KCC Class Action Services

# KCC Class Action Digest
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## ASCERTAINABILITY

### *Via Claims Process*

*Ruzhinskaya v. Healthport Technologies, LLC*, No. 14-cv-2921, 2015 WL 9255562 (S.D.N.Y. Dec. 17, 2015) (Engelmayer, J.)
Plaintiff Ruzhinskaya, executrix of her decedent mother's estate, brought suit against Defendant HealthPort Technologies, LLC, a medical records processor procuring records from numerous healthcare providers. Plaintiff brought claims of unjust enrichment and violations of New York Public Health Law (PHL) §18 and New York General Business Law (GBL) §349, alleging a routine overcharging for costs incurred beyond the statutory limits. A previous motion to certify a class had been denied for overbroad criteria, and now Plaintiff sought to certify a narrow class of those who had requested records from the applicable healthcare provider.

The Court granted the motion to certify, first addressing the question of ascertainability. While Defendants contended that the class could not be ascertainable as some attorneys may have made payments independent of their clients, the Court rejected that argument, finding that it would be possible to arrange the claims process to require parties to certify in writing that the charges in question were properly distributed according to the professional fiduciary duty owed by the applicable ethical rules.

After rejecting again arguments that had been rejected previously the Court certified the class.

## CAFA NOTIFICATION

*In re Flonase Antitrust Litigation*, No. 08-cv-3301, 2015 WL 9273274 (E.D. Pa. Dec. 21, 2015) (Brody, J.)
After a class action settlement had been reached between Defendant and third party health care providers, Louisiana's Attorney General ("the AG") sued Defendant GlaxoSmithKline (GSK) in state court for recovery of unlawfully inflated amounts charged for the State's purchases of the drug Flonase. Defendant, on a premise of federal question jurisdiction, removed the suit to the United States District Court for the Eastern District of Pennsylvania, where the class action settlement had been reached. The class in the settlement specifically excluded all governmental entities and agencies except those purchasing the drug for a government employee health plan. Defendant moved to enforce the settlement and enjoin Plaintiff from pursuing claims against it; Plaintiff moved to dismiss for lack of jurisdiction on grounds that it had not waived its 11th Amendment right to sovereign immunity.

The Court granted Louisiana's motion to dismiss for lack of jurisdiction, and denied Defendant's motion, reasoning that under the sovereign immunity doctrine, while the AG did fall within the settlement class, it had not waived sovereign immunity by failing to opt out of the settlement. The Court declined to address the question of whether Rule 23(b)(3) can bind a state as an absent class member to settlement terms, instead finding that the purported class notice that had been served to the State was inadequate and unclear, in that it was merely a CAFA notice (a courtesy notice issued to government officials notifying them of the existence of a class action settlement involving the state's residents), which was not sufficient to notify the State that it had been named as a class member and that its claims were to be resolved in a settlement agreement. The Court found this lack of clarity did not meet the stringent test for a finding of waiver of sovereign immunity.

## CLASS CERTIFICATION

### *Ohio State Court*

*Safi v. Central Parking System of Ohio, Inc.*, Nos. C-150021, C-150029, 2015 WL 9258136 (Ohio Ct. App. Dec. 18, 2015) (Stautberg, J.)
Plaintiff brought suit in Ohio state court against Defendants Central Parking System of Ohio, Inc. and The Car Barn Garage, alleging statutory violations, breach of contract, conversion, trespass to chattels, and negligence in systematically towing away vehicles and charging excessive fees for vehicle release. Plaintiff sought to certify a class of all motor vehicle owners having cars towed away from Ohio tow zones who were charged above the maximum amounts to reclaim their vehicle. After the trial court granted class certification, Defendants appealed.

The Court found the trial court had improperly granted the motion for certification, and reversed the underlying order.

The Court analyzed Defendants' argument that the trial court misapplied Ohio's civil procedure Rule 23, first considering typicality and adequacy and finding them to not have been satisfied, as the facts of the case were sufficiently similar to those in *Carlin v. Genie of Fairview Park*, another car towing case in Ohio. In affirming the trial court's denial of certification in *Carlin*, the appellate court found that typicality could not be established when the class was likely to have many atypical claims or defenses to their illegal parking on private property, and that each vehicle owner's damages were therefore likely to be unique. Additionally, the court in *Carlin* found plaintiffs to be inadequate representatives, as the remedy they sought would not serve the class's best interests, as pursuing it could expose the class to liability for any
unpaid parking violations as a condition of membership.

Turning then to predominance and superiority, the Court found that Plaintiff had failed to satisfy these requirements as well, finding that individual issues in Plaintiff's case would predominate by virtue of requiring review of each alleged parking violation and whether each car was towed properly, with differing defenses and damages. The Court also found that no need existed for a class action as a dispute mechanism here, as (1) Defendants had already corrected their fee policy, (2) a class action would not be economically sensible, as the award to Plaintiff and his counsel would exceed the potential class award minus costs, and (3) Defendants' dispute resolution process was a more favorable forum for potential plaintiffs' claims.

