BakerHostetler
2013 Year-End
Review of Class Actions
(*and what to expect in 2014*)

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The *BakerHostetler 2013 Year-End Review of Class Actions* offers a summary of some of the key developments in class action litigation during the past year. The *2013 Year-End Review* is a joint project of the firm's Class Action Defense, Securities, Antitrust, Data Privacy, Appellate, and Employment Class Action practice teams and is the fruit of collaborative efforts of numerous attorneys from across the firm. For updates throughout the year, please be sure to visit the blogs sponsored by each of these practice teams: *Class Action Lawsuit Defense Blog*, *Antitrust Advocate*, *Data Privacy Monitor*, and *Employment Class Action Blog*.

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I. Introduction

Library shelves will someday swell with history books about the U.S. Supreme Court under the leadership of Chief Justice John Roberts. No doubt sensational cases about corporate speech, national health care, and marriage rights will populate several chapters, in addition to whatever untold media-friendly cases are forthcoming in the years ahead. When those books are written, however, it may have to be acknowledged that the Roberts Court altered the landscape of class action law more than any other field within its jurisdiction. At least that is an early conclusion that can be drawn after a remarkable 2013 year in which the Court issued numerous influential decisions on class actions and in which lower courts continued to apply landmark Supreme Court precedents from only a few years prior to bring about permanent change in the way class actions are fought. In a matter of a few years, and especially after 2013, the Roberts Court has established a new body of law to govern class action lawsuits. The scope of how much has actually changed is sure to be debated in the years to come, but it cannot be denied that the Roberts Court has decided that it is going to play a significant role in determining the boundaries of that conversation.

For the first time in 2013, the Court issued a decision that required it to delve into the nuances of the Class Action Fairness Act of 2005 (CAFA). After the unanimous decision in *Standard Fire Ins. Co. v. Knowles*, the Court not only created a new rule regarding CAFA removal, but signaled to lower courts a position that federal courts generally should play a greater role in class action jurisprudence.

Meanwhile, the Court continued to aggressively patrol territory related to class action waivers, issuing decisions in *American Express Co. v. Italian Colors Restaurant* and *Oxford Health Plans LLC v. Sutter* that amplify the enforceability of class action waivers and agreements to individually arbitrate claims. The decisions built on recent Court opinions issued in 2011 and 2010, respectively, emphasizing the Court's apparent intent to hash out the fine doctrinal details of class action waiver enforcement.

Of course, the Court rarely speaks with one voice, and nowhere was that more evident in 2013 than in its most noteworthy class action case, *Comcast v. Behrend*. Taking its seminal 2011 analysis from *Wal-Mart v. Dukes* and applying it to a damages predominance inquiry under Rule 23(b), a 5-4 majority of the Court instantly created a new battle front for litigants at the class certification stage. With vociferous push-back from a four-member dissent, the battle remained contentious among lower courts throughout the year and is likely to maintain that status quo for some time.

Indeed, as much as the Roberts Court has equipped class action defendants with tools to fight off class liability, Rule 23 still exists and occupies a robust place within the federal and state court systems. In fact, not every Supreme Court decision is defendant-friendly. In February 2013, for instance, the Court held that class action securities plaintiffs need not establish materiality at the class certification stage, even when relying on a fraud-on-the-market theory of liability. And, in June, the Court agreed that an

arbitration agreement authorized class-wide arbitration, while offering an important lesson for drafters of such agreements.

Few years offer as much Supreme Court class action case law to review as 2013 delivered. Those cases, obviously, cannot be ignored. But neither can the sea of lower court opinions filling in the blanks that the Supreme Court has left in the past few years as it crafts new class action rules. From insurance law to employment law and so many places in between, class action law has developed at a rapid pace in recent years, a pace that accelerated in 2013 thanks to historic activity at the top.

II. Developments in Class Action Procedure and Jurisdiction

A. The Class Action Fairness Act

Reverberations of Standard Fire decision continue after U.S. Supreme Court decides historic CAFA case

The U.S. Supreme Court sounded a loud, unanimous signal in early 2013: the outer boundaries of the class action device remain under heavy scrutiny inside the nation's highest court. In deciding its first Class Action Fairness Act of 2005 (CAFA) case, the Court in *Standard Fire Ins. Co. v. Knowles*[1] noted that plaintiffs may be the masters of their complaint, but they cannot use a damages stipulation to avoid federal jurisdiction.

A unanimous Court explicitly ruled that named plaintiffs' stipulation to seek less than $5 million jurisdictional threshold in a putative class action could not be used to defeat federal removal jurisdiction under CAFA. Because due process prevents a named plaintiff from binding unnamed class members prior to class certification, the Court recognized that a stipulation to seek less than $5 million is essentially meaningless. Justice Stephen Breyer's opinion laid down a bright line: damages stipulations that do not bind unnamed class members must be ignored when analyzing the amount-in-controversy for removal jurisdiction under CAFA.

"To hold otherwise," Justice Breyer wrote, "would, for CAFA jurisdictional purposes, treat a nonbinding stipulation as if it were binding, exalt form over substance, and run counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.' "[2]

Standard Fire was a ray of light to defense attorneys who often found themselves—and their cases—knee deep in rural outposts of state-court jurisdictions where Rule 23 strictures on certification received short shrift. Wise plaintiffs' counsel understood that a damages stipulation could both block federal removal and dissolve post-certification. *Standard Fire* snuffed out the tactic, but did leave some unanswered questions.

[1] 133 S. Ct. 1345 (2013).
[2] *Id.* at 1350.

Ninth Circuit relies on Standard Fire to re-write the standard for providing removal jurisdiction under CAFA

Perhaps the biggest post-*Standard Fire* question focused on the standard of proof by which defendants had to show more than $5 million in dispute to trigger CAFA removal jurisdiction. Before *Standard Fire*, Circuits were split on whether a defendant had to show $5 million in controversy by either preponderance of the evidence (i.e., Sixth and Eighth Circuits) or as a matter of legal certainty (i.e., Ninth and Third Circuits). *Standard Fire*, while striking down damages stipulations as artificial bypasses to CAFA jurisdiction, did not expressly address the level of required proof.

In August, the Ninth Circuit picked up where *Standard Fire* left off, changing course to hold that a defendant need only prove by a preponderance of the evidence that the aggregate amount in controversy exceeds the jurisdictional minimum. In *Rodriguez v. AT&T Mobility Services, LLC*,[3] the Ninth Circuit overruled its longstanding rule that a defendant may remove pursuant to CAFA only when proving by a legal certainty that more than $5 million is in dispute. To complete the reversal, the court had to revisit the Ninth Circuit's 2007 opinion in *Lowdermilk v. U.S. Bank, N.A.*[4]

In *Lowdermilk*, the Ninth Circuit adopted the legal certainty test on the grounds that the plaintiff is the master of the complaint and has the discretion to seek less than the jurisdictional threshold for removal. Moreover, the *Lowdermilk* court held that the four corners of the complaint provide all the information necessary to assess removal jurisdiction, thus spawning the legal certainty regime.

Standard Fire upset that theory on two fronts. First, the Supreme Court held that named plaintiffs may not avoid CAFA jurisdiction through artificially low damages stipulations. And second, the Court expressly disagreed with *Lowdermilk's* four-corners-of-the-complaint reasoning. Not only is the district court free to look beyond the four corners of the complaint when determining the amount in controversy, *Standard Fire* clarified that a district court must "add[] up the value of the claim of each person who falls within the definition of [the] proposed class."[5]

In other words, *Standard Fire* undercut the entire *Lowdermilk* framework that established the legal certainty test for CAFA removal. Recognizing this, the *Rodriguez* court held *Lowdermilk* to be effectively overruled by *Standard Fire* and brought the Ninth

[3] 728 F.3d 975 (9th Cir. 2013).
[4] 479 F.3d 94 (9th Cir. 2007).
[5] *Standard Fire*, 133 S. Ct. at 1350.

Circuit in line with the majority rule that a defendant must prove the amount in controversy by a preponderance of the evidence.[6]

An estimate of the total amount in dispute satisfies Eighth Circuit CAFA standards

When determining what satisfies a preponderance of the evidence, the Eighth Circuit clarified in June that a defendant need not show that the amount in controversy is satisfied beyond all doubt. The relevant question the court noted "is not whether the damages are greater than the requisite amount, but whether a fact finder might legally conclude that they are."[7] In *Raskas v. Johnson & Johnson*, plaintiffs alleged that Johnson & Johnson violated the Missouri sales practices statute by placing misleading expiration dates on various medication bottles. Johnson & Johnson removed, using the overall sales totals of the medications in question to establish $5 million jurisdictional threshold. The district court remanded to state court, holding that Johnson & Johnson's evidence was overinclusive and that it had not provided a formula by which to determine actual damages based on only the sales data.

But the amount in controversy to satisfy CAFA's jurisdictional threshold is not the same as the actual amount of damages, the Eighth Circuit noted in reversing the remand order.[8] And Johnson & Johnson's sales data, therefore, was more than enough to establish that more than $5 million was in dispute in the case.

The case should have a significant effect on defendants' decisions whether or not to remove in the first instance because it opens the door to federal court a little wider for defendants who might be concerned about remand regarding the amount in controversy.

Standard Fire limitation: Plaintiffs remain master of complaint when dividing mass actions to avoid CAFA jurisdiction

Although the *Standard Fire* opinion appeared to do away with the exhalation of form-over-substance in CAFA jurisdictional disputes, even Supreme Court opinions have limitations. For instance, *Standard Fire* does not open the door to removal when mass action plaintiffs divide mass actions into separate cases to avoid going over the 100-person threshold for CAFA removal. The Eleventh Circuit held in July that *Standard Fire* has not altered the rule that plaintiffs remain masters of their complaint.[9] As long as they

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[6] 728 F.3d at 981 ("We hold that *Standard Fire* has so undermined the reasoning of our decision in *Lowdermilk* that the latter has been effectively overruled. A defendant seeking removal of a putative class action must demonstrate, by a preponderance of evidence, that the aggregate amount in controversy exceeds the jurisdictional minimum. This standard conforms with a defendant's burden of proof when the plaintiff does not plead a specific amount in controversy.").

[7] *Raskas v. Johnson & Johnson*, 719 F.3d 884, 887 (8th Cir. 2013).

[8] *Id.* ("[T]he amount in controversy is simply an estimate of the total amount in dispute, not a prospective assessment of defendant's liability.").

[9] *Scimone v. Carnival Corp.*, 720 F.3d 876 (11th Cir. 2013).

do so without fraud, plaintiffs remain free to craft their pleadings to avoid CAFA jurisdiction. So when victims of the Costa Concordia accident divided into two separate actions—one with 48 persons and another with 56—they could successfully block CAFA removal, the Eleventh Circuit held, because U.S.C. § 1332(d)(11)(B)(i) requires 100 or more class members for removal jurisdiction. *Standard Fire*, although concerned with abusive avoidance of CAFA jurisdiction by artful pleading, focused exclusively on the amount in controversy requirement, which provided the Eleventh Circuit ample ground to distinguish the case. Ultimately, the court held that *Standard Fire* "cannot be read to suggest that all sections of CAFA strip plaintiffs of their traditional role as masters of their complaint."[10]

Supreme Court holds that parens patriae mass actions are not removable under CAFA

After hearing its first CAFA case, *Standard Fire*, in the October 2012 term, the Supreme Court granted certiorari to a second CAFA case in 2013: *Mississippi v. AU Optronics Corp.*[11] On January 14, 2014 the Court announced its decision, holding that *parens patriae* actions are not removable under CAFA.

Under the theory of *parens patriae*, state AGs bring mass suits against companies and organizations on behalf of the citizens of their state. Defendants have attempted to remove such cases to federal court under CAFA on the premise that the actions are CAFA mass actions and the AGs are class representatives. In *Au Optronics Corp.*, the Fifth Circuit split from the Fourth, Seventh, and Ninth Circuits and agreed with the defendants that CAFA removal was permitted because the real parties in interest were individual consumers in Mississippi.[12]

Writing for a unanimous Court, Justice Sotomayor rejected that argument because CAFA mass actions require claims brought by 100 or more persons and, in *Au Optronics*, the State of Mississippi was the only named plaintiff.[13] The Court expressly disagreed with the defendant liquid crystal display manufacturers who argued that CAFA's mass action 100-person requirement was satisfied because more than 100 unidentified Mississippi consumers had purchased LCD televisions at the center of the dispute. That wasn't good enough for the Court, which noted that CAFA mass actions require " '100 or more persons,' not '100 or more named or unnamed real parties in interest.' "

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[10] *Id.* at 886.
[11] 133 S.Ct. 2736 (2013).
[12] *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 803 (5th Cir. 2012) cert. granted, 133 S. Ct. 2736, (2013) ("At its core, this case practically can be characterized as a kind of class action in which the State of Mississippi is the class representative. By proceeding the way it has, the plaintiff class and its attorneys seek to avoid the rigors associated with class actions (and avoid removal to federal court). . . .Because this suit is a mass action under the terms of the CAFA, removal is proper.").
[13] 571 U.S. ___ (2014), slip op. at 1.

Indeed, the bulk of the Court's opinion stood on statutory construction of CAFA in a text-mining effort to determine if Congress meant to include *parens patriae* actions under CAFA's umbrella. The Court went on to criticize the Fifth Circuit for relying on the "substance" of the action as an apparent mass action to find it removable.[14]

B. Class Waiver Developments

Class waivers

In *Am. Exp. Co. v. Italian Colors Rest.* (*Amex III*),[15] the Supreme Court answered the looming question of whether its landmark decision upholding class action waivers in *AT&T Mobility LLC v Concepcion*[16] applied to class actions pursuing rights under federal law. *Amex III* rejected the proposition "that federal law secures a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration."[17] The Court made clear that: "[AT&T Mobility] established … that the Federal Arbitration Act's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims," even if the "absence of litigation . . . is the consequence of a class action waiver."[18]

In *Amex III*, the plaintiffs were a group of merchants that contracted with American Express for credit cards. As part of their credit card contract, the plaintiffs agreed to a provision requiring arbitration and prohibiting class-wide arbitration. Nonetheless, the plaintiffs filed a class action lawsuit, alleging antitrust violations. The Second Circuit held the arbitration clause was unconscionable because the individual cost of arbitration would exceed any potential individual recovery.[19] The Supreme Court granted certiorari to consider whether the Federal Arbitration Act[20] permits courts to invalidate arbitration agreements on the ground that they do not permit class arbitration.

