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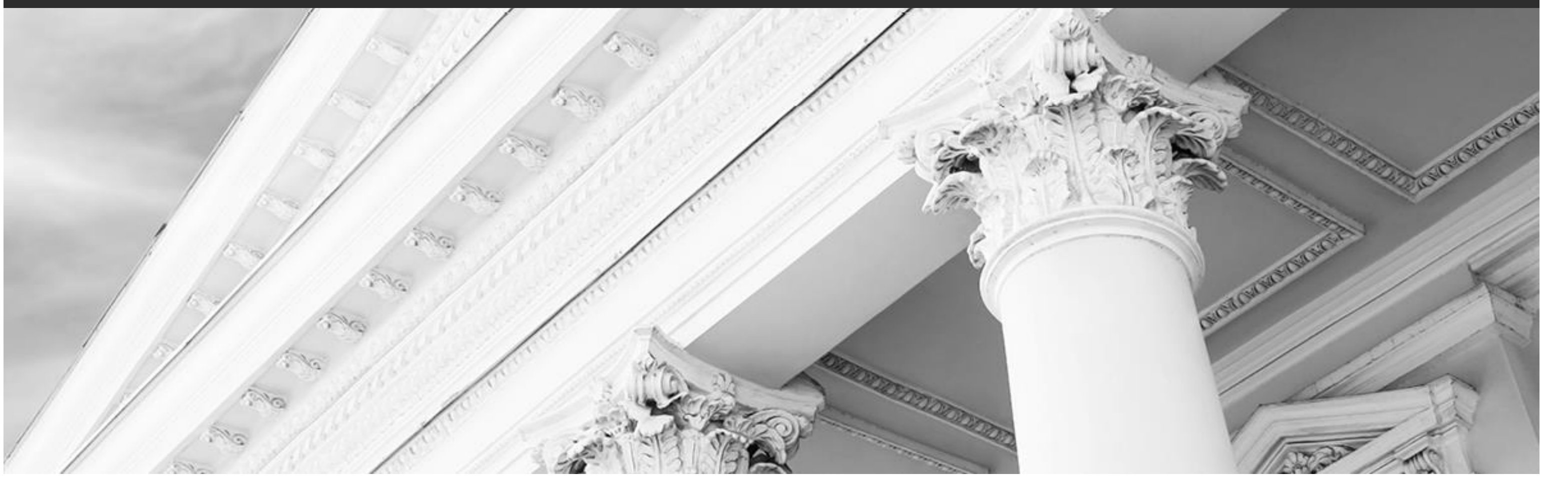
Class Action Litigation Newsletter | Fall 2019



In this Issue:

This Report Provides an Overview and Summary of Recent Class Action Decisions From Across the United States

Highlights from this issue include:

- The U.S. Supreme Court's decision that ambiguous arbitration provisions do not permit class arbitration.
- The Supreme Court's holding that Rule 23(f)'s deadline to seek to appeal is not tolled by a motion for reconsideration.
- Massachusetts and Illinois courts reaching different conclusions on whether an unaccepted offer of judgment can moot a class action.
- The Third Circuit's decision that *cy pres* settlements are not per se unreasonable.
- Sixth, Seventh and Eleventh Circuit opinions addressing whether a statutory violation is enough to show standing under *Spokeo*.
- Decisions by the Illinois Supreme Court and Ninth Circuit on whether a plaintiff must show actual injury to assert claims under the Biometric Information Privacy Act.
- A decision by the Eighth Circuit holding that a billion-dollar statutory damages award under the TCPA violated due process.

- The Ninth Circuit's decision that the Federal Arbitration Act does not preempt California's rule allowing plaintiffs to seek public injunctive relief.
- The D.C. Circuit's opinion holding that a class should not be certified where it includes a material number of uninjured class members.

U.S. Supreme Court

Home Depot U.S.A. Inc. v. Jackson, 139 S. Ct. 1473 (2019)

Counterclaim defendants not permitted to remove under the Class Action Fairness Act (CAFA).

In this case, Citibank filed a debt-collection action against George Jackson in North Carolina state court. Jackson answered and added a counterclaim against Citibank, as well as claims and class allegations against Home Depot. These class allegations arose out of an alleged scheme by Home Depot to induce homeowners to buy water treatment systems at inflated prices, alleging unlawful referral sales and deceptive and unfair trade practices in violation of North Carolina law. Citibank dismissed its claims against Jackson and Home Depot filed a notice of removal a month later. Jackson moved to remand and amended his class allegations to remove references to Citibank and limit the claims to Home Depot. The district court granted Jackson's motion to remand, and the Fourth Circuit granted Home Depot permission to appeal but affirmed.

In its decision, the Supreme Court ruled that 28 U.S.C. § 1441(a) only permits "the defendant or the defendants" to remove, not counterclaim defendants. The court evaluated the term "defendant" in other contexts and concluded that its use "bolster[ed its] determination that Congress did not intend for the phrase 'the defendant or the defendants' in § 1441(a) to include third-party counterclaim defendants." 139 S. Ct. at 1749. The Supreme Court also ruled that CAFA's removal provision, 28 U.S.C. § 1453(b), which uses the language "any defendant," does not "alter[] § 1441(a)'s limitation on *who* can remove" to federal court. *Id.* at 1750.

Frank v. Gaos, 139 S. Ct. 1041 (2019)

Supreme Court declines to address *cy pres* recovery in class actions.

This case involved a class action against Google for alleged violations of the Stored Communications Act, which ultimately resulted in a settlement. Among other things, the settlement required Google to make certain disclosures and pay $8.5 million, the majority of which would be distributed to six *cy pres* recipients – all nonprofits who "were selected by class counsel and Google to 'promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet.'" 139 S. Ct. at 1045.

Following preliminary approval, five class members, including the petitioners, objected to the settlement, arguing that the *cy pres* relief violated the requirements of Rule 23(e)(2) and that "conflicts of interest infected the selection of the *cy pres* recipients." *Id.* The district court granted final approval notwithstanding these objections and the Ninth Circuit affirmed.

After granting certiorari, the Supreme Court had been expected to decide whether and the extent to which *cy pres* settlements were permissible. Instead, the Court determined that "there remain substantial questions about whether any of the named plaintiffs has standing to sue" and remanded the standing question to the district court.

Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019)

Ambiguous arbitration provision does not permit class arbitration.

In this case, a hacker tricked a Lamps Plus employee to disclose tax information related to other employees. A fraudulent income tax return was then filed in the name of Frank Varela, who was a Lamps Plus employee at the time. Like other employees, Varela had signed an arbitration agreement when he began working at the company. When Varela filed a proposed class action on behalf of employees whose tax information had been compromised, Lamps Plus moved to compel arbitration on an individual basis. The district court granted the motion, but denied the request for individual arbitration, instead authorizing arbitration on a class-wide basis. Lamps Plus appealed and the Ninth Circuit affirmed.

The Supreme Court reversed and remanded, holding that an ambiguous agreement cannot provide the necessary "contractual basis" for compelling class arbitration consistent with *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*, 559 U.S. 662 (2010). The Court emphasized that the Federal Arbitration Act requires courts to enforce arbitration agreements according to their terms, and that, without mutual consent to class arbitration, it cannot be compelled. As in *Stolt-Nielsen*, where the Supreme Court held that silence on class arbitration is not enough, ambiguity also is not enough to permit class arbitration.

Nutraceutical Corp v. Lambert, 139 S. Ct. 710 (2019)

Supreme Court confirms that Rule 23(f)'s 14-day deadline is not subject to equitable tolling.

