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Class Action Litigation Newsletter | Summer 2020

In this Issue:

This GT Report Summarizes Recent Class-Action Decisions From Across the United States

Highlights from this issue include:

- Second Circuit affirms class certification in long-running "flushable" wipes litigation, concluding that the plaintiff's damages model was sufficient under *Comcast*.
- Third Circuit declines to enforce an arbitration provision under New Jersey's "incorporation by reference" doctrine.
- The Third Circuit and Ninth Circuit reiterate that district courts must undertake a rigorous analysis when evaluating expert evidence at the class certification stage.
- The New Jersey Supreme Court holds that aggregate damages calculations are improper absent evidence supporting a presumption that all class members were damaged.
- The Fourth Circuit provides a reminder on how to evaluate limited fund settlements under Rule 23(b)(1)(B).
- The Fifth Circuit clarifies the "local single event" exception to mass action removal under CAFA.
- The Ninth Circuit rules that PAGA actions are not "class actions" under CAFA.
- The Ninth Circuit holds that a plaintiff seeking equitable relief under state law must establish the absence of an adequate remedy at law.

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First Circuit

In re Intuniv Antitrust Litig., 2020 U.S. Dist. LEXIS 119289 (D. Mass. July 8, 2020)

Court decertifies class based on plaintiff's bankruptcy filing, concluding that debtor-in-possession cannot act as a class representative when defendants themselves are creditors.

In this case, a direct purchaser filed an antitrust action against various entities alleging that they improperly delayed competition when manufacturing the brand name and generic versions of Intuniv, an extended release guanfacine hydrochloride product. After plaintiff filed for bankruptcy protection, defendants moved to decertify the class. The district court granted the motion in part, concluding that plaintiff was no longer an adequate class representative but inviting motions to provide a substitute class representative. As to plaintiff's inadequacy, which the district court referred to as a matter of first impression in the First Circuit, the district court concluded that a debtor cannot act as a class representative when defendants are creditors. The district court found that plaintiff was now an inadequate representative based on two conflicting duties when acting as a debtor-in-possession and class representative: First, it must maximize the value of its assets and the value of the lawsuit for the benefit of its creditors, including defendants in the case. Second, it must fairly and adequately protect the interests of the class. The district court, however, refused to find that the debtor-plaintiff was inadequate based on its inability to fund the litigation as class counsel was advancing expenses and had taken the matter on a contingent basis. Finally, the district court made clear that it was "not advocating a blanket rule that a debtor-in-possession could never be an adequate class representative."

Quadrelli v. Moniz, 2020 U.S. Dist. LEXIS 99456 (D. Mass. June 8, 2020)

Civil detainees granted class certification to avoid risk of COVID-19 exposure.

This action was filed by a group of pro se civil immigration detainees seeking a writ to fast-track their cases due to concerns about contracting COVID-19 while in a state correctional facility. Plaintiffs sought to certify a class of civil detainees. In opposing plaintiffs' motion, defendant challenged commonality and typicality under Fed. R. Civ. P. 23(a) and asserted that plaintiffs could not meet Fed. R. Civ. P. 23(b)(2) based on disparate factual circumstances. As to commonality, the district court agreed that there existed a common question among the proposed class, whether, because of COVID-19, their continued detention violated their constitutional rights. This common question focuses on the conditions at the detention center and the risk of infection in general, rather than, as defendant argued, on the unique impact of those conditions on individual plaintiffs. As to typicality, that too was met because plaintiffs resided in the same center and were exposed to the same risk of contracting COVID-19. Finally, plaintiffs' satisfied Rule 23(b)(2) by demonstrating that a single remedy (release) could provide relief to all class members.

Vara v. Devos, 2020 U.S. Dist. LEXIS 112296 (D. Mass. June 25, 2020).

Former students granted class certification in lawsuit alleging that the Department of Education arbitrarily and capriciously denied petition to set aside defaulted student loans.

Plaintiffs, former students, filed this lawsuit to challenge actions taken by the Department of Education concerning thousands of student loans used to pay for attending Everest Institute, a for-profit college. Plaintiffs sought to set aside the DOE's denial of an application to discharge their loans as submitted by the Massachusetts Attorney General's Office. The district court concluded that commonality was met because the following common questions were resolvable through common proof: (1) whether the AGO's

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submission represents a valid borrower defense on behalf of all former Everest Massachusetts students named therein; (2) whether defendant constructively denied that application without making a reasoned decision; and (3) given Everest's undisputed violations of state law, whether any decision that fails to grant full relief to plaintiffs and proposed class members is arbitrary and capricious under the Administrative Procedures Act. The district court also found that the Higher Education Act's anti-injunction provision did not preclude class certification based on the Administrative Procedure Act's waiver of sovereign immunity provision. Finally, the proposed relief (declaratory and injunctive) was appropriate under Fed. R. Civ. P. 23(b)(2).

Second Circuit

Kurtz v. Costco Wholesale Corp., Nos. 17-1856-cv, 17-1858-cv, 2020 U.S. App. LEXIS 20077, at *1 (2d Cir. June 26, 2020)

The Second Circuit affirms certification in flushable baby wipes class actions while reversing certification for injunctive relief class.

Plaintiffs alleged that wipes sold by defendants were not "flushable" as advertised but instead damaged plumbing and septic systems because they did not disintegrate and thus were not truly "flushable." As to the damages class, the Second Circuit focused on defendants' argument that the class representative had a conflict of interest because he had abandoned claims based on damages to plumbing in favor of a theory that customers paid more for disposal wipes than was warranted. The Second Circuit found there was insufficient evidence that such plumbing damages offered a meaningfully greater recovery than the "overcharge" theory and found that the expense of litigating plumbing damages claims would have outweighed any recovery. The Second Circuit also addressed defendants' challenges to the expert evidence plaintiffs submitted to establish a "price premium." The court reasoned that, "Defendants' central contention is that [the expert's] analysis either does not or cannot establish a price premium because of issues such as an incomplete dataset, flawed parameters of the regression, or business considerations not captured by the model." Concluding that these arguments showed "a fatal similarity—an alleged failure of proof as to an element of the plaintiffs' cause of action," the court affirmed certification. The court, however, rejected the injunctive relief class because the class representative had given no indication that he planned to buy wipes in the future and thus had no standing for an injunction.

Third Circuit

Bacon v. Avis Budget Group, Inc., 959 F.3d 590 (3d Cir. 2020)

Third Circuit rejects enforcement of arbitration clause based on incorporation-by-reference doctrine.

