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As part of our commitment to practitioners, KCC provides this resource on decisions related to class action litigation in state and federal court.

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## EMPLOYMENT

### *Settlement Class Certification*

*Bell v. Consumer Cellular, Inc.*, No. 15-cv-00941, 2016 WL 3063870 (D. Or. May 31, 2016) (Simon, J.) Plaintiff brought suit under the Fair Labor Standards Act (“FLSA”) and Oregon wage laws against their employer, and later sought preliminary approval of a class settlement and approval of a proposed notice procedure.

The Court denied the motion, reasoning that Plaintiffs’ motion did not address any of the elements of Rule 23, and also did not address why an opt-in class was appropriate instead of an opt-out class, which is more typically certified under Rule 23. The Court further reasoned that the prospect of an opt-in class raised concerns as to fairness and propriety, since the certification would bind absent members while providing for reversion of any unclaimed interest to Defendant. The Court also found that Plaintiffs’ motion failed to address why Rule 23 is an appropriate pathway for asserting FLSA class claims at all. Accordingly, certification was found inappropriate.

The Court also found that the proposed notice procedure was not fair, reasonable, or adequate, citing in support of its ruling (1) the requirement that any objections must be filed with both attorneys and the court; (2) that the notice does not notify recipients of certain rights to object to the various parts of the settlement, which the Court found should be expressly stated; (3) the requirement that class members obtain their own copies of the settlement agreement; (4) the response process and relevant time limits were found inadequate; (5) that the contemplated objection procedures were inadequately set at 25 days after mailing (the Court preferred two weeks after the filing of counsel’s fee motion); and (6) the incentive award amount was not stated in the notice, nor was the deadline for the fee motion, the proper fee limits, and the details of to be unstated, as well as the deadline for the fee motion filing, the proper fee limits, and the details of adjudication on the fees motion.

## FAIR DEBT COLLECTION PRACTICES ACT

*Baez v. LTD Financial Services, L.P.*, NNo. 15-cv-1043, 2016 WL 3189133 (M.D. Fla. Jun. 8, 2016) (Byron, J.) Plaintiff filed suit against a debt collector alleging violations of the Fair Debt Collection Practices Act (“FDCPA”) based on a faulty demand letter which failed to notify recipients of the revival effect of making partial payments on a debt after the statute of limitations had passed. Plaintiff sought certification of a class of recipients of the letter, and a subclass of those recipients who had partially paid.

The Court granted the motion in part for the class, and denied in part for the subclass. In support of its decision, the Court first considered standing, finding that Plaintiff had received the letter, and therefore had standing. In terms of numerosity, the Court found that 34,000 other people in Florida having received the letter sufficed. For commonality and typicality, the Court found the same claims involved the same legal theory and question under the same FDCPA provision.

Turning then to predominance, the Court found that the only issues in the case were common questions concerning a statutory provision with statutory damages, and were thus likely to predominate. For superiority, the Court found no evidence of parallel litigation, that the class was unlikely to file claims on its own, that there was no risk to the class to proceed, and that individual suits would be inefficient and burdensome. The Court also reviewed whether local rules were met requiring that Plaintiff suggest alternate methods of lowering the costs of notice, and found Plaintiff had provided this.

In terms of the subclass, the Court found that typicality was not met, as Plaintiff had not made partial payment on her own claim, and therefore she was inadequate to represent those who had.

## PRODUCT DEFECT

### *Windows*

*Romig v. Pella Corp.*, No. 14-cv-00433, 2016 WL 3125472 (D. S.C. Jun. 3, 2016) (Norton, J.)

Plaintiff filed a consumer class action against a window manufacturer, alleging that various product defects of its window design caused water leaks, and sought class certification.

The Court denied the motion, but began its analysis with a discussion of ascertainability, in which it found Defendant's database of warranty claimants sufficient as a starting point, and found further that the notice process would adequately supplement those records. The Court also found numerosity satisfied on the basis of 3,058 claims having been filed with the company related to the subject matter of the litigation.

The Court then turned to commonality, finding a dispute over whether the defect alleged was common to all class members (the proposed class period included 15 different window designs) unresolved due to the question of whether three different alleged defects in the windows were properly considered separate. There the Court found each alleged defect to have independent causes and differing rates of occurrence, and noted that the main claim was breach of warranty, which requires a showing of actual damage and breach after due notice was made—not merely the existence of a defect. This dynamic led the Court to conclude that it may need to analyze numerous individualized factual issues.

Turning next to predominance, the Court found again that analysis of the individualized issues identified in the commonality analysis were required to prove causation in asserting the claims, such that those issues would predominate over common issues.

The Court also found Defendant may have had affirmative defenses to assert in opposition to other Plaintiffs' claims. While Plaintiff cited cases where product defect classes had been certified despite the presence of such issues, the Court found that none of those cases involved the same causation-dependent claims. The Court then cited cases finding predominance was not satisfied with breach of warranty claims such as the one in this case.

The Court then found that a class action would not be the superior mechanism for resolving this litigation, noting that although a narrow issue might be susceptible to class treatment, it would be otherwise inefficient with respect to the other issues.