Consistent with its holding in *AT&T Mobility*, the Court "rigorously enforced" the terms of the arbitration agreement, and found the FAA controlled in the face of federal, as well as state, statutes.[21] The Court noted that the only way to override the FAA's provisions is by finding a contrary congressional intent: which the Court noted did not exist in federal antitrust laws.[22]

The Court also rejected the "effective vindication" argument.[23] This judicially created exception allows a court to invalidate arbitration agreements on the public policy

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[14] *Id.* at 11.
[15] *Am. Exp. Co. v. Italian Colors Rest. (Amex III),* 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).
[16] 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).
[17] *Am. Exp.*, 133 S. Ct. at 2310.
[18] *Id.* at 2312.
[19] *In re American Express Merchant's Litigation,* 667 F.3d 204 (2nd Cir. 2012).
[20] hereinafter "FAA"
[21] *Am. Exp. Co. v. Italian Colors Rest.,* 133 S. Ct at 2309.
[22] *Id.*
[23] *Id.*

grounds when they operate as a prospective waiver of a party's right to pursue statutory remedies.[24] Although the plaintiffs determined the cost of individual arbitration outweighed their statutory remedies, the Court noted that this did not waive their right to pursue that remedy.[25] Rather, the Court determined that every claim brought under the antitrust laws is not guaranteed an affordable procedural path to adjudicate.[26]

Prior to *Amex III*, some circuit courts narrowly construed the *AT&T Mobility* ruling: allowing the FAA's arbitration mandate to control only against state law claims, and refusing to extend the ruling to federal statutory claims.[27] Since the *Amex III* ruling clarified *AT&T Mobility*, circuit courts have already begun to apply the FAA's controlling effect as against federal statutes. The Second,[28] Fifth,[29] Eighth,[30] and Ninth[31] Circuits have all rejected the National Labor Relations Board's *D.R. Horton*[32] decision which held that a waiver of the collective right to pursue a Fair Labor Standards Act[33] claim violates Section 7 of the National Labor Relations Act, 29 U.S.C. § 157.[34] Most notably, the Fifth Circuit overturned the *D.R. Horton* decision and ruled that the "effect of [the NLRB's] interpretation is to disfavor arbitration," which is precluded by *AT&T Mobility*.[35]

The Supreme Court's recent decisions in *AT&T Mobility* and *Amex III* have helped to solidify the enforceability of class waivers and clarify the FAA's controlling power. As a

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[24] *Id.* at 2311.
[25] *Am. Exp.*, 133 S. Ct. at 2308 n.5.
[26] *Id.* at 2309.
[27] *See, e.g., In re American Express Merchant's Litigation,* 667 F.3d 204 (2nd Cir. 2012).
[28] *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Raniere v. Citigroup Inc.,* 11-5213-CV, 2013 WL 4046278 (2d Cir. Aug. 12, 2013). The Second Circuit issued these two opinions both holding that the "effective vindication" argument cannot be used to invalidate class action waivers in FLSA actions where the recovery sought is exceeded by the costs of individual arbitration.
[29] *D.R. Horton, Inc. v. National Labor Relations Board*, ___ F.3d ___ (5th Cir. Dec. 3, 2013).
[30] *Owen v. Bristol Care Inc.,* 702 F.3d 1050, 1052-53 (2013).
[31] *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013) (ruling that the *AT&T Mobility* decision preempted California's Broughton-Cruz rule shielding claims for broad, public injunctive relief from arbitration); *see also*, *Lombardi et al. v. DirecTV Inc.*, case numbers 10-56602 and 11-56752 (9th Cir. Dec. 2, 2013)(finding the arbitration agreement was not made unconscionable because the customers have to arbitrate their claims for injunctive relief against DirecTV, when DirecTV is unlikely to seek injunctive relief from its customers).
[32] 357 NLRB No. 184 (2012).
[33] hereinafter "FLSA"
[34] *See id.*
[35] *D.R. Horton, Inc. v. National Labor Relations Board*, ___ F.3d ___ (5th Cir. Dec. 3, 2013). (Slip Op. at 20). However, this ruling does not eliminate the *D.R. Horton* decision, as the NLRB can appeal to the Supreme Court or limit the Fifth Circuit's rejection to cases arising only in the Fifth Circuit. But the Supreme Court heard oral argument in *National Labor Relations Board v. Noel Canning,* (Case No. 12-1281) on January 13, 2014, and if the Court rules that the NLRB was not properly constituted at the time *D.R. Horton* was issued, this could potentially wipe the entire case away.

result, employers can expect a more uniform approach in the lower court's enforcement and positive treatment of class waivers.[36]

The U.S. Supreme Court also issued another decision affecting class action waivers in *Oxford Health Plans LLC v. Sutter*.[37] On June 10, 2013, the Court unanimously affirmed an arbitrator's ruling that the contract between Oxford and Sutter authorized class-wide arbitration.[38] The Court accepted review under the highly deferential standard of FAA's §10(a)(4), and, as a result, limited its inquiry to "the sole question… [of] whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."[39] The Court affirmatively answered this question by finding that an arbitral decision is not subject to court review as long as the arbitrator is "even arguably construing or applying a contract."[40] The Court noted that "it is not enough ... to show that the [arbitrator] committed an error—or even a serious error."[41]

When addressing the appeal's merits, the Court found that Oxford and Sutter "bargained for the arbitrator's construction of their agreement" when the parties twice submitted and allowed the arbitrator to determine whether their contract contemplated class wide arbitration.[42] Since the arbitrator's decision was based on the scope of the parties' arbitration provision, the Court found that he had "arguably construed" the contract and, therefore, had not exceeded his powers under the FAA. [43]

Although originally viewed as a challenge to the Supreme Court's ruling in *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,*[44] the Court noted a "stark contrast" between *Oxford* and *Stolt-Nielsen*.[45] In *Stolt-Nielsen* the parties stipulated that they had not reached an agreement on class arbitration, so the arbitrators did not have a contract to construe and could not identify any agreement authorizing class proceedings.[46] Thus, in *Stolt-Nielsen*, the Court did not find that the arbitrator misinterpreted the contract, but that he

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[36] These decisions have already affected state courts throughout the United States. For example, the Supreme Judicial Court of Massachusetts recently overturned its decision in *Feeney v. Dell, Inc.*, 989 N.E.2d 439 (2013), in order to comply with the Supreme Court's decision in *Italian Colors*. The Supreme Court of Florida applied *AT&T Mobility* to hold a class action waiver valid in a consumer check-cashing class action. *McKenzie Check Advance of Florida, LLC v. Betts,* 112 So. 3d 1176, 1188 (Fla. 2013).

[37] 133 S. Ct. 2064 (2013).

[38] *See id.* at 2065-66.

[39] *Id.* at 2068.

[40] *Id.*

[41] *Id.* at 2065, citing *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 671, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010).

[42] *Oxford Health Plans,* 133 S. Ct. at 2069.

[43] *Id.*

[44] *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 671 (2010) (finding an arbitrator abused his powers by enforcing a class arbitration).

[45] *Oxford Health Plans v* 133 S. Ct. 2064, 2070 (2013), citing *Stolt–Nielsen,* 559 U.S. at 671.

[46] *Id.*

abandoned his interpretive role.[47] Conversely, in *Oxford*, "the arbitrator did construe [a] contract, and did find an agreement to permit class arbitration." [48]

The *Oxford* opinion, however, leaves open several questions. First, the Court indicated that it "would face a different issue" had *Oxford* argued that the availability of class arbitration under the contract was a "question of arbitrability," an issue that the Court left open in *Stolt-Nielsen*.[49] The Court also quoted its opinion in *Green Tree Financial Corp. v. Bazzle*[50] to the effect that questions of arbitrability — which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"— are appropriate for courts to decide or review de novo.[51]

Justice Samuel Alito echoed this concern in his concurring opinion, noting that "in the absence of concessions like Oxford's, … courts [should give] pause before concluding that the availability of class arbitration is a question the arbitrator should decide."[52] Justice Alito also questioned whether absent class members could be bound by rulings in the class arbitration, as these absent members never conceded to class arbitration, the arbitrator's authority, nor the arbitration procedures.[53]

At least some of the questions raised in *Oxford* should be answered in the upcoming year. On December 2, 2013, the Court heard oral arguments in *BG Group PLC v. Argentina*,[54] regarding whether arbitrators or courts have the authority to determine whether prerequisites to arbitration have been satisfied. In the meantime, *Oxford* will stand for an arbitrator's ability to enforce a contract's class waiver provisions, so long as the parties submit to the arbitrator's authority.

C. Commonality, Predominance, and the Burden of Proof at Class Certification

This year also saw significant decisions in the areas of predominance, commonality, and ascertainability. Generally, the cases addressing these issues have raised the bar for class certification by requiring plaintiffs to demonstrate, at the certification stage, that a case is susceptible to resolution by common proof, and that class members can be identified using an "administratively feasible" method.

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[47] *Id.*
[48] *Id.*
[49] *Oxford Health Plans,* 133 S. Ct. at 2068, n.2; *see also, Stolt–Nielsen,* 559 U.S. at 680 (making clear that the Court had not yet decided whether the availability of class arbitration is a question of arbitrability).
[50] *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion).
[51] *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071, 186 L. Ed. 2d 113 (2013), quoting *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003) (plurality opinion).
[52] *Oxford Health Plans*, 133 S. Ct. at 2072.
[53] *Id.* at 2071.
[54] Case No. 12-138.

Comcast builds on Dukes and requires plaintiffs to demonstrate— not merely allege —predominance, commonality, and other class certification prerequisites

Perhaps the most significant class action decision of this year was *Comcast Corp. v. Behrend,*[55] which provides a valuable tool for the defense in combatting class certification in antitrust and other types of class actions. The case solidified the trend established in the Supreme Court's 2011 *Wal-Mart Stores, Inc. v. Dukes* decision that, to certify a class, plaintiffs must be able to demonstrate that a case is susceptible to resolution by common proof.

The *Comcast* plaintiffs were cable subscribers who alleged that the defendant cable company used an anticompetitive "clustering strategy" that drove up prices in the Philadelphia media market. Plaintiffs argued that the challenged "clustering strategy" raised cable rates through four theories of antitrust impact. But the District Court accepted only one of the four impact theories.[56]

The defendant argued that plaintiffs failed to prove that damages could be calculated on a class-wide basis, reasoning that plaintiffs' statistical damages model jointly measured damages flowing from all *four* antitrust impact theories, not merely the one theory accepted by the District Court. The District Court certified the class anyway, and the Third Circuit affirmed, finding that it was improper to inquire into the merits of plaintiffs' damages calculation methodology at the certification stage, and that plaintiffs were not required to "tie each theory of antitrust impact to an exact calculation of damages."[57]

The Court reversed. Justice Scalia, writing for the majority, held that *Dukes*' requirement that trial courts undertake a "rigorous analysis" of whether the class action elements were satisfied applied not just to the four elements of Rule 23(a), but to Rule 23(b)'s as well—including predominance.[58] The majority concluded that an action cannot be certified under Rule 23(b)(3) for class treatment when it is evident that "individual damage calculations will inevitably overwhelm questions common to the class."[59]

The majority found that the lower courts erred by "refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination" of the case.[60] To the contrary, a district court may consider as much of the merits of a

[55] 569 U.S. __, 133 S. Ct. 1426 (2013).
[56] *Id.* at 1431. ("Accordingly, in its certification order, the District Court limited respondents' "proof of antitrust impact" to "the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA.").
[57] *Id.*
[58] *Id.* at 1433.
[59] *Id.*
[60] *Id.* at 1432-33.

claim as necessary to determine whether a putative class of plaintiff's meets the certification requirements of Rule 23. “Repeatedly," Justice Scalia wrote, "we have emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.”[61]

Instead, the Court required the plaintiffs to prove, rather than simply allege, that they could calculate class-wide damages attributable to the specific antitrust impact the District Court allowed. The Court concluded that plaintiffs failed to meet that burden because their model could not separately measure the pricing injury caused by the single allowed antitrust theory from the three disallowed theories. Thus, “in light of the model’s inability to bridge the differences between supra-competitive prices in general and supracompetitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.”[62]

The opinion prompted an aggressive dissent from Justices Ginsburg and Breyer who attempted to minimize the impact of the majority opinion, arguing it was limited to merely the underlying antitrust case and offered no new guidance on whether plaintiffs must be able to measure damages class-wide.[63]

In the end, *Comcast* required plaintiffs to prove that common issues of law and fact predominate with respect to *damages* as well as liability, and held that the class was improperly certified. Going forward, defense counsel can use *Comcast* as an example of just how important it is for a putative class to show that both liability and damages can be measured on a class-wide basis and that common questions are not overwhelmed by individualized determinations. The plaintiffs’ bar surely will seize upon the dissenting language designed to limit *Comcast* to the facts of the case.

Silence on Daubert

Notably, the *Comcast* majority did not address whether a district court must conduct a *Daubert* evidentiary analysis when considering a motion to certify a class. Both sides had briefed and presented oral arguments on whether a *Daubert* analysis, which examines whether expert evidence is admissible, should be required for class certification. BakerHostetler attorneys filed an amicus brief on behalf of the Cato Institute, arguing that *Daubert* analyses are necessary prior to certification.

Perhaps, a procedural hiccup prompted the Court to sidestep the *Daubert* issue. At the district court level, the defendant did not object to the admissibility of the plaintiffs’ expert evidence, thereby failing to preserve the issue for Supreme Court review.

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[61] *Id.* at 1432.
[62] *Id.* at 1435.
[63] Id. at 1436 (dissent) (“[T]he opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3). In particular, the decision should not be read to require, as a prerequisite to certification, that damages attributable to a class-wide injury be measurable ‘on a class-wide basis.’”).

Whirlpool: Moldy washing machines test the boundaries of Comcast

Left unclear from *Comcast* is whether the decision requires plaintiffs in all types of class actions to establish predominance with respect to damage calculations as well as liability. Two class action cases involving allegedly moldy washing machines are testing the boundaries of *Comcast*, and the U.S. Supreme Court is expected to decide in January whether to review those cases and clarify the scope of *Comcast*.

The two cases — *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*,[64] and *Butler v. Sears, Roebuck & Co.*[65] — arise out of allegations that defects in certain front-loading washing machines caused mold to develop inside them. In both cases, the Courts of Appeals had certified classes, and the defendants had petitions for writs of certiorari pending in the Supreme Court when *Comcast* was decided.

After *Comcast* was handed down, the Supreme Court granted, vacated, and remanded both *Whirlpool* and *Butler* to the Courts of Appeals for reconsideration in light of that decision. And in each case, the lower courts affirmed their earlier rulings by distinguishing and limiting *Comcast* in a key way: *Comcast* involved both a liability and damages class, whereas *Whirlpool* and *Butler* sought only to certify liability classes and to leave damage determinations for later, with separate hearings pursuant to Fed. R. Civ. P. 23(c)(4).[66]

Judge Posner interpreted *Comcast*'s holding as requiring only common *injury*, not common *damages*: "*Comcast* holds that a damages suit cannot be certified to proceed as a class action unless the damages sought are the result of class-wide *injury* that the suit alleges."[67] Thus, since common questions of liability and injury involving the alleged washer defects were found to predominate over individualized damages issues, these courts held that the lack of a class-wide measure of damages was not fatal to certification under *Comcast*.

The defendants have since sought Supreme Court review of these decisions, raising numerous challenges to the manner in which those courts decided predominance and commonality questions with respect to both liability and damages. The Supreme Court is expected to consider whether to grant the certiorari petition during its January conference sessions. We look forward to seeing how lower courts continue to interpret *Comcast* and whether the Supreme Court will use the moldy washer cases as a vehicle to further refine the test for predominance under *Comcast*.

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[64] 722 F.3d 838 (6th Cir. 2013).
[65] 727 F.3d 796 (7th Cir. 2013).
[66] *E.g., Butler*, 727 F.3d at ___, slip op. at 7 ("a class action limited to determining liability on a class-wide basis, with separate hearings to determine—if liability is established—the damages of individual class members, is permitted by Rule 23(c)(4) and will often be the most sensible way to proceed"); *Whirlpool*, 722 F.3d at ___, slip op. at 26-27.
[67] 727 F.3d at 800 (emphasis in original).

Push-back on class-wide damages theory after Comcast

Since *Comcast*, numerous judges and commentators have attempted to divine its basic essence. In one of the most notable lower-court decisions interpreting *Comcast*, in August, Southern District of New York Judge Paul Oetken recapped the state of development throughout the federal courts since *Comcast* was decided. He wrote that upon reflection in *Jacob v. Duane Ready* that it was "most logical to construe *Comcast* as requiring a baseline inquiry into damages at the certification phase—meaning that the putative class's theory of liability must track its theory of damages. Put another way, there cannot be a mismatch between the injury and the remedy. . . . *Comcast* does not, however, establish a rule that prohibits certification of solely a liability class in the face of individualized proof of damages. In fact, were the Court to interpret *Comcast* to adopt such a rule, employers would be subject to a perverse incentive: maintain company-wide, computerized, and generally accessible records of overtime hours and face class action litigation or rely on individual agreements and employee-by-employee records and defeat class certification in every instance."[68]

Carrera highlights the need for plaintiffs to prove that class member identities are ascertainable

Carrera v. Bayer Corp.[69] further clarified a plaintiff's duty to show, in order to certify a class, that class member identities can be ascertained either through the defendant's records or a "reliable, administratively feasible alternative." In that case, plaintiffs sought to certify an advertising class based on claims that Bayer falsely advertised its One-a-Day WeightSmart dietary supplement. Bayer objected to class certification, arguing that it would be impossible to ascertain the members of the class due to a lack of proof over whether putative class members had, in fact, purchased the product.

The court held that plaintiff was required to demonstrate an "administratively feasible" means of identifying who purchased WeightSmart—one that did not require mini-trials or individualized fact-finding as to each putative member of the class.[70] The plaintiff sought to satisfy his burden by relying on retailer records and affidavits submitted by class members attesting to their purchases of WeightSmart. The court rejected both methods, reasoning that the plaintiff had failed to demonstrate any evidence that retailer records existed that would allow for the identification of purchasers, and that affidavits are insufficient to prove membership in the class.

The court rejected the use of affidavits for three reasons. First, while plaintiff argued the affidavits were reliable because the low-dollar value of the claim made fraud unlikely, the court rejected the argument because it afforded the defendant no practical means of challenging class membership—a concern especially relevant in cases where the named plaintiff's deposition testimony suggests that individuals may have difficulties

[68] *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578 (S.D.N.Y. 2013).
[69] 727 F.3d 300 (3d Cir. 2013).
[70] *Id.* at 307.

accurately recalling their purchase of the product.[71] Second, plaintiff argued the accuracy of the affidavits was less important because he could calculate Bayer's total liability based on the total volume of product sales in the state, which could be accurately determined. The court rejected this argument too, holding that the payment of fraudulent claims would dilute the recovery payable to legitimate members of the class.[72] Finally, plaintiff argued that its proposed class action administrator could use anti-fraud screening techniques, including duplicate identification and the inclusion of false options on the claim form designed to root out fraudulent claims (e.g., options for incorrect product descriptions or pill counts), to ensure the affidavits' accuracy. But the plaintiff failed to demonstrate the effectiveness of those techniques, instead offering only assurances that the technique would work.[73]

This case highlights the importance of class member identification issues in cases where the defendant's records are not sufficient to reliably identify members of the putative class, and is a potent, if sometimes overlooked, tool to defeat class certification.