Plaintiffs alleged that the defendant rental car company imposed unauthorized charges on their credit and debit cards and asserted claims on behalf of a putative class under various states' consumer protection statutes, unjust enrichment and conversion. Defendant moved to compel individual arbitration under the terms and conditions for the rental. Specifically, the one-page rental agreement signed by each customer stated that the customer "reviewed & agreed to all notices & terms here and in the rental jacket." The agreement was folded and then placed in the rental jacket, which bore the title "Rental Terms and Conditions" and not "rental jacket," and the twenty-eighth paragraph of the terms and conditions contained a mandatory arbitration clause. The district court ordered the parties to conduct discovery as to

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arbitrability and then denied the motion to compel arbitration, reasoning that the arbitration clause was not incorporated by reference in the rental agreement.

The Third Circuit affirmed. The panel applied New Jersey law, which provides that "for there to be a proper and enforceable incorporation by reference of a separate document, (1) the separate document must be described in such terms that its identity may be ascertained beyond doubt and (2) the party to be bound by the terms must have had knowledge of and assented to the incorporated terms." The panel found that standard was not satisfied because (i) the agreement provided that the customer "reviewed & agreed to all notices & terms here and in the rental jacket," "but the phrase 'rental jacket' is not defined or even used in the … Agreement and is not otherwise so 'specific or identifiable' that the customer could ascertain the document to which the phrase refers," and (ii) "there is no evidence that Plaintiffs knew about the arbitration provision in the rental jacket when they signed the … Agreement" because it was without dispute that the customers were not showed the rental jacket until after they signed the agreement. In short, the panel held that "[w]hile there is no obligation to provide a copy of a clearly identified incorporated agreement at the time the agreement itself is signed, the incorporated document must be identified beyond doubt."

In re Lamictal Direct Purchaser Antitrust Litigation, 957 F.3d 184 (3d Cir. 2020)

Third Circuit reiterates that Rule 23 requires a rigorous analysis of expert evidence when evaluating class certification.

Plaintiffs alleged that an agreement between two drug manufacturers to settle a patent dispute was an impermissible "reverse payment agreement" that violated antitrust laws. In seeking certification, plaintiffs' expert provided a model using an "average hypothetical price" to show that the entire class suffered injury. The district accepted this model to certify a class of all those who purchased drugs from defendants. The Third Circuit reversed, holding that the district court erred by assuming that "averages are acceptable" to show commonality and predominance, explaining averages could "mask individualized injury."

Little v. Kia Motors America, Inc., __ A.3d __, 2020 WL 3455799 (N.J. 2020)

New Jersey Supreme Court prevents class from pursuing aggregate damages.

Plaintiff alleged breach of warranty against Kia based on an allegedly defective brake system. The class was certified, and, at trial, the class presented two claims for damages: (1) diminution in value of their vehicles, and (2) out of pocket costs due to brake defects. The second theory of damages was not supported by individual proof of out-of-pocket costs but on an expert's estimate of the amount of money an average Kia owner would pay for brake repairs. The jury rejected the diminution of value damages claim but awarded out-of-pocket cost damages of $750 per class member. On post-trial motions, the trial court determined that it should have required individualized proof of out of pocket damages, decertified the class on that issue, and appointed a special master to administer a claims process and adjudicate individual class members' damages claims. Plaintiff appealed, and the New Jersey Appellate Division reversed, finding that aggregate damages were appropriate.

The Supreme Court granted review to "consider the standard that guides a court's determination whether to permit a class to prove its damages in aggregate form, or to require evidence specific to each class member." After discussing the judicial efficiencies that class actions may achieve, the Court observed that "a court must recognize that the most expeditious method of presenting a claim or defense may not ensure a fair trial. Accordingly, before admitting aggregate proof of damages in a class action, a court

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must undertake a careful inquiry to ensure that the proposed evidence does not deprive the defendant of a meaningful opportunity to contest the plaintiff's claims." The Court then set forth the following factors for a court to consider when deciding whether to permit aggregate proof of damages: "(1) the underlying cause of action for which the class seeks recovery; (2) the measure of damages that the law allows if there is a finding of liability for that claim; and (3) the methodology by which plaintiff seeks to prove damages on an aggregate basis." Significantly, the Court found that "[i]f the plaintiff cannot establish a basis for a presumption that all members of the class have sustained damage, aggregate proof of damages raises the specter that an individual with no viable claim will recover a windfall. In such settings, the court should require individualized proof of damage." Even if plaintiff has established that all class members have sustained damages, "aggregate proof of damages must be based on a reliable mathematical formula in order to be admissible." Because plaintiff did not establish that presumption here, the Court affirmed the trial court's rejection of the class's aggregated damages model.

Fourth Circuit

Herrera v. Charlotte School of Law, LLC, __ Fed. Appx. __, 2020 WL 3118494 (4th Cir. 2020)

Fourth Circuit applies guidelines for consideration of limited fund class settlements.

Plaintiffs asserted claims against a law school concerning the school's ABA accreditation. The court approved a class settlement in the amount of $2,650,000.00, comprised of a $2,500,000 portion of an insurance policy and a $150,000 contribution from defendant. The aggregate claims of the class were approximately 40 times the amount of the settlement, but the trial court overruled all objections.

Objectors appealed, and the Fourth Circuit affirmed the limited fund settlement under Fed. R. Civ. P. 23(b)(1)(B). The panel described a "limited fund class settlement" as one where "'claims … made by numerous persons against a fund insufficient to satisfy all claims'" are aggregated. The panel adopted the following standard: "1) 'the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims,' 2) 'the whole of the inadequate fund was to be devoted to the overwhelming claims,' and 3) 'the claimants identified by a common theory of recovery were treated equitably among themselves.'" The panel determined that those conditions were satisfied because (1) the evidence established that defendant had no ability pay the total claims of $105 million and the most that could be contributed to the fund was the $2.5 million insurance policy and $150,000 from defendant, (2) the entirety of the fund, other than attorneys' fees, was to be paid to class members, and (3) the trial court established a detailed claims process to ensure similarly situated class members were treated equally.

Chambers v. Moses H. Cone Memorial Hospital, 843 S.E.2d 172 (N.C. 2020)

North Carolina Supreme Court establishes standard for "picking off" named class plaintiffs.

Chambers began as a debt collection case filed by the defendant hospital against Chambers, a former patient. Chambers then filed a putative class action against the hospital seeking a declaratory judgment that the hospital only was permitted to recover the reasonable value of the services provided. The hospital dismissed its debt collection action, ceased all attempts to collect the debt and contended that the entire putative class action was now moot. The trial court agreed and dismissed the case, and the Court of Appeals affirmed.

