

CLASS ACTION LAW MONITOR

Volume 9
Number 17
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News & Filings page 258

- Facebook sued in connection with information sharing program
- Apple and AT&T sued over iPhone
- Class action filed against California hospital over botched CT scans

Docket + Trak page 259

Federal Securities First Filings

In The U.S. Supreme Court page 259

- **FLSA:** Employer is not entitled to decertification of collective action filed by 1,424 employees 259

Certifications page 259

- **Insurance:** Variety in degree of damages among plaintiffs with hurricane-damaged homes does not preclude class certification 259
- **Products Liability:** Tort claims arising from alleged carbon monoxide exposure present individualized questions 260
- **Usury:** Class certification denied in counterclaim challenging student loan debt collection practices 261
- **Products Liability:** Individual questions concerning replacement of allegedly defective products render class certification inappropriate 261

Motions page 262

- **Products Liability:** \$567 Million attorneys' fee award in diet drug settlement affirmed 262
- **Consumer Protection:** Arbitration clause in Chase's cardmember agreement is enforceable 262
- **Employment Discrimination:** District court has jurisdiction over employment discrimination claims against United Airlines 263
- **Antitrust:** Commodity Exchange Act does not preempt natural gas purchasers' antitrust claims 263

- **Insurance:** Settlement in previous class action does not bind plaintiffs in new lawsuit 264
- **Privacy Rights:** Defendants' alleged disclosure of drivers' personal information actionable 264
- **Constitutional Law:** Dismissal of motorists' claims that toll policy restricted interstate travel vacated 265

Dismissals page 265

- **ADA:** Disabled plaintiffs' ADA claims against Walt Disney World dismissed 265
- **Antitrust:** Travel agencies fail to show conspiracy between airlines to cut commissions 266
- **FCRA:** Fair Credit Reporting Act preempts mortgage broker's claims against credit reporting agencies 267
- **Consumer Protection:** Third-party payors lack standing as consumers to assert consumer fraud claims 267
- **Consumer Protection:** Washington law permits Cingular Wireless to include state tax in overhead costs 268
- **FCRA:** Fair Credit Reporting Act does not require that "firm offer" have value 268
- **Consumer Protection:** Court declines to certify lawsuit challenging Rite Aid's alleged sale of expired products 269

Settlements page 269

- **Antitrust:** \$85 Million settlement of antitrust claims against Lufthansa approved 269
- **FLSA:** Settlement class of securities brokers certified in FLSA action 270

In The Law Journals page 270

- The unique challenges of certification in environmental toxic tort class actions

Cases Reported In This Issue page 272

News & Filings

Facebook sued in connection with information sharing program

Facebook Inc. is the defendant in a class action lawsuit that claims it revealed private information about users through the Beacon program.

The Beacon program allows affiliated Web sites to distribute information to Facebook about users' actions, such as renting a movie online or making a purchase online. According to the lawsuit, Facebook told users about their friends' activity on Blockbuster's Web site. Facebook had already agreed to settle a similar lawsuit in California for \$9.5 million. This newest lawsuit alleges that users are entitled to \$2,500 per occurrence for violations of the 1988 Video Privacy Protection Act.

Harris v. Facebook Inc., No. 09-1912 (N.D. Tex. *complaint filed Oct. 9, 2009*)

Counsel for Harris: Thomas M. Corea, Jeremy R. Wilson, The Corea Firm P.L.L.C., 214-953-3900, Dallas.

Apple and AT&T sued over iPhone

Apple Inc. and AT&T Mobility L.L.C. are defendants in a lawsuit that claims the latest version of the iPhone does not work as advertised.

According to the lawsuit, both Apple and AT&T marketed the 3G-S iPhones as having multimedia messaging service (MMS) capabilities. MMS allows users to send and receive pictures and video on their phones.

The lawsuit claims that customers who purchased the new iPhones soon began having trouble with MMS. Apple and AT&T allegedly falsely advertised that such problems would not exist. The lawsuit was filed in federal district court in Michigan and seeks to represent an estimated class of at least 100,000 customers in Michigan who purchased iPhones.

Baxter v. Apple Inc., No. 09-13938 (E.D. Mich. *complaint filed Oct. 6, 2009*)

Counsel for Baxter: Joel J. Schwartz, Rosenbaum Schwartz Rogers Glass P.C., 314-862-4332, St. Louis.

Class action filed against California hospital over botched CT scans

A class action lawsuit alleges that Cedars Sinai Medical Center performed CT scans that gave patients eight times the approved dosage of radiation. The lawsuit also names GE Healthcare Inc. and GE Healthcare Technologies.

According to the lawsuit filed in Los Angeles Superior Court, Cedars Sinai overdosed as many as 206 patients with botched scans. The machines used were manufactured by GE.

The lawsuit seeks damages for medical malpractice, products liability and negligence. The lawsuit was filed on behalf of all individuals who received brain perfusion scans at Cedars Sinai from February 2008 through August 2009.

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| Docket★Trak™ Federal Securities First Filings | | | | | |
|--|----------------------|--|--|---|---|
| Company (defendants) | Industry | Plaintiff | Citation | Plaintiff Firm | Contact |
| Advanta Corp. | Consumer Fin. Servs. | Steamfitters Local 449 Pension Fund | Steamfitters Local 449 Pension Fund v. Advanta Corp. , No. 09-CV-4730 (E.D. Pa. filed 10/14/09) | Bernard M. Gross P.C., Philadelphia | Deborah R. Gross, 215-561-3600 |
| EnergySolutions Inc.; Credit Suisse Secs. (USA) L.L.C.; J.P. Morgan Secs. Inc.; Morgan Stanley & Co. Inc.; ENV Holdings L.L.C. | Bus. Servs. | City of Roseville Employees' Ret. Sys. | City of Roseville Employees' Ret. Sys. v. EnergySolutions Inc. , No. 09-CV-8633 (S.D.N.Y. filed 10/9/09) | Coughlin Stoia Geller, Melville, N.Y. | David Avi Rosenfeld, 631-367-7100 |
| Men's Wearhouse Inc. | Retail | Material Yard Workers Local 1175 Benefit Funds | Material Yard Workers Local 1175 Benefit Funds v. Men's Wearhouse Inc. , No. 09-CV-3265 (S.D. Tex. filed 10/8/09) | Schwartz Junell, Houston | Roger B. Greenberg, 713-752-0017 |
| ProShares Trust; ProShare Advisors L.L.C.; SEI Invs. Distribution Co. | Misc. Fin. Servs. | Worden | Worden v. ProShares Trust , No. 09-CV-8662 (S.D.N.Y. filed 10/12/09) | Bernstein Liebhard L.L.P., New York | Christian Patrick Siebott, 212-779-1414 |
| Regions Fin. Corp.; Merrill Lynch Pierce Fenner & Smith Inc.; Ernst & Young L.L.P. | Reg'l Banks | McClellan | McClellan v. Regions Fin. Corp. , No. 09-CV-1976 (N.D. Ala. filed 10/2/09) | Whatley Drake & Kallas L.L.C., Birmingham, Ala. | Joe R. Whatley Jr., 205-328-9576 |
| RHI Entm't Inc. | Motion Pictures | Kleiman | Kleiman v. RHI Entm't Inc. , No. 09-CV-8634 (S.D.N.Y. filed 10/9/09) | Coughlin Stoia Geller, Melville, N.Y. | Samuel Howard Rudman, 631-367-7100 |
| SpongeTech Delivery Sys. Inc.; RM Enters. Int'l Inc. | N/A | Le | Le v. SpongeTech Delivery Sys. Inc. , No. 09-CV-8616 (S.D.N.Y. filed 10/9/09) | Rosen Law Firm P.A., New York | Laurence Matthew Rosen, 212-686-1060 |

Source: Securities Class Action Reporter research

In The Supreme Court

FLSA

Employer is not entitled to decertification of collective action filed by 1,424 employees

Family Dollar Stores Inc. v. Morgan, 551 F.3d 1233 (11th Cir. 2008), *cert. denied*, No. 08-1287 (U.S. Oct. 5, 2009)

The U.S. Supreme Court refused to review an Eleventh U.S. Circuit Court of Appeals' decision that a district court did not abuse its discretion in denying an employer's motion for decertification of a collective action by 1,424 employees who alleged that their employer willfully violated the Fair Labor Standards Act (FLSA) by refusing to pay them overtime compensation.