In this case, Lambert sued Nutraceutical Corp., alleging that its dietary supplement marketing violated California consumer protection laws. The district court granted certification, but later decertified on February 20, 2015. At a March 2, 2015, status conference, Lambert's counsel informed the court that he intended to file a motion for reconsideration, but did not mention an appeal. Twenty days after the class decertification order issued, Lambert filed a motion for reconsideration, which was denied. Lambert then filed a request for permission to appeal the decertification order 14 days after the reconsideration denial. The Ninth Circuit deemed Lambert's petition timely by tolling the 14-day deadline based on his pursuit of the reconsideration motion and reversed the decertification order.

The Supreme Court reversed and remanded the matter for further proceedings, holding that Rule 23(f)'s 14-day deadline is not subject to equitable tolling because it is "a nonjurisdictional claim-processing rule" without any room in the text for flexibility. 139 S. Ct. at 714-15. The Court highlighted how "the Federal Rules of Appellate Procedure single out Civil Rule 23(f) for inflexible treatment" and thus "express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause of equitable tolling might otherwise exist." *Id.* at 715.

First Circuit

In re: Celexa and Lexapro Sales Practices Litig., 915 F.3d 1 (1st Cir. 2019)

First Circuit confirms that a class action does not toll statute of limitations for a subsequent class action.

This case involved consolidated prescription drug marketing cases. Plaintiffs asserted RICO and state-law claims, alleging that defendants improperly promoted antidepressant drugs for uses the FDA had not approved. One of the plaintiffs sought certification of two classes of third party-payors that had paid for or reimbursed prescriptions for unapproved uses. The district court denied class certification for several reasons, including because the class action was time barred.

On appeal, plaintiffs convinced the First Circuit that their individual claims were not time barred because they had been tolled based on an earlier class action. But tolling could not save the class allegations. Although the Supreme Court has held that filing a putative class action tolls the running of the statute for all purported members, the Court also clarified in *China Agritech* that this rule has limits: a putative class member may join an existing suit or file an individual action upon denial of class certification, but may not commence a class action anew beyond the time allowed by the untolled statute of limitations. *See China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018).

In *In re: Celexa and Lexapro*, plaintiffs argued for a narrow interpretation of *China Agritech*, asserting that the rule should not apply because there had not been a substantive decision on certification in the earlier class action. The First Circuit rejected this argument: "the Court [in *China Agritech*] effectively ruled that the tolling effect of a motion to certify a class applies only to individual claims, no matter how the motion is ultimately resolved. To hold otherwise would be to allow a chain of withdrawn class-action suits to extend the limitations period forever." 915 F.3d at 17.

Gammella v. P.F. Chang's China Bistro, Inc., 482 Mass. 1, 120 N.E.3d 690 (2019)

Massachusetts SJC clarifies class certification standard for wage and hour claims and confirms that an unaccepted Rule 68 offer of judgment does not moot a class action.

In this case, the Massachusetts Supreme Judicial Court (SJC) held that the proper standard for class certification for a Wage Act claim was Rule 23, and that this certification standard was not expanded by a provision in the Wage Act that allows an employee to seek relief on his or her own behalf as well as for others "similarly situated." Instead, the SJC reasoned that the "similarly situated" language merely served to authorize class actions under Rule 23. *See Gammella*, 482 Mass. at 9-12.

The SJC also confirmed that an unaccepted offer of judgment by the defendant to the putative class representative and sole named plaintiff did not render the matter moot. *Id*. at 19. This ruling should be compared with *Demmler v. ACH Food Cos.*, where a defendant discontinued the labeling a plaintiff claimed was misleading before suit was filed and sent a check providing the plaintiff with full relief (with no conditions), which rendered the plaintiff's claims moot. No. 15-13556-LTS, 2016 WL 4703875, at *4–5 (D. Mass. June 9, 2016); *see also Kaplan v. Fulton Street Brewery, LLC*, No. 17-10227-JGD, 2018 WL 2187369 (D. Mass. May 11, 2018) (same).

Second Circuit

Hunter v. Time Warner Cable, No. 15-CV-6445 (JPO), 2019 U.S. Dist. LEXIS 137495 (S.D.N.Y. Aug. 14, 2019)

Court denies certification in TCPA case where plaintiffs failed to present a reliable methodology for identifying those who had received improper calls.

In August 2019, the Southern District of New York denied the motion for class certification in a decision emphasizing the importance of expert witness testimony at the class certification stage. In this putative class action, plaintiffs alleged violations of the Telephone Consumer Protection Act (TCPA) based on allegedly unsolicited robocalls to cell phones. Plaintiffs claimed the robocalls were "wrong number calls" directed to individuals not associated with plaintiffs and were part of a debt collection campaign. After taking class discovery, plaintiffs moved for class certification, supported by an expert report.

The court's analysis focused on whether ascertaining class membership would require individualized determinations that would predominate over common issues. The court found that, under Second Circuit precedent, "difficulty in determining class membership is a factor considered under the predominance prong." Plaintiffs argued that ascertaining class membership would not require individualized inquiries, relying on the methodology proposed by their expert witness. Plaintiffs' expert proposed that "reverse-lookup" data provided from LexisNexis could be used to determine the identity of a user of a phone number at a specific time, and that data could be compared to defendant's call record to establish the occasions on which the robocall program made wrong-number calls.

The court, however, found that testimony from LexisNexis undermined plaintiffs' expert. According to LexisNexis, its data "cannot be used to determine definitively the subscribers or customary users of a telephone number on a current or historical basis." In addition, defendant's expert found substantial issues with plaintiffs' expert's methodology, including that a sample of 75 alleged wrong-number call recipients showed that 65 were properly called.

In rebuttal, plaintiffs argued they were not required to present a definitive method for identifying class members at the class certification stage. The court rejected this argument because "plaintiffs bear the burden of satisfying the Rule 23 requirements … including predominance [and] the predominance inquiry considers the means of determining membership in the proposed class." Plaintiffs also argued that courts had found reverse-lookup tools sufficient to identify class members in other TCPA cases. Emphasizing its obligation to conduct a "rigorous analysis" of the facts, the court found the citation to what other courts had done insufficient to satisfy the predominance requirement given the specific flaws in plaintiffs' methodology.

Third Circuit

In re Google Inc. Cookie Placement Consumer Privacy Litigation, 934 F.3d 316 (3d Cir. 2019)

Third Circuit holds that *cy pres* settlements are not per se unreasonable.

In this case, the Third Circuit addressed two issues for the first time: (1) whether a class settlement is per se unreasonable if the only monetary component is a *cy pres* payment, and (2) whether a *cy pres* award is per se unreasonable if the recipient has a connection with the defendant or class counsel. The panel answered both questions in the negative.

The case involved "cookies" that allegedly operated even if the user employed privacy settings. The district court approved a settlement under Rule 23(b)(2) where defendant agreed to stop using the cookies, class counsel would be paid $5.5 million, *cy pres* distributions would be made to six data privacy organizations, and defendant would be released from all claims, including monetary claims.

On appeal, the Third Circuit considered whether a class settlement is per se unreasonable if the only monetary benefit to the class is a *cy pres* distribution. The panel recognized that such a settlement has the capacity to create a conflict of interest. 934 F.3d at 327. But in a situation where it would be infeasible to compensate individual class members and where the *cy pres* distributions would have a deterrent effect on the defendant, the court held it is not necessarily an abuse of discretion to approve a "cy pres only" settlement.