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The Supreme Court granted review to consider "whether the unilateral action by Moses Cone to moot the named plaintiff's individual claim renders the entire case moot when there has been no discovery or ruling on plaintiff's motion for class certification." The Court noted that eight out of ten federal circuit courts "have ruled that when a defendant acts to moot the claims of individual named plaintiffs before the court has ruled on a class certification motion, the entire action is not yet moot, and the named plaintiff retains the representative capacity to pursue class certification and a ruling on the merits" to prevent defendants from thwarting class actions. The Court adopted this position, and held that a motion for class certification relates back to the filing of the complaint, even if the individual plaintiff's claim is moot, if (1) "the plaintiff was given a 'fair opportunity' to show that class certification is appropriate"; and (2) "the plaintiff submitted the issue of class certification to the trial court without 'undue delay.'"

Fifth Circuit

Bonin v. Sabine River Auth. of La., 961 F.3d 381 (5th Cir .2020)

Fifth Circuit clarifies local single event exception to mass action removal under CAFA.

In this case, the Fifth Circuit clarified the local single event exception to a "mass action" under the Class Action Fairness Act (CAFA). The *Bonin* Court held that the local single event exception was inapplicable to a flood event that, by its very nature, caused flooding in two bordering states. The Court also clarified that unanimous consent of defendants to removal under CAFA is not a requirement.

The case arose from a flood that occurred when the Sabine River, located on the border of Texas and Louisiana, overflowed its banks causing flood damage in the states of Texas and Louisiana. Flood control of the waterway is divided between two state agencies, the Sabine River Authority of Texas (SRA-T) and the Sabine River Authority of Louisiana (SRA-L). These entities control the flow of water on the Sabine River and generate electricity.

In March 2016, heavy rains in the border area lead to flooding of the Sabine River despite the mitigation efforts of SRA-L and SRA-T. The flooding led to damages to property owners in Louisiana and Texas. Some 300 property owners in Louisiana and Texas filed suit in Texas state court alleging that their properties were damaged by flooding that was either caused or exacerbated by SRA-T and SRA-L failing to properly regulate water levels in the reservoir and improperly opening the spillway gates.

The case, after being remanded and adding additional private company defendants, was removed to federal court. The removed case included claims against power generating companies (Entergy defendants) that operated the hydroelectric dam on behalf of SRA-T and SRA-L. The Entergy defendants consented to removal under the theory that the case represented a "mass action" under CAFA. SRA-L did not consent to the removal. Plaintiffs argued for remand, which was subsequently denied. Upon the denial of remand and an amendment to the complaint, the Entergy defendants filed a Rule 12(b)(6) motion to dismiss that was granted by the district court. On appeal, plaintiffs argued that the denial of their motion for remand was error. The Fifth Circuit affirmed the decision of the district court as the case was a "mass action" under CAFA.

The *Bonin* Court examined plaintiffs' argument that the case fit within an exception to CAFA under which a mass action "shall not include any civil action in which . . . all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." Plaintiffs asserted that the "flooding occurred in Texas, the state where the action was filed" and argued that, while flooding occurred in both Texas and Louisiana,

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the court should focus only on "the fact that the rainfall and flooding took place in Texas." Essentially plaintiffs asked the court to ignore the clear language of the statute that "*all of the claims* in the action arise from an event or occurrence in the State in which the action was filed . . .." The *Bonin* Court declined the invitation to parse the statute in such an idiosyncratic manner, concluding that "[e]ven if we say that the March 2016 flooding occurred 'in Texas.' We still could not possibly conclude that *all of the claims* in the suit arose from the flooding event 'in Texas.'" Thus, the Court concluded that the case did not fit within the exception to a mass action under CAFA.

Additionally, plaintiffs argued that the matter should have been remanded since SRA-L declined to consent to removal. The Court flatly rejected that argument finding that "[u]nder CAFA, mass actions 'may be removed by any defendant without the consent of all the defendants.'"

Chavez v. Plan Ben Servs., 957 F.3d 542, 545 (5th Cir. 2020)

Fifth Circuit rejects district court's superficial analysis of class certification under Rule 23(b)(1)(B).

This case arose from a typical "fiduciary misbehavior" claim in which plaintiffs sought to represent "a class of 'all participants in and beneficiaries of employee benefit plans that provide benefits through [the trusts] . . . ." The claim involved various benefits plans for various employers over a 9-year period. The defendants, Plan Benefit Services, Inc., Fringe Insurance Benefits, Inc., and Fringe Benefit Group (collectively, FBG) contested class certification on numerous grounds including whether it was a fiduciary or charged excessive fees. Despite the number of issues raised by the number of plans and the estimated participants, over 1700, the district court issued a short certification order with only five pages of actual analysis of the complex issues presented.

On appeal, the *Chavez* Court found that the analysis was inadequate. The Fifth Circuit went out of its way to illuminate that, in the context of a class certification, "a district court must detail with sufficient specificity how plaintiff has met the requirements of Rule 23," and to emphasize that a class certification is not just a mere review of a complaint as in a motion to dismiss but requires the court to analyze "the facts and law of the case, spurning reliance on generalizations about what types of disputes may be fit for a class." Reversing, the *Chavez* court found the district court's analysis was superficial and did not respond at all to the objections raised by the defendant to class certification.

Sixth Circuit

Johnson v. BLC Lexington, SNF, LLC, No. 19-cv-064, 2020 WL 3578342 (E.D. Ky. July 1, 2020)

Court finds arbitration agreement to be an impediment to class certification.

The Eastern District of Kentucky refused to certify a putative class of skilled nursing residents because, among other things, the facility's admissions agreement included a provision requiring binding arbitration.

Analyzing plaintiff's motion for class certification, the court held that the presence of an arbitration provision required it to engage in a "threshold inquiry" of whether the class members' claims were subject binding arbitration, and that this "threshold inquiry" destroyed both commonality and typicality. In so

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holding, the court explained that the defendants did not waive their right to enforce the arbitration provision because such a waiver could not occur until the class composition was final.

The named plaintiff, though, was not required to arbitrate because her husband had "signed the admission agreement without authority to bind her" to the provision. According to the court, this caused her situation to be "not typical" and was an additional reason for why typicality was not met. At the same time, the court concluded that, because the named plaintiff did not personally sign the agreement, she was an inadequate class representative, insofar as "she [was] not subject to a binding arbitration defense like other potential class members might be." Because of this, and because the typicality and commonality were not met, the court denied the motion for class certification.

Hicks, et al. v. State Farm Fire & Casualty Co., No. 14-cv-53, 2020 WL 3888156 (6th Cir. July 10, 2020)

Sixth Circuit affirms certification of class concerning alleged underpayments on insurance policies based on improper calculation of "actual cash value."