The Eleventh Circuit noted that § 216(b) of the FLSA authorizes collective actions against employers accused of violating the statute "by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." The statute does not define "similarly situated."

The Eleventh Circuit found, however, that ample evidence supported the district court's findings that the employees were similarly situated, given its findings that the employees, who were universally classified as store managers with the same job duties, spent only a small fraction of their time on managerial duties and a large amount of time on nonmanagerial duties. Moreover, the employees had restrictions on their power to manage stores relative to district managers' sweeping managerial discretion, were closely supervised by district managers, were accorded little manage-

rial discretion by employer's corporate policies, and shared some of their managerial duties with hourly employees.

The Seventh Circuit found that scant evidence supported the employer's argument that the duties of store managers varied significantly depending on store size, sales volume, region and district. Moreover, the bulk of the evidence demonstrated that store managers were similarly situated and that even the employer perceived no distinction among them.

Certifications

INSURANCE

Variety in degree of damages among plaintiffs with hurricane-damaged homes does not preclude class certification

Dupree v. Lafayette Ins. Co., No. 2009-CA-0321 (La. Ct. App. Oct. 14, 2009)

The Louisiana Court of Appeal, affirming a trial court's class certification order, ruled in part that individual differences in the degree of damages among plaintiffs did not preclude certification where common questions as to liability existed and predominated.

Charles Dupree and other individuals whose properties sustained wind damage as a result of Hurricane Katrina sued their insurer, Lafayette Insurance Co. The plaintiffs alleged that they made timely claims but Lafayette systematically underpaid claims through such practices as refusing to pay overhead and denying additional living expenses for displaced policyholders. The trial court granted the plaintiffs' motion for class certification.

The court of appeal determined that numerosity was satisfied. Approximately, 7,000 policyholders made claims during the relevant period. Further, common questions of fact existed concerning the alleged failure of Lafayette to pay all amounts due under its homeowners' policies.

The plaintiffs argued that all of the class members' claims were based on the allegation that Lafayette intentionally failed to adjust claims for wind damage properly. The court of appeal found that the evidence supported the trial court's conclusion that individual questions did not predominate.

A class action was the superior method of adjudication. The court of appeals reasoned that inconsistent results would likely occur if 7,000 individual lawsuits were prosecuted. A class action would promote judicial economy and ensure fairness.

The court of appeals concluded that the proposed class was sufficiently defined but one sentence of it was not appropriate. The class definition referenced the denial of claims when such was "arbitrary, capricious and without probable cause." The language took away from the objectivity of the class definition and impermissibly went to the merits.

The court of appeal affirmed certification and directed the trial court to address the inadequacy in the class definition.

Judge: Edwin A. Lombard

Counsel for plaintiffs: Robert H. Murphy, Gary J. Gambel, Donald R. Wing, Murphy Rogers Sloss & Gambel, 504-523-0400, New Orleans; Jennifer N. Willis, Samuel O. Buckley, Willis & Buckley, 504-488-6301, New Orleans.

Counsel for Lafayette: Howard B. Kaplan, Bernard Cassisa Elliott & Davis P.L.C., 504-834-2612, Metairie, La.; William J. Wegmann Jr., Orr Adams Jr., William J. Wegmann L.L.C., 504-833-3800, Metairie, La.

PRODUCTS LIABILITY

Tort claims arising from alleged carbon monoxide exposure present individualized questions

Simpson Hous. Solutions L.L.C. v. Hernandez,
No. 08-396 (Ark. Oct. 8, 2009)

The Arkansas Supreme Court affirmed the grant of class certification for one subclass and the denial of class certification for another subclass. The trial court did not abuse its discretion in finding that tort claims were inappropriate for class certification. Common issues as to whether there was carbon monoxide exposure in an apartment complex did not predominate over issues of proximate cause, comparative fault and damages.

Current and former residents of Springdale Ridge Apartments brought a class action that arose from the alleged presence of dangerous carbon monoxide levels in the apartments. The complaint alleged that there was a design defect in the HVAC units installed in individual apartments that resulted in the presence of the carbon monoxide.

The plaintiffs moved to certify their case as a class action. The trial court conditionally certified Subclass A which asserted breach of contract and fraud claims. Subclass C brought claims for outrage, strict liability, negligence and wrongful death. The trial court declined to certify Subclass C, finding that the predominance and superiority requirements were not met. The parties filed cross-appeals of the trial court's judgment.

The supreme court found that the evidence supported certification of Subclass A. Further, commonality was satisfied. Each member of the subclass alleged that his exposure to carbon monoxide was a result of the faulty design of the HVAC system.

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The predominance requirement was also met. The supreme court reasoned that common questions concerning whether the installed HVAC units were defective and whether the owner/manager of Springdale Ridge knew of and should have disclosed the defect could be resolved before reaching any individual issues.

The predominance of individualized questions precluded certification of Subclass C's claims. The tort claim of outrage was highly individualized. With respect to the other tort claims, issues of causation, comparative fault and damages of individual class members would predominate over any common issues.

The supreme court found that Subclass A and Subclass C were different in that proximate causation was an element of the tort claims asserted in Subclass C. Subclass C members could not establish liability with addressing individualized issues of the extent of carbon monoxide exposure and resulting damage.

The supreme court affirmed the trial court's class certification ruling.

Judge: Robert L. Brown

USURY

Class certification denied in counterclaim challenging student loan debt collection practices

HICA Educ. Loan Corp. v. Sullivan, No. 13-08-00736 (Tex. App. Oct. 8, 2009)

As to a plaintiff's counterclaim against the servicer of his student loans and the law firm that filed suit to collect the defaulted loans, the Texas Court of Appeal reversed the trial court's class certification order. The plaintiff failed to prove that the class was so numerous as to make joinder impracticable.

HICA Education Loan Corp. owned the promissory notes for John Sullivan's student loans. Sallie Mae Inc. was the servicing agent for HICA's loans.

In 2007, HICA sued Sullivan for default. Sullivan filed a counterclaim against Sallie Mae and the Flow Law Firm. He asserted, among others, claims of unlawful debt collection practices and usury. Sullivan moved for class certification.

The trial court granted the motion for class certification. The first certified class included persons who received form letters from Sallie Mae attempting to collect the HICA loans. The second class included those persons whom Flow Law Firm sued or sent collection letters.

The court of appeal found that there was no evidence to satisfy the numerosity requirement. HICA denied Sullivan's request to admit that there were more than 100 people in the proposed classes. At the class certification

hearing, Sullivan's counsel testified that he did not know how many individuals were in the class.