The panel nevertheless reversed because the district court did not conduct a rigorous analysis of the scope of the release or the relationship of the *cy pres* recipients with the parties. On the release, the court noted that releasing monetary claims in a Rule 23(b)(2) settlement raises a "red flag" and questioned whether such a release ever would be appropriate or may require some heightened form of notice. *Id.* at 329-30. On the *cy pres* issue, the court remanded for further fact finding to "determine whether [the *cy pres* recipients] have a significant prior affiliation with any party, counsel, or the court . . . and, if so, whether the selection process failed to satisfy Rule 23(e)(2) by raising substantial questions whether the recipients were chosen on the merits." *Id.* at 331.

Coba v. Ford Motor Company, 932 F.3d 114 (3d Cir. 2019)

Third Circuit confirms that a warranty of "materials and workmanship" does not cover alleged design defects.

This case involved claims against an automaker based on an alleged malfunction in the fuel tank of plaintiff's vehicle. Plaintiff filed a putative class action asserting claims for breach of express warranty, violation of the New Jersey Consumer Fraud Act (NJCFA), and breach of the duty of good faith and fair dealing. The district court granted defendant's summary judgment motion, dismissing all claims except for the NJCFA claim, and denied class certification as moot. An appeal followed.

The Third Circuit first considered whether the denial of class certification divested the court of subject matter jurisdiction under CAFA. The panel followed other circuits and determined that subject matter jurisdiction remained. The panel reasoned that CAFA's "conferral of jurisdiction plainly encompasses a suit like [plaintiff's], which was 'filed under [R]ule 23,' notwithstanding its eventual failure to become certified under Rule 23." 932 F.3d at 119.

The court next considered the district court's dismissal of plaintiffs' express warranty claim. The warranty at issue stated that the automaker would "repair, replace, or adjust all parts on [plaintiffs'] vehicle that are defective in factory-supplied materials or workmanship." The defendant argued that this warranty did not apply to plaintiffs' design defect claim, and the panel agreed. Recognizing that this was an open issue under New Jersey law, the panel interpreted the plain meaning of the warranty, used the dictionary definitions of the terms "workmanship," "materials," and "design," and determined that the warranty did not extend to design defect claims. The panel also relied on the distinction historically drawn by courts in products liability actions between a "workmanship" claim and a "design" claim.

Kernahan v. Home Warranty Administrator of Florida, Inc., 236 N.J. 301 (2019)

New Jersey Supreme Court declines to enforce unclear arbitration provision.

The New Jersey Supreme Court has again addressed the enforceability of an arbitration provision in a consumer contract. *Kernahan* follows the New Jersey Supreme Court's decision in *Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430 (2014), in which the Court declined to enforce an arbitration provision in a consumer contract that did not explain that the consumer was waiving the right to sue in court. *Id.* at 436. The *Atalese* Court found there was no "mutual assent [to arbitrate], as determined under customary principles of contract law." *Id.* at 442.

The plaintiff in *Kernahan* filed a putative class action alleging that the "home service contract" she entered into with the defendants violated the New Jersey Consumer Fraud Act, the New Jersey Truth-in-Consumer Contract, Warranty and Notice Act, and the implied covenant of good faith and fair dealing. The trial court denied the defendants' motion to compel arbitration, finding that the arbitration provision in the contract did not comply with *Atalese*, and the Appellate Division affirmed.

The New Jersey Supreme Court granted certification "to review defendants' argument that an overly demanding review resulted in a prohibited hostility to arbitration," which would render the decision preempted under the Federal Arbitration Act. *Kernahan*, 236 N.J. at 308. The Supreme Court affirmed, finding that there was no "mutuality of assent" to arbitration. *Id.* at 320. The Court found several problems with the arbitration provision in support of its decision. First, the arbitration provision was contained in a section of the contract entitled "Mediation" and referred to the AAA's Commercial Mediation Rules, rather than Arbitration Rules. *Id.* at 322. Second, "the small size of the print makes the provision burdensome to read and appears to violate the font size requirements of the New Jersey Plain Language Act." *Id.* at 322-23. The defendants argued that the provision as a whole made clear that it intended arbitration rather than mediation (*e.g.*, it contemplated the issuance of an award), but the Court found that "[i]t is unreasonable to expect a lay consumer to parse through the contents of this small-font provision to unravel its material discrepancies." *Id.* at 326.

Fourth Circuit

Bell v. Brockett, 922 F.3d 502 (4th Cir. 2019)

Fourth Circuit reviews certification of a defendant class action.

In this case, the Fourth Circuit encountered "one of the rarest types of complex litigation, the defendant class action." 922 F.3d at 504.

Bell involved an alleged Ponzi scheme in which many participants lost money and some participants earned money – the "Net Winners." After the SEC shut down the scheme, the court appointed a receiver who sought to recover money earned by the Net Winners. Because their identities were not readily available, the receiver filed a defendant class action that sought to certify a class of the Net Winners. The district court certified the defendant class, but the court and the receiver found it difficult to find class counsel because the named defendants were not willing to fund the defense of the entire class. Class counsel was not appointed until seven months after the class was certified – after the class notice was sent and after experts were retained. Two years after the class was certified, the district court entered judgment against the class, after which multiple class members moved to decertify. The district court denied the motions.

The appeal focused primarily on the adequacy of class counsel under Rule 23. The Fourth Circuit recognized that the adequacy requirement is "especially important for a defendant class action where due process risks are magnified" because "an unnamed class member can be brought into a case, required to engage in discovery and even be subjected to a judgment compelling the payment of money or other relief without ever being individually served with a lawsuit." *Id.* at 511. The Fourth Circuit agreed with the class members that the district court violated Rule 23(c)(1)(B) by failing to appoint class counsel at the time of certification and violated Rule 23(g) by not explicitly considering the adequacy factors set forth in the Rule. Although these errors would normally "render certification fatally defective," the panel affirmed the district court due to the "unique circumstances of this case," namely the failure of the class members to timely raise their objections. *Id.* at 512. The other "unique circumstance" was that, due to the significant post-certification progress made in the district court – including over 2,500 settlements with class members – "the toothpaste cannot be put back into the tube" if the class certification order were rescinded. *Id.* at 513.

Bell demonstrates that a defendant class action can be used where there is a large group of defendants whose identities are not readily available at the outset of a case. Unlike a plaintiff class action, however, where class counsel accepts the representation on a contingency basis, it may be difficult to find counsel to represent a defendant class when the named defendants are not willing to fund the defense of the entire class. Finally, *Bell* demonstrates the importance of raising objections to a proposed class because the failure to timely do so typically will not be overlooked by the reviewing court.

Fifth Circuit

Nathan and Misti Robinson v. Home Owners Management Enterprises Inc., No. 18-0504 (Tex. 2019)

Texas Supreme Court set to decide whether arbitrator or court must decide whether arbitration can be conducted on a class basis.

In a case worth watching, the Texas Supreme Court has been asked to decide whether an arbitrator or a trial court judge should decide whether class allegations should be decided in arbitration or in state court. The Robinsons contracted for the construction of a home that included a warranty program administered by Home Owners Management Enterprises, Inc. ("Home"). The Robinsons sued in state court for breach of warranty for certain construction defects. Home moved to compel arbitration pursuant to a binding arbitration provision. Once in arbitration, the Robinsons amended their claim to include claims for class relief. Home, after an award on the individual claims by the arbitrator, requested that the state court strike the class allegations. The trial court agreed. The Robinsons appealed from the order, which was upheld on appeal. 549 S.W.3d 226 (Tex. App. – Fort Worth 2018). The Texas Supreme Court granted the Robinsons' petition for review.

