlawfully required waiters to share their tips with tip-ineligible employees.

The plaintiffs moved to certify their state law claims as a class action. The district court exercised supplemental jurisdiction over the NYLL claims and granted class certification.

The Second Circuit found that the district court properly exercised supplemental jurisdiction. The NYLL and FLSA claims clearly derived from a common nucleus of operative facts since they arose out of the same compensation policies and practices of Park Avenue.

The NYLL claims did not substantially predominate over the FLSA claims. The Second Circuit noted that the

standards for determining whether the plaintiffs were tip-eligible were similar under the FLSA and the NYLL.

The district court did not abuse its discretion in finding that the requirements for class certification were met. There were questions of law or fact common to the class that predominated over individual questions. The NYLL claims all derived from the same compensation policies and tipping practices.

The typicality requirement was met. If the trier of fact determined that tip-ineligible employees were included in the tip pool, that determination would affect every putative class member.

The Second Circuit affirmed the district court's judgment. Class certification was appropriate since all claims arose from the same controversy and the proposed class satisfied the prerequisites for certification.

Judge: Roger J. Miner

Counsel for plaintiffs: Daniel Maimon Kirschenbaum, Denise A. Schulman, Charles Joseph, Joseph, Herzfeld, Hester & Kirschenbaum L.L.P., 212-688-5640, New York; Richard J. Burch, Bruckner Burch P.L.L.C., 713-877-8788, Houston.

Counsel for Park Avenue: Gregory B. Reilly III, A. Michael Weber, Litter Mendelson P.C., 212-583-9600, New York.

FAX ADVERTISING

Risk of financial hardship from class action judgment is irrelevant in certification analysis

Critchfield Physical Therapy v. Taranto Group Inc., No. 101,949 (Kan. Sept. 30, 2011)

Affirming class certification in a lawsuit brought under the Telephone Consumer Protection Act (TCPA), the Kansas Supreme Court ruled in part that a class action was the superior method of resolving the dispute because individual actions created the risk of inconsistent results.

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From March 2005 to March 2008, Taranto Group Inc. contracted with AmeraScope Media Inc. and Westfax Inc. to send advertisements for its products via facsimile. Between them, AmeraScope and Westfax completed approximately 122,000 fax transmissions.

Critchfield Physical Therapy sued Taranto alleging violation of the TCPA. The TCPA generally prohibits, among other things, the use of any fax machine to send unsolicited advertisements. The trial court granted Critchfield's motion for class certification.

Taranto argued on appeal that the commonality requirement was not met because some persons may have consented to receiving the fax transmissions or had a business relationship with Taranto. Additionally, Taranto argued that there was no proof that the persons on the transmission logs actually received a fax.

Class satisfies certification requirements. The supreme court found that issues concerning consent and/or a prior business relationship did not defeat the commonality of class members' claims. Separating the persons who gave their consent or had a business relationship with Taranto from the class should be a relatively simple matter.

The supreme court determined that the fact that some putative class members may not have received the allegedly unlawful fax transmissions did not preclude their entitlement to damages. The plain language of the TCPA demonstrates that Congress intended to restrict the sending of unsolicited fax advertising. The statute does not require receipt of such advertising. An attempt to complete a fax transmission is sufficient to establish liability.

Thousands of individual actions were not superior to a single class action. The threat of an "annihilating" judgment in favor of the class did not preclude certification as Taranto contended. The supreme court reasoned that possible financial hardship should not protect defendants that engage in widespread unlawful behavior.

A class action was the superior method of adjudication because it avoided the risk of inconsistent results. The TCPA allows treble damages for the willful or knowing violation of the statute. One court might impose punitive damages based on Taranto's conduct while another court might decline to do so.

The supreme court agreed that certification was appropriate; a class action promoted judicial economy.

Judge: Eric S. Rosen

Counsel for Critchfield: Rex A. Sharp, Barbara C. Frankland, Gunderson Sharp & Walke L.L.P., 913-901-0505, Prairie Village, Kan.; Max Margulis, Margulis Law Group, 314-434-8502, Chesterfield, Mo.; Brian J. Wanca, Ryan Kelly, Anderson & Wanca, 847-368-1500, Rolling Meadows, Ill.; Phillip A. Bock, Tod A. Lewis, Bock & Hatch, L.L.C., 312-658-5500, Chicago.

Counsel for Taranto: Leonard R. Frischer, Mark B. Schaffer, Frischer & Schaffer Chtd., 913-345-0100, Overland Park, Kan.

BREACH OF CONTRACT

Certification of claims disputing healthcare organizations' reimbursement practices denied

Windisch v. Hometown Health Plan Inc., No. 08-0664 (D. Nev. Oct. 7, 2011)

The U.S. District Court for the District of Nevada ruled that a doctor who failed to allege how many other persons were harmed by healthcare organizations' improper "downcoding" and "bundling" of reimbursement claims compelled the denial of class certification.

Dr. Kevin Windisch provided primary care services to enrollees of Hometown Health Plan Inc., Hometown Health Providers Insurance Co., Hometown Health Partners and Renown Health. He sued the healthcare organizations for breach of contract and consumer fraud.

Windisch claimed that the defendants refused to pay for more than one service per visit (bundling) and changed submitted claims to billing codes with lower reimbursement rates (downcoding). The alleged practices resulted in improperly low reimbursements.

Windisch requested certification of a class of participating providers of the defendants in the state of Nevada from Dec. 19, 2002 to the present. The record showed that there were approximately 900 physicians in Nevada who had primary care physician agreements with the defendants.

Numerosity and commonality requirements not met. Windisch failed to allege or submit evidence of how many of the physicians who contracted with the defendants were harmed by the claimed bundling and downcoding practices. The district court was therefore unable to make a finding that numerosity was satisfied.

Windisch contended that the commonality requirement was met because the defendants used a standardized software program to process reimbursement claims. The district court determined that Windisch did not show commonality of claims. It was not clear how many doctors suffered the same alleged downcodings or bundlings through use of the software program.

The district court denied Windisch's motion for class certification. Windisch offered nothing more than speculation to support his allegation that the practices to which he was subjected were suffered in common by a sufficiently numerous class.

Judge: Robert C. Jones

Counsel for plaintiff: Edith M. Kallas, Ilze C. Thielmann, Whatley Drake & Kallas L.L.C., 212-447-7070, New York; Mark Albright, D. Chris Albright, Dustin A. Johnson, Albright Stoddard Warnick & Albright, 702-384-7111, Las Vegas; Nicholas B. Roth, Eyster Key Tubb Roth Middelton & Adams L.L.P., 256-353-6761, Decatur, Ala.; Charlene P. Ford, Whatley Drake & Kallas L.L.C., 205-328-9576, Birmingham, Ala.

