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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.

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](http://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.

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## CIVIL RIGHTS

*Gordon ex rel. S.G. v. Jordan School District*, No. 17-cv-00677, 2018 WL 4899098 (D. Utah Oct. 9, 2018) (Shelby, J.)

Students brought suit against a high school district, alleging violations of Title IX and the Equal Protection Clause, on grounds of allegedly not providing equal athletic opportunities for girls as compared to boys. Plaintiffs moved for certification of an athlete class and football-only subclass.

The Court granted the motion for one class only on the equal protection claim, but denied certification for the other class on the other claims. Reasoning in support of its decision, the Court first considered adequacy, acknowledging Defendants' contention that the class and subclass sought conflicting remedies, such that if one won the other would no longer be represented by Plaintiffs, but finding that Plaintiffs had asked the Court to remedy any such conflict as needed, and it did so by creating two subclasses.

For the athlete class, the Court denied certification on numerosity grounds, finding that the athlete class had not been shown to be sufficiently numerous due to lack of evidence on number of participants.

For the football class, the Court found Defendants' suggestion that the class might opt for other sports irrelevant, holding that the allegation of the class claim was sufficient to define its membership. The Court found the evidence of actual numbers lacking here, but noted that for injunctive classes, precedent existed to allow for an inference of numerosity to be made. The Court did so based on the 200 girls who currently play football in a non-school recreational league, and found numerosity could be inferred here.

With respect to commonality, the Court ruled that although the Title IX claims revolved around individualized inquiries and were not common questions, the equal protection claim was common to all class members.

The Court then looked to whether injunctive or declaratory relief was appropriate, finding these remedies applicable without differentiating between class members.

## CONSUMER

*Huskey v. Birch Telecom of Missouri, Inc.*, No. 17-cv-02415, 2018 WL 4679738 (E.D. Mo. Sep. 28, 2018) (Ross, J.)

Plaintiff brought suit against Defendants alleging violation of the Missouri Merchandising Practices Act by virtue of using a deceptive marketing scheme to entrap consumers in an unconscionable contract. Plaintiff sought class certification.

The Court denied the request. Although the Court first found that the class definition was sufficiently ascertainable under the claim that the contract was substantively unconscionable upon the class as a whole, even if individual inquiries might be needed to determine damages (as Defendant's records would be sufficient to determine class membership), and that numerosity was generally satisfied despite a vague alleged count of class members, the Court found fault with commonality and typicality. Specifically, the Court was concerned that Plaintiff could not recall how he had entered into the contract, and therefore he could not affirm that half of the common questions pertaining to the class applied to him. As such, the Court found Plaintiff was not typical of the class. The Court then did not address adequacy in-depth, other than to observe that an atypical representative cannot be adequate on that basis alone.

## EMPLOYMENT

*Bolding v. Banner Bank*, No. 17-cv-0601, 2018 WL 4908260 (W.D. Wash. Oct. 10, 2018) (Lasnik, J.)  
Mortgage loan officers brought claims for violation of the Fair Labor Standards Act (“FLSA”) and state law against their bank employer, alleging unpaid wage violations by virtue of time-clock policies. Plaintiffs sought certification of four subclasses in separate states.

After limiting the class definition, the Court granted the request. Reasoning in support of its decision, the Court first found numerosity satisfied by virtue of there being 200 members spread over three subclasses, but noted also that a class of potentially nine in the proposed Idaho subclass was too small to proceed on a class basis, and should be done via joinder instead.

In terms of commonality, the Court found that the key FLSA question involved Defendants’ sets of policies as applied to the whole class, despite a number of individualized issues involved. For the state law claims, the Court found similarly that the key common question could be answered by a class-wide determination. For typicality, the Court found no challenge, and that Plaintiffs’ claims were reasonably co-extensive with the class.

In terms of adequacy, the Court found no conflict and counsel qualified, but found that Plaintiffs were employed only by two entities in the case, and had not introduced evidence suggesting the other banks named shared the same policies. As such, Plaintiffs were not adequate representatives for those class members.

Turning to predominance, the Court found the common questions would predominate, and that any individualized questions likely pertained to proof of damages only. The Court also noted that any potential defenses here would not be sufficient to forestall certification.

## FAIR DEBT COLLECTION PRACTICES ACT

*Dickens ex rel. Estate of Dickens v. GC Services Ltd. Partnership*, No. 16-cv-803, 2018 WL 4732478 (M.D. Fla. Oct. 2, 2018) (Moody, J.)

