KCC Class Action Services

KCC Class Action Digest
March 2018

KCC Class Action Services partners with counsel to deliver high-quality, cost-effective notice and settlement administration services. Recognized as Best Claims Administrator by *The Recorder, The National Law Journal*, and *The New York Law Journal*, KCC has earned the trust and confidence of our clients with our track record as a highly responsive partner.

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

In addition to industry resources, KCC offers interactive CLE-accredited courses geared toward class action settlement administration and legal notification, some of which carry Professional Responsibility CLE credit. Go to *www.kccllc.com/class-action/insights/continuing-education* to learn more about our courses and schedule a CLE for your law firm or industry event.

INSIDE THIS ISSUE

This KCC Class Action Digest is provided by Patrick Ivie, Executive Vice President Class Action Services.

To request a proposal, or schedule a CLE, contact Patrick at 310.776.7385 or pivie@kccllc.com.

@KCC_ClassAction

ADEQUACY

Familial Relationship

Wexler v. AT&T Corp., No. 15-cv-0686, 2018 WL 748607 (E.D.N.Y. Feb. 7, 2018) (Block, J.)
Plaintiff consumer brought suit against a telephone service provider, alleging violation of the Telephone Consumer Protection Act ("TCPA"), with her husband serving as counsel. Counsel then withdrew after another law firm joined, and pledged to pursue his legal fees under a *quantum meruit* theory instead of from any class award. Defendant moved to strike the class allegations, claiming Plaintiff was not an adequate representative.

The Court granted the motion, reasoning in support of its decision that under Rule 23 adequacy, while there was no *per se* rule against relatives acting as counsel to class representatives, a familial relationship could create a conflict involving a class representative's interest in class counsel's legal fees. The Court found that in withdrawing and seeking a *quantum meruit* claim for legal fees, counsel had not mooted the issue, and while counsel was no longer in a position to negotiate with Defendant, any fees recovery would still be owed from the class award. As the Court found this left the class representative with a sufficient interest in the possible fee award, it found Plaintiff could not adequately represent the class's interests without conflict.

CIVIL RIGHTS

Title IX University Athletic Programs

Portz v. St. Cloud State University, No. 16-cv-1115, 2018 WL 1050405 (D. Minn. Feb. 26, 2018)(Tunheim, J.)
Plaintiffs, female student athletes, brought suit against their university and its governing body, alleging violations of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 in eliminating specific women's athletic programs. Among other motions, Defendants sought partial summary judgment on Plaintiffs' Section 1983 claim, Plaintiffs sought class certification.

The Court granted summary judgment, and granted class certification with redefinition. In terms of class certification, the Court first considered whether the class definition was appropriate, and found it overbroad, narrowing the class to exclude certain individuals accommodated by the athletic programming. The Court also found that including "future students" or students of other sports was acceptable.

The Court noted that numerosity was satisfied by virtue of there being a class defined as all 4,470 female students at the university, as well as future students who would be harmed. For commonality, the Court found that Plaintiffs' claims presented common questions of law and fact centering on athletic programming en masse, and that injunctive relief would resolve class-wide harm. For typicality, the Court found Plaintiffs' claims typical, and that Defendant's arguments here were best addressed in the context of adequacy. In that regard, the Court considered those arguments, which alleged conflicts, and found (1) that it was speculative and unsupported that Plaintiffs were antagonistic toward other sports teams; (2) that it was speculative and unwarranted to investigate hidden conflicts due to undisclosed fee arrangements; and (3) that there was no valid concern with Plaintiffs' providing vigorous representation, and thus found that Plaintiffs to be adequate representatives.

In terms of Rule 23(b)(2), the Court found that injunctive relief would adequately remedy the class. Accordingly, class certification was granted.

CONSUMER

Ticket Holders

McAllister v. St. Louis Rams, LLC, Nos. 16-cv-172, 16-cv-262, 16-cv-297, 16-cv-189, 2018 WL 1299553 (E.D. Mo. Mar. 13, 2018) (Limbaugh, J.)