Counsel for defendants: Emily M. Yinger, Michael M. Smith, N. Thomas Connally, Hogan Lovells U.S. L.L.P., 703-610-6100, McLean, Va.; Jeremy J. Nork, Tamara Jankovic, Holland & Hart L.L.P., 775-327-3000, Reno, Nev.

CONSUMER PROTECTION**Certification of class alleging looting of pre-paid funeral trusts denied**

Farno v. Ansure Mortuaries of Ind. L.L.C., No. 41A05-1002-PL-104 (Ind. Ct. App. Sept. 26, 2011)

The Indiana Court of Appeals affirmed the denial of class certification of customers' claims alleging the looting of their pre-paid burial services funds. The trial court's finding that actions by the state's securities commissioner and a court-appointed receiver were the superior method of resolving the total controversy was not an abuse of discretion.

Angela Farno pre-paid for funeral services at Forest Lawn Memory Gardens. Indiana law requires that cemeteries deposit a portion of customers' payments for burial spaces and funeral services in irrevocable trusts to pay for perpetual care.

In 2004, Fred Meyer Jr. and other family members agreed to sell four cemeteries, including Forest Lawn, to Robert Nelms. In January 2008, Meyer sued Nelms and the entities he owned to enforce promissory notes that Nelms executed. The complaint alleged that Nelms had transferred millions of dollars out of the cemeteries' pre-need trust accounts for his personal use.

The Indiana Securities Commissioner intervened in the lawsuit and filed a complaint against Nelms and several other defendants alleging violations of the Indiana Securities Act. The trial court appointed a receiver to control the operations and assets of the cemeteries. The receiver later filed a lawsuit to recover trust assets.

In June 2008, Farno sued Nelms and other defendants including Ansure Mortuaries of Indiana L.L.C., Smith Barney, Craig Bush, Forethought Federal Savings Bank and Forest Lawn Cemetery. The complaint asserted several claims arising from the alleged looting of trust funds.

Superiority of class action not established. Farno moved to certify the case as a class action. The trial court denied the motion, ruling that a class action was not the superior method of adjudicating the case. Subsequent to that decision, the receiver arranged for a sale of the cemeteries.

Farno argued on appeal that the trial court should not have considered the receiver's action or the securities commissioner's action in its superiority analysis. The court of appeals noted that Farno cited no Indiana authority in support of her argument.

Furthermore, Farno and the receiver asserted similar claims against many of the same defendants. The relief obtained by the receiver would be virtually identical to any relief that Farno obtained for a class.

Farno's stated purpose in pursuing class certification was to restore the pre-need trust funds and ensure that customers' pre-paid funeral services would be provided when

they died. The court of appeals concluded that the securities commissioner's action, the receiver's action and the pending sale of the cemeteries were superior methods of achieving that purpose.

Judge: Terry A. Crone

Counsel for plaintiff: Irwin B. Levin, Richard E. Shevitz, Vess A. Miller, Lynn A. Toops, Cohen & Malad L.L.P., 317-636-6481, Indianapolis.

Counsel for defendants: Jackie M. Bennett Jr., Anthony Paganelli, Taft Stettinius & Hollister L.L.P., 317-713-3500, Indianapolis; H. Nicholas Berberian, Terry D. Weissman, Kyle D. Rettberg, Neal Gerber & Eisenberg L.L.P., 312-269-8000, Chicago; Kathleen A. DeLaney, Christopher S. Stake, DeLaney & DeLaney L.L.C., 317-920-0400, Indianapolis; David K. Herzog, Jon B. Laramore, Kevin M. Kimmerling, Baker & Daniels L.L.P., 317-237-0300, Indianapolis; Fred R. Biesecker, Donald M. Snemis, Brian J. Paul, Ice Miller L.L.P., 317-236-2100, Indianapolis.

INSURANCE**Progressive insured ruled inadequate class representative in coverage dispute**

Fosmire v. Progressive Max Ins. Co., No. 10-5291 (W.D. Wash. Oct. 11, 2011)

Denying a motion for class certification of claims alleging an auto insurer's breach of contractual duties to pay diminished value, the U.S. District Court for the Western District of Washington found in part that the plaintiff's decision to exclude individuals with a certain type of damages from the class rendered her an inadequate class representative.

On June 5, 2007, Elaine Fosmire's vehicle was damaged in a collision with an uninsured motorist. Fosmire's fiancé was driving her vehicle when the collision occurred. Progressive Max Insurance Co., Fosmire's insurer, paid for repairs to her vehicle but denied her demand for diminished value loss.

Fosmire sued Progressive claiming that the insurance company breached its contractual obligation to pay diminished value losses. Progressive's standard underinsured and uninsured (UIM) policies required it to pay policyholders all damages to which they were legally entitled to recover from the owner or operator of an uninsured or underinsured vehicle. Fosmire sought certification of a nationwide class action.

Progressive argued that Fosmire did not satisfy the typicality or adequacy requirement. Progressive contended that Fosmire made a material misrepresentation on her insurance application by failing to identify her fiancé as an additional driver of her vehicle. After the accident, Fosmire acknowledged that her fiancé was a regular driver in her household.

The district court determined that litigation concerning Progressive's defense to Fosmire's claim for coverage would preoccupy Fosmire to the detriment of the class. Ad-

ditionally, the defense threatened to undermine Fosmire's credibility at trial. For those reasons, typicality was not met.

Because stigma damages were not considered diminished value in Washington, Fosmire defined the proposed class to exclude claims for such damages. As a result, putative class members from other states could not bring their stigma damages claims in the lawsuit along with their diminished value claims. The conflict between Fosmire's interests and those of the putative class made her an inadequate class representative.

Assuming *arguendo* that Fosmire satisfied typicality and adequacy prerequisites, class certification was still inappropriate. The district court reasoned that there were at least seven states in which Progressive issued policies with UIM coverage and at least 17 different types of policies. The policies varied with respect to the definition of damages. The district court observed that an examination of each state's breach of contract law and every class member's policy would be necessary.

The district court declined to certify Fosmire's proposed class. Even if Fosmire were an adequate class representative, individual issues predominated.

Judge: James L. Robart

CONSUMER PROTECTION

Class of customers disputing telecommunications carriers' collection of surcharge certified

Bowers v. Windstream Ky. E. L.L.C., No. 09-0440 (W.D. Ky. Oct. 12, 2011)

The U.S. District Court for the Western District of Kentucky granted a motion to certify a class action against telecommunications carriers under the Federal Rules of Civil Procedure 23(b)(1) and (b)(3) where the proposed class of customers shared the common question of whether the defendants improperly collected a surcharge from them. Certification was inappropriate under Rule 23(b)(2), however, because the plaintiffs sought monetary damages only.

