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## CONSUMER

### *Call Recording*

*Burrow v. Sybaris Clubs Int'l, Inc.*, No. 13-cv-2342, 2015 WL 1887930 (N.D. Ill. Apr. 24, 2015) (Leinenweber, J.).

An employee brought suit against Defendant for alleged violations of the Federal Wiretap Act and related Indiana and Wisconsin state laws, on grounds that Defendant allegedly purchased and used a telephone system which allowed it to record phone calls made to and from phones at the various reservation desks without consent of the party on the other end of the line. Plaintiff sought certification of a proposed class of all persons who made a telephone call into or out of the reservation telephone lines.

Granting class certification, the Court first addressed Rule 23(b)(3) predominance, as that served as the parties' main source of disagreement, reasoning that there is no dispute Defendant intended to and did in fact record phone calls. In so finding, the Court rejected Defendant's argument that consent to recording, particularly for its own employees, should be construed broadly, observing that the Seventh Circuit had expressly rejected the precedent Defendant sought to rely on from the Second Circuit. The Court further noted that Defendant did not obtain individual consent from some employees but not others, but rather argued that it had implied consent for all employees—which in the Court's estimation was an issue to be dealt with on a common basis rather than an individualized one, and thus presented no problem for purposes of class certification. The Court further observed that Defendant neither sought nor obtained express consent, pointing out that the affidavits and testimony Defendant relied on in an attempt to establish implied consent would be the same evidence it would introduce if class members proceeded individually, which would be especially true for non-employee class members. The Court further noted that Defendant would rely on the same testimony from employees who allegedly did consent to recording in order to impeach employees' claims, and the Court cannot deny class certification to the other two-thirds of potential employee class members based on the eighteen affidavits that Sybaris submits in support of its consent defense.

The Court also found superiority satisfied, reasoning that the statute in question involves the application of similar wiretap statutes to a single system of recording calls, making any potential need for class members to have individualized control minimal. The Court also pointed out that the claims are nearly identical, and concentrating the case into a single forum is more desirable. The Court also found any difficulties in managing a class this size not to be insurmountable in light of the simple nature and limited scope of the claims, and furthermore, Plaintiff sought only statutory damages, thus removing any concern over measuring damages on a class-wide basis.

In terms of Rule 23(a), the Court first considered whether the class was ascertainable, finding that it was on grounds that the class definition posed no problem in terms of identifying class members, as it was narrowly defined to include only calls recorded at specific locations during a short period of time. Furthermore, the Defendant's systems included unique identification numbers that could help identify customers who made reservations during the class period, as well as allow for a determination of whether an individual called to make that reservation. The Court further acknowledged that although the Defendant's telephone system was only able to record ten calls at a time, and Defendant had 46 reservation lines and no longer possessed certain data that would demonstrate which calls were actually recorded, objective data exists to identify at least some class members, and any subsequent disqualification by Defendant of particular class members would be based on objective data.

In terms of numerosity, the Court relied in part on one of Defendant's IT employees confirming that on a single day early in the class period, Defendant's telephone system recorded over 300 calls, and the Court did not need to rule on the consent defense at this juncture.

Turning then to Rule 23(b)(3), the Court found that common questions predominated. The Court further noted that the case involves a single system of recording calls and a potential consent defense that is essentially identical under the federal and state laws at issue. Similarly, only one party needs to consent to recording in order to defeat either parties' claims, and while Defendant had presented no evidence that any customer consented, its defense that employees impliedly consented was common to the class rather than an individual issue.

## CONSUMER FINANCE

### *Mortgages*

*Parker, Jr. v. Bank of America*, No. 11-cv-0520, 2015 WL 1737278 (D.D.C. Apr. 16, 2015) (Jackson, J). Mortgagor brought suit against Bank of America, alleging breach of and tortious interference with their mortgage modification agreement by virtue of Defendant's allegedly not implementing the terms of his mortgage modification agreement for nearly two years, which allegedly resulted in foreclosure notices, demands for balloon payments and late fees, and statements threatening to report his alleged delinquency to credit agencies. Plaintiff sought certification of a class of borrowers whose valid, binding mortgage modifications were not implemented in a timely fashion.