## SETTLEMENT ISSUES

*Shane Group Inc. v. Blue Cross Blue Shield of Michigan*, Nos. 15-1544/1551/1552, 2016 WL 3163073 (6th Cir. Jun. 7, 2016) (Hood, J.)

Plaintiffs sought relief in a consolidated class action alleging price fixing by an insurer. After the United States District Court for the Eastern District of Michigan sealed the related filings and approved the settlement without allowing objectors to examine the record, certain objectors appealed.

The Sixth Circuit vacated the district court's order approving the settlement and the order to seal, and remanded for further review. In support of its decision, the Court first found the district court's cursory justifications insufficient for sealing evidence, having instead been more akin to a Rule 26 protective order analysis. As a result, Court found that the district court failed to adequately discharge its obligation to keep the record open for public inspection.

The Court then turned to the question of whether sealed records can form a basis to approve a class settlement, finding that a public record must exist to illustrate the analysis for approving a settlement, and the district court thus erred in not providing an independent analysis for approving it.

The Court then considered whether the district court erred in applying a lodestar method of calculating the fee award, finding that the record showed that the attorney fee rates and those of staff members in question were inflated above market rates, and that the trial court had found this irrelevant without any explanation, despite the fact that the attorneys had not submitted any time records or activity logs.

The Court then asked whether the incentive awards constituted an unfair bounty to the named plaintiffs. The Court found no specific documentation on timesheets for the recipients to have been submitted, and therefore concluded that there was no basis for the district court to judge whether the award might have been inappropriate. Finally, the Court assessed whether the district court abused its discretion in failing to respond to the objectors' arguments that the process was unduly burdensome, and found that it had.

## TELEPHONE CONSUMER PROTECTION ACT

### *Mootness*

*Ung v. Universal Acceptance Corp.*, No. 15-cv-127, 2016 WL 3136858 (D. Minn. June 3, 2016) (Kyle, J.) Plaintiff brought a putative class action against a credit financing company, alleging violations of the Telephone Consumer Protection Act ("TCPA") on grounds that Defendant allegedly made unauthorized calls to cell phones via an auto-dialer. Defendant sought entry of judgment in its favor on grounds that it had tendered "complete" damages to Plaintiff, thereby rendering the action moot based upon the United States Supreme Court's recent decision in *Campbell-Ewald v. Gomez*, where the Supreme Court held that an offer of payment was found not to moot claims in TCPA cases, but left a window open for the question of whether providing tender does so.

The Court denied the motion, reasoning that (1) because Plaintiff had rejected the tender, the parties remained adverse, and therefore the claims were not moot; (2) under *Campbell-Ewald*, there was no meaningful distinction between a rejected tender of payment and an offer of payment; (3) under contract law, there was no basis for a rejected tender (as an unaccepted offer) to have any effect on the litigation; and (4) by offering terms of a stipulated injunction within its tender, Defendant actually required further action from the Court, which by definition could not result in a dismissal for mootness.

The Court also found that Plaintiff had brought the case as a putative class action, and that by these terms he represented an asserted class, to the point where he must be afforded reasonable opportunity to show certification is warranted even if his underlying claim is moot. The Court found that Plaintiff had already filed a pending motion seeking certification, and cited numerous cases which held that allowing defendants to pick off potential plaintiffs in this way would frustrate the purpose of the class action device.

### *Ascertainability*

*Dr. Robert L. Meinders D.C., Ltd. v. Emery Wilson Corp.*, No. 14-cv-596, 2016 WL 3402621 (S.D. Ill. June 21, 2016) (Yandle, J.) Plaintiff brought a class action against a consulting company alleging (1) violations of the TCPA; and (2) conversion, for sending unsolicited faxes. Plaintiff sought class certification.

The Court granted the motion, first considering numerosity. There, the Court found that a potential class size of thousands of fax recipients was sufficient. The Court then considered Defendant's argument that the class was not ascertainable on grounds that there is no way to learn which class members received unsolicited advertisements, and rejected it, relying upon the Seventh Circuit's decision in *Mullins v. Direct Digital*, which held that ascertainability depends on a precise class definition based on objective criteria, which was present here.

Turning then to commonality, the Court rejected Defendant's contention that there was no common fact nucleus, such as a standardized course of conduct involved, reasoning that Rule 23 required only that the claims arise under the same statute and involve common legal issues, which they did in the claims for statutory damages under the TCPA. Finally, Defendant argued that class members' consent or lack thereof was an individual issue defeating commonality and requiring individual inquiry. The Court found that such variations did not defeat the common claims based on the same legal theory and course of conduct.

In terms of typicality, while Defendant argued that Plaintiff's claim was vulnerable to unique defenses and objections based on the possibility of providing consent and forming a continuous business relationship (specifically due to Plaintiff attending Defendant's seminar in 1987), the Court found that any evidence of possible prior consent was destroyed, and thus essentially speculation.

Looking next at predominance, Defendant argued that individualized issues regarding consent would predominate. There, the Court found insufficient evidence had been submitted, and that Defendant's own lack of records was not enough to defeat certification. The Court found all class claims arose under the TCPA, and that the common questions under the TCPA were central to the claims, such that predominance was satisfied. For superiority, the Court found that a large class size and likely small individual recovery made the class action an efficient way to achieve justice on claims class members were not likely to bring on their own, and found superiority was met.

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