Windstream Kentucky East L.L.C. and Windstream Kentucky West L.L.C. (collectively, Windstream) provided telephone, cable and Internet services. Telecommunications carriers in Kentucky were obligated to pay the Kentucky Gross Revenue Tax (GRT). Windstream passed the GRT on to customers in the form of the Kentucky Gross Receipts Surcharge (GRS).

Dana Bowers and Sunrise Children's Services Inc. were Windstream customers. They filed a class action complaint alleging that Windstream's charge and collection of the GRS violated state and federal telecommunications laws. Bowers and Sunrise moved for certification of a class of Kentucky Windstream customers on whom the GRS had been imposed.

The district court found that the proposed class satisfied the requirements of Federal Rule of Civil Procedure 23(a). The class numbered in the thousands, making joinder impracticable. The common question of whether and to what extent Windstream improperly charged and collected the GRS was central to the litigation. Typicality was met because adjudication of the plaintiffs' claims would resolve the claims of other class members.

The district court concluded that certification was proper under Rule 23(b)(1) because proposed class members might face inconsistent rulings if certification were denied. Also, one class action as opposed to potentially thousands of lawsuits would protect Windstream from inconsistent findings of liability.

Class treatment was also suitable under Rule 23(b)(3). The allegation that Windstream improperly billed the GRS could be proved on a class-wide basis.

Rule 23(b)(2) does not extend to cases in which a request for damages predominates over injunctive and declaratory relief. The plaintiffs acknowledged that they were pursuing damages only. Because separate damages hearings would likely be necessary, the denial of certification under Rule 23(b)(2) was justified.

The district court granted in part and denied in part the plaintiffs' motion for class certification. The court appointed the law firm of Stoll Keenon Ogden as class counsel, finding that counsel had experience in class actions and in the areas of tax and telecommunications law.

Judge: John G. Heyburn II

Counsel for plaintiffs: David R. Gibson, Douglas F. Brent, David T. Royse, Deborah T. Eversole, Stoll Keenon Ogden P.L.L.C., 502-333-6000, Louisville, Ky.

Counsel for Windstream: Chadwick A. McTighe, Joseph Lee Hamilton, Marjorie Ann Farris, Mark R. Overstreet, Stites & Harbison P.L.L.C., 502-587-3400, Louisville, Ky.

Motions

CONSUMER PROTECTION

Consumer has standing to challenge Quaker Oats' advertising of products' nutritional qualities

Askin v. Quaker Oats Co., No. 11-0111 (N.D. Ill. Oct. 12, 2011)

The U.S. District Court for the Northern District of Illinois held that a consumer's allegation that he purchased Quaker Oats' products which he would not have purchased absent misleading statements about the nutritional content of the products was sufficient to state a claim of economic injury.

Daniel Askin brought a class action against the Quaker Oats Co., claiming that Quaker Oats marketed its oatmeal and granola products as being “heart healthy” when they in fact contained unhealthy trans fat. The complaint alleged violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA), breach of warranties and unjust enrichment.

Quaker Oats moved to dismiss on the grounds that Askin lacked standing and failed to state a claim. Quaker Oats also moved to dismiss under the first-to-file rule, arguing that Askin’s case was duplicative of preexisting California actions. The district court resolved the standing issue first and concluded that the allegations of the complaint established standing.

Physical harm not required to demonstrate standing.

Askin alleged that he paid more for Quaker Oats’ products because he believed they contained zero grams of trans fat. The price differential between what Askin paid and what he would have paid if he had known that Quaker Oats’ products contained an ingredient he wanted to avoid represented a concrete injury-in-fact. It was not necessary that Askin plead physical harm from the products he consumed.

Quaker Oats argued that Askin did not have standing to assert an ICFA claim because he was a resident of New York and purchased Quaker Oats products there. The district court found that the question of whether a resident of a state other than Illinois could sue under the ICFA went to the merits and was not relevant to the standing inquiry. The district court denied Quaker Oats’ motion to dismiss on standing grounds.

Judge: Young B. Kim

Counsel for Askin: Michael Robert Reese, Reese Richman L.L.P., 212-579-4625, New York.

Counsel for Quaker Oats: Terrence Patrick Canade, Locke Lord Bissell & Liddell L.L.P., 312-443-0700, Chicago.

INSURANCE

Potential for punitive damages helps plaintiffs reach amount in controversy requirement

Keeling v. Esurance Ins. Co., No. 11-8018 (7th Cir. Sept. 26, 2011)

Reversing the district court’s ruling, the Seventh U.S. Circuit Court of Appeals held that a case was properly removed under the Class Action Fairness Act (CAFA). It was not legally impossible for the class of automobile policyholders to obtain enough punitive damages to reach the statutory threshold.

Lukus Keeling filed a class action complaint against Esurance Insurance Co. alleging that Esurance fraudulently charged for uninsured and underinsured motorist coverage that was effectively worthless in light of policy

restrictions. Esurance collected premiums totaling \$613,894 from the putative class during the relevant period and paid no claims.

Esurance removed the case to federal court pursuant to CAFA. Keeling argued that the amount in controversy was less than \$5 million. The district court agreed and remanded the case to state court. The district court specifically found that the injunctive relief requested had no monetary value because that relief required changing only a few words on a pre-printed form. In the district court’s opinion, it would be “legally impossible” for the class to receive \$4.4 million in punitive damages to push the amount in controversy over \$5 million.

The Seventh Circuit determined that the cost of injunctive relief could not be ignored in calculating the amount in controversy. If the class prevailed, Esurance had to cease charging the coverage premium or change the terms of its policies so that claims were paid more frequently.

Defendant satisfies burden of establishing jurisdiction.

The Seventh Circuit noted that Esurance’s current profit on uninsured/underinsured motorist coverage was approximately \$125,000 annually. The present value of foregoing profits for the coverage for a period of 20 years, discounted at five percent a year, was \$1.5 million. Accordingly, the expense of restitution plus the cost of injunctive relief was approximately \$2 million.

The Seventh Circuit ruled that it was not “legally impossible” for Illinois policyholders to obtain \$3 million in punitive damages so as to reach the \$5 million jurisdictional minimum. A punitive damages award of \$3 million would amount to a multiplier of five since the damages to the class were a little more than \$600,000. The Seventh Circuit observed that Illinois courts had affirmed higher multipliers in other fraud cases.

The Seventh Circuit reversed the remand order. On a jurisdictional inquiry, the court could not conclude that \$3 million in punitive damages was an impossibility.

