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ASCERTAINABILITY

Securities

Brecher v. Republic of Argentina, No. 14-4385, 2015 WL 5438797 (2d Cir. Sept. 16, 2015) (Wesley, J.). Holders of defaulted bonds brought suit against Argentina for losses arising out of the country's default on roughly \$80 to \$100 billion of sovereign debt. After the United States District Court for the Southern District of New York modified the class definition by removing a requirement that class members have held bonds continuously during the class period and expanded the class to include all holders of beneficial interests in the relevant bond series without limitation as to time held, Defendant appealed.

The Second Circuit found that the district court's amended class definition violates the ascertainability requirement and vacated and remanded. The Court first noted the district court's lack of analysis of ascertainability, and then set forth its own ascertainability standard, stating that "the touchstone of ascertainability is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member,'" and further that "[a] class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case."

In support of its decision vacating the lower court's decision, the Court found that it rests upon an error of law as to ascertainability and the resulting class definition does not fall within the range of permissible interpretations of that legal requirement, reasoning that although it purported to be defined by objective criteria, the simple inclusion of objective criteria alone, without, for example, a limitation on time or context, does not satisfy ascertainability. The Court then applied its newly-stated rule to find that owning a beneficial interest in a bond series is insufficiently definite to allow ready identification of the class or the persons who will be bound by the judgment: unlike the gift cards to which Plaintiffs likened Argentine bonds to, which exist in physical form and have a unique serial number, an individual does not hold the physical bond itself and all Argentine bonds from the same series have the same trading number identifier making it impossible to trace purchases and sales of a particular beneficial interest once traded on the secondary market.

Ultimately, the Court ruled that the district court erred in attempting to address questions created by the issue of damages by introducing an ascertainability defect into a class definition not previously so afflicted, and concluded that the district court should apply the same process dictated by prior precedent in a related line of litigation for calculating the appropriate damages and called for a hearing to ensure damages do not enlarge Plaintiffs' rights.

CLASS CERTIFICATION

Damages Calculations

Pulaski & Middleman, LLC v. Google, Inc., No. 12-16752, 2015 WL 5515617 (9th Cir. Sept. 21, 2015) (Paez, J.).

Advertisers brought suit against an internet search engine seeking restitution for violations of California's Unfair Competition Law and Fair Advertising Law, specifically alleging that Defendant misled advertisers as to the types of websites on which Plaintiffs' advertisements would appear by not disclosing that they would appear on parked domains and error pages instead of just search feed and content network websites through its auction-based advertising program AdWords. After the United States District Court for the Northern District of California denied class certification due to a failure of predominance, and also denied leave to file for reconsideration, Plaintiff appealed the denial of class certification.

The Court reversed the denial of class certification and remanded for further proceedings, finding that the district court abused its discretion by concluding that it was not bound by the *Yokoyama* holding (that damages calculations alone cannot defeat certification), reasoning that (1) as per *Jimenez*, said holding remains the law even after the United States Supreme Court's *Comcast* decision; (2) the relevant statutes' treatment of restitution damages is based on what a purchaser would have paid at the time of purchase had the purchaser had all information; (3) California law requires only that some reasonable basis of computation be used; and (4) Plaintiff's proposed method of calculating damages was not arbitrary and was targeted to remedying the alleged harm and did not turn on individual circumstances.

DATA BREACH

Financial Institution Plaintiffs

In re: Target Corporation Customer Data Security Breach Litigation, MDL No. 14-2522, 2015 WL 5432115 (D. Minn. Sept. 15, 2015) (Magnuson, J.).

After Defendant, a large national retailer, suffered a data breach, financial institutions brought suit for negligence, negligence per se and violation of Minnesota's Plastic Security Card Act ("PCSA"), specifically alleging that computer hackers gained virtually unfettered access to Defendant's computer system, extracting the financial information of more than 40 million consumers during the holiday shopping season, causing Plaintiffs to replace cards for their customers, and reimburse fraud losses, among other remedial steps in response to the breach. After litigation brought by consumers settled, the financial institution plaintiffs sought certification of a class of all entities that issued payment cards compromised in the data breach.