The court of appeal determined that Sullivan's unsupported representation that numerosity was met was insufficient to meet his burden under Rule 23. The court of appeal concluded that the trial court abused its discretion in granting class certification.

Judge: Nelda V. Rodriguez

PRODUCTS LIABILITY

Individual questions concerning replacement of allegedly defective products render class certification inappropriate

Evans v. Lasco Bathware Inc., No. D053731 (Cal. Ct. App. Oct. 13, 2009) *unpublished*

Affirming the denial of class certification, the California Court of Appeal ruled that the sole common issue in a products liability action did not predominate over individualized questions of damages. Further, the evidence supported a finding that the plaintiffs were inadequate class representatives because of their choice to seek only one form of recovery.

Roy Evans and Arthea LaFrades owned homes in which shower pans manufactured by Lasco Bathware Inc. were installed. Evans and LaFrades filed a products liability and negligence action against Lasco.

The complaint alleged that Lasco's shower pans were defectively designed, resulting in water leakage which caused damage to adjacent shower components.

The trial court denied the plaintiffs' motion for class certification, holding that individualized questions as to the amount of damages for removing and replacing the shower pans predominated over the common question of whether the shower pans were defective. The trial court further held that the plaintiffs could not adequately represent the putative class.

Failure to establish predominance and adequacy precludes class certification. The court of appeal found that a determination of the appropriate damages award for each class member would depend on individualized proof even without consideration of consequential damages for any adjacent components that might need repair. Lasco's evidence showed that the actual costs of replacement were not suited to estimation. Lasco's expert testified about the variety of construction materials and methods used to install shower pans and the extent of labor involved.

The court of appeal determined that the trial court acted within its discretion when it found that the plaintiffs were inadequate class representatives. The plaintiffs only sought damages for the cost of replacing the shower pans.

Any class members would forfeit their right to other recoveries such as damage to other parts of the house.

The court of appeal rejected the plaintiffs' argument that a class should have been certified as to the common issues of liability and causation. A "liability only" class would not be feasible. Liability could not be established unless each class member individually proved damage to his house caused solely by the shower pan.

The court of appeal affirmed the trial court's judgment.

Judge: Alex C. McDonald

Motions

PRODUCTS LIABILITY

\$567 Million attorneys' fee award in diet drug settlement affirmed

In re Diet Drugs Prod. Liab. Litig., No. 08-2387 (3d Cir. Oct. 8, 2009)

The Third U.S. Circuit Court of Appeals held that the district court's award of attorneys' fees to class counsel was reasonable based on such factors as the duration of the diet drug litigation and the efforts of counsel.

Users of diet drugs sued manufacturer Wyeth after studies revealed that there was a link between the ingestion of fen-phen and dexfenfluramine and valvular heart disease. The district court appointed a plaintiffs' management committee (PMC) to oversee the multi-district litigation and conduct discovery.

The PMC and attorneys in state court class actions negotiated a nationwide settlement with Wyeth. Wyeth agreed to pay \$3.75 billion into a settlement fund.

The settlement agreement provided for staged opt-out opportunities. Wyeth agreed to waive any statute of limitations defenses for those class members who later opted out of the settlement to pursue individual litigation.

The district court approved the settlement agreement. Class counsel was awarded approximately \$567 million in attorneys' fees. Three law firms and some of their clients (collectively, the objectors) appealed.

The Third Circuit rejected the objectors' argument that the fee award was improperly based on billing summaries instead of actual time and expense reports from class counsel. The procedure that the district court adopted did not violate principles of transparency.

The Third Circuit reasoned that the district court solicited submissions from all interested parties and had three public hearings. Additionally, the district court allowed objectors to conduct limited discovery on the attorneys' fee

issue. The district court's reliance on summaries in a very large case was within its discretion.

The Third Circuit found that the fee award was not based on an erroneous application of the reasonableness factors. The district court did not give undue weight to the absence of substantial objections to the settlement.

The objectors argued that it was improper for the district court to impose assessments against individuals who exercised initial opt-outs from the settlement because they did not receive a substantial benefit from the PMC's services.

The Third Circuit found that the mere availability of discovery that the PMC conducted substantially influenced Wyeth's evaluation of every plaintiff's case and its decision to settle. Moreover, the PMC obtained a number of favorable rulings from the court that applied on a litigation-wide basis.

The Third Circuit affirmed the district court's ruling.

Judge: Kent A. Jordan

CONSUMER PROTECTION

Arbitration clause in Chase's cardmember agreement is enforceable

Cicle v. Chase Bank USA, No. 08-1362 (8th Cir. Oct. 6, 2009)

Reversing the denial of Chase Bank USA's motion to compel arbitration, the Eighth U.S. Circuit Court of Appeals found that the arbitration agreement's cost-sharing terms were not unconscionable. There was no evidence that the costs and fees associated with arbitration of the plaintiff's individual claim made the agreement unconscionable as to her.

Virginia Cicle opened a credit card account with Chase Bank USA. She received a cardmember agreement that included a binding arbitration clause and a class action waiver. The annual percentage rate on Cicle's Chase credit card increased from 7.99% to 25.99% due to activity on an unrelated account.

Thereafter, Cicle brought a class action against Chase. She alleged that Chase imposed illegal penalties and violated the Missouri Merchandising Practices Act (MMPA). Chase moved to compel arbitration pursuant to the terms of the cardmember agreement. The district court denied Chase's motion, finding that the class action waiver and cost-sharing terms were unconscionable.

The Eighth Circuit ruled that the district court erred in concluding that the class action waiver violated Missouri's fundamental public policy as reflected in the MMPA. Punitive damages, attorneys' fees and equitable relief was recoverable under the MMPA. The Eighth Circuit found that

the arbitration agreement neither limited Chase's liabilities nor Cicle's remedies under the MMPA.

The arbitration agreement obligated both parties to bear their own costs, except that the arbitrator had the discretion to shift all costs regardless of which party prevailed. Cicle had the burden of establishing the likelihood that she would incur excessive arbitration costs and expenses.

The Eighth Circuit concluded that Cicle did not satisfy her burden. She did not provide any evidence to estimate the length of arbitration and the corresponding amount of fees for an individual arbitration.

The Eighth Circuit reversed the district court's judgment and remanded with instructions to grant Chase's motion to compel arbitration.

Judge: Pasco M. Bowman

Counsel for Cicle: Timothy W. Van Ronzelen, Matthew A. Clement, Kari Schulte, Cook Vetter Doerhoff & Landwehr P.C., 573-635-7977, Jefferson City, Mo.

Counsel for Chase: Christopher Martin Hohn, Roman P. Wuller, Thompson Coburn L.L.P., 314-522-6000, St. Louis; Danielle T. Uy.

EMPLOYMENT DISCRIMINATION

District court has jurisdiction over employment discrimination claims against United Airlines

Lovell v. United Airlines Inc., No. 09-0146 (D. Haw. Oct. 2, 2009)

Finding that two defendants were fraudulently joined, the U.S. District Court for the District of Hawaii denied the plaintiffs' motion for remand. There was no evidence that the two defendants committed an independent discriminatory act and allegations of aiding and abetting were not adequately pled.

Maria Lovell and Kimberly Sullivan were part-time employees of United Airlines Inc. Lovell and Sullivan brought a class action lawsuit against the airline and two supervisors, Jacquelyn Shook and Bernadette Erwin. The plaintiffs and the supervisors were citizens of Hawaii. United was a citizen of Illinois.