This case involved claims against an insurer alleging that it miscalculated benefits under replacement-cost homeowners insurance contracts. The insurance contracts required the carrier to pay the "actual cash value at the time of the loss of the damaged part of the property," up to the policy's liability limit, "not to exceed the cost to repair or replace the damaged part of the property." The "actual cash value" (ACV) was calculated under the policy by estimating the amount it will cost to repair or replace damaged property and subtracting depreciation and the deductible. If a policyholder owned a house with a ten-year-old roof that was destroyed by hail, "it is not feasible" for the insurer "to buy a ten-year-old roof (or ten-year-old roofing materials) to install on an existing building," and thus insurers subtract depreciation to arrive at ACV estimates. The insurer determined the ACV first by sending an adjuster to inspect the damage and estimate the reconstruction cost. The adjuster input the reconstruction cost estimate—the "replacement cost value" or RCV—and depreciated costs for both materials and labor. This produced an ACV calculation (RCV minus material and labor cost depreciation), subtracted the insured's deductible, and then State Farm paid that Xactimate estimate to the insured. Insureds did not have to spend this ACV payment or make repairs on their property; if they made no repairs or made repairs for less than the ACV payment, they did not have to return any of the ACV payment to State Farm. If an insured made repairs and incurred costs exceeding the ACV payment, however, the individual could seek further payment from State Farm. After plaintiffs' homes burned, they submitted claims and received ACV payments and later sued, claiming that the insurer breached the insuring contract by including labor costs in the depreciation deduction.

On appeal from the district court's order certifying a class, a divided Sixth Circuit panel affirmed. The panel first held that the Rule 23(a) commonality requirement was satisfied, in that "Plaintiffs' claims share a common legal question central to the validity of each putative class member's claims: whether State Farm breached Plaintiff's standard-form contracts by deducting labor depreciation from the ACV payments." As for Rule 23(b)(3), the panel concluded that the common legal question predominated over any individualized inquiries, disagreeing with defendant's argument that predominance was not met "because it may have miscalculated ACV payments based on individualized errors unrelated to depreciating labor costs." Put another way, the insurer was defending against the claims of individual class members by seeking to prove that some insureds were not damaged because it either overestimated ACV payments to such a degree that the deduction of labor depreciation resulted in no damages or it mistakenly reimbursed labor depreciation costs to RCV claimants for more than they were owed. The panel rejected this argument because the insureds did not have to use the ACV payments to rebuild and

any overestimation was an error in the insureds' favor. The panel also explained that, to the extent these overestimations became an issue, the district court could address the issue during later proceedings. Finally, the panel acknowledged the circuit split on whether a district court must conduct a *Daubert* analysis at the class-certification stage, but ultimately declined to resolve that question as the district court's order granting class certification did not rely on the challenged expert's damages formula.

Judge McKeague, however, concurred in the judgment but dissented in part. Specifically, the dissent took issue with the overall lack of rigor in the majority's Rule 23 analysis and noted that "the majority partly stumbles on the right result, but for the wrong reasons." The dissent criticized the majority's encapsulation of the common question, remarking that the district court did not distinguish between two different types of insureds (those who disputed their ACV payments and those who accepted them) and should amend the class definition.

Seventh Circuit

Johnson v. Enhanced Recovery Co., 961 F.3d 975 (7th Cir. 2020)

Seventh Circuit reiterates the Fair Debt Collection Practices Act "unsophisticated consumer" standard.

Plaintiff filed a putative class action alleging that defendant debt collector violated the Fair Debt Collection Practices Act (FDCPA) by sending misleading letters to consumers. On appeal, plaintiff argued that, by including the date of May 26, 2016 with the first listed settlement offer, and stating that the delinquent account "may be reported" to credit bureaus, followed by the assurance that "[p]ayment of the offered settlement amount will stop collection activity on this matter," the letter gave the impression that credit reporting could be avoided by accepting the first listed settlement offer and paying by May 26, 2016. The Seventh Circuit first ruled that the district court had properly denied defendant's motion to dismiss because it was plausible that a debtor would be misled by such language.

The panel then addressed the district court's decision to grant defendant's motion for summary judgment because plaintiff failed to present any evidence beyond her own opinion that the letter was misleading. Plaintiff argued that no further extrinsic evidence was necessary upon a showing of ambiguity in the language of the letter, as the ambiguity itself should be enough to show confusion. The Seventh Circuit noted that it had rejected the "least sophisticated consumer" standard used by other circuits in favor of its own "unsophisticated consumer" standard, under which a letter must be confusing to "a significant fraction of the population." The panel further explained that, when the debt collection language is not deceptive or misleading on its face but could be construed so by the unsophisticated consumer, plaintiff cannot prevail without producing evidence showing that unsophisticated consumers are in fact confused or misled. The Seventh Circuit reasoned that, although plaintiff explained how the letter *could* be read, plaintiff failed to present evidence on how the letter is *actually* read by consumers and thus failed to meet her burden.

Rios v. Bayer Corp., 2020 IL 125020 (Ill. 2020)

Illinois Supreme Court ruled that Illinois courts lack personal jurisdiction over nonresident defendants when there is no meaningful link between defendants' conduct in Illinois and the nonresident plaintiff's claims.

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This appeal addressed a jurisdictional dispute between a nationwide group of 95 plaintiffs and defendant manufacturers of a contraceptive device. Plaintiffs argued that "Illinois courts had specific personal jurisdiction over" defendants because defendants marketed the product in Illinois while also "us[ing] Illinois to develop, label, or work on the regulatory approval for" the product. The Court disagreed, highlighting the need to "assess whether the nonresident defendants' contacts with Illinois suffice to satisfy both federal and Illinois due process." Relying on *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017), the Illinois Supreme Court found that plaintiffs' theory of specific personal jurisdiction failed. The Court held that, despite defendants' activity in Illinois, where they conducted clinical trials and developed marketing strategies, these activities did not have any meaningful relation to plaintiffs' claims and thus failed to provide a basis for specific personal jurisdiction.

Lewis v. Lead Indus. Ass'n, 2020 IL 124107 (Ill. 2020)

Illinois Supreme Court rules that plaintiffs cannot maintain a claim that rests solely upon economic injury without having suffered an economic loss.

This case involved a class action under Illinois' Family Expense Act and Public Aid Code. After having their children undergo blood lead screening in accordance with the Illinois Lead Poisoning Prevention Act, plaintiff parents asserted a variety of allegations against defendants to recover costs for the blood tests. While plaintiffs conceded that the testing had been paid for by Medicaid and third-party insurers, they argued that, under the collateral-source rule that these payments did not negate their economic injury. The circuit court disagreed and granted defendants' motion for summary judgement, dismissing all claims. The court determined that plaintiffs had no liability nor obligation to pay for the blood testing under state or federal law and held that plaintiffs had suffered no injury.