The Court granted class certification, finding commonality and predominance satisfied, focusing on the question of common and predominating questions of law. In support of this decision, the Court reasoned that it may constitutionally apply Minnesota law despite conflicts of law between the Plaintiffs' home states and Minnesota law in light of Minnesota's contacts with the action, which are such that Defendant cannot claim surprise with application of Minnesota law. On the question of the particular causes of action being suitable for class treatment, the Court reasoned that (1) negligence claims could go forward because Plaintiffs had already suffered harm by justifiably reissuing nearly every card subject to an alert after the breach; and (2) PCSA claims can go forward because on one hand Defendant conceded that some of the elements are capable of class-wide proof and whether particular actions are reasonable in face of a data breach can be determined on a class-wide basis and need not be examined with respect to each individual financial institution.

On the question of damages, the Court found it readily apparent that each plaintiff suffered an injury in fact, and the Seventh Amendment is not implicated as contributory negligence or failure to mitigate damages by consumers do not relate to the underlying liability for the data breach. The Court also relied upon the opinion of an expert in the litigation that both types of damages from fraud loss and card reissuance are calculable on a class-wide basis, and even if they are not, class certification is still appropriate as a damages class can be decertified later.

The Court then found typicality satisfied on grounds that Plaintiffs' claims arise from the same event—the data breach—or practice or course of conduct giving rise to the claims of other class members, and are based on the same legal theory. The Court also noted that the class representatives share common interests with the members of the class and have established they will vigorously prosecute the interests of the class. The Court also found superiority satisfied.

ENVIRONMENTAL

Smith v. ConocoPhillips Pipe Line Co., No. 14-2191, 2015 WL 5332450 (8th Cir. Sept. 15, 2015) (Murphy, J.). Property owners brought suit against the owner of a pipeline system for injunctive relief, nuisance and negligence, specifically alleging that land owned by Defendant that was purchased in 2002 after being contaminated by a pipe leak in a nearby town in 1963 gives rise to their nuisance and negligence claims. After the United States District Court for the Eastern District of Missouri certified the class on the theory that possible pockets of contamination exist within an identified area, Defendant appealed.

The Eighth Circuit reversed the decision to certify on grounds that the fear of contamination spreading from the leak site to Plaintiffs' property was not a sufficient injury to support a claim for common law nuisance (in the absence of proof), reasoning that a particular chemical found a quarter mile from the contamination site was not one of the chemicals found at Defendant's contamination site, and the chemicals found at that contamination site had not been shown to be on land owned by the putative class members. The Court further noted that Plaintiffs had not shown contamination of their own well water.

FAIR DEBT COLLECTION PRACTICES ACT

Tripp v. Berman & Rabin P.A., No. 14-cv-02646, 2015 WL 5704075 (D. Kan. Sep. 29, 2015) (Crabtree, J.). Debtor brought suit against a collection company and its legal representation for violation of the Fair Debt Collection Practices Act ("FDCPA"), specifically alleging that Defendants sent debt collection form letters without sufficient/proper description of the debt(s) owed. Plaintiff sought certification of two classes: (1) Kansas recipients of all such form letters sent by the law firm within one year of the petition's filing; and (2) Kansas recipients of all such form letters sent from the law firm on behalf of the collection company within one year of the petition's filing.

The Court granted certification of both classes, reasoning in support of its decision that numerosity was satisfied by the fact that 13,000 recipients received the form letter. The Court then found commonality in the allegation that the form letter's language violated the FDCPA as to all class members, and that these violations warrant a determination of statutory damages for the class. The court found typicality in the class claims sharing the same legal or remedial theory, noting that all the letters are alleged to violate the FDCPA in the same way. The Court also found adequacy satisfied.

Turning then to Rule 23(b)(3) predominance, the Court found that the common question of whether Defendants violated the FDCPA as to the class predominated over any individualized issues. The Court then also found that the FDCPA's statutory damages cap would not render the class device impractical, finding that the purpose of class actions is to bring FDCPA cases to court, and that the claimants' liberty to opt out in order to pursue individual claims was sufficient to satisfy the superiority prong.