D. Class Action Settlements

1. CAFA

Divided Ninth Circuit panel became first Circuit Court of Appeals to interpret settlement provision of CAFA regarding attorneys' fees

In May, a divided Ninth Circuit panel became the first federal court of appeals to interpret a provision in the Class Action Fairness Act (CAFA) limiting the scope of attorneys' fees in coupon settlement cases.[74]

In re HP Inkjet—a consolidated class action—arose out of allegations that Hewlett-Packard had engaged in unfair business practices relating to the sale of its printer ink cartridges. After five years of litigation, the parties entered into a settlement agreement, with Hewlett-Packard agreeing to: (1) distribute up to $5 million in e-credits—essentially, coupons—redeemable on its website; (2) make additional disclosures on its website and in user manuals and software interfaces; (3) pay up to $950,000 for class notice and administrative costs; and (4) pay up to $2.9 million in attorneys' fees.

In approving the settlement, the district court limited the fee award to $1.5 million, which it estimated was the "ultimate value" of the settlement to the class. A small group of objectors appealed to the Ninth Circuit, alleging that the settlement was unfair, unreasonable, and inadequate in violation of CAFA. The Ninth Circuit reversed, holding that the district court had misinterpreted CAFA's attorneys' fees provision found in 28

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[71] *Id.* at 309.
[72] *Id.* at 310.
[73] *Id.*
[74] *See In re HP Inkjet Printer Lit.*, 716 F.3d 1173 (9th Cir. 2013); *see also* 28 U.S.C. § 1712(a)-(c).

U.S.C. § 1712(a)-(c).

Section 1712(a) provides that any portion of attorneys' fees "attributable to the award of coupons shall be based on the value to class members of the coupons that are redeemed." According to the Ninth Circuit, that provision requires fee awards "attributable to" coupon payments to be calculated using the *actual* redeemed value of those coupons, not their projected value.[75]

In *In re HP Inkjet*, the parties' agreement precluded the coupons from being issued or redeemed until the settlement became final. Thus, under the current settlement agreement, class counsel was precluded from seeking compensation based on the value of the coupon relief.

In dissent, Judge Berzon argued that the district court had not violated CAFA because it had based the fee award on a lodestar calculation, not a percentage of the coupon recovery, and had simply limited that lodestar amount based on an estimate of the benefits received by the class.[76]

The *In re HP Inkjet* decision will likely create additional hurdles for class action settlements involving coupon awards, as class counsel can no longer obtain fees as a percentage of the award unless the coupons are redeemed prior to final settlement approval. Defendants, on the other hand, will be understandably reluctant to issue relief before a settlement is finalized, as a failed settlement could result in additional liability.

2. Incentive Awards

Sixth Circuit determines incentive awards can doom class certification

Incentive awards for class representatives are commonplace, but depending on their terms, those awards may pose obstacles to successful class settlement. In February, the Sixth Circuit held that an incentive award can so far outweigh the benefits to unnamed class members as to create a conflict of interest that renders the class representatives unfit under Rule 23, thus negating class certification.[77]

In *Vassalle*, the class alleged that Midland Funding LLC—a debt collection agency—had engaged in a series of misconduct, including the use of fraudulent affidavits in collection lawsuits against debtors. The parties entered into a settlement in which Midland agreed to pay $5.2 million into a common fund for the benefit of the class, ultimately resulting in a payment of $17.28 to each class member. On top of that amount, each named plaintiff would receive an incentive award of $2,000 each, and would have their debts erased. The district court approved the settlement, but objectors brought the case to the Sixth Circuit.

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[75] *In re HP Inkjet Printer Lit.*, 716 F.3d at 1182.
[76] *Id.* at 1186 (dissent).
[77] *Vassalle v. Midland Funding LLC*, 708 F.3d 747 (6th Cir. 2013).

The Sixth Circuit reversed, holding that the preferential treatment of the class representatives was unfair and further that the settlement undermined Rule 23's "adequacy of representation" and "superiority" requirements.

First, the court noted that, in order to adequately represent the class, a named plaintiff must vigorously pursue the interests of that class. But here, the court held, the class representatives' personal interest in having their debts forgiven ran counter to the interests of the other class members in ensuring that they could use evidence of the false affidavits against Midland in their individual collection cases.

Likewise, the court found that class litigation was not superior to individual litigation because the class members' state law claims created an opportunity for greater monetary relief than offered by the settlement. Thus, the Sixth Circuit held that the district court had abused its discretion in certifying the class, as plaintiffs had not satisfied the "superiority" or "adequacy of representation" elements of Rule 23.[78]

This case should give pause to counsel considering significant incentive awards to class representatives during settlement. Not only can incentive awards impact the fairness analysis, but they can also poison class certification under Rule 23.

Incentive award created a conflict of interest and made class representatives inadequate

In another cautionary tale for incentive awards, the Ninth Circuit recently reversed a class settlement on the ground that the incentive payments to class representatives were "conditioned on the class representatives' support for the settlement."[79]

Radcliffe involved a consumer class action brought against the three major credit agencies—Experian, TransUnion, and Equifax—under the Fair Credit Reporting Act (FCRA). The plaintiffs alleged that the credit agencies continued to provide reports that incorrectly listed debts that had been discharged in bankruptcy proceedings.

The parties eventually settled the case, with the defendants agreeing to pay a monetary award of $5,000 to each named plaintiff, and about $26 to each of the remaining 755,000 class members. The agreement also provided that the class representatives could only receive the $5,000 incentive payment if they did not object to the settlement. If the court approved the settlement over a class representative's objection, that representative would receive the same $26 share as any other class member. The district court approved the terms of the settlement, and the objectors appealed.

The Ninth Circuit reversed, holding that the incentive awards "created a conflict of interest between the class representatives and the class," that "class counsel engaged in conflicted representation . . . after the two groups developed divergent interests," and "that the class representatives and class counsel were [therefore] inadequate to

[78] *Id.* at 759.
[79] *Radcliffe v. Experian Information Solutions, Inc.*, 715 F.3d 1157 (9th Cir. 2013).

represent the absent class members" under Rule 23.[80] Although the court noted that "the conditional incentive awards themselves are sufficient to invalidate this settlement," it found that "the significant disparity between the incentive awards and the payments to the rest of the class members further exacerbated the conflict of interest."[81]

After the court of appeals "once again reiterate[d] that district courts must be vigilant in scrutinizing all incentive awards," counsel in class action settlements may see district courts in the Ninth Circuit engaging in closer examination of settlement terms.[82]

3. Large *Cy Pres* Distributions Raise Certification Issues

In February, the Third Circuit joined a growing number of courts in expressing skepticism over large *cy pres* distributions in class action settlements, vacating a large settlement based on the district court's failure to consider whether the fund—which included a large *cy pres* distribution—gave "sufficient direct benefit to the class."[83]

Plaintiffs alleged that Babies "R" Us had conspired with manufacturers to artificially inflate prices in violation of the Sherman Antitrust Act. The parties settled the case for a total of $35.5 million, setting $14 million aside for attorneys' fees and expenses and reserving the remainder for claims by members of the settlement class. The settlement agreement divided claimants into three categories: (1) claimants with "valid documentary proof of purchase and of the actual price paid for a product" would receive 20% of the *actual* purchase price; (2) claimants with valid proof of purchase but not "documentary proof of the actual purchase price" would receive 20% of the *estimated* retail price; and (3) claimants without proof of purchase would receive a single $5 payment. The settlement agreement further provided that any funds remaining after the claims period had run would be distributed to one or more *cy pres* recipients, with the recipients to be selected by the district court from nominations by the parties.

According to the Third Circuit, that settlement arrangement "resulted in a troubling and . . . surprising allocation of the settlement fund," as it became clear during the claims period that only $3 million—about 14% of the available settlement money— would end up in the hands of the class, with the remaining $18.5 million distributed *cy pres* to a non-profit group selected by the court.[84]

Noting that the district court did not know—and could not have known—the ultimate allocation of the funds when approving the settlement, the Third Circuit vacated and remanded the judgment for reconsideration on the question of fairness. And while the court of appeals approved the use of *cy pres* distributions in general, it cautioned that "direct distributions to the class are preferred over *cy pres* distributions."[85] The court

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[80] *Id.* at 1163.
[81] *Id.* at 1165.
[82] *Id.* at 1164.
[83] *In re Baby Prods. Antitrust Lit.*, 708 F.3d 163 (3d Cir. 2013).
[84] *Id.* at 169.
[85] *Id.* at 173.

reasoned that not only do *cy pres* distributions give only "attenuated" benefits to the class, but also create a "potential conflict of interest between class counsel and their clients because the . . . *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class."[86]

In remanding the case for reconsideration of the settlement's fairness, the Third Circuit instructed the district court to consider "the degree of direct benefit provided to the class," keeping in mind that "[b]arring sufficient justification, cy pres awards should generally represent a small percentage of total settlement funds."[87]

In future cases, the Court noted that district courts might be forced to "withhold final approval of a settlement until the actual distribution of funds can be estimated with reasonable accuracy."[88]

4. No Benefit to Class Members

Sixth Circuit overturned settlement that gave $2.7 million in attorneys' fees, but had no real benefit for class members

In yet another example of courts' distaste for exorbitant class action fee awards, the Sixth Circuit recently overturned a settlement agreement that rewarded class counsel with $2.7 million in fees, but gave only "perfunctory relief" to the class.[89]

In the wake of an investigation into Pampers' "Dry Max" diaper products by the Consumer Product Safety Commission (CPSC), plaintiffs filed a dozen lawsuits against manufacturer Procter & Gamble, resulting in a consolidated nationwide class action. After the CPSC found no safety issues with the diapers, the parties negotiated a settlement.

The settlement agreement provided for mostly equitable relief, including changes to the product labeling and website. Procter & Gamble also agreed to reinstate a previous offer to give consumers a full refund with proof of purchase. Only the class representatives received an unconditional monetary award of $1,000 per affected child. Class counsel received $2.73 million in attorneys' fees.

Several plaintiffs appealed the district court's approval of the settlement, and a split panel of the Sixth Circuit reversed, holding that the settlement failed the basic fairness analysis under Rule 23 by giving "preferential treatment to class counsel while [giving] only perfunctory relief to unnamed class members."[90]

The court cited a number of "not particularly subtle" signs that "class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the

[86] *Id.* at 173.
[87] *Id.* at 174.
[88] *Id.*
[89] *In re Dry Max Pampers Lit.*, 724 F.3d 713, 718 (6th Cir. 2013).
[90] *Id.* at 718 (quotations omitted).

negotiations" to the detriment of the absent class members.[91] Specifically, the court explained that the "fee of $2.73 million—this, in a case where counsel did not take a single deposition, serve a single request for written discovery, or even file a response to P & G's motion to dismiss" vastly outweighed the "medley of injunctive relief" meant to benefit the class.

The panel also held that the district court abused its discretion in certifying the class because the named plaintiffs did not satisfy the "adequacy of representation" element of Rule 23. The incentive payments of $1,000 per child created a conflict of interest that would prevent the named plaintiffs from "vigorously prosecuting" the claims of the absent class members.[92] While the court did not disapprove incentive awards altogether, it suggested a "sliding scale" approach, similar to attorneys' fees measured as a fraction of the total recovery for the class.[93]

Again, this case serves as an important example of increased scrutiny of class action settlements by the courts. Disproportionate fee awards and incentive payments are increasingly disfavored, and may lead to more failed settlements and ultimately reduce the incentive to bring class actions in the first place, as the rewards shrink for both named plaintiffs and class counsel.

III. Developments by Subject Matter

A. Consumer Class Actions

1. Insurance

As expected, 2013 proved to be another noteworthy year for class actions involving the insurance industry. In fact, BakerHostetler attorneys won a decisive victory before the Ohio Supreme Court in one of the most important insurance cases of the year.

In *Cullen v. State Farm Mut. Auto. Ins. Co.*,[94] a case that turned on interpretation of class certification requirements of Rule 23(B)(2) and (3), the Ohio Supreme Court continued to bring the state's class certification requirements up to date and in line with the U.S. Supreme Court's *Dukes* and *Comcast* decisions.

In *Cullen*, the Ohio Supreme Court reversed the trial and appellate courts' decisions certifying a class, holding that both lower courts erred by failing to apply a "rigorous analysis" of the Civil Rule 23 requirements. As the opinion reiterated, a "rigorous analysis" must consider the evidence relevant to the Rule 23 factors even if that evidence also bears upon the underlying merits. Accordingly, the Court held that the

[91] *Id.* at 718 (quotations omitted).
[92] *Id.* at 722.
[93] *Id.*
[94] 2013-Ohio-4733, 2013 WL 5941377.

trial and appellate courts erred by assuming that the plaintiff's theory of the case was accurate, rather than examining the relevant evidence.[95]

Further, following the U.S. Supreme Court's *Walmart Stores, Inc. v. Dukes* reasoning, the Court rejected the plaintiff's proposed Rule 23(B)(2) (the Ohio counterpart to federal Rule 23(b)(2)) injunctive-relief class for two reasons: first, because monetary damages were not merely incidental to the declaratory relief sought; and second, because prospective relief would not benefit all class members. The Court thus held that Ohio courts cannot certify Rule 23(B)(2) classes seeking declaratory relief intended merely to lay a foundation for subsequent individual determinations of liability.[96]

Additionally, the *Cullen* Court ratcheted up the standard of proof required to certify a class. While it did not expressly require a *Daubert* analysis of expert opinions offered to support class certification, the Court implicitly approved of and performed such an analysis in rejecting the plaintiff's experts' opinions. The plaintiff had proffered expert testimony in support of its argument that there was common proof that windshield repairs failed to return all windshields to pre-loss condition. The Court held that Cullen's experts "asserted that the repair could not restore a windshield to pre-loss condition, but neither had sufficient evidentiary foundation for those opinions."[97] And without evidentiary foundation, those opinions could not carry the plaintiff's burden of showing that common issues predominated over individualized issues.

The Ohio Supreme Court in *Cullen* amplified its *Stammco v. United Telephone Co. of Ohio* opinion decided on July 16, 2013. *Stammco*, in which BakerHostetler attorneys also prevailed, held that "at the certification stage in a class action lawsuit, a trial court must undertake a rigorous analysis, which may include probing of the merits of the plaintiff's claim, but only for the purpose of determining whether the plaintiff has satisfied the prerequisites of Civ. R. 23."[98] Now that Ohio's Rule 23 is in line with prevailing interpretations of Federal Rule 23, class certification decisions in Ohio courts should be based upon a rigorous analysis of the evidence that is in the record -- and not just upon the plaintiff's allegations or theories.

Comcast damages analysis playing key role in insurance actions

In August, the U.S. District Court for Alaska also relied on *Comcast* to deny certification to a class of insureds seeking to recover additional attorneys' fees in connection with settlement of auto accident claims. Citing *Comcast*, the court noted that the named plaintiff "has not provided the Court with any common method of determining the amount of each proposed class member's actual damages, and thus has not demonstrated that damages are capable of measurement on a class-wide basis . . .

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[95] *Id.* at ¶ 17 ("However, deciding whether a claimant meets the burden for class certification pursuant to Civ.R. 23 requires the court to consider what will have to be proved at trial and whether those matters can be presented by common proof.").
[96] *Id.* at ¶ 27.
[97] *Id.* at ¶ 47.
[98] 213-Ohio-3019, 136 Ohio St.3d 231, 994 N.E.2d 408, syllabus.

The individual questions of fact implicated in the determination of damages for the proposed class would 'inevitably overwhelm' the common questions of law and fact."[99]

CAFA removal approved for declaratory judgment involving liability insurance coverage

As discussed above, the Class Action Fairness Act of 2005 (CAFA) was passed into law as an effort to prevent gamesmanship from keeping federal class actions out of federal court through artful pleading. In October, the Seventh Circuit reaffirmed the essence of CAFA when it held that an insurance company could remove a liability insurance coverage case under CAFA even though the plaintiffs had cleverly brought the case as an individual case rather than a class action. In *Addison Automatics, Inc. v. Hartford Cas. Ins. Co.,*[100] the plaintiff had previously brought a putative class action against Domino Plastics Company. Hartford, Domino's liability insurer, declined to defend the suit. Domino then settled the case for $18 million, and all of Domino's claims against its insurer were assigned to the class. Then, acting on the assignment of rights, the plaintiffs sued Hartford, attempting to hold the company liable for the judgment against Domino and purporting to be filing as an individual.

