KCC Class Action Services

KCC Class Action Digest
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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.

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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.

CONSUMER

Mortgage Loan Servicing

Jackson v. Bank of America, N.A., No. 16-cv-787, 2019 WL 7288508 (W.D.N.Y. Dec. 30, 2019) (Geraci, J.) Plaintiffs brought suit against mortgage loan servicer, alleging improper mortgage processing for the purpose of charging excessive fees, in violation of the Real Estate Settlement Procedures Act ("RESPA") and New York laws. Plaintiffs moved for certification and Defendants moved to strike expert testimony.

The Court denied both motions. Reasoning in support of its decision, the Court first analyzed the Daubert motion, finding that the majority of the expert's testimony related to the dismissed claims, mooting the motion as to them. For the remaining claim, the Court found that the expert's testimony showed the Plaintiff's claim lacked commonality and predominance and therefore decided not to strike this from the record.

In terms of class certification, the Court found the motion sought to certify the class under the dismissed claims, and denied certification as to these for lack of injury and ability to represent the class. For the remaining claim, the Court found a lack of commonality as noted in the expert's testimony, which supported the argument that there was a need for individual inquiries of each mortgage file to discern a common question. Because of this the Court also found modification of the class definition was not a solution, as no claim could be certified at this time.

EMPLOYMENT

Standard for Certification

Ferreras v. American Airlines, Inc., No. 18-3143, 2019 WL 7161214 (3rd Cir. Dec. 24, 2019) (Jordan, J.) Airline employees alleged violations of state wage and hour laws, but apparently not under the Fair Labor Standards Act (FLSA). After a class was certified by the United States District Court for the District of New Jersey, Defendants appealed.

The Third Circuit found no commonality or predominance and reversed. Reasoning in support of its decision, the Court reviewed the order for abuse of discretion, first finding that the district court had ordered conditional certification typically available in FLSA litigation, but that this was not the appropriate standard under Rule 23. The district court had also found pleadings and initial evidence sufficient for certification purposes, but the Court noted that Rule 23 requires satisfaction of a higher threshold. The Court also found conflicts in the evidence on record, which showed a likely need for individual inquiries that would undermine commonality and predominance.

Exit Inspections

Heredia v. Eddie Bauer LLC, No. 16-cv-06236, 2020 WL 127489 (N.D. Cal. Jan. 10, 2020) (Freeman, J.) Plaintiff brought suit for violation of wage and hour laws against employer, alleging that off-clock exit inspections went unpaid. After a class was certified, and Defendant examined newly-discovered video evidence, Defendant sought to decertify the class. Plaintiff filed a motion to modify the class definition.

The Court granted the decertification and denied the other motions, reasoning in support of its decision first that the new evidence defeated commonality by showing most inspections were done on the clock, and no policy seemed to have been followed uniformly. The Court agreed, and found Plaintiff had no reply to that argument, and thus conceded the issue. Nonetheless, the Court also noted that this presented an ascertainability problem, as many class members seemed now to lack any injury or standing to sue. Additionally, the Court found this showed a lack of common injury, and that individual inquiries would be

needed to determine class inclusion, while conflicting evidence would create a need for mini-trials. As such, the Court found commonality was not met and decertification was warranted.

In terms of Plaintiff's motion to modify the class definition, Plaintiff sought to limit the class definition to the date in which the policy had been changed. The Court found no direct evidence of this policy change had been submitted, and that the same defects in commonality would still be present. The Court also found this would prejudice the Defendant, as discovery had already been concluded and trial was only a few months away. The Court further noted that this motion did not address Rule 23 factors at all, and that it could not be considered valid under the previous certification order's commonality ruling.

SECURITIES

Vrakas v. U.S. Steel Corp., No. 17-cv-579, 2019 WL 7372041 (W.D. Pa. Dec. 31, 2019) (Bissoon, J.)
Plaintiffs brought securities case against Defendants. Plaintiffs moved to certify, and Defendants moved to strike an expert rebuttal report.

The Court granted certification, and granted in part and denied in part the motion to strike. Reasoning in support of its decision, the Court first looked at certification under Rule 23. For numerosity, the Court found 176 million outstanding shares to be sufficient for a presumption of numerosity. While Defendants challenged this, alleging that recent Third Circuit and Supreme Court cases had abrogated this presumption, the Court found no precedent holding such and did find precedent that the presumption was still available.

After finding commonality and typicality satisfied on the basis of the same legal theory, alleged harm, and underlying facts, the Court turned to predominance. The Court first considered reliance, asking whether a reliance presumption could apply. The Court found that the available evidence of market efficiency (including trading on NYSE and CBOE) was sufficient not to require a look at Cammer factors to presume reliance, and that the Plaintiffs' damages model was sufficiently valid, such that predominance was met. For superiority, the Court found economic efficiency would be best served by a class action, and that no manageability problems were likely.

SETTLEMENT ISSUES

Class Notice

Murphy v. SFBSC Mgmt., LLC, No. 17-17079 (9th Cir. Dec. 11, 2019) (Tashima, J.)
Exotic dancers from various nightclubs brought suit against their employers, alleging violations of labor law due to misclassification as independent contractors. After the parties settled and the United States District Court for the Northern District of California approved a settlement (and related settlement notice procedures), Objectors appealed in part on grounds of inadequate notice.