PRODUCT DEFECT

Pagliaroni v. Mastic Home Exteriors, Inc., No. 12-cv-10164, 2015 WL 5568624 (D. Mass. Sept. 22, 2015) (Casper, J.).

Deck purchasers and owners brought suit for breach of warranty, negligence, misrepresentation, unjust enrichment and violations of state law, specifically alleging that their decks were damaged by a defect in the decking material formula that used one product instead of another. Plaintiffs sought certification of a class of all owners of homes or buildings in Massachusetts, Minnesota, New York, and Oregon outfitted with the applicable decking.

The Court denied class certification on grounds of a failure of several Rule 23 elements, including commonality, typicality, and adequacy.

In support of its decision, the Court first found that the proposed class definition satisfied ascertainability because (1) *Carrera* and other cases involving the difficulty of ascertaining a class of purchasers of consumable products are inapposite where the purchase in question is a significant and last addition to a property; (2) even though individual consumers did not purchase the product directly from Defendant and there is no comprehensive purchase record available from distributors of the product, Plaintiffs need not be able to identify all class members at this stage; and (3) the proposed class is determinable by a single objective criterion of whether a person owns a property where the product is or was installed, as verifiable by laser-etching on the deck boards.

Turning then to the explicit requirements of Rule 23(a), the Court found numerosity satisfied on grounds that Defendants did not dispute it, and according to a particular database, over 16 million feet of the decking product were produced, which is enough to make 20,000 decks.

The Court then analyzed commonality, finding it unsatisfied. In support of its decision, the Court reasoned that even though Plaintiffs proffered five questions that could be answered yes or no for the entire class, depending upon the cause of action in question, further inquiry was necessary to determine whether those answers would drive the resolution of any of Plaintiffs' causes of action. In the case of the express warranty theories, determining which if any representations became a basis of the bargain between Defendant and a class member would be driven by individualized proof, especially given that Defendant used a multi-tiered distribution system and did not sell directly to homeowners. In light of those facts, where contractors or consumers are part of the basis of the bargain, whether the goods in fact conformed to representations is a question of individualized proof.

In the case of the implied warranty theory claims, some consumers received decks alleged to be unfit for ordinary use, whereas others had no performance problems with their decks. In the case of the unjust enrichment claims, individual class members would need to demonstrate that due to the condition of their decks and notwithstanding any warranty payments offered by Defendants, the class member paid Defendants a benefit that would be unjust for Defendants to retain.

In the case of the consumer protection claims, the Court reasoned that questions of injury and causation are not amenable to common resolution where the record raises individualized questions of proof as to whether a deck owner actually suffered any injury, or whether that injury has already been remedied by the warranty program and whether a particular representation or action by Defendants caused that owner's damage.

The Court also found typicality unsatisfied, reasoning that although the named plaintiffs allege that they suffered deck failure, most class members have not reported any problems with their decks, and thus had no legally cognizable injury. The Court further reasoned that unless the alleged defect has manifested itself in the product used by the claimant, even if class members who owned decks in perfect condition were considered to be injured due to a latent defect, that group would not share the same kind of injury or theory of damages as the named plaintiffs. Here the Court distinguished Plaintiffs' citation to *Daffin* on grounds that Plaintiffs do not rely on a diminution of value theory of damages, instead presenting a replacement cost theory requiring individual inspection of each deck—and regardless, Plaintiffs have not met their burden of showing that a latent defect is actionable under the various state laws asserted. Further difficulty with typicality was found in the fact that four named plaintiffs did not accept the warranty payments offered to them or were deemed ineligible for warranty compensation, whereas most class members accepted warranty payments and have received redress. The Court also noted that the class definition was too broad in that it included purchasers and transferee owners, which presented varying theories of liability depending on the date of the purchase and warranty coverage eligibility.

For similar reasons, the Court found adequacy unsatisfied, citing conflicts between the class representatives and class members as a whole.