## EMPLOYMENT

### *Restaurant Workers*

*Sanchez v. Roka Akor Chicago LLC*, No. 14-cv-4645, 2016 WL 74668 (N.D. Ill. Jan. 7, 2016) (Gottschall, J.)
Restaurant workers brought suit against their employer, alleging violations of the Fair Labor Standards Act ("FLSA") and the Illinois Minimum Wage Law ("IMWL") by virtue of Defendant allegedly taking tip credits against their minimum wages. Plaintiffs sought class and conditional certification, respectively.

The Court both granted class certification and allowed the FLSA claims to proceed as a collective action. First considering the claims governed by Rule 23, the Court found numerosity satisfied in light of the fact that a "tip-out spreadsheet" showed participation from more than 40 workers employed during the relevant period, and found that this would allow for a "good faith estimate" to conclude a class size of 40 or more.

In terms of commonality, the Court found all questions to be common ones, as the Defendant allegedly engaged in a common policy of operating the tip pool improperly. For typicality, the Court found that all claims

depended on the same questions. In terms of adequacy, the Court found Plaintiff had no conflict with the class, and found no reason why counsel might be inadequate.

Looking next at Rule 23(b)(3), the Court rejected Defendant's objection to predominance, finding that the involuntary nature of the operation of the tip pool by Defendant was sufficient to show that common claims would predominate over any individualized issues.

In terms of the FLSA claims, the Court found that discovery had been completed in this case, allowing the Court to forego the two-step process often employed, and cited the Seventh Circuit's decision in *Espenscheid v. DirectSat USA, LLC* as precedent to use the same standard in determining certification of a class action and collective action in the same suit. Accordingly, the Court found the Rule 23 analysis sufficient to certify the FLSA claim.

## FAIR DEBT COLLECTION PRACTICES ACT

### *Cy Pres Settlement*

*Graff v. United Collection Bureau, Inc.*, No. 12-cv-2402, 2016 WL 74092 (E.D.N.Y. Jan. 6, 2016) (Brown, J.) Debtor brought suit under the Fair Debt Collection Practices Act ("FDCPA") against a Defendant debt collector based on Defendant's leaving phone messages without self-identification. After a proposed nationwide class was certified of approximately 568,000 class members, the parties sought final certification and approval of a negotiated *cy pres* settlement paying $40,000 to a public interest organization, among other payments, fees and costs. One class member opposed the settlement.

The Court modified the proposed class and rejected the settlement. In support of its decision, the Court evaluated the settlement terms for procedural and substantive fairness in light of Rule 23(e). In terms of procedural fairness, the Court found that the substantial discovery conducted, mediation, and settlement negotiations conferred upon the settlement a presumption of fairness.

Turning to substantive fairness, the Court looked to the analytical framework of the Second Circuit's decision in *City of Detroit v. Grinnell Corp*. While the Court found most of the factors referenced therein to be satisfied by (1) the economic efficiency of the class action case, and (2) the fact that only 66 members opted out and one objected, the Court also took issue with issues created by the uncertainties faced by the class.

In particular, the Court looked at the settlement's likelihood to effectuate the goals of the FDCPA as a deterrent to future activity, and found it questionable to expect this effect here, when the Defendant was already subjected to a similar *cy pres* settlement in a previous class action, and yet was not deterred from engaging in the same misbehavior leading to this case.

The Court next looked at the scope of the release provisions. Finding the terms released liability under other FDCPA provisions and other statutes, the Court expressed doubt as to how such a release might co-exist alongside the damages cap in the FDCPA provision at issue in the case. To that end, the Court found the release faulty for extending its reach beyond the claim at issue, especially in its quality as a *cy pres* settlement where class members would receive nothing of value in exchange.

The Court then looked at the size of the class, and weighed an earlier motion by Plaintiff to expand the class beyond New York to a nationwide group, finding such an extension to be over-inclusive, in that the granting of *res judicata* in all 50 states would not bring a greater benefit to the class members, who might otherwise be willing to bring suit in other states to deter/punish the same behavior. The Court thus limited the class solely to New York.

Finally, the Court reviewed the propriety of the *cy pres* remedy, and found various case law precedents raise fundamental concerns with the plan to make this remedy the exclusive relief for the class. The Court also expressed its view that in circumstances where a defendant attempts to repeatedly settle class action litigation providing virtually no relief to class members, such arrangements will be viewed with disfavor. The Court found this arrangement fundamentally unfair, unreasonable, and inadequate.

