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WHAT'S INSIDE

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REUTERS/Lucy Nicholson

The lawsuit alleges two New Jersey counties violated the Fourth Amendment by strip-searching all arrestees, including those detained for minor, non-criminal offenses.

CLASS ACTION

Strip searches unconstitutional, N.J. man tells high court

The U.S. Supreme Court heard oral argument Oct. 12 in the case of a New Jersey man who says jailhouse strip searches following his arrest for a minor offense violated the Fourth Amendment.

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Commonality in class actions after *Wal-Mart v. Dukes*

By John R. Wester, Esq., and Richard C. Worf, Esq.
Robinson Bradshaw & Hinson

Among the several important holdings in *Wal-Mart Stores v. Dukes,*[1] the new test for commonality has the potential to be most far-reaching, since it applies to every proposed class action in our nation's federal courts. In only a few months, we have seen several lower court decisions in which the *Dukes* commonality holding appears to have been determinative of the outcome — that is, in which the court probably would have certified the class pre-*Dukes*, but would not certify after *Dukes* — directly because of a failure to meet commonality.

In one case, a Michigan federal court that had previously been inclined to certify a class under Federal Rule of Civil Procedure 23(b)(3), thus finding that common issues predominated over individual issues, now found there was not a *single* common question sufficient to sustain the class under the reading of Rule 23(a)(2) in *Dukes*.

In another post-*Dukes* case, the 8th U.S. Circuit Court of Appeals refused to certify an employment discrimination class of black employees in a single steel plant, even though the 4th Circuit had previously certified a class at a separate plant operated by the same company on very similar allegations.

Although the *Dukes* decision is still young, these are early indications that its reformulation of the commonality test will have a significant bite across a wide spectrum of class actions.

QUESTIONS LEFT OPEN

Before a discussion of these new cases in detail, a glance at the Rule 23 road map seems worthwhile. No case can proceed as a class action unless the class members can meet all four of the requirements of Rule 23(a): numerosity, commonality, adequacy and typicality. Rule 23(a)(2) speaks to commonality: "There are questions of law or fact common to the class." The class must also fit into one of the categories outlined in Rule 23(b).

In *Dukes*, the trial court had certified a nationwide Rule 23(b)(2) class containing approximately 1.5 million members, alleging that Wal-Mart had discriminated against them on the basis of sex in refusing them equal pay and promotions.[2] Specifically, the plaintiffs alleged that Wal-Mart gave local managers discretion over pay and promotions, which they exercised in a disparate manner that created an adverse impact on female employees.[3] The *Dukes* plaintiffs also alleged that Wal-Mart was aware of the effect its delegation had on gender equality, which constituted disparate treatment.[4]

Although the *Dukes* decision is still young, these are early indications that its reformulation of the commonality test will have a significant bite across a wide spectrum of class actions.

The plaintiffs alleged that the question of whether Wal-Mart had a "corporate culture" of gender discrimination was a common one sufficient to unite their claims under Rule 23(a)(2).[5] To demonstrate this common question, the plaintiffs relied on a statistical study comparing pay and promotion between men and women at Wal-Mart, as well as about 120 anecdotes suggesting discrimination and an expert analysis of Wal-Mart's allegedly discriminatory culture.[6]

The Supreme Court reversed the certification on commonality grounds, giving this test teeth for the first time in the history of Rule 23.[7] To show commonality, the court held that class members must show they "have suffered the same injury," not merely that they have suffered a violation of the same provision of law.[8]

In particular, each class member's claim "must depend upon a common contention" — for example, in the employment discrimination context, "discriminatory bias on the part of the same supervisor."[9] Moreover, that common contention must be a sufficiently important one. Its decision must "resolve an issue that is central to the validity of each one of the claims in one stroke."[10]

Applying these tests to the *Dukes* class, the court found that although an employment discrimination class could be certified on the basis of a common procedure (such as a common test, as in *Griggs v. Duke Power Co.*, 401 U.S. 424 [1971]) or upon "significant proof" of a "general policy of discrimination," there was no common test at Wal-Mart, and the plaintiffs had failed to show a general policy of discrimination. In fact, the plaintiffs had shown nothing more than the *lack* of such a policy, since Wal-Mart admittedly had a commitment to decentralized decision making.

Statistics showing disparity in pay and promotions between men and women did not provide the necessary "significant proof," because such disparities had any number of explanations that are likely to vary by region or store. In short, "[w]ithout some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question why was I disfavored."[11]

Thus, the court made clear that showing commonality on the basis of a trivially common issue will not suffice henceforth. Rather, plaintiffs' claims must depend upon at least one common contention, "central to the validity of each one of the claims," that can be resolved in "one stroke." More than this, the plaintiffs must also have "suffered the same injury."

Dukes left unspecified, however, what it means, outside the employment discrimination context, for plaintiffs to have "suffered the same injury" or how "central" the common contention that can be resolved in "one stroke" must be.[12]

In addition, *Dukes* made clear that, for the employment discrimination context, lacking an admitted common procedure (such as a test), the employees must show a "general policy of discrimination." Global statistics on gender disparity are not enough to establish such a policy. However weighty these pronouncements by the court, going forward, what evidence will be sufficient to show a general policy of discrimination?

WHAT MUST BE RESOLVED IN 'ONE STROKE'?

The requirement that plaintiffs have suffered the same injury and are able to allege a common contention "central" to the validity of all their claims has already caused a major change in at least one Michigan federal court — in a field well removed from employment discrimination. *Corwin v. Lawyers Title Insurance Co.* involved unjust enrichment claims, specifically, the allegation that a title insurance company had overcharged by failing to give a discount required for persons who previously had insurance on their property.[13]

The plaintiff sought to certify a class of all people purchasing title insurance in Michigan for a specified period and alleged common questions. These questions included whether the title insurance company could require the policy purchaser to prove the prior policy before obtaining the discount credit, the proper construction of the company's rate manuals, and whether the company was required to give the credit unless it could prove that title insurance was being issued for the first time on the property.[14]

The court recognized that these were common questions on which all members of the proposed class would have to succeed in order to recover on their unjust enrichment claims. The court further acknowledged that these questions "could be determined at once for all the class members without individualized proof."[15]

Likewise, the court noted that it had previously certified a similar class alleging unjust enrichment claims against a title insurance company. And indeed, in that case, the court had readily found commonality because the defendant did not "appear to contest this ground, and for good reason. Several of these questions are common questions that would advance the litigation."[16] In fact, the court had found that these common issues predominated over questions affecting only individual class members, thereby permitting certification under Rule 23(b)(3).[17]

In *Corwin*, however, the court found that the *Dukes* commonality test prevented the court from finding even a single common issue. One of the elements of liability on the unjust-enrichment claims was not subject to common proof: whether, in fact, there had been previous insurance on the class member's property.

"Therefore, instead of liability being established 'in one stroke,' it would take an assessment of each transaction to determine if the absent class member qualified for the discount rate." Thus, "the plaintiff cannot satisfy the requirement of Rule 23(a)(2) because, although there are questions common to the absent class members and the plaintiff that must be decided before liability is established, the critical inquiry without which liability cannot attach requires individualized determination."[18]

This court — previously inclined to certify the very same kind of claim as a Rule 23(b)(3) action — read the "one stroke" and "central question" language in *Dukes* to require that *all elements needed to establish liability* to be subject to common proof.

Whether the view of *Dukes* by the *Corwin* court will ultimately be tenable remains open to question. Other courts have not required commonality with respect to all liability elements of class members' claims in order to find that Rule 23(a)(2) has been satisfied. For example, courts since *Dukes* have found commonality to exist on claims alleging unfair business practices and false advertising under California law because whether members of the public were likely to be deceived by the advertising in question is a sufficient "common question" under *Dukes* — even though liability to any individual consumer would ultimately depend upon individual proof of injury and causation.[19] One of these courts noted that the very existence of the "predominance" standard in Rule 23(b)(3) implies that not all questions need be common in order to satisfy Rule 23(a)(2).[20]

Still, even if *Corwin* went too far by requiring common proof on *every* liability element, the opinion illustrates that *Dukes* gives lower courts considerable discretion in determining what kinds of common questions will suffice under Rule 23(a)(2). *Dukes* demands such an inquiry, explicitly holding that not just any common question will do and that Rule 23(a)(2) requires an examination of whether plaintiffs have "suffered the same injury" and whether the alleged common contention is in fact "central" to the validity of their claims. Just how far courts will take this language will mark the battleground for cases to come.

'GENERAL POLICY OF DISCRIMINATION'

Another important question left open by *Dukes* was what evidence would be necessary to show a general policy of discrimination sufficient to support commonality. An August decision from the 8th Circuit demonstrates that, after *Dukes*, plaintiffs may have to do much more than simply reduce the scope from a nationwide class to a plant or job-site class.

> *Dukes* left unspecified what it means, outside the employment discrimination context, for plaintiffs to have "suffered the same injury" or how "central" the common contention that can be resolved in "one stroke" must be.