The Illinois Supreme Court held that plaintiffs' claim was invalid due to the absence of an economic injury. The Court determined that arguments based on the collateral source rule "put the cart before the horse, as the relevant threshold question was whether plaintiffs could establish an injury at all." In assessing both the Family Expense Act and Public Aid Code, the Court determined that neither act created any obligation or liability for plaintiffs. Based upon this finding, the Court determined that plaintiffs had failed to establish an economic injury, a required element of their intentional misrepresentation claim.

Eighth Circuit

Vogt v. State Farm Life Ins. Co., __ F.3d __, 2020 WL 3477011 (8th Cir. June 26, 2020)

Eighth Circuit affirms $34 million jury verdict in favor of a class.

This case involved allegations that the defendant life insurer had impermissibly included non-enumerated factors when it calculated the Cost of Insurance (COI) fees assessed on plaintiffs' life insurance policies. Defendant allegedly had "deducted from the monthly premium payments more than what [their policies] stated would be included in the COI fees" thus violating the terms of the policies. The district court certified the class and eventually a jury returned a $34 million verdict in the class's favor.

On appeal, defendant argued that some class members received a credit during the period in which the alleged overcharges occurred and that the credit "created a set-off that left the class members without any damages." Because of this, defendant argued that the class members did not suffer an injury, did not have standing, and their inclusion in the class caused class certification to be inappropriate. The panel rejected

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this argument, reiterating the holding in *Stuart v. State Farm Fire and Casualty Company*, 910 F.3d 371 (8th Cir. 2018). Specifically, the *Vogt* panel concluded that this argument went to the merits of the plaintiff's claims – not standing – because "a party to a breached contract has a judicially cognizable interest for standing purposes." Because of this, and because the district court amended "the class definition following the jury trial to exclude those class members who suffered no damages," the panel affirmed the district court's grant of class certification.

Ninth Circuit

Brady v. Autozone Stores, Inc., No. 19-35122, __ F.3d. __ (9th Cir. June 3, 2020)

Ninth Circuit confirms that a plaintiff's voluntary settlement of individual claims moots the class allegations under the plaintiff retains a personal stake in the case.

This issue in this case was "what happens when a class representative voluntarily settles on his individual claims without indicating any financial stake in the unresolved class claims." Plaintiff asserted violations of meal break laws. Following denial of class certification, plaintiff settled his claims for $5,000, which also covered any "claims to costs or attorneys' fees." The agreement did not provide for any financial award for plaintiff if the unresolved class allegations ultimately were successful. Following the settlement, an appeal of the certification rulings was filed.

The Ninth Circuit found the appeal moot, reasoning that plaintiff did not retain a "personal stake in the case." A personal stake must be "concrete" and "financial," which "turns on [the] language of the settlement agreement." Plaintiff's agreement did not allow for any additional compensation for the class allegations, and he released any claim for costs and fees. Plaintiff also had no proof of an obligation to pay advanced costs unless the class was certified.

Canela v. Costco Wholesale Corp., No. 18-16592, __ F.3d __ (9th Cir. July 9, 2020)

Ninth Circuit rules that lawsuits filed under California's Private Attorney General Act (PAGA) are not "class actions" under the Class Action Fairness Act (CAFA).

Plaintiff brought a claim in California superior court under PAGA, alleging that Costco violated California Labor Code section 1198 by failing to provide employees with adequate seating as required by section 14 of California's Wage Order 7-2001. Canela's complaint said "Class Action Complaint" on its cover page and included references to the lawsuit as a class action. Costco removed the case to federal court based on the federal diversity statute, 28 U.S.C. § 1332(a) and CAFA. About a year later, plaintiff informed the District Court that she did not intend to pursue a class action. The district court concluded that, because Canela had denominated her lawsuit as a "class action" and had sought class status on her PAGA claim as of the time the case was removed from state court, the district court retained CAFA jurisdiction even though Canela later decided not to pursue class certification. Costco then moved for partial summary judgment, contending that, without a certified class, Canela lacked Article III standing to represent absent aggrieved employees and could not represent absent "aggrieved employees" under Rule 23. The district court denied Costco's motion, and Costco appealed.

Addressing traditional diversity jurisdiction, the Ninth Circuit panel held that the amount in controversy did not meet the statutory threshold at the time of removal. Because the named plaintiff's pro-rata share of civil penalties, including attorney's fees, totaled $6,600 at the time of removal, and the claims of other employees could not be aggregated with hers under *Urbino v. Orkin Services of California, Inc.*, 726 F.3d

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1118 (9th Cir. 2013), the requisite $75,000 jurisdictional threshold was not met. Accordingly, the court held the district court lacked diversity jurisdiction at the time of removal.

The panel also held that the district court lacked subject matter jurisdiction under CAFA because plaintiff's stand-alone PAGA lawsuit was not, and could not have been, filed under a state rule similar to Rule 23. The panel held that the rule in *Baumann v. Chase Investment Services Corp*., 747 F.3d 1117, 1122 (9th Cir. 2014), that "PAGA actions are [] not sufficiently similar to Rule 23 class actions to trigger CAFA jurisdiction," controlled. The panel also rejected Costco's argument that, because the named plaintiff originally sought class status in her complaint, her case was filed as a class action within the meaning of CAFA. Rejecting a "formalistic" approach, the court explained that the "substance and essentials" of the complaint must be evaluated when deciding whether a state cause of action is filed under a state law similar to a "class action" under CAFA. The court explained that because "PAGA suit is a type of *qui tam* action" it is not similar to a "class action" under CAFA, and thus subject matter jurisdiction was lacking at the time of removal.

Grodzitsky v. American Honda Motor Co., 957 F.3d 979 (9th Cir. 2020)

Ninth Circuit affirms decision denying class certification and excluding expert testimony under *Daubert* at the class certification stage.

This case involved allegations that window regulators installed on vehicles were defective because they caused windows to fall into the doorframes, which increased the likelihood of injuries or accidents. In seeking class certification, plaintiffs submitted expert evidence purporting to show a common defect. But the expert's opinion had multiple flaws, including being based on an inappropriate "life of the vehicle" standard for design defects and an analysis of only 26 vehicles without any showing that this sample was representative or reliable. The district court denied certification on commonality grounds and excluded the expert's opinion under *Daubert*.

On appeal, the Ninth Circuit affirmed, explaining that, in "evaluating challenged expert testimony in support of class certification, a district court should evaluate admissibility under the standard set forth in *Daubert*." The court emphasized the expert's testimony that he believed the regulators had a "common defect" because they were not "durable enough" to "last the life of the vehicle," and conceded that he was unable to identify a "common solution" to the purported defects in the regulators and had no opinion concerning the proper manufacturing method that should have been. "Due to these concessions," the expert "did not and could not provide a reliable opinion demonstrating a common defect for over 400,000 regulators," thus making class certification improper.

