

**BakerHostetler**  
**2012 Year-End**  
**Review of Class Actions**  
*(and what to expect in 2013)*

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The *BakerHostetler 2012 Year-end Review of Class Actions* offers a summary of some of the key developments in class action litigation during the past year. The *2012 Year-End Review* is a joint project of the firm’s Class Action Defense, Antitrust, Data Privacy, and Employment Class Action practice teams and is the fruit of collaborative efforts of numerous attorneys from across the firm. For updates throughout the year, please be sure to visit the blogs sponsored by each of these practice teams: *Class Action Lawsuit Defense Blog*, *Antitrust Advocate*, *Data Privacy Monitor*, and *Employment Class Action Blog*.

## Contents

I.	Introduction.....	1
II.	Developments in Class Action Procedure and Jurisdiction.....	1
	A. The Class Action Fairness Act.....	1
	B. Class Arbitration Waivers.....	5
	C. Commonality, Predominance and the Burden of Proof at Class Certification.....	7
	D. Issue Certification .....	9
	E. Expert Evidence at the Class Certification Stage.....	10
	F. Statistical Evidence.....	11
	G. Class Action Settlements .....	12
III.	Developments by Subject Matter.....	16
	A. Consumer Class Actions.....	16
	1. Insurance .....	16
	2. Banking .....	21
	3. Consumer products.....	24
	B. Privacy .....	30
	C. Employment Discrimination and Wage & Hour .....	34
	D. Securities .....	37
	E. Antitrust.....	38
	F. International Class and Collective Litigation .....	42
IV.	Looking Forward to 2013.....	44

## I. Introduction

The Supreme Court's 2011 decisions in *AT&T Mobility v. Concepcion* and in *Wal-Mart Stores, Inc. v. Dukes* were seen by many commentators as potentially bringing about a significant decrease in the number of class actions, if not marking the death knell of class actions as we know them. If there is a lesson to be learned from 2012, it is that while the Supreme Court's 2011 decisions have had a significant impact on class action litigation, they have not brought about an end to class actions entirely and are not likely to do so anytime soon.

Class actions remain common in all areas of civil litigation, from antitrust, consumer products, insurance, and banking, to employment discrimination, and wage & hour. One area that has seen a dramatic increase in the past year is the area of data privacy class actions, where the state legislatures and Congress continue to struggle to keep up with constantly changing technology, and the courts continue to struggle with interpreting new statutory enactments and the application of old statutes to new technologies.

If 2011 was a banner year for landmark decisions, 2012 was no less important as a year in which the lower courts provided important judicial gloss to those decisions. At the same time, the Supreme Court did not simply rest on its laurels after an active 2010-11 term considering class action issues. Instead, the Court reloaded its docket with a series of key cases set to be decided in early 2013.

## II. Developments in Class Action Procedure and Jurisdiction

### A. The Class Action Fairness Act

#### ***U.S. Supreme Court Accepts First CAFA Case***

Plaintiffs desiring to avoid federal jurisdiction have long attempted to do so by stipulating that they do not seek above the jurisdictional minimum. But, do *putative* class representatives, or their counsel, have any authority to limit or waive recovery in a complaint on behalf of absent class members, whom the representatives and counsel do not yet represent, in order to avoid CAFA? The U.S. Supreme Court is set to decide this issue in its first-ever case addressing the 2005 class action reform law.

In *Standard Fire Insurance Co. v. Knowles*,<sup>1</sup> the Eighth Circuit denied an interlocutory appeal from an order of an Arkansas District Court remanding an alleged class to state court on the basis that the named plaintiff's filing of a "binding stipulation" that his class would not seek more than \$5 million in damages precluded jurisdiction under CAFA. The defendants argue neither the named plaintiff nor his counsel have any authority to

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<sup>1</sup> No. 11-8030, 2012 WL 3828891 (8<sup>th</sup> Cir. Jan. 4, 2012), *cert. granted* (Aug. 31, 2012) (11-1450).

waive or disclaim recovery for those whom they do not yet represent. The Eighth Circuit Court denied leave to appeal, and then denied rehearing *en banc*.

The case's procedural journey to the U.S. Supreme Court is unusual. The Court granted cert nearly a month before the first conference of the new term, and there is no circuit split on the issue. In fact, there is no circuit opinion addressing this direct issue at all – the Eighth Circuit declined to hear the case, twice. But *Standard Fire* points out that the Court held just last year, in *Smith v. Bayer Corp.*,<sup>2</sup> that prior to class certification a plaintiff has no authority to limit the rights of absent individuals he does not yet (and may never) represent.

The case was argued on January 7, 2013.

### ***Circuit Split on Treatment of Attorney General Parens Patriae Actions under CAFA***

In 2012, a circuit split developed on the question of whether *parens patriae* actions brought by state Attorneys General qualify as class or mass actions under CAFA and, therefore, are subject to federal jurisdiction. State AGs bring mass suits against companies and organizations on behalf of the citizens of their state, under the theory of *parens patriae*, meaning the state has the power to bring suit on behalf of its affected citizens. In some cases, *parens patriae* cases do not require the AGs to show standing or seek certification, and damages can be deemed payable to the AG and the state treasury rather than the consumers, depending on the suit.

Although the question was first addressed in 2008, there is now a split in the Circuit Courts as to whether State AGs may bring these cases under CAFA. This can be significant because AGs have different cost concerns and different means of resolving claims with defendants as compared to the private practice. Further, courts may allow AGs to bring *parens patriae* suits even when the defendant(s) have reached a private settlement with individuals in a class action over the same facts, when these are same individuals being “protected” by the AG.

The Fourth Circuit case of *State ex rel. McGraw v. CVS Pharmacy, Inc.*,<sup>3</sup> was the first time a federal circuit court decided an AG consumer *parens patriae* case does not meet the definition of class action under CAFA.

The case was brought by defendant pharmacy companies in West Virginia, who were being sued by the West Virginia AG for violations of the WV generic prescription drug laws. The AG alleged that the pharmacies overcharged the consumers for these drugs in violation of state consumer protection law exclusively, but the defendants attempted to remove the case to federal district by claiming that the case was a class action under

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<sup>2</sup> 131 S. Ct. 2368, 2379 (2011).

<sup>3</sup> 646 F.3d 169 (4<sup>th</sup> Cir. 2011).

CAFA. The district court remanded, holding that the case was a “classic *parens patriae*” action not subject to CAFA, and the pharmacies appealed. The 4<sup>th</sup> Circuit, in siding with the AG, concluded that “These West Virginia statutes, on which the Attorney General relies for his claims, contain virtually none of the essential requirements for a Rule 23 class action.” The AG was not a member of the class, but rather was acting in capacity as a trustee, and that this was not the “type of representation essential to the representational aspect of a class action.”

The Ninth Circuit followed suit in *Nevada v. Bank of America Corp.*,<sup>4</sup> concluding that in an AG *parens patriae* case, if the state is the real party-in-interest, the case is not a CAFA mass action. In *Bank of America*, the Nevada AG filed suit in state court alleging misrepresentation in connection with mortgages issued by the defendant. The defendant removed the case to federal court under CAFA. The district court denied remand, but the Ninth Circuit reversed, holding that “[p]*arens patriae* suits lack the defining attributes of true class actions. As such, they only ‘resemble’ class actions in the sense that they are representative suits.” The AG was seeking enforcement of a prior judgment, civil penalties under state consumer law and to recover investigative costs, all of which could only be done by the state, and not the individuals. Therefore, the Nevada case was not a class or mass action within the meaning of CAFA and should not have been removed.

The Seventh Circuit has followed the same approach as the Fourth and Ninth in *LG Display Co. Ltd. v. Madigan*.<sup>5</sup> There, the Illinois AG brought a *parens patriae* action on behalf of Illinois citizens against LCD (liquid crystal display) manufacturers over alleged state anti-trust violations. Defendants removed to federal court, arguing that the case was a class action or mass action under CAFA, and the district court remanded the case to state court. Defendants appealed, because the Seventh Circuit Court had not yet decided whether the individual consumers should be considered the real parties-in-interest.

The Seventh Circuit Court rejected the appeal on jurisdictional grounds, holding that because, under Illinois law, only AG could bring a *parens patriae* claim, the case could not qualify as a class or mass action CAFA, the district court’s remand order was not subject to appeal.

In a November 2012 opinion in *Mississippi v. Au Optronics Corp.*,<sup>6</sup> the Fifth Circuit confirmed its split from the Fourth, Seventh, and Ninth Circuits. In an opinion by Judge Jolly, the court stated that the case was a correctly labeled a mass action under CAFA and that the State of Mississippi, through the AG bringing the case, was a proper class representative. Thus the case could be properly removed to federal court.

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<sup>4</sup> 672 F.3d 661 (9<sup>th</sup> Cir. 2012).

<sup>5</sup> 665 F.3d 768 (7<sup>th</sup> Cir. 2011).

<sup>6</sup> No. 12-60704 (5<sup>th</sup> Cir. Nov. 21, 2012).

*Au Optronics* was an antitrust action brought by the Mississippi AG on behalf of LCD consumers against LCD manufacturers. The manufacturers removed the case federal court based under CAFA. The Fifth Circuit agreed that the defendants can remove the case under the mass action section of CAFA. The Court based its opinion on an earlier case, *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*<sup>7</sup> In that insurance case, the Court concluded that the interested parties were the individual policyholders, not the AG bringing the case. Additionally, the Court found that the amount in controversy exceeded \$5 million in damages, and there were more than 100 individual policyholders, so the Court concluded it was a mass action under CAFA and determined that the case could be removed.

Following the earlier court's logic, the 2012 Fifth Circuit Court held that the courts would have to conduct a claim-by-claim analysis to determine the real beneficiaries in a given case. In this case, because the real beneficiaries were the individual LCD consumers, and the Mississippi AG could not claim money damages under the state law, the case met the requirements of a CAFA mass action was subject to removal under CAFA.

### ***Seventh Circuit Rejects Claim of Corporate Governance Exception to CAFA***

Under 28 U.S.C. § 1453(d)(2), a claim is not removable, even if CAFA's requirements are otherwise met if the claim "relates to the internal affairs or governance of a corporation or other form or business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized."

In *LaPlant v. Northwestern Mut. Life Ins. Co.*,<sup>8</sup> the Seventh Circuit concluded that breach of contract claims brought by annuity holders against Northwestern Mutual Life Insurance Co. cannot be kept out of federal court under the CAFA corporate governance exception. Northwestern Mutual sold annuity contracts to residents inside and out of Wisconsin, the state where the suit was initially filed. The annuitants alleged that Northwestern changed the method it used to calculate the annuitants' annual dividend subsequent to the purchase of the contract and that this change violates the terms of the contracts. Northwestern removed the case to federal court, and the annuitant class sought to remand on the ground that the dispute "relates to the internal affairs" of Northwestern Mutual, and falls under the corporate governance exception.

In Judge Easterbrook's opinion, the case turned on the definition of "internal affairs" in the CAFA statute. CAFA does not define the term, so the Seventh Circuit Court turned to the Supreme Court decision of *Edgar v. MITE Corp.*,<sup>9</sup> stating the meaning as "matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders." Since the case does not involve the corporation's officers

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<sup>7</sup> 536 F.3d 418 (5<sup>th</sup> Cir. 2008).

<sup>8</sup> No. 12-3264, 2012 WL 5936030 (7<sup>th</sup> Cir. Nov. 28, 2012).

<sup>9</sup> 457 U.S. 624, 645 (1982).

or directors, and the annuitants are not shareholders, the Seventh Circuit Court concluded the issues do not fall under corporate law. Instead, the case is an issue of contract law, and the case was properly removed to federal court under CAFA.

## B. Class Arbitration Waivers

The United States Supreme Court's landmark decision in *AT&T Mobility v. Concepcion*,<sup>10</sup> is far from the final word on class action waivers and arbitration. Instead, *Concepcion* has raised a host of new questions, and courts across the country continue to grapple with its implications. In *Concepcion*, the Supreme Court invalidated a California judicial rule barring class action waivers in the context of consumer contracts. There, two consumers and AT&T had entered an agreement containing a clause providing for arbitration for all disputes. The district court and the Ninth Circuit both found the arbitration clause at issue to be unconscionable, but the Supreme Court reversed. It held that Federal Arbitration Act ("FAA") preempted a judicial rule regarding the unconscionability of class action waivers. Notably, the Supreme Court held that courts must place arbitration agreements on equal footing with other contracts, enforcing them according to their terms.<sup>11</sup>

*Concepcion* may have invalidated certain defenses to class action waivers, but plaintiffs have waged new attacks against arbitration clauses. Some have employed other conventional defenses to contract formation. In *Grosvenor v. Qwest Corp.*,<sup>12</sup> a Colorado federal court held that an arbitration clause in the parties' agreement was unenforceable and illusory. Plaintiff filed a putative class action against Qwest, which provided internet service pursuant to a Subscriber Agreement. That Agreement required (i) the parties to arbitrate disputes, and; (ii) prohibited the maintenance of class actions. Qwest filed a motion to compel arbitration. But the district court determined the Subscriber Agreement was illusory and unenforceable because Qwest maintained an unfettered ability to modify the existence, term and scope of the agreement.<sup>13</sup>

To date, the biggest challenge to *Concepcion* arises from the Second Circuit. Repeatedly, the Second Circuit has held that *Concepcion* permits the FAA to preempt only state laws, as opposed to also controlling over other federal law in cases involving federal statutory rights.<sup>14</sup>

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<sup>10</sup> 131 S. Ct. 1740 (2011).

<sup>11</sup> *Id.* at 1743.

<sup>12</sup> 854 F. Supp. 2d 1021, 1034 (D. Colo. 2012).

<sup>13</sup> *Id.* at 1034.

<sup>14</sup> See, e.g., *Orman v. Citigroup*, No. 11 Civ. 7086, 2012 WL 4039850 (S.D.N.Y. Sept. 12, 2012) (noting that *Concepcion* does not apply to federal statutory rights); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950, WL 2671813 (S.D.N.Y. July 7, 2011) (declining to apply *Concepcion* where the question before the court involved plaintiffs' ability to vindicate a federal statutory right).

This coming term, the Supreme Court will decide *In re American Express Merchants' Litigation*,<sup>15</sup> squarely confronting the question of “whether the Federal Arbitration Act permits courts, invoking the ‘federal substantive law of arbitrability,’ to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.”

*In re American Express Merchant's Litigation* has a protracted litigation history.<sup>16</sup> It involves retail businesses that filed a putative class action, alleging that American Express had engaged in an illegal “tying arrangements” in violation of the Sherman and Clayton Acts, in connection with two of its products: its charge card and credit card. In response, American Express moved to compel arbitration based upon a clause in the parties’ agreement. While American Express prevailed in the district court, the Second Circuit reversed.