In *Bennett v. Nucor Corp.*, black plaintiffs who worked in one department of a single Nucor steel plant sought to certify a class of all black employees at the plant, alleging disparate treatment and a disparate impact as a result of racially discriminatory denials of promotion and training opportunities, as well as a hostile work environment. The 8th Circuit upheld the District Court's refusal to certify this class on commonality grounds.[21]

Nucor had presented evidence that the plant in question had a decentralized management structure with a "wide variety of promotion, discipline, and training policies that vary substantially among departments."[22] The plaintiffs attempted to rely upon an allegation that despite this division, the plant had a

common policy of subjective promotion that was applied in a racially discriminatory manner.

But the court rejected this contention, in large part because the various departments operated independently, both applying different objective criteria (concerning experience, training, test scores and so on) and not necessarily applying what discretion they did have in a common, racially discriminatory manner.[23] The court rejected the plaintiffs' statistical evidence concerning racial disparities in promotion because it did not distinguish between departments with distinct promotion practices.[24]

Dukes gives lower courts considerable discretion in determining what kinds of common questions will suffice under Rule 23(a)(2).

The *Bennett* court also upheld a denial of certification of the plaintiffs' claim of a hostile work environment. The plaintiffs had alleged that the company store sold clothing with the Confederate flag on it, that plant-wide radio and email carried racial comments, that there was racist graffiti in the plant and that Confederate flags and nooses were displayed in the plant.

However, the court held that these allegations were not enough, since they came from workers in one department, which meant that "their observations do little to advance a claim of commonality across the entire plant," especially since the evidence showed that departments within the plant did not interact and had separate break and restroom areas.[25]

Bennett is a remarkable decision as compared with the 4th Circuit's previous reversal of a lower court ruling that had refused certification of a class of black employees at a Nucor plant in a different state — and on very similar facts. In *Brown v. Nucor Corp.*, the black plaintiffs alleged a similar set of facts: a pervasive hostile work environment consisting of direct racial insults, some broadcast plant-wide, as well as widespread displays of the Confederate flag, a company store selling Confederate memorabilia, and racially offensive emails.[26]

Like the Arkansas plant in *Bennett*, this Nucor plant in South Carolina was separated into departments. But the 4th Circuit found that denials of promotions in favor of more junior white employees, combined with statistics on disparity in promotions, were sufficient to demonstrate commonality, despite the division into departments.[27] The *Brown* court also rejected classification of the different departments as separate environments for purposes of the claims regarding a hostile work environment.[28] The 4th Circuit further found predominance sufficient to support a Rule 23(b)(3) class action.[29]

In *Bennett*, the 8th Circuit distinguished *Brown* on two grounds: the intervening *Dukes* decision and that *Brown* had less evidence of separate departments. But given the similar facts in *Brown*, it appears that *Dukes* and the reorientation it gave to the commonality inquiry played the decisive part (indeed, in *Brown*, as in *Bennett*, the plaintiffs all worked in only a single department). In any event, the 8th Circuit's deviation from the 4th Circuit after *Dukes* shows that limiting the class definition to the plant or work site will be no panacea for plaintiffs in class-action litigation regarding employment discrimination.

Since *Dukes*, at least one court has found a general policy of discrimination that satisfies *Dukes* and falls outside the employment arena. In *Morrow v. Washington*, a federal judge in Texas certified a class of all minorities subjected to traffic stops in Tenaha, Texas, upon allegations that there was a "specific, city-wide policy in Tenaha of targeting racial and ethnic minorities for traffic stops."[30]

The plaintiffs were able to put forth not just statistical proof of disparity of the kind criticized in *Dukes*, but also that the program "was conceived and implemented by a small number of Tenaha police officers and city officials working in concert during a specified time period." They were also able to rely on adverse inferences from certain police officers who were exercising their Fifth Amendment rights and from the department's admitted failure to collect and report information about racial profiling as required by state law.[31]

The *Morrow* court's decision to certify a broad class on the basis of a "general policy of discrimination," with only slightly more than the statistical evidence of disparity excoriated in *Dukes*, represents an approach that is markedly different from the *Bennett* decision. How particular courts will be in applying the *Dukes* commonality test clearly remains an open question of true significance. WJ

NOTES

1 *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (June 20, 2011).

2 *Id.* at 2547

3 *Id.* at 2548.

4 *Id.*

5 *Id.*

6 *Id.* at 2549.

7 A prominent treatise had previously found that commonality is "easily satisfied." *See* 5 J. Moore et al., Moore's Federal Practice § 23.23[2], p. 23-72 (3d ed. 2011).

8 *Dukes*, 131 S. Ct. at 2551.

9 *Id.*

10 *Id.*

11 *Id.* at 2552.

12 Certain decisions have long enforced a robust commonality requirement. For example, in *Stott v. Haworth*, 916 F.2d 134, 145 (4th Cir. 1990), the 4th Circuit held that "[c]lass certification is only proper when a determinative critical issue overshadows all other issues," in the course of reversing the certification of a class of public employees claiming they were dismissed for impermissible political reasons.

13 *Corwin v. Lawyers Title Ins. Co.*, 2011 WL 3346824 (E.D. Mich. Aug. 1, 2011).

14 *Id.* at *1-4.

15 *Id.* at *6.

16 *Hoving v. Lawyers Title Ins. Co.*, 256 F.R.D. 555, 564 (E.D. Mich. 2009).

17 *Id.* at 569-70 (though denying certification because of inadequate representation).

18 *Corwin*, 2011 WL 3346824 at *6.

19 *O'Shea v. Epson Am.*, 2011 WL 4352458 (C.D. Cal. Sept. 19, 2011); *Johnson v. Gen. Mills Inc.*, 2011 WL 4056208 (C.D. Cal. Sept. 12, 2011).

20 *Johnson*, 2011 WL 4056208 at *2.

21 *Bennett v. Nucor Corp.*, 656 F.3d 802 (8th Cir. Sept. 22, 2011).

22 *Id.* at 814-815.

23 *Id.* at 815.

[24] *Id.* at 817.

[25] *Id.* at 816.

[26] *Brown v. Nucor Corp.,* 576 F.3d 149, 151 (4th Cir. 2009).

[27] *Id.* at 153-56.

[28] *Id.* at 158.

[29] *Id.* at 160.

[30] *Morrow v. Washington,* 2011 WL 3847985 at *18 (E.D. Tex. Aug. 29, 2011).

[31] *Id.* at *18-21.


John R. Wester (left) of **Robinson Bradshaw & Hinson** in Charlotte, N.C., tries cases and argues appeals in the area of complex civil litigation and has represented both plaintiffs and defendants in class actions involving federal securities, the Employee Retirement Income Security Act, employment discrimination and tax law. He is a fellow in the American College of Trial Lawyers. He can be reached at jwester@rbh.com. **Richard C. Worf** (right), also with the firm in Charlotte, practices in the area of complex civil litigation, with a particular concentration in mass tort defense. He can be reached at rworf@rbh.com.

Is your legal notice designed to be noticed?

By Carla Peak
Kurtzman Carson Consultants

Effective communication with class members is an essential element of the class-action process. As guided by Rule 23 of the Federal Rules of Civil Procedure, the Manual for Complex Litigation (Fourth) and the Federal Judicial Center, two critical components of notices are necessary to meet due process: reaching class members and communicating effectively.

Getting noticed is the first step in effective communication with class members; therefore, a conscious effort must be made to design a "noticeable notice." Like any other editorial or advertisement, class-action notices must be clear, concise, informative and inviting. They should grab the attention of potential plaintiffs, alert them that they have been affected and provide them with a compelling reason to continue reading. The notice should take very little time to read, supply readers with the facts they need to make an informed decision and allow them to learn more, if they wish.

POSITIONING

Due process requires a "desire to actually inform," so it is important to seek positioning of notices among content that is highly read. Intentionally placing an ad in the legal-notice section of a newspaper or in the back pages of a magazine does not necessarily benefit class members. Instead, consider the demographics of the class to determine which sections they are most likely to read.

For example, the main news and local news are the highest-read sections of the newspaper. A total of 82.2 percent of newspaper readers read the main news section of the newspaper, as compared with 50.8 percent who read classifieds. If the class is highly composed of men, the sports and business sections would rank next in terms of readership. Among women, entertainment/lifestyle and cooking sections are highly read.[1]

NOTICE SIZE

The size of a notice should be based on the amount of space needed to communicate all the required information with easily legible print. Often, cost is the primary factor in the determination of size. However, since the goal is to provide absent class members with an opportunity to receive and understand their legal rights and options, the size of the notice should attract attention.

Advertising professionals routinely analyze the effectiveness of ad sizes and the impact they have on readership. Research shows that larger ads attract higher readership because they are "more often seen than smaller ads."[2] There is nothing appealing about a lot of text crammed into a small space. Instead, select the size of the notice to attract attention, and include a prominent headline and all necessary information. Copious amounts of white space, such as large margins, will attract attention and get the notice read.

HEADLINE

The headline is the single most important element of a print ad. Research indicates that 90 percent of body copy is not read, making an informative and inviting headline essential in capturing the reader's attention and encouraging him or her to read on.[3]

The headline should be broad enough to draw in all potential class members, yet specific enough to allow the reader to determine whether he or she should continue reading. Unfortunately, many class-action notices are still printed with the use of a pleading-style case caption.