When Hartford removed under CAFA, the district court agreed with the plaintiffs and remanded the case as an individual action outside of CAFA jurisdiction. The Seventh Circuit, however, recognized the nature of the suit as arising in substance as a class action. Importantly, the court noted that Domino's rights were assigned to the "class," which was represented by the named plaintiff and its attorneys.[101] Accordingly, the court noted that "if we were to treat Addison as anything other than a class representative here, the interests of the class would be in danger. If a class representative could seek such relief on its own, relieved of its fiduciary duties, it could be induced to sell out the interests of other class members in a lucrative settlement."[102] Then, in a nod to the U.S. Supreme Court's *Standard Fire v. Knowles* decision, the Seventh Circuit noted that "to hold otherwise would, for CAFA jurisdictional purposes, …exalt form over substance, and run directly counter to CAFA's primary objective of expanding federal jurisdiction over national class actions."[103]

Considering the *de rigueur* nature of such declaratory judgment actions in the liability insurance arena, the *Addison* decision is likely to shine as an important beacon, signaling that such cases belong in federal court under CAFA.

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[99] *Wheeler v. United Servs. Auto. Ass'n*, 2013 WL 4525312, *5 (D. Alaska Aug. 27, 3013).
[100] 731 F.3d 740 (7th Cir. 2013).
[101] *Id.* at 742.
[102] *Id.* at 743.
[103] *Id.* at 744 (quoting *Standard Fire*, 133 S. Ct. 1345, 1350 (2013)).

2. Consumer products

In 2013, there were significant developments in consumer products class action cases, and class action lawyers at BakerHostetler represented clients in some of these significant decisions.

Heightened ascertainability requirement

In 2013, a new, positive trend regarding class ascertainability emerged in cases involving relatively low-priced consumer products. Typically, in such cases – where consumers would were unlikely to maintain proof of purchase (receipts or packaging) and manufacturers would not have records of consumers who purchased the products – courts generally have found that class members are nevertheless readily identifiable because consumers could purportedly self-identify as members of the class (e.g., purchasers of a product in a state). However, this year, courts have shown a willingness to scrutinize the proof used to demonstrate class membership, recognized the rights of defendants to challenge class membership, and denied certification where there is no reliable way to determine class membership.

In *Carrera v. Bayer Corporation*,[104] the Third Circuit, relying heavily on its earlier decision in *Marcus v. BMW of North America, LLC*,[105] vacated the district court's order certifying a class of consumers who purchased Bayer's One-A-Day WeightSmart multivitamin and dietary supplement in Florida (which plaintiff alleged was deceptively advertised), finding that the class members were not ascertainable. The Third Circuit noted that, in *Marcus*, it "explained that if class members cannot be ascertained from a defendant's records, there must be a 'a reliable, administratively feasible alternative,' but we cautioned 'against approving a method that would amount to no more than ascertaining by potential class members' say so.'"

Significantly, the Third Circuit found that the "rigorous analysis" requirement for class certification "appl[ies] to the question of ascertainability," which the court called an "essential prerequisite of a class action." The court stated that "[t]he method of determining whether someone is in the class must be 'administratively feasible,'" which means that identifying class members does not require individual factual inquiries. "A plaintiff does not satisfy the ascertainability requirement if individualized fact-finding or mini-trials will be required to prove class membership." Thus, the Third Circuit found that "[i]n sum, to satisfy ascertainability as it relates to proof of class membership, the plaintiff must demonstrate his purported method for ascertaining class members is reliable and administratively feasible, and permits defendant to challenge the evidence used to prove class membership."

The court stated that the "ascertainability question" in this case "is whether each class member purchased WeightSmart in Florida." The court noted that there was no dispute in the case "that class members are unlikely to have documentary proof of purchase,

[104] 727 F.3d 300 (3d Cir. 2013).
[105] 687 F.3d 583 (3d Cir. 2012).

such as packaging or receipts. And Bayer has no list of purchasers because . . . it did not sell WeightSmart directly to consumers." Given the lack of proofs of purchase or records identifying purchasers of the product, the plaintiff pointed to two types of evidence to ascertain the class: (1) through retailer's records of online sales and sales made with store loyalty or rewards cards, and (2) by affidavits of class members attesting that they purchased the product and stating the amount of product purchased. The court determined that "neither method satisfies [plaintiff's] burden to show the class is ascertainable."

With respect to plaintiff's first argument concerning retailer records, the Third Circuit found that the plaintiff failed to put forth sufficient evidence to show that these records can be used to identify class members. The court found that there was "no evidence that a single purchaser of WeightSmart could be identified using records of customer membership cards or records of online sales" and that there was "no evidence that retailers even have records for the relevant period."

With respect to the plaintiff's second argument concerning class member affidavits, the court rejected plaintiff's argument that class members were unlikely to submit fraudulent affidavits because of the relatively low value of the claims. The Third Circuit stated that "[t]his argument fails because it does not address a core concern of ascertainability: that a defendant must be able to challenge class membership. This is especially true where the named plaintiff's deposition testimony suggested that individuals will have difficulty accurately recalling their purchases of WeightSmart." The court also found that the screening model that plaintiff proposed to screen out unreliable affidavits – the defendant argued that the memories of putative class members would be unreliable as to the circumstances of their purchase(s) that had occurred many years earlier – was insufficient because the plaintiff "suggested no way to determine the reliability of such a model." In vacating and remanding the case, the Third Circuit stated that it would allow the plaintiff to submit a screening model and prove how that model would be reliable and how it would allow Bayer to challenge the affidavits, but the "[m]ere assurances that a model can screen out unreliable affidavits will be insufficient."

It is also important to note that the *Carrera* decision contains a significant discussion on the due process rights of defendants in class actions. The court found that "[a] defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues." The court further stated that a "defendant has similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim," and that "[a]scertainability provides due process by requiring that a defendant be able to test the reliability of the evidence submitted to prove class membership."

In *Hernandez v. Chipotle Mexican Grill, Inc.*,[106] a case from the Central District of California, the court made a similar ruling (under California's more liberal consumer protection laws), although it based its decision on predominance and superiority

[106] No. 12-5543, 2013 U.S. Dist. LEXIS 172607 (C.D. Cal. Dec. 2, 2013).

grounds. The court noted that "the dispute concerns a very low price transaction that neither the class members nor Chipotle maintain any specific record of or could be expected to recall." The court found the details of each class members' purchase(s) raised individual issues because it was not "practical" for class members to recall the specifics of their purchases over a five year period, and that Chipotle "should be allowed some mechanism for confirming or contesting" class members' recollections. The court also found that the class action mechanism was neither fair nor efficient since, even if the parties reached a settlement, very few people would be able to remember the details of their purchases during the claims process, and that people would "either (1) lie, (2) attempt to fill out the claim form as best they can but be unable to do so accurately, or, most likely, (3) not bother," and that, therefore, "[m]oney would be given out basically at random to people who may or may not actually be entitled to restitution," which was "unfair both to legitimate class members and to Chipotle."

Taken together, these decisions provide a significant argument for defendants in cases involving the sale of consumer products where class members generally do not save receipts and defendants do not have records of consumers who purchased the products. Defendants in such cases can use the reasoning of these decisions to argue that classes are not ascertainable because there is no feasible and reliable method to determine class membership without resulting to individual inquiries of each class member (or depending on the facts of the case, that individual purchasing inquiries predominate), thus defeating certification.

"Lack of Substantiation" cases

In 2013, courts continued to dismiss cases based on a "lack of substantiation" for advertising (i.e., where a private plaintiff alleges that a defendant does not have adequate scientific substantiation for its advertising claims), rendering those claims false and misleading under state consumer protection laws. Over the past few years a strong defense has emerged where private plaintiffs base cases on a purported "lack of substantiation." As discussed in last year's update, in 2012, district courts granted motions for summary judgment in a number of "lack of substantiation" cases where the plaintiffs did not present evidence demonstrating falsity of the claims, as opposed to a "lack of substantiation" for the claims[107] – a trend that has continued in 2013, both in the summary judgment context and at the pleading stage.

In *Johns v. Bayer Corporation*,[108] the Southern District of California granted summary judgment in favor of the defendant in a "lack of substantiation" case. In *Johns*, the plaintiffs alleged that Bayer's advertising for two of its One-A-Day vitamin products (Men's Health Formula and Men's 50+ Advantage) was false and misleading because the claims that the products supported prostate health and that the selenium in one of the products may reduce the risk of prostate cancer were not adequately substantiated

[107] *See Stanley v. Bayer Healthcare LLC*, No. 11-cv-862, 2012 U.S. Dist. LEXIS 47895 (S.D. Cal. Apr. 23, 2012); *Scheuerman v. Nestle Healthcare Nutrition, Inc.*, No. 10-3684, 2012 U.S. Dist. LEXIS 99397 (D.N.J. July 16, 2012).
[108] No. 09cv1935, 2013 U.S. Dist. LEXIS 51823 (S.D. Cal. Apr. 10, 2013).

with scientific evidence. The court found that there is no private right of action for unsubstantiated advertising – only regulatory authorities can bring claims for unsubstantiated advertising – and that private plaintiffs bear the burden of proving the falsity of the advertising claims. In a lengthy and detailed opinion, the court concluded that the plaintiffs did not meet this burden since they did not offer any affirmative scientific evidence that "disproved" Bayer's advertising claims concerning prostate health. In reaching this conclusion, the court found that the "strength of Bayer's evidence is irrelevant" because plaintiffs have the burden of proving through scientific evidence that the ingredients in the products did not provide the advertised benefits.

In *Bronson v. Johnson & Johnson, Inc.*,[109] the Northern District of California granted the defendant's motion to dismiss where the false advertising allegations concerning certain claims relating the defendant's Splenda products were based on an alleged "lack of substantiation" for the advertising. The court found that "lack of substantiation" claims were not cognizable under California law, and that a "plaintiff's reliance on a lack of scientific evidence or inconclusive, rather than contradictory, evidence is not sufficient to state a claim." Because the plaintiffs in that case did not cite to any evidence purportedly demonstrating falsity with respect to certain claims, and alleged only that the claims were not substantiated, the court granted the defendant's motion to dismiss with leave to amend. On a renewed motion to dismiss the amended complaint, the court found that claims were still premised on a "lack of substantiation," and dismissed those claims with prejudice.[110]

In *Gaul v. Bayer Healthcare, LLC*,[111] the District of New Jersey dismissed the plaintiff's complaint which was premised on allegations that Bayer falsely advertised its calcium supplement product, Citrical SR. The court found that the law "requires that Plaintiffs prove, *inter alia*, that the labeling claims are false," but that the complaint failed to "point to any facts which make plausible the inference that Plaintiffs have a factual basis for asserting that the labeling claims are false." The court addressed the plaintiff's citation to a National Advertising Division (NAD) report which criticized the reliability of one of Bayer's studies, finding that this allegation did not provide a factual basis on which to conclude that Bayer's advertising claims were false since "unreliable does not mean that its conclusions are necessarily incorrect." The court also rejected conclusory allegations in the complaint concerning studies that had no bearing on the particular advertising claims at issue in this case.

These decisions, and the reasoning behind them, provide a strong defense in consumer class actions that allege a "lack of substantiation" for advertising claims. It is not sufficient for plaintiffs in such cases to allege that a defendant's advertising is unsubstantiated, or to attack or poke holes in the studies that a manufacturer relies on to support its advertising claims; instead, plaintiffs must allege the existence of, and present, scientific evidence that affirmatively disproves the advertising claims, which is

[109] No. 12-04184, 2013 U.S. Dist. LEXIS 54029 (N.D. Cal. Apr. 16, 2013).
[110] No. 12-04184, 2013 U.S. Dist. LEXIS 151842 (N.D. Cal. Oct. 21, 2013).
[111] No. 12-5110, 2013 U.S. Dist. LEXIS 22637 (D.N.J. Feb. 11, 2013).

an extremely high and difficult bar for plaintiffs to meet, particularly in the summary judgment context.

"Reasonable Consumer" standard

In 2013, courts continued to dismiss claims brought under California's consumer protection statutes (including the Unfair Competition Law (UCL), Consumers Legal Remedies Act (CLRA), and False Advertising Law (FAL)) at the pleading stage where a "reasonable consumer" could not be deceived by the advertising as a matter of law. While strong case law has developed over the past few years in federal court, the California Court of Appeal made a similar determination this year, providing a strong basis for defendants to argue in state court that advertising would not deceive a "reasonable consumer."

In *Simpson v. The Kroger Corporation*,[112] the California Court of Appeal affirmed the dismissal of a complaint with prejudice in a case where the plaintiff alleged that the defendant's products were falsely labeled as "butter" because they also contained canola oil or a combination of canola oil or olive oil. The Court of Appeal noted that to prove a claim under California's consumer protection statutes, a plaintiff must establish that the advertising is likely to deceive a "reasonable consumer," and stated that "under California law, in appropriate circumstances, reasonableness can be decided as a question of law." The court found that the advertising at issue was not misleading as a matter of law: "The labels on the products here clearly informed any reasonable consumer that the products contain both butter and canola or olive oil. This was plain on both the top and side panels of the tubs in which the products are sold. No reasonable person could purchase the products believing that they had purchased product containing only butter."

In *Cheramie v. HBB, LLC*,[113] the Ninth Circuit affirmed dismissal of the plaintiff's claims asserted under California's consumer protection statutes in a case where the plaintiff alleged that the defendant failed to inform consumers about the serious side effects stemming from the excessive quantity of melatonin in the defendant's Lazy Cakes products. The Ninth Circuit found that a "reasonable consumer" was not likely to be deceived in the manner alleged since "the Lazy Cakes packaging describes the product as a relaxation agent, discloses the presence and quantity of melatonin in each serving and the relevant serving size, and warns consumers about the risks of drowsiness."

In *Pelayo v. Nestle USA, Inc.*, the Central District of California dismissed with prejudice the plaintiff's consumer protection claims concerning various Buitoni stuffed pasta products, which the plaintiff alleged were falsely labeled as "All Natural" because they contained at least two ingredients that were "unnatural, artificial, or synthetic." The court found that "Plaintiff cannot state a claim under the CLRA or UCL regarding Defendants' allegedly false, misleading, and deceptive 'All Natural' labeling because she fails to offer an objective or plausible definition of the phrase 'All Natural,' and the use of the term 'All

[112] 219 Cal. App. 4th 1352 (2013).
[113] No. 12-55148, 2013 U.S. App. LEXIS 23222 (Nov. 18, 2013).

Natural' is not deceptive in context." The court stated that the definitions of "natural" offered by the plaintiff, which included "produced or existing in nature" and "not artificial or manufactured," "clearly does not apply to the Buitoni Pastas because they are a product manufactured in mass . . . and the reasonable consumer is aware that Buitoni Pastas are not 'springing fully-formed from Ravioli trees and Tortellini bushes.'" The court further noted that the "All Natural" designation appears not just on the front of the products, but on the back "immediately above the list of ingredients," and, therefore, "to the extent there is any ambiguity regarding the definition of 'All Natural' with respect to each of the Buitoni Pastas, it is clarified by the detailed information contained in the ingredient list."

These decisions, and others, provide defendants with strong grounds on which to argue at the pleading stage that advertising is not false or misleading as a matter of law, particularly where plaintiffs attempt to pluck certain words or phrases out of context to allege that the advertising is false.

Motion to strike class allegations

A motion to strike class allegations is a powerful tool available to defendants to attempt to defeat certification early, before the plaintiff files a motion for class certification or any significant discovery takes place. Typically, courts have only granted motions to strike class allegations (if at all) where it was clear from the face of a complaint that a class could not be certified. In 2013, the Southern District of Ohio issued a significant decision granting a motion to strike class allegations based on evidence outside the pleadings, but before any significant discovery had taken place.

In *Loreto v. The Procter & Gamble Company*,[114] a case in which BakerHostetler class action attorneys represented Procter & Gamble, the court granted, in full, Procter & Gamble's motion to strike class allegations. In that case, the plaintiff alleged that Procter & Gamble falsely advertised two over-the-counter cold and flu products. Specifically, plaintiffs alleged that the purported advertising statement that Vitamin C "won't cure a cold, but . . . can help blunt its effects" was false and misleading under New Jersey Consumer Fraud Act.

Procter & Gamble moved to strike the class allegations, relying on Rule 23(c)(1)(A) of Federal Rule of Civil Procedure, and the Sixth Circuit's decision in *Pilgrim v. Universal Health Card, LLC*,[115] which confirmed the principle that a district court should determine "[a]t an early practicable time" in a case whether class treatment is appropriate. In support of its motion, Procter & Gamble submitted evidence, including the packaging and advertisements for the products, copies of Vicks.com web pages, and Vicks.com website page view records. The plaintiffs responded that the motion was premature, that further discovery was required for the court to make a determination as to whether the class could be certified, and that a motion to strike could only be granted if it was clear from the face of the complaint that a class could not be certified.

[114] No. 1:09-cv-815, 2013 U.S. Dist. LEXIS 162752 (S.D. Ohio Nov. 15, 2013).
[115] 660 F.3d 943 (6th Cir. 2011).