Judge: Frank H. Easterbrook

ANTITRUST

Attorney general’s representative lawsuit does not constitute class action under CAFA

Washington v. Chimei Innolux Corp., No. 11-16862 (9th Cir. Oct. 3, 2011)

The Ninth U.S. Circuit Court of Appeals, affirming the grant of a motion to remand, ruled that parens patriae actions brought by state attorney generals did not constitute class actions within the meaning of the Class Action Fairness Act (CAFA) and thus were not subject to removal under CAFA.

The attorneys general of Washington and California sued various manufacturers and distributors of thin-film transistor liquid crystal display (TFT-LCD) panels used in such items as televisions and cell phones. The complaints alleged that the defendants conspired to fix the prices of the panels in violation of state antitrust laws, causing state agencies and consumers to pay inflated prices.

The defendants removed the actions to federal court. Washington and California moved to remand, contending that removal under CAFA was improper. The district court granted the motions to remand.

The doctrine of *parens patriae* permits a sovereign to bring suit on behalf of its citizens when the sovereign alleges injury to a sufficiently substantial portion of its population and expresses an interest apart from the interests of private parties. The district court correctly held that the *parens patriae* lawsuits against the defendants were not class actions within the plain meaning of CAFA.

Lawsuits lack defining attributes of class actions. The Ninth Circuit reasoned that neither lawsuit was filed under Rule 23 of the Federal Rules of Civil Procedure or a similar state statute that authorizes an action as a class action. The attorneys general did not have to demonstrate standing or obtain class certification in order to recover on behalf of their citizens.

The Ninth Circuit rejected the defendants' argument that the lawsuits constituted class actions because they were representative actions with sufficient similarity to a Rule 23 class action. *Parens patriae* lawsuits lack the requirement of showing numerosity, commonality, typicality or adequacy of representation; those requirements were necessary to maintain a class action.

The Ninth Circuit determined that the district court lacked jurisdiction over the lawsuits and properly remanded them. The representative lawsuits were not class actions or sufficiently similar to class actions.

Judge: Sidney R. Thomas

Counsel for plaintiffs: Kamala Harris, Kathleen E. Foote, Ester H. La, Adam Miller, Atty Gen.'s Office, 415-703-5500, San Francisco; Robert M. McKenna, Jonathan Mark, Brady R. Johnson, Atty Gen.'s Office, 206-464-7744, Seattle.

Counsel for defendants: John M. Grenfell, Jacob R. Sorenson, Pillsbury Winthrop Shaw Pittman L.L.P., 415-983-1000, San Francisco; Christopher B. Hockett, Neal A. Potischman, Davis Polk & Wardwell L.L.P., 650-752-2000, Menlo Park, Cal.; Melvin R. Goldman, Stephen P. Freccero, Derek F. Foran, Morrison & Foerster L.L.P., 415-268-7000, San Francisco; Kent M. Roger, Herman J. Hoying, Morgan, Lewis & Bockius L.L.P., 415-442-1000, San Francisco; Simon J. Frankel, Jeffrey M. Davidson, Covington & Burling L.L.P., 415-591-6000, San Francisco; Bijal Vakil; Christopher M. Curran, Kristen J. McAhren; John H. Chung, White & Case L.L.P., 202-626-3600, Washington.

ENVIRONMENT

\$830,000 In unused settlement funds cannot be distributed to charities

Klier v. Elf Atochem N. Am. Inc., No. 10-20305 (5th Cir. Sept. 26, 2011)

The Fifth U.S. Circuit Court of Appeals held that a district court abused its discretion by ordering a *cy pres* distribution of unused settlement funds to charitable organizations in contravention of the terms of a settlement agreement.

In 1992, Lillian Hayden and five others initiated a class action lawsuit seeking compensation for exposure to arsenic and other toxic chemicals allegedly emitted from a plant owned and operated by Elf Atochem North America Inc. The case was certified as a class action.

Subclass A included all persons who had contracted any form of cancer, suffered certain birth defects or had a pregnancy that ended in stillbirth. Subclass B members had no physical injuries; they instead alleged nuisance and exposure. Subclass C included class members who sustained property damage.

The parties agreed to a settlement of \$41.4 million. Part of the monies allocated to Subclass B funded a medical monitoring program. At the close of the medical monitoring program, \$830,000 remained in the settlement fund. The district court ordered that the unused funds be distributed to four charities pursuant to the *cy pres* doctrine.

Ralph Klier was a member of Subclass A who suffered from leukemia. The treatments for leukemia weakened Klier's heart, resulting in a heart transplant. He received \$6,500 in settlement proceeds. Klier appealed the district court's order arguing that the unused funds should be distributed pro rata to Subclass A members as they were most seriously affected by the plant's emissions.

Settlement agreement requires distribution to class members. The parties agreed that distribution of the unused funds to Subclass B members was not economically feasible. Paragraph 28 of the settlement agreement authorized the district court to act for the benefit of the settlement class as a whole if unused monies in any subclass fund could not be distributed to all claimants in that subclass.

The Fifth Circuit concluded that the express terms of the settlement agreement provided no support for the district court's decision. The settlement agreement required the district court to allocate unused medical monitoring funds in a manner that was feasible and equitable. Giving away settlement funds to third parties did not directly benefit the class.

Judge: Patrick E. Higginbotham

Counsel for Klier: Brian Wolfman, Georgetown Univ. Law Ctr., 202-661-6582, Washington; Allen Mark Stewart, Allen Stewart P.C., 214-965-8700, Dallas.

Counsel for Elf Atochem: Lewis Cooper Sutherland, Knox D. Nunnally, Vinson & Elkins L.L.P., 713-758-2222, Houston; Roger M. Milgrim,

Paul Hastings L.L.P., 212-318-6000, New York; Kevin T. Van Wart, Kirkland & Ellis L.L.P., 312-862-2130, Chicago.

FLSA

Time Warner not employer of cable installers for FLSA purposes

Jean-Louis v. Metro. Cable Commc'ns Inc., No. 09-6831 (S.D.N.Y. Sept. 30, 2011)

The U.S. District Court for the Southern District of New York ruled that Time Warner met its burden of showing as a matter of law that it did not jointly employ the technicians of its contractor and therefore was not liable for alleged Fair Labor Standards Act (FLSA) violations. Time Warner did not hire and fire technicians, control work conditions or determine rate of pay.

Metropolitan Cable Communications Inc. (Metro) contracted with Time Warner Cable of New York City to provide technicians to perform cable installation services for Time Warner subscribers. Seven Metro technicians brought a FLSA action against Metro and Time Warner alleging that the companies failed to pay overtime wages. Time Warner moved for summary on the ground that it was not the plaintiffs' employer.

The district court determined that Time Warner lacked formal control of Metro technicians. Only Metro had the power to hire technicians. Although Time Warner had the power to "de-authorize" any Metro technician from performing installations on its behalf, there was no evidence that Time Warner ever requested that Metro fire a technician.