Assuming the ad is seen (which is highly unlikely given that it does not contain a headline), will average people — who most likely do not understand that they can be part of lawsuit they did not initiate — actually read a notice that begins with a case caption? The FJC does not think so, since its studies show that "a first impression must persuade readers that they may have a stake in the class action and that they will be able to comprehend the notice."[4]

The FJC recommends stating the potential benefit to the class and/or individual class members as part of the headline. Advertising research proves that this is an effective tactic, noting that benefit statements usually draw more readers than general headlines.[5] When a headline tells readers they may have something to gain, they are more likely to invest the time to continue reading.

Class action notices should:

- ☑ grab the attention of potential plaintiffs
- ☑ alert them that they have been affected
- ☑ provide them with a compelling reason to continue reading

LAYOUT

A good design and layout of an ad are essential. Print ads are often poorly designed and are easily ignored because they do not attract the eye to any particular feature or element.[6] Readers are naturally drawn to photos and strong typography, so these strategic design tactics should be utilized when possible. Photos can be especially useful in helping class members identify a particular product or brand they otherwise would not identify.[7] If a photo cannot be used, the size and shape of a block of text or diagram can create a similar effect.

The use of strong typography can be easily incorporated into any class-action notice by breaking up the text with subheadings, tables or bullet points. Smart design helps readers locate information, adds depth to the notice design and avoids a gray-mass look. Subheadings allow text to flow in logical sequences that highlight the major points of a settlement agreement or class-action complaint. In turn, readers are able to gain a general understanding of the case without having to read the entire document.

TEXT SIZE

The appropriate font size of class-action notices should also be selected in order

to maximize readership. Small text is and should be reserved for the fine print of a contract or disclaimer of an advertisement. Although publications will generally accept smaller fonts, the font size used in a class-action notice should be similar to that of the publication's editorial.

Publications base the font size of their editorial on their target audience (standard-size fonts for general audiences and larger fonts for older audiences or children); a significant reduction in font size can greatly reduce readership.

USE OF TEXT EFFECTS

To emphasize text, the design should include the use of bullets, underlining, bold or italics. Be selective in the words that are emphasized to ensure that only important information such as recovery amounts, dates and product identifiers are highlighted. It is critical to avoid the use of long strings of capital letters and bold text. When overused, text effects tend to blur together and can become very difficult to read and distract the reader from the message.

THE 'PLAIN-LANGUAGE' TEST

According to the Center for Plain Language, when you write in plain language, you create material that works well for people who use that material. The definition of "plain" depends on the audience. One measure of plain language is behavioral: can the audience quickly and easily (1) find what they need, (2) understand what they find and (3) act appropriately on that understanding?

> Two critical components of notices are necessary to meet due process: reaching class members and communicating effectively.

In most notices, plain language is designed to be read and understood by the average person. It speaks directly to the reader in a simple manner and avoids the use of unnecessarily complex words, terms and phrases. Plain language provides information in short, concise sentences, paragraphs and sections; uses at most a high-school-level vocabulary; and is presented in an inviting fashion. It avoids redundancy and encourages readership.

Consider the words and sentence structure used in the editorial of your local newspaper. Most newspaper editorials are written on a sixth-grade reading level.[8]

Class members do not understand jargon that is common to attorneys and legal professionals. During their research on plain-language notices, the FJC found that most people did not understand even the most basic concepts of a class-action notice such as "a class" or "class members." In fact, most people do not know or understand what a class action is or how our legal system can allow them to be a plaintiff in a lawsuit that they did not initiate.

When plain language is used properly, "legalese," which is characterized by long sentences, complex vocabulary, modifying clauses and high abstraction, is not present.

Example of a bad legal notice

COURT-ORDERED LEGAL NOTICE

The following is a summary of information presented in more detail in the Notice of Proposed Class Action Settlement, Settlement Hearing and Right to Appear (the "Notice"), which Settlement Class Members should have received in the mail. Since this is just a summary, you should see the full Notice for additional details.

Please read this information carefully. If you are a Settlement Class Member (as defined below), your rights will be affected by these proceedings and you may be entitled to receive benefits under a proposed settlement.

IF YOU ARE AN INSURANCE COMPANY AND YOU PARTICIPATED IN THE NATIONAL WORKERS COMPENSATION REINSURANCE POOL (THE "NWCRP") OR THE NEW MEXICO WORKERS COMPENSATION ASSIGNED RISK POOL (THE "NMWCARP") AT ANY TIME DURING THE PERIOD FROM 1970 THROUGH THE PRESENT (THE "SETTLEMENT CLASS"), <u>YOU MAY BE ELIGIBLE TO PARTICIPATE IN A $450 MILLION CLASS ACTION SETTLEMENT</u>.

If you believe that you are eligible to participate in the class action settlement described in this Court-Ordered Legal Notice but did not receive in the mail the detailed Notice describing the Settlement, please visit www.WCPoolSettlement.com, where you can obtain the Notice, or contact the Court-approved Administrator as set out below to request a copy of the Notice.

SUMMARY STATEMENT BY THE SETTLEMENT CLASS REPRESENTATIVES

The Settlement - A settlement consisting of $450 million in cash, plus interest as it accrues (the "Settlement"), has been reached with American International Group, Inc. ("AIG") in a class action lawsuit (the "Class Action") alleging, among other things, claims for fraud, breach of contract, accounting, violation of the federal anti-racketeering statute and other theories in connection with the alleged underreporting of workers compensation premium to the NWCRP and the NMWCARP from 1970 to the present (the "Class Period"). If approved, the Settlement will create a Class Fund to pay the claims of insurance companies that participated in the NWCRP and/or NMWCARP during the Class Period that qualify for distributions under a Plan of Allocation which must be approved by the Court. The Settlement, if approved, would be a final resolution and release of the claims brought on behalf of the Settlement Class against AIG and of every Settlement Class member's claims by reason of any matter whatsoever arising out of the underreporting of workers' compensation premium in any of the 50 States or the District of Columbia for all years from the beginning of time through January 28, 2011, against every other member of the Settlement Class.

The Settlement has the support of the Board of Governors of the NWCRP and the Board of the NMWCARP, and the settlement amount has been endorsed as reasonable by the Examiner-in-Charge appointed by the Lead States of the Multistate Targeted Market Conduct Examination conducted pursuant to the National Association of Insurance Commissioners' ("NAIC") Market Regulation Handbook (the "Multistate Examination"). The Lead States are Delaware, Florida, Indiana, Massachusetts, Minnesota, New York, Pennsylvania and Rhode Island. The other 42 states and the District of Columbia were Participating States in the Multistate Examination which concerned AIG's writing and financial reporting of workers compensation insurance. The Examiner-in-Charge, pursuant to confidentiality agreements with AIG and the NWCRP, also facilitated the settlement discussions that ultimately led to the Settlement.

The Class Action - The Class Action complaint, captioned *Safeco Insurance Company of America, et al. v. American International Group, Inc., et al.*, No. 09-CV-2026 (N.D. Ill.), alleges, among other things, that during the Class Period, AIG underreported its workers compensation premiums in connection with its participation in the NWCRP and NMWCARP and, as a result, underpaid its taxes and assessments, including residual market assessments.

The Class Action claims stem from the New York Attorney General and Department of Insurance's (the "New York Authorities") 2005 investigation of, and subsequent settlement with, AIG regarding AIG's historic reporting of workers compensation premium. As part of its settlement with the New will receive no cash consideration under the Settlement, even though their claims against AIG and all other premium underreporters will be released. For these reasons, and others, Safeco and Ohio Casualty believe the Settlement is unfair, unreasonable and inadequate to the Settlement Class. Safeco and Ohio Casualty urge the members of the Settlement Class to reject the Settlement and continue the Class Action. The bases for their position are outlined in summary form in Section 10 of the Notice, and Safeco's and Ohio Casualty's previously-filed objections to the Settlement are available on the Court's website as Docket #370. Settlement Class Representatives' and AIG's responses to those objections are available on the Court's website as Docket #386 and 387, respectively. Further information about the grounds upon which Safeco and Ohio Casualty oppose the settlement can be accessed at www.aig-objectoptout.com.

Terms of the Settlement - In exchange for the releases set forth in the Settlement Agreement, as amended (the "Releases"), AIG has agreed to fund a $450 million "Class Fund" to be allocated, after deduction of Court-awarded attorneys' fees and expenses, possible incentive compensation payments not to exceed $175,000 in the aggregate to the Settlement Class Representatives, Notice and administrative expenses, and any applicable taxes (the "Distribution Amount"), among all eligible Settlement Class insurance companies (the "Settlement Class Members"), provided that such Settlement Class Members do not submit a valid and timely request for exclusion from the Settlement Class in accordance with the procedures set out in Section VI of the Settlement Agreement.

If approved by the Court, the Distribution Amount will be allocated to the Settlement Class Members pursuant to a Plan of Allocation prepared by the National Council on Compensation Insurance, Inc. (the "NCCI") in its capacity as administrator of the NWCRP and the NMWCARP. A copy of a summary of the Proposed Plan of Allocation is attached to the Notice and available by visiting www.WCPoolSettlement.com, and a full copy of the Plan of Allocation may also be obtained by contacting the Court-approved Administrator or by logging into www.WCPoolSettlement.com.

If any Settlement Class Members "opt out" of the Settlement Class (as described below), the Distribution Amount will be reduced by the amount allocated to those excluded parties by the Plan of Allocation.