In February 2012, the Second Circuit held in *In re American Express Merchant's Litigation* that *Concepcion* did not require that all class-action waivers be deemed per se enforceable.<sup>17</sup> It further reasoned that “the practical effect” of the enforcement of the arbitration clause at issue would preclude plaintiffs’ ability to bring federal anti-trust claims. A key factor was the cost of pursuing the anti-trust claims individually. Plaintiffs had presented an expert who detailed the impracticability of pursuing individual anti-trust claims. As a result, the Second Circuit concluded:

[T]he class action waiver in ... [the Agreement] cannot be enforced in this case because to do so would grant AmEx de facto immunity from anti-trust liability by removing the plaintiffs’ only reasonably feasible means of recovery. ...<sup>18</sup>

The Second Circuit noted that American Express presented no evidence to challenge the plaintiffs’ arguments that their claims cannot be reasonably pursued as individual actions, whether in federal court or in arbitration.

Another case the Supreme Court will consider during the October 2013 term related to class actions and arbitration is *Oxford Health Plans, LLC v. Sutter*. There, the Supreme Court will consider: what contractual basis supports a finding that the parties agreed to

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<sup>15</sup> 667 F.3d 204 (2d Cir. 2012).

<sup>16</sup> In *AMEX I*, the Second Circuit held that the class action waiver was unenforceable “because the enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs.” *AMEX I* at 304. The U.S. Supreme Court vacated *AMEX I* and remanded it for reconsideration in light of its opinion in *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010). However, the Second Circuit found that *Stolt-Nielsen* did not affect its original analysis and again reversed the district court. On April 11, 2011, the Second Circuit put a hold on the mandate of *AMEX I* pending the outcome of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). After *Concepcion*, the Second Circuit considered supplemental briefing upon *Concepcion*’s potential impact on *AMEX I*.

<sup>17</sup> *Id.* at 214.

<sup>18</sup> *Id.* at 211, citing *AMEX I*.

class arbitration? In *Oxford Health Plans LLC v. Sutter*,<sup>19</sup> the lower courts found a contractual basis for class arbitration. The parties had entered a 1998 Primary Care Physicians Agreement (the “Agreement”) which provided that any disputes between the parties be submitted to arbitration. The Agreement did not expressly address class arbitration. Rather, it contained a broad clause regarding arbitration:

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration. . . .<sup>20</sup>

The arbitrator interpreted this clause as allowing class arbitration, holding that the phrase “all such disputes” included all conceivable court actions, including class actions.

*Oxford* presents a challenge to *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*,<sup>21</sup> in which the Supreme Court decided that parties may not be compelled under the FAA to submit to class arbitration in the absence of specific evidence that they agreed to do so. In *Stolt-Nielsen*, the majority held that class-based arbitrations were not permitted unless the parties expressed a clear intent to engage in such an arbitration: “[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their dispute in class proceedings.”<sup>22</sup>

### **C. Commonality, Predominance and the Burden of Proof at Class Certification**

Arguably, the most significant developments in class certification this year arise from the Supreme Court’s seminal 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.<sup>23</sup> *Wal-Mart* not only heightened the commonality standard, but also made it clear that the merits of a case could be considered at the class certification stage, and indicated that the *Daubert* standard must be met for expert testimony at the class certification stage. In 2012, we saw courts attempting to implement – or circumvent – *Wal-Mart*’s mandate.

In *Wal-Mart*, of course, plaintiffs brought one of the most expansive class actions ever on behalf of 1.5 million female Wal-Mart employees alleging discrimination in violation of Title VII of the Civil Rights Act of 1964. Wal-Mart gave wide discretion on employment matters to local supervisors. Plaintiffs argued that the local managers exercised this authority over pay and promotions disproportionately in favor of men, which had an unlawful disparate impact on the female employees who comprised the class. The district court certified the class, finding the class met Rule 23(a)’s commonality

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<sup>19</sup> 675 F.3d 215, 217 (3d Cir. 2012).

<sup>20</sup> *Id.* at 222.

<sup>21</sup> 130 S. Ct. 1758 (2010).

<sup>22</sup> *Id.* at 625.

<sup>23</sup> 564 U.S. \_\_\_, 131 S. Ct. 2541 (2011).

requirement and Rule 23(b)(2)'s requirement that defendant "acted or refused to act on grounds that apply generally to the class," and the Ninth Circuit affirmed.

The Supreme Court reversed, finding certification inconsistent with both Rule 23(a) and (b). Because the employment decisions alleged to be discriminatory were made at the local level, the Supreme Court held that the reasons behind those decisions could not be litigated on a classwide basis. As to commonality, the Court held: "claims must depend upon a common contention . . . of such a nature that it is capable of classwide resolution . . . . What matters to class certification is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."<sup>24</sup> Justice Ginsberg was highly critical of this standard, reasoning that the commonality standard had been transformed into the predominance standard: "[t]he Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), . . . [a]nd by asking whether the individual differences 'impede' common adjudication . . . the Court duplicates 23(b)(3)'s question whether 'a class action is superior' to other modes of adjudication."<sup>25</sup>

Besides the Supreme Court, the Seventh Circuit, particularly Judge Richard Posner of that court, has issued a number of pro-plaintiff decisions. In *Butler v. Sears, Roebuck and Co.*,<sup>26</sup> the Seventh Circuit ruled that predominance in class actions "is a question of efficiency," whether it's more efficient to litigate issues on a class-wide basis or all issues in separate trials. While stating that it intended to provide "clarity" to the meaning of Rule 23's predominance requirement, the Seventh Circuit arguably eviscerated that rule by allowing cases with numerous individualized issues to go forward as classes.

In *Butler*, plaintiffs brought two sets of claims: one class of plaintiffs alleged that a defect caused mold to be generated in washing machines sold by Sears and the other alleged that a faulty control unit caused the machines to shut down "inopportunistly."

The Seventh Circuit decided that both classes warranted certification because in each, common questions predominated over questions affecting individual members. As to the mold class, the court held that the common question—whether machines were defective in permitting mold to accumulate—predominated over any individualized issues arising from design changes made during the class period. The court found that

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<sup>24</sup> 131 S. Ct. at 2552 (internal citations omitted).

<sup>25</sup> *Id.* at 2565–66. A unanimous Court also found certification of Plaintiffs' backpay claims to be inappropriate, among other reasons, because there could not be a single injunction or declaration that would provide relief to all women in the class. 131 S. Ct. at 2557. (See our discussion of Rule 23(b)(2) class certification below.) The Court was also concerned with the potential violation of due process rights that would occur with the certification of a mandatory class under Rule 23(b)(2)—no notice or right to exclude oneself from the class—when there were money damages at issue. *Id.* at 2559. (See our discussion of due process rights below.)

<sup>26</sup> No. 11-8029 (7<sup>th</sup> Cir. Nov. 13, 2012).

it would be more efficient to litigate liability on a class basis in this case, where a defect “may have imposed costs on tens of thousands of consumers, yet not a cost to any of them large enough to justify the expense of an individual suit.” As to the control unit class, the Seventh Circuit upheld the class certification finding that common issues predominated because it was more efficient to litigate the issue of whether the machines were defective in a single proceeding and then to resolve damages in individual proceedings, if necessary.

In certifying the mold class, Judge Posner noted that the decision was consistent with the Sixth Circuit’s ruling in *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*,<sup>27</sup> which certified an “identical” mold class against Whirlpool, the manufacturer of the washers sold by Sears. In *Whirlpool*, the plaintiffs alleged on behalf of a putative class that certain front-loading Whirlpool washing machines did not prevent or eliminate accumulating moisture, “which leads to the growth of mold and mildew in the machines, ruined laundry, and malodorous homes.” The district court certified the class and the Sixth Circuit affirmed. As in *Butler*, the defendants argued that the issue of liability would be too individualized because there were at least 21 different models included in the class and that the laundry habits of the individual homes varied widely. However, the court held “that common questions predominate over individual ones and that the class action mechanism is the superior method to resolve these claims fairly and efficiently.” Similarly to Judge Posner in *Butler*, the court noted that its ruling on predominance was “especially true since class members are not likely to file individual actions because the cost of litigation would dwarf any potential recovery.”

#### D. Issue Certification

In the wake of *Wal-Mart*, in another decision by Judge Posner, the Seventh Circuit held that certain issues can be certified even when the class could not be certified overall. In *McReynolds v. Merrill Lynch*,<sup>28</sup> a case that is factually similar to *Wal-Mart*, the court allowed issue certification under Rule 23(c)(4) to permit an otherwise uncertifiable class to be certified despite the need for individual trials to determine liability.

In *McReynolds*, approximately 700 African American brokers filed a class action against Merrill Lynch claiming racial discrimination in its employment practices in violation of Title VII. Plaintiffs claimed that the company’s “teaming” and “account distribution” policies—which allowed brokers to form their own sales teams and which allowed allegedly biased criteria to determine the distribution of accounts of departing brokers—had a disparate impact on African American brokers.

The Seventh Circuit reasoned that, as opposed to *Wal-Mart*, where “there was no company-wide policy to challenge,” Merrill Lynch’s policies were alleged to be implemented company-wide and were well suited to a class-action challenge, even

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<sup>27</sup> 678 F.3d 409 (6<sup>th</sup> Cir. 2012).

<sup>28</sup> 672 F.3d 482 (7<sup>th</sup> Cir. 2012).

though there would need to be separate trials for liability in each case. The court rejected defendants' argument that any discrimination would result from the "local, highly-individualized implementation of policies rather than the policies themselves." Even if there would have been racial discrimination on the local level in the absence of the corporate policies, "[t]he incremental causal effect . . . of those company-wide policies—which is the alleged disparate impact—could be most efficiently determined on a class-wide basis."

Assuming the Plaintiffs were to succeed in their challenge, each of the class members would have to prove their compensation was adversely affected by the corporate policies in separate, individual actions. The Seventh Circuit reasoned that judicial efficiency favored permitting certification of an injunctive relief class and a class concerning the determination of issues susceptible to class-wide treatment, with damages to be determined separately.

The *McReynolds* decision demonstrates again that cases in the Seventh Circuit may be certified on efficiency grounds, even when there are significant individualized issues at play in the litigation.

#### E. Expert Evidence at the Class Certification Stage

For years, courts labored under the misconception that they could not delve into the merits of a case at the class certification stage under *Eisen v. Carlisle & Jacquelin*.<sup>29</sup> The Supreme Court corrected this misconception in *Wal-Mart*, stating in a footnote that *Eisen* does not preclude courts from considering the merits at the class certification stage of a case as necessary to determine if class treatment is appropriate.<sup>30</sup> Nevertheless, courts continue to struggle with what evidence is properly heard at the class certification stage as opposed to the merits phase of a case. In addition, courts continue to struggle with the level of evidence required at the class certification stage.<sup>31</sup> In November, the Supreme Court heard oral argument in *Comcast Corp. v. Behrend*,<sup>32</sup> a case which should further refine the Court's guidance in *Wal-Mart*, at least with respect to the level of expert testimony required at the class certification stage.

In *Comcast*, the plaintiffs claimed that Comcast contracted with competing cable companies to "cluster" cable systems giving it an effective monopoly on the cable market and allowing it to raise cable prices for cable customers. The district court certified the class, relying on expert testimony that clustering deterred competition without conducting a *Daubert* analysis. The Third Circuit affirmed the certification, finding the *Daubert* analysis unnecessary: "although the Supreme Court recently hinted

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<sup>29</sup> 417 U.S. 156 (1974).

<sup>30</sup> 131 S. Ct. at 2552 n.6.

<sup>31</sup> See, e.g., *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7<sup>th</sup> Cir. 2012); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970 (9<sup>th</sup> Cir. 2011); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604 (8<sup>th</sup> Cir. 2011).

<sup>32</sup> No. 11-864.

that *Daubert* may apply for evaluating expert testimony at the class certification stage, it need not turn class certification into a mini-trial. We understand the Court's observation to require a district court to evaluate whether an expert is presenting a model which could evolve to become admissible evidence, and not requiring a district court to determine if a model is perfect at the certification stage.”<sup>33</sup>

The Supreme Court heard argument in November on the question of “[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.” Although it appeared the court might address whether *Daubert* standards are applicable at the class certification stage, several justices questioned whether the petitioner had waived the *Daubert* question by not objecting that the expert’s testimony was inadmissible evidence. Justice Kagan did, however, point to the “preponderance of the evidence” standard for demonstrating that damages could be measured classwide and did not appear ready to change the standard.

The question remains as to what a preponderance of the evidence means in the class certification context and whether a full *Daubert* analysis should be conducted. The decision in this case will hopefully provide guidance on the evidentiary bar for expert testimony at the class certification stage.

#### F. Statistical Evidence

Using statistical evidence is common practice to demonstrate pattern or practice discrimination in employment lawsuits. However, whether statistical evidence can also be used to certify a class under Rule 23 or establish liability is much more controversial. Concerned with conserving judicial resources, some courts have increasingly used statistical samples to adjudicate facts in class and mass action cases. Such a “trial-by-formula” approach allows litigants to extrapolate information gathered from a statistically significant sample to the rest of the class. This method remains afloat despite significant criticism by Justice Scalia in *Wal-Mart v. Dukes*<sup>34</sup>—a criticism with which all nine justices concurred. In *Dukes*, Scalia rejected a “novel” approach where a relative sample would establish the amount of backpay allotted to the entire certified class.

Despite such reproach by the United States Supreme Court, the “trial by formula” method has gained momentum, especially in California trial courts. This could be, in part, because the California Supreme Court guided trial courts to use “innovative” procedures to manage class actions in the 2004 case *Sav-On v. Superior Court*.<sup>35</sup> Overtime misclassification cases seem to be particularly prone to such “rough justice” treatment.

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<sup>33</sup> *Behrend v. Comcast*, 655 F.3d 182, 204 n.13 (3d Cir. 2011).

<sup>34</sup> 131 S. Ct. 2541 (2011).

<sup>35</sup> 17 Cal. Rptr. 3d 906 (2004).

In California, cases such as *Bell v. Farmers Ins. Exchange*<sup>36</sup> (2004) established precedent for using statistical sampling as a means of apportioning damages. However, earlier this year, a California Court of Appeals rejected an attempt to use statistical sampling to prove liability in a wage and hour class action in *Duran v. U.S. Bank National Association*.<sup>37</sup> *Duran* is currently pending before the California Supreme Court. The decision to grant review in *Duran* was foreshadowed by Justice Werdegar's concurrence in his own majority opinion in *Brinker Restaurant Corp. v. Superior Court*.<sup>38</sup> In that concurrence, Justice Werdegar argued that “[r]epresentative testimony, surveys, and statistical analysis all are available as tools to render manageable determinations of the extent of liability [in wage and hour cases].” In *Duran*, the court will have an opportunity to explore that issue in more detail.

The plaintiff in *Duran* had presented testimony from statistician Richard Drogin, who had also served as an expert for the plaintiffs in *Wal-Mart*. Drogin presented a random sampling analysis that purported to estimate the percentage of the defendant's employees that had been misclassified for purposes of entitlement to overtime pay. The trial court adopted a sampling approach that was modeled after Drogin's proposal, though the two were not identical.