The plaintiffs cited no evidence demonstrating that Time Warner controlled how technicians did their job. Metro organized work orders into routes and assigned technicians to the routes. Time Warner did not evaluate technicians' performance and had no involvement in Metro's discipline of technicians.

The district court observed that Time Warner did not control the rate and method of payment of wages to technicians. Time Warner was not a party to the collective bargaining agreement between Metro and the technicians' union that specified wages. No plaintiff ever received any payment from Time Warner. It was undisputed that technicians' paychecks contained a Metro logo and were issued by Metro.

The undisputed facts demonstrated that Time Warner did not exercise functional control over Metro technicians. Metro, not Time Warner, provided technicians with the equipment necessary to perform cable installation.

Metro technicians were not fungible. There was no evidence that the technicians would continue installing Time Warner cable if Time Warner ended its relationship with Metro.

The district court granted Time Warner's motion for summary judgment. The only factor that weighed in favor of a finding that Time Warner was a joint employer was that Metro technicians only installed cable for Time Warner. That fact alone was insufficient to preclude summary judgment.

Judge: Richard J. Holwell

INSURANCE

Paralyzed veteran sues government to maintain coverage for skilled nursing care

Flores v. United States, No. 11-12119 (E.D. Mich. Oct. 11, 2011)

The U.S. District Court for the Eastern District of Michigan, denying a motion to dismiss a claim alleging the unlawful denial of health care coverage, concluded that the allegations in the plaintiff's complaint showed a concrete injury so as to confer standing.

Joe Flores suffered a stroke in 2003 that left him paralyzed and unable to move any part of his body except for his eyes and eyelids. Due to his condition, Flores required the use of a tracheotomy tube, an oxygen concentrator running through his tracheotomy tube, a feeding tube and a catheter at all times.

TRICARE Management Activity was a managed healthcare program for members of the armed forces, retirees and their dependents. Beginning in 2004, TRICARE paid for Flores' skilled nursing care (SNC) at Crestmont Healthcare Center at a cost of approximately \$7,000 per month.

In 2009, TRICARE denied Crestmont's claim for reimbursement for SNC on the ground that Flores' care was custodial. TRICARE defined custodial care as medical treatment or services that could be rendered safely by someone who was not medically skilled or was designed to help a patient with daily activities. The claims processor for TRICARE later informed Flores that his liability for care would actually begin on Feb. 10, 2010.

Flores filed an administrative appeal. The National Quality Monitoring Contractor declined to consider the appeal, finding that there was no amount in dispute because Flores was not responsible for paying anything prior to Feb. 10, 2010.

Flores brought a class action against the United States, TRICARE, and the Department of Defense and its Secretary. The complaint requested relief under the Administrative Procedures Act.

The defendants moved to dismiss arguing that Flores lacked standing. In the government's view, there was no adverse agency action because Flores was not responsible for services provided before February 10 and had not presented claims for nursing care services after February 10.

The district court held that Flores satisfied the injury-in-fact requirement. Flores asserted that TRICARE's decision meant that he was financially responsible for nursing care from Feb. 10, 2010 onward. The district court noted that the record clearly showed TRICARE's belief that Flores' care was custodial and thus not covered.

The district court determined that Flores' lawsuit could proceed. TRICARE's rejection of Crestmont's claim for reimbursement was in effect a de facto rejection—or agency action—of any claim by Flores for skilled nursing care.

Judge: Avern Cohn

LABOR LAW

Motion to compel arbitration of employee's action to recover statutory penalties denied

Urbino v. Orkin Servs. of Cal. Inc., No. 11-6456 (C.D. Cal. Oct. 5, 2011)

The U.S. District Court for the Central District of California denied a motion to remand an action brought under California's Labor Code Private Attorneys General's Act of 2004 (PAGA), finding that the amount in controversy more likely than not exceeded the jurisdictional minimum. The court denied the defendant's motion to compel arbitration on the ground that the arbitration agreement was unenforceable.

Jose Urbino worked for Orkin Services of California Inc. as an hourly employee. At the time he was hired, Urbino signed an arbitration agreement. The agreement precluded class actions, private attorney general actions or similar representative actions.

Urbino sued Orkin on behalf of himself and other current and former employees under PAGA. A PAGA action is a law enforcement action brought on behalf of the state that is not required to meet the requirements for a class action.

The complaint alleged that Orkin deprived hourly employees of meal periods, overtime wages and accurate itemized wage statements. Urbino sought statutory penalties for Orkin's purported violations of the California Labor Code.

Orkin removed the case to federal court. Thereafter, Orkin filed a motion to compel arbitration. Urbino moved to remand. The parties disputed whether the amount in controversy exceeded \$75,000.

Orkin's evidence indicated that Orkin had 811 hourly employees in California during the relevant time period. The statutory penalties for the approximately 17,182 paychecks issued to the 811 employees totaled \$9,004,050. Of that amount, 75% would be allocated to the California Labor and Workforce Development Agency.

Urbino argued that his PAGA action was not being brought as a class action so aggrieved employees' claims could not be aggregated to meet the jurisdictional minimum. The district court found that the "common and undivided" exception to the anti-aggregation rule applied. The primary beneficiary of a PAGA action is the general public, not the private individuals involved. Accordingly, the plaintiffs in a PAGA action do not have separate and distinct claims.

The district court ruled that denial of the motion to compel arbitration was warranted. The PAGA waiver undermined the fundamental purpose of a PAGA action—to protect the public and penalize the employer for illegal conduct.

The district court concluded that Orkin met its burden of establishing diversity jurisdiction and denied Urbino's motion to remand. Orkin's effort to compel arbitration, however, was unsuccessful because the PAGA waiver was unconscionable.

Judge: Cormac J. Carney

Counsel for Urbino: Amber S. Healy, Kimberly Anne Westmoreland, Peter M. Hart, 310-478-5789, Los Angeles; Kenneth H. Yoon, Kenneth H. Yoon Law Offices, 213-612-0988, Los Angeles.

Counsel for Orkin: Christopher C. Hoffman, James C. Fessenden, Fisher & Phillips L.L.P., 858-597-9600, San Diego; John E. Lattin IV, Fisher & Phillips L.L.P., 949-798-2156, Irvine, Cal.

Dismissals

ANTITRUST

Claims concerning alleged anticompetitive conduct occurring outside United States dismissed

Minn-Chem Inc. v. Agrium Inc., No. 10-1712 (7th Cir. Sept. 23, 2011)

The Seventh U.S. Circuit Court of Appeals vacated the denial of a motion to dismiss an antitrust class action against foreign potash producers. The allegations of the complaint failed to raise a plausible inference that the defendants' alleged overseas anticompetitive conduct had a direct and substantial effect on the United States market.