The Robinsons argued Home engaged in improper forum shopping, since it had initially argued the arbitration provision was broad and all-inclusive in its motion to compel arbitration, but subsequently retreated from that position once the Robinsons amended their arbitration claim. The Robinsons also showed that Home initially asked the arbitrator to decide whether the class allegations fell within the scope of the arbitration provision, and that Home's request occurred after it lost the argument that it sought to have the trial court decide the correct forum. Home argues that the question of arbitrability of class claims is a "gateway matter" to be decided by the trial court, relying on a series of United States Supreme Court cases for its position that only the trial court can decide the initial issue of arbitrability. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740 (2011); and *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 133 S. Ct. 2064 (2013).

Oral argument was held on September 18, 2019. The decision of the Texas Supreme Court is expected to bring clarity to the issue of whether the arbitrability of class allegations is a gateway matter for Texas trial courts to decide.

Sixth Circuit

Huff v. TeleCheck Services, Inc., 923 F.3d 458 (6th Cir. 2019)

Sixth Circuit finds no standing where plaintiff failed to show concrete injury caused by alleged violations of the Fair Credit Reporting Act (FCRA).

This case involved an alleged violation of the FCRA where the plaintiff's check verification report omitted certain information about his accounts and transactions. To understand the decision, some background is helpful. When a consumer writes a check to a merchant, the consumer generally provides a form of identification like a driver's license number. The retailer then sends the driver's license number and the bank account number on the check to a check verification company such as TeleCheck Services. TeleCheck will then recommend that the retailer accept or refuse the check based upon the consumer's check writing history. Under the FCRA, consumers can request from check verification companies a copy of their file, which generally shows the consumer's transactions and bank accounts. Plaintiff requested his report and claimed it was incomplete, in violation of the FCRA. The district court granted summary judgment, finding that plaintiff did not have standing.

On appeal, the Sixth Circuit began by asking whether (1) the plaintiff suffered an actual injury; (2) there was a risk of imminent injury, and (3) "Congress had authority to establish the injury in view of its identification of meaningful risks of harm in this area." *Huff*, 923 F.3d at 463.

On the first issue, the panel held that no actual injury had been shown, as the plaintiff failed to "allege, much less prove, harm in the flesh-and-blood or dollars-and-cents sense of the term." *Id.*

The panel also found no risk of imminent injury, as plaintiff proffered no evidence concerning "the difference between what [he] would have done with a report containing the linked information and what he did with the report he received," and thus the risk of the defendant's action causing a future check decline was "highly speculative." *Id.* at 463, 464. The panel also observed that the defendant had minimized the risk of harm by including a disclaimer that informed the plaintiff that his "record is linked to information not included in [the] report, subject to identity verification prior to disclosure." *Id.* at 461, 464.

Finally, the panel held that there was also no evidence the defendant's statutory violation created a cognizable Article III injury. This was so, the panel concluded, because "Congress cannot conjure standing by declaring something harmful that is not, by saying anything causes injury because the legislature says it causes injury." *Id.* at 465. As Congress had provided no "guidance about the ills [the] statute is meant to remedy," and had "not attempted to show how technical violations of the [FCRA] that carry no actual consequences or real risk of harm are concrete injuries," the court concluded the plaintiff lacked standing.

Seventh Circuit

Miller v. Southwest Airlines Co., 926 F.3d 898 (7th Cir. 2019)

Seventh Circuit holds that union member claims under the Biometric Information Privacy Act could not proceed in court.

This case considered two consolidated appeals posing the same question: "whether persons who contend that air carriers have violated state law by using biometric identification in the workplace must present these contentions to an adjustment board under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, which applies to air carriers as well as railroads." 926 F.3d at 900.

Both actions arose from Illinois' Biometric Information Privacy Act (BIPA), which imposes restrictions before a private entity, including an employer, can obtain and store biometric information – including information gleaned from fingerprints. *Id.* Generally speaking, a private entity cannot collect biometric information without disclosing certain information to and receiving consent from "the subject or the subject's legally authorized representative." 740 ILCS 14/15.

In both cases, plaintiffs asserted that defendants had implemented a timekeeping system requiring workers to clock in and out with their fingerprints "without their consent, fail[ing] to publish protocols, and us[ing] third-party vendors to implement the systems, which plaintiffs call a forbidden disclosure." *Id.* at 901. The question boiled down to whether the dispute was properly heard in federal courts or in front of an adjustment board under the Railway Labor Act. *Id.* at 903.

The Seventh Circuit held that "how workers clock in and out is a proper subject of negotiation between unions and employers" and is, in fact, "a mandatory subject of bargaining." *Id.* "When a subject independent of collective bargaining arises, and concerns different treatment of different workers, litigation may proceed outside the scope of the Railway Labor Act." *Id.* at 904. In this case, however, the questions raised are "about how an air carrier acquires and uses fingerprint information for its whole workforce." *Id.* Such a question cannot be resolved without asking whether the union has consented on behalf of the employees. *Id.* For this reason, the Seventh Circuit ruled that the dispute had to be decided by an adjustment board.

Because BIPA class actions often come up in the employment context, this holding, which appears to preclude federal jurisdiction of BIPA class actions where the plaintiff is a union member, is significant.

Nielen-Thomas v. Concorde Inv. Servs., LLC, 914 F.3d 524 (7th Cir. 2019)

Seventh Circuit clarifies meaning of "covered class action" under SLUSA.

This case was a putative class action alleging mismanagement of financial accounts and investment portfolios by multiple investment advisory firms and a broker. Bringing nine different state-law claims on behalf of the putative class, the named plaintiff alleged violations of Wisconsin and Nebraska securities laws and claims for breach of contract, fraud, negligence, failure to supervise, and breach of fiduciary duty, among other claims. 914 F.3d at 527. After the defendants removed the case, defendants successfully moved to dismiss plaintiff's nine state-law claims. In granting dismissal with prejudice, the district court held that the claims were precluded by the Securities Litigation Uniform Standards Act of 1998 (SLUSA), finding that, even though the proposed suit was not a "covered class action" under subsection I of SLUSA because the class consisted of fewer than 50 members, the lawsuit was still a "covered class action" under subsection II because the action was brought on behalf of unnamed parties in a representative capacity under SLUSA. *Id.*

On appeal, the Seventh Circuit affirmed the dismissal with prejudice. *Id.* at 535. The opinion assessed the plain language and legislative history of SLUSA to determine that subparagraphs I and II provide two conceptions of lawsuits deemed "covered class actions" under SLUSA: (I) lawsuits that identify more than 50 plaintiffs but where no plaintiff seeks damages in a representative capacity, and (II) all putative class actions with 50 or fewer proposed class members. *Id.* at 531. Although plaintiff argued that a collection of Supreme Court and Seventh Circuit holdings indicated that class actions brought by fewer than 50 plaintiffs were not covered under SLUSA, the court ruled that these holdings were non-binding dicta, finding the courts in these cases did not have the opportunity to rule on the context in which Subparagraphs I and II applied. *Id.* at 534.

The opinion solidifies the broad reach of "covered class actions" under SLUSA to include all putative class actions with fewer than 50 proposed class members.

Casillas v. Madison Ave. Assocs., Inc., 926 F.3d 329 (7th Cir. 2019)

Seventh Circuit holds that omitting information required by the Fair Debt Collection Practices Act (FDCPA) was not enough for standing.