In granting the motion to strike class allegations, the court rejected the plaintiffs' arguments. It noted that Procter & Gamble had provided the court with all of the packaging and advertisements for the products which showed that "blunt its effects" statement was not in any of the advertisements, the web pages from the Vicks.com website which showed that the statement only appeared on a "tips" page among other general health and wellness tips, and the page view records for the Vicks.com website, which showed that the "tips" page received only a few thousand page views during the time the statement was on the website. The court found that the plaintiffs did not contest or dispute any of these facts or identify any further discovery that could alter the fact that the statement did not appear in the products' advertisements. Instead, citing to *Pilgrim*, the court concluded that "further discovery and briefing on the certification issue would simply postpone the inevitable conclusion that the putative class cannot be certified," and noted that the case "is precisely the type of case that *Pilgrim* anticipated."

The court then addressed its decision to strike the class allegations. Among other things, the court held that "a class cannot be certified if any members in the class would lack Article III standing," and that most class members lacked Article III standing because they "did not suffer an injury that is causally connected" to the "blunt its effects" statement since most were never even exposed to that statement. The court also found, independent of the Article III requirement, that the putative class was overly broad because it "would consist primarily of uninjured class members," most of whom had never been exposed to the "blunt its effects" statement. Furthermore, the court found that the commonality requirement was not met, and that individual issues predominated.

While early motions to strike class allegations have generally been disfavored, the recent *Loreto* and *Pilgrim* decisions, along with others, indicate that defendants should consider filing an early motion to strike class allegations. Although the success of a motion to strike will depend on the jurisdiction in which the case is pending (for example, the case law is particularly favorable in the Sixth Circuit), and the facts of the case, there is a growing body of case law that supports the notion that a court should decide the certification question early, if possible, to avoid the unnecessary expense of additional discovery and briefing where it is clear that the requirements for certification cannot be met.

Denial of class certification on predominance grounds

In 2013, there were a number of helpful decisions in consumer products cases in which the courts denied class certification on predominance grounds. These decisions highlight some arguments that defendants can use to oppose class certification depending on the facts of the case. In addition, these cases are of particular significance since they involve claims asserted under California's more liberal consumer protection statutes.

In *Chow v. Neutrogena Corp.*,[116] the Central District of California denied certification in a case alleging that the defendant falsely advertised products from its Healthy Skin Anti-

[116] No. 12-04624, 2013 U.S. Dist. LEXIS 17670 (C.D. Cal. Jan. 22, 2013).

Wrinkle line in violation of California's UCL and CLRA. The court found that the predominance requirement could not be met since there were significant individualized questions as to whether the product worked as advertised for each individual class member, and that "[b]ecause those class members for whom the product worked as advertised would not have suffered the same injury as Plaintiff, the class cannot be sustained without resorting to individualized inquiries into the merits of each class members' claims, and therefore the class device is not appropriate." In addition, the court found that the plaintiff's CLRA claim "suffered from the additional individualized issues of demonstrating reliance" and that an inference of class-wide reliance was not appropriate because, among other things, "a significant portion of consumers who purchased the product were repeat purchasers." The plaintiff, according to the court, did not provide significant proof to distinguish between "mere favorability toward products bearing the Neutrogena brand name, for example, and reliance upon specific advertised benefits of the products in the case."

In re Celexa and Lexapro Marketing and Sales Practices Litigation,[117] the court denied certification on predominance grounds in this multidistrict litigation alleging that the defendant promoted antidepressants Celexa and Lexapro for off-label use in minors, even though the Food and Drug Administration (FDA) had only approved the drugs for use in adult patients. In the two cases asserted on behalf of nationwide classes, the court determined that it must apply the law of each purchaser's home state to their claims. As a result, the court found that given its "determination that the law of plaintiffs' home states must apply . . . a class action applying the law of many (presumably all 50 states) would simply be unmanageable." In the case asserted on behalf of a California class, the court found that under the UCL and FAL, class members must prove that they, or in this case, the prescribing physicians, were exposed to the alleged false or misleading advertising. The court stated that each plaintiff is required to show that each physician who prescribed Celexa was exposed to the allegedly false statements made by the defendant's representatives and that it was "not sufficient simply to presume" that they all received those representations. The court found that "[b]ecause the UCL and FAL claims require individual, plaintiff-specific determinations, those claims are not subject to common proof."

In *Minkler v. Kramer Laboratories, Inc.*,[118] the Central District of California denied certification in a case alleging false advertising of an anti-fungal nail product in violation of California's UCL, CLRA, and FAL. Among other things, the court found that "Plaintiff cannot demonstrate the common issues predominate because some of the members of the [California class of purchasers] never saw or relied upon the images on Fungi-Nail packaging on which the Plaintiff claims he exclusively relied and, instead, relied on the recommendation of doctors or pharmacists . . ." The court further concluded "that issues of reliance and injury will require individualized inquiry. Accordingly, Plaintiff will not be able to demonstrate, as he must to prevail on his claims, that Defendants made misrepresentations to every member of the Class, that every member of the Class

[117] MDL No. 09-02067, 2013 U.S. Dist. LEXIS 15419 (D. Mass. Feb. 5, 2013).
[118] 2013 U.S. Dist. LEXIS 90651 (C.D. Cal. Mar. 1, 2013).

exposed to the alleged misrepresentation were ignorant of the truth, that every member of the Class reasonably relied on the alleged misrepresentations, and that this reliance caused every member of the Class to suffer a financial injury without significant, time-intensive, individualized evidence."

In *McManus v. Sturm Foods, Inc.*,[119] the Southern District of Illinois denied certification of eight state-wide subclasses (Alabama, California, Illinois, New Jersey, New York, North Carolina, South Carolina, and Tennessee) in a case alleging false advertising of a coffee product. The court found that "in cases requiring individual subjective inquiries into causality, individual questions predominate over common questions." The court concluded that "each state requires individualized proof of reliance, causation, or both," and that the individual inquiries required of each class member as to reliance and/or causation "would far outweigh any judicial economy gained by certifying the classes."

Defendants opposing class certification should always identify the individual issues in their case with respect to factual issues such as the causation and reliance elements present in most state consumer protection statutes, injury, and/or proof of damages, and any legal issues. For example, if consumers may have relied on sources of information other than the packaging or advertising alleged to be false, defendants can present a strong challenge to certification. In addition, if the plaintiff alleges that the product does not work as advertised (a common allegation in cases involving health-related products), defendants can present a strong argument that individualized issues as to injury predominate since some class members benefitted from the product(s) (even if the named plaintiffs did not). Furthermore, given recent case law finding that the consumer protection laws of the various states differ and that class member claims should be governed by the laws of the state where the consumer purchased the product,[120] nationwide class allegations are particularly vulnerable to attack.

3. Banking

Seventh Circuit says size not relevant in EFTA class litigation

The Seventh Circuit Court of Appeals has developed something of a reputation as being certification friendly in recent years, and the September decision in *Hughes v. Kore of Indiana Enterprise, Inc*.[121] will do little to alter that perception.

In *Hughes*, the defendant owned ATMs in two Indianapolis-area college bars. In violation of the Electronic Funds Exchange Act (EFTA)[122] and Regulation E[123], the ATMs lacked the necessary stickers providing notice that the defendant charged a fee

[119] 292 F.R.D. 606 (S.D. Ill. 2013).
[120] *See*, *e.g.*, *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943 (6th Cir. 2011).
[121] 731 F.3d 672 (7th Cir. 2013).
[122] 15 U.S.C. § 1693(d)(3). Since the time of the violation, the EFTA has been amended to remove the requirement of the sticker notice.
[123] 12 C.F.R. § 105, 16(c)

for using the ATMs. Importantly, the parties stipulated to a damages limit of $10,000 and more than 2,800 transactions. Originally, the district court certified a class of customers, but later decertified the class because class members might only receive $3.57 per transaction (as opposed to a minimum of $100 when such claims are brought on an individual basis). Additionally, the district court concluded that the notice requirement could not be satisfied because the cost of providing notice would exceed class damages.

The Seventh Circuit reversed the decertification order, noting that it is unrealistic to expect individuals to find attorneys interested in $100 lawsuits. The *de minimis* class recovery did not bother the court, which suggested a *cy pres* decree would solve the problem: "A foundation that receives $10,000 can use the money to do something to minimize violations of the [EFTA]; as a practical matter, class members each given $3.57 cannot."[124]

Additionally, the court was not bothered by the expense of notice because less expensive notice via a sticker on the ATMS, publication in the *Indianapolis Star,* and publication on a website were sufficient. Because notice is provided to give class members an opportunity to opt out to bring their own lawsuits, it was unlikely that any class member would have such a claim large enough to entice him to opt out.

Judge Posner, who wrote the opinion, emphasized that the small size of an aggregate class claim should not bar certification because "[a] class action, like litigation in general, has a deterrent as well as a compensatory objective. . . . [T]he damages sought by the class, and, probably more important, the attorney's fee that the court will award if the class prevails, will make the suit a wake-up call for Kore and so have a deterrent effect on future violations[.]"[125]

The decision seemed to be the Seventh Circuit's attempt at a common-sense answer to an irksome problem, but it left unaddressed what to do about individual class members who do want their share of the recovery. Nevertheless, Hughes is likely to prompt the plaintiffs' bar to keep pursuing EFTA claims, even where the potential class recovery appears to be on the low side.

Consumer banking plaintiffs must provide evidence to satisfy CAFA's local controversy exception

Although the Class Action Fairness Act of 2005 provides class defendants with broad latitude to remove a class action to federal court when there is minimal diversity, there are a few exceptions to the rule. One notable exception is the "local controversy" rule, which requires a district court to remand a case to state court when more than two-thirds of the class members are citizens of the state where the action was originally filed

[124] *Hughes*, 731 F.3d at 676.
[125] *Id.* at 677-78.

and at least one defendant is as well.[126]

In *Mondragon v. Capital One Auto Finance,*[127] the Ninth Circuit Court of Appeals held that when consumer plaintiffs attempt to invoke the "local controversy" rule to force remand, they have a burden to show some evidence that more than two-thirds of the class members are citizens of the state of filing. The *Mondragon* plaintiff brought suit on behalf of California automobile purchasers, alleging that Capital One violated various California law provisions relating to automobile finance contract disclosures.[128] The district court granted the plaintiffs' motion to remand under the local controversy exception to CAFA and vacated the decision, even while acknowledging that more than two-thirds of the class members probably were from California. "It is likely that most of the prospective class members—we would guess more than two-thirds of them—were California citizens at the time the lawsuit was filed," the court's opinion said. "But it is also likely that some of them were not."[129] Thus, because plaintiffs did not provide any actual evidence—other than "guesswork"—that the local controversy rule was satisfied, the court vacated the ruling to remand with instructions to give the plaintiff an opportunity for discovery to produce such evidence.

B. Privacy

For a number of years, the key issue in data privacy class actions has been whether plaintiffs could allege damages sufficient for standing purposes or to state a claim for relief. Several key decisions addressed the issue in 2013. In addition, in 2013, theories of injury and damages revealed themselves to be deciding factors at the class certification stage of litigation. Finally, courts continued to address new and creative theories of liability arising out of data breaches and claims of invasion of privacy.

Article III Standing

Several key decisions this year highlighted the ongoing challenges privacy class action plaintiffs face in alleging adequate injury for the purposes of both Article III standing and to state a claim for relief. Because many privacy class action plaintiffs are only able to allege increased risk of future identity theft or other hypothetical harm, as opposed to actual identity theft or a related harm from a breach, privacy class action suits often are dismissed for lack of Article III standing. Two key decisions in 2013 strengthened the prevailing view by courts that in the absence of actual injury, plaintiffs cannot establish the "concrete" and "particularized" injury necessary to confer standing.

In February, the Supreme Court held in *Clapper v. Amnesty International*[130] that class action plaintiffs lacked standing to challenge government monitoring of communications under section 702 of the Foreign Intelligence Surveillance Act because they could not prove that interception of their communications under section 702 was "certainly impending." The *Clapper* plaintiffs were attorneys and organizations whose work

[126] 28 U.S.C. § 1332(d)(4)(A).
[127] *Mondragon v. Capital One Auto Fin.*, 736 F.3d 880 (9th Cir. 2013).
[128] *Id.* at 882.
[129] *Id.* at 884.
[130] *Clapper v. Amnesty International*, 133 S. Ct. 1138 (2013).

required them to engage in sensitive and privileged communications with individuals whom they believed were likely targets of surveillance. The *Clapper* plaintiffs asserted that their work would be compromised by the chilling effect of the law, but also that, in response to and to protect their communications from the law's application, they had undertaken "costly and burdensome measures" to protect the confidentiality of their sensitive communications. The court held that standing requires an injury that is "certainly impending" and that "[a] speculative chain of possibilities" regarding future injury and standing theories that "rest on speculation about the decisions of independent actors" will not suffice. Plaintiffs, therefore, could not satisfy the "injury-in-fact" prong of the Supreme Court's test for Article III standing.

Though *Clapper* was not itself a data privacy class action, the decision suggests that privacy class action plaintiffs cannot manufacture standing either by claiming that a breach put them at increased risk of identity theft or, relatedly, by incurring costs to mitigate a future unknown risk of identity theft, such as by obtaining credit reports or purchasing credit monitoring services. And, in fact, later in the year, two federal courts independently dismissed class action complaints for failing to adequately allege cognizable damages relying on the Supreme Court's decision in Clapper.

In September, the Northern District of Illinois issued its opinion in *In re Barnes & Noble Pin Pad Litigation*.[131] The Barnes & Noble litigation stemmed from the October 2012 discovery that hackers were stealing credit and debit card information from Barnes & Nobles' PIN pad devices at 63 stores across the country. In their suits, the plaintiffs pled multiple state law claims alleging various injuries, including but not limited to, inadequate notification of the incident, expenses incurred in efforts to mitigate the increased risk of identity theft or fraud, and an increased risk of identity theft. The court held that a mere increased risk of identity theft or fraud fails to establish standing under *Clapper* because speculation of future harm does not constitute actual injury. Moreover, the court held that alleged expenses incurred by plaintiffs to combat future identity theft were not sufficient to create injury because plaintiffs could not "manufacture standing by incurring costs in anticipation of non-imminent harm."

To close out the year, on December 26th, the U.S. District Court for New Jersey made a similar finding in *Polanco v. Omnicell, Inc. Polanco* arose from the November 2012 theft of a laptop computer from the vehicle of an employee of Omnicell, a business associate of numerous hospitals. According to the class action complaint, the "stolen laptop computer contained the unencrypted Personal Confidential Information (PCI) of Plaintiff, and thousands of other individuals, all of whom provided their information to Defendants Sentara, Inspira, and the University of Michigan during the course of seeking healthcare treatment . . ."[132] Based on these allegations, plaintiff brought claims for breaches of various state security notification laws, violations of various states' consumer fraud laws, fraud, negligence, and conspiracy. Attempting to put a new spin on damages, the plaintiff claimed she suffered damages in the form of unspecified out-of-pocket expenses in seeking medical treatment for her daughter at medical facilities other than

[131] *In re Barnes & Noble Pin Pad Litig.,* 12-CV-8617, 2013 WL 4759588 (N.D. Ill. Sept. 3, 2013).
[132] *Polanco v. Omnicell, Inc*, No. 13-1417 (D. N.J. December 26, 2013).

defendants' where plaintiff allegedly felt personal health information would be protected. The court rejected the plaintiffs' damages claims. In dismissing all claims, and relying on *Clapper*, the court held, *inter alia*, that plaintiff had "prophylactically spent money to ease [her] fears of [a] future" loss, but had failed to demonstrate a "'concrete and particularized' or 'actual or imminent' injury." Furthermore, the *Polanco* court addressed the plaintiff's failure to adequately allege the causation element of standing against defendant Sentara, given that she had no relationship with Sentara, thereby reaffirming that a putative named plaintiff in a class action must be able to adequately allege standing against each defendant.

Barnes & Noble and *Polanco* highlight the uphill battle plaintiffs will continue to face in bringing privacy class actions that can successfully survive the initial dispositive pleadings stage. Still, given class action plaintiffs' lawyers' historic creativity in alleging injury, companies should expect allegations in future lawsuits to adapt to the changing privacy class action landscape.

Damages and class treatment

Another key issue in data breach class actions is whether plaintiffs are able to prove damages on a class-wide basis. Even in those cases where some members of the proposed class can show that they suffered injury, the existence and nature of any injuries tend to vary greatly amongst putative class members. One key decision issued in 2013 reinforced the conclusion that variation in the existence and extent of any damages suffered by the victims of a privacy breach can prevent class treatment, but another illustrated that the availability of statutory damages may be used to overcome this problem.

First, in March, the United States District Court for the District of Maine denied the plaintiffs' motion to certify a class in *In re Hannaford Brothers Company Data Security Breach Litigation*.[133] The court's analysis was a victory for the class action defense bar because it turned on the issue of the plaintiff's inability to prove total damages. Without a reliable method to demonstrate the damages of class members, the court held, plaintiffs could not meet the predominance requirement of Rule 23(b)(3).