Plaintiffs, season ticket holders of a National Football League franchise, brought suit against said franchise after the team announced it was moving to California and all season ticket rights would expire upon the move. Plaintiffs moved for certification of multiple classes and subclasses.

The Court granted the motion, reasoning in support of its decision that numerosity was satisfied on grounds of there being 46,000 licenses held by approximately 8,500 owners. The Court found commonality uncontested and ruled that numerous common questions and common evidence were at issue. The Court then found typicality, adequacy, predominance and superiority satisfied.

The Court then reviewed Defendant's specific arguments. For ascertainability, Defendant argued that relevant records only recorded sales and not true ownership, and did not distinguish between natural and legal persons. The Court found that the contract terms of the ticket sales applied to the buyer, and that notice was required to be given to the team for legal transfer to occur; as such, the class could be ascertained from correspondence with buyers or their known transferees.

In terms of Rule 23(b)(3) predominance, while Defendant argued that individual damages and issues would predominate, the Court found the issues in question to have been foreclosed by narrowing of the class. While Defendant argued that adequacy was in question based on the fact that class counsel included Plaintiff's brother, this was proof of a conflict of interest, and narrowing the class had resolved in any case.

EMPLOYEE RETIREMENT INCOME SECURITY ACT

Sacerdote v. New York University, No. 16-cv-6284, 2018 WL 840364 (S.D.N.Y. Feb. 13, 2018)(Forrest, J.) Plaintiffs, faculty members, brought suit against Defendant university, alleging violations of the Employee Retirement Income Security Act ("ERISA"), specifically alleging that breaches of fiduciary duty occurred in the maintenance of Defendant's retirement plan. Plaintiffs sought class certification.

The Court granted the motion, reasoning in support of its decision that numerosity was satisfied on grounds of there being 19,000 class members. In terms of commonality and typicality, the Court found that the ERISA claims shared by all class members centered on common actions by Defendant in relation to the plan as a whole, thus satisfying both elements. In terms of adequacy, the Court found no evidence of counsel being unqualified or having a conflict of interest, and that Plaintiff understood the role of representative and was willing to pursue litigation vigorously, thus satisfying adequacy.

The Court then considered whether Rule 23(b), specifically 23(b)(1)(A), was satisfied. Observing that this rule applied where the Defendant is obliged by law or necessity to treat the class alike in its actions, the Court found that separate suits would lead to inconsistent judgments, which supported certifying the class under this provision. The Court also looked at Rule 23(b)(1)(B), applicable where a lawsuit by one class member would resolve the claims of all class members, and found this was another suitable provision for certifying the class. While Defendant contended that these provisions did not apply to cases seeking monetary damages, the Court disagreed, reasoning that the instant case was about the effect upon plan assets involving 20,000 people, and that monetary relief was incidental to the claims.

Defendant also argued that individualized inquiries were needed as to whether class members knew about the alleged breaches of duty in question three years before the complaint was filed, which would have time-barred the case. The Court found this issue speculative and unsupported by any evidence beyond quarterly published reports that were not likely to be able to prove actual knowledge for any given member.

EMPLOYMENT

Meal/Rest Breaks

Westfall v. Ball Metal Beverage Container Corp., No. 16-cv-02632, 2018 WL 705534 (E.D. Cal. Feb. 5, 2018)
Plaintiffs, hourly workers, brought suit against Defendant employer, alleging state labor law violations based upon employees being individually paged back to work during meal and rest breaks. Plaintiffs sought certification.

The Court granted the motion in part as to certain claims, and denied the motion in part as to the other claims. Reasoning in support of its decision, the Court first denied Defendant's objection to certain evidence submitted with the motion as lacking various admissibility requirements, reasoning that that certification stage evidence need not meet trial admissibility requirements.