The Court of Appeal held that the trial court's approach was improper and that it violated defendant's due process rights for a variety of reasons, including that 1) the use of statistics to estimate the total number of employees who had been misclassified deprived the defendant an opportunity to present relevant evidence and individualized defenses as to individual plaintiffs' alleged misclassification; 2) the court's statistical methodology was flawed because it arbitrarily used a sample of 20 employees without any basis for concluding that the sample was statistically significant; 3) even the use of sampling as to damages was improper because the methodology used had an unacceptably high margin of error.

The *Duran* opinion is noteworthy for its application to the use of statistics in class certification proceedings, both in the employment context and in other types of class actions. The California Supreme Court holding in this case will shed more light on the use of statistical evidence in light of *Wal-Mart Stores, Inc. v. Dukes*.

## G. Class Action Settlements

### ***Pre-Class Certification Settlement Issues***

In 2012, the United States Supreme Court granted certiorari in a case that will affect class action settlement defense strategies in every jurisdiction. In *Genesis Healthcare v.*

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<sup>36</sup> 9 Cal. Rptr. 3d 544 (2004).

<sup>37</sup> 203 Cal. App. 4<sup>th</sup> 212 (2012).

<sup>38</sup> 53 Cal. 4<sup>th</sup> 1004, 1054 (2012).

*Symczyk*,<sup>39</sup> the Court is being asked to decide what federal courts are to do when a putative class action lawsuit has been filed, the defense offers a settlement that provides the proposed class representative everything they are seeking individually, and that offer is rejected. Hopefully, the Court will resolve once and for all—in the context of putative class actions—whether a rejected settlement offer that would moot the individual claim moots the entire class action.

This issue presented to the Court was originally based on two different perspectives. First, under Article III of the Constitution, federal courts cannot decide a case unless it involves a live controversy. In the context of a full offer of settlement that provides the asserting party 100% of what they have asked for, is there really any controversy left to justify federal court adjudication? Second, Federal Rule of Civil Procedure 68 encourages parties to settle lawsuits, and specifically outlines a process for the sued party to make an early offer to settle the case. Does this rule become superfluous if the sued party can offer to literally make the suing party whole, and still have to litigate the case?

Plaintiffs on the other end of these offers typically argue that the defense is merely making a complete offer of settlement to the proposed class representative for the sole purpose of “picking off” the representative in the hopes that the entire proposed class action will go away. Thus, they claim these offers of settlement in the class action context, while may be following the letter of law, are not in the spirit of the very wrongs that class actions are trying to right.

Interestingly, the facts of this specific case, which may have wide-reaching impacts for settlement strategies in putative class actions, do not technically involve a class action. In the case below, an individual brought a Fair Labor Standards Act lawsuit against her employer, a nursing home in Philadelphia, claiming that the nursing home had a policy that automatically deducted thirty minutes worth of pay from each shift for a lunch break. She brought the suit as a “collective action,” in which she was able to sue on “behalf of” herself and others who were the alleged victims of the same policy.

Early in the lawsuit, the nursing home offered the Plaintiff a total of \$7,500 for unpaid wages, plus attorneys’ fees, costs, and expenses in an amount to be decided by the federal judge. When the Plaintiff did not respond to the offer, the nursing home filed a motion to dismiss the case, arguing that the Plaintiff had effectively rejected the offer under Rule 68 and that there was no longer a case in controversy to adjudicate under Article III. The judge agreed with the defense, and given that the Plaintiff had made no claim that others had or would join the case, the judge dismissed the lawsuit.

This ruling is consistent with defense settlement strategies in putative class actions to settle with the proposed class representative, because like collective actions, until there are others actually in the lawsuit (i.e. a class has been certified) the case in controversy

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<sup>39</sup> No. 11-1059 (U.S. 2012).

is only an individual case. Any other ruling would permit the proposed class representative, and their counsel, to enjoy the benefits of representing a certified class action without actually getting a class certified and the benefits of representing proposed class members without any notice or authority to act on their behalf.

The Third Circuit disagreed with this strategy, ordering the district court to more fully explore whether other workers would join the lawsuit. It accepted that the Plaintiff did not have a case in controversy, but it was skeptical of dismissing the case entirely if the result would be to frustrate the very intent behind collective actions by allowing defendants to “pick off” named plaintiffs one by one so that no broader claim could ever be successfully brought. In reaching this conclusion, the Third Circuit relied mainly on precedent from the Rule 23 context.

Whether the Supreme Court will rule in favor of a literal application of the Constitution, the rules governing federal court dockets, and the rules governing putative class actions, or a liberal construction of public policies generally behind class and collective actions is yet to be seen, but regardless, all class action defense practitioners should be following this ruling.

### ***Settlement Class Certification Issues***

In the settlement class certification context, 2012 highlighted the continuing scrutiny for class action notice programs, especially publication only programs. In *Hecht v. United Collection Bur., Inc.*,<sup>40</sup> for example, a plaintiff asserted claims identical to those in a settled class action against the same defendant certified under Rule 23(b)(2).<sup>41</sup> The *Hecht* plaintiff acknowledged that her claims were covered by the settlement class, but argued that binding her to the settlement would violate her due process rights because the publication notice (the only notice given) was constitutionally inadequate. The Second Circuit agreed and ruled that “[a]bsent class members have a due process right to [the best practicable] notice and an opportunity to opt out of class litigation when the action is ‘predominately’ for money damages.” The court also noted that “notice and an opportunity to opt out under Rule 23 now applies not only when a class action is predominately for money damages, but when a claim for money damages is more than ‘incidental.’”<sup>42</sup>

While 2012 did bring a lot of class action objectors, it did not appear to bring any heightened deference to professional class action objectors. For example, in *Kaplan, et al. v. Mead Johnson & Company, et al.*,<sup>43</sup> a multidistrict litigation case involving alleged

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<sup>40</sup> No. 11-1327, 2012 U.S. App. LEXIS 17374 (2d Cir. Aug. 17, 2012).

<sup>41</sup> *Gravina v. United Collection Bur., Inc.*, No. 09-cv-4816, 2010 U.S. Dist. LEXIS 142718 (E.D.N.Y. Nov. 29, 2010).

<sup>42</sup> *Hecht*, 2012 U.S. App. LEXIS 17374, at \*9, citing *Wal-Mart Stores, Inc. v. Dukes*, 131 U.S. S.Ct. 2541, 2557 (2011).

<sup>43</sup> No. 11-15956 (11<sup>th</sup> Cir. July 20, 2012).

false representations regarding infant formula, the district court rejected 11 objectors finding “significant evidence of bad faith on the part of” the objectors, including that counsel sought \$150,000 in exchange for a withdrawal of the appeal. On appeal, the Eleventh Circuit affirmed the district court approval of the settlement. It determined that the objections were “conclusory and failed to account for other pertinent consideration, including the plaintiffs’ risk of losing at trial,” and, in other respects, “wholly unfounded.”

Undoubtedly, class action settlements are not over when the terms sheet is agreed-upon. The devil continues to be in the details of the settlement agreement and the notice program, and the reality is that most times those burdens fall squarely on defense counsel.

### ***Use of Cy Pres Funds in Class Action Settlements***

This last year also demonstrated a continuing disapproval for generalized *cy pres* awards in class action settlement agreements. In *Dennis v. Kellogg Co.*,<sup>44</sup> which could have a significant impact on settlements in consumer class actions, the Ninth Circuit rejected the \$10.6 million settlement reached in that case. The putative class action against Kellogg alleged that it had engaged in deceptive advertising of its Frosted Mini-Wheats cereal by advertising that the cereal helped improve children’s attentiveness. Only several months after the case was filed, the parties agreed to a \$10.6 million settlement, with the following provisions:

- Kellogg would establish a \$2.75 million fund to distribute to class members, who could each receive \$5 per box of cereal purchased, up to \$15. Funds not distributed to the class would be donated to charities pursuant to the *cy pres* doctrine;
- Kellogg would distribute \$5.5 million “worth” of Kellogg food items to charities that feed the indigent pursuant to the *cy pres* doctrine;
- The settlement also provided for injunctive relief and \$2 million in attorneys’ fees.

The Ninth Circuit found that the settlement failed to satisfy standards of the *cy pres* doctrine, which is frequently used in class settlements “where the proof of individual claims would be burdensome and distribution of claims costly.” The court found that there must be a “driving nexus” between the claims in the case and the *cy pres* beneficiaries. In this case, the court ruled that the proposed \$5.5 million *cy pres* fund consisting of food to be donated to charities that feed the indigent had an insufficient connection to the suit’s claims and class members. The court emphasized that the alleged misrepresentations in that case – advertisements that the cereal improved attentiveness – were what provided the plaintiffs with a cause of action, so appropriate

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<sup>44</sup> 697 F.3d 858, 868-69 (9<sup>th</sup> Cir. 2012).

*cy pres* recipients were “not charities that feed the needy, but organizations dedicated to protecting consumers from, or redressing injuries caused by, false advertising.”<sup>45</sup> The court also found that the *cy pres* award was unacceptably vague because there was no indication as to whether the \$5.5 million value ascribed to the food was at Kellogg’s cost or retail cost, or whether the donated food would be in addition to Kellogg’s usual charitable donations or part of what it already obligated itself to donate.<sup>46</sup>

The First Circuit also issued a decision on the use of *cy pres* in class action settlements. In *In re: Lupron Marketing and Sales Practices Litigation*,<sup>47</sup> the court outlined circumstances under which a court may approve a *cy pres* distribution of unclaimed settlement funds.

### III. Developments by Subject Matter

#### A. Consumer Class Actions

##### 1. Insurance

2012 brought several interesting decisions in class actions involving the insurance industry.

In two post-*Dukes* decisions, the Sixth Circuit signaled a greater willingness to uphold certification of claims against insurers. In *Young v. Nationwide Mutual Ins. Co.*,<sup>48</sup> the court of appeals affirmed certification under Rule 23(b)(3) of a class of Kentucky policyholders of several insurers, pursuing claims for the assessment of local government insurance premium taxes that were not owed or at a rate greater than owed. The class was proposed to be identified by applying a software system to identify the correct taxing jurisdiction for each insured risk, using geocoding software. The Sixth Circuit rejected challenges to the class definition requiring proof of actual injury as fail-safe, reasoning that liability would not be established by meeting the class definition. The court also found that identifying class members would be administratively feasible because it was defined using objective criteria, and rebuffed challenges that the inaccuracy of the software as applied to millions of transactions would require many individual determinations, holding that the need to manually review files was not dispositive of administrative feasibility.

Plaintiffs in *Young* relied on expert opinion to support administrative feasibility. The court of appeals was untroubled by the lack of any *Daubert* review of that challenged

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<sup>45</sup> *Id.* at 866-67. In its original opinion, which was withdrawn on July 13, 2012, the court also found that the \$2 million attorneys’ fee award was unreasonable in light of the relief actually provided directly to class members, as well as in relation to the hours plaintiffs’ counsel actually devoted to the case. 687 F.3d 1149, 1160-62 (9<sup>th</sup> Cir. 2012).

<sup>46</sup> 697 F.3d at 867-68.

<sup>47</sup> Case Nos. 10-2494, 11-1329 (1<sup>st</sup> Cir. Apr. 24, 2012).

<sup>48</sup> 693 F.3d 532 (6<sup>th</sup> Cir. 2012).

opinion (which the court mistakenly concluded had occurred), because reliance on that opinion was “limited.” The court further found that common issues exist “[b]ecause the named Plaintiffs allege that geocoding verification procedures would have prevented . . . their tax misassignment, . . .” The court similarly found predominance satisfied from plaintiffs’ “theory that verification processes using geocoding software” would have prevented their injuries, and held that a class action was superior primarily because the alleged tax overcharges are relative small for each absent class member.

In *Gooch v. Life Investors Ins. Co. of America*,<sup>49</sup> the Sixth Circuit reversed in part certification of a nationwide class under Rule 23(b)(2) seeking declaratory relief under a cancer insurance policy, seeking recovery of the difference between “actual charges” and the amounts accepted by medical providers. A nationwide class had also been filed in Arkansas state court, under the framework of an agreement to settle. The court of appeals vacated class certification because most of the class claims were encompassed within the Arkansas settlement class and barred by claim preclusion. However, the court engaged in an extensive analysis of whether that settlement met due process standards, including notice, adequacy of representation, attorneys’ fees to class counsel and whether a settlement had been agreed to in advance of the filing of the state court action. For defendants, the *Gooch* opinion contains some cautionary statements of how a class settlement may be collaterally reexamined by another court.

The Sixth Circuit restated principles from *Dukes*, that a limited factual inquiry is not enough and that the district court cannot simply presume allegations of complaint as true. However, as in *Young*, the court of appeals found these errors harmless, finding sufficient evidence of commonality since the core common question is legal – interpretation of the insurance policy. The *Gooch* court avoided the question of whether differences in state laws in a nationwide class would preclude certification simply because the district court had not yet addressed the issue. The court also rejected defendants’ argument that the district court’s ruling in favor of plaintiff on a preliminary injunction created a fail-safe class, finding that preliminary injunctive relief was not a decision on the merits. The Sixth Circuit also found it acceptable to certify a Rule 23(b)(2) class as a predicate to monetary relief, and instead of examining whether damages are incidental to injunctive relief, attempted to distinguish *Dukes* based on the possibility of certifying a separate subclass under Rule 23(b)(3) of class members entitled to damages.

The difficulty of certifying a class for claims involving reductions in payment of health care claims was affirmed in two key decisions. In *DWFII Corporation v. State Farm Mutual Automobile Insurance Company*,<sup>50</sup> the district court denied certification of a class of all Florida healthcare providers who submitted a claim for payment under Florida’s no-fault insurance statute that was reduced or denied. The Eleventh Circuit affirmed because individual questions predominated, because each medical service

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<sup>49</sup> 672 F.3d 402 (6<sup>th</sup> Cir. 2012).

<sup>50</sup> 469 Fed. Appx. 762, 2012 WL 1002234 (11<sup>th</sup> Cir. 2012).

provider would have to establish individual facts and legal arguments to prove they were entitled to reimbursement under the governing statute. Additionally, State Farm would be entitled to present any unbundling or set off defenses that reduce the amount of each reimbursement, which also required individual proof. The Eleventh Circuit likewise upheld a decision denying class certification to a healthcare provider in an attempt to recover insurance reimbursements, alleging that State Farm improperly reduced and denied reimbursements for healthcare services provided to a policyholder.<sup>51</sup> On review, the court of appeals found that the district court properly considered individualized defenses in its predominance analysis, and that a limited inquiry into the factual and legal merits of plaintiffs' case was correct to determine if the requirements of Rule 23 are satisfied.