## FALSE ADVERTISING

### *Computer Products*

*Karim v. Hewlett-Packard Co.*, No. 12-cv-5240, 2015 WL 9258100 (N.D. Cal. Dec. 18, 2015) (Hamilton, J.) Plaintiff brought suit alleging misrepresentations in his purchase of a computer with a customized "dual-band" wireless card, including a claim under California's express warranty law. Plaintiff moved to certify a class of individuals who customized and purchased particular computers shipped to a California address, with exclusions for purchasers who did not suffer the same injury, or who had received an alternate remedy.

The Court granted the motion to certify, noting that it regarded the motion as intended to correct the defects of a prior denied motion by narrowing the class to only California residents. Accordingly, the Court first considered new predominance arguments put forth by Defendant, rejecting Defendant's contention that Plaintiff needed to show individual exposure to the statement in question—which thus made it a common question.

The Court also reviewed a survey of putative class members which purported to show that the vast majority of class members had not read the statement in question. Although Defendant argued that it constituted "clear affirmative proof," the Court found the survey contained various defects: the survey took place 5 years after the purchases were made, and a significant percentage of respondents somehow remembered statements that were never even on Defendant's website, while 69% of respondents did not recall what statements they had actually seen. The Court also found website tracking data was unreliable, in that the data was not limited to purchasers, let alone to California visitors only.

The Court then reviewed an alternative argument against predominance, that consumers expected to receive "single-band" wireless cards because the term "dual-band" did not appear on the site; the Court found that "dual-band" adequately described the purported characteristic in the statement, in offering wireless cards capable of operating on two separate frequencies. The Court then rejected Defendant's further argument that customers may have had different interpretations of the challenged language, reiterating that the question was not what the purchasers had seen, but the Defendant seller's own behavior and obligations.

In terms of numerosity, the Court found 42,000 class members sufficient. With regard to commonality, the Court found the fact that each class member purchased a computer from Defendant's website during the applicable time period, and each class member having suffered a common injury in receiving a product incapable of the promised functionality. Typicality was satisfied for similar reasons.

While it was also contended that Plaintiff was an inadequate class representative due to an alleged failure to pursue a CLRA claim offering a broader range of damages, including punitive damages and attorneys' fees, the Court found no evidence that this decision was been made contrary to the class's interests.

## MORTGAGE

### *Unauthorized Fees*

*Stitt v. Citibank*, No. 12-cv-03892, 2015 WL 9177662 (N.D. Cal. Dec. 17, 2015) (Rogers, J.)
Plaintiffs brought suit against Defendants Citibank and CitiMortgage, Inc., alleging fraud under statutes in New York and Alabama, and unjust enrichment in sending letters requiring inspection fees in the event of a default on a mortgage, beyond what was in the pertinent agreements. Plaintiffs sought to certify classes as to each claim.

The Court denied the motion to certify, first finding numerosity satisfied on account of the more than 1 million class members at issue. The Court then however found that commonality was not satisfied on grounds that Plaintiffs had submitted only one potential common question, namely whether a particular program run by the Defendant generated unauthorized inspection fees and assessed them to borrower accounts without individual review of circumstances, as a uniform practice spanning more than a decade. The Court found that this common question was so simplistic as to ignore Plaintiff's claims for relief, and that Plaintiffs had not illustrated the efficacy of a determination of the impropriety of that program's automated system in the context of their claims. The Court found that under Plaintiff's theory, the case hangs on a contract dispute involving materially distinct contract terms, as to whether the inspection charges were warranted, which is an individual inquiry, not a common question.

## OIL AND GAS

### *Royalties*

*Gagnon v. Merit Energy Co., LLC*, No. 14-cv-832, 2015 WL 9489609 (D. Colo. Dec. 30, 2015) (Martinez, J.)
Owners of interests in gas wells brought suit against an energy company, alleging breach of lease agreements and failure to pay royalties for gas production based on the proper value of the gas. Plaintiffs sought certification of a class of all royalty owners of Oklahoma wells and in areas of Colorado and Washington, including a list of exclusions of certain types of class members.

The Court denied class certification. While the Court found numerosity sufficient on grounds of approximately 3,500 leases at issue, the Court expressed doubt as to whether the common questions proposed would lead to a common answer. Here the Court first considered whether class members' royalties were commonly based on the same gross value, and found it necessary to review the various lease terms, finding that the terms varied on the subject. While Plaintiffs argued the existence of an "Implied Covenant to Market" ("ICM") clause obligating payments according to gross values, the Court identified scenarios where this standard would not apply to every lease or gas well. The Court also found that no information about the Plaintiffs' well had been provided, nor about the class members' wells. The Court held that commonality was therefore not satisfied, and declined to certify on those grounds.

The Court also took issue with Plaintiffs' proposed exclusions from the class, concluding that the presence of those exclusions essentially asked the Court to define the class for the Plaintiffs by excluding members that violate commonality piecemeal.