If you are a Settlement Class Member and you do not wish to participate in the settlement, you must request exclusion from the Settlement Class by no later than October 3, 2011.

Under Paragraphs I.A 49-50 of the Settlement Agreement, all parents, predecessors, successors, subsidiaries and affiliates are treated as a single Settlement Class Member for purposes of inclusion or exclusion from the class.

The Legal Effects of the Settlement - If the Court approves the Settlement, AIG and the Settlement Class Representatives will seek the entry of an Order Approving Settlement and accompanying Judgment that, among other things, will (a) find that the Settlement is fair, reasonable, and adequate; (b) enter a final order certifying the class for settlement purposes; (c) dismiss with prejudice all claims and counterclaims in the Litigations between AIG, the NCCI, the NWCRP, and/or the Settlement Class Members, meaning that no member of the Settlement Class including you (unless you timely exclude yourself) will be able to bring another lawsuit or proceeding against any of the Releasees (as that term is defined in the Settlement Agreement) based upon the claims that have been raised or that could have been raised in the Litigations; (d) incorporate the Releases as part of the Order Approving Settlement; (e) permanently bar members of the Settlement Class from filing or participating in any lawsuit or other legal action against any or all Releasees arising from or relating to any and all claims that have been raised or that could have been raised in this Class Action; (f) enter a bar order that will: (i) prevent any person or entity from commencing, prosecuting, or asserting any claim (including any claim for indemnification or contribution or otherwise denominated, including, without limitation, claims for breach of contract and for misrepresentation) against any Releasee where the alleged injury to the barred person or entity is based upon

Bad version

Legalese is insensitive to the average person's need to comprehend the document.

According to Richard Wydick, author of "Plain English for Lawyers," "We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is (1) wordy, (2) unclear, (3) pompous and (4) dull."[9]

When it comes to class members, legalese is intimidating, uninviting, lengthy, confusing and incomprehensible. For example, when legal terms such as *whereas*, *hereinafter* and *aforementioned* are used in documents intended to be read by non-lawyers, they baffle and frustrate the reader.

Notices that are written in legalese have and will continue to face scrutiny. In *White v. Alabama*, the court commented: "The notice ... was printed in very small type and couched in 'legalese' at times so dense that even a lawyer would have had difficulty determining the settlement's probable impact on Alabama's judicial system and on the rights of Alabama voters. It is not surprising that few people objected."[10]

More recently, in *Orrill v. AIG Inc.* the court found that class members probably would not understand common language used by attorneys or the ramifications of such language in the notice. Specifically, the court stated, "We venture to say that most lay persons do not know what *res judicata* means; thus, there is the potential that many interested persons did not realize that by not opting out of *Orrill,* their claims in *Oubre* [*Oubre v. Louisiana Citizens Fair Plan,* 961 So. 2d 504 (La. Ct. App., 5th Cir. 2007)] would never be litigated and that they could potentially lose thousands of dollars."[11]

PLAIN-LANGUAGE DRAFTING TIPS

When drafting plain language, it is important to consider your audience, be specific and use short, concise sentences to summarize key points and highlight important information. Write the way people think. Omit unnecessary words, use an active voice, choose and arrange words with care and avoid footnotes. Consider the certified wording of the class definition and reword it if it will help readers better identify themselves as class members.

Be careful with release language. If it is complex and lengthy, this too should be rewritten so that class members can understand exactly what they are giving up. Define relevant terms upfront and in sentence format; use the defined terms throughout the document to avoid lengthy text and redundancies.

It is important to avoid pleading formats, long strings of capital letters and deterrent language such as "Do not contact the court." Pleading formats turn off the reader. Long strings of capital letters are difficult to read. Deterrent language in class-action notices can have an adverse effect, resulting in an increase in contact with the court.

Example of a good legal notice

LEGAL NOTICE

If you purchased Innova, EVO, California Natural, HealthWise, Mother Nature, or Karma dog or cat food you could get a payment from a class action settlement.

A $2,150,000 settlement has been reached with Natura Pet Products, Inc., Natura Pet Food, Inc., Natura Manufacturing and Peter Atkins ("Defendants" or "Natura") in a class action lawsuit about the statements made in the advertising of Natura brand dog and cat food. Natura denies all of the claims in the lawsuit, but has agreed to the settlement to avoid the cost and burden of a trial.

WHO IS INCLUDED?

Those included in the class action, together called a "Class" or "Class Members" include anyone in the U.S. who purchased Natura brand dog or cat food products from March 20, 2005 through July 8, 2011.

WHAT DOES THE SETTLEMENT PROVIDE?

The maximum payment you can get is $200. A $2,150,000 settlement fund will be created by Natura. After paying the lawyers representing the Class for attorneys' fees of up to 35% of the fund and costs and expenses of up to $60,000; costs to administer the settlement of up to $400,000; and up to $20,000 to the Class Representative (Judy Ko), payments will be made to Class Members who submit valid claim forms.

HOW DO YOU ASK FOR A PAYMENT?

Submit a claim form online, or get one by mail by calling the toll free number. The deadline to submit or mail your claim form is **January 8, 2012**.

WHAT ARE YOUR OPTIONS?

You have a choice about whether to stay in the Class or not. If you submit a claim form or do nothing, you are choosing to stay in the Class. This means you will be legally bound by all orders and judgments of the Court, and you will not be able to sue or continue to sue Natura about the legal claims resolved by this settlement. If you stay in the Class you may object to the settlement. You or your own lawyer may also ask to appear and speak at the hearing, at your own cost, but you don't have to. The deadline to submit objections and requests to appear is **December 28, 2011**. If you don't want to stay in the Class, you must submit a request for exclusion by **December 28, 2011**. If you exclude yourself, you cannot get a payment from this settlement, but you will keep any rights to sue Natura for the same claims in a different lawsuit. The detailed notice explains how to do all of these things.

THE COURT'S FAIRNESS HEARING.

The U.S. District Court for the Northern District of California will hold a hearing in this case (*Ko v. Natura Pet Products, Inc.*, Case No 5:09cv2619), on February 17, 2012, at 9:00 a.m. to consider whether to approve: the settlement; attorneys' fees, costs, and expenses; and the payment to the Class Representative. If approved, the settlement will release the Defendants from all claims listed in the Settlement Agreement.

HOW DO YOU GET MORE INFORMATION?

The detailed notice and Settlement Agreement are available at the website. You can also call 1-888-768-2047, or write to Natura Settlement Administrator, PO Box 2005, Chanhassen, MN 55317-2005, or contact Class Counsel at 800-851-8716.

1-888-768-2047 **www.PetProductsSettlement.com**

CONCLUSION

In order for unidentified or absent class members to learn about a class action, they have to be notified. To be notified, they have to *notice* the information and understand it. If it is noticed, it has a chance of being read. The advertising industry has conducted research on and analyzed what will attract readers. The FJC has taken that research a step further by determining how to apply it to class-action notices, and it has created models to help practitioners design notices and communicate with class members. These notices can be used as a guide to help create notices for almost every class action.

The information presented in the FJC models, combined with effective communication tactics, will help ensure that the notice will be noticed, read and understood to fulfill due process obligations. WJ

NOTES

[1] *See* Newspaper Ass'n of America, Daily Newspaper Sections Read, *available at* http://www.naa.org/Trends-and-Numbers/Readership/~/media/NAACorp/Public%20Files/TrendsAndNumbers/Readership/Daily_Sections_2010.ashx.

[2] Advertising for Dummies (2d ed. 2007).

[3] *Id.* at 100.

[4] Fed. Jud. Ctr., Detailed Discussion of Methodology, available at http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/376

[5] Riger Knowledge Base, Creativity: Can It Affect Ad Readership?, *available at* http://www.riger.com/know_base/advertising/creativity.html.

[6] Advertising for Dummies at 103.

[7] *See, e.g., Talalai v. Cooper Tire & Rubber Co.,* No. L-8830-00-MT, 2002 WL 34668710 (N.J. Super. Ct., Middlesex County Sept. 13, 2002).

[8] Advertising for Dummies, at 69.

[9] Richard C. Wydick, Plain English for Lawyers (5th ed. 2005).

[10] *White v. Alabama,* 541 F.2d 1092 (5th Cir. 1976).

[11] *Orrill v. AIG Inc.,* 38 So. 3d 457 (La. Ct. App., 4th Cir. Apr. 21, 2010).

Carla Peak is the director of legal notification services at **Kurtzman Carson Consultants**. With more than a decade of industry experience, she specializes in designing plain-language legal-notice documents to effectively tackle the challenges of communicating complex information to class members in a manner that they can understand. Her notice documents satisfy the notification requirements of Rule 23 of the Federal Rules of Civil Procedure, the Manual for Complex Litigation (Fourth) and applicable state laws. She has successfully provided notice in both national and international markets, including communications in more than 35 languages. She can be reached at cpeak@kccllc.com.

Strip searches

CONTINUED FROM PAGE 1

Florence v. Board of Chosen Freeholders of the County of Burlington et al., No. 10-945, oral argument held (U.S. Oct. 12, 2011).

According to the plaintiff's petition for writ of *certiorari*, the high court needs to rule on the legality of strip searches to resolve conflicting decisions in federal circuit courts across the country.