Plaintiff, the widow of the original plaintiff in the litigation, continued his already pending suit for violation of the Fair Debt Collection Practices Act, on grounds of an alleged failure to provide the required written notice of debtor rights. After first failing to obtain class certification, Plaintiff moved again for certification.

The Court granted certification. Observing first that it had previously denied class certification on grounds of a lack of adequacy and superiority, the Court found the substitute Plaintiff did not affect the other elements, and thus looked only at these two elements here. For adequacy, while the Court previously found the original plaintiff adequate to represent the class only on statutory damages, and inadequate to represent class members who might have also suffered actual damages, the Court’s ruling on this issue had been appealed and remanded with directions to allow an opt-out mechanism for the class to manage that issue. In light of this, adequacy was now satisfied.

Turning to predominance and superiority, the Court found that it had already entered a summary judgment on liability, supporting satisfaction of predominance, and that the issue of damages could be individually determined without foreclosing certification. In terms of superiority, the Court noted it had denied certification on superiority previously due to the now-resolved issue with respect to actual damages. Accordingly, the Court now determined that the low likelihood of individual suits and lack of parallel litigation or manageability concerns weighed in favor of superiority.

## SETTLEMENTS

### *Northern District of California*

The United States District Court for the Northern District of California recently amended its Procedural Guidance for Class Action Settlements. The amendments include new requirements for information to be provided to the court at both preliminary approval and after final approval, including information concerning projected claim rates, comparable past settlements, settlement administrator selection, final claim rates, methods of notice and claim payment considered, methods to increase notice (including social media, hiring of a marketing specialist, and acquisition of class member information from third party sources). The amendments also require the parties to submit a Post-Distribution Accounting, which touches upon the notice process, the claims process, payments made pursuant to the settlement, as well as details concerning any non-monetary relief provided by the settlement.

The amended Procedural Guidance can be found at:  
<https://cand.uscourts.gov/ClassActionSettlementGuidance>.

## UTILITIES

*Marrero-Rolon v. Puerto Rico Electric Power Authority*, No. 15-cv-1167, 2018 WL 4740202 (D. P.R. Sep. 30, 2018) (Garcia-Gregory, J.)

Plaintiffs brought suit for violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) against a public utility company, alleging falsification of lab results to allow non-compliant fuel to be deemed compliant and therefore purchased at a higher price than justified, resulting in overcharges to customers. Plaintiffs sought class certification.

The Court granted the motion, reasoning in support of its decision that numerosity was satisfied on grounds of the utility company having more than a million customers potentially subjected to these allegations. In terms of commonality, the Court found that the RICO claims were all common questions susceptible to class-wide proof. For typicality, the Court found all claims arose from the same conduct and fell under the same theory, so as to make Plaintiffs’ claims typical of the class.

In terms of adequacy, the Court found no conflict of interest and counsel qualified. While Defendants argued that Plaintiffs lacked sufficient knowledge about the suit, the Court disagreed, finding the record showed otherwise, and that the knowledge threshold was not an extensive requirement.

Turning then to predominance, while Defendants contended that neither liability, injury, nor damages could be determined by common evidence, the Court disagreed, finding that (1) for liability, the focus should properly be on Defendants’ conduct upon the class as a whole; (2) for injury, while Defendants asserted that a shipment-by-shipment analysis was needed, the Court found that such an analysis would not lead to proving individual damages, but damages for any class members affected by each shipment, and that if properly identified, any uninjured class members could be excluded as appropriate; (3) injury questions were secondary to the liability issues, which were likely to predominate; and (4) damages could not be bifurcated for treatment at a later stage of proceedings.

The Court also reviewed Defendants’ statute of limitations defenses for purposes of predominance and found that they did not impede certification, in that a sufficient constellation of common issues bound the class together, despite potential limitations defenses against individual members. Furthermore, the Court found it

unlikely that Defendants would make hundreds of individualized defenses in this case, instead of relying on public documents and media coverage to cover them all. As such, the Court found predominance satisfied.

In terms of superiority, the Court found the likelihood of individual actions low due to economics, that no parallel litigation was pending, and that consolidation locally was favorable, while the manageability issues were not likely to be eliminated by proceeding with individual suits. As such, the Court found superiority satisfied.

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