Cheslow v. Ghirardelli Chocolate Co., No. 19-cv-07467-PJH, 2020 WL 1701840 (N.D. Cal. April 8, 2020); *Prescott v. Nestle, USA. Inc.*, No. 19-cv-07471-BLF, 2020 WL 3035798 (N.D. Cal. June 4, 2020)

Multiple courts conclude that no reasonable consumer would understand the terms "white chips" or "white morsels" on product packaging to refer to white "chocolate" or imply the product contains chocolate.

In this pair of lawsuits, the same law firm filed separate class actions against Ghirardelli and Nestle, alleging false advertising claims based on the contention that the terms "white chips" and "white morsels," on the defendants' product packaging misleads consumers into believing that the products contain chocolate. Both defendants moved to dismiss, and the district courts in both actions (involving different

judges) granted the motions. The courts independently concluded that, as a matter of law, no reasonable consumer would understand the terms "white chips" or "white morsels" on the product packaging as referring to chocolate, finding that the package labels at issue do not include the word "chocolate," and therefore contain no affirmative statements or representations that would support a qualitative assumption that the chips are made of chocolate.

The court in *Cheslow* also found that "the adjective 'white' in 'white chips' does not define the food itself but rather defines the color of the food." The *Cheslow* court also found that the placement of a package marked "white chips" alongside packages marked semi-sweet chocolate, bitter-sweet chocolate, or milk chocolate only serves to highlight the absence of the word 'chocolate' in the description of 'white chips.'

Sonner v. Premier Nutrition Corp., No. 18-15890, __ F.3d. __ (9th Cir. June 17, 2020)

Ninth circuit holds that a plaintiff must demonstrate that she has an inadequate remedy at law when seeking equitable relief.

Plaintiff filed a putative class action regarding "Joint Juice," a nutritional product manufactured, marketed, and sold by defendant. Plaintiff alleged that defendant falsely advertised that its product provided health benefits, in violation of the UCL and CLRA. Plaintiff sought damages under the CLRA and restitution under the UCL. Two months before trial, plaintiff dropped the CLRA damages claim, hoping that the district court would award equitable restitution under the UCL without a need for a jury trial. The plan backfired when the district court dismissed her claims for restitution because an adequate remedy at law, i.e., damages, was available under her CLRA claim.

On appeal, the Ninth Circuit affirmed the district court's decision (albeit on different grounds) and held, as a threshold jurisdictional issue, that under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), federal courts must apply equitable principles derived from federal common law to claims for equitable restitution. The panel held that state law cannot circumscribe a federal court's equitable powers, even when state law affords the rule of decision. Explaining that federal law requires a party to prove they have an inadequate remedy at law when seeking an equitable remedy like restitution, regardless of whether California may have abrogated that requirement under state law.

Van v. LuLaRoe, No. No. 19-35242, ___ F.3d __ (9th Cir. June 24, 2020)

Ninth Circuit rules that the loss of the use of money, even a tiny sum, is sufficient to plead Article III standing.

Plaintiff filed a putative class action on behalf of defendant's customers in Alaska who were improperly charged sales taxes. Defendant moved to dismiss the complaint for lack of Article III standing arguing that plaintiff could not establish injury in fact where defendant had fully refunded the tax charges and her claim for interest alone was insufficient to establish standing.

On appeal, the Ninth Circuit held that the district court erred by concluding the interest was too little to support Article III standing. The panel held that plaintiff suffered a cognizable and concrete injury: the loss of a significant amount of money (over $500) for a substantial amount of time. The panel concluded that the temporary loss of use of one's money constituted an injury in fact for purposes of Article III. The panel noted that plaintiff did not assert that she was injured because she lost interest income, but rather that she was injured because she lost the use of her money, which was an actual, concrete, and particularized injury.

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Walker v. Nestle, Inc., No. 3:19-cv-723-L-BGS, 2020 WL 3317194 (S.D. Cal. June 17, 2020)

Court holds that defendants cannot use California's Anti-SLAPP statute to attack false advertising claims based on commercial packaging and websites, which fall under the commercial speech exemption to the statute.

In this case, plaintiff filed a putative class action based on the allegation that the statements on defendant's chocolate product packaging are deceptive because they falsely lead consumers to believe that the products were produced in accordance with environmentally and socially responsible standards, when they purportedly were not. This included references to the "Nestle Cocoa Plan," "UTZ Certified" and "Sustainably Sourced," and representations that defendant "Support[s] farmers" and "help[s] improve the lives of [ ]cocoa farmers." Plaintiff alleged she purchased defendant's chocolate products in reliance on the social and environmental benefits prominently featured on the packaging and would not have purchased them had she known they were false. According to plaintiff, the labels were deceptive because defendant sources its cocoa from West African cocoa plantations that rely on child labor and child slave labor, and which contribute to deforestation and use other practices harmful to the environment.

Defendant moved to dismiss under California's Anti-SLAPP (Strategic Litigation Against Public Participation) statute, codified at California Civil Procedure Code § 425.16. Defendant argued that the statements on its Nestle Cocoa Plan website regarding efforts to combat child and slave labor in West Africa and reduce the negative effect of cocoa farming on the environment were within the scope of the Anti-SLAPP statute because they concern an issue of public interest.

Denying the motion, the court noted that the California legislature enacted the Anti-SLAPP Law to stem "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." But the court also pointed out that, in response to a "disturbing abuse" of the Anti-SLAPP Law, the California legislature subsequently enacted two exemptions, including the "commercial speech exemption." The court found this exemption applied expressly to product packaging, which is designed to sell products, and also applied to statements on defendant's website.

Silver v. BA Sports Nutrition, No. 20-cv-00633-SI, 2020 WL 2992873 (N.D. Cal. June 4, 2020)

Court rules that "Superior Hydration" and "More Natural Better Hydration" claims are non-actionable puffery as a matter of law.

Plaintiff filed a putative class action based on the contention that defendant falsely advertised that BodyArmor sports drinks provide "Superior Hydration" on the label of its drinks, and through other marketing such as in-store displays, social media and television. The complaint also referenced non-label advertising, such as on billboards, promoting BodyArmor as the "More Natural Better Hydration" drink. Plaintiff claimed that, in contrast to these representations, BodyArmor on balance is not nutrient beneficial for the general public but is instead an unlawfully fortified junk food.