Eight circuits have ruled that some reasonable suspicion is necessary to conduct a strip search. Three circuits, including the 3rd U.S. Circuit Court of Appeals in this case, have determined that such a search does not violate the Fourth Amendment's protection against unreasonable searches, the petition says.

The appeals courts have differed in their interpretations of a 1979 Supreme Court ruling that said a New York City jail could reasonably strip-search inmates following a visit with a friend or family member in order to prevent the smuggling of weapons or drugs into the jail. *Bell v. Wolfish*, 441 U.S. 520 (1979).

The true question before the Supreme Court now, according to **Norm Pattis**, a civil rights

Appeals courts divided over the question: Does a strip search of all arrestees, regardless of the offense, violate the Fourth Amendment?

YES

Logan v. Shealy, 660 F.2d 1007 (4th Cir. 1981)
Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983)
Hill v. Bogans, 735 F.2d 391 (10th Cir. 1984)
Stewart v. Lubbock County, Texas, 767 F.2d 153 (5th Cir. 1985)
Jones v. Edwards, 770 F.2d 739 (8th Cir. 1985)
Weber v. Dell, 804 F.2d 796 (2d Cir. 1986)
Masters v. Crouch, 872 F.2d 1248 (6th Cir. 1989)
Roberts v. Rhode Island, 239 F.3d 107 (1st Cir. 2001)
Jimenez v. Wood County, Texas, 621 F.3d 372 (5th Cir. 2010)

NO

Powell v. Barrett, 541 F.3d 1298 (11th Cir. 2008)
Bull v. City & County of San Francisco, 595 F.3d 964 (9th Cir. 2010)
Florence v. Board of Chosen Freeholders, 621 F.3d 296 (3d Cir. 2010)

lawyer and author of "Taking Back the Courts," is whether the "court is capable of recognizing a limit on government intrusion justified on grounds of security."

"The balance ought to be struck in favor of individual liberty," said Pattis, who is not involved in the case. "Some particularized showing should be made to justify the intrusive search of a person presumed innocent."

The case involves Albert Florence, who was arrested during a traffic stop in 2005 on a bench warrant for failure to pay a fine. Although he produced a paper showing that he had paid the fine, Florence was taken to the state police barracks in Burlington County, N.J., the petition says.

He was forced to submit to a strip search at the county jail and again six days later when he was transferred to a jail in Essex County, where the bench warrant originated, according to the petition.

Florence filed suit in the U.S. District Court for the District of New Jersey in 2005, alleging both counties violated the Fourth Amendment by strip-searching all arrestees, including those detained for minor, non-criminal offenses.

According to the petition, New Jersey law provides that someone arrested for something other than a crime should not be strip-searched without a warrant, consent or reasonable suspicion.

Burlington County's official policy on strip searches conforms to state law, the petition says. Jail officials nevertheless strip-searched Florence without any reason to suspect that he was carrying weapons or drugs, he says.

In 2008 U.S. District Judge Joseph J. Rodriguez certified a class consisting of all those who were arrested for a minor offense and subjected to a strip search at a Burlington County or Essex County jail since 2003.

Judge Rodriguez granted Florence's motion for summary judgment in February 2009, ruling that the Fourth Amendment forbids a strip search without suspicion. The strip searches invade an arrestee's personal privacy, the judge said.

Citing the Supreme Court's decision in *Bell*, Judge Rodriguez said the defendants gave no evidence that those arrested for minor offenses contribute to the problem of smuggling contraband into prison.

A divided 3rd Circuit panel reversed Judge Rodriguez's decision in 2010, ruling 2-1 that the jails' practice of strip-searching arrestees — no matter the circumstances of the arrest — was consistent with the Fourth Amendment.

The panel said that, under *Bell*, the jails do not have to demonstrate a smuggling problem.

Florence is asking the Supreme Court to clarify the *Bell* decision, arguing that it is inapplicable in this case.

The inmates in *Bell* voluntarily submitted to searches by accepting outside visitors, Florence says. In contrast, Florence was arrested without warning for a non-criminal offense. Jail officials should have had no concern in those circumstances that Florence might smuggle in weapons or drugs, he says.

Florence does not challenge the jails' authority to strip-search those with a prior criminal conviction, but contends that searching every arrestee without considering the circumstances is unreasonable and a "deep intrusion" on personal dignity.

"A strip search demands ... forced exposure of intimate details that the individual may have throughout his life withheld from *almost everyone*," the petition says. WJ

Attorneys:
Petitioner: Thomas C. Goldstein, Goldstein, Howe & Russell, Bethesda, Md.

Respondents: Carter G. Philips, Sidley Austin LLP, Washington

Related Court Documents:
Oral argument transcript: 2011 WL 4836171
Petition: 2011 WL 220710
3rd Circuit opinion: 621 F.3d 296
District Court opinion: 595 F. Supp. 2d 492

1st Circuit squeezes Welch's suit for deceptive-ad coverage

The 1st U.S. Circuit Court of Appeals has ruled that an insurance policy's antitrust exclusion bars coverage for two lawsuits against Welch Foods over the marketing of its white grape pomegranate juice.

Welch Foods Inc. v. National Union Fire Insurance Co. et al., No. 10-2261, 2011 WL 5027445 (1st Cir. Oct. 24, 2011).

The three-judge appellate panel unanimously ruled that National Union Fire Insurance Co. need not pay Welch's defense costs in a false-advertising suit filed by rival POM Wonderful and a separate class-action lawsuit filed by a customer.

Welch's policy contained an antitrust exclusion that barred coverage for claims alleging antitrust violations, unfair competition and deceptive trade practices.

The underlying suits claimed Welch falsely implied that pomegranate juice is the primary ingredient in its white grape pomegranate blended-juice product, even though the product contains little or no pomegranate juice.

The underlying suits claimed Welch's falsely implied that pomegranate juice is the primary ingredient in its white grape pomegranate blended-juice product, even though the product contains little or no pomegranate juice.

POM markets a 100 percent pomegranate juice and promotes it as having nutritional and health benefits, court documents say.

According to court documents, a California federal jury found that Welch's advertisements were intentionally deceptive but dismissed the case because POM failed to prove it was injured as a result.

POM has appealed, the opinion says.

Welch requested a defense from National Union, but the insurer contended the policy's antitrust exclusion expressly barred coverage, Welch's brief says.

The company then sued National Union in the U.S. District Court for the District of Massachusetts for breach of contract, seeking a declaration that the insurer had a duty to defend it in the underlying suits.

Both sides moved for summary judgment.

U.S. District Judge Rya Zobel granted summary judgment to National Union, saying the antitrust exclusion "was broad enough to include a variety of anti-competitive behavior," including the allegations against Welch (see *Westlaw Journal Class Action*, Vol. 17, Iss. 12).

> The 1st Circuit noted the policy said its headings were provided only for convenience and should not be construed as an insuring provision.

Welch appealed, arguing that the exclusion's heading, which read "antitrust exclusion," was evidence that it applied only to antitrust claims.

The 1st Circuit disagreed.

The appellate panel found the antitrust exclusion's plain language overcame its narrow label.

It noted the policy itself stated that the headings were provided only for convenience and should not be construed as an insuring provision.

In addition, applying the exclusion broadly did not threaten to defeat the entire purpose of the policy, the panel said.

As a result, National Union owed no coverage to Welch. WJ

Attorneys:
Appellant: Martin C. Pentz and Jeremy A.M. Evans, Foley Hoag LLP, Boston

Appellee: Michael P. Duffy, Harvey Weiner and Jane A. Horne, Peabody & Arnold, Boston

Related Court Document:
Opinion: 2011 WL 5027445

See Document Section A (P. 12) for the opinion.

CHINESE DRYWALL

Chinese-drywall coverage barred by hazardous-materials exclusion

Coverage for damage resulting from the installation of defective Chinese drywall in a Miami Beach home was barred by the hazardous-materials exclusion in a contractor's commercial general liability policies, a Florida federal judge has ruled.

Colony Insurance Co. v. Total Contracting & Roofing Inc. et al., No. 10-23091-CIV, 2011 WL 4962351 (S.D. Fla. Oct. 18, 2011).

The sulfides and other noxious gases released by the Chinese-manufactured drywall fell under the policies' definition of "hazardous materials," U.S. District Judge Patricia A. Seitz of the Southern District of Florida determined, granting summary judgment to the insurer.

She rejected the homeowners' "baseless" argument that coverage under the contractor's four commercial general liability policies was illusory.

The decision stems from defective drywall that Total Contracting & Roofing Inc. installed as part of the renovation of David and Wendy Smith's Miami Beach home.

According to Judge Seitz's order, the Smiths allege the drywall emits noxious gases that have caused injuries such as eye and lung irritation and has damaged their property, including appliances, wiring and metal surfaces.

Total's commercial insurer, Colony Insurance Co., refused to pay for the damages caused by the defective drywall, citing the policies' hazardous-materials exclusion, the order said.

Under that provision, the CGL policies excluded losses caused in whole or part by the release of hazardous materials. The order said that the policies, in turn, defined "hazardous materials" as "'pollutants', lead, asbestos, silica and materials containing them" and "pollutants" as "any solid, liquid, gaseous or thermal irritant or contaminant."

The Smiths filed a product liability lawsuit against Total as part of the multidistrict litigation over Chinese-manufactured drywall, which is pending in the Louisiana federal court.