The Eleventh Circuit halted a class action against WellPoint Health Networks because the non-network dentists had failed to exhaust their administrative remedies before filing suit.<sup>52</sup> The action, filed by three dentists under the Employee Retirement Income Security Act, alleged that WellPoint used a faulty method in calculating the reimbursement paid to dental providers for services to patients. The trial court granted WellPoint's motion for summary judgment, because the plaintiffs had failed to exhaust administrative remedies as required by ERISA. The Eleventh Circuit affirmed, finding that plaintiffs were obligated to exhaust any administrative remedies before filing suit and that a letter to WellPoint, requesting documentation of the data used to determine uniform, customary, and reasonable rates, did not constitute an election to pursue an administrative remedy. The court observed that the letter did not challenge the partial denial of benefits nor did it request that WellPoint perform any kind of review. Moreover, plaintiffs were not relieved from pursuing administrative remedies on the basis that such remedies would have been futile.

*In Lass v. Bank of America, N.A.*,<sup>53</sup> the First Circuit revived a putative class action by a homeowner seeking damages for a bank's unilateral purchase of additional flood insurance on behalf of the homeowner. The borrower claimed that the mortgage lender and servicer wrongfully increased flood insurance coverage beyond the amount required by the mortgage. The district court dismissed the action, finding that the mortgage documents gave the lender complete discretion to set the required amount of flood insurance. In vacating and remanding, the First Circuit found that the contract between the lender and borrower was ambiguous as to the lender's discretion to increase flood insurance coverage. Considering the language in both the mortgage and a notification given to the borrower at closing, the court found it plausible that the original lender could have intended to limit the borrower's flood insurance obligation at

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<sup>51</sup> *Coastal Neurology, Inc. v. State Farm Mutual Automobile Insurance*, 458 Fed. Appx. 793, 2012 WL 205800 (11<sup>th</sup> Cir. 2012).

<sup>52</sup> *American Dental Association v. WellPoint Health Networks Inc.*, No. 11-11208, 2012 WL 5233562 (11<sup>th</sup> Cir. 2012).

<sup>53</sup> 695 F.3d 129 (1<sup>st</sup> Cir. 2012).

the level of coverage required by federal law, instead of at a higher amount set by the current lender.

The Fifth Circuit reversed certification of a Rule 23(b)(3) class of homeowners claiming that a title insurance company withheld insurance discounts mandated under Texas law.<sup>54</sup> The named plaintiffs alleged that the defendant failed to comply with Texas law entitling a mortgagor who refinances a mortgage to a sliding-scale discount on a title insurance policy. The plaintiffs argued that class certification was appropriate because the transactions at issue involve standard documents and the class members and their damages could be identified using the defendant's business records, and the district court agreed. The Fifth Circuit reversed and remanded, holding that plaintiffs failed to satisfy the predominance requirement. Citing to its decision in *Benavides v. Chicago Title Ins. Co.*,<sup>55</sup> the Fifth Circuit found that the questions presented by plaintiffs could not be commonly resolved for all class members in one universal decision. Instead, the fact-finder would have to engage in a file-by-file review in order to determine whether each plaintiff qualified for the statutory discount. Because the plaintiffs' claims required individualized inquiries, the court found that none of the questions of law and fact identified by the district court were actually common to the class, and class certification was inappropriate.<sup>56</sup>

In another title insurance case, the Seventh Circuit recently affirmed the denial of certification of a class alleging that First American Title made illegal kickbacks to real estate attorneys in violation of RESPA.<sup>57</sup> First American sold title insurance through its attorney title program, in which it paid the consumer's real estate attorney to conduct a title examination and determine whether the title was insurable. Plaintiffs claim that this program violates section 8 of RESPA, which prohibits kickbacks and fee splitting. The district court declined to certify a class, finding that individual inquiries would be necessary to determine liability for each class member. Plaintiffs then attempted to limit the class to those persons where a "search summary sheet" provided by the title agency to the attorney was returned to the agency with "no charges" and the attorney was paid in full. However, the district court again found that liability would still depend on individual inquiries into each transaction. The Seventh Circuit agreed that predominance was not satisfied, opining that RESPA section 8 kickback cases are generally not a good fit for class action treatment because they often require an individualized analysis of each alleged kickback and a specific comparison of the services performed with the payment made. Moreover, plaintiffs' attempts to limit the class by the search summary sheets did not obviate the need for an individual analysis of each claim because a determination that no services were provided would still need

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<sup>54</sup> *Ahmad v. Old Republic National Title Insurance Co.*, 690 F.3d 698 (5<sup>th</sup> Cir. 2012).

<sup>55</sup> 636 F.3d 699 (5<sup>th</sup> Cir. 2011).

<sup>56</sup> See also *Loef v. First American Title Ins. Co.*, No. 2:08-cv-311-GZS (D. Me. Dec. 10, 2012) (granting motion to decertify class of mortgage holders who refinanced at more than approved refinance rate, commonality lacking because of individual liability issues).

<sup>57</sup> *Howland v. First American Title Insurance Co.*, 672 F.3d 525 (7<sup>th</sup> Cir. 2012).

to be confirmed on an individual basis. Thus, because there was no evidence that either the actual services performed or the compensation paid were the same across the entire class, no class-wide relief was possible.

In *Movsesian v. Victoria Versicherung AG*,<sup>58</sup> the Ninth Circuit dismissed the claims of a putative class of persons of Armenian descent who claimed benefits under life insurance policies issued by various insurance companies. Plaintiffs brought their action under a California law that vests California courts with jurisdiction over various insurance actions brought by “Armenian Genocide” victims arising out of policies issued or in effect between 1875 and 1923, and extends the statute of limitations for victims’ claims. The defendants argued that the state law is unconstitutional under the 14th Amendment and preempted under the foreign affairs doctrine. The district court denied the defendants’ motion to dismiss and a three-judge panel affirmed. However, the Ninth Circuit *en banc* vacated the panel’s opinion and reversed the district court’s decision. Relying on the doctrine of field preemption, the court of appeals found that the law was barred under the foreign affairs doctrine because it intruded on the field of foreign affairs without addressing a traditional state responsibility. The law did not involve a traditional state responsibility because its purpose was to provide monetary relief and a friendly forum for individuals who suffered from specific foreign events. Moreover, California’s law was found to intrude on powers reserved for the federal government in regulating foreign affairs.

In *Woodhams v. Allstate Fire and Casualty Co.*,<sup>59</sup> insureds brought a purported class action against related insurance companies arguing that the defendants’ fire insurance policy runs afoul of New York law. Allstate’s fire insurance policy pays homeowners for the actual cash value of the damaged property and also obligates Allstate to reimburse a policyholder for actual replacement or repair costs incurred within 180 days of the damage. Following fire damage to their home, plaintiffs filed a claim with Allstate and received the actual cash value of their damaged property. However, Allstate denied plaintiffs’ additional reimbursement for repairs because the repairs were not made within 180 days of the actual cash value payment. The district court granted the defendants’ motion to dismiss and the Second Circuit affirmed, finding that Allstate’s policy did not violate state law and that Allstate did not breach the terms of the policy.

The Eighth Circuit held that damages resulting from unsolicited fax advertisements sent in violation of the Telephone Consumer Protection Act are covered under the provisions of the insured’s commercial insurance policy.<sup>60</sup> The Court held that the plain meaning of

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<sup>58</sup> 670 F.3d 1067 (9<sup>th</sup> Cir. 2012) (en banc).

<sup>59</sup> 453 Fed. Appx., 108, 2012 WL 5834 (2d Cir. 2012).

<sup>60</sup> *Owners Insurance Company v. European Auto Works, Inc.*, 695 F.3d 814 (8<sup>th</sup> Cir. 2012).

"publication" under the policy is broad enough to include the dissemination of fax advertisements, and thus damages for the statutory violation were covered.<sup>61 62</sup>

## 2. Banking

2012 has been a busy year for class action litigation against banks and other financial institutions, with several high profile class actions proceeding that challenge bank fees and collection practices.

We profile three trends in banking class action litigation—first, the infamous *In re Checking Account Overdraft Litigation* class action MDL; second, some recent litigation over the Electronic Funds Transfer Act (EFTA); and third, some recent developments in banks' attempts to use organic federal banking statutes to preempt class actions arising under state consumer protection statutes.

### ***In re Checking Account Overdraft Litigation – Has Concepcion Come To Save The Day?***

One of the highest profile string of class actions to hit the banking sector in years is the *In re Checking Account Overdraft Litigation* MDL pending in U.S. District Court in Miami, Florida. At issue is a banking practice where banks "re-order" items presented for payment on a customer's account in order from highest to lowest dollar amount. Plaintiffs contend that this "re-ordering" practice allows banks to amplify the number of overdraft fees charged to a customer's account.

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<sup>61</sup> Some lower court decisions in class actions involving life insurance during 2012 are noteworthy. *Andrews v. Nationwide Mutual Insurance Co.*, 2012 Ohio 4935 (2012) (in putative class action against life insurer for failing to search death master file and determine whether insureds had died and death benefits were due, affirming dismissal because plaintiff lacked standing and claims barred by policy requiring claim for payment of benefits); *Thao v. Midland National Life Ins. Co.*, 2012 U.S. Dist. LEXIS 72277 (E.D. Wisc. May 24, 2012) (denying class certification of claims that life insurer improperly adjusted rates based on cost of insurance that was contrary to the policy); *Yue v. Conseco Life Ins. Co.*, 2012 U.S. Dist. LEXIS 46565 (C.D. Cal. Apr. 2, 2012) (certifying injunctive relief class of current policyholders to enjoin rate increase based on varying methods of determining cost of insurance charges); *Rowe v. Bankers Life & Casualty Co.*, 2012 U.S. Dist. LEXIS 43198 (N.D. Ill. Mar. 29, 2012) (denying certification of class based on sales practices for annuities); *Vander Luitgaren v. Sun Life Assurance Co. of Canada*, 2012 U.S. Dist. LEXIS 164983 (D. Mass. Nov. 19, 2012) (dismissing claim that creation of retained asset accounts violated ERISA fiduciary duty in management of plan assets, but allowing to proceed claim that paying benefits through retained asset accounts and determining interest rates breached fiduciary duty).

<sup>62</sup> Other decisions involving property and casualty and medical benefits bear mention. *Folks v. State Farm Mutual Automobile Ins. Co.*, 2012 U.S. Dist. LEXIS 43294 (D. Colo. Mar. 29, 2012) (denying class certification of claims for failure to offer enhanced PIP coverage based primarily on voluntary relief program); *Cox v. Allstate Ins. Co.*, No. 5:07-cv-01449 (W.D. Okla. Mar. 28, 2012) (denying certification of class claims for first party claims for wildfire damage based on failure to advise of recoverable depreciation and method of increasing policy limits resulted in unduly high premiums); *Stiers v. State Farm Insurance*, 2012 U.S. Dist. LEXIS 87591 (E.D. Tenn. June 25, 2012) (dismissing putative class claims for overhead and profit omitted from actual cash value estimate, but paid with costs of repair).

Most of the banks' account agreements contained mandatory arbitration provisions, and the banks moved to compel arbitration under the Federal Arbitration Act. The district court denied those motions, holding the arbitration provisions were unconscionable. Some of the defendants settled thereafter, reportedly agreeing to pay out more than \$1 billion dollars.

Then the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion*,<sup>63</sup> which breathed new life into the banks' arbitration defense. In light of *Concepcion*, the Eleventh Circuit Court of Appeals remanded several appeals from the denial of arbitration motions back to the district court for reconsideration. Thereafter, several of the defendants were able to compel putative class members to arbitrate their disputes.<sup>64</sup> As a practical matter, enforcement of the arbitration provisions has already resulted in the dismissal of the class claims against SunTrust and Regions on December 12 and 21, 2012 after Plaintiffs conceded they lacked the "financial ability to pursue [the] matter" if compelled to individually arbitrate.

Of course, each bank's arbitration provision is different. As a result, litigation in the MDL continues over the enforceability of the specific arbitration provisions applicable to each putative class. We will keep an eye on developments in this high profile MDL.

### ***EFTA Litigation***

Another active area for class action litigation has been claims against banks for alleged violations of the Electronic Fund Transfer Act (EFTA) due to inadequate or non-existent notices on bank ATM machines warning consumers of ATM-related fees. This litigation hit a significant roadblock earlier this year when two district courts denied class certification of EFTA classes on superiority and predominance grounds.

In *Ballard v. Branch Banking & Trust Co.*,<sup>65</sup> plaintiffs sought to certify a class of all persons who withdrew money from an ATM located at 614 H. St., N.W., in Washington, D.C. during part of 2011. The district court denied class certification on superiority grounds, finding that logistical difficulties associated with identifying and contacting each ATM user rendered the class vehicle impractical.<sup>66</sup> The court concluded individual contact with each putative class member was required to verify the member was a "consumer," a finding required to establish standing to recover under EFTA.

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<sup>63</sup> \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

<sup>64</sup> See, e.g., *In re Checking Acct. Overdraft Litig.*, 672 F.3d 1224, 1228-1229 (11<sup>th</sup> Cir. 2012) (holding that Region Bank's arbitration clause was not unconscionable and compelling arbitration); *Buffington v. SunTrust Banks, Inc. (In re Checking Acct. Overdraft Litig.)*, 459 Fed. Appx. 855, 858-859 (11<sup>th</sup> Cir. 2012) (same); *Given v. M&T Bank Corp. (In re Checking Acct. Overdraft Litig.)*, 674 F.3d 1252 (11<sup>th</sup> Cir. 2012) (same).

<sup>65</sup> 284 F.R.D. 9 (D.D.C. 2012).

<sup>66</sup> *Id.* at 14-15.

In *Brown v. Wells Fargo Bank, N.A.*,<sup>67</sup> decided only weeks after *Ballard*, the Minnesota District Court declined to certify a similar class of ATM users who alleged that a certain model of a bank's ATM failed to provide EFTA fee notices. Plaintiffs tried to solve the notice problem identified in *Ballard* by arguing that the defendant bank could identify all the ATM machines that had the affected design, then enlist the aid of other banks to identify and contact those class members who used the bank's ATM but were not the bank's customers.<sup>68</sup> The court rejected plaintiffs' approach, finding plaintiffs failed to identify how the bank could identify the affected ATMs and compel other institutions to cooperate with the notification effort.<sup>69</sup> Finally, the district court also found that common questions did not predominate, because plaintiffs sought to certify an actual damages class, and to recover actual damages under EFTA, plaintiffs must demonstrate detrimental reliance—an inherently individual, rather than class-wide, determination.<sup>70</sup>

### ***Are Class Actions Challenging Banking Practices Preempted By Federal Banking Regulations?***

The final trend we have seen in banking class actions this year is an attempt by banks to argue that state consumer protection statutes are preempted by federal organic banking statutes (e.g., the National Bank Act). So far, this emerging theory has met with a cold reception in the courts.