United instituted a policy that required all part-time employees to work at least 30 hours/five days per week. The plaintiffs alleged that their disabilities prevented them from working the minimum hours. Lovell retired "involuntarily" and Sullivan's employment was terminated.

The complaint asserted that the policy violated state law and public policy. HRS § 378-2 prohibits employers from discriminating against any disabled employee with respect to compensation or in the terms and conditions of employment.

The defendants removed the case to federal court, contending that Shook and Erwin were fraudulently joined. The plaintiffs filed a motion to remand.

The district court determined that the plaintiffs had fraudulently joined Shook and Erwin because no actionable claim was stated against those defendants.

Nothing in the complaint indicated that either Lovell or Shook committed an independent discriminatory act. In addition, the plaintiffs did not sufficiently state a claim for aiding and abetting discrimination.

The district court reasoned that the plaintiffs did not allege substantial assistance on the part of Shook or Erwin in implementing the policy. The plaintiffs also did not allege that Shook and Erwin knew that the policy violated HRS § 378-2. The plaintiffs' public policy claim failed as a matter of law. HRS § 378-2 provided a remedy for the public policy claim.

The district court concluded that complete diversity of citizenship existed. Remand was therefore improper.

Judge: Alan C. Kay

Counsel for plaintiffs: Carl M. Varady, 808-523-8447, Honolulu; Thomas R. Grande, Grande Law Offices, 808-521-7500, Honolulu.

Counsel for United: Jeffrey S. Harris, Torkildson Katz Moore Hetherington & Harris, 808-523-6000, Honolulu; John T. Murray, Seyfarth Shaw L.L.P., 404-885-1500, Atlanta; Kari Erickson Levine, Seyfarth Shaw L.L.P., 415-397-2823, San Francisco.

ANTITRUST

Commodity Exchange Act does not preempt natural gas purchasers' antitrust claims

In re W. States Wholesale Natural Gas Antitrust Litig., No. 03-1431 (D. Nev. Oct. 12, 2009)

The U. S. District Court for the District of Nevada denied the defendants' motion for judgment on the pleadings, finding that the plaintiffs' claims were not barred by the Commodity Exchange Act (CEA). No particular regulatory expertise was required to determine if the defendants conspired to engage in intentional price manipulations of natural gas as the plaintiffs alleged.

Plaintiffs in consolidated multidistrict litigation that arose following the energy crisis of 2000-2001 alleged that the defendants engaged in a conspiracy to artificially increase the price of natural gas for consumers. The defendants filed a motion for judgment on the pleadings, arguing that the plaintiffs' antitrust claims and state unfair competition claims were barred by the doctrine of implied antitrust immunity. The defendants contended that applying antitrust laws to their alleged conduct would be in conflict with the CEA.

The district court noted that the CEA does not expressly preempt the application of antitrust laws to activity within

the regulatory authority of the Commodity Futures Trading Commission (CFTC). Moreover, the statute contained a savings clause which preserved some antitrust actions.

The district court found that the plaintiffs did not allege violations directly under the CEA. The plaintiffs instead asserted that the defendants engaged in prearranged, intentional agreements to make offsetting trades in order to manipulate prices.

The district court ruled that a jury was just as equipped as the CFTC to decide whether there was an intent to conspire. No special expertise was required to determine whether a natural gas company's altered price reports or fictitious trades were made as a part of a conspiracy to manipulate prices.

The district court concluded that the antitrust laws and CEA were reconcilable. Both barred the defendants' conduct. The district court denied the motion for judgment on the pleadings. (For an earlier decision in this case, see 7 **Cl.Act.Law.Mon.** 215, Aug. 31, 2007.)

Judge: Philip M. Pro

INSURANCE

Settlement in previous class action does not bind plaintiffs in new lawsuit

Thao v. Cent. States Health & Life Ins. Co. of Omaha, No. A09-0204 (Minn. Ct. App. Oct. 13, 2009)

The Minnesota Court of Appeals, reversing the dismissal of a class action complaint, ruled that the complaint was not barred by a judgment in a previous class action settlement. The plaintiffs were not members of that settlement class or in privity with the plaintiffs in the previous action.

In 1998, a group of plaintiffs brought a class action claim against Central States Health & Life Co. of Omaha. Central States sold credit insurance policies which insured payment of loans if an obligor was unable to pay due to death or disability.

The plaintiffs alleged that Central States failed to refund unearned premiums upon early termination of the underlying loans. The case settled in 2004, with the settlement class limited to individuals whose loans were paid off on or before Dec. 31, 2001.

Pang Nhia Thao and Ying Lo purchased a credit insurance policy from Central States in August 2000. They received notice of the prior settlement and claim forms. Thao and Lo paid off their loan in September 2003. The claims administrator for the prior action sent a rejection notice to them since their loan was not paid off before Dec. 31, 2001.

Thao and Lo brought a class action against Central States. The trial court granted Central States' motion for

summary judgment on the ground that the plaintiffs' claims were barred under the doctrine of res judicata.

The court of appeals ruled that the plaintiffs were not bound by the judgment in the prior case because their interests were not represented by the prior plaintiffs. The plaintiffs in the prior case were acting on behalf of a class which did not, by definition, include Thao and Lo.

Central States argued that the plaintiffs' interests were protected by a letter sent to them advising them how to pursue a refund outside the class action settlement. The court of appeals found that representing the plaintiffs' interests would have meant including them within the class so that their recovery would be guaranteed.

The court of appeals reversed the trial court's judgment.

Judge: Edward Touissant Jr.

Counsel for plaintiffs: William H. Crowder, Vildan A. Teske, Marisa C. Katz, Crowder Teske P.L.L.P., 612-746-1558, Minneapolis; Eric W. Valen, 651-227-5161, St. Paul, Minn.

Counsel for Cent. States: Lewis A. Remele Jr., Kevin P. Hickey, Bassford Remele P.A., 612-333-3000, Minneapolis.

PRIVACY RIGHTS

Defendants' alleged disclosure of drivers' personal information actionable

Arrington v. Richardson, No. 09-4049 (N.D. Iowa Oct. 1, 2009)

Denying a motion to dismiss the plaintiff's 42 U.S.C. § 1983 claim, the U.S. District Court for the Northern District of Iowa held that the defendants did not meet their burden of showing that the privacy rights created under the Driver's Privacy Protection Act (DPPA) were not enforceable under § 1983.

Angela Arrington sued Nancy Richardson, director of the Iowa Department of Transportation (IDOT), Mark Lowe, director of the Iowa Motor Vehicle Division and 10 John Does. Arrington alleged that the defendants unlawfully provided her personal information and the personal information of other Iowa drivers to Source Public Data L.P. and Shadowsoft Inc.

The complaint asserted violation of the DPPA. Count two of the complaint alleged that the right to privacy provided for in the DPPA could be enforced under 42 U.S.C. § 1983.

Richardson and Lowe (collectively, the defendants) filed a motion to dismiss the § 1983 claim. The district court determined that the DPPA created a federal right to privacy. Therefore, the existence of a federal right created a rebuttable presumption that the DPPA was enforceable under § 1983.

The defendants had the burden of rebutting that presumption by demonstrating that Congress explicitly or im-

plicitly foreclosed § 1983 enforcement of the right to privacy under the DPPA.

The district court agreed that the DPPA's remedial scheme was more expansive than that provided in § 1983. The DPPA contains no reference to a statute of limitations and does not require a plaintiff to comply with any pre-litigation requirements.