Direct and indirect purchasers of potash products brought antitrust class actions against Canadian, Russian and Belarusian producers of potash, a mineral used in agricultural fertilizer. The actions were consolidated in multi-district litigation.

The complaint alleged that potash prices in the United States rose by more than 600% from 2003 to 2008. The surge in prices was allegedly the result of the defendants' agreement to restrict supply and increase prices in the markets of Brazil, India and China.

The defendants moved to dismiss arguing that the district court lacked jurisdiction under the Foreign Trade An-

titrust Improvements Act (FTAIA). The district court denied the motion.

The FTAIA limits the extraterritorial reach of the Sherman Act by making the Act generally inapplicable to foreign anticompetitive conduct. Foreign anticompetitive conduct that “involves import commerce” or that has a “direct, substantial and reasonably foreseeable” effect on domestic or import commerce brings the conduct back within the reach of the Sherman Act.

Plaintiffs fail to state Sherman Act claim. The Seventh Circuit found that the district court incorrectly conflated the “import commerce” exception and the “direct effects” exception. Under the district court’s reasoning, a foreign company that does any import business in the United States would violate the Sherman Act whenever it conspired to fix prices overseas regardless of the impact on the American market.

The general allegation that prices of potash were increasing around the world was insufficient to avoid dismissal. The complaint contained no specific allegations of how price increases in China, Brazil or India “directly” and “substantially” affected prices in the United States for applicability of the direct effects exception.

The Seventh Circuit instructed the district court to dismiss the plaintiffs’ Sherman Act claim. The conduct alleged amounted to nothing more than a nonactionable “ripple effect” on the U.S. domestic market.

Judge: Diane S. Sykes

Counsel for plaintiffs: **J. Timothy Eaton**, Shesky & Froelich, 312-527-4000, Chicago; **Steven A. Hart**, Segal McCambridge Singer & Mahoney, 312-645-7903, Chicago; **Bruce L. Simon**, Pearson Simon Warsaw & Penny L.L.P., 415-433-9000, San Francisco; **Beverly Tse Mirza**, McInerney & Squire, 212-371-6600, New York.

Counsel for defendants: **Richard Parker**, O’Melveny & Myers L.L.P., 202-383-5380, Washington; **Steven M. Shapiro**, Mayer Brown L.L.P., 312-701-7327, Chicago; **Brian J. Murray**, Jones Day; **Duane M. Kelley**, Winston & Strawn L.L.P., 312-558-5764, Chicago; **Jeffrey L. Kessler**, Dewey & Leboeuf, 212-259-8050, New York; **Robert A. Milne**, White & Case, 212-819-8924, New York.

CONSUMER PROTECTION

Homeowner’s lawsuit alleging defect in windows dismissed for lack of standing

Hosler v. Jeld-Wen Inc., No. 10-3966 (E.D. Pa. Sept. 30, 2011)

The U.S. District Court for the Eastern District of Pennsylvania concluded that a consumer’s complaint did not sufficiently demonstrate that he suffered an injury-in-fact from an alleged defect in the windows installed in his home.

Jeld-Wen Inc. manufactured and sold low-emittance (Low-E) windows that were specifically designed to re-

duce radiant heat flow. David Hosler purchased a home in which Low-E windows were installed.

Hosler claimed that the windows had a concave shape, resulting in reflective distortion. Such a distortion amplifies reflective light in a point, causing excessive radiant capable of melting the siding of neighboring structures. Hosler contended that in January 2010 he noticed that the siding on a neighbor’s home appeared to be melting.

Hosler sued Jeld-Wen alleging that the corporation had knowledge of defect in its windows and concealed it from homeowners. The complaint asserted claims for breach of express and implied warranties, fraud and unjust enrichment.

Complaint contains no claim of concrete harm. The district court found that the allegations in the complaint were not sufficient to confer standing. Hosler did not allege that the windows in his home were not operating or performing properly. He also did not allege that he replaced his neighbors’ windows at his own expense or that the neighbors demanded that he pay for their siding.

The district court granted Jeld-Wen’s motion to dismiss. However, the court granted Hosler leave to file an amended complaint to allege an injury that was more than hypothetical.

Judge: Lawrence F. Stengel

Counsel for plaintiff: **Gary E. Mason**, Mason L.L.P., 202-429-2290, Washington.

Counsel for Jeld-Wen: **Karen A. Crawford**, Nelson Mullins Riley & Scarborough, 202-712-2800, Washington; **Jennifer L. Snodgrass, Richard N. Sieving**, Sieving Law Firm A.P.C., 916-444-3366, Sacramento, Cal.; **Stephen G. Morrison, Susan M. Glenn**, Nelson Mullins Riley & Scarborough L.L.P., 803-799-2000, Columbia, S.C.

ANTITRUST

Antitrust lawsuit by university students challenging mandatory dining fee dismissed

Vandenberg v. Aramark Educ. Servs. Inc., No. 1100557 (Ala. Sept. 30, 2011)

The Alabama Supreme Court affirmed the dismissal of claims brought by current and former students of state universities challenging the legality of the universities’ “dining-dollars” programs. The boards of trustees of the universities were entitled to state immunity while university administrators and food service vendors were entitled to state action immunity on antitrust claims as they acted pursuant to a clearly articulated state policy.

The University of Alabama (UA), Auburn University and the University of Alabama at Birmingham (UAB) each required their undergraduate students to pay a dining fee every semester. The fee was credited back to the students in the form of “dining dollars” that could be spent only in on-campus dining facilities that were controlled by the universities’ respective food service vendors.

A group of current and former students of UA, Auburn and UAB sued each university's board of trustees, administrators and assigned food service vendor. The students alleged that the universities' exclusive food service contracts violated § 6-5-60 of the Alabama Code because the contracts created a monopoly. Also, the students claimed that the universities and food service vendors converted their funds and transformed them from lawful currency into dining dollars.

The trial court granted the defendants' motions to dismiss. The supreme court ruled that the trial court properly dismissed claims against each university's board of trustees. Under Ala. Const. 1901, Art. I § 14 the state is immune from suit. The immunity afforded by § 14 extends to actions against officers, trustees and employees of state universities in their official capacities. The doctrine of state action immunity holds that states and their instrumentalities are immune from antitrust liability if their alleged anticompetitive behavior was in accordance with a clearly articulated and expressed policy of the state. The university administrators and food service vendor had state action immunity.

The supreme court reasoned that the Alabama Constitution gave the boards of trustees broad authority to manage university operations. It was foreseeable that the boards of trustees would require some form of meal plan for students and contract exclusively with an appropriate vendor. The supreme court noted that the universities actively supervised the challenged dining dollars programs and the food service vendors performed pursuant to lawful contracts.