Colony then sued Total and the Smiths in federal court in Miami, seeking a declaratory judgment on the questions of coverage for damage from the defective drywall.

The District Court entered a default judgment for Colony against Total because the contractor failed to respond to the suit.

Both Colony and the Smiths moved for summary judgment.

The Smiths argued that Colony's CGL policies were unconscionable and violated public policy.

They contended that coverage under the policies was illusory because the hazardous-materials exclusion completely contradicted the policies' insuring provisions. Furthermore, they argued Colony cited enough exclusions in its complaint to render coverage illusory.

> "The adjudication of insurance coverage disputes does not lend itself to mathematical computations," the judge said.

Judge Seitz disagreed, ruling that the hazardous materials exclusion completely precluded the Smiths' claims against Total.

The "sulfides and other noxious gases" emitted by the defective drywall plainly qualified as gaseous irritants and contaminants that were barred as hazardous materials under the policy, she reasoned.

Turning to the Smiths' arguments, she noted the policies appeared to insure a broad array of business activities that were not precluded by the exclusion.

As a result, the insuring provisions and the exclusion were not complete contradictions.

"If they were, then every policy that contained a hazardous materials exclusion would be illusory," Judge Seitz wrote.

The judge also rejected the Smiths' argument that coverage was illusory due to some threshold number of exclusions cited by Colony.

"The adjudication of insurance coverage disputes does not lend itself to mathematical computations," she said.

Consequently, Judge Seitz granted Colony summary judgment. WJ

Attorneys:
Plaintiff: Hugh Joseph Connolly IV, Stone & Connolly, Miami

Defendants: Patrick Shanan Montoya and Ervin Amado Gonzalez, Colson Hicks Eidson, Coral Gables, Fla.

Related Court Document:
Order: 2011 WL 4962351

California panel says trial court made wrong assumption in certifying class

A California trial court relied on an "erroneous legal assumption" when it certified a class of Acura owners and lessees who alleged their vehicles have a defective third gear, a state appellate court has ruled.

American Honda Motor Co. Inc. v. Superior Court for the State of California for the County of Los Angeles; Lee, Real Party in Interest, No. B229687, 2011 WL 4487695 (Cal. Ct. App., 2d Dist. Sept. 29, 2011).

The 2nd District Court of Appeal said the judge erroneously ruled that the plaintiffs do not need proof of a common defect that is substantially certain to cause a future malfunction.

The panel also found insufficient "community of interest" to sustain the class.

The dispute stems from a suit brought by Jin Hyeong Lee, who bought a new Acura RSX with six-speed manual transmission in October 2006.

In January 2007 Honda issued a service update to dealers, noting that some customers were complaining about the manual transmission shifting stiffly or popping out of gear.

The following year the company issued a technical service bulletin to address the problem by installing a redesigned third gear set.

Lee filed his a class-action suit in January 2008 in the Los Angeles County Superior Court. He sought to certify a class of people in California who bought or leased the 2002-2008 Acura models described in the service bulletin who had not had the gear upgrade installed.

The trial court granted the certification request, relying primarily on *Wolin v. Jaguar Land Rover North America*, 617 F.3d 1168 (9th Cir. 2010). The *Wolin* case involved a technical service bulletin indicating that the tires on certain vehicles may wear prematurely.

In *Hicks* a California court held that a breach-of-warranty claim requires proof that the product is substantially certain to malfunction during its useful life.

Wolin did not address California law, the panel said, adding that *Wolin* and *Hicks* are in agreement that proof of current manifestation of the defect is not needed in a breach-of-warranty action. But that is not the end of the inquiry, the appellate court added.

"Just because the law does not require a current malfunction to prove breach of warranty does not mean it should not require proof of *any* malfunction, present or future," the Court of Appeal said.

In addition, the panel found that common questions of law and fact do not predominate in the case.

"We are presented with a class composed of 715 members who experienced third gear problems and reported it, and 18,755 other members who experienced no third gear problems, who might experience third gear problems in the future and who suffered in silence," the panel said.

"This class, as it is currently defined, presents too many individualized issues for class treatment," the court said.

> "Just because the law does not require a current malfunction to prove breach of warranty does not mean it should not require proof of *any* malfunction, present or future," the appeals court said.

The *Wolin* court held that "proof of the manifestation of a defect is not a prerequisite to class certification" and that an allegation of a defect was enough to satisfy the predominance question for certification.

In Lee's case, the Court of Appeal said the trial court's certification order was based on an erroneous legal assumption. The panel said *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908 (Cal. Ct. App., 2d Dist. 2001), represented "the better reasoned statement of law on this issue."

Related Court Document:
Opinion: 2011 WL 4487695

Court shoots down class certification in Porsche repair-cost case

A California appeals panel has turned down an insured's bid for class certification in a bad-faith suit involving the appropriate labor rate for the repair of luxury automobiles.

Holzman v. Farmers Insurance Exchange, No. B221989, 2011 WL 4436449 (Cal. Ct. App., 2d Dist., Div. 3 Sept. 26, 2011).

"Whether an insured incurs out-of-pocket expenses requires an individualized, case-by-case analysis," the 2nd District Court of Appeal said.

The panel explained that, in some situations, defendant Farmers Insurance Exchange negotiates a rate that exceeds the "predominant market labor rate" used by the insurer.

> "Whether an insured incurs out-of-pocket expenses requires an individualized, case-by-case analysis," the 2nd District Court of Appeal said.

"The court must determine for each individual whether Farmers agreed to a higher labor rate and, if so, whether that rate was reasonable, or whether it was still so low that it violates the insurance policy, Insurance Code and/or applicable regulations," it said.

The dispute began when Farmers refused to pay the labor rate charged by a repair shop that Daniel Holzman had selected to fix his vehicle.

In 2005 Holzman had scraped the bottom of his 1999 Porsche 911 Carrera Cabriolet on a speed bump. The oil pan leaked and damaged the car's engine, according to the panel's opinion.

Holzman took the vehicle to a Porsche dealer for an engine replacement. The dealer estimated repairs exceeded $13,000, which included a labor charge of $135 per hour.

Farmers initially said it would pay the "predominant market labor rate" of $65 per hour but later agreed to pay $85 per hour for the repairs, the opinion says.

Holzman ultimately paid $1,400 out-of-pocket, reflecting the difference between the dealer's and the insurer's rates.

In 2007 Holzman filed a class-action lawsuit against Farmers for breach of contract and bad faith.

The suit said the insurer acted inappropriately by paying claims based on the predominant market labor rate. Data used to calculate the rate is skewed against owners of "above average cost automobiles" even though those owners pay higher insurance rates, according to the suit.

The class was defined as California residents who insured their expensive-to-repair vehicles with Farmers, made covered claims for repairs and were forced to pay out of pocket to have the vehicles repaired.

In 2009 the Los Angeles County Superior Court denied Holzman's motion for class certification. In a 27-page order the trial court concluded "that there are highly individualized issues present in this litigation which far outnumber any common questions of fact or law."

Holzman appealed.

The appeals panel agreed with the trial court that class certification is inappropriate. Specifically, it held that common questions of fact and law are not predominant.

"Farmers' use of the predominant market labor rate cannot be unlawful or a violation of the insurance policy unless it ... coerces the insured to repair his or her vehicle at a repair facility chosen by Farmers in order to avoid [out-of-pocket expenses]," the panel said.

"Thus the court must still determine whether a particular insured incurred unwarranted out-of-pocket expenses as a result of Farmers' use of the predominant market labor rate, which is an individualized, case-by-case analysis," it said.

The panel also rejected Holzman's contention that the trial court prematurely decided the merits of his claims for breach of contract and bad faith when it denied his motion for class certification. WJ

Related Court Document:
Opinion: 2011 WL 4436449

REUTERS/Pascal Volery

The plaintiff took his Porsche 911 Carrera to a Porsche dealer for an engine replacement. The dealer estimated a labor charge of $135 per hour, but the plaintiff's insurer said it would only pay the "predominant market labor rate" of $65 per hour. It later agreed to pay $85 an hour.

Casino must answer discovery requests related to class certification

A Nevada federal judge has limited a plaintiff's discovery requests to those related to her bid for class certification in a lawsuit alleging that a casino exposes its employees to secondhand smoke.

Kastroll v. Wynn Resorts Ltd., No. 2:09-cv-02034-LDG-LRL, 2011 WL 4916623 (D. Nev. Oct. 17, 2011).

U.S. Magistrate Judge Cam Ferenbach of the District of Nevada said the casino must answer discovery requests related to its smoking policy and air filtration system but gave the casino a pass on providing information on its smoking signage and sale of tobacco products.

WORKERS FORCED TO 'DODGE THE SMOKE'

Casino dealer Kanie Kastroll sued Wynn Resorts Ltd., which does business as Wynn Las Vegas, seeking an order requiring the company to take "reasonable" steps to shield its workers from secondhand smoke (see *Westlaw Journal Class Action*, Vol. 16, Iss. 11).

As a result of secondhand smoke, Kastroll says, she has suffered health problems such as dizziness, headaches, ingestion of carcinogens and exacerbation of her asthma.

Other casinos in Nevada have reduced the amount of secondhand smoke on their gaming floors, according to the complaint. However, Wynn Las Vegas has refused to take any action to mitigate secondhand smoke in its gaming areas, the suit says.