For example, in *Peterson v. Kitsap Comm. Fed. Credit Union*,<sup>71</sup> plaintiffs alleged that a federal credit union's practice of charging consumers a "reconveyance fee" upon the satisfaction of their mortgages violated Washington's Consumer Protection Act because the fee included an allegedly undisclosed \$26 "processing" fee.<sup>72</sup> The credit union moved for summary judgment, arguing that the WCPA was preempted by the Federal Credit Union Act, which reserves to the National Credit Union Administration the right to regulate the terms of repayment of credit union loans.<sup>73</sup> The court rejected this argument, narrowly construing the preemptive force of the FCUA to cover the substantive repayment terms themselves, but not the union's disclosure obligations regarding those terms.<sup>74</sup>

A pair of cases narrowly construed regulations promulgated under the National Bank Act to avoid preempting state consumer protection laws. In *Epps v. J.P. Morgan Chase Bank, N.A.*,<sup>75</sup> a customer defaulted on an automobile retail installment sales contract, leading to the repossession of the car. The customer brought a class action, alleging

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<sup>67</sup> 284 F.R.D. 432 (D. Minn. 2012).

<sup>68</sup> *Id.* at 444-45.

<sup>69</sup> *Id.* at 445.

<sup>70</sup> *Id.* at 446.

<sup>71</sup> 287 P.3d 27 (Wash. App. 2012).

<sup>72</sup> *Id.* at 31.

<sup>73</sup> *Id.* at 34-35.

<sup>74</sup> *Id.* at 35-36.

<sup>75</sup> 675 F.3d 315 (4<sup>th</sup> Cir. 2012).

that the notices the bank issued to the customer in connection with the repossession violated provisions of Maryland's Credit Grantor Closed End Credit Provisions (the CLEC) by failing to disclose the location where the car would be sold and certain other details.<sup>76</sup> The trial court dismissed the CLEC and other claims, concluding that those acts were preempted by OCC regulations and the National Bank Act. The Fourth Circuit reversed, holding that the then-applicable regulation in question—12 C.F.R. § 7.4008(d)(1), which preempted state laws that “obstruct, impair, or condition a national bank’s ability to fully exercise its Federally authorized non-real estate lending powers” – was not broad enough to preempt the CLEC. In so doing, the Fourth Circuit held that the regulation only prohibited state regulation of powers granted by the NBA itself—and that the power to enforce a bank’s rights and remedies arose under state law and was subject to regulation.<sup>77</sup>

A recent Ohio case followed *Epps* in a similar case brought under Ohio’s Retail Installment Sales Act. In *White v. Wells Fargo Bank, N.A.*,<sup>78</sup> the defendant sought dismissal based on 12 C.F.R. § 7.4008(d)(8), which preempted state regulation of disclosure and content included in “credit-related documents,” arguing that its repossession notices were “credit-related documents.” The court denied the motion to dismiss, finding that repossession notices were not related to the extension of credit and thereby did not fall within § 7.4008(d)(8)’s reach. Further, the court applied the savings provision in § 7.4008(e)(4) to hold that Ohio’s law was a state regulation of the “right to collect debts,” which were expressly *not* preempted by the NBA and OCC regulations.<sup>79</sup>

Notwithstanding these cases, the scope of federal preemption in the area of banking regulation is fairly broad. Banks that face class claims arising under consumer protection statutes should carefully analyze what preemption defenses may be available.

### 3. Consumer products

In 2012, there were significant developments in consumer products class action cases, and class action lawyers at BakerHostetler represented clients that were part of some of these important court decisions.

#### ***Nationwide Class Certification Under California Consumer Protection Statutes***

*Mazza v. American Honda Motor Co.*,<sup>80</sup> is an important decision by the Ninth Circuit that established significant limits on the circumstances in which California’s consumer protection laws can apply to transactions that took place in other states. This decision

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<sup>76</sup> *Id.* at 318-19.

<sup>77</sup> *Id.* at 323-24.

<sup>78</sup> No. 1:12-cv-943, 2012 WL 4958516 (N.D. Ohio Oct. 17, 2012).

<sup>79</sup> *Id.* at \*4.

<sup>80</sup> 666 F.3d 581, 585 (9<sup>th</sup> Cir. 2012).

provides a strong basis for defendants to challenge the certification of nationwide classes in California-based consumer product cases.

In *Mazza*, the district court certified a nationwide class of purchasers and lessees of Acura RLs who alleged that Honda had misrepresented the manner in which its Collision Mitigation Braking System (“CMBS”) operates. The plaintiffs – who were from Florida and Maryland – alleged that CMBS was falsely advertised in a variety of media, including a product brochure, television commercials, magazine advertisements, Acura’s website and magazine, and the owner’s manual. Even though the plaintiffs bought their cars in Florida and Maryland, they argued that the advertising was created in California and violated California’s (plaintiff-friendly) consumer protection laws. The district court certified a nationwide class of consumers who purchased or leased new or used Acura RL cars with CMBS, on the premise that California consumer protection statutes could be applied even to out-of-state consumers who purchased the cars outside of California.

The Ninth Circuit reversed and vacated the district court’s order certifying a nationwide class. First, the court held that the class did not satisfy the “predominance” prong of Rule 23(b)(3) because “variances in state law overwhelm common issues and preclude predominance for a single nationwide class.” The court noted that California law may be applied extraterritorially on a class wide basis, *i.e.*, to transactions that took place outside the state, only if “the interests of other states are not found to outweigh California’s interest in having its law applied.” Applying California’s choice of law rules (the “governmental interest” test), the court first found that the consumer protection laws in the other states differed materially from those in California. The court then looked at the interests of the various jurisdictions in having their own laws applied, and stressed that each state has the right to determine the proper “balance between protecting consumers and attracting foreign businesses.” The court held that the district court “did not adequately recognize that each foreign state has an interest in applying its law to transactions within its borders and that, if California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce.” The district court’s reasoning “elevated all states’ interests in consumer protection to a subordinate level, while ignoring or giving too little attention to each state’s interest in promoting business.” The Ninth Circuit concluded that each class member’s claims “should be governed by the consumer protection laws of the jurisdiction in which the transaction took place.”

Second, the court also ruled that common questions of fact did not predominate, providing further support for vacating class certification. The court found that Honda’s marketing campaign for the CMBS was limited in scope and, therefore, was distinguishable from *In re Tobacco II Cases*,<sup>81</sup> in which the California Supreme Court held that reliance on the part of all absent class members could be presumed where the

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<sup>81</sup> 46 Cal. 4<sup>th</sup> 98 (2009).

allegedly false advertising was part of an “extensive and long-term advertising campaign.”<sup>82</sup> The court explained that a “presumption of reliance does not arise when class members were exposed to quite disparate information from various representatives of the defendant,” and found that the limited scope of the advertising in that case made it unreasonable to assume that all class members viewed it. Therefore, the Ninth Circuit concluded that the class, as certified, was overbroad because it “almost certainly includes members who were not exposed to, and therefore could not have relied on, [the] allegedly misleading advertising material.”

The Ninth Circuit’s California conflict of law analysis in *Mazza* has put a serious stake in the heart of plaintiffs attempting to use California consumer protection laws – and their relatively flexible standing and injury requirements – to reach to claims of national or multi-state classes of consumers. However, it is important to note that simply citing to *Mazza* may not be sufficient to block certification of a nationwide class of consumers.<sup>83</sup>

In *Rikos v. The Procter & Gamble Company*, BakerHostetler class action lawyers represent Procter & Gamble in a consumer class action in the Southern District of Ohio, in which the district court granted Procter & Gamble’s motion to strike the class nationwide class allegations asserted in the complaint.<sup>84</sup> The plaintiff alleged that Procter & Gamble falsely advertised its probiotic product, and asserted claims under California’s consumer protection statutes, and for breach of express warranty on behalf of a nationwide class. With respect to the claims brought under California’s consumer protection statutes, the court ruled that it did have to reach the choice of law issues addressed in *Mazza* because it found that those claims could not be constitutionally applied to out of California purchases. Because Procter & Gamble is headquartered in Ohio, and plaintiff did not allege that any of the relevant marketing, packaging, or product development decisions were made in California (unlike the allegations in *Mazza*),<sup>85</sup> the court concluded that a nationwide class could not be certified under the California statutes.

With respect to the warranty claims, the court found, similar to *Mazza*, that the express warranty laws of California and the other states differed materially, that each state

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<sup>82</sup> *Mazza*, 666 F.3d at 596 (quoting *In re Tobacco II Cases*, 46 Cal. 4<sup>th</sup> at 328).

<sup>83</sup> Some district courts have interpreted *Mazza* as placing substantial burden on defendants to establish that material differences in the various state laws exist and that the foreign states have greater interest in their laws applying. See, e.g., *In re POM Wonderful LLC Marketing and Sales Practices Litigation*, No. 10-02199, 2012 U.S. Dist. LEXIS 141150, at \*12-\*14 (C.D. Cal. Sept. 28, 2012) (finding that POM failed to satisfy burden of showing that there were material differences between California and other state consumer protection laws or that the interests of any foreign jurisdiction outweighed California’s interest in applying its own consumer protection laws in that case).

<sup>84</sup> No. 1:11-cv-226, 2012 U.S. Dist. LEXIS 25104, at \*2, \*21 (S.D. Ohio Feb. 28, 2012).

<sup>85</sup> Honda, the defendant in *Mazza*, was headquartered in California, as was the advertising agency that created that allegedly false advertising. 666 F.3d at 590 (“California has a constitutionally sufficient aggregation of contacts to the claims of each putative class member in this case because Honda’s corporate headquarters, the advertising agency that produced the allegedly fraudulent misrepresentations, and one fifth of the proposed class members are located in California.”).

where the product was purchased or sold had an interest in applying its own express warranty laws, and that those states had the predominant interest in the application of their laws. Accordingly, the court found that “individual questions of law predominate” plaintiff’s express warranty claims and that a nationwide class could not be certified.

### ***Plausibility and the “Reasonable Consumer” Standard***

Two cases decided in 2012 illustrate the point that courts will look carefully at allegations in consumer product cases – often where plaintiffs pull out single words or phrases and allege that those excerpted words render advertising false and misleading – and dismiss implausible claims before companies are forced to spend massive amounts of money on discovery, experts, and motion practice.

In *Carrea v. Dreyer’s Grand Ice Cream, Inc.*,<sup>86</sup> a California consumer class action, in which BakerHostetler class action lawyers participated in representing Dreyer’s, the Ninth Circuit affirmed the dismissal at the early pleading stage of a case in which the plaintiff alleged that Dreyer’s misleadingly marketed its “Drumstick” frozen dairy desserts. The plaintiff claimed that Dreyer’s packaging was misleading because it stated that the product contained “0g Trans Fat” per serving, which plaintiff alleged would lead “reasonable consumers” to believe that Drumstick desserts were more nutritious and healthy than other frozen desserts. Plaintiff also alleged that the use of the terms “Original Sundae Cone,” “Original Vanilla,” and “Classic,” to describe Drumstick desserts were false and misleading because these terms would lead a “reasonable consumer” to believe that the Drumstick product contained the same ingredients as when they were first invented in 1928, which according to plaintiff, would also lead those consumers to believe that the ingredients were more wholesome and nutritious than other desserts.

The Ninth Circuit agreed with the district court that the state law claims challenging the “0g Trans Fat” statements – which fully complied with federal labeling laws – were preempted under the Federal Food, Drug and Cosmetic Act, as amended by the Nutrition Labeling and Education Act.

The court also rejected plaintiff’s attempt to pluck selective phrases from the product packaging out of context, finding “[i]t is implausible that a reasonable consumer would interpret ‘Original Sundae Cone,’ ‘Original Vanilla,’ and ‘Classic,’ to imply that Drumstick is more wholesome or nutritious than competing products,” and also noted that the terms do not modify “recipe,” “ingredients,” “1928” or any other term “that might suggest that the modern Drumstick is identical in composition to its prototype.” The Ninth Circuit further found that “it strains credulity to claim that a reasonable consumer would be misled to think that an ice cream dessert, ‘with chocolate coating topped with nuts,’ is healthier than its competitors simply by virtue of these ‘Original’ and ‘Classic’ descriptors.”

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<sup>86</sup> 475 Fed. Appx. 113, 115 (9<sup>th</sup> Cir. 2012).

In *Rooney v. Cumberland Packaging Corp.*,<sup>87</sup> the District Court for the Southern District of California also dismissed with prejudice a plaintiff's claims pursuant to the California Unfair Competition Law, False Advertising Law, among others, and found that, contrary to plaintiff's allegations, a reasonable consumer would not be misled by the phrase "in the raw" on Sugar in the Raw product packaging into believing that the product contains completely unprocessed or unrefined sugar cane. In its ruling, the court emphasized that the entire context of a package is relevant and noted that the Sugar in the Raw box "repetitively and clearly indicates that the product contains pure natural cane turbinado sugar [a processed sugar]. [] Nowhere on the box do the words 'unprocessed' or 'unrefined' appear." The court further noted that "the description on the back of the box states that the product is natural premium turbinado cane sugar but does not state that this is the result of less refinery or less processing."

### **"Lack of Substantiation" Theory**

A standard relating to "lack of substantiation" claims, *i.e.*, where a plaintiff alleges that a defendant does not have adequate scientific substantiation for its advertising claims, also started to emerge in 2012. In *Scheuerman v. Nestlé Healthcare Nutrition Inc.*,<sup>88</sup> the District Court for the District of New Jersey granted in part Nestlé's motion for summary judgment and motion to dismiss in a putative consumer class action, resulting in the dismissal of all but one claim (for breach of warranty). The complaint alleged false advertising under California, New Jersey, and Pennsylvania law relating to a children's drink called "Boost® Kid Essentials," which was sold with a straw that contained a probiotic ingredient. The court agreed with Nestlé that the plaintiff's claims were based on the theory that Nestlé lacked scientific substantiation for the advertising claims made regarding the drink. The court found that there is no private right of action for lack of substantiation under the consumer protection statutes at issue, and that a plaintiff must affirmatively prove that the advertising is false or misleading (not just that it is not substantiated by a certain level of scientific proof). The court further found that, notwithstanding lengthy discovery and the opinions of three experts, the plaintiffs failed to show that Nestlé's claim that the advertised health benefits were "clinically shown" were false or misleading, especially in light of the fact that Nestlé produced over 40 scientific articles and studies supporting the advertising claims. The court held that, while the plaintiffs' experts took issue with the strength and significance of Nestlé's studies, those criticisms did not satisfy the plaintiffs' burden of demonstrating that the "clinically shown" advertising claims were false or misleading. The only surviving claim was breach of express warranty, and only because of the parties' failure to address that claim in detail.

*Stanley v. Bayer Healthcare, LLC*,<sup>89</sup> is another case similar to *Scheuerman* in which the District Court for the Southern District of California granted Bayer's motion for summary

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<sup>87</sup> No. 12-CV-003, 2012 U.S. Dist. LEXIS 58710, at \*10-13 (S.D. Cal. Apr. 16, 2012)

<sup>88</sup> No. 10-3684, 2012 U.S. Dist. LEXIS 99397, at \*37 (D.N.J. July 16, 2012).