Hannaford arose out of a criminal attack on the payment card system network at the Hannaford Bros. grocery chain, which potentially affected over 4 million credit and debit card numbers. Notably, at the time of its decision on certification, the court was adjudicating the case on remand from the First Circuit, which had affirmed the viability of the plaintiffs' negligence and implied breach of contract claims because they had alleged damages as foreseeable costs, including fees for replacing cards and the cost of identity theft protection products, to mitigate harm arising from the data breach.[134]

On remand, the plaintiffs filed their motion for class certification in line with the First Circuit decision by limiting the proposed class to "Hannaford customers who incurred

[133] *In re Hannaford Brothers Company Data Security Breach Litigation*, 293 F.R.D. 21. (D. Me. 2013).
[134] *Hannaford* was adjudicated prior to the Supreme Court's decision in *Clapper*, and the issues were decided in the context of a Rule 12(b)(6) motion to dismiss.

out-of-pocket costs in mitigation efforts that they undertook in response to learning of the data intrusion." Nevertheless, the court held that plaintiffs could not overcome the predominance requirement because they had not identified a purported expert with a method to show class-wide damages. The *Hannaford* court held that although plaintiffs had established commonality as to purported liability, without an expert to show lump-sum damages, they would be left with a series of mini-trials to determine individualized damages.

Conversely, in *comScore v. Dunstan*, in June, the Seventh Circuit upheld the certification of data privacy class action for alleged privacy violations under various federal statutes, including the Stored Communications Act (SCA) and the Electronic Communications Privacy Act (ECPA). According to the complaint, comScore, "an Internet research corporation that provides marketing data to a wide variety of clients, generally in the form of aggregated reports about online consumer behavior," obtained information including "username and passwords," "PDFs," and "every file on the monitored consumer's computer" through software distributed by either "paying affiliate partners to post comScore's advertisements on their websites in an effort to solicit consumers to download comsScore's Surveillance Software" or "paying developers to bundle the Surveillance Software with the third-party application provider's software." The expansive class included all individuals "who have had comScore's Surveillance Software installed on their computer(s)."

The Northern District of Illinois granted certification in April on the statutory claims, which carried with them statutory damages. The court found that the "plaintiffs raise[d] a variety of common questions that can be resolved on a class-wide basis" under these statutes—which define statutory penalties per violation—and that it would be "far more efficient to resolve all of the common issues in a single proceeding, and then to hold individual hearings on damages if necessary, than it would be to litigate all of the common issues repeatedly in individual trials."[135]

Notably, in its appeal to the Seventh Circuit, comScore argued that "individualized issues inherent in cases of this type make them particularly unsuited to class treatment" because plaintiffs would not be able to prove that the entire class, which could potentially include "tens of millions of people," had "even downloaded comScore's software, a prerequisite to membership in the class." The court rejected this argument and, without releasing a written opinion, denied leave to appeal certification[136] of the 10-million member internet privacy class—"the largest privacy case ever certified on an adversarial basis."

The key difference between *Hannaford* and *comScore* is that the damages in *comScore* were statutory in nature. Thus, the efficacy of the argument that data privacy class action plaintiffs cannot prove damages on a class-wide basis appears to have been compromised where the damages are statutory in nature.

[135] *Harris v. comScore, Inc.*, 292 F.R.D. 579 (N.D.Ill. April 2, 2013).
[136] *comScore v. Dunstan*, No. 13-cv-8007 (7th Cir. Jun. 11, 2013).

Theories of liability

One hot area of data privacy litigation over the past several years has been data breach class actions brought under the California Confidentiality of Medical Information Act (CMIA),[137] which provides that a person may recover $1,000 "nominal" damages against a healthcare provider who has negligently "released" the person's medical information. Until recently, no California appellate court had directly analyzed what constitutes a "release" of medical information under the CMIA. The court in *The University of California v. Superior Court* (*Platter*)[138] addressed this question for the first time in 2013 and held that the mere loss of possession of computer equipment containing medical information was not sufficient to constitute a release of the information itself. Instead, the court held, a plaintiff must be able to plead, and ultimately prove, that an unauthorized person actually accessed the plaintiff's medical information. The *Platter* decision will protect defendants from CMIA liability in instances in which a computer or other device is lost or stolen and never recovered but where there is no evidence to suggest that anyone ever looked at the information contained on the device after the loss or theft.

In another influential decision involving statutory claims under both California and federal law, the U.S. District Court for the District of Delaware dismissed a complaint against Google in *In re Google Inc. Cookie Placement Consumer Privacy Litigation*[139] for its alleged act of circumventing the privacy settings on Apple's Safari web browser in order to place web cookies on the user's hardware that tracks web browsing activity. In addition to holding that the plaintiffs lacked Article III standing in the absence of proof of a statutory violation, the court dismissed a variety of state and federal claims, including claims brought under the Electronic Communications Privacy Act, the Stored Communications Act, the Computer Fraud and Abuse Act, and various state laws.

The results were more mixed in *Bell v. Blizzard Entertainment, Inc.*,[140] where the U.S. District Court for the Central District of California dismissed most, but not all, state law causes of action brought against a video game manufacturer after hackers gained access to users' account information. The court dismissed the plaintiffs' claims for unjust enrichment based on the theory that the defendant benefited from the sale of products without protecting their data security because the parties' relationship was governed by a comprehensive, express contract. The court dismissed the plaintiffs' negligence per se claims based on the theory that the defendant had failed to give timely notice of the breach under state law because the information compromised (email addresses, secret question answers, and scrambled passwords) did not fall within the definition of "personal information" the compromise of which would trigger a reporting requirement under state law. The court also dismissed the plaintiffs' claim brought on a

[137] California Civil Code § 56.
[138] *The University of California v. Superior Court* ("*Platter*"), 220 Cal. App 4th 549 (2013), *mod. on reh'g* (Cal. App., Nov. 13, 2013).
[139] *In re Google Inc. Cookie Placement Consumer Privacy Litigation*, MDL Civ. No. 12-2358-SLR (D. Del. Oct. 9, 2013).
[140] *Bell v. Blizzard Entertainment, Inc.*, 12-CV-09475 BRO (PJWx) (C.D. Cal. July 11, 2013).

bailment theory, finding that personal information is not a chattel that can be subject to the common law principle of bailment and finding the claim duplicative of the contract and negligence claims.

Following the general trend, the *Blizzard* court also dismissed the plaintiffs' contract and negligence claims based primarily on the plaintiffs' failure to allege any compensable harm. The court rejected the plaintiffs' argument that an increased risk of future identity theft could satisfy the harm element of these claims and found that any claimed diminution of value of the video games the plaintiffs purchased was too speculative to be compensable. However, the court permitted the case to continue on one of the three theories the plaintiffs submitted in support of their consumer fraud claims, finding that alleged omissions about the need to purchase a physical "authenticator" device to ensure account security could support a claim under the Delaware Consumer Fraud Act.

The *Google* and *Bell* cases illustrate the variety of ways in which theories of liability for invasions and breaches of privacy are constantly changing, just as Internet technology continues to evolve. Although many of these creative theories of liability are ultimately unsuccessful, companies that do business using the internet should frequently reevaluate their privacy policies and business practices in light of the developing theories of liability.

Intersection of statutory damages claims, statutes of limitation, and Erie

State laws that bar class action claims in certain contexts may not actually have the teeth to block the class claims if federal law controls under the Erie doctrine.

Plaintiffs can often find success in achieving standing by bringing claims for statutory damages under statutes such as a the Fair Credit Reporting Act, the Telephone Consumer Protection Act, the Electronic Communications Privacy Act, and the Video Privacy Protection Act (TCPA). In 2012, the U.S. Supreme Court settled a jurisdictional question by holding in *Mims v. Arrow Financial Services, LLC*, that TCPA claims arise under federal law and, therefore, give rise to federal jurisdiction absent diversity of citizenship.

In 2013, the Second Circuit had to determine whether a New York state class action bar for such claims could be enforced to bar a class action under the state-law analog to the TCPA.[141] New York Civil Procedure law § 901(b) prohibits class claims for statutory damages.[142] Previously, the Second Circuit had determined that "*Mims* cannot be construed as requiring us to apply state limitations periods to TCPA claims in federal

[141] *Bank v. Independence Energy Grp. LLC*, 736 F.3d 660, 661 (2d Cir. 2013).
[142] N.Y. C.P.L.R. 901 (b.) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").

court."[143] Thus, under *Mims*, the Second Circuit concluded that *Mims* dictated that federal law—namely, the TCPA—and not the state procedural law determined solely whether the case could proceed as a class action. Despite the state bar to class claims for statutory damages, the Second Circuit said it was forced to vacate the dismissal of class claims under the TCPA.[144]

The bottom line is that even where a state law may bar class claims, if the relevant federal law declares that claims for statutory damages arise under federal law, then the state class bar may be no bar at all.

TCPA growth in claims offers lessons

In addition to the Second Circuit's *Bank v. Independence Energy* decision on TCPA claims, the past year featured tremendous growth in filings of TCPA claims, with a reported 65 percent increase from 2012.[145] One of the most noteworthy decisions occurred in *Nelson v. Santander Consumer USA*,[146] when the U.S. District Court for the Western District of Wisconsin determined that a defendant could be liable for violating the TCPA as long as the defendant's call-center technology had the capacity to make an automated dial even if the actual call was placed by a live person.[147] In making its ruling, the court turned to the Federal Communication Commission's interpretation of "automatic telephone dialing system" under the TCPA to hold that the relevant inquiry is "whether the system it used had the 'capacity' to make the automated call." Although *Nelson* was not itself brought as a class action, the analysis could have significance for call-center defendants facing TCPA class liability. Before *Nelson*, such defendants might have considered making individualized defense arguments based on whether a class member received an automated call or a live call. *Nelson* shoots an arrow in that defense by essentially removing it.

TCPA changes to monitor

The TCPA is an attractive class action device for the plaintiffs' bar because it provides for statutory damages of up to $1,500 per knowing or willful violation. And with the inevitable violations due to the statute's complexity, class liability can creep up on businesses in substantial ways.

On October 16, 2013, the FCC added some additional liability threats for businesses to keep in mind. First, the agency issued a new interpretation of the "prior express consent" rule, which previously provided an exception to liability when "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the

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[143] *Giovanniello v. ALM Media, LLC*, 726 F.3d 106 (2d Cir. 2013).
[144] *Bank v. Independence Energy Grp. LLC*, 736 F.3d 660, 661 (2d Cir. 2013).
[145] http://www.insidearm.com/daily/debt-collection-news/debt-collection/fdcpa-lawsuits-continue-steady-decline-as-tcpa-suits-rise/.
[146] 931 F.Supp.2d 919 (W.D. Wis. 2013).
[147] *Id.* at 930.

contrary."[148] Under the new interpretation, liability is precluded under the prior express consent rule only when the consumer signs a written agreement "clearly authoriz[ing]" transmission of "advertisements or telemarketing messages using an automatic telephone dialing system or an artificial prerecorded voice."[149] Additionally, the agreement cannot be a condition of purchase.[150]

Second, the FCC eliminated the "established business relationship" exception that permitted businesses to sidestep TCPA liability when there was an underlying "established business relationship" with a customer. Without that exception, businesses will have to follow the new prior express consent rules even with their established consumer customers.

Seventh Circuit decision illustrates why TCPA claims make good class action vehicles

Class action plaintiffs' attorneys know that their biggest obstacle to a successful class action lawsuit will often turn on class certification issues of commonality, predominance, and ascertainability. TCPA class actions remove some of the doubt in those respects because of the nature of TCPA violations. Typically, when a business violates the TCPA by making unsolicited phone calls or sending unsolicited advertisements, it violates the statute in the same way with each iteration and/or class member. In *Holtzman, C.P.A. v. Turza*, the Seventh Circuit explained that because of this feature "class certification is normal under [the TCPA]."[151] And holding true to that statement, the court then affirmed certification of a class of recipients of unsolicited facsimile advertisements.

In *Turza*, the defendant CPA sent unsolicited facsimile messages, containing a mix of industry news and an advertisement for his CPA business. With more than 8,000 faxes and a statutory damage award of $500 per unsolicited fax, the defendant rang up a bill of $4.2 million after the district court certified the class.

To the Seventh Circuit, the defendant tried to argue that the district court improperly certified the class because it could not be proven that each recipient actually printed the advertisement. Of course, the Seventh Circuit, with Judge Easterbrook writing the opinion, quickly dismissed that argument because the TCPA does not require a fax to be printed. It just has to be received to trigger a violation.[152] And even after *Comcast v. Behrend's* damage analysis with respect to certification, Judge Easterbrook noted that every recipient in *Turza* would have been damaged in exactly the same way—by receiving an unsolicited facsimile. As for whether class members were ascertainable, it turned out that the marketing company that distributed the advertisements for Holtzman kept an electronic log of all of the fax numbers that had successfully received the

[148] 47 U.S.C. § 227(b)(1).
[149] 47 C.F.R. § 64.1200(f)(8).
[150] *Id.*
[151] 728 F.3d 682 (7th Cir. 2013).
[152] 47 U.S.C. 227(b)(3)(B).

advertisements. So there would be no individualized inquiry problem in identifying class members.

In fact, the only significant hiccup with the case, as the Seventh Circuit saw it, had nothing to do with certification, but instead revolved on the merits. The defendant argued that the advertisement technically did not violate the TCPA because it was an "incidental" advertisement exempt from TCPA violations under guidance provided by the Federal Communications Commission (FCC). In response, the Seventh Circuit discredited the guidance on the basis that it was untethered legislative history expounding on unambiguous statutory text. And to the extent the FCC passage was attempting to explain when the FCC would bring TCPA actions, it was not relevant in a private TCPA action.

C. Employment Discrimination and Wage and Hour

Wal-Mart v. Dukes continues to reverberate through the employment class action arena

Two years ago, the U.S. Supreme Court reset the employment class action playing field—if not the entire class action playing field—when it decided *Wal-Mart Stores, Inc. v. Dukes*. Simply by requiring a strict analysis of whether a class of employees satisfied Rule 23's commonality mandate, *Dukes* provided employers with fierce weaponry in combating class certification motions. In 2013, employers sharpened those knives in U.S. appellate courts.

Time and again, Circuit courts sent cases back to district courts for failing to rigorously analyze under *Dukes'* mandate whether class members in fact share legal commonality. Importantly, courts began to affirmatively stake out that *Dukes* requires such a rigorous analysis in all types of class actions—not just those that assert discrimination claims.

Sixth Circuit leans on Dukes to affirm denial of certification in disparate impact case

Recall that in *Dukes*, Justice Scalia, writing for a 5-4 majority, noted that for class-wide claims alleging unfavorable employment decisions there must be "some glue holding the alleged reasons for all those decisions together;" otherwise "it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*."[153] The Sixth Circuit revisited that analysis in May, asking whether there was any such glue to hold together a class of Title VII disparate impact claims in *Davis v. Cintas Corp.*[154]

In *Davis*, the plaintiffs—and the Equal Employment Opportunity Commission—alleged that Cintas discriminated on the basis of sex in hiring for entry-level sales positions. The plaintiffs' attorneys followed a successful blue print at the time: they challenged the

[153] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011).
[154] 717 F.3d 476 (6th Cir. 2013).

company's nationwide hiring practices; they traced the alleged discrimination to Cintas' corporate culture, which included an expert opinion regarding the "white-male dominated business culture;" and they provided statistical evidence to back up their assertions. Nevertheless, the district court denied certification of a putative class of unsuccessful female job applicants, notably citing a difference among hiring managers at various locations. While the appeal to the Sixth Circuit was pending, the *Dukes* decision came down from the Supreme Court, essentially validating the district court's reasoning and doing away with any notion of "trial by formula."

Citing *Dukes* throughout, the Sixth Circuit affirmed the denial of class certification because "when plaintiffs challenge employment practices in a large, national corporation, . . . demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."[155]

With *Davis*, the Sixth Circuit joined the Tenth Circuit in 2013 in striking back against class claims alleging disparate impact tied to discretionary conduct. In *Tabor v. Hilti Inc.*,[156] the Tenth Circuit relied on *Dukes* to hold that "bottom line" disparities between male and female sales representatives did not satisfy Rule 23 commonality after *Dukes*. In that case, even among the named plaintiffs, there was obvious dissimilarity with respect to individualized defenses that rendered commonality nearly impossible to find.

Dukes plays key role in vacation of certification of security guard class action

Unlike the district court in *Davis*, the *Ealy v. Pinkerton Gov't Services, Inc.* court did not rigorously examine whether a class of security guards maintained sufficient commonality in their attempt to seek overtime payment on a class-wide basis.[157] The *Ealy* plaintiffs sued under the Fair Labor Standards Act (FLSA), as well as Maryland law, alleging Pinkerton violated state and federal law by not compensating them for "disarming" time, or the time they spent reporting to the armory at the beginning and end of their shifts to collect and return weapons used during patrol—a 15-minute process according to plaintiffs. Plaintiffs also alleged that 45-minute uncompensated meal breaks violated federal and state law because security guards had to remain on call.