"While casino patrons are playing table games such as blackjack and roulette, employees working on the casino floor at Wynn Las Vegas play a different game called 'dodge the smoke,'" the suit says.

The suit alleges failure to provide a safe workplace in violation of Nev. Rev. Stat. § 618.375.

The proposed class includes all past, present and future Wynn Las Vegas employees who have been or will be exposed to dangerous levels of secondhand smoke.

CASINO'S MOTION TO DISMISS FAILS

Wynn Las Vegas said in a December 2009 dismissal motion that the federal court lacks jurisdiction to hear the suit (see *Westlaw Journal Class Action*, Vol. 16, Iss. 12).

In support it cited the home-state-controversy exception to the Class Action Fairness Act, 28 U.S.C.A. § 1332, which requires federal courts to refuse jurisdiction when a case is distinctly local in nature.

> Identifying which employees work in smoking areas and where the secondhand smoke travels will help determine the class members, the judge said.

The casino also claimed it has no duty to shield workers from secondhand smoke because the state's Clean Indoor Air Act, Nev. Rev. Stat. § 202.2483, bars smoking in "indoor places of employment" but exempts casinos from the ban.

U.S. District Judge Lloyd D. George refused to dismiss the suit based on jurisdictional issues, noting that the "proper scope" of the class will be fleshed out during later stages of the litigation.

There might be circumstances under which Kastroll would be entitled to relief, he added.

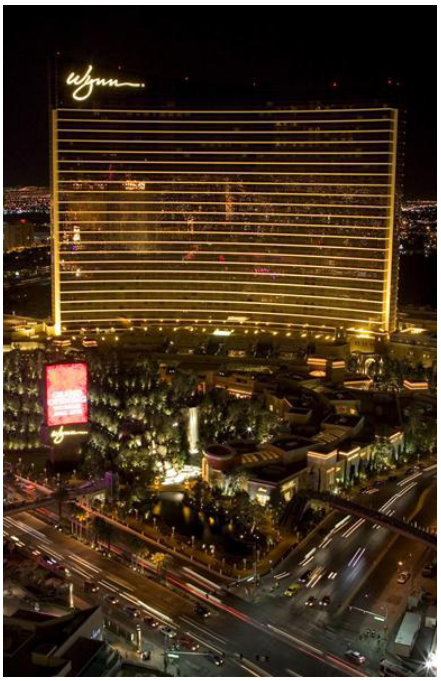
JUDGE LIMITS DISCOVERY REQUESTS

After reviewing the casino's objections, Magistrate Judge Ferenbach limited Kastroll's discovery requests to those needed to decide the issue of certification.

For example, he said the casino must describe its current smoking policy and its air filtration system, but the defendant need not list any past policy changes or previous air filtering systems.

Identifying which employees work in smoking areas and where the secondhand smoke travels will help determine the class members, the judge explained.

On the flip side he said the casino is not obligated to describe the steps that it has taken to improve its air quality, disclose signs related to its smoking policy or reveal the tobacco products sold onsite as that information is irrelevant to the issue of class certification. WJ



REUTERS/Ethan Miller

The plaintiff, who worked as a casino dealer at Wynn Las Vegas, shown here, sought an order requiring the casino to take "reasonable" steps to shield its workers from secondhand smoke.

Attorneys:
Plaintiff: George P. Kelesis and Marc P. Cook, Bailus Cook & Kelesis, Las Vegas

Defendant: James J. Pisanelli, Debra Spinelli and Jarrod L. Rickard, Pisanelli Bice PLLC, Las Vegas

Related Court Document:
Order: 2011 WL 4916623

Scan this code with your QR reader to see the complaint on Westlaw.

Troops pay $40 to call home, phone company reaps millions, suit says

An international telecommunications company charges exorbitant fees to U.S. military personnel who use the company's phones at a German airport to call home, a federal court lawsuit alleges.

Corder et al. v. BBG Communications Inc. et al., No. 11-00264, complaint filed (W.D. Tex., Waco Div. Oct. 12, 2011).

Since 2007 hundreds of thousands of troops have used the phones in the airport lounge to call family for the last time before going off to war in Iraq and Afghanistan or to tell them they are on their way home, the complaint says.

Army Sgt. Richard Corder and his wife, Dharma, filed the suit on behalf of such troops in the U.S. District Court for the Western District of Texas. Defendant BBG Communications and BBG Global charged Richard Corder $41 for a four-second phone call that the sergeant made from the airport in Germany, the complaint says.

According to the complaint, Corder, stationed in Fort Hood, Texas, called his wife on his way to Iraq and left a message on her voicemail. He was unaware of the charges, the suit says, because the phones provide no notice about charges and accept only credit or debit cards.

BBG Communications and BBG Global operate a bank of phones in the secure military lounge at the airport in Leipzig, Germany. The phones, used exclusively by military personnel, are often the only way they can call home during refueling stops, the suit says.

The San Diego-based company has more than 350,000 pay phones in hotels, airports and businesses in 30 countries, according to its website.

The Corders allege that the company set up the phones to accept only credit or debit cards, rather than the prepaid calling cards used by many service members, and it fails to disclose the charges anywhere on or near the phones.

REUTERS/Chris Helgren

The defendants charged the plaintiff $41 for a four-second phone call that the Army sergeant made from the airport in Germany, the complaint says.

The company programs the phones to make it difficult to determine the charges and instructs its operators not to disclose the fees unless directly asked, the suit says.

Each call starts with a $40 charge, the complaint says, that increases with the length of the call. At $41 for four seconds, Corders' call, for example, works out to about $615 per minute.

According to the complaint, based on the company's pricing charts, the $40-per-call charge at the German airport's military lounge is more than it charges other customers in Europe.

The complaint, which includes anecdotal evidence from hundreds of troops who have lodged complaints against the company, says the telecom has put profit ahead of any sense of duty or fairness.

According to the complaint, the scheme has netted millions of dollars for BBG and BBG Global's majority owners Gregorio and Rafael Galicot.

The Galicots are not defendants in the suit.

The suit alleges that BBG committed fraud by misrepresenting and failing to disclose the call fees and breached a contract with its service member customers. In addition to restitution and damages for the victimized military personnel, it seeks to force the company to display the charges on the phones. WJ

Attorney:
Plaintiffs: Jim Dunnam, Dunnam & Dunnam, Waco, Texas

Related Court Document:
Complaint: 2011 WL 4954004

States oppose class in Texas child welfare suit

Ten states say a class of 12,000 children who allege the Texas foster care system fails to provide adequate care and stable families should be decertified because it cannot meet the strict commonality requirements set by a recent U.S. Supreme Court decision.

M.D. et al. v. Perry et al., No. 11-40789, amicus brief filed (5th Cir. Oct. 7, 2011).

In an *amicus curiae* brief filed with the 5th U.S. Circuit Court of Appeals, the states also argue that more than two dozen similar suits filed across the country have resulted in federal oversight and threatened states' rights.

National advocacy group Children's Rights filed a federal court suit in March alleging that Texas and its foster care system violated the constitutional rights of children in the system by failing to provide proper care (see *Westlaw Journal Class Action* Vol. 18, Iss. 6).

According to the suit, children in the Texas Department of Family and Protective Services foster care system were denied services, put in group homes and often split up from their siblings. The overworked agency staff failed to properly oversee foster families, the suit said.

In June U.S. District Judge Janis Graham Jack of the Southern District of Texas certified a class of 12,000 children against the state and the DFPS.

Judge Jack ruled that despite each child's varying circumstances, the class met federal certification requirements because the suit's goal was an overall reform of the system, which would affect all class members, rather than one particular child.

Texas appealed the certification decision in July.

Ten states that have faced similar challenges to child welfare programs are supporting Texas in opposition to the class certification.

The states' brief says that in certifying the class, Judge Jack incorrectly concluded that:

- All class members have suffered the same injury.
- Resolution of the injury would resolve the issues for all class members.
- An injunction will provide relief to every class member.

To support their arguments, the states point to the U.S. Supreme Court's recent landmark decision to decertify the largest employment discrimination class in history. The June 20 ruling in *Wal-Mart Stores v. Dukes et al.*, 131 S. Ct. 2541 (2011), makes it more difficult for a proposed class to meet the commonality requirement under Federal Rule of Civil Procedure 23.

In *Dukes*, the high court ruled that more than 1 million female Wal-Mart current and former employees could not sue the chain for gender discrimination as a group because they failed to show "there are questions of law or fact common to the class."

The decision requires courts to apply a "rigorous analysis" to make sure the Rule 23 requirements — particularly commonality — are met, the states' brief says. Judge Jack did not do this, they contend.

> Just as the Wal-Mart managers had discretion over the promotion of the women in *Dukes*, the Texas social workers have broad discretion over how they address the individual needs of foster care children, the states say.

In light of *Dukes*, the 5th Circuit should decertify the class, the states say. According to the brief, DFPS' response to each child is unique, so broad system-wide allegations cannot be handled efficiently by a class action.

The court must consider each child's circumstances, the states argue.

Just as the Wal-Mart managers had discretion over the promotion of the women in *Dukes*, the state's social workers have broad discretion over how they address the individual needs of foster care children, the brief says.