<sup>89</sup> No. 11-cv-862, 2012 U.S. Dist. LEXIS 47895, at \*1-\*4, \*33 (S.D. Cal. Apr. 3, 2012).

judgment in a consumer class action in which the plaintiff alleged under California consumer protection laws that Bayer's probiotic supplement was falsely marketed as promoting immunity and digestive health benefits. Plaintiff alleged that the advertised attributes were not "substantiated by the vast majority of generally accepted scientific literature . . . relating to probiotics." The court agreed with Bayer that there is no private right of action for "lack of substantiation" under California's consumer protection laws, and that the plaintiff failed to meet her burden of proving that the challenged labeling statements were false or misleading. The court found that the opinions of plaintiff's experts that Bayer's advertising was not substantiated with the level of scientific proof that they believe was required, could not establish that the challenged advertising was actually false.

### ***Certification Of Classes Where Some Class Members Did Not Suffer Harm***

Two decisions from the Sixth and Seventh Circuits, *Glazer v. Whirlpool* and *Butler v. Sears Roebuck and Co.*, discussed above in Section II.C., are particularly relevant to recent developments in class actions relating to consumer products. Both cases involved classes that were defined so broadly that they included consumers who did not actually experience problems with the products.

In *Glazer*,<sup>90</sup> the Sixth Circuit affirmed the district court's decision to certify the class, finding that the district court properly concluded that whether design defects proximately caused the mold or mildew and whether Whirlpool adequately warned consumers about the propensity for mold growth, were liability issues common to the plaintiff class and capable of class wide resolution. Importantly, the Sixth Circuit also rejected Whirlpool's argument that the class as certified was overly broad because it included Duet owners who had not experienced a mold problem. The court found that certification is appropriate if class members complain of a pattern or practice that is generally applicable to the class as a whole even if some class members have not been injured by the challenged practice.

On September 14, 2012, Whirlpool petitioned the Supreme Court for a writ of certiorari. The questions presented in the petition are: (1) Whether a class may be certified under Rule 23(b)(3) even though most class members have not been harmed and could not sue on their own behalf; (2) Whether a class may be certified without resolving factual disputes that bear directly on the requirements of Rule 23; and (3) Whether a class may be certified without determining whether factual dissimilarities among putative class members give rise to individualized issues that predominate over any common issues.<sup>91</sup> Perhaps most significantly, Whirlpool argued in its petition that the certification of a class comprised predominantly of members who did not suffer any harm (since they did not experience the mold or odor problems) is inconsistent with the Supreme Court's

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<sup>90</sup> 678 F.3d 409, 421 (6<sup>th</sup> Cir. 2012).

<sup>91</sup> <http://blog.pacificlegal.org/wordpress/wp-content/uploads/2012/10/Whirlpool-v-Glazer-cert-petition-as-sent-to-printer-091312.pdf>

ruling in *Wal-Mart Stores Inc. v. Dukes*,<sup>92</sup> which requires that named plaintiffs and absent class members share a common injury (in order to satisfy Rule 23(a)(2)'s commonality requirement).<sup>93</sup> Respondents filed their brief in opposition on November 30, 2012 and Whirlpool filed its reply on December 11, 2012.<sup>94</sup>

In *Butler*, the Seventh Circuit “accepted the appeals in order to clarify the concept of ‘predominance’ in class action litigation.” Whirlpool argued that common questions of fact concerning the mold problem and its consequences did not predominate over individual questions since Whirlpool made a number of design modifications to the washing machines, and as a result, some contained different defects and others possibly contained no defects. The Seventh Circuit rejected this argument, finding that “[t]he basic question in the litigation – were the machines defective in permitting mold to accumulate and emit noxious odors? – is common to the entire mold class, although the answer may vary with the differences in design.” The court also found that Sears’ argument that most members of the class did not experience a mold problem was “an argument not for refusing to certify the class but for certifying it and then entering a judgment that will largely exonerate Sears – a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment.” The court referenced the Sixth Circuit’s decision in *Glazer*, stating that “[f]or us to uphold the district court’s refusal to certify such a [mold] class would be to create an intercircuit conflict – and a gratuitous one, because as should be apparent from the preceding discussion, we agree with the Sixth Circuit’s decision.”

### ***Cy Pres in Consumer Class Action Settlements***

Finally, the Ninth Circuit’s 2012 decision in *Dennis v. Kellogg Co.*, discussed in Part II.G, above, is of critical importance in the consumer products area. The Ninth Circuit’s ruling in that case on the form that *cy pres* contributions may take is particularly relevant to consumer products class actions because it is difficult to identify and distribute payments directly to class members. Every party seeking to obtain court approval for a consumer class action settlement should consider the standards set forth in this important decision.

### **B. Privacy**

During 2012, privacy class actions continued to trend toward two major categories: 1) actions that arose out of a data breach event and 2) actions brought to prosecute an alleged consumer privacy right.

### ***Article III Standing in Data Breach Class Actions***

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<sup>92</sup> 131 S. Ct. 2541 (2011).

<sup>93</sup> *Id.* at 2551 (“Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.”) (internal quotation omitted).

<sup>94</sup> <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-322.htm>

A key issue in data breach class actions is the question of what types of injuries are necessary to confer standing to sue. In general, many of the federal district courts that have dismissed data breach class actions due to a failure to allege or prove injury have done so on Article III standing grounds. As a general proposition, it remains true that plaintiffs have not been able to establish standing where the conduct and harm alleged was simply use or disclosure of personal information, and where the complaint only alleged hypothetical or future injury. However, there are signs that courts may be more willing to consider what were once considered speculative injuries as sufficient to confer Article III standing.

In *Resnick v. Avmed, Inc.*,<sup>95</sup> the 11th Circuit reversed the dismissal of all but two claims in a class action that arose from a data breach. In *Resnick*, two unencrypted Avmed laptops containing personal health information (“PHI”) and personally identifiable information (“PII”) for approximately 1.2 million Avmed customers were stolen, and the plaintiffs alleged that they were the victims of identity fraud approximately 10 to 14 months after the theft. The Southern District of Florida dismissed plaintiffs’ claims, in part because the complaint failed to allege cognizable injury.

The Eleventh Circuit reversed on all but two counts. The court held that the plaintiffs properly alleged an injury in fact that was fairly traceable to the Avmed theft by alleging that they were careful with their own PII, that they were the victims of identity theft, and that their identities were stolen only after the Avmed incident. And, because Plaintiffs alleged they suffered monetary damages, the court held that their alleged injuries were cognizable and redressable. Based on similar reasoning, the court also found that under the *Twombly* standard of federal pleading, the plaintiffs had properly alleged causation for purposes of their common law claims. The court further found that the plaintiffs stated an unjust enrichment claim because they paid Avmed premiums, part of which allegedly went to Avmed’s data security expenses.

Likewise, in *In re: Sony Gaming Networks and Customer Data Security Breach Litigation*,<sup>96</sup> the court found that the plaintiffs had alleged sufficient injury to establish Article III standing. Citing to *Krottner v. Starbucks*,<sup>97</sup> which held that future injury could be cognizable if it were “real and immediate” rather than “conjectural” or “hypothetical,” the court found that under the circumstances, by “alleg[ing] that their sensitive Personal Information was wrongfully disseminated, thereby increasing the risk of future harm,” the plaintiffs had stated “a cognizable loss sufficient to satisfy Article III’s injury-in-fact requirement.” The court largely dismissed the plaintiffs’ claims for failure to state a claim, however, because those alleged injuries, while sufficient for standing purposes, were not sufficient for purposes of stating a claim under the law.

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<sup>95</sup> No. 11-13694 (11<sup>th</sup> Cir. Sep. 5, 2012).

<sup>96</sup> MDL No.11md2258 AJB (MDD); Civil Case Nos. 11-cv-2119, 11-cv-2120 (S.D. Cal.).

<sup>97</sup> 628 F.3d 1139, 1142 (9<sup>th</sup> Cir. 2010).

One key difference between *Avmed* and *Sony* is the inability of the plaintiffs in the *Sony* case to allege any identity theft or out-of-pocket expenses resulting from the breach. Thus, the probability of a dismissal for lack of injury or standing in a data breach class action appears to be higher where there is no evidence of identity theft or other use of any compromised information.

### ***Claims for Statutory Damages***

Plaintiffs have had some success in avoiding the standing or lack of injury defense by bringing claims for statutory damages. With respect to state claims, over the last several years, plaintiffs have frequently brought claims under state consumer protection statutes and state data breach statutes.

The second key category of privacy cases are those brought under a federal or state consumer privacy statute. Federal consumer privacy statutes include the Fair Credit Reporting Act as amended by the Fair and Accurate Credit Transactions Act (FCRA/FACTA);<sup>98</sup> the Telephone Consumer Protection Act (TCPA);<sup>99</sup> the Driver's Privacy Protection Act (DPPA);<sup>100</sup> the Electronic Communications Privacy Act (ECPA) (18 U.S.C.A. §§ 2510–22); and the Video Privacy Protection Act (VPPA).<sup>101</sup>

Several high profile cases were litigated or settled this year under the VPPA, which provides for damages of \$2,500.00 per violation for improper retention or disclosure of a consumer's video viewing history, including cases against Netflix, Blockbuster, Redbox, and Hulu.<sup>102</sup> Perhaps the most significant development in the law as it relates to the VPPA this year was the ruling in *In re Hulu Privacy Litigation* that rejected Hulu's argument that the VPPA does not apply to online video providers.

Also trending this year were claims under the TCPA, which provides for statutory damages of \$500 or \$1,500 per violation (for willful violations), alleging liability premised on unsolicited text messages. A significant decision this year in the TCPA area was handed down by the U.S. Supreme Court in *Mims v. Arrow Financial Services, LLC*,<sup>103</sup> in which the Court held that TCPA claims arise under federal law and may be asserted in federal court even absent diversity of citizenship jurisdiction. Prior to *Mims*, the federal circuits disagreed over whether the TCPA provided for federal question jurisdiction or whether jurisdiction was limited to state courts and federal suits brought or removed on diversity jurisdiction.

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<sup>98</sup> 15 U.S.C.A. § 1681 et seq.

<sup>99</sup> 47 U.S.C.A. § 227.

<sup>100</sup> 18 U.S.C.A. §§ 2721–25.

<sup>101</sup> 18 U.S.C.A. § 2710.

<sup>102</sup> *In re: Netflix Privacy Litigation*, 5:11-CV-00379 (N.D. Cal.); *Missaghi v. Blockbuster, LLC*, Civil No. 11-2559 (Dist. of Minn.); *Sterk v. Redbox Automated Retail, LLC*, No. 11 C 1729 (N.D. Ill.); *In re Hulu Privacy Litigation*, No. C 11-03764 (N.D. Cal.).

<sup>103</sup> 132 S. Ct. 740 (2012).

As in the data breach cases, a common question that arises in statutory damages cases is whether the named plaintiff must prove some sort of injury to herself and/or members of the putative class in order to recover statutory damages. In some situations, courts have held that no proof of injury is required at all for the recovery of statutory damages; however, in some cases, such as this year's decision in *Sterk v. Best Buy Stores, L.P.*,<sup>104</sup> defendants have been successful in arguing for dismissal on the grounds that the plaintiff had alleged no plausible actual injury.

The problem for all parties in these cases seeking statutory damages is that the damages, when aggregated over hundreds, thousands, or even millions of consumers, can become crippling to the defendant. Accordingly, constitutionally excessive damages is a defense that defendants frequently raise in these cases, though no reported decision appears to have decided the viability of the defense.

### ***Class Certification and Settlement***

To date, class certification battles have been rare in cases arising out of data breach, which is likely explained by the fact that so many defendants have been successful disposing of cases prior to certification. With respect to consumer privacy cases, particularly those that arise out of a defendant's privacy policies, the statutory privacy claims are often litigated on the merits, with little argument around the issue of whether a class can be properly certified, though that certainly is not always the case. For example, in *Local Baking Products, Inc. v. Kosher Bagel Munch, Inc.*,<sup>105</sup> the New Jersey appellate court decided this year, after reviewing cases on both sides of the issue, that TCPA claims were not suitable for class certification because class treatment is not a superior method for handling claims because the statutory damages regime incentivizes individual actions. Further, the court found, common issues did not predominate because of individualized issues over whether calls and faxes were authorized by the consumer.

Frequently, privacy class actions are certified for settlement purposes, and given the immense exposure under statutory damages provisions, settlement at even close to the maximum aggregate value of the claims is a practical impossibility, which creates challenges for both the parties and the courts. Cases are commonly settled for coupons or services, injunctive relief or compliance monitoring (*i.e.*, changes in privacy policies), cy pres awards, or monetary relief to class members in the cases where statutory damages are sought. And while most privacy class action settlements have been approved, in some cases, the courts have been skeptical.

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<sup>104</sup> 2012 WL 5197901, \*7 (N.D. Ill.) (holding that actual injury was required to support standing under the VPPA).

<sup>105</sup> 23 A.3d 469 (N.J. Super. A.D. 2011).

For instance, the district court in *Fraley v. Facebook*<sup>106</sup> declined to grant preliminary approval to a proposed settlement in November. In *Fraley*, the plaintiffs charged that Facebook violated its own privacy policies as it related to the use of Facebook subscribers' information in connection with the "sponsored stories" advertising service. The proposed settlement called for a \$20 million settlement fund, half of which was earmarked for class counsel, and the other half of which would be distributed as cy pres awards. Judge Richard Seeborg specifically questioned the adequacy of compensation to the class in light of the \$750 per violation that would be recoverable under the statute at issue. Judge Seeborg ultimately preliminarily approved, however, of a revised settlement that allowed for payments of up to \$10 per class member.

### C. Employment Discrimination and Wage & Hour

During 2012, employment cases were shaped by many of the same opinions affecting class actions in other subject matter areas, with some unique twists due to the different regulatory environment. While, on balance, the cases in general were more favorable for employers than not, significant issues remain, particularly in the class action waiver context.

#### ***Application of Wal-Mart Stores, Inc. v. Dukes to Employment Claims***

For the most part, courts are following the lead of the Supreme Court's decision in *Wal-Mart* and are refusing to certify a larger number of employment class actions.<sup>107</sup> Some courts, in the wake of *Wal-Mart*, are decertifying cases that previously were certified under the prior law.<sup>108</sup>

Two areas remain unsettled under *Wal-Mart* and bear watching over the coming months and years. The first is whether a court may still certify a larger, even nationwide, class on a single issue as opposed to the entire claim. In the *McReynolds* case discussed earlier, the Seventh Circuit reviewed a potential class of 700 African-American brokers who contended that the employer discriminated against them on the basis of their race through "teaming" and "account distribution" practices. Despite its recognition that *Wal-Mart* had largely made it more difficult to pursue company-wide discrimination claims, it found that the plaintiffs did, indeed, allege company-wide policies and found that a class could be certified on the issue of whether those policies had a disparate impact on minorities. So far, despite creative lawyering by employment plaintiffs' counsel, few courts have taken up the banner of certifying such claims.