The Court then turned to Rule 23, finding numerosity satisfied on grounds of 140 class members, and typicality satisfied on grounds that Plaintiffs and class members shared the same claims and defenses to satisfy the element. Similarly, adequacy was satisfied on grounds that the Court found no conflict existed between Plaintiffs and the class. In terms of commonality and predominance, the Court found that the elements were met by virtue of the central issue in the case: Defendant's use of a communication system to page the entire class of employees, even though at any given time only some class members were subject to being called away from their meal break.

While superiority was satisfied, the Court did find a concern with manageability for certain claims, reasoning that Plaintiffs had not submitted examples of wage statements or evidence that former employees were subject to waiting time penalties. Certification was denied as to those claims.

Worker Adjustment and Retraining Notification Act

Grimes v. Evergreen Recreational Vehicles, LLC, No. 16-cv-472, 2018 WL 1257237 (N.D. Ind. Mar. 12, 2018) (DeGuilio, J.)
Plaintiff sued a former employer after two facilities were suddenly closed and employees laid off, alleging violation of the 60-day notice provisions of the Worker Adjustment and Retraining Notification ("WARN") Act. Plaintiff sought class certification.

The Court granted the request, reasoning in support of its decision that in terms of ascertainability, the questions at issue applied to certain employees, as well as equally to all employees at the locations at issue. The Court did however adjust the proposed class definition to define the facilities at issue. In terms of numerosity, the Court found 240 class members to be sufficient, and then found commonality satisfied on grounds that the WARN Act claims specifically invoked common employee claims.

In terms of typicality, while Defendants argued that Plaintiff had not shown that all terminations were issued via mass layoff, or that the layoffs at issue were at "a single site" under the statute, especially given Plaintiff's own work-from-home allowance, the Court found that Defendants had not submitted information on the company structure, but that they clearly had considered the layoffs as occurring at "a single site" and event. Observing that the statute covers the work-from-home location inclusively, the Court found typicality satisfied.

FAIR CREDIT REPORTING ACT

Disclosure of Background Check

Coles v. Stateserv Medical of Florida, LLC, No. 17-cv-829, 2018 WL 1181645 (M.D. Fla. Mar. 5, 2018) (Porcelli, J.)
Plaintiff brought suit against a business that had obtained background checks on the Plaintiff in violation of the disclosure provisions of the Fair Credit Reporting Act ("FCRA"). Plaintiff moved for certification.

The Court granted the motion, reasoning in support of its decision that numerosity was satisfied on grounds of there being 500 class members, and that commonality was satisfy by virtue of the fact that the FCRA violations in this case were based on policies against the whole class, so as to be common claims. In terms of typicality, the Court found this element uncontested, and that Plaintiff's claims shared a legal and factual basis with the class claims. In terms of predominance, the Court found it satisfied, reasoning that there was no need for individualized proof. In terms of superiority, the Court found the reasoning under predominance sufficient, and that judicial economy would be best served by a class procedure.

TELEPHONE CONSUMER PROTECTION ACT

Faxes

Levine Hat Co. v. Innate Intelligence, LLC, No. 16-cv-01132, 2018 WL 806762 (E.D. Mo. Feb. 9, 2018) (Limbaugh, J.)
Plaintiff brought suit for violation of the Telephone Consumer Protection Act, alleging that unsolicited faxes were sent without appropriate opt-out instructions. Plaintiff sought class certification.

The Court granted the request, reasoning in support of its decision that numerosity was satisfied on grounds of there being 10,000 class members, while commonality was satisfied on the basis of common questions involving the provisions of the TCPA, which were also found to predominate over any individualized issues. Typicality and adequacy were met on simple terms.

The Court then considered Defendant's opposition to the motion, which was that the TCPA should not be used in a class action context, and rejected it, noting that the Eighth Circuit has found class certification in TCPA cases uncontroversial.