The FDCPA requires debt collectors to notify consumers about the process that the statute provides for verifying a debt. In this case, the defendant sent Casillas a debt-collection letter that described the process, but failed to specify that she had to communicate in writing to trigger the statutory protections. *Casillas*, 926 F.3d at 331. Casillas then filed a putative class action based on the omission. *Id*. The district court dismissed the complaint, finding that without an allegation of harm, there was no standing. *Id*. at 332–33.

The Seventh Circuit, in an *en banc* decision, affirmed. *Id*. at 334. The court noted that "Casillas did not allege that [defendant's] actions harmed or posed any real risk of harm to her interests under the [FDCPA]." *Id*. "She did not allege that she tried to dispute or verify her debt orally and therefore lost or risked losing the statutory protections. Indeed, she did not allege that she ever even considered contacting [defendant] or that she had any doubt about whether she owed … the stated amount of money." *Id*. Instead, she "complained only that her notice was missing some information that she did not suggest that she would ever have used." *Id*. In the court's view, "Casillas had no more use for the notice than she would have had for directions accompanying a product that she had no plans to assemble." *Id*. Distinguishing other cases, the court concluded that the alleged omission was nothing more than a procedural violation that failed to place the plaintiffs in any real harm. *Id*.

This opinion is significant largely because it highlights a split between the Sixth and Seventh Circuits, one exemplified by the division between the majority and dissent of the *en banc* decision itself. The Sixth Circuit has held that the same omission places individuals at a greater risk of falling victim to abusive collection practices. *Id*. at 335–36 (citing *Macy v. GC Services Limited Partnership*, 897 F.3d 747 (6th Cir. 2018)).

Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, 129 N.E.3d 1197 (Ill. 2019)

Illinois Supreme Court holds that actual injury not required to bring a claim under the Biometric Privacy Information Act (BIPA).

Defendants own and operate an amusement park and sell "repeat-entry passes" that entitle the holder to admission to the park throughout the season. Since 2014, "defendants have used a fingerprinting process when issuing those passes." 2019 IL 123186, at 4. This system relies on the fingerprints of pass holders to verify customer identities and, for that purpose, collects and stores biometric information gleaned from the pass holders' fingerprints. *Id*. Plaintiffs sued for alleged violations of the BIPA, and defendants argued that, to state a claim, a plaintiff must plead an actual injury – that is to say, some injury beyond the mere statutory violation of BIPA. *Id*. at 15.

Rejecting defendants' argument, the Illinois Supreme Court held that "a person need not have sustained actual damage beyond violation of his or her rights under the Act in order to bring an action under it." *Id*. at 28. BIPA defendants "who fail to follow the statute's requirements" will be subjected "to substantial potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses 'for each violation' of the law whether or not actual damages, beyond violation of the law's provisions, can be shown." *Id*. at 36 (internal citations omitted).

Joiner v. SVM Management, No. 1-17-2336, 2019 IL App (1st) 172336-U (Ill. App. Ct. 2019)

Court of Appeal confirms that class actions in Illinois state court still can be mooted by tendering an offer of complete relief.

In this case, plaintiffs brought a putative class action based on a landlord's failure to repay a security deposit at the end of a lease agreement. Before plaintiffs filed a motion for class certification, defendant delivered a cashier's check to plaintiffs providing the amount of the security deposit along with a letter stating that defendant "unconditionally tenders" the security deposit in addition to "[a]ll court costs and reasonable attorney's fees as allowed by the court that Plaintiffs incurred in pursuing Count I of the complaint." 2019 IL App (1st) at ¶ 7.

Plaintiffs argued that under *Campbell-Ewald Co. v. Gomez*, 577 U.S., 136 S. Ct. 663 (2016), an unaccepted settlement offer – even a tender of the full amount owed – has no force, and thus because plaintiffs rejected the tender offer, it is null and void and cannot moot the case. Defendant pointed to *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 948 N.E.2d 1042, 350 Ill. Dec. 535 (2011), in which the Illinois Supreme Court held that "even rejected offers can moot a claim."

Ultimately, despite changes in how the Seventh Circuit treats similar tenders under *Campbell-Ewald*, the Illinois Appellate Court found that "until our supreme court says otherwise, *Barber* and *Ballard* remain the controlling authority in Illinois." 2019 IL App (1st) at ¶ 28. Thus, in Illinois courts, a class action lawsuit still can be mooted by a tender offer made before a motion for class certification.

Eighth Circuit

Golan v. FreeEats.com, Inc., 930 F.3d 950 (8th Cir. 2019)

Eighth Circuit finds that receiving telemarketing voice messages in violation of the TCPA creates standing, but that billion-dollar statutory penalty award violated due process.

This decision addresses two increasingly prominent issues arising in class actions: Article III standing and statutory penalties.

The court first addressed whether plaintiff's receipt of telemarketing voice messages that violated the Telephone Consumer Protection Act (TCPA) qualified as a "concrete injury" sufficient for Article III standing. Relying on Supreme Court and sister circuit precedent, the panel held that the proper analysis required determining whether the suffered harm had a close relationship to a type of harm traditionally actionable at common law. Because the receipt of telemarketing messages without prior consent "bear[ed] a close relation to the types of harms traditionally remedied by tort law, particularly the law of nuisance," 930 F.3d at 959, the panel held that the named plaintiffs suffered a concrete injury and thus had standing.

Next, the panel addressed whether the district court erred in remitting the statutory damages award from $1.6 billion ($500 per call) to $32 million ($10 per call). Because defendant plausibly believed it was not violating the TCPA, and only about 7% of calls relayed the violative message, the court held the $1.6 billion in statutory damages to be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable," and thus in violation of the Due Process Clause. *Id.* at 963 (quoting *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919)). The court thus upheld the district court's 98% reduction of statutory damages.

Ninth Circuit

Duguid v. Facebook, Inc., 926 F.3d 1146 (9th Cir. 2019)

Ninth Circuit deepens circuit split over proper definition of "automatic telephone dialing system" under the TCPA, setting the stage for Supreme Court review.

This case involved alleged violations of the Telephone Consumer Protection Act (TCPA). Plaintiff alleged violations based on text messages that were intended to alert users that their social media accounts had been accessed by unrecognized devices or browsers. Plaintiff was not a user, and he attempted to terminate the alerts without success. He then sued on behalf of (1) persons who received a message without having provided their cell numbers to defendant; and (2) persons who told defendant to cease the messages, but then received at least one more. The trial court dismissed plaintiff's claims, agreeing with Facebook that plaintiff had not adequately alleged the use of an "automatic telephone dialing system (ATDS)," a prerequisite for TCPA liability, in sending the messages.

On review, the Ninth Circuit noted that *ACA International v. Federal Communications Commission*, issued in 2018 by the D.C. Circuit, vacated several declaratory rulings from the Federal Communications Commission regarding the definition of an ATDS. The court, however, still articulated the definition as "equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically." The Ninth Circuit found that the phrase "using a random or sequential number generator" modifies only the verb "to produce," not the verb "to store." Thus, in the court's view, an ATDS need only have the capacity to "store numbers to be called" and to "dial such numbers automatically." Against this background, the Ninth Circuit found that the text message equipment allegedly used met the definition, rejecting the argument that the numbers were not "stored to be called," but rather were to be used "reflexively" in response to outside conditions. The Ninth Circuit stated that the equipment need only have the "capacity" to store numbers to be called. The Ninth Circuit's definition of ATDS, as affirmed in *Duguid*, reflects a circuit split with the Third Circuit's earlier decision in *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018), which construed the statute by its plain terms to require that an ATDS have the capacity to generate numbers randomly or sequentially and dial those numbers (not merely to store and dial them). *Id.* at 121; *see also Dominguez v. Yahoo, Inc.*, 629 F. App'x. 368, 372, 373 n.2 (3d Cir. 2015) ("an autodialer must be able to store or produce numbers that themselves are randomly or sequentially generated"). Separately, following the Fourth Circuit's reasoning in *American Association of Political Consultants, Inc. v. Federal Communications Commission*, the Ninth Circuit rejected a challenge to the entirety of the TCPA as unconstitutional on First Amendment grounds, but did invalidate the debt-collection exception enacted through the Bipartisan Budget Act amendment in 2015. That amendment exempts from the TCPA's prior express consent requirement "calls made solely to collect a debt owed to or guaranteed by the United States." The Ninth Circuit found that the exception is "content-based and insufficiently tailored to advance the government's interests in protecting privacy or the public."