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<sup>106</sup> No. C 11-1726 RS (N.D. Cal).

<sup>107</sup> See, e.g., *Bolden v. Walsh Construction*, No. 12-2205 (7<sup>th</sup> Cir. Aug. 8, 2012) (reversing certification of race discrimination action); *Deane v. Fastenal, Inc.*, No. 11-CV-0042 YGR (N.D. Cal. Sept. 27, 2012) (refusing to certify class of retail managers in state law wage and hour case).

<sup>108</sup> See, e.g., *Wackenhut Wage and Hour Cases*, Judicial Council Coordination Proceeding No. 4545 (Los Angeles Sup. Ct. Aug. 1, 2012) (decertifying previously certified class of 13,000 employees); see also *Odle v. Wal-Mart Stores, Inc.*, No. 3:11-CV-2954-O (N.D. Tex. Oct. 15, 2012) (refusing to apply equitable tolling to former members of decertified *Wal-Mart* class; finding the claims time-barred).

The second question remains the application of *Wal-Mart* to collective actions under section 16(b) of the Fair Labor Standards Act (“FLSA”).<sup>109</sup> While section 16(b) does not incorporate the Rule 23 standards, many courts, such as the Second Circuit, have defined its requirements in terms virtually identical to the Rule 23(a)(2) element of commonality. Most courts will apply *Wal-Mart* to state court wage and hour matters under Rule 23.<sup>110</sup> Some courts, at least impliedly, have used the *Wal-Mart* standards in the collective action context.<sup>111</sup> But while there is little authority at the second “motion to decertify” stage, most courts are not applying *Wal-Mart* at the conditional certification phase of collective action litigation.<sup>112</sup>

### ***The California Supreme Court, At Long Last, Decides Brinker***

On April 12, 2012, the California Supreme Court, after a wait of over three years, finally issued its long awaited decision in *Brinker Restaurant Corp. v. Superior Court*,<sup>113</sup> relating to the obligation of California employers to provide rest and meal periods for their employees. The court resolved a split among the California appellate courts and held that:

An employer’s duty with respect to meal breaks . . . is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so.

The court also recognized, consistent with *Wal-Mart*, that the trial court may “properly evaluate” the merits of a case when “evidence or legal issues germane to the certification question bear as well on aspects of the merits.” This is generally a positive standard for employers as oftentimes the merits will demonstrate that certification is not appropriate.

Until *Brinker* was decided, the California rest and meal period requirements were proving a fertile source of claims against employers, although some courts were staying such cases because the standards were so uncertain while the case was

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<sup>109</sup> 29 U.S.C. § 16(b).

<sup>110</sup> See, e.g., *Dalton v. Lee Publications, Inc.*, No. 3:08-CV-01072 (S.D. Cal. April 24, 2012).

<sup>111</sup> See, e.g., *Beecher v. Steak N Shake Operations*, No. 1:11-CV-4102-ODE (N.D. Ga. Sept. 27, 2012); *Deane v. Fastenal*, No. No. C 11-00042 SI (N.D. Cal. Nov. 14, 2011) (appearing to apply *Wal-Mart* to a motion to decertify an FLSA conditionally certified class).

<sup>112</sup> See, e.g., *Myles v. Prosperity Mortgage Co.*, Case No. CCB-11-01234 (D. Md. May 31, 2012); *Spellman v. American Eagle Exp., Inc.*, Case No. 10-1764 (E.D. Pa. July 21, 2011) (refusing to apply *Wal-Mart* at conditional certification stage, but inviting *Wal-Mart* arguments at decertification); but see *MacGregor v. Farmers Ins. Exchange*, No. 2:10-CV-03088 (D.S.C. July 22, 2011) (applying *Dukes* and denying conditional certification).

<sup>113</sup> 165 Cal. 4<sup>th</sup> 1004 (2012).

pending. Following *Brinker*, however, many courts have refused to certify rest and meal period claims because the employer's obligation, as rendered in *Brinker*, requires an individual inquiry.<sup>114</sup>

### ***Offers of Judgment in Collective Actions***

Employers continued to struggle in 2012 with attempts to terminate collective actions under the FLSA with Rule 68 offers of judgment. An example is *Symczyk v. Genesis Healthcare Corp.*, a decision that is discussed above in Section II.G.

In *Pitts v. Terrible Herbst, Inc.*,<sup>115</sup> the Ninth Circuit also decided a case in which the plaintiff's individual claim was only for \$88, and the employer made a Rule 68 offer of \$900 before any motion for class certification had been filed. The Ninth Circuit held that an unaccepted offer of judgment, even one made before a motion to certify a class had been filed, did not moot the case and it ordered the lower court to consider the certification issue.

One problem with *Symczyk* and *Pitts* is their lack of regard for the massive cost of defending even the weakest or most meritless collective action claim. Unless the Supreme Court reverses the *Symczyk*, the net result of these decisions is to negate the value of a Rule 68 offer of judgment to a representative plaintiff in an FLSA collective action, unless the plaintiff actually accepts it.

### ***Class Action Waivers***

Nowhere have seas been more stormy than in the class action waiver arena. Despite the Supreme Court's decisions in *Concepcion* and *Stolt-Nielsen*, the state and lower courts' treatment of those opinions has been less than uniform in employment cases. Adding even more complexity and uncertainty, the National Labor Relations Board has weighed in, declaring that class action waivers may be unfair labor practices, a pronouncement that is already receiving a less than friendly reception in the courts.

Some California courts are defiantly refusing to enforce arbitration provisions containing waivers of class action claims in the employment context.<sup>116</sup> Other courts, including courts in California, have enforced them.<sup>117</sup>

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<sup>114</sup> See, e.g., *Gonzalez v. OfficeMax North America*, No. 8:07-CV-00452-JVS-MLG (C.D. Cal. Nov. 5, 2012); *Kimani v. Healthcare Investments, Inc.*, No. BC432360 (Los Angeles Sup. Ct., May 11, 2012).

<sup>115</sup> No. 10-15965 (9<sup>th</sup> Cir. Aug. 9, 2011).

<sup>116</sup> See, e.g., *Samaniago v. Empire Today LLC* (finding without much analysis that *Concepcion* largely does not affect prior California law), No. A132297 (1<sup>st</sup> App. Dist., Apr. 5, 2012).

<sup>117</sup> See, e.g. *Iskanian v. CLS Transportation Los Angeles, LLC*, No. B235158 (2<sup>nd</sup> App. Dist., June 4, 2012) (compelling arbitration of California wage and hour claims); *Cohen v. UBS Financial Services, Inc.*, No. 12 Civ. 2147 (S.D.N.Y. Dec. 4, 2012) (compelling arbitration of class action wage claims on an

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In *Nitro-Lift Technologies, L.L.C. v. Howard*,<sup>118</sup> the Supreme Court dealt with a case that was not a class action, but did involve issues of the enforcement of arbitration provisions. In that case, the parties entered into a covenant not to compete in an employment agreement that also contained an arbitration provision. The Oklahoma Supreme Court, however, held that as a result of its own view of the importance of state law issues, the question of the enforceability of the covenant was to be decided by a court, and not the arbitrator. The U.S. Supreme Court, in a per curiam decision, reversed and politely admonished the Oklahoma Supreme Court that in our federal system, it was obliged to follow U.S. Supreme Court authority on issues of federal law, including the FAA. This decision is significant because it reflects the tension between the FAA and the Supreme Court, which strongly support arbitration, and state courts that view arbitration agreements in the employment arena with distaste.

On January 3, 2012, in *D.R. Horton*,<sup>119</sup> the NLRB held that the employer violated Section 8(a)(1) of the National Labor Relations Act (“NLRA”) by “requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.” The decision, which affects virtually all employers, also concluded that the Board was not bound by the recent United States Supreme Court rulings on the FAA and class arbitration, because, in its view, they were not implicated. To many management observers, the ruling elevates a procedural device, a class or aggregate proceeding, to the status of an individual statutory right applicable to any employment claim.

The *D.R. Horton* decision is being applied by NLRB Administrative Law Judges,<sup>120</sup> but courts are more skeptical and have largely refused to follow it.<sup>121</sup> The *D.R. Horton* decision itself is currently on appeal before the Fifth Circuit Court of Appeals, Case No. 12-60031, and a decision from that court may persuade still more courts to refuse to enforce it. If *D.R. Horton* becomes the law, class action waivers will become highly problematic for the majority of employers.

#### D. Securities

Akin to the evidentiary issue in *Comcast*, in the securities context, the key issue last year in the securities context was whether materiality needs to be demonstrated at the

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individual basis).

<sup>118</sup> 568 U.S. \_\_\_\_ (additional citation) (Nov. 26, 2012).

<sup>119</sup> 357 NLRB No. 184 (2012).

<sup>120</sup> See, e.g., *Advanced Services, Inc. and Tamita Sheppard Howard*, Nos. 26-CA-6318 and 26-CA-71805 (July 2, 2012).

<sup>121</sup> See, e.g., *LaVoice v. UBS Financial Services*, No. 11 Civ. 2308 (S.D. N.Y. Jan. 13, 2012) (rejecting *D.R. Horton* only 10 days after it was decided in case involving both class and collective claims); *Morvant v. P.F. Chang’s China Bistro, Inc.*, No. 4-11-CV-05405; *Iskanian v. CLS Transportation* (rejecting *D.R. Horton* because arbitration is governed by the FAA, and not simply the NLRA).

class certification stage of a case in order for plaintiff to get the benefit of the fraud-on-the-market presumption of reliance. The Supreme Court heard oral argument in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*,<sup>122</sup> in November, which concerns whether the materiality of an alleged misrepresentation in a fraud-on-the-market case needs to be determined at the class certification stage. The Court appeared divided on the issue.

The fraud-on-the-market theory allows a rebuttable presumption of class-wide reliance in a securities case dealing with stocks traded on an efficient market.<sup>123</sup> Last year, in *Erica P. John Fund, Inc. v. Halliburton Co.*,<sup>124</sup> the Supreme Court held that a plaintiff does not need to prove that the defendants' allegedly deceptive conduct caused plaintiff's loss at the class certification stage, to get the benefit of the fraud-on-the-market presumption of reliance.

In *Amgen*, the Ninth Circuit had held that proof of materiality of an alleged misrepresentation was not required for establishing the fraud-on-the-market presumption of reliance. Several of the Supreme Court justices appeared to agree at oral argument, seeing materiality as a merits issue. Justices Ginsberg, Kagan and Sotomayor, for example, reasoned that the only question on materiality at the class certification stage was whether it was an issue common to the class. As Justice Kagan put it: "... for materiality, the class wins or loses together. If it's material, it's material as to everybody." Meanwhile, Justice Scalia tried to place the issue of materiality in perspective, pointing out that the fraud-on-the-market theory is nothing more than a "shortcut" to getting a class certified, from which one can infer that the materiality debate should play out at the class certification stage.

*Amgen* demonstrates the ongoing debate in the class context at large as to what is a merits versus a class certification issue. In the wake of *Wal-Mart*, courts continue to struggle with the specifics of the divide between class certification and merits issues. The *Amgen* decision may provide some insight into this divide, at least in the securities context.

## E. Antitrust

While only a handful of new antitrust investigations or charges by government agencies were disclosed in 2012, the disclosures continued to result in nearly instantaneous class actions. Within days of the December 2012 disclosure of the DOJ's and State of New York's claims that four bus operators had illegally stopped competing, monopolized a market and raised fares,<sup>125</sup> multiple antitrust class actions with similar allegations were

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<sup>122</sup> No. 11-1085.

<sup>123</sup> See *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

<sup>124</sup> 131 S. Ct. 2179 (2011).

<sup>125</sup> See *United States, et al. v. Twin Am., LLC, et al.*, No. 12-CV-8989 (S.D.N.Y. Dec. 11, 2012).

filed.<sup>126</sup> The governments' claims are notable because they seek to unwind a consummated joint venture which, evidently, did not require clearance under Hart-Scott-Rodino.<sup>127</sup> Similarly, FTC administrative complaints against the three largest U.S. suppliers of ductile iron pipe fittings in early 2012<sup>128</sup> soon led to a consolidated class action tracking the FTC's alleged conspiracy to fix, raise, maintain and stabilize prices for DIPF.<sup>129</sup> In addition to attracting class action plaintiff lawyers, government investigations and charges also were considered by courts as support for the plausibility of antitrust allegations during motions to dismiss during 2012.<sup>130</sup>

### ***Application of Daubert to antitrust class actions was center stage***

Whether and how *Daubert* analysis applies to experts during certification of class actions has been center stage for antitrust cases during 2012. The application of *Daubert* is particularly important for antitrust cases brought under Rule 23(b)(3), because it generally requires plaintiffs to rely on expert analysis to show the proposed class was "impacted" by the alleged antitrust violation and that this can be shown with evidence common to the proposed class.<sup>131</sup> Consequently, whether expert testimony withstands *Daubert* challenges can be the "whole game" for antitrust class actions.<sup>132</sup>

Without doubt, the Supreme Court's review of *Behrend v. Comcast Corp.*,<sup>133</sup> is the most discussed antitrust and *Daubert* case in 2012.<sup>134</sup> The Third Circuit, in *Comcast*, affirmed certification of a class which relied on expert testimony to show predominance and antitrust impact that was "capable of proof at trial" and which "could evolve to become admissible evidence,"<sup>135</sup> as opposed to proving the testimony was in fact trial admissible. The Supreme Court decided it would consider whether a district court is allowed to certify a class without adequate admissible evidence that damages may be measured and quantified on a class-wide basis. The Supreme Court's ruling, expected in the spring of 2013, is widely expected to clarify the standard for application of *Daubert* to experts on class certification in antitrust and other types of class actions.

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<sup>126</sup> See, e.g., *Nobel, et al. v. Twin Am., LLC, et al.*, No. 12-CV-09128 (S.D.N.Y. Dec. 14, 2012); *Hanson v. Twin Am., L.L.C.*, No. 12-CV-09066 (S.D.N.Y. Dec. 12, 2012).

<sup>127</sup> See, e.g., <http://www.antitrustadvocate.com/2012/12/17/i-dont-care-how-much-i-pay-too-much-the-magic-bus/>.

<sup>128</sup> See *In the matter of McWane, Inc. and Star Pipe Prods., Ltd.*, No. 101-0080 (FTC Jan. 4, 2012); *In the Matter of Sigma Corp.*, No. 101-0080 (FTC Jan. 4, 2012).

<sup>129</sup> See *In re Ductile Iron Pipe Fittings (DIPF) Direct Purchaser Antitrust Litigation*, No. 12-00711 (D.N.J.).

<sup>130</sup> See, e.g., *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012); *In re Optical Disk Drive Antitrust Litig.*, No. 3:10-md-2143 (N.D. Cal. April 19, 2012) (viewing DOJ pleas as "an item of relevance as to the plausibility of plaintiffs' conspiracy claims").