SETTLEMENT ISSUES

Notice Content

Nieberding v. Barrette Outdoor Living, Inc., No. 12-cv-2353 (D. Kan. Sep. 11 2015) (Crabtree, J.). Purchaser of guardrail kit for a residential deck brought suit against manufacturer and retailer for breach of warranty, violations of the Kansas Consumer Protection Act and unjust enrichment, specifically alleging that the guardrail brackets were defective and not sufficiently robust for reasonably anticipated use, as demonstrated by the fact that said bracket broke when Plaintiff's son fell into it, causing him to fall two stories and suffer injuries. After a class settlement had been reached and preliminarily approved, Plaintiff sought final approval and fees and expenses.

After lowering the fee award from that requested and reducing the class representative incentive award, the Court granted final approval. After first finding that it retained subject matter jurisdiction over the litigation because the alleged damages in the original complaint exceeded \$5,000,000 as required by the Class Action Fairness Act, despite the gross amount of the settlement being only \$350,000, the Court analyzed the settlement and found it to be fair and reasonable and adequate, pointing out that the value of an immediate recovery of \$113.16 for a \$2.50 bracket was a reasonable amount that outweighed the possibility of future relief after additional litigation, and also noted that personal injury claims were not released under the settlement.

The Court addressed one issue with respect to notice, finding it reasonable and satisfactory of due process despite a typographical error which provided the wrong street address of the federal courthouse in the long-form notice, finding that it was not a material defect, reasoning that the inclusion of the time and place for the final approval hearing was not a requirement of Rule 23(c)(2)(B), and no objections were received from any class members which would allow for appearance at the hearing and the error itself was minimal in that the correct address was just three blocks away from that included in the notice.

Turning then to the fee and incentive award, the Court reduced the amount of the requested fees from \$125,000 to \$118,000, noting that *Shutts* and certain Kansas state law factors supported the reduction, and reasoning that although counsel's work and risk taken were appropriate, a fee award that exceeds the benefits received by the claimants asks too much.

In terms of the incentive award, the Court reduced it from the requested \$7,000 to \$3,500, reasoning that Plaintiff's actions in helping to prosecute the class claims, including keeping his deck in a defective condition helped obtain a favorable result and thus justified an incentive award, but given that Plaintiff did not keep track of his time on the matter or provide an estimate of the actual hours consumed by the case, 1% of the settlement fund (or \$3,500 total) is more in line with other cases applying similar law, as doing so would provide greater recovery to the class.

TAXATION

Municipalities

Village of Bedford Park v. Expedia, Inc., No. 13-cv-5633, 2015 WL 5693596 (N.D. Ill. Sep. 28, 2015) (Kennelly, J.).

Fourteen Illinois municipalities brought suit against a number of online travel companies for unpaid tax revenue under municipal hotel tax ordinances. After initially being denied a motion to certify a class of 276 municipalities, Plaintiffs subsequently sought certification of a class of 154 municipalities under Rule 23(b)(3).

The Court again denied class certification, focusing its analysis on predominance and superiority. With respect to predominance, the Court found that common questions of law and fact did not predominate over individualized questions, reasoning that Plaintiffs had failed to show that the class members could be grouped according to “materially identical legal standards” among their individual ordinances. Despite a cohesive subclass organization, the ability of each municipality to amend their individual ordinances, as well as the wide variance in statutory definitions and interpretation, would lead to a myriad of individualized issues and administrative confusion. The Court found superiority unsatisfied for the same reasons.

Although the above was sufficient for the Court to deny class certification, arguments of commonality and ascertainability of the class were explored separately. Defendants argued that the Court should find Plaintiffs’ claim of commonality lacking where the alleged basis was the existence of a company policy against paying taxes; the Court nonetheless upheld a previous ruling holding the commonality requirement sufficiently met. For ascertainability, the Defendants argued that Plaintiffs had defined the class members in terms of the merits of the case, which should lead to denial of the class; the Court held that if the class had been otherwise certifiable, any vagueness of the class definition would be refined, not denied outright.

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