The district court conditionally certified the FLSA class and granted certification to the Maryland claims pursuant to a Rule 23 analysis. After the Supreme Court decided *Dukes*, Pinkerton appealed the Rule 23 order to the Fourth Circuit demanding vacation of the class ruling because the district court haphazardly analyzed the plaintiffs' commonality and typicality burdens.

The Fourth Circuit agreed in March, holding that "consistent with *Wal-Mart Stores, Inc. v. Dukes*, a more rigorous analysis into the Rule 23 requirements is necessary in this

[155] *Id.* at 488.
[156] 703 F.3d 1206 (10th Cir. 2013).
[157] *Ealy v. Pinkerton Gov't Servs., Inc*., 514 Fed. Appx. 299 (4th Cir. 2013).

case to ensure meaningful appellate review."[158] Accordingly, the class certification order was vacated and returned to the district court for review.

Second Circuit cites Dukes and Comcast in overturning certification order

A class of bank assistant branch managers seeking overtime payment due to misclassification lost their certification award in May when the Second Circuit held that the Eastern District of New York failed to properly apply a *Dukes*-style rigorous analysis prior to a class certification order. Specifically, the Second Circuit in *Cuevas v. Citizens Financial Group*[159] noted that the rigorous analysis requirement under *Dukes* can only be met if the district court "resolves factual disputes relevant to each Rule 23 requirement."[160] Because the district court merely glossed over the contrary evidence presented by Citizens and the plaintiffs with respect to the commonality among the class members' primary job duties, the Second Circuit vacated the certification grant and sent the case back to the district court for reconsideration.

The Second Circuit also held the district court erroneously concluded that the plaintiffs met Rule 23(b)(3)'s predominance requirement. Turning to *Comcast v. Behrend*, the Second Circuit pointed out that the district court failed to consider how the body of conflicting evidence impacted the predominance inquiry, especially because it raised questions as to whether resolution of claims would involve a substantial individualized inquiry.[161]

On remand, the Ninth Circuit reconsiders and falls in line with Dukes

With approximately 1.5 million potential class members, *Dukes* presented one of the most expansive actions in Rule 23 history. The Supreme Court's decision, however, drew no distinctions between large and small class action claims. No matter the size, the Court said, a class's proposed claims must "depend upon a common contention . . . of such a nature that it is capable of class-wide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

In *Wang v. Chinese Daily News, Inc.*,[162] the Ninth Circuit clarified that the *Dukes* rigorous analysis requirement carries as much weight when examining the commonality of a 200-member class as it does in a *Dukes*-size million-member plus class. On remand from the Supreme Court in the wake of Dukes, the Ninth Circuit reversed a certification order, remanding to the district court to examine the plaintiffs' class claim for overtime pay under the *Dukes'* "rigorous analysis."

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[158] *Id.* at 310-11.
[159] 526 Fed. Appx. 19 (2d Cir. 2013).
[160] *Id.* at 21.
[161] *Id.* at 22 ("As with its determination on commonality, however, the district court declined to address all of the evidence before it and resolve the material factual disputes arising from the conflicting declarations. Resolving these issues is essential to determining whether ABMs actually share primary duties such that common issues predominate over individual.").
[162] --- F.3d ---, 2013 WL 4712728 (9th Cir. Sept. 3, 2013).

Wang had a curious history because the case rose and fell on the fortunes of the *Dukes* plaintiffs, its Rule 23 forerunners. In *Wang*, plaintiffs alleged that *Chinese Daily News* (CDN) employees were made to work more than eight hours per day and 40 hours per week without overtime in violation of federal and state law. When the district court granted class certification in the first instance, and when the Ninth Circuit affirmed that order, both courts relied upon the Ninth Circuit's *Dukes* opinion prior to Supreme Court reversal. After *Dukes*, of course, certification of such a class was specious when it occurred without a rigorous *Dukes* analysis. So the Supreme Court granted certiorari and remanded for reconsideration in light of *Dukes*.

Upon reconsideration, the Ninth Circuit first determined that the change in law brought about by *Dukes* was so substantial that CDN had not waived its right to challenge the district court's commonality finding by failing to make that argument during the initial appeal. Then, applying *Dukes*, the court explained that even though the *Wang* class contained only about 200 employees, all of whom worked at the same office, "there are potentially significant differences among the class members" so as to require remand.[163]

Indeed, *Dukes* permeated every corner of the Ninth Circuit's decision on remand. The court also explained that the certification grant of an injunctive class under Rule 23(b)(2) likely could not stand under *Dukes* because of the individualized nature of the non-incidental monetary claims. The court remanded for reconsideration to the district court. Finally, the Ninth Circuit remanded for reconsideration the district court's certification pursuant to Rule 23(b)(3), noting that an underlying requirement of Rule 23(b)(3) certification is satisfaction of Rule 23(a)'s commonality standard.

In sum, the application of *Dukes* took a class action that had been certified and tried to a jury with judgment in favor of the plaintiffs, and sent it back to the pre-certification drawing board, all the while arming defendants with necessary artillery to blowback the plaintiffs' advance. The decision further underscored the emerging theory that the *Dukes* rigorous analysis fills a large box of class action activity and cannot be confined to a small subset of discrimination cases. Importantly, the Ninth Circuit's interpretation on that point contrasted with a January 2012 Seventh Circuit opinion holding that *Dukes* does not affect off-the-clock cases, raising the specter that the opportunity for the Supreme Court to explicitly expand—or contract—*Dukes* may soon come again.

Building on *Dukes*, *Comcast's* influence on labor and employment class actions is evident. First, with respect to showing damages in discrimination cases, *Comcast* applies direct weight in barring statistical methods to prove such damages when those methods can't show the actual damages of each individual. More broadly, *Comcast* can apply in a wage-and-hour context when analyzing whether there is a class-wide method to prove damages at all—at least a method that syncs with the theory of liability. The Supreme Court, for instance, vacated the judgment and remanded a Seventh

[163] *Id.* at *3.

Circuit decision affirming certification of a wage and hour class action, directing the court to further consider its decision in light of *Comcast*.[164]

Tolling statutes of limitations

Even where certification issues are not percolating, *Dukes* continues to play a pivotal role in the development of class action jurisprudence. A follow-on *Dukes* case in the Sixth Circuit is navigating the boundaries of statute of limitations bars after a certification denial.[165] The typical rule, laid down in the Supreme Court case *American Pipe & Construction Co. v. Utah,*[166] is that during the pendency of a class action, relevant statutes of limitation are tolled for would-be individual plaintiffs who are putative class members. Once certification is denied, the clock restarts.

The rule is different, however, for subsequent class actions. *American Pipe* tolling, which is a form of equity created by federal courts, does apply to follow on class actions that are filed after a denial of certification. The issue currently before the Sixth Circuit is whether *American Pipe* tolling can toll the statute of limitations for a follow on regional class action after certification denial of a nationwide class action. In its September 11, 2013 order granting permission to appeal, the Sixth Circuit defined the issue as whether *American Pipe* "permits the named plaintiffs in this case to pursue a class action on behalf of a regional subclass after certification of the broader nationwide class was denied. . . Although our precedent seemingly establishes a bright-line rule barring follow-on subclass actions by former putative class members, subsequent case law from this court, the Supreme Court, and other circuit and district courts have established exceptions to the rule that might extend to the present subclass."[167]

Indeed, the district court, even in granting a motion to dismiss based on *American Pipe*, noted that several courts have found exceptions to the categorical bar against *American Pipe* tolling for subsequent class actions—however, none of those cases addressed the precise question of whether a narrower, regional subclass may take advantage of *American Pipe* tolling after a certification denial.[168]

Rapid decline of D.R. Horton decision bolsters employment-based class waivers

In 2013, appellate courts resoundingly discredited the National Labor Relations Board (NLRB) decision that held that class waivers are unenforceable in the employment context because they conflict with Section 7 of the National Labor Relations Act.[169] The

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[164] *Ross v. RBS Citizens, N.A.*, 667 F.3d 900 (7th Cir. 2012), vacated by 133 S. Ct. 1722 (2013).
[165] *In re: Cheryl Phipps*, Case No. 13-503 (6th Cir. 2013).
[166] *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).
[167] *In re: Cheryl Phipps*, Case No. 13-503 (6th Cir. 2013).
[168] *Phipps v. Wal-Mart Stores, Inc.* 925 F. Supp.2d 875 (M.D. Tenn. 2013). A subset of the original *Dukes* plaintiff class filed three regional suits in Tennessee (id.), Texas (*Odle v. Wal-Mart Stores, Inc.* 2011 WL 5119693 (N.D. Tex. filed Oct. 28, 2011)), and Florida (*Love v. Wal-Mart Stores, Inc.*, 2012 WL 4739296 (S.D. Fla. filed Oct. 4, 2012)).
[169] *In re D.R. Horton, Inc.*, 2012 WL 36274 (NLRB Jan. 3, 2012).

blowback began early in 2013 and ended with a flourish when the Fifth Circuit reversed the NLRB's *D.R. Horton* decision.

First, the Eighth Circuit acted in January, holding that pursuant to recent Supreme Court case law interpreting the Federal Arbitration Act, class waivers are enforceable in employment settings despite the right to bring a class action under the Fair Labor Standards Act (FLSA).[170] In reversing the district court's denial of a motion to compel arbitration, the Eighth Circuit noted that it was under no obligation to follow the NLRB's attempt to distinguish employment-based class waivers from the Supreme Court's mandate of their enforceability in *AT&T Mobility LLC v. Concepcion*. Thus, the court held that an employment arbitration agreement containing a class waiver was enforceable, striking the first appellate court blow in *D.R. Horton*.

The Second Circuit followed in August, agreeing with the Eighth Circuit that the NLRB's *D.R. Horton* decision invalidating a class waiver was entitled to no deference. More broadly, the Second Circuit relied on the 2013 Supreme Court *American Express Co. v. Italian Colors Restaurant* (*Amex III*) decision to hold that a waiver of collective action claims is permissible in the FLSA context. Importantly, the court was compelled by *Amex III* to conclude that an employee's "class action waiver is not rendered invalid by virtue of the fact that her claim is not economically worth pursuing individually."[171]

Then in December, the Ninth Circuit and Fifth Circuit delivered decisive blows that for the moment rendered *D.R. Horton* a blip in class action history. Most prominently, the Fifth Circuit on December 3 overturned the *D.R. Horton* decision and ruled that the "effect of [the NLRB's] interpretation is to disfavor arbitration," which is precluded by *Concepcion*.[172] Six days later, in *Richards v. Ernst & Young, LLP*, the Ninth Circuit vacated a class certification order and reversed a denial of a motion to compel arbitration in an employment setting while noting that the Eighth and Second Circuits had already discredited the *D.R. Horton* decision.[173]

Offers of judgment

The Supreme Court also approved the "pick-off" move as a defensive strategy in FLSA actions. In *Genesis Healthcare Corp. v. Symczyk*,[174] the Supreme Court reversed the Third Circuit and held that FLSA collective actions can be mooted by making a Rule 68 offer of judgment to the named plaintiff.[175] Specifically, the Court found that "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied."[176]

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[170] *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).
[171] *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).
[172] *D.R. Horton, Inc. v. National Labor Relations Board*, ___ F.3d ___ (5th Cir. Dec. 3, 2013). (Slip Op. at 20).
[173] 2013 WL 6405045.
[174] *Genesis Healthcare Corp. v. Symczyk* (Genesis), 133 S. Ct. 1523, 185 L.Ed.2d 636 (2013).
[175] *Id.* at 1529.
[176] *Id.*

In *Genesis*, the plaintiff brought an FLSA action to challenge Genesis's policy of automatically deducting 30 minutes per shift for meal breaks regardless of whether the employee actually took the break.[177] Simultaneously with its answer, Genesis served a Rule 68 offer of judgment, which included $7,500 for alleged unpaid wages and reasonable attorneys' fees, costs, and expenses.[178] The offer was left open for 10 days, during which time the plaintiffs did not respond.[179] Genesis then moved for dismissal, which the district court granted, finding that the plaintiffs' claims were moot.[180] The Third Circuit reversed the decision based on its' concern that the defendants could simply "pick off plaintiffs" in FLSA collective actions, and remanded to allow the plaintiff to seek "conditional certification."[181]

In its decision, the Supreme Court rejected the Third Circuit's decision that a court could disregard a Rule 68 offer in order to prevent a defendant from picking off plaintiffs. The Court noted that this could be a valid concern in the Rule 23 context when the relief sought was "transitory" or "fleeting," usually in the context of Constitutional claims.[182] In FLSA actions, however, the relief sought is only monetary.[183]

Rather, the Court limited its ruling to overturning the Third Circuits decision to remand because the district court had already found the claims to be moot. The Court refused to address the issue of whether an unaccepted Rule 68 offer that fully satisfies the plaintiff's demands moots the case because the plaintiff-employee did not properly preserve the issue and had, in fact, conceded that the offer mooted her individual claim.[184] As a result, the lower courts remain split on this issue.[185]

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[177] *Id.* at 1527.
[178] *Id.*
[179] *Genesis Healthcare,* 133 S. Ct. at 1527.
[180] *Id.*
[181] *Id.*
[182] *Id.* at 1531.
[183] *Id.*
[184] *See Genesis Healthcare,* 133 S. Ct. at 1528–29 ("While the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot, we do not reach this question, or resolve the split, because the issue is not properly before us." (footnote omitted)).
[185] *See, e.g., Warren v. Sessoms & Rogers, P.A.,* 676 F.3d 365, 371 (4th Cir. 2012) ("When a Rule 68 offer unequivocally offers a plaintiff all of the relief 'she sought to obtain,' the offer renders the plaintiff's action moot." (citation omitted)); *Lucero v. Bureau of Collection Recovery, Inc.,* 639 F.3d 1239, 1243 (10th Cir.2011) ("As Rule 68 operates, if an offer is made for a plaintiff's maximum recovery, his action may be rendered moot."); *Thorogood v. Sears, Roebuck & Co.,* 595 F.3d 750, 752 (7th Cir.2010) ("The offer exceeded the amount in controversy and so the case was moot."); *Samsung Elecs. Co. v. Rambus, Inc.,* 523 F.3d 1374, 1379 (Fed.Cir.2008) ("An offer for full relief moots a claim for attorney fees."); *Krim v. pcOrder.com, Inc.,* 402 F.3d 489, 502 (5th Cir.2005) ("[A] full settlement offer, even if refused, would dispose of [the plaintiff's] individual claims."); *Weiss v. Regal Collections,* 385 F.3d 337, 342 (3d Cir.2004) ("[U]nder traditional mootness principles, an offer for the entirety of a plaintiff's claim will generally moot the claim."); *Greisz v. Household Bank (Illinois), N.A.,* 176 F.3d 1012, 1015

However, the majority opinion's refusal to address the issue allowed the approach in Justice Kagan's dissent to influence lower court's treatment of Rule 68 offers. Justice Kagan was joined by three justices in a dissent that addressed whether an unaccepted Rule 68 offer mooted a claim.[186] Specifically, Justice Kagan warned: "So a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home."[187] The Ninth Circuit grasped onto this language and relied on Justice Kagan's dissent to hold, in light of *Genesis*, that "an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." [188]

Another issue with the Court's decision in *Genesis* is that it did not involve class certification under Rule 23. Nonetheless, the Court drew a clear distinction between the "opt-out" procedures for Rule 23 class certification versus the "opt-in" procedures for FLSA conditional certification. The Court stated that while "a putative class acquires an *independent* legal status once it is certified under Rule 23" in a FLSA collective action, "'conditional certification' does not produce a class with an independent legal status, or join additional parties to the action."[189] The Court recognized that FLSA collective actions are "fundamentally different" from Rule 23 class actions for purposes of Rule 68, indicating that the law applying Rule 68 to class actions remains unclear and that *Genesis* has limited value in a Rule 23 context.[190] The lower courts have already shown uncertainty with *Genesis'* application in Rule 23 contexts, and this will potentially result in the Supreme Court revisiting the issue.[191]

(7th Cir.1999) (holding that an offer of judgment that encompasses the relief claimed "eliminates a legal dispute upon which federal jurisdiction can be based," because "[y]ou cannot persist in suing after you've won"); *contra Pitts v. Terrible Herbst, Inc.,* 653 F.3d 1081, 1091–92 (9th Cir.2011) ("An unaccepted Rule 68 offer of judgment—for the full amount of the named plaintiff's individual claim and made before the named plaintiff files a motion for class certification—does not moot a class action."); *McCauley v. Trans Union, L.L.C.,* 402 F.3d 340, 342 (2d Cir.2005) ("In the absence of an obligation to pay [the plaintiff] the…claimed damages, the controversy between [the plaintiff] and [the defendant] is still alive.").

[186] *Genesis Healthcare,* 133 S.Ct. at 1533–34 (Kagan, J., dissenting) (emphasis added).

[187] *Id.*

[188] *Diaz v. First Am. Home Buyers Prot. Corp.,* 732 F.3d 948, 954-55 (9th Cir. 2013).