The students' conversion claims failed. The students clearly consented to pay the mandatory dining fee when choosing to attend their respective university.

The supreme court concluded that the defendants were immune from antitrust liability. The students' dissatisfaction with the mandatory dining fee was not equivalent to a lack of consent and, therefore, could not support a conversion claim.

Judge: Lyn Stuart

CONSUMER PROTECTION

Claims based on statute creating no private right of action dismissed

Schlessinger v. Valspar Corp., No. 10-2694 (E.D.N.Y. Sept. 23, 2011)

The U.S. District Court for the Eastern District of New York dismissed an action challenging the defendant's alleged premature termination of service contracts for furniture. The plaintiffs' claims relied entirely on a statute that created no private right of action and therefore could not be maintained.

Lori Schlessinger and Brenda Pianko each bought furniture from Fortunoff Department Store. Schlessinger and Pianko also purchased a protection plan for their furniture

from Valspar Corp. A "store closure provision" in Valspar's maintenance agreements obligated it to refund the price of the protection plan if the store where a customer purchased his furniture closed, changed ownership or stopped selling new furniture.

Fortunoff later went bankrupt. By the time Pianko submitted a claim to Valspar, Fortunoff had gone out of business and Valspar denied the claim. Schlessinger and Pianko commenced a class action against Valspar.

The complaint alleged that the store closure provision was invalid under New York's General Business Law (GBL) § 395-a. The complaint also alleged that the denial of claims based on the store closure provision breached the maintenance agreements. Finally, the complaint alleged that Valspar engaged in deceptive practices in violation of GBL § 349 by selling maintenance agreements that contained the purportedly improper store closure provision.

Plaintiffs cannot circumvent operation of statute. The district court determined that dismissal of the complaint was justified. There was no private right of action under GBL § 395-a. The statute expressly gave exclusive enforcement authority to the state's attorney general. The creation of an implied private right of action would be inconsistent with the stated enforcement scheme.

The plaintiffs' breach of contract claim was based entirely on the allegation that the store closure provision was unenforceable under § 395-a. However, the plaintiffs were without the right to bring an action for enforcement of § 395-a.

Section 349 prohibits deceptive acts or practices declared to be unlawful. Under Second Circuit precedent, § 349 claims premised on the violation of a state statute with no private right of action are not viable.

The district court granted Valspar's motion to dismiss. The plaintiffs failed to state a cause of action that was distinct and independent of § 395-a.

Judge: Denis R. Hurley

Counsel for plaintiffs: Dan Edelman, Cathleen M. Combs, Edelman Combs Lattner & Goodwin L.L.C., 312-739-4200, Chicago.

Counsel for Valspar: Paula J. Morency, David Elliot Jacoby, Jeannice D. Williams, Schiff Hardin L.L.P., 312-258-5500, Chicago.

ANTITRUST

Trucking companies allege manufacturers' conspiracy to monopolize transmissions market

Wallach v. Eaton Corp., No. 10-0260 (D. Del. Sept. 30, 2011)

The U.S. District Court for the District of Delaware held that trucking companies adequately alleged that they paid higher prices for transmissions as a result of the defendants' agreement to create a monopoly in violation of the Sherman Act. The complaint failed to state a claim under

the Clayton Act because the Act does not impose liability on purchasers for exclusive dealing contracts.

Prior to filing for bankruptcy, Performance Transportation Services Inc. (PTS) transported new vehicles from manufacturing facilities to retail dealerships using Class 8 trucks. Eaton Corp. manufactured transmissions for Class 8 trucks.

Tauro Brothers Trucking Co. and Mark Wallach, the trustee for the bankruptcy estate of PTS, commenced a class action lawsuit against Eaton and various companies that manufactured and sold Class 8 trucks (collectively, the original equipment manufacturers or OEMs).

The plaintiffs alleged that Eaton held a near monopoly on the market for Class 8 transmissions until ZF Meritor entered the market. According to the plaintiffs, Eaton and the OEMs conspired to put ZF Meritor out of business in order to expand Eaton's monopoly and share the resulting profits. The alleged conspiracy was achieved by the defendants' act of entering into long term agreements (LTAs).

Each LTA provided that the OEMs would receive lucrative rebates from Eaton if they used a certain percentage of Eaton transmissions each year. Pursuant to other provisions in the LTAs, OEMs agreed to overcharge for ZF Meritor transmissions and refuse to provide warranties on trucks with ZF Meritor transmissions. The plaintiffs claimed that the LTAs were de facto exclusive dealing contracts.

The district court found that the complaint sufficiently pled an antitrust injury to sustain a Sherman Act claim. The plaintiffs alleged that the drastic decline in ZF Meritor's market share as a result of the conspiracy decreased competition and increased prices for transmissions, and in turn, Class 8 trucks.

The plaintiffs plausibly pled the existence of an anticompetitive agreement. In addition to the defendants' parallel conduct in negotiating similar LTAs, the plaintiffs alleged that the OEMs acted contrary to their self-interest. Although an OEM could gain a competitive advantage over others by doing business with ZF Meritor, that did not occur. A ZF Meritor testified that each OEM rejected competitive counter-offers for ZF Meritor's business.

The district court concluded that dismissal of the Clayton Act claim against the OEMs was warranted. The Act imposes liability on sellers of goods. The plaintiffs cited no authority holding that purchasers of goods acting under exclusive dealing contracts can be liable under the Clayton Act.

The district court granted the OEMs' motion to dismiss the Clayton Act claims against them. The Sherman Act claim could proceed.

Judge: Sue L. Robinson

Settlements

MERGERS & ACQUISITIONS

Objectors challenge settlement of dispute concerning Wachovia and Wells Fargo merger

Ehrenhaus v. Baker, No. COA10-1034 (N.C. App. Oct. 4, 2011)

The North Carolina Court of Appeals affirmed in part and reversed in part the trial court's order approving the settlement of claims arising from Wachovia Corp.'s merger with Wells Fargo & Co. The likelihood of success at trial supported approval of the settlement agreement but the record did not permit a review of the attorney's fees awarded.

In 2008, the mortgage loan liabilities in Wachovia's loan portfolio helped precipitate a financial decline for Wachovia. The Federal Deposit Insurance Corp. informed Wachovia's corporate officers and board of directors that Wachovia needed to merge with a solvent financial institution by a certain deadline or be placed into receivership. The board agreed to a merger with Wells Fargo. Irving Ehrenhaus sued Wachovia and Wells Fargo on behalf of a class of shareholders of Wachovia common stock challenging the merger.