The Court denied class certification, reasoning that Plaintiff failed to satisfy Rule 23(a)'s commonality requirement. The Court took particular issue with Plaintiff's evidence, finding that the documents put forth to purportedly show that Defendant relied on a limited number of standard form contracts and terms for modification agreements actually vary widely between templates and with varying conditions precedent to the formation of a valid agreement. The Court also found that Defendant's designation that a modification was completed does not signify a valid binding contract because the definition of "completed" in this context was internally ambiguous and also repealed a week after it was issued. The Court laid out the evidence of this ambiguity, and concluded that Plaintiff had not provided a basis for concluding that Defendant intended the coding of a borrower's file as "completed" to serve as a countersignature for post loan modification review, the point at which Defendant considers the contracts as binding. The Court also noted a dearth of evidence sufficient to prove Defendant conducts any post loan modification review that results in systematic breach of valid modification agreements, as no documents presented referenced any critical review phase after binding mortgage modification contracts are implemented. In short, Plaintiff had not established that the closing process is uniform and systematic.

## EMPLOYMENT

### *Wages*

*Garcia v. E.J. Amusements of New Hampshire, Inc.*, No. 13-cv-12536, 2015 WL 1623837 (D. Mass. Apr. 13, 2015) (Saris, J.).

Employee brought proposed class action lawsuit against Fiesta Shows, a company that provides rides and attractions to fairs and carnivals throughout New England, for alleged violations of Massachusetts and New Hampshire state minimum wage and overtime laws. Plaintiff sought to certify a class of current and former employees; Defendant cross-moved to deny class certification.

In the course of granting class certification, the Court first rejected Plaintiff's request for a more lenient standard for class certification by way of Massachusetts law, reasoning that Plaintiff had not explained how the matter would proceed any differently from a Rule 23 analysis, as the cases Plaintiff cited do not shed any light on what a more lenient standard would look like, and there is no reason to think Massachusetts law would

require class certification for wage and hour claims to be treated similarly to certification under Chapter 93A. Likewise, the Court rejected Defendant's request to displace Rule 23 based on an alleged conflict with New Hampshire law §275:53(l), reasoning that said law is actually silent on certification of wage claims, the same argument has been rejected at least twice by other courts, and class relief is appropriate in the absence of direct intent to deny certification by Congress. The Court further noted that even if there is a conflict, Rule 23 does not abridge, enlarge or modify any substantive right by allowing class certification, when such would not be allowed under New Hampshire law.

Turning to the Rule 23 requirements, the Court first found numerosity satisfied on grounds that Plaintiff identified over 100 workers who did not release their claims against Defendant, and allegedly suffered wage and overtime violations, making joinder impracticable. In terms of commonality, the Court found it satisfied because the parties can use common proof to establish the number of hours worked by showing the "gang time" payroll exceeded 40, 50 or 60 hours, and also because Plaintiff can use representative testimony from Defendant's employees as common proof of hours worked, as Defendant failed to keep records of specific number of hours worked in violation of state law, and thus cannot benefit from that. Moreover, the defenses Defendant raised (such as its asserted use of a pre-payment plan and lump sum payments to compensate for unpaid overtime or minimum wages) would if valid apply on a class basis.

In terms of typicality, the Court found it satisfied because the contours of Plaintiff's claims are typical of class members having to rely on the "gang time" payroll system and having to defend against pre-payment and end-of-season payments (having received weekly flat payments). Last, the Court found adequacy satisfied by virtue of a lack of conflicts of interest between Plaintiff and his proposed class, noting also that any interest class members may have in maintaining an unlawful policy (if for example the current allegedly illegal policy was preferable to some class members) is not reason to deny class certification.

Turning then to Rule 23(b)(3), the Court found predominance satisfied on grounds that Plaintiff identified a number of factual and legal issues that can be addressed on a class-wide basis. The Court further noted that determining each class member's weekly salary will not likely be an individualized, arduous task, noting there is no dispute regarding how much each employee was paid on a weekly basis and there is a presumptive number of hours worked based on the "gang time" payroll. The Court further noted that calculating each class member's damages will likely be mechanical, based on common evidence about the typical number of hours worked from the "gang time" payroll and representative testimony. The Court also acknowledged that it could in the future decertify the case after liability issues have been resolved, or appoint a magistrate judge or special master to preside over individual damage proceedings. For reasons similar to those prompting the court to find the other elements satisfied, the Court also found superiority satisfied.