The district court ruled, however, that the DPPA's more expansive remedial scheme did not equal incompatibility with individual enforcement under § 1983. The relief offered by the DPPA complemented the relief available under § 1983. Most significantly, the text of the DPPA does not restrict a plaintiff from obtaining any remedies provided in § 1983.

The district court declined to dismiss Arrington's § 1983 claim.

Judge: Mark W. Bennett

Counsel for plaintiffs: Christopher P. Welsh, Welsh & Welsh P.C., 866-546-2853, Omaha, Neb.

Counsel for defendants: David Steven Gorham, Teresa K. Baumann, Iowa AG's office, 515-239-1521, Ames, Iowa.

CONSTITUTIONAL LAW

Dismissal of motorists' claims that toll policy restricted interstate travel vacated

Selevan v. N.Y. Thruway Auth., No. 07-0037 (2d Cir. Oct. 15, 2009)

The Second U.S. Circuit Court of Appeals affirmed in part and vacated in part a district court's dismissal of an action challenging the constitutionality of an interstate highway toll policy that gave a discount only to residents of a particular New York municipality.

The New York Thruway Authority (NYTA) operated the Grand Island Bridge. Each person driving across the bridge, except residents of Grand Island, had to pay a toll of 75 cents. Residents of Grand Island paid a 9-cent toll.

Robert Selevan, a U.S. citizen residing in New York and Anne Rubin, a U.S. citizen residing in Canada, filed a class action lawsuit against NYTA. The plaintiffs alleged that the toll policy violated several constitutional provisions. The district court granted NYTA's motion to dismiss, concluding that the plaintiffs lacked standing under the U.S. Supreme Court's "prudential standing" doctrine.

The Second Circuit disagreed. Prudential standing requires that a plaintiff's complaint fall within the zone of interests protected by the particular law invoked.

With respect to the Commerce Clause claim, the relevant inquiry was whether the complaint alleged a plausible claim that the toll policy affected interstate commerce. The plaintiffs alleged that they paid the toll on their way

to New Jersey where each of them shopped and engaged in other commercial activities. Accordingly, the allegations were sufficient.

The Second Circuit found that the plaintiffs stated a claim under the Commerce Clause. The plaintiffs alleged that the toll policy placed burdens on interstate commerce that exceeded any local benefit that could be derived from the tolls.

The plaintiffs contended that the toll policy violated the Privileges and Immunities Clause and the Equal Protection Clause. The Second Circuit found that the allegations at most suggested a minor restriction on the plaintiffs' right to travel, not a burden or penalty as the plaintiffs asserted.

The Second Circuit nevertheless determined that the plaintiffs' allegations implicated a possible right to travel as the plaintiffs contended they were charged an excessive toll to use the bridge while others were not. Remand was necessary to determine if the toll policy implicated the right to travel or discriminated against interstate commerce.

The Second Circuit held that the Privileges and Immunities Clause did not extend its protection to U.S. citizens residing in foreign countries.

The Second Circuit affirmed the dismissal of Rubin's claim under the Privileges and Immunities Clause and vacated and remanded the remainder of the district court's judgment.

Judge: Jose A. Cabranes

Counsel for plaintiffs: Seth R. Lesser, Andrew P. Bell, Locks Law Firm P.L.L.C., 212-838-3333, New York.

Counsel for NYTA: Benjamin Gutman, Andrew M. Cuomo, Barbara D. Underwood, Peter H. Schiff, Robert M. Goldfarb, AG's Office, 800-771-7755, Albany, N.Y.

Dismissals

ADA

Disabled plaintiffs' ADA claims against Walt Disney World dismissed

Ault v. Walt Disney World Co., No. 07-1785 (M.D. Fla. Oct. 6, 2009)

The U.S. District Court for the Middle District of Florida vacated its prior order conditionally certifying a case against Walt Disney World Co. as a class action and giving preliminary approval to the parties' settlement agreement. There was no evidence that the defendant failed to make reasonable modifications that were "necessary" for the disabled plaintiffs to access its theme parks.

A Segway is a two-wheeled motorized transportation device upon which an individual must stand in order to

ride. Disney prohibited the use of Segways in its parks, but allowed visitors to use wheelchairs or scooters.

Disabled individuals who relied primarily on Segways for mobility brought a class action against Disney for violation of the Americans with Disabilities Act (ADA). The parties reached a settlement. Pursuant to that settlement, Disney agreed to make electrically-powered, stand-up vehicles (ESVs) available at its theme parks. The district court conditionally certified a settlement-only class and granted preliminary approval to the settlement.

Following a fairness hearing, the district court determined that it was without jurisdiction to initially certify a class or give preliminary approval to the parties' settlement.

The district court determined that the plaintiffs' claims fell outside the zone of interests created by 42 U.S.C. § 12182(b)(2)(A)(ii). That statutory provision applies only when the discrimination at issue involves a modification that is arguably essential to afford access.

The plaintiffs' requested relief—being able to use a Segway—was not “necessary” within the meaning of statute. The district court reasoned that each of the named plaintiffs were able to use wheelchairs or scooters though their preference was to use a Segway. That preference alone was not essential to accessing Disney's theme parks.

The district court vacated its previous order and dismissed the plaintiffs' lawsuit. (For an earlier decision in this case, see 9 Cl.Act.L.Mon. 29, Jan. 31, 2009.)

Judge: Gregory A. Presnell

Counsel for plaintiffs: Bernard H. Dempsey Jr., Dempsey & Assocs. P.A., 407-422-5166, Winter Park, Fla.; John A. Baker Jr., J. Phillip Krajewski, Baker Baker & Krajewski L.L.C., 217-522-3445, Springfield, Ill.; Jason M. Medley, O'Donnell Ferebee Medley & Keiser P.C., 281-875-8200, Houston, Tex.

Counsel for Disney: Jeremy M. White, Kerry Alan Scanlon, Kaye Scholer L.L.P., 202-682-3500, Washington; Manuel Kushner, Kaye Scholer L.L.P., 561-802-3230, W. Palm Beach, Fla.; Aaron C. Bates, Bates Mokwa P.L.L.C., 407-893-3776, Orlando, Fla.

ANTITRUST

Travel agencies fail to show conspiracy between airlines to cut commissions

In re Travel Agent Comm'n Antitrust Litig., No. 07-4464 (6th Cir. Oct. 2, 2009)

The Sixth U.S. Circuit Court of Appeals affirmed the dismissal of a complaint against various airlines. The travel agencies' claims that the airlines conspired to reduce and then eliminate the payment of base commissions in violation of the Sherman Act were not plausibly pled.

Prior to 2002, travel agencies received a commission from its sale of airline tickets that equaled a percentage of the purchased ticket price. Delta, American, Northwest, United, Continental and other airlines began to impose a cap

on base commissions. Ultimately, each airline eliminated its practice of paying base commissions to travel agencies.

Tam Travel Inc. and 48 other travel agencies filed suit alleging that various airlines illegally agreed to cap, cut and eliminate base commissions. The defendants moved to dismiss for failure to state a claim under the Sherman Act.

The district court granted the motion, finding that the claims against United were discharged in bankruptcy. The district court also found that the plaintiffs failed to allege sufficient facts to plausibly suggest a conspiracy between the other defendants.

United filed for bankruptcy in December 2002. Although United allegedly made its last commission cut in March 2002, the plaintiffs argued that United was liable under a continuing violation theory because it allegedly rejoined the conspiracy after it emerged from bankruptcy in 2006.