The parties reached a settlement in which Wachovia agreed to make additional disclosures regarding the merger. and Wells Fargo agreed to absorb the cost of providing notice to the class of the settlement. The trial court approved the settlement agreement and awarded \$932,621 in attorney's fees to class counsel. Norwood Robinson and John Loughridge appealed the trial court's order.

The court of appeals determined that the trial court did not err in finding that the likelihood of success strongly weighed in favor of final approval. The class had little to no chance of prevailing on a breach of fiduciary duty claim. Wachovia's issuance of preferred stock in exchange for shares of Wells Fargo common stock was not unlawful since the type of "share exchange" between the corporations did not require shareholder approval.

The court of appeals noted that the class would have to overcome the strong presumption under the "business judgment rule" that the board acted with due care in approving the merger. To defeat the presumption, the class would have to demonstrate that the board's conduct could not be attributed to any rational business purpose. That likely was an insurmountable task given the time demands and market conditions existing at the time of the merger.

The lack of complete findings of fact and conclusions of law in the trial court's order on the issue of attorney's fees prevented adequate review of the fees awarded. The trial court's order made no allowance for an award of fees to North

Carolina local counsel who participated in the results obtained. Also, the attorneys failed to submit records showing the number of hours expended and the hourly rates charged.

The court of appeals concluded that the trial court did not err in approving the settlement agreement as fair, adequate and reasonable. However, the case was remanded for the trial court to examine additional evidence and explain how it calculated the fees to be awarded.

Judge: Robert N. Hunter Jr.

Counsel for plaintiff: Gregory Jones, Greg Jones & Assocs. P.A., 800-693-6903, Wilmington, N.C.; Robert M. Kornreich, Chet Waldman, Carl L. Stine, Wolf Popper L.L.P., 212-759-4600, New York.

Counsel for defendants: Robert W. Fuller, Mark W. Merritt, Louis A. Bledsoe III, Adam K. Doerr, Robinson Bradshaw & Hinson P.A., 704-377-2536, Charlotte, N.C.

FLSA

Preliminary approval given to \$250,000 settlement of cable technicians' wage claims

Butler v. Am. Cable & Tel. L.L.C., No. 09-5336 (N.D. Ill. Oct. 6, 2011)

The U.S. District Court for the Northern District of Illinois granted a renewed motion for preliminary approval of a settlement agreement and conditional certification. The proposed classes raised common questions as to the legality of the employer's compensation policies and practices and the settlement agreement was within the range of approval.

Quinn Butler, Christopher Skillin and Jason Barth filed a class action lawsuit against American Cable & Telephone L.L.C. (ACT) alleging violation of the Fair Labor Standards Act (FLSA) and Illinois wage laws among other claims. The plaintiffs contended that prior to January 2009, ACT improperly classified cable technicians as independent contractors and failed to pay them overtime wages.

In January 2009, ACT reclassified cable technicians as employees. The plaintiffs claimed that their job duties did not change after the reclassification and ACT continued to deny overtime wages.

The parties agreed to a settlement of \$250,000. The district court denied the plaintiffs' initial motion for preliminary approval of the settlement agreement. After continued negotiations, the parties renewed their motion.

The district court ruled that conditional certification of a FLSA collective action for settlement purposes was proper. The independent contractor class and the employee class combined included 293 individuals. Joinder of all class members would be impracticable.

The case presented common questions of law and fact including whether ACT improperly classified cable technicians prior to January 2009 and whether ACT failed to pay time and half for all hours worked in excess of 40 per week.

The plaintiffs' claims and those of class members arose out of ACT's same course of conduct.

A class action was superior to individual litigation. The cost of litigation on an individual basis would likely outweigh any recovery of damages. Moreover, litigating each claim separately was an inefficient use of resources.

The proposed settlement agreement was within the range of approval. The agreement was not the product of collusion. The parties had sufficient discovery to evaluate the merits of the case.

ACT had vigorously contested liability and reserved its right to contest class certification if the settlement agreement was not approved. The district court observed that the parties would incur great expense in conducting further discovery, briefing summary judgment motions, having a trial and pursuing appeals absent preliminary approval.

The district court granted conditional certification of the proposed classes and directed that notice of the proposed settlement be distributed.

Judge: Michael T. Mason

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In The Law Journals

Opting out of punitive damages class actions

Richard Frankel, *The Disappearing Opt-Out Right in Punitive-Damages Class Actions*, 2011 Wis. L. Rev. 563 (2011)

Sometimes, a defendant's single action can affect many different plaintiffs. Each plaintiff will want to receive compensation for his damages, and punitive damages may be allowed for each plaintiff. However, the defendants may run out of assets before all of the plaintiffs are compensated if the individual claims are not aggregated, and substantive due process problems may arise, too. Plaintiffs in such aggregated lawsuits are seeing their opt-out options dwindling, though. According to Richard Frankel, plaintiffs should be given robust opportunities to opt out of the aggregate lawsuits involving punitive damages.

The right to opt out of a class action lawsuit can be found in Rule 23 of the Federal Rules of Civil Procedure. The right applies to all class action lawsuits certified under Rule 23(b)(3). However, Rule 23(b)(1) provides that members of the certified class cannot opt out if a limited fund is involved. The opt-out right protects the due process constitutional rights of the plaintiffs. However, some critics ar-

gue that allowing plaintiffs to opt out of the class action may reduce the effectiveness of the class action as a means to achieve judicial efficiency.

In addition to the due process rights of the plaintiffs, the defendants have due process rights too, and these due process rights extend to limits on the punishment that can be inflicted upon the defendant. For example, if a defendant's actions affect multiple individuals, then the punitive damages that each individual could seek from the defendant could overshadow the harm caused by the defendant, and justice would not be served by such an action. As a result, courts began certifying class actions where there was no opt-out clause, especially for cases where huge numbers of individuals were affected.

Over the years, the U.S. Supreme Court has moved toward defining what would be an acceptable amount of punitive damages. In particular, the Court has stated that punitive damages collectible by a plaintiff should only be

for the harm that was done to that plaintiff and not the harm done to others. The Court has also suggested that a single-digit ratio is most appropriate when determining punitive damages. Therefore, four-to-one would be appropriate, but 40-to-one would not be appropriate.

Class actions lawsuits typically end in settlements. Plaintiffs who are not able to opt out and pursue individualized punitive damages against the defendant may end up getting less than they deserve. The Court's limitations on punitive damages have led to more emphasis on non-opt-out limited-punishment punitive damages class action lawsuits. However, requiring mandatory class participation for punitive damages misinterprets the Court's reasoning behind the limitations on punitive damages. The Court had emphasized the individual nature of punitive damages and mandatory classes take away much of that individual autonomy.

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