The Ninth Circuit reversed and remanded the notice approval and settlement approval. Reasoning in support of its decision, the Court first looked at adequacy of notice. Objectors argued that the notice was inadequate because it did not notify class members about related lawsuits, and was only issued once via mail, rather than with reminders and via electronic notice. The Court found the content of the notice was adequate, but that notice about related lawsuits was not required under Rule 23. However, the Court agreed that the notice process was insufficient, especially where many class members were determined as difficult to reach by mail, and where the settlement included reversionary deadlines that would foreclose absentee claims. As such, the Court reversed the notice approval.

For the settlement approval, Objectors argued that the district court failed to apply heightened scrutiny concerning collusion and the negotiated class award. The Court found the district court abused its discretion in approving the settlement without such review. The Court found error in the district court's beginning its analysis with a presumption of fairness and reasonableness instead. The Court found that this was an abuse of discretion, especially as there were some signs of collusion to be investigated further: a reversion clause, a clear sailing agreement, and a disproportionate fee award.

Taafua v. Quantum Global Technologies, LLC, No. 18-cv-06602, 2020 WL 95639 (N.D. Cal. Jan. 8, 2020) (Demarchi, J.)
Plaintiff brought suit for violation of the Fair Credit Reporting Act ("FCRA") against Defendant, by virtue of inclusion of an extraneous liability waiver in a disclosure form. After a settlement was reached, Plaintiff filed a motion for preliminary approval.

The Court denied the motion, reasoning in support of its decision that numerosity was satisfied on grounds of 1,041 class members. In terms of commonality, the Court found two common questions: whether (1) the form included the waiver; and (2) Defendant had procured a credit report without authorization.

For typicality, the Court found the Plaintiff's claim and the class claims fell under a uniform course of conduct of Defendant's, resulting in the same injury. However, the Court noted that Plaintiff might be barred from proceeding due to a statute of limitations question, and that half the class also might be so barred. As such, the class not subject to the limitation would likely be harmed by the settlement proceeding at a lower recovery, and was not uniform, thus the Court found typicality unsatisfied.

Turning to adequacy, the Court followed the same analysis and found the statute of limitations issue created a conflict of interest which defeated adequacy. In terms of superiority, the Court found that a class action was superior due to efficiency and manageability of the case. However, the Court found predominance could not be met, as the statute of limitations issue meant that common questions could not predominate.

Turning to the settlement for fairness, the Court found the weakened case of Plaintiff, the risk of further litigation especially with respect to the statute of limitations, the likelihood of lower recovery from the same, and an overinflated fee amount and service award would not be reasonable. Additionally, the Court found that in light of the Ninth Circuit's recent decision in *Roes v. SFBSC Management, LLC*, the single notice issued may be insufficient, and remanded the matter for further briefing on the subject of notice.

TELEPHONE CONSUMER PROTECTION ACT

Text Messages

George v. Shamrock Saloon II LLC, No. 17-cv-6663, 2020 WL 133621 (S.D.N.Y. Jan. 13, 2020) (Abrams, J.)
Plaintiff brought suit for violation of the Telephone Consumer Protection Act ("TCPA") against Defendant, alleging text messages were sent via an auto-dialer to Plaintiff's cell phone without consent. Plaintiff moved for certification, and the magistrate judge recommended it be granted.

The Court granted the motion, first rejecting two new objections made by Defendant to the magistrate judge's report on grounds that both should have been addressed in discovery. Next, the Court considered Defendant's contention that individualized inquiries would be needed due to the consequences of a 2012 FCC order and ruled that the magistrate judge correctly concluded the timing of the FCC order had no effect on the class, and that typicality and predominance were met without need for individual inquiries. The Court noted that the only common questions revolved around whether a text message had been sent, and that Defendant had given no evidence against Plaintiff's claim that consent was lacking.

The Court also reviewed the other Rule 23 factors for clear error, and found that a proposed class of 67,000 satisfied numerosity. In terms of commonality, the Court found the class suffered from the same conduct and injury. For adequacy, the Court found no dispute, and no conflict of interest with Plaintiff or counsel. For ascertainability, the Court found Defendant's phone records sufficient. For superiority, the Court found efficiency, central location of the venue, and lack of management concerns sufficient.

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KCC Class Action Services would appreciate your vote for "Best Claims Administrator" and "Best Business Escrow Services" for the *Daily Report's Best of* reader poll, as well as for *The National Law Journal's Best of* reader poll. Thanks to the support of our clients and colleagues, we have been recognized in the past.

Our high-quality, cost-effective notice and settlement administration services have been recognized by *Daily Business Review, The National Law Journal, The Recorder*, *The Legal Intelligencer, The New Jersey Law Journal*, among other leading publications. KCC has earned the trust and confidence of our clients with our track record as a highly-responsive partner.

Daily Report

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Vote for KCC on question 14 (Best Claims Administrator)
and question 24 (Best Business Escrow Services).
The voting period is scheduled to run through **February 21, 2020**.

The National Law Journal

Please show your support and visit
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Vote for KCC on question 16 (Best Claims Administrator)
and question 39 (Best Business Escrow Services).
The voting period is scheduled to run through **February 28, 2020**.

KCC appreciates your vote!

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Lead Editor of KCC Class Action Digest: Robert DeWitte, Vice President, Class Action Services