The Sixth Circuit rejected the plaintiffs' argument. United's decision to maintain its policy of paying no commissions was not an overt act that created a new Sherman Act violation.

Parallel business conduct does not establish collusion. Dismissal of the claims against the remaining defendants was appropriate. The Sixth Circuit noted that any conduct by a particular airline that paralleled the business conduct of other airlines did not, on its own, establish an antitrust violation.

The plaintiffs' argument that the defendants would not seek to reduce commissions independently was unpersuasive. The defendants presented evidence that technological advances in airline ticket purchasing, such as the ability to buy a ticket on the Internet, created an economic incentive for airlines to cut commission rates. The Sixth Circuit found that each defendant's decision to match its competitors' commission cuts was arguably a prudent business decision, not the product of an illegal agreement.

The Sixth Circuit affirmed the district court's judgment.

Judge: Richard Allen Griffin

Counsel for plaintiffs: Joseph M. Alioto Jr., Thomas Paul Pier, Joseph Alioto Sr., Alioto Law Firm, 415-434-8900, San Francisco.

Counsel for defendants: Peter K. Huston, Latham & Watkins, 415-391-0600, San Francisco; James A. Reeder Jr., Vinson & Elkins L.L.P., 713-758-2222, Houston; Lauren J. Harrison, Greenberg Traurig L.L.P., 212-801-9200, Elizabeth A. Pannill, Ahmad Zavitsanos & Anaipakos P.C., 713-655-1101, Houston; Lee H. Simowitz, Baker & Hostetler, 202-861-1500, Washington.

FCRA**Fair Credit Reporting Act preempts mortgage broker's claims against credit reporting agencies**

Premium Mortgage Corp. v. Equifax Inc., No. 08-5317 (2d Cir. Aug. Oct. 5, 2009)

The Second U.S. Circuit Court of Appeals, affirming the dismissal of the plaintiff's complaint, concluded in part that certain of the plaintiff's state law claims arising from consumer credit reporting agencies' practice of permitting lenders to purchase pre-screened credit reports were preempted by the Fair Credit Reporting Act.

Premium Mortgage Corp. sued Equifax Inc., Trans Union L.L.C., Experian Information Solutions Inc. and Equifax Information Services L.L.C. The plaintiff's claims related to the defendants' sale of mortgage "trigger leads."

The plaintiff alleged that the defendants permitted other lenders to purchase pre-screened consumer reports once a mortgage broker obtained a loan applicant's aggregated credit report. The lenders then competed with the plaintiff and similarly situated mortgage brokers by offering different loan terms to customers. The defendants moved to dismiss the complaint on preemption grounds, and the district court granted the motion.

The FCRA restricts states from imposing laws relating to the pre-screening of consumer reports. The Second Circuit determined that the plaintiff's allegations related to the pre-screening of consumer credit reports. Therefore, the FCRA preempted the plaintiff's misappropriation of trade, unfair competition and unjust enrichment claims. The Second Circuit determined that it was not necessary to reach the defendants' preemption argument on the plaintiff's remaining claims because the claims were not adequately pled.

With respect to the tortious interference with contract claim, the complaint failed to allege the legal basis for the defendants' alleged duty to maintain the confidentiality of trigger leads.

The fraud claim was properly dismissed. The Second Circuit reasoned that the plaintiff did not identify any misrepresentation or material omission by the defendants. Further, the allegations in the complaint did not raise an inference of justifiable reliance.

The Second Circuit affirmed the district court's judgment.

Judges: Barrington D. Parker, Richard C. Wesley, Jane A. Restani (by designation)

Counsel for plaintiff: Louis B. Cristo, Trevett Cristo Salzer & Andolina P.C., 585-563-3417, Rochester, N.Y.

Counsel for defendants: David Cooper, Meir Feder, Victoria Dorfman, Jones Day, 212-326-3939, New York; Christopher R. Lipsett, David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr L.L.P., 212-230-8800, New York; Craig E. Bertschi, Cindy D. Hanson, Kilpatrick Stockton L.L.P., 404-815-6500, Atlanta.

CONSUMER PROTECTION**Third-party payors lack standing as consumers to assert consumer fraud claims**

Cent. Reg'l Employees Benefit Fund v. Cephalon Inc., No. 09-3418 (D.N.J. Oct. 7, 2009) *unpublished*

Dismissing the plaintiffs' complaint for failure to state a claim, the U.S. District Court for the District of New Jersey concluded that third-party payors challenging "off label" drug marketing efforts were not "consumers" within the meaning of the New Jersey Consumer Fraud Act (NJCFCA) and that the mere allegation of marketing drugs for off-label purposes was insufficient to state a claim for fraud.

Local governmental health and welfare benefits funds and one county brought a class action against Cephalon Inc. and Cima Labs Inc., manufacturers of prescription drugs for sleep disorders. The complaint asserted violations of the NJCFCA and common law fraud claims.

The plaintiffs alleged that the defendants promoted prescription drugs for uses other than those approved by the FDA. The plaintiffs further alleged that the defendants' marketing efforts caused the plaintiffs to pay for off-label uses of drugs that their employees and other covered beneficiaries purchased. Cephalon moved to dismiss for failure to state a claim.

Off-label drug marketing not inherently fraudulent. The district court found that dismissal of the NJCFCA claims was appropriate. The plaintiffs were not consumers within the meaning of the statute because they did not use or consume prescription medications themselves. The common law fraud claims were inadequately pled. The complaint referred to a transaction and/or Cephalon's provision of prescription drugs.

The district court determined that the plaintiffs failed to identify the who, what, when, where and why of any transaction. Merely alleging that Cephalon provided prescription drugs, without indicating to whom or under what circumstances the drugs were provided, did not state a claim for fraud. The district court concluded that Cephalon's past plea agreement and civil settlement in another action alleging misbranding of products did not establish fraud.

The district court dismissed the NJCFCA claims with prejudice and the common law fraud claims without prejudice.

Judge: Mary L. Cooper

Counsel for defendants: Robert Alan White, Daniel Edward Orr, Morgan Lewis & Bockius L.L.P., 609-919-6600, Princeton, N.J.

CONSUMER PROTECTION**Washington law permits Cingular Wireless to include state tax in overhead costs**

Riensch v. Cingular Wireless, No. 06-1325 (W.D. Wash. Oct. 2, 2009)

The U.S. District Court for the Western District of Washington granted Cingular Wireless' motion for summary judgment, finding in part that the practice of including a business and occupation surcharge in the price of wireless service did not violate the Consumer Practice Act.

Nathan Riensch filed a class action lawsuit against Cingular Wireless L.L.C. and its affiliated entities (collectively, Cingular Wireless). The state of Washington assessed a business and occupation (B&O) tax against Cingular Wireless. Riensch challenged Cingular Wireless' practice of passing on the tax to its customers as a surcharge.

Cingular Wireless moved for summary judgment. Cingular Wireless contended that the voluntary payment doctrine precluded Riensch's breach of contract claim. The district court interpreted Riensch's failure to respond to the contention as a concession that it had merit.

Riensch argued that Cingular Wireless committed a per se Consumer Protection Act violation by failing to comply with RCW 82.04.500. That statute provided that the intent of the legislature was to have B&O taxes treated as overhead of a business, not amounts separately passed on to customers.

Surcharge for cellular service lawfully imposed. The district court found that RCW 82.04.500 does not prohibit a business from including in the price of goods or services a pro rata portion of its overhead, including the B&O tax. Cingular Wireless disclosed the B&O surcharge to customers on their bills.