Patel v. Facebook, Inc., 932 F. 3d 1264 (9th Cir. Aug. 8, 2019)

Ninth Circuit finds standing for violations of the Biometric Information Protection Act (BIPA).

Plaintiffs asserted claims under the Illinois BIPA based on the alleged use of facial-recognition technology, including technology relating to a feature called Tag Suggestions, which allows users to receive suggestions of persons to tag based on matching facial feature data in photographs. According to plaintiffs, this practice violated the BIPA by collecting, using, and storing biometric identifiers without consent.

On review, the Ninth Circuit found that plaintiffs had established Article III standing. Defendant argued plaintiff stated only a bare procedural violation of BIPA, rather than a concrete injury-in fact. Although the plaintiffs conceded having suffered no real harm from Tag Suggestions — monetary, emotional, reputational, or otherwise — and that no consequential harm had been suffered, the Ninth Circuit disagreed, finding that the BIPA protects privacy interests, and relying on federal statutes relating to seemingly distinguishable privacy protections, like the TCPA, and common law torts. The Ninth Circuit also noted the United States Supreme Court's recent and evolving views on the impact of technological enhancements on privacy issues, including in *United States v. Jones and Carpenter v. United States* (GPS monitoring) and *Riley v. California* (cell phone storage of personal information).

Blair v. Rent-A-Ctr., Inc., 928 F.3d 819 (9th Cir. 2019)

Ninth Circuit holds that the Federal Arbitration Act does not preempt the *McGill* prohibition against agreements that preclude "public injunctive relief" in any forum.

In this case, the consumer sought, among other relief, a "'public injunction' on behalf of the people of California to enjoin future violations" of California consumer protection laws. The district court refused to compel arbitration because the arbitration agreement purported to waive the consumer's "right to seek public injunctive relief in any forum" and thus violated the California Supreme Court's rule from *McGill v. Citibank*, which held that a contractual agreement purporting to waive a party's right to seek public injunctive relief in any forum is unenforceable under California law.

Defendant challenged the district court's ruling on appeal, arguing that California's *McGill* rule was preempted by the Federal Arbitration Act (FAA). The panel disagreed, however, concluding that *McGill* was "a generally applicable contract defense" for purposes of the FAA's saving clause because it "derives from a general and long-standing prohibition on the private contractual waiver of public rights" and "applies 'equally to arbitration and non-arbitration agreements.'" The panel also found that the *McGill* rule did not "mandate procedures that interfere with arbitration" because arbitration "of public injunctive relief does not 'sacrifice[ ] the principal advantage of arbitration – its informality.'" The panel thus held that the *McGill* rule was not preempted by the FAA.

Arias v. Residence Inn, 936 F.3d 920 (9th Cir. 2019)

Ninth Circuit provides a refresher on removal under the Class Action Fairness Act.

In this case, the Ninth Circuit vacated a decision to remand an action to state court. The action had been removed under the Class Action Fairness Act, and the district court *sua sponte* ordered it remanded, finding a lack of evidence in support of the amount-in-controversy requirement.

Plaintiff had filed a putative class action, alleging that Marriott failed to compensate employees for wages and missed meal breaks, and failed to issue accurate authorized wage statements. To meet the amount-in-controversy requirement, Marriott used plaintiff's class definition, employee data, assumptions about the number of violations alleged in the complaint and projected attorneys' fees. The district court found the calculations "unpersuasive" as resting on conjecture, criticized Marriott for not submitting evidence, and found the attorneys' fees too speculative.

On review, the Ninth Circuit found that, when a notice of removal plausibly alleges federal court jurisdiction, a district court may not remand without giving defendant an opportunity to prove the requirements by a preponderance of the evidence. The court also ruled that a defendant may rely on "a chain of reasoning that includes assumptions" in addressing the amount in controversy. Those assumptions may be reasonable if based on the allegations of the complaint, and the assumptions can reflect the maximum that plaintiff might recover, including attorneys' fees.

Nguyen v. Nissan North America, Inc., 932 F.3d 811 (9th Cir. 2019)

Ninth Circuit approves cost-to-replace measure of damages in design defect class action.

In this case, Plaintiff asserted claims related to an alleged design defect in the hydraulic clutch system of certain Nissan vehicles. The district court denied class certification, finding that the proposed measure of damages lacked a sufficient nexus to the theory of liability and would give rise to individualized issues. Plaintiff asserted a benefit-of-the-bargain measure, seeking to recover the difference in value between non-defective and defective vehicles based on the average cost to replace the clutch system. The district court found this replacement cost calculation would be an appropriate issue only if consumers would have found the clutch to be of no value.

On appeal, the Ninth Circuit reversed, determining that, under *Comcast Corp. v. Behrend*, and the specific theory at issue, plaintiff's damages theory was adequate. Plaintiff argued that: the defect was "inherent in each of the [vehicles] at the time of purchase, regardless of when and if the defect manifested"; Nissan knew about, and failed to disclose, the defect at the time of sale; and a reasonable person would not have purchased the vehicle, or would have paid less.

Emphasizing that the defective clutch was itself the injury, the court ruled that the damages model satisfied Rule 23: "Whether his proposed calculation of the replacement cost is accurate, whether the clutch was actually defective, and whether Nissan knew of the alleged defect are merits inquiries unrelated to class certification. For now, it is sufficient that Plaintiff has demonstrated the nexus between his legal theory—that Nissan violated California law by selling vehicles with a defective clutch system that was not reflected in the sale price—and his damages model—the average cost of repair." *Nguyen*, 932 F.3d at 821.

In re Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539 (9th Cir. 2019)

Ninth Circuit rejects earlier ruling that threatened nationwide class settlements.

The Ninth Circuit, sitting *en banc*, overturned an earlier panel decision that ostensibly made certification of nationwide settlement classes more difficult and time-consuming by requiring district courts to scrutinize a settlement class to the same degree as litigation classes. The divided panel had reversed the certification of a nationwide settlement class because the district court did not undertake a comprehensive choice-of-law analysis in addressing predominance under Rule 23(b)(3).

In overturning the panel and affirming the district court's order, the Ninth Circuit explained that Rule 23(b)(3)'s predominance inquiry is a "manageability" concern, and that district courts need not consider "manageability" concerns when certifying settlement classes. It reasoned that choice-of-law concerns related to the certification of nationwide classes pursuing claims under state law "present a significant issue for trial manageability," but do not preclude certification in the settlement context where the claims otherwise "revolve[ ] around a 'common nucleus of facts.'" In addition, "[s]ubject to constitutional limitations and the forum state's choice-of-law rules, a court adjudicating a multistate class action is free to apply the substantive law of a single state to the entire class." The court noted that the objectors had not even argued "that differences between the consumer protection laws of all fifty states precluded certification of [the] settlement class." Therefore, the district court was not "obligated to address choice-of-law issues beyond those raised by the objectors." The court thus affirmed the district court's certification of the settlement class because "the class claims turn[ed] on the automakers' common course of conduct–their fuel economy statements–and no objector established that the law of any other states applied."