Calls

Fisher v. MJ Christensen Jewelers, LLC, No. 15-cv-00358, 2018 WL 1175215 (D. Nev. Mar. 6, 2018) (Boulware, J.)
Plaintiff brought suit alleging violation of the TCPA and certain state deceptive trade statutes, alleging the use of customer lists acquired by third parties in calling with unsolicited advertisements. Plaintiff sought class certification and Defendant for summary judgment.

The Court granted class certification and denied the motion for summary judgment. In terms of the motion for class certification, the Court found that Plaintiff's proposed class definition, which was broader than the definition stated in the initial complaint to also encompass landline owners, was permissible and the change would not prejudice Defendant. In terms of ascertainability, the Court found the class was defined by objective criteria from Defendant's own records and procedures, and limited enough to be ascertainable.

In terms of numerosity, the Court found it satisfied by virtue of there being 8,225 class members. While commonality was satisfied easily, typicality faced a challenge by Defendant, which argued that Plaintiff, who used solely a cell phone, was atypical with the landline class members. The Court rejected this argument, and also found adequacy satisfied, over Defendant's contentions that: (1) the connection between class counsel and the proposed named plaintiff was improper; and (2) Plaintiff's criminal history defeated adequacy.
In terms of Rule 23(b), the Court first found that injunctive or declaratory relief under 23(b)(2) was inappropriate, as there was no evidence of a risk of future calls to the numbers at issue. In terms of 23(b)(3), the Court found predominance and superiority satisfied.

SETTLEMENT ISSUES

Opt Out Right

Low v. Trump University, LLC, No. 17-55635, 2018 WL 718916 (9th Cir. Feb. 6, 2018)(Nguyen, J.)
Plaintiffs, purchasers of real estate seminars, brought suits in multiple states against Defendants, alleging racketeering and violations of state unfair competition laws. After class certification was granted, and notice issued, and a settlement was reached and approved, a class member's request to opt out was denied by the United States District Court for the Southern District of California, the class member appealed.

The Ninth Circuit affirmed the district court's order. Reasoning in support of its decision, the Court first considered the objector's standing, and found that the objector's claim that the settlement approval denied her a settlement-stage opportunity for opt-out was a sufficient interest to confer standing.

The Court then considered the contention that no second, settlement-stage opt-out was provided to her, despite her belief that the notice promised this to her. The Court found that the notice did not provide a second, settlement-stage opt-out opportunity after the only listed opt-out deadline in the notice had passed.

The Court then considered the question of whether due process compelled a second opt-out opportunity to be provided to the objector after a class certification notice. In finding that due process did not require a second opportunity to opt out when one was already provided at the class certification stage, the Court relied upon *Officers for Justice v. Civil Service Commission of San Francisco*, a 1982 Ninth Circuit case involving the same legal argument and procedural circumstances, which rejected the same due process argument, noting that cases in which a second opt-out opportunity is presented are rare, and not similar to this one. As such, the Court found similarly that the class notice process was sufficient to satisfy due process, and that a second opportunity was not required. Accordingly, the Court found that the district court had not abused its discretion in refusing to allow a second stage for opt out in weighing the fairness of the settlement as a whole and approving it.

Notice

Morgan v. Public Storage, No. 14-cv-21559, 2018 WL 1324690 (S.D. Fla. Mar. 9, 2018)(Ungaro, J.)
After a class action settlement was reached in a case concerning self-storage insurance plans, the parties moved for final approval over objections, including objections to notice founded upon the Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide.

The Court granted the final approval of settlement, fees, and costs, and denied the objections. In terms of the Checklist-based objections, the Court rejected them, finding that the allegedly deficient notice program did in fact satisfy due process, and that Objector's attempt to rely on the Checklist to claim there were alleged flaws with the email notice was not well-taken in that it ignored current trends in court approval of email notice.

Lead Editor of KCC Class Action Digest: Robert DeWitte, Sr. Director Class Action Services