<sup>131</sup> See, e.g., *Cordes & Co. Fin. Servs. v. AG Edwards & Sons*, 502 F.3d 91, 107-08 (2d Cir. 2007).

<sup>132</sup> Rebecca Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 Nw. U. L. Rev. 1262, 1271 (2012).

<sup>133</sup> 655 F.3d 182 (3d Cir. 2011).

<sup>134</sup> See <http://www.antitrustadvocate.com/2012/12/06/comcast-lesson-no-1-clearly-raise-daubert-issues/>.

<sup>135</sup> 655 F.3d at 197 & 204 n.13.

While awaiting the Supreme Court's ruling, district courts applied *Daubert* to varying degrees during 2012. A number of courts applied full-blown *Daubert* analysis during the certification stage of antitrust cases.<sup>136</sup> Notably, even a Pennsylvania district court applied a full *Daubert* analysis after determining the Third Circuit's *Comcast* guidance was incomplete.<sup>137</sup> Other courts, in contrast, applied a less rigorous *Daubert* analysis during 2012. For example, *In re Wholesale Grocery Prods. Antitrust Litig.*,<sup>138</sup> explained that "district courts may properly apply a 'focused' or 'tailored' *Daubert* inquiry at class certification stage" because the "main purpose of *Daubert* exclusion is to protect juries from being swayed by dubious scientific testimony" and at the class certification stage, "the Court, not a jury, is the decision maker, and therefore a less stringent analysis is required."<sup>139</sup>

Whichever *Daubert* standard applies, the Seventh Circuit affirmed the standard equally applies to defense and plaintiff experts. In *Messner v. Northshore University HealthSystem*,<sup>140</sup> the court rejected the proposition that the Federal Rules of Evidence apply only to plaintiffs during the class certification stage because they bear the burden of proving satisfaction with Rule 23.<sup>141</sup> The court explained that defendants cannot oppose class certification with inadmissible expert testimony any more than plaintiffs can rely on such testimony in support of certification: "The fact that a defendant is not required to present evidence to defeat class certification does not give that defendant license to offer irrelevant and unreliable evidence."<sup>142</sup>

### ***Food and agriculture antitrust class actions continued to "grow"***

The recent surge of food and agriculture-related antitrust class actions continued to progress through the courts during 2012, with most cases moving closer to trial or settlement. Most notably, partial settlements in *In re Southeastern Milk Antitrust Litigation* were finally approved, after the district court had decertified a subclass and then vacated preliminary approval of a \$140 million settlement days before the scheduled trial.<sup>143</sup> The court subsequently reinstated the settlement, following appointment of separate subclass counsel and recertification of the subclass for

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<sup>136</sup> See, e.g., *Perez, et al. v. State Farm Mut. Auto. Ins. Co., et al.*, No. C 06-01962 (N.D. Cal. July 31, 2012) (excluding expert testimony supporting class certification upon full *Daubert* analysis); *In re Flonase Antitrust Litig.*, No. 08-cv-3301 (E.D. Pa. June 18, 2012) (declining to exclude experts on antitrust class certification, "even making a full *Daubert* examination").

<sup>137</sup> See *In re Chocolate Confectionary Antitrust Litigation*, No. 1935 (M.D. Pa. Dec. 7, 2012).

<sup>138</sup> No. 09:MD-2090 (D. Minn. July 16, 2012).

<sup>139</sup> See also *In re Blood Reagents Antitrust Litig.*, No. 09-2081 (E.D. Pa. Aug. 22, 2012) (certifying class when "plaintiffs have presented a theory of impact that is 'plausible in theory' and susceptible to proof through common evidence, which is sufficient at the class-certification stage").

<sup>140</sup> 669 F.3d 802 (7<sup>th</sup> Cir. 2012).

<sup>141</sup> See *id.* at 814.

<sup>142</sup> *Id.*

<sup>143</sup> See No. 2:08-MD-1000 (E.D. Tenn. Aug. 31, 2011).

settlement purposes.<sup>144</sup> The court then recertified the same subclass for purpose of litigating against the remaining defendants,<sup>145</sup> a decision that withstood a Rule 23(f) petition to the Sixth Circuit.<sup>146</sup> Lawyers in BakerHostetler's antitrust group represent a subclass in *In re Southeastern Milk Antitrust Litigation*.

Another antitrust milk case, *Allen, et al. v. Dairy Farmers of America, Inc., et al.*,<sup>147</sup> also was certified as a class in 2012. *Allen* alleges farmers in the Northeast have received anti-competitively suppressed prices for raw milk. There, the court declined to certify a class in 2011, but upon reconsideration – with additional expert testimony and a subdivision of the proposed class – the court certified subclasses on November 26, 2012.<sup>148</sup> Lawyers in BakerHostetler's antitrust group represent a subclass in *Allen*.

The past year saw significant developments for a number of class actions alleging anticompetitive supply reduction practices by agriculture and food producers and their organizations. In *Edwards, et al. v. National Milk Producers Federation, et al.*,<sup>149</sup> the court declined to dismiss a class action complaint alleging a dairy herd retirement program unlawfully reduces milk supply and inflates prices, after concluding the court has jurisdiction and the Filed Rate Doctrine does not apply to the unregulated portion of raw milk prices. Similarly, in *In re Processed Egg Products Antitrust Litigation*,<sup>150</sup> the court partially denied certain defendants' motions to be dismissed from direct purchasers' complaints that egg producers and trade associations conspired to reduce egg supply and inflate prices because the complaints sufficiently alleged the defendants participated in the challenged supply reduction. Likewise, in *In re Fresh and Process Potatoes Antitrust Litigation*,<sup>151</sup> the court denied motions to dismiss amended complaints, brought by direct and indirect purchasers, alleging potato producers and processors illegally agreed to reduce the supply of potatoes in order to raise prices because the complaints sufficiently alleged the defendants joined an unlawful conspiracy.

Whether any supply reduction class actions can withstand a Capper-Volstead challenge and proceed to trial remains to be seen. The Capper-Volstead Act exempts non-predatory conduct by eligible agricultural producers from application of the Sherman Act.<sup>152</sup> The only court to analyze Capper-Volstead's application to supply control decided the issue is not amenable to a motion to dismiss, *Fresh and Process Potatoes*,<sup>153</sup> but the court provided an "advisory opinion" tentatively concluding that

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<sup>144</sup> See No. 2:08-MD-1000 (E.D. Tenn. Feb. 14, 2011).

<sup>145</sup> See No. 2:08-MD-1000 (E.D. Tenn. Jun. 8, 2012).

<sup>146</sup> See No. 12-0507 (6<sup>th</sup> Cir. Sept. 14, 2012).

<sup>147</sup> No. 5:09-cv-230 (D. Vt. Aug. 30, 2010).

<sup>148</sup> See No. 5:09-cv-230 (D. Vt. Nov. 26, 2012).

<sup>149</sup> Nos. 3:11-CV-04766, 3:11-cv-04791, 3:11-cv-05253 (N.D. Cal. Oct. 30, 2012).

<sup>150</sup> No. 2:08-md-02002 (E.D. Pa. Oct. 4, 2012).

<sup>151</sup> No. 4:10-MD-2186 (D. Idaho July 27, 2012).

<sup>152</sup> See *Md. & Va. Milk Prods. Ass'n, Inc. v. United States*, 362 U.S. 458 (1960).

<sup>153</sup> 834 F. Supp. 2d 1141, 1151-54 (2011).

Capper-Volstead does *not* protect agreements to limit output.<sup>154</sup> In perhaps a preview of how courts will approach this issue, the Ninth Circuit, in *Carlin et al. v. DairyAmerica, Inc. et al.*,<sup>155</sup> determined that an antitrust exemption – the Filed Rate Doctrine – does not bar dairy farmers from seeking damages for alleged underpayment for raw milk resulting from defendants misreporting related dairy prices to the USDA’s office that calculates prices paid for raw milk.

### ***Healthcare-related pricing and allocation class actions proliferate***

Since DOJ and the State of Michigan sued Blue Cross Blue Shield in 2010 to prohibit “most favored nation” pricing provisions (“MFN”) in contracts with hospitals,<sup>156</sup> numerous similar suits have been filed by various healthcare-related parties. Most private class actions allege BCBS’s MFN pricing violates antitrust laws by requiring that BCBS’s providers charge its competitors either more than, or no less than, what the providers charge BCBS for the same services, and that independent Blue Cross and Blue Shield entities have unlawfully divided and allocated health insurance markets to eliminate competition.<sup>157</sup> These cases were consolidated in December 2012.<sup>158</sup> The courts have not yet issued any rulings of significance for the private cases.

## **F. International Class and Collective Litigation**

### ***Supreme Court Questions International Jurisdictional Reach of U.S. Courts***

In the absence of an international civil court, litigants have resorted to the U.S. federal courts as *de facto* international courts for certain types of class actions, especially securities and human rights cases. This trend began to change in 2010 when the Court decided *Morrison v. National Australia Bank Ltd.*<sup>159</sup> In *Morrison*, the Court severely limited federal jurisdiction over so-called “foreign-cubed” cases: securities fraud claims involving foreign investors who bought foreign stock issued on a foreign exchange.

Earlier this year, the Court took what could be another step toward further limiting the availability of the U.S. courts as a forum for resolving international class actions. In recent years, the Alien Tort Statute (ATS),<sup>160</sup> has increasingly become a vehicle for bringing international class actions against both governmental and corporate interests based on alleged human rights abuses occurring throughout the world. However, after hearing oral argument was held on February 28, 2012 in an ATS case called *Kiobel v. Royal Dutch Petroleum*,<sup>161</sup> the Court ordered additional briefing on the issue “whether

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<sup>154</sup> See *id.* at 1157.

<sup>155</sup> No. 10-16448 (9<sup>th</sup> Cir. Aug. 7, 2012).

<sup>156</sup> See *United States, et al. v. BCBS of Mich.*, No. 2:10-cv-15155-DPH (E.D. Mich. Oct. 18, 2010).

<sup>157</sup> See, e.g., *Galactic Funk Touring, Inc. v. BCBS of La., et al.*, No. 3:12-00709 (M.D. La. Nov. 13, 2012).

<sup>158</sup> See *In re BCBS Antitrust Litig.*, MDL No. 2406 (J.P.M.L. Dec. 12, 2012).

<sup>159</sup> 130 S.Ct. 2869 (2010).

<sup>160</sup> 28 U.S.C. § 1350.

<sup>161</sup> No. 10-1491.

and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” A second oral argument was held on October 1, 2012, and a ruling in *Kiobel* is expected before the current Supreme Court term ends in the Spring of 2013. The decision could turn on any number of issues other than the question of extraterritorial application of the ATS, so it remains to be seen whether *Kiobel* will further the trend set in *Morrison* of restricting extraterritorial jurisdiction.<sup>162</sup>

### ***Multi-party and Representative Action Procedures Continue to Evolve Worldwide***

At the same time that avenues for global mass redress in the U.S. Courts may be closing, doors are opening in other parts of the world. Dozens of other countries in all corners of the world now have procedures allowing at least some form of mass redress. More than 30 foreign jurisdictions now have a procedural or statutory mechanism allowing some form of collective redress. In March 2012, a “class action” law came into force for the first time in Mexico. Mexico’s legislation, while quite different from class actions in the United States, provides express mechanisms for seeking collective redress in consumer, environmental, and competition cases. Additional reforms that would increase the availability of collective redress are being considered in Brazil. In South Africa, the Supreme Court of Appeal issued an opinion in December that clarifies the elements needed to support class certification in antitrust matters. The Netherlands has become a leader in Europe in adopting novel mechanisms for collective redress, and although the country has no express legislation allowing for claims to be prosecuted as class actions, it has a law that permits collective *settlements*. Class action law continues to develop in many British Commonwealth countries, such as Canada, Australia, and even India.

As local class action procedures continue to evolve, a once-obscure federal statute has begun to take on new significance. Section 1782 of Title 28 of the US Code<sup>163</sup> allows an “interested person” to utilize the full force of U.S. discovery rules to collect information in the United States in connection with foreign “proceedings.” The statutory purpose behind Section 1782 is to provide an efficient means of assistance to participants, both direct and indirect, in foreign litigation, and to encourage reciprocity abroad. Section 1782 is extraordinary for the breadth of its application. The term “interested person” has been liberally construed by US courts to include persons beyond the parties to a proceeding. Any person or entity who can demonstrate a legitimate interest in a foreign proceeding can have standing to pursue Section 1782 discovery. The term “foreign proceeding” has also been liberally construed to include not just foreign lawsuits, but also regulatory proceedings, criminal investigations, arbitrations and even reasonable contemplation of a future action.

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<sup>162</sup> Also at issue in *Kiobel* is the important question on which the Court originally granted certiorari, which is whether private corporations may be sued for alleged aiding and abetting government actors in committing violations of international law.

<sup>163</sup> (28 U.S.C. § 1782).

## **Landmark Model Proceeding in Germany Ends with a Win for the Defense**

The development of collective action procedures in other parts of the world, however, has not necessarily meant greater success for plaintiffs' interests, however. In May, after 12 years of litigation, a German court finally reached a decision in a landmark case for group actions in European civil law jurisdictions. The case was the first of its kind under 2005 German legislation allowing for special model proceedings in mass actions for certain types of securities fraud. The legislation had been enacted as a direct result of the thousands of individual lawsuits that had been filed against Deutsche Telekom for prospectus fraud after the stock dropped following a secondary stock offering in 2000. The model proceeding was not a model of efficiency, and proceedings in the model case dragged on for approximately seven years after similar class action litigation brought on behalf of U.S. investors had been resolved. In the end, the German court concluded that Deutsche Telekom did not make false or misleading statements of fact in the prospectus. However, because the German procedure only provides for the resolution of a model case, the court's decision is not necessarily binding with respect to all claims arising out of the 2000 secondary stock offering.

## **IV. Looking Forward to 2013**

The coming year promises to be another active one in the development of class action law. Among the most highly anticipated developments are the Supreme Court's rulings in at least seven cases that can potentially impact class action litigation. Four of the cases have already been argued and await a ruling, including *Kiobel*, *Amgen*, *Comcast*, and *Genesis Healthcare*. Argument is set in the *Standard Fire* case for early January and in the first of two arbitration cases, *Amex*, in February. The second of the two arbitration cases, *Oxford Health Plans*, is still awaiting an oral argument setting.

The continued proliferation of privacy class action litigation is widely expected in 2013, as the courts continue to grapple with the interpretation of both new and old privacy laws to rapidly changing technologies. Another potential trend to keep an eye on is the development of class action litigation relating to the LIBOR rate-fixing scandal, which has the potential to impact trillions of dollars of financial transactions worldwide and could be a catalyst to the accelerated expansion of class and collective action procedures in other parts of the world. And, if the past is prologue, there will be unexpected twists and new trends in the varied and complex world of class action litigation.