The court also rejected objectors' contentions that the settlement notices were required, but failed to inform class members of the formula for calculating each member's benefits, because "[a] settlement notice need not provide an exact forecast of the award each class member would receive, let alone a detailed mathematical breakdown." The court also rejected the argument that, because Virginia substantive law was supposedly more favorable, the settlement was unfair to Virginia residents. The objector was "free to opt out of the class," the court explained, but had "no right to do so on behalf of anyone else." The court also disagreed that the settlement was the result of a "reverse auction" and collusion between class counsel and defendants, noting that "the settlement bears none of the typical signs of collusion …, such as when class counsel 'receive a disproportionate distribution of the settlement,' the agreement contains a 'clear sailing' provision for attorney's fees 'separate and apart from class funds,' or unawarded fees revert to the defendants rather than to the class." Finally, the court concluded that the district court did not abuse its discretion in using the lodestar method to award attorneys' fees to class counsel and had no obligation to "crosscheck" the amount of the award using the "percentage method," which "is merely a shortcut to be used 'in lieu of the often more time-consuming task of calculating the lodestar.'"

NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc., 926 F.3d 528 (9th Cir. 2019)

Ninth Circuit holds that a class must be decertified when the named plaintiff does not have standing.

In this case, plaintiff alleged, on behalf of itself and a putative class, that a concrete supplier recorded customer calls without consent in violation of California law. The district court initially certified a class consisting of customers who had called the concrete supplier before its implementation of a prerecorded message notifying callers that their calls were being recorded. The class was later decertified, after the supplier identified several customers who had called during that time with knowledge of the supplier's recording practice and continued to place orders anyway, which the supplier argued demonstrated consent to be recorded. Based on this evidence, the district court concluded that Rule 23's "commonality" and "predominance" requirements were not satisfied.

After a bench trial on plaintiff's individual claim, the district court denied statutory damages. The district court further found plaintiff lacked standing to pursue its claim because it had not suffered a "concrete or particularized injury by the violation." Following entry of judgment, plaintiff appealed the decertification order but not the finding that it lacked standing.

On appeal, the Ninth Circuit framed the question as "whether a class must be decertified when the class representative is found to lack standing as to its individual claims." Under "circuit precedent," the panel explained, "when a class is certified and the class representatives are subsequently found to lack standing, the class should be decertified and the case dismissed."

Thus, because the plaintiff failed to appeal – and therefore waived its right to challenge the district court's finding that it lacked standing – the order decertifying the class was affirmed.

Banks v. N. Tr. Corp., 929 F.3d 1046 (9th Cir. 2019)

Ninth Circuit clarifies scope of the Securities Litigation Uniform Standards Act in the beneficiary-trustee context.

In this case, the beneficiary-plaintiff alleged that the trustee breached its fiduciary duties by investing trust assets in affiliated funds rather than in unaffiliated investments that would have yielded higher returns, and that the trustee charged excessive fees and failed to maintain adequate records in connection with preparing routine fiduciary tax returns. Based on these allegations, the beneficiary also asserted elder abuse and unfair competition claims under California law.

The district court granted the trustee's motion to dismiss, finding that the Securities Litigation Uniform Standards Act (SLUSA) barred the beneficiary's claims. SLUSA was enacted to prevent class action litigants from circumventing the Private Securities Litigation Reform Act (PSLRA), which limited the filing of federal securities class actions in federal court. SLUSA carries out its purpose of preventing state-law class actions from end-running the PSLRA by depriving federal courts of jurisdiction to hear class actions asserting claims under state law based on allegations that a defendant made a misrepresentation or omission or employed any manipulative or deceptive device *in connection with the purchase or sale of a covered security*. In dismissing the beneficiary's claims as barred by SLUSA, the district court reasoned that the trustee was the agent of the trust's beneficiaries, and thus the beneficiary's claims regarding the imprudent investments featured allegations of material misrepresentations or omissions "in connection with the purchase or sale of covered securities."

The Ninth Circuit reversed, holding that SLUSA did not bar the beneficiary's claims, because the trustee's alleged violations were not "in connection with the purchase or sale of a covered security." The Ninth Circuit distinguished the trustee-beneficiary relationship from the archetypical principal-agent relationship, because the beneficiary of an irrevocable trust, like the one in question, has no control over how trust assets were invested. As a result, the trustee's misconduct – over which the beneficiary had no control – could not constitute misconduct "in connection with" the sale of covered securities because "the only party who decide[d] to buy or sell a covered security as a result of a lie [was] the [trustee]." The Ninth Circuit also found the beneficiary's fee-related claims lacked any plausible relationship to covered securities, and otherwise concluded the beneficiary adequately stated his claims such that dismissal under Rule 12(b)(6) was improper.

Noel v. Thrifty Payless, Inc., 7 Cal. 5th 955 (2019)

California Supreme Court softens ascertainability requirement in state court.

Plaintiff, who purchased an inflatable swimming pool allegedly smaller than the one pictured on its packaging, brought a putative class action against the seller, alleging violations of California's Consumer Legal Remedies Act, Unfair Competition Law, and False Advertising Law. In his motion to certify a class, plaintiff argued he had no obligation to offer evidence as to how class members could be identified, and contended (without supporting evidence) that modern day point-of-sale systems used by retailers such as Rite Aid could track customers who pay by credit card, and that Rite Aid also could contact consumers who were members of its loyalty program or on its mailing list because it had their contact information. The trial court found that this speculation without evidentiary support was insufficient, and denied certification on that basis. The Court of Appeal agreed and affirmed.

The Supreme Court disagreed, however, and reversed. After an exhaustive review of the court's prior opinions on the issue of ascertainability, the court held that this requirement is satisfied when a proposed class is defined "in terms of objective characteristics and common transactional facts" that make "the ultimate identification of class members possible when that identification becomes necessary." Thus, the court held that a representative plaintiff in a class action does not have to introduce evidence establishing how notice will be communicated to individual class members.

ZB, N.A., v. Superior Court (Lawson), 8 Cal. 5th 175 (2019)

California Supreme Court holds that wages cannot be recovered under PAGA.

In recent years, plaintiffs' lawyers have been bringing claims for unpaid wages under California's Labor Code section 558 as Private Attorneys General Act (PAGA) claims, to avoid arbitration or having to certify a class. In *ZB*, the California Supreme Court changed this landscape dramatically by holding that unpaid wages are not "penalties" for which plaintiffs may recover as private attorneys general under PAGA.

Plaintiff brought a PAGA-only action against her employer alleging wage and hour violations and seeking civil penalties, including unpaid wages. The employer filed a motion to compel arbitration of plaintiff's claim for unpaid wages under Section 558. The trial court granted the motion but compelled arbitration as a representative action for unpaid wages of all allegedly aggrieved employees.

ZB filed an appeal and a writ for mandate from the trial court's order. The appellate court issued a writ and reversed the trial court's order, holding that the employer's claim for unpaid wages could not be arbitrated because those wages were "penalties" under PAGA.