To obtain a remedy under the Uniform Declaratory Judgments Act, Riensch had to assert a "legal right capable of judicial protection which exists in a statute." The district court concluded that Cingular Wireless' past billing practices did not violate RCW 82.04.500 as Riensch contended.

Riensch had an opportunity to review Cingular Wireless' service agreement when he activated his account. The service agreement disclosed that charges included applicable taxes and governmental fees.

The district court noted that the B&O surcharge was treated as part of the base price charged to customers instead of as an impermissible tax added to the final price. The district court granted summary judgment to Cingular Wireless. (For earlier decision, see 7 **Cl.Act.L.Mon.** 310, Dec. 15, 2007.)

Judge: Thomas S. Zilly

Counsel for plaintiffs: David Elliot Breskin, Daniel Foster Johnson, Roger M. Townsend, Breskin Johnson & Townsend P.L.L.C., 206-652-8660, Seattle.

Counsel for Cingular: Scott A.W. Johnson, Shelley Hall, Bradford J. Axel, Stokes Lawrence, 206-626-6000, Seattle.

FCRA**Fair Credit Reporting Act does not require that "firm offer" have value**

Gelman v. State Farm Mut. Auto. Ins. Co., No. 07-3665 (3d Cir. Oct. 5, 2009)

The Third U.S. Circuit Court of Appeals, affirming a district court's judgment, held that the disclosure of the plaintiff's credit report did not violate the Fair Credit Reporting Act (FCRA) because the information in the credit report was used to extend a firm offer of insurance.

State Farm Mutual Automobile Insurance Co. obtained Bruce Gelman's consumer credit report from Experian without his consent. Gelman received a mailer from State Farm. The mailer indicated that Gelman should call a State Farm agent to find out how he could save money by purchasing State Farm coverage.

Gelman filed a class action complaint against State Farm alleging that it violated the FCRA by obtaining his credit report without his consent without a permissible purpose.

Under the FCRA, a consumer credit agency may provide a consumer report without the consumer's initiation or authorization when a credit or insurance provider is extending a firm offer of credit or insurance. Gelman contended that State Farm obtained his credit report under false pretenses because State Farm did not extend a firm offer of credit. The district court granted State Farm's motion to dismiss for failure to state a claim.

Credit report obtained for permissible purpose. The Third Circuit rejected Gelman's argument that a firm offer of insurance must have value. Gelman did not explain what value the mailer should have provided to him. Moreover, the text of the FCRA does not mention value.

The Third Circuit determined that a firm offer of insurance is any offer that will be honored if the consumer meets the specific criteria used to select him for the offer. State Farm's mailer satisfied the FCRA's definition of a firm offer. The mailer expressly stated that State Farm's offer was not guaranteed if Gelman did not meet eligibility criteria.

The Third Circuit affirmed the district court's holding that Gelman failed to state a claim under the FCRA. (For an earlier decision in this case, see 7 **Cl.Act.L.Mon.** 218, Aug. 31, 2007.)

Judge: Theodore A. McKee

Counsel for plaintiff: Patrick J. Loughren, Loughren Loughren & Loughren P.C., 412-232-3530, Pittsburgh; Daniel C. Levin, Levin Fishbein Sedran & Berman, 215-592-1500, Philadelphia; Christopher G.

Hayes, The Law Office of Christopher G. Hayes, 610-431-9505, W. Chester, Pa.

Counsel for State Farm: James T. Moughan, Britt Hankins & Moughan, 215-569-6936, Philadelphia; **Michael P. Kenny, Cari K. Dawson, Derin B. Dickerson,** Alston & Bird L.L.P., 404-881-7000, Atlanta.

CONSUMER PROTECTION

Court declines to certify lawsuit challenging Rite Aid's alleged sale of expired products

Brennan v. Rite Aid Corp., No. 08-2970 (E.D. Pa. Oct. 7, 2009)

The U.S. District Court for the Eastern District of Pennsylvania struck a complaint's class allegations and dismissed the lawsuit against Rite Aid Corp. for lack of subject matter jurisdiction. The plaintiff could not establish commonality or typicality because each consumer's purchase of allegedly expired products from Rite Aid was a distinct and separate transaction.

Terri Brennan purchased an over-the-counter nasal decongestant from a Rite Aid drugstore. She discovered that the product was expired after she returned home. Brennan sued Rite Aid on behalf of all purchasers of expired Rite Aid drugstore products. The complaint sought injunctive relief and damages.

Rite Aid moved to dismiss for failure to state a claim and to strike the complaint's class allegations. The district court determined that class certification was inappropriate; there was no commonality of law or fact.

The district court reasoned that each class member would have to offer proof that she purchased an expired product from Rite Aid and that she was ignorant of the expiration date. Consequently, mini-trials would be necessary.

The district court further reasoned that the proof that Brennan offered to support her claim was insufficient to support a claim for other class members. Even if Brennan could establish commonality and typicality, denial of the motion for class certification was still warranted. The complaint implicated the laws of numerous states. The district court would have to interpret those laws as applied to a wide variety of dissimilar products.

Because Brennan could not maintain a claim under the Class Action Fairness Act, the district court concluded that there was no longer any basis for federal jurisdiction.

The district court dismissed Brennan's lawsuit.

Judge: John P. Fullam

Counsel for plaintiff: Evan J. Smith, Brodsky & Smith L.L.C., 610-667-6200, Bala Cynwyd, Pa.; **Sherrie R. Savett, Douglas M. Risen, Shoshana Michelle Savett,** Berger & Montague P.C., 215-875-3000, Philadelphia.

Counsel for Rite Aid: Melissa Furrer Miller, Miller & Miller L.L.C., 717-609-4931, Carlisle, Pa.; **Thomas A. Schmutz, William Bradley Nes,** Morgan Lewis & Bockius L.L.P., 202-739-3000, Washington; **Eric W. Sitarchuk,** Morgan Lewis & Bockius L.L.P., 215-963-5000, Philadelphia.

Settlements

ANTITRUST

\$85 Million settlement of antitrust claims against Lufthansa approved

In re Air Cargo Shipping Servs. Antitrust Litig., No. 06-1775 (E.D.N.Y. Sept. 25, 2009)

The U.S. District Court for the Eastern District of New York approved the settlement of antitrust claims against certain airlines, finding that the \$85 million settlement was fair, adequate and reasonable given the complexity of the litigation and the risks of establishing liability and damages. The district court ruled that an attorneys' fee request of 25% of the settlement was excessive.

Purchasers of airfreight shipping services brought class actions against domestic and foreign airlines that provided such services. The plaintiffs alleged that the defendants engaged in a conspiracy to fix prices.

The plaintiffs reached a settlement with defendants Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Air Lines Ltd. (collectively, Lufthansa). Lufthansa agreed to pay \$85 million. The plaintiffs moved for approval of the settlement agreement and an award of attorneys' fees.

Settlement agreement procedurally and substantively fair. The district court determined that various factors weighed in favor of approving the settlement. The settlement agreement was the product of arm's length negotiations between experienced counsel. Expert analysis of antitrust damages assisted the parties in engaging in informed settlement negotiations.

The district court found that the complexity of legal and factual issues meant that continued litigation would consume considerable time and resources. Another factor in favor of approval was the reaction of the class. Tens of thousands of persons and entities fell within the class definition but there were only 42 opt-outs and no filed objections.