Defendant moved to dismiss, contending that plaintiffs did not plausibly allege that they were misled by BodyArmor's labeling and advertising because the statements "Superior Hydration" and "More Natural Better Hydration" are non-actionable puffery as a matter of law, and the product labels accurately disclosed the contents of the sports drinks, including the sugar content. In addition, defendant contended

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that the FDA regulations upon which plaintiffs relied for their "fortification" claims were inapplicable. Defendant also argued that all of plaintiffs' claims are barred by the First Amendment, and that plaintiffs cannot seek injunctive relief.

The court granted defendant's motion, concluding that the "fortification" allegations failed because plaintiff did not adequately allege any violations of FDA regulations. The court also agreed that the statements "Superior Hydration" and "More Natural Better Hydration" were non-actionable puffery because they were general, vague statements about product superiority, rather than a misdescription of a specific or absolute characteristic of the product. The court found it implausible that a reasonable consumer would view the BodyArmor label and other marketing about "superior," "more" or "better" and believe that BA was making a specific, verifiable claim about BodyArmor's superior hydrating attributes.

Barriga v. 99 Cents Only Stores, LLC, No. E069288, __ Cal. App. 5th __ (June 26, 2020)

California Court of Appeal rules that trial courts have a duty to scrutinize "happy camper" declarations offered in opposition to a motion for class certification for actual or threatened abuse.

Plaintiff filed a wage and hour class action alleging various violations based on defendant's alleged policy of locking late shift employees in the store at closing time and not paying for their time while they wait to be let out of the store. Plaintiff moved for class certification and, in opposing the motion, defendant offered 174 "happy camper" declarations from employees who claimed they were let out of the store immediately upon closing and/or were paid for their time waiting. But only 53 of the declarants were members of the proposed class, and when plaintiff deposed 12 of the declarants, several testified that they had no idea what they lawsuit was about (even though all declarations contained an identical paragraph stating that the testimony would be used in the case), they didn't even know why they were appearing for deposition, and they were summoned by the company's human resources department, presented with declarations and told to sign them on the spot. Plaintiff moved to strike all 174 declarations on the ground that they were substantively inconsistent. The trial court denied the motion and granted class certification, in part based upon a community of interest demonstrated by the declarations, finding that it lacked authority to strike the declarations.

The court of appeal reversed and remanded for further consideration. The court explained that California courts have long recognized the trial court has both the duty and the authority to exercise control over precertification communications between the parties and putative class members to ensure fairness in class actions. Moreover, the lower federal courts have consistently held that an ongoing business relationship between the class opponent and putative class members – especially a current employer-employee relationship – creates the potential for abuse and coercion. Therefore, courts have cautioned that statements obtained by the class opponent from its employees, to oppose a class certification motion, must be scrutinized for actual or threatened abuse. If the trial court concludes the statements were obtained under coercive or potentially abusive circumstances, it has discretion to either strike those statements entirely or discount their evidentiary weight.

Williams v. U.S. Bancorp Investments, Inc., No. A156226, __ Cal. App. 5th __ (June 8, 2020)

California Court of Appeal rules that collateral estoppel does not prevent an absent class member in a class initially certified, and then decertified, from pursuing a separate, subsequent class action.

In 2005, *Burakoff, et al. v. U.S. Bancorp* was filed in Los Angeles County Superior Court, involving claims regarding wages, waiting time penalties and meal breaks. The court granted plaintiffs' motion for class certification on May 8, 2008. The plaintiff in *Williams* became employed at U.S. Bancorp in May 2007, and he was a member of the *Burakoff* class. On April 23, 2010, plaintiff filed a new class action in San Francisco Superior Court, alleging similar claims beginning the day after the *Burakoff* class period ended, and two subclasses consistent with those in *Burakoff*. On US Bancorp's demurrer, the San Francisco court stayed the new case as involving "the same primary rights" and "substantially the same causes of action" as *Burakoff*, pending the conclusion of *Burakoff*. In May 2011, the court decertified one subclass – the overtime subclass – as lacking commonality. The parties subsequently settled the case but not as to the overtime subclass. Plaintiff in *Williams* participated in the settlement.

Following motion practice regarding non-class arbitration and an earlier appeal, U.S. Bancorp renewed a motion to compel arbitration and argued that the class decertification order in *Burakoff* had collateral estoppel effect and barred the *Williams* claims. The San Francisco court dismissed the claims with prejudice on November 21, 2018.

On appeal, the court held that collateral estoppel does not apply to decertification orders, as a matter of law. Relying on the settled elements of collateral estoppel, the court ruled that absent class members in *Burakoff* were not "parties" for purpose of analyzing the order's preclusive effect. The court noted that "[a] 'party' to litigation is '[o]ne by or against whom a lawsuit is brought," and that plaintiff "filled no such role in *Burakoff*." The court also determined that, because the Los Angeles court had ultimately decertified the overtime class, named plaintiffs and counsel in *Burakoff* may not have adequately represented plaintiff's interests. Because the overtime class was "rejected," no judicial finding of adequacy "survived to become final." In addition, the court noted that, as a logical matter, plaintiff could not be bound "as a member of a class action . . . to a determination that there could not be a class action."

Tenth Circuit

Amy G. v. United Healthcare, No. 17-cv-413, 2020 WL 3065414 (D. Utah June 9, 2020)

District of Utah denies motion for class certification because proposed class lacked commonality.

In a case involving health insurers' denial of insurance coverage for wilderness therapy programs, plaintiffs sought to certify a class of "any member of a health benefit plan governed by ERISA in the time frame from May 17, 2013, to the present whose health benefit plan was administered by Defendants, who paid for a wilderness therapy program, and for whom Defendants refused to authorize or pay the wilderness therapy program claim based on an exclusion that the wilderness therapy was experimental, investigational, or unproven." Their efforts failed, though, because the District of Utah held, among other things, that the proposed class lacked commonality.

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Before plaintiffs' class certification motion, the parties had engaged in discovery showing that some individual's claims for wilderness therapy had been paid in full or in part by defendants. According to the court, the existence of those individuals "undercut[] the premise that defendants [had] a uniform policy of exclusion based on wilderness therapy being experimental, investigational, or unproven." The court also explained that there were "[d]ifferences in the proposed class members' medical conditions, the type of wilderness therapy and programs for which coverage was sought, and the terms of the proposed class members' benefits plans." As such, the court held that there were no "common question of law or fact … capable of classwide resolution" and denied the motion for certification.

U.S. Supreme Court

Thole et al. v. U.S. Bank N.A. et al., 140 S. Ct. 1615 (2020)

Supreme Court affirms Eight Circuit decision on Article III standing, highlighting how a plaintiff must establish a concrete injury to file suit and that an "equitable or property interest" is insufficient.