ZB petitioned the California Supreme Court to determine whether an employer may compel arbitration of a PAGA claim seeking unpaid wages under Section 558. The Supreme Court first addressed whether a plaintiff may seek unpaid wages in a PAGA action at all. The court concluded the answer is no, and held that the civil penalties a plaintiff may seek under Section 558 through PAGA do not include unpaid wages. The court reasoned that Section 558 does not provide a private right of action, and that only the Labor Commissioner may recover unpaid wages under that statute.

The Supreme Court, however, upheld the decision overturning the trial court's order compelling arbitration, because the employer had only moved to compel "victim-specific relief under Section 558," which the court had determined was not recoverable as a penalty under PAGA in the first place. Nonetheless, the court held that plaintiffs may still recover fixed penalties available under the Labor Code for violations of the statute under PAGA, and that such claims are not arbitrable. And plaintiffs may seek to recover unpaid wages on other theories on a class basis, which claims may also be subject to arbitration depending on the circumstances and arbitration clause at issue.

Tenth Circuit

Allred v. ReconTrust Co., N.A., 2019 U.S. App. LEXIS 29097 (10th Cir. Sept. 26, 2019)

Tenth Circuit reverses decision modifying *cy pres* component of class settlement.

As part of a class settlement, the parties created a *cy pres* fund to distribute unclaimed or non-distributable funds to the state of Utah for programs related to housing, housing loans, and homelessness. No class member opted out or objected to the settlement. Although the district court approved the class-member fund, it modified the *cy pres* fund, redirecting those funds from Utah to the federal government.

The sole rationale the district court offered was notable, opining that the federal government "need[s] all the money [it] can get" and that "we're not in the charity business."

The Tenth Circuit rejected the modification, finding that the district court failed to adequately assess whether the parties' agreement to a *cy pres* fund was fair, reasonable, and adequate. The panel expressly noted that "it appear[ed] that the district court may have rejected the very premise of a *cy pres* remedy, given [its] inclination to give the money to the United States for an economic reason and its opposition to the money being used for a charitable purpose." Given that assessment, the panel vacated the underlying decision and remanded to the district court with instructions to conduct a proper *cy pres* analysis.

Naylor Farms, Inc. v. Chaparral Energy, LLC, 923 F.3d 779 (10th Cir. 2019)

Tenth Circuit concludes that variations in damage calculations did not preclude certification.

In a case alleging that the defendant, an oil and gas company, improperly distributed royalty payments to owners with interests in its oil and gas wells under various lease agreements, the Tenth Circuit considered whether class certification was barred by (1) lease-language variations and (2) the lack of a uniform payment methodology. The panel, applying an abuse of discretion standard, held that neither issue barred certification and that the district court had properly certified the class.

On the lease-language variation question, the defendant argued the district court erred by relying on a plaintiff-prepared chart categorizing lease language to determine the existence of commonality and predominance. The panel addressed this argument by first reiterating the Tenth Circuit's previous suggestion that plaintiffs prepare such a chart to establish commonality. The panel noted the plaintiff in this case followed that suggestion and the district court "independently confirmed that the chart was generally accurate." 923 F.3d at 796. Because the district court confirmed the accuracy of the chart and because the defendant failed to provide the panel with "any information that might call into question the district court's assessment of the chart's accuracy," the panel concluded that the district court did not abuse its discretion. *Id.*

On the payment-methodology question, the defendant argued that the lack of a common methodology to calculate royalty payments made it impossible to certify the case consistent with Rule 23. The panel rejected this argument, explaining that, although the Tenth Circuit had previously "explained that the existence of a uniform payment methodology isn't *sufficient* to establish predominance," "nothing … indicates the existence of such methodology is *necessary* to accomplish this task." *Id.* at 798 (citing *Wallace B. Roderick Revocable Living Tr. v. XTO Energy, Inc.*, 725 F.3d 1213, 1220 (10th Cir. 2013)). The panel then expressed its disagreement with the argument that "individual questions about damages defeat predominance," on the ground that "material differences in damages determinations will only destroy predominance if those individualized issues will overwhelm questions common to the class," and it saw "no indication" that would happen in this case. *Id.* (quoting *Roderick*, 725 F.3d at 1220) (internal quotation marks omitted; alteration incorporated).

Eleventh Circuit

Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019)

Single text message sent in violation of the Telephone Consumer Protection Act (TCPA) does not establish standing.

Plaintiff, a former client of a Florida law firm, received a text message to his mobile phone advertising discounted legal services of his former lawyer. He filed suit in federal court seeking to be the class representative of a putative class of former clients of the Hanna law firm who received unsolicited text messages over a four-year period from the firm. In the district court, the defendant moved to dismiss for lack of standing. The district court found that plaintiff had standing, but acknowledged that its opinion involved a "controlling question of law" and certified its order for interlocutory appeal to the Eleventh Circuit.

The Eleventh Circuit first analyzed whether the TCPA covered text messages sent to a mobile phone. The TCPA was enacted in 1991, before the rise of text messaging, and does not expressly address this scenario. But the court found persuasive that the FCC, under its TCPA rulemaking authority, had applied the statute's regulations to text messages. Thus, the Eleventh Circuit concluded that a plaintiff could state a violation of TCPA based upon the receipt of text messages.

The Eleventh Circuit, however, concluded that the plaintiff lacked standing. The Eleventh Circuit conducted an extensive review of its precedent to determine whether a single text message was sufficient. The court relied on case law examining harm and Article III jurisdiction in the context of junk faxes, a different technology. A single fax can prevent the receiver from receiving other faxes. No such impediment exists, however, with respect to sending a text to a mobile phone. A mobile phone can receive multiple texts while conducting other activities. The court concluded: "Simply sending one text message to a private cell phone is not closely related to the severe kinds of actively intermeddling intrusions that the traditional tort contemplates." The Eleventh Circuit thus found that plaintiff failed to allege a concrete harm sufficient for standing.

D.C. Circuit

In re: Rail Freight Fuel Surcharge Litig., 934 F.3d 629 (D.C. Cir. 2019)

Class should not be certified where it includes material number of uninjured class members.

This case involved allegations by rail shippers – i.e., the railroads' customers – that the railroads conspired to fix rate-based fuel surcharges, which are imposed when the price of fuel rises above a certain price. The "direct purchaser" plaintiffs sought certification under Rule 23(b)(2). Although their request was granted, the D.C. Circuit vacated that certification order and remanded for further proceedings, expressing concern with "the damages model's propensity towards false positives" and stressing "a hard look at the soundness of statistical models that purport to show predominance." *In re: Rail Freight Fuel,* 934 F.3d at 621-22. On remand, following additional discovery and expert reports, the court denied certification, finding the predominance requirement was not satisfied. *In re: Rail Freight Fuel Surcharge Antitrust Litig*., 292 F. Supp. 3d 14 (D.D.C. 2017). Plaintiffs filed a timely petition for permission to appeal pursuant to Rule 23(f), which was granted by the D.C. Circuit.

The D.C. Circuit affirmed, concluding that the plaintiffs' damages model could not satisfy Rule 23(b)(3)'s predominance requirement. Instead, the model could only show (1) injury as a result of the purported conspiracy and (2) a causal connection between defendants' purported conduct and injury for 87.3% of the class. 934 F. 3d at 623-24. The inability to provide common proof of injury for 12.7% of the class meant that plaintiffs could not show predominance. *Id*. Rejecting plaintiffs' contention that they did not have to show that all class members were injured, the court emphasized that "uninjured class members cannot prevail on the merits, so their claims must be winnowed away as part of the liability determination." *Id.* at 624. Plaintiffs had no method for identifying and winnowing the uninjured class members short of individual trials, and thus could not show a basis for certification. *Id.*

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