The Court then examined at what point gas might be "marketable" even if the ICM applied, and found that these were questions of fact under Colorado and Oklahoma law, and would require individualized analysis of the condition of each well. The Court found this to be an additional ground to deny certification.

The Court also took issue with typicality, finding that there were several different potentially distinct groups of plaintiffs, and there was a lack of evidence to support the proposition that those potentially distinct groups might conclusively share a common injury with the class, and found in this an additional ground to decline to certify, based on lack of typicality.

In light of its findings on commonality and typicality, the Court declined to review Rule 23(b)(3).

## SETTLEMENT ISSUES

### *Objectors*

*Bezdek v. Vibram USA Inc.*, Nos. 15-1207, 15-1208, 15-1209, 2015 WL 9583769 (1st Cir. Dec. 31, 2015) (Woodlock, J.)
After the United States District Court for the District of Massachusetts approved a class action settlement and awarded attorneys' fees over the objections of Objectors in a suit brought by consumers against Defendant concerning allegedly false claims made in advertising and marketing of a footwear product, Objectors appealed.

The First Circuit affirmed, holding that the district court did not abuse its discretion in the settlement approval nor the fee award. In support of its decision, the Court noted that a class action settlement must be fair, reasonable and adequate, and addressed Objectors' arguments.

In rejecting the first argument, that the trial court did not consider that the actual payment to class members would be less than initially estimated in the class notice, and that this statement was therefore a misrepresentation, the Court found that while the district court did not deal with that issue explicitly, no guarantees had been made in the record concerning the total amount of recovery, and that the actual recovery was a fair compromise. While Objectors had also argued there was a better deal that could have been negotiated, the Court found the recovery amount was reasonable enough to be fair.

With respect to Objectors' second argument, that some (not all) of the objectors were required to file a proof of purchase, which they characterized as a punitive measure against objections, the Court found that as the underlying settlement was fair, any disparate requirements imposed on objectors did not provide an independent basis to invalidate it.

With respect to Objectors' third argument, that the injunctive relief included in the settlement was illusory in that it obligated Defendants not to do things they would be obligated not to do anyway, namely, to cease their false advertising campaign, the Court noted that the trial court considered and rejected this argument, and agreed that the injunction concerned the heart of the case and provided a meaningful concession providing future relief to consumers.

With respect to attorneys' fees, Objectors argued that the attorneys' fees were set out under a clear-sailing agreement, and alleged that self-dealing behavior had occurred to reach that fee amount. Here the Court found the district court had reviewed the fees using two methods of scrutiny (lodestar and percentage of the fund), and found the fees to be reasonably consistent with other district court's opinions. While Objectors also argued the fee was unreasonable for the amount of work performed, the Court found that the district court had reviewed statements listing the work performed and approved them on that basis, and therefore did not abuse its discretion in awarding the fees.

## TELEPHONE CONSUMER PROTECTION ACT

### *Faxes*

*Avio, Inc. v. Alfoccino, Inc.*, No. 10-cv-10221, 2015 WL 8731983 (E.D. Mich. Dec. 14, 2015) (Rosen, J.) Plaintiff brought suit against a restaurant company and its owners, alleging violations of the Telephone Consumer Protection Act ("TCPA") for allegedly sending thousands of fax advertisements through its agent marketer. The Court previously granted Defendant's motion for summary judgment alleging lack of Article III standing and that the TCPA does not provide for third party liability. The Sixth Circuit reversed, holding that Plaintiff has standing and the TCPA provides for direct liability against a defendant whose goods or services are advertised in the fax at issue. As a result, Plaintiff sought to certify a class of all persons sent faxes on key dates in 2006.

The Court granted class certification, first rejecting Defendant's argument that the class was not ascertainable because the fax lists used to identify members were based off of faxes sent a decade ago, and that discovery is needed to establish a prior relationship with Defendant, as well as consent to receive the faxes. Here the Court reasoned that despite having ruled along the lines Defendant requested in a previous matter, in light of the appellate decision, the Court observed that there was precedent to hold that the fax numbers themselves are objective data satisfying the requirement, and made it administratively feasible to determine class membership. The Court also found that a handful of class members having established contacts with Defendant was insufficient to render the class unascertainable, as the defense could be asserted later in litigation anyway.

Turning next to numerosity, the Court found that the existence of more than several hundred estimated recipients sufficed. The Court then found commonality satisfied on grounds that there were numerous common questions under the TCPA, including those concerning statutory damages, violations as to consent, willful actions, or treble damages. Turning to typicality, the Court found each class member received the same fax, and each claim is based on the same theory as Plaintiff's.

Looking to predominance, the Court rejected Defendant's argument that liability for each fax is an individual question, reasoning that the litigation centers around common issues in a single campaign of identical faxes under the same statute on an identical legal theory.



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