[189] *Genesis Healthcare,* 133 S.Ct. at 1530.

[190] *Id.*

[191] *Compare Schlaud v. Snyder,* 717 F.3d 451, 456 fn3 (6th Cir. 2013)(finding that its decision to retain jurisdiction to consider whether the district court properly denied the class certification despite the district court's dismissal for mootness was not at odds with *Genesis* since that case did not involve Rule 23 class certification), and *Chen v. Allstate Insurance Co.*, 2013 BL 204616 (N.D. Cal. July 31, 2013) (concluding that the effect of *Genesis Healthcare* in class cases was uncertain enough to warrant immediate appeal to the Ninth Circuit, certifying the question for review), *with Keim v. ADF Midatlantic LLC*, 12 – 80577 – CIV, 2013 WL 3717737 at *9 (S.D. Fla. July 15, 2013) (holding that an offer that comes before class certification and that the court concludes is for complete relief to a named class plaintiff moots an action).

D. Securities

The U.S. Supreme Court began 2013 by giving class action securities plaintiffs a measure of relief in their efforts to achieve class certification when relying on a fraud-on-the-market theory. Then, near the close of the year, the Court granted certiorari in order to reconsider the viability of a key fraud-on-the-market presumption that underlies class action securities litigation industry. In other words, although 2013 was a pivotal year for securities class actions, the final words on the developments that occurred in the past 12 months likely have not been written.

Amgen Inc. v. Connecticut Retirement Plans and Trust Funds

In February, the Supreme Court affirmed the Ninth Circuit's holding in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*,[192] holding that (1) plaintiffs need not establish materiality at the class certification stage even when relying on the fraud-on-the-market theory of reliance; and (2) defendants are not entitled to present evidence of an absence of materiality at the class certification stage to defeat certification.

The Court emphasized that the presence or absence of materiality must be determined on an objective basis and is an issue that must be common to all class members. The majority held: "As to materiality, therefore, the class is entirely cohesive: It will prevail or fall in unison. In no event will the individual circumstances of particular class members bear on the inquiry."[193]

Rule 23 requires plaintiffs to demonstrate numerosity, commonality, typicality, adequacy of representation, and that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Private securities fraud claims under Section 10(b) and Rule 10b-5 require reliance on a material misrepresentation or omission. Reliance is often established by invoking the fraud-on-the-market theory, which presumes that an efficient market will rely on material misrepresentations aired to the general public.

Amgen eases the burden on securities plaintiffs seeking certification. The Court did not consider the continuing viability of the fraud-on-the-market presumption because the issue was not before the Court. But Justice Alito wrote a separate concurrence to emphasize the point, noting that "more recent evidence suggests that the presumption may rest on a faulty economic premise" and that "in light of this development, reconsideration of the *Basic* presumption may be appropriate."[194]

[192] 133 S.Ct. 1184 (2013).
[193] *Id.* at 1191.
[194] *Id.* at 1204 (concurrence).

Basic reconsideration

Indeed, the *Basic, Inc. v. Levinson* presumption—which presumes reliance for a class of investors alleging financial losses because of misleading stock information--is due to be reconsidered early in 2014 when the U.S. Supreme Court hears oral arguments in *Halliburton Co. v. Erica P. John Fund, Inc.*[195] The Court granted certiorari in November to expressly to reconsider whether *Basic's* presumption of class-wide reliance derived from the fraud-on-market theory should be overruled or substantially modified. Oral argument is scheduled for March 5, 2014.

Halliburton contends that the *Basic* presumption is out of place in class actions brought by investors because they are free to prosecute the action as a class without having to link their individual losses to the allegedly misleading information. In addition to considering whether the Basic presumption should be struck down after a quarter century of defining the class action securities battleground, the Court will also consider whether in rebutting the presumption, defendants may introduce evidence to show that the misrepresentations did not distort the stock price.

Chadbourne & Park LLP v. Troice and Willis of Colorado Inc. v. Troice

In October, the Court heard oral arguments in three consolidated Fifth Circuit cases[196] addressing an alleged multi-billion dollar Ponzi scheme perpetrated by R. Allen Stanford through various corporate entities. The appeals center on the Securities Litigation Uniform Standards Act (SLUSA), and address a circuit split about the standard for determining when a misrepresentation is "material" enough to the purchase or sale of a covered security to satisfy the "in connection with" requirement, triggering SLUSA's preclusive effect.[197]

The Court is considering what it means for a misrepresentation to be "in connection with" a purchase or sale, and repeatedly asked whether the lawyers arguing on both sides agreed that Bernie Madoff committed Rule 10b-5 securities fraud when he represented that he was purchasing securities on behalf of investors when, in fact, he purchased nothing. According to the plaintiff's allegation, Stanford Investment Bank acted like Madoff by falsely representing to investors that it was buying an instrument (certificates of deposit) that was backed by securities which did not exist (like Madoff's securities purchases that never happened).

If the answer is yes, that Madoff did commit Rule 10b-5 securities fraud and that the alleged facts in the *Stanford* cases are analogous to the Madoff situation, then it follows that the SLUSA precludes the state actions, because SLUSA uses the same "in connection with" language that Section 10(b) does. Media commentators have suggested that the case will likely have far-reaching implications for third-party

[195] 134 S.Ct. 636 (2013).
[196] Case Nos. 12-79, 12-86, 12-88.
[197] *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012).

defendants (such as banks, law firms, and insurance companies) that are sued as "aiders and abettors" of another party's fraud.

Freeman Group et al. v. The Royal Bank of Scotland Group PLC

In September, the Second Circuit declined to revive an investor class action alleging Britain's Royal Bank of Scotland PLC (RBS) misled investors about its exposure to subprime mortgage-backed securities, and held that RBS satisfied its disclosure requirements.[198]

A three-judge panel held that offering documents for five RBS securities identified exposure to tens of billions of pounds worth of securitized assets, including U.S. securitizations of residential mortgages, and the risks and rewards associated with them. While those documents did not state the exact percentage of securities backed by subprime mortgages, the court noted that it has previously held that an offering document doesn't need to identify every type of asset a security contains, so long as its description of the security's contents is broad enough to cover the type of asset at issue.

In September 2012, the lower court found the bank's disclosures were adequate given the realities of the pre-financial crisis climate. In their appeal to the Second Circuit, the investors highlighted the claims in RBS's offering materials that RBS had strong credit quality, few problem loans and stable risks. But, the panel held that these were subjective evaluations and did not indicate that RBS held no subprime assets, but rather that RBS thought its subprime holdings were stable.

Supreme Court to decide ERISA pleading standards

A fiduciary of an employee stock ownership program is traditionally protected by a presumption that a decision to invest in the employer's stock is reasonable. Late in 2013, the U.S. Supreme Court granted certiorari in a case that turns on the level of plausibility class action stock-drop plaintiffs must show in attempting to overcome that presumption. Specifically, in *Fifth Third Bancorp v. Dudenhoeffer*,[199] the Court will decide if such plaintiffs must plausibly allege that fiduciaries abused their discretion by remaining invested in the employer's stock—a requirement under the Employee Retirement Income Security Act of 1974 (ERISA).

In June 2012, in *Dudenhoeffer v. Fifth Third Bancorp,*[200] the Sixth Circuit reaffirmed its position that the presumption of reasonableness does not apply at the motion to dismiss stage, a holding in direct contrast with sister circuits, including the Second Circuit,

[198] *Freeman Group et al. v. the Royal Bank of Scotland Group PLC et al.*, No. 12-3642 (2d Cir. Sept. 25, 2013).
[199] Case No. 12-751.
[200] 692 F.3d 410 (6th Cir. 2012).

which has held that the presumption provides robust protection at the 12(b)(6) stage absent an abuse of discretion.[201]

The *Dudenhoeffer* employees claim that Fifth Third breached ERISA duties by making substantial, imprudent investments in the bank's stock in 2007 on the brink of the residential mortgage collapse, despite warnings about the underlying toxicity of the subprime lending market. Whether the employees can maintain that suit now depends entirely on how the Supreme Court interprets the pleading requirements vis-à-vis the fiduciaries' supposed presumption of reasonableness.

E. Antitrust

Because the U.S. Supreme Court decided *Comcast v. Behrend*, 2013 certainly was a big year for predominance as a class action trend. As influential as *Comcast* was across the board, it held even more cache within the antitrust class action niche. Recall that *Comcast* came to the Court as an antitrust action and the Court's predominance analysis depended entirely upon how it viewed the damages model as it applied to a particular theory of antitrust liability. Thus, whatever Comcast said about analyzing predominance generally, its message rang noticeably louder for those courts analyzing antitrust class action claims.

The D.C. Court of Appeals, for instance, relied heavily on *Comcast* in August when it vacated class certification in an antitrust suit accusing freight railroads of engaging in a price-fixing conspiracy.[202] The court noted that the district court that had granted certification did not have the benefit of the *Comcast* decision, and thus may not have been on alert to evaluate the flaws in the plaintiffs' damages model. The fact that the damages model tended to produce false positives, combined with *Comcast*, was "sufficient to render the certification decision questionable."[203]

Operating under the new *Comcast* regime, the U.S. District Court of Massachusetts described its task as going "into the wild" when analyzing class certification issues in an antitrust case.[204] Noting that "*Comcast* simply requires the moving party to present a damages model that directly reflects and is linked to an accepted theory of liability under Rule 23(b)(3)," the court granted class certification, holding that the damages model propounded by the plaintiffs' expert lined up with the three distinct theories of antitrust liability. In other words, the case signaled that even in the antitrust realm, *Comcast* was not a death knell for class actions, but rather ushered in an additional element of precision at the certification stage.

Amex III reinforces that antitrust cases often need class certification to justify the expense – but no right to bring as class claims

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[201] *In re Citigroup ERISA Litigation*, 662 F.3d 128 (2d Cir. 2012).
[202] *In re Rail Freight Fuel Surcharge Antitrust Lit.*, MDL No. 1869, 725 F.3d 244 (D.C. 2013).
[203] *Id.* at 253.
[204] *In re Nexium (Esomeprazole) Antitrust Lit.*, ---F. Supp.2d---, 2013 WL 6019287 (D. Mass. 2013).

Antitrust actions are expensive to prosecute because considerable expert-level evidence is often necessary to prove antitrust liability and damages. Despite this, the Supreme Court held in *Amex III* that there is no right under the "effective vindication" doctrine to bring an antitrust lawsuit as a class action when a class waiver mandates individualized arbitration.[205] The Court emphasized that even if the individual arbitration would be prohibitively expensive from an economic efficiency standpoint, there is no stand-alone right to pursue antitrust claims. The Court noted that every claim brought under the antitrust laws is not guaranteed an affordable procedural path to adjudicate.

Food and agriculture antitrust class actions continued to "grow"

Activity in food and agriculture-related antitrust class actions continued to percolate throughout 2013. In *In re Southeastern Milk Antitrust Litigation*, final settlement was approved in May by the Eastern District of Tennessee[206] and included a payment of $158.6 million. It was the third of three settlements for a total of more than $300 million for the certified class of Southeastern dairy farmers represented by BakerHostetler attorneys.

In October, the U.S. Supreme Court denied certiorari of *DairyAmerica, Inc. v. Carlin*, the dairy case in which the Ninth Circuit concluded that dairy farmers could proceed with a class action alleging that a coalition of dairy buyers improperly affected prices by relaying artificially low rates to a pricing regulator. The Ninth Circuit had held that an antitrust exemption in the form of the Filed Rate Doctrine did not bar the dairy farmers from seeking damages related to the alleged misreporting of prices to the USDA.

Following the Supreme Court's denial, the case returned to the Eastern District of California where the court dismissed all claims except for claims based on negligent misrepresentation regarding the prices and volumes submitted to the USDA.[207]

F. International Class and Collective Litigation

Supreme Court further limits international jurisdictional reach of U.S. courts

U.S. federal courts are frequently viewed as an attractive forum to resolve certain international disputes, particularly class action securities and human rights cases. In recent years, however, the U.S. Supreme Court has taken steps to severely limit United States' jurisdiction in certain types of international cases. In 2004, the Supreme Court articulated a presumption against extraterritorial cases that would unreasonably interfere with the sovereign authority of other nations in *F. Hoffmann-La Roche v. Empagran*.[208] In 2010, the Supreme Court decided *Morrison v. Australia National*

[205] *Am. Exp. Co. v. Italian Colors Rest. (Amex III),* 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).
[206] *See* No. 2:08-MD-1000 (E.D. Tenn. May 17, 2013).
[207] *Carlin v. DairyAmerica, Inc.*, --F.Supp.2d--, 2013 WL 5670864 (E.D. Cal. Oct. 16, 2013).
[208] 542 U.S. 155 (2004).

Bank,[209] limiting federal jurisdiction over "foreign-cubed" cases--securities fraud claims by foreign investors who bought foreign stock issued on a foreign exchange. *Morrison* has become a landmark case that continues to generate ripples throughout the U.S. legal system.

This past year, the Supreme Court decided *Kiobel v. Royal Dutch Petroleum*,[210] holding that the presumption against extraterritorial jurisdiction of the U.S. Courts also applies to human rights cases filed under the Alien Torts Statute (ATS). Prior to *Kiobel*, the ATS, a one-sentence, purely jurisdictional statute, was a frequently-used vehicle for bringing international class actions against both governmental and corporate defendants based on alleged human rights abuses occurring throughout the world. Interestingly enough, the Supreme Court raised the issue of extraterritoriality *sua sponte*, during oral argument, requesting additional briefing on the subject at that time; the case was then extensively briefed by numerous nations, including the Netherlands and the United Kingdom.

The *Kiobel* decision continues a trend of limiting jurisdiction over extraterritorial disputes. In all, the Supreme Court has made it clear that a presumption against extraterritoriality applies absent clear Congressional authorization to the contrary.

A continuation of this trend will likely hasten the expansion of class actions and other collective disputes outside the United States. More than 30 jurisdictions worldwide now have a procedural or statutory mechanism allowing for some sort of collective redress. In Mexico, a class action law has been in effect since 2012, enabling collective redress in consumer, environmental, and competition cases. Despite its recent passage, Mexican citizens are already taking advantage of the law and are currently preparing to file a class suit against British Petroleum, the British oil giant responsible for the infamous oil spill in the Gulf of Mexico in 2010. Brazil's system also allows for class actions and may undergo further reform in this arena in the near future. The Netherlands, a well-known leader in adopting novel class dispute resolution mechanisms, has a law which allows class settlements (though not express legislation allowing for claims to be prosecuted as class actions). South Africa's Court of Appeals also recently validated class actions there, setting forth requisite criteria to establish a class. Other class action developments are currently happening in Canada, Australia, and India, among other jurisdictions.

Moreover, the International Centre for Settlement of Investment Disputes (ICSID) recently granted jurisdiction in a class action-like claim in *Abaclat and Others v. Argentine Republic,*[211] indicating that mass redress may well become more accessible in class action arbitrations going forward. At issue in that case was Argentina's $100 billion sovereign debt default, which occurred in 2001. In that proceeding, eight Italian banks formed an association and contracted with 60,000 Italian bondholders, negotiating and bringing legal action on their behalf. The ICSID Panel's decision

[209] 130 S.Ct. 2869 (2010).
[210] 133 S.Ct. 1659 (2013).
[211] ICSID Case No. ARB/07/5.

specifically addressed whether relevant persons consented to "mass" claim liability, validating the ability of the Italian bank association to proceed on behalf of individual bondholders. The ICSID Panel rejected Argentina's assertions that the tribunal does not allow mass claims and allowed the action to proceed under ICSID rules.

IV. Looking Forward to 2014

Much of 2014's significance in the class action realm is likely to be defined by how lower courts respond to the Supreme Court developments of 2013. Undoubtedly, the question of how much *Comcast* actually narrows the scope of viable class actions is sure to resonate throughout the federal and state court systems.

Indeed, certiorari petitions from the Sixth and Seventh Circuit opinions in *Whirlpool* and *Butler*, relying heavily on *Comcast*, have already been submitted to the Supreme Court and are awaiting the Court's decision on whether to grant review.

For the Supreme Court, 2013 will certainly be hard to top, but this year already promises decisions *Chadbourne & Parke LLP v. Troice* and *Halliburton*, another securities case scheduled for oral argument in March. And *Fifth Third v. Dudenhoeffer*, which turns on ERISA pleading standards, has been accepted for Supreme Court review with an April 2 argument date. Whether the Supreme Court grants review of the washing machine cases, *Whirlpool* and *Butler*, to further refine Rule 23's commonality and predominance requirements will be of immediate interest early this year.

The continued proliferation of privacy class action litigation is widely expected in 2014, with particular emphasis on the growing trend of Telephone Consumer Protection Act claims. Additionally, the data breach involving Target Corp. has already prompted numerous class action lawsuits and could result in one of the largest ever data breach class actions. And as 2014 proceeds, it is sure to feature more unexpected developments in class action jurisprudence that demand constant scrutiny.