## LENDING

### *Student Loans*

*Toler v. Global College of Natural Medicine, Inc.*, No. 13-cv-10433, 2015 WL 1611274 (E.D. Mich. Apr. 10, 2015) (Berg, J.).

Former student brought suit against Global College of Natural Medicine ("GCNM") and other defendants on grounds that her pre-paid tuition was not refunded, alleging that Defendants collected millions of dollars in advance tuition from students despite being aware of GCNM's precarious financial and regulatory situation and did not refund students' tuition payment after closing down. After Plaintiff was granted entry of default, Plaintiff sought class certification.

The Court granted class certification, first noting as a threshold matter that the entry of default does not alter the class certification analysis. In support of its class certification decision, the Court found numerosity satisfied on grounds that Defendant had approximately 1,359 students enrolled when it closed, and far smaller classes have been certified. The Court also found commonality satisfied because the essential claim of each class member—that Defendant did not provide the paid-for education program, and did not refund tuition upon shutting down—is fundamentally the same. The Court likewise found typicality and adequacy satisfied in short order.

Turning to 23(b)(3), the Court found predominance satisfied on grounds that there was no indication of any question of law or fact affecting only individual members and each class member was affected by the same course of standardized conduct, as mentioned in the commonality analysis. The Court also found superiority satisfied, noting that Defendants have defaulted and it is unlikely that any potential class member will prefer to pursue his or her claim individually in any other manner or forum.

## SETTLEMENT ISSUES

### *Cy Pres*

*Keepseagle v. Vilsack*, No. 99-cv-3119, 2015 WL 1969814 (D.D.C. May 4, 2015) (Sullivan, J.).

After the parties to a class action reached a settlement agreement creating a compensation fund of \$680,000,000 for the benefit of the class, which included precise terms directing how that fund was to be distributed after a non-Judicial Claims Process. Any funds leftover from this fund were to be directed to a set of *cy pres* beneficiaries, each to receive equal share of the fund for the benefit of Native American farmers and ranchers. Eligibility as a recipient was contingent upon class counsel's recommendation, approval by the Court and could only be conferred upon non-profit organizations that provided agricultural businesses assistance or advocacy services to Native American farmers between 1981 to November, 2010, and excluded law firms and education institutions. After finding the settlement agreement to be fair and reasonable, the Court approved it in late 2010, with no appeals filed. After the closure of a non-judicial claims process in 2013, \$380,000,000 still remained, at which point class counsel asserted that the contemplated *cy pres* distributions were impractical. Class counsel thereafter filed an unopposed motion to modify the settlement agreement.

As an initial matter, the Court found that Rule 23(e) did not apply, but that the settlement agreement together with the Court's supervisory authority over the matter permitted it to direct class counsel to provide notice to the class and allow class members to submit written comments or to speak during the hearing on class counsel's motion for modification. Turning then to class counsel's proposed modification to the settlement agreement, the Court found that the proposed modification would not materially alter the legal rights of any class member, reasoning that all class members have settled their legal claims and retain no property interest in the unclaimed funds; and the lack of additional payments to class members is not a harm caused by the proposed modification but rather stems from the language of the settlement agreement.

Relying upon Rule 23(d)(1)(B), the Court found the authority to order notice to the class of a hearing at which they may speak, noting that the rule permits the Court to protect absent class members and fairly conduct the action. Moreover, the settlement agreement provides that it may be modified with the written agreement of the parties and with the approval of the district court upon such notice to the class, if any, as the Court may require. The Court reasoned that to fairly conduct the action at this stage, class members must be informed fully about the pending proceedings given the extensive interest in them, and observed that taking comments will be useful for the Court's consideration on the matter.

In terms of notice to the class, the Court ruled that class counsel shall provide notice of the status of the case and the class's right to provide comment, but found inclusion of a copy of the motion for modification and copies of two declarations submitted regarding the investment of the leftover settlement funds unnecessary in light of the purpose of the notice, that being to provide a summary of relevant information. The Court directed a more limited version be distributed, found publication notice on one day rather than multiple days appropriate, and directed notice to be sent by mail, posted on the settlement website and emailed to tribal offices. The Court declined for the time being to address the issue of the cost of providing notice, noting that the parties disagreed as to what was permissible, and that the Court could rule later depending on case developments.

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