The district court determined that the settlement eliminated the risks associated with a trial. Lufthansa would hotly contest liability and damages, as would the non-settling defendants. The settlement was within the range of reasonableness. The \$85 million equaled approximately 10.5% of Lufthansa's surcharges during the class period. That percentage was comparable to settlements reached in other price-fixing antitrust class actions.

The district court concluded that class counsel's request of 25% of the settlement fund for attorneys' fees was unreasonable. The district court noted that in "mega-fund" cases, courts generally award a lower percentage of fees to avoid a windfall to counsel.

The fact that a large percentage of the fees requested was based on work that counsel expended on the litigation as a whole also made the request unreasonable. Class counsel's supplemental fee application, which was limited to work performed solely on the settlement as the district court directed, provided for a lodestar of \$8,286,093.

The district court awarded attorneys' fees in the amount of \$12,750,000 which was 15% of the settlement fund with a multiplier of approximately 1.5.

Judge: John Gleeson

FLSA

Settlement class of securities brokers certified in FLSA action

Bernhard v. TD Bank N.A., No. 08-4392 (D.N.J. Oct. 5, 2009) *unpublished*

The U.S. District Court for the District of New Jersey granted the parties' joint motion for preliminary approval of a class action settlement of Fair Labor Standards Act (FLSA) claims. The settlement was fair and reasonable given the arm's length negotiations of the parties and the risks of proceeding to trial. Additionally, the proposed class satisfied class action requirements.

Securities brokers employed by TD Bank N.A. and Bancnorth Investment Group Inc. filed a class action complaint against the companies alleging violation of the FLSA. The parties reached a settlement and filed a joint motion for preliminary approval of their agreement. The settlement required the defendants to pay \$375,000 into a common fund.

The district court found that various factors weighed in favor of approving the settlement agreement. The parties engaged in arm's length negotiations and participated in mediation conducted by a magistrate judge.

The settlement was reached after extensive discovery. That discovery helped to shape the parties' respective factual and legal positions in support of case dispositive motions.

The district court determined that the risks of establishing liability and damages supported approval. In the absence of a settlement agreement, the defendants could assert colorable defenses to the plaintiffs' claims.

The requirements for class certification were met. There were likely more than 100 class members. A question common to all class members was whether the defendants' pay practices violated the FLSA.

The class members all claimed the same injury—that they worked in excess of 40 hours per week without overtime compensation. Common questions of fact and law predominated over any individual questions. Class treat-

ment of the FLSA claims was superior in part because the individual claims were modest.

The district court preliminarily approved the parties' settlement agreement.

Judge: Robert B. Kugler

Counsel for plaintiffs: Philip Stephen Fuoco, Joseph A. Osefchen, The Law Firm of Philip Stephen Fuoco, 856-354-1100, Haddonfield, N.J.; Stephen P. Denittis, Shabel & Denittis P.C., 856-797-9951, Marlton, N.J.

Counsel for defendants: Susan M. Leming, William M. Tambussi, Brown & Connery L.L.P., 856-854-8900, Westmont, N.J.

In The Law Journals

The unique challenges of certification in environmental toxic tort class actions

Patrick Hayes, *Exploring the Viability of Class Actions Arising From Environmental Toxic Torts: Overcoming Barriers to Certification*, 19 J. Env. L. & Prac. 189 (2009)

Toxic substances in the environment can affect large numbers of people, and the most likely means for recovery will be through a class action lawsuit. However, each plaintiff's injuries may be unique, which may make certification of the class unlikely. According to Patrick Hayes, courts may need to change the way they think of causation and injury when considering class certification of environmental toxic tort class action lawsuits.

Environmental toxic torts are different from regular torts for a number of reasons, and some of these reasons directly affect their viability as class action lawsuits. For example, causation may be difficult to prove because the toxic substances are often invisible to the naked eye. In addition, the toxic event may be caused by the combination of two separate substances put into the environment by different parties.

Plaintiffs may bring environmental toxic tort lawsuits based on negligence, strict liability or nuisance, but like every tort, there may be challenges in showing that, but for the defendant's negligence, the plaintiff would not have suffered the injuries related to the toxic substances. The plaintiff must prove that the substance in the environment is capable of causing an injury, and the plaintiff must prove that the substance caused the plaintiff's specific injuries.

However, plaintiffs run into a number of difficulties and obstacles when trying to prove generic and specific causation. The scientific information available might be insufficient to prove generic causation, and often the toxic substance is not the sole cause of a specific illness or condition. In addition, the illness may be the result of exposure to the substance over a long period of time, and each situation giving rise to an environmental toxic tort is different.

Courts may take broader views of the certification requirements because of the social utility of allowing class certification for environmental toxic torts. However, each court is different with regard to how it views the social utility of class certification.

Causation and commonality obstacles to certification.

As noted above, the main obstacles to certification in environmental toxic tort class action lawsuits are proving causation and showing there is commonality with regard to the injury. For causation, courts would consider the person's occupation, health history and physical activity, among other factors.

Courts should take a broad view when considering "generic causation" and how generic causation helps es-

tablish commonality because without class actions as a vehicle for recovery, victims of environmental contamination may not be able to get compensation for their injuries. Because of the individual and complex nature of environmental toxic torts, class certification faces almost insurmountable obstacles.

However, it is possible to approach generic causation to find common questions, as is seen in the case of products liability class action lawsuits. In addition, evidence of generic causation may be used to show specific causation. However, each type of environmental toxic tort could have its own set of standards. Environmental toxic torts can be classified according to the nature of the contamination and the type of personal injury alleged.

Daubert Motions in Class Certification Proceedings Strategies for Plaintiffs and Defendants Post In re Hydrogen Peroxide

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Cases Reported In This Issue

Air Cargo Shipping Servs. Antitrust Litig., In re 269
 Arrington v. Richardson 264
 Ault v. Walt Disney World Co. 265
 Baxter v. Apple Inc. 258
 Bernhard v. TD Bank N.A. 270
 Brennan v. Rite Aid Corp. 269
 Cent. Reg'l Emps. Benefit Fund v. Cephalon Inc. 267
 Cicle v. Chase Bank USA 262
 City of Roseville Employees' Ret. Sys. v. EnergySolutions
 Inc. 259
 Diet Drugs Prod. Liab. Litig., In re 262
 Dupree v. Lafayette Ins. Co. 259
 Evans v. Lasco Bathware Inc. 261
 Family Dollar Stores Inc. v. Morgan 259
 Gelman v. State Farm Mut. Auto. Ins. Co. 268
 Harris v. Facebook Inc. 258

HICA Educ. Loan Corp. v. Sullivan 261
 Kleiman v. RHI Entm't Inc. 259
 Le v. SpongeTech Delivery Sys. Inc. 259
 Lovell v. United Airlines Inc. 263
 Material Yard Workers Local 1775 Benefit Funds v.
 Men's Wearhouse Inc. 259
 McClellan v. Regions Fin. Corp. 259
 Premium Mortgage Corp. v. Equifax Inc. 267
 Reiensche v. Cingular Wireless 268
 Selevan v. N.Y. Thruway Auth. 265
 Simpson Hous. Solutions L.L.C. v. Hernandez 260
 Steamfitters Local 449 Pension Fund v. Advanta Corp. 259
 Thao v. Cent. States Health & Life Ins. Co. of Omaha 264
 Travel Agent Comm'n Antitrust Litig., In re 266
 W. States Wholesale Natural Gas Antitrust Litig., In re 263
 Worden v. ProShares Trust 259

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