This putative class action under the Employee Retirement Income Security Act of 1974 (ERISA) was pursued by plaintiffs James Thole and Sherry Smith, retired participants in U.S. Bank's defined-benefit retirement plan (the Plan). The Plan guaranteed plaintiffs a fixed payment each month regardless of (1) the Plan's value at any one moment and (2) the investment decisions that had been undertaken by the Plan's fiduciaries. Nevertheless, plaintiffs alleged that defendants, including U.S. Bank, "violated ERISA's duties of loyalty and prudence by poorly investing the [P]lan's assets," and requested repayment of $750 million to the Plan. The U.S. District Court for the District of Minnesota dismissed the case and the Eighth Circuit affirmed, finding that plaintiffs lacked standing.

In its decision, the Supreme Court affirmed the Eighth Circuit's decision on the ground that plaintiffs lacked Article III standing. At the heart of this decision was the fact that the Plan was a defined-benefit, and not a defined-contribution, plan; the latter is typically tied to the value of an account and benefits can turn on the plan fiduciaries' investment decisions, whereas the former is not. As such, plaintiffs were not missing any vested pension benefits.

The Court explained, "Thole and Smith have received all of their monthly benefit payments so far, and the outcome of this suit would not affect their future benefit payments. If Thole and Smith were to lose this lawsuit, they would still receive the exact same monthly benefits that they are already entitled to receive, not a penny less. If Thole and Smith were to win this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit." The absence of a "concrete stake in the lawsuit" means that plaintiffs could not satisfy the first element of Article III standing, that is, a concrete, particularized, and actual or imminent injury.

In so holding, the Court rejected plaintiffs' various attempts to establish standing, including their analogies to trust law and a contention that they had "an equitable or property interest in" the Plan (and thus necessarily any injury to the Plan is an injury to them as Plan participants). The Court highlighted that plaintiffs could have established standing by sufficiently alleging that the mismanagement of the Plan was "so egregious that it substantially increased the risk that the [P]lan and the employer would fail and be unable to pay the participants' future pension benefits." But plaintiffs had not done so, providing only a "bare allegation of plan underfunding."

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Barr v. Am. Ass'n of Political Consultants, Inc. et al., — S. Ct. —, 2020 U.S. LEXIS 3544, 2020 WL 3633780 (2020)

Supreme Court finds 2015 government-debt exception to the Telephone Consumer Protection Act of 1991 (the TCPA) unconstitutional, but preserves general robocall restriction.

This decision involved the scope of the TCPA, often the focus of class action lawsuits. In this case, plaintiffs (the American Association of Political Consultants and three other political system organizations) filed a declaratory judgment action asserting that their First Amendment rights were violated by the TCPA's prohibition on making robocalls to cell phones, which they believed would bolster their political outreach efforts. The District Court for the Eastern District of North Carolina determined that the robocall restriction with the government-debt exception implemented in 2015 required strict scrutiny, but that the law survived strict scrutiny because of the government's compelling interest in collecting debt. The Fourth Circuit vacated that judgment, agreeing that the robocall restriction, with its 2015 amendment, required strict scrutiny but disagreeing that the law survived such scrutiny.

The Supreme Court agreed with the Fourth Circuit that (1) the robocall restriction was a content-based restriction, which required strict scrutiny, and (2) that the 2015 exception for debt collection could not satisfy such scrutiny, making it unconstitutional. But the Court found that the government-debt exception could be severed, leaving the general robocall restrictions in the TCPA.

FCC

Federal Communications Commission (FCC) Clarifies Meaning of Autodialers

The Federal Communications Commission on June 25, 2020, clarified the definition of an autodialer to exclude platforms that require a person "to actively and affirmatively manually dial each recipient's number" regardless of the volume of telephone numbers actually dialed. The FCC also clarified that where a recipient has "indicated his or her consent to receive such messages by providing a contact number" the calls are no subject to the Telephone Consumer Protection Act ("TCPA").

The TCPA specifically prohibits anyone from calling or texting a person on a wireless phone using an automatic telephone dialing system (autodialer). *See* 47 U.S.C. §227; *see also* 47 CFR §64.1200(a)(1). An autodialer is defined as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers."

The P2P Alliance is an organization of providers and users of a peer-to-peer text messaging system. *See Petition for Clarification of the P2P Alliance*, CG Docket No. 02-278 at 1 (filed May 3, 2018) (*P2P Alliance Petition*). Peer-to-peer is a network in which participants can send information directly to one another without going through a centralized server. *See* Cambridge Dict. P2P sought clarification as to whether texts sent via peer-to-peer messaging platforms are subject to the TCPA. *P2P Alliance Petition*. P2P argued that since its platform require a person to manually send each text message one at a time that it did not fit within the statutory definition of an autodialer.

The FCC first clarified that the mere fact "a calling platform or other equipment is used to make calls or send texts to a large volume of telephone numbers is not determinative of whether that equipment constitutes an autodialer under the TCPA." The gist of the inquiry relies upon whether human intervention is necessary to complete the phone communication. "If a calling platform is not capable of

dialing such numbers without a person actively and affirmatively manually dialing each one, that platform is not an autodialer and calls made using it are not subject to the … [TCPA].” It is the human interaction that distinguishes whether a platform comes within the ambit of the TCPA or not.

Finally, the FCC noted that where a participant has provided his or her number for a particular purpose the person provides permission to be called at the number provided. Such consent takes the communication outside the scope of the TCPA.

This Greenberg Traurig Newsletter was prepared by the firm’s Class Action Litigation Group.

Editors

Robert J. Herrington
Shareholder
+1 310.586.7816
herringtonr@gtlaw.com

Stephen L. Saxl
Shareholder
+1 212.801.2184
saxls@gtlaw.com

Contributors

John K. Crisham
Shareholder
+1 303.685.7453
crishamj@gtlaw.com

Phillip H. Hutchinson
Shareholder
+1 561.650.7952
hutchinsonp@gtlaw.com

Lisa M. Simonetti
Shareholder
+1 310.586.7824
simonettil@gtlaw.com

David G. Thomas
Shareholder
+1 617.310.6040
thomasda@gtlaw.com

Gregory A. Nylen
Of Counsel
+1 949.732.6504
nyleng@gtlaw.com

Aaron Van Nostrand
Of Counsel
+1 973.443.3557
vannostranda@gtlaw.com

Sylvia E. Simson
Of Counsel
+1 212.801.9275
simsons@gtlaw.com

William Wargo
Of Counsel
+1 212.801.3115
wargow@gtlaw.com

Joseph F. Leeson III
Associate
+1 312.476.5089
leesonj@gtlaw.com

Kelyn J. Smith
Associate
+1 312.476.5092
smithkel@gtlaw.com

Brian D. Straw
Associate
+1 312.476.5113
strawb@gtlaw.com

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