In order to claim a common injury to all the foster children in the class, the brief says, the suit would have to show a system-wide policy that overrides these individually based discretionary decisions.

Injunctive relief that could solve the alleged problems of some class members might not help others, the brief says.

Additionally, the states oppose certification out of concern for federal oversight of state programs that has proven in the past to be costly and burdensome, the brief says.

"Perhaps because of the sympathetic plaintiffs these cases present, it may be easy to lose sight of the limited role that the federal courts should play even when institutional reform seems advisable," the brief says. WJ

Attorney:
Amici: Massachusetts Attorney General Martha Coakley, Boston

Related Court Document:
Brief: 2011 WL 4947267

See Document Section B (P. 31) for the brief.

No coverage for printing too much info on credit card receipts

An insurer's commercial general liability policy did not cover a class-action lawsuit alleging that a restaurant printed too much personal information on its credit card receipts, a federal appellate court has ruled.

Creative Hospitality Ventures Inc. v. U.S. Liability Insurance Co., No. 11-11781, 2011 WL 4509919 (11th Cir. Sept. 30, 2011).

The 11th U.S. Circuit Court of Appeals said Essex Insurance Co. had no duty to defend restaurant owner E.T. Ltd. against the class action because credit card receipts do not qualify as "publications" under the policy's definitions.

Therefore, the panel upheld a decision by the U.S. District Court for the Southern District of Florida to grant Essex's motion for summary judgment in the coverage action.

According to the appeals court's opinion, patrons sued ETL in Florida state court, alleging violation of the Fair and Accurate Credit Card Transaction Act, 15 U.S.C. § 1681(c)(g)(1).

The plaintiffs alleged ETL willfully violated FACTA or at least negligently failed to comply with the law by printing five or more digits of credit card numbers or the cards' expiration dates on receipts.

ETL told Essex about the pending suit and requested coverage, but the insurer denied the claim, the panel said.

Consequently, ETL joined a federal class-action declaratory judgment suit against various insurers that had been filed in the District Court by policyholders who had been sued under FACTA and whose coverage claims were denied.

REUTERS/Jo Yong hak

The insurer argued that printed credit card receipts did not fall within the policy's coverage for advertising injuries because the receipts were not "publications," as defined by the policy.

Fair and Accurate Credit Card Transaction Act, 15 U.S.C. § 1681(c)(g)(1)

"Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."

The proposed class of policyholders sought an order declaring that their insurance policies covered the alleged FACTA violations.

Each insurer filed a motion to dismiss the suit for failure to state a claim.

In its motion, Essex argued that printed credit card receipts did not fall within the policy's coverage for advertising injuries because the receipts were not "publications," as defined by the policy.

The District Court referred the motions to a federal magistrate judge, who found that insurers' policies, which covered "publication in any manner," potentially covered the printed credit card receipts and the alleged privacy violations.

However, the magistrate judge noted most of the underlying suits alleged the policyholders willfully violated FACTA. He pointed out that the policies excluded coverage for willful violations, and he therefore recommended that the District Court grant the insurers' motions to dismiss.

On the other hand, the suit against ETL included allegations of negligent noncompliance, and the magistrate judge recommended that ETL's coverage action be allowed to proceed against Essex.

Essex objected to the recommendation, reasserting that it owed no coverage because the credit card receipts were not publications.

Meanwhile, the patrons dismissed the underlying state court class action against ETL. In turn, the District Court converted Essex's motion to dismiss to one for summary judgment in the coverage action.

After hearing further arguments from both parties, the District Court agreed with Essex that its policy did not cover the FACTA allegations. The court cited the Florida Supreme Court's decision in *Penzer v. Transportation Insurance Co.*, 29 So. 3d 1000, 1005 (Fla. 2010), which held that "publication" requires a public announcement.

> The plain meaning of "publication" in the policy is unambiguous. Therefore, a receipt provided to a customer involves no such "publication," the 11th Circuit said.

"Printing a non-truncated credit card receipt, and providing it to the cardholder does not constitute publication because there is no dissemination of information to the public," the decision said.

The 11th Circuit affirmed, saying the plain meaning of "publication" in the policy is unambiguous, and therefore, a receipt provided to a customer involves no such "publication."

Thus, Essex owed no coverage to ETL for the alleged FACTA violations, the appeals court held. WJ

Attorneys:
Plaintiff: Valentina M. Tejera, Bruce B. Baldwin, Richard D. Lara, Leah Harkiewicz Martinez and Curtis J. Mase, Mase Lara Eversole, Miami

Defendant-appellee: Carmen Y. Cartaya, Dawn Marshall and John C. Webber, McIntosh Sawran & Cartaya, Fort Lauderdale, Fla.

Related Court Document:
Opinion: 2011 WL 4509919

Wage-and-hour suit against Dollar Tree remains in federal court

A wage-and-hour class action against Dollar Tree Stores does not belong in California state court because the potential damages amount meets the $5 million threshold for federal jurisdiction, a federal judge there has ruled.

REUTERS/Rick Wilking

Stevenson v. Dollar Tree Stores Inc., No. 11-1433, 2011 WL 4928753 (E.D. Cal. Oct. 17, 2011).

U.S. District Judge Kimberly J. Mueller of the Eastern District of California rejected plaintiff Laurence Stevenson's bid to have the case returned to the Sacramento County Superior Court.

Because the number of meal periods that employees allegedly missed was uncertain, the judge found that Dollar Tree presented reasonable calculations showing that lost wages and attorney fees likely would meet the jurisdictional minimum under the Class Action Fairness Act, 28 U.S.C.A. § 1332.

According to the opinion, Stevenson was a non-exempt assistant manager in a Sacramento Dollar Tree store.

Non-exempt employees are not subject to the state's overtime provisions.

> The judge said that because portions of the complaint were ambiguous, the defendant was able to show that the case met the CAFA jurisdictional minimum.

Stevenson sued the company in April, alleging it failed to pay overtime and full wages, and failed to provide meal periods or compensation for employees' missed meal time. She also alleged deceptive business practices.

Virginia-based Dollar Tree removed the suit to District Court, noting the diversity of citizenship between the parties and that the suit involves at least $5 million in damages.

Although the parties agreed the diversity requirement had been met, Stevenson said Dollar Tree failed to show the amount in controversy made the case subject to CAFA.

In support she noted the complaint limits the potential number of missed meal periods to instances in which the assistant manager was the only managerial employee on duty.

Judge Mueller rejected this argument, citing ambiguity in portions of the complaint. Specifically, she noted its use of phrases like "among other things" and "including, but not limited to," which allowed Dollar Tree to present the calculations of an expert showing that lost meal-period wages alone could exceed $5 million.

The judge also said Dollar Tree presented evidence that "waiting time" penalties would amount to more than $3 million.

Such penalties are imposed on employers who "willfully" fail to provide final wages to employees.

Finally, Judge Mueller accepted Dollar Tree's estimate of $2 million in attorney fees. She said this is a reasonable in California, where wage-and-hour class actions have settled for millions of dollars before trial, and attorney fees range from 25 percent to 30 percent of the settlements. WJ

Attorneys:
Plaintiff: Alfredo Torrijos, Granada Hills, Calif.; Dylan Pollard, Pollard Bailey, Beverly Hills, Calif.

Defendant: Aimee Axelrod, Matthew Vandall and Maureen McClain, Littler Mendelson, San Francisco

Related Court Document:
Order: 2011 WL 4928753

Scan this code with your QR reader to see the order on Westlaw.

Suits: $21 billion bid for El Paso Corp. benefits insiders, cheats investors

Kinder Morgan Inc.'s $21.1 billion bid to acquire El Paso Corp. and create the nation's largest natural gas pipeline company benefits affiliates of El Paso adviser Goldman Sachs and other insiders at the shareholders' expense, suits filed in Delaware and Texas allege.

Kahn v. Foshee et al., No. 6949, complaint filed (Del. Ch. Oct. 19, 2011).

El Paso shareholder Alan Kahn's Delaware Chancery Court complaint claims the company's directors breached their fiduciary duty by indiscriminately accepting a cash-and-stock offer of $26.87 per share from rival KMI.

Three other El Paso shareholders filed nearly identical suits the same day in Delaware, and a fourth filed a similar action Oct. 17 in Texas, in an effort to halt the merger.

All the plaintiffs have standing to sue because both companies are based in Houston but chartered in Delaware.

In an Oct. 16 joint announcement of the merger, KMI CEO Richard Kinder called the deal a "once-in-a-lifetime transaction that is a win-win opportunity for both companies."

In that same press release, El Paso CEO Doug Foshee said the merger will provide greater value for shareholders than a planned spin-off of one of El Paso's subsidiaries.

> The class-action suit alleges the merger "is unfair both with respect to process and price and is designed to benefit El Paso's and KMI's insiders to the detriment of plaintiff and the class."

Kahn's class-action suit alleges the merger "is unfair both with respect to process and price and is designed to benefit El Paso's and KMI's insiders to the detriment of plaintiff and the class."

REUTERS/Richard Carson

Kinder Morgan Inc. CEO Richard Kinder, shown here, called his company's proposal to acquire El Paso Corp. a "once-in-a-lifetime transaction that is a win-win opportunity for both companies." An El Paso investor disagrees and has sued to stop the deal.

Some of the measures the El Paso board allegedly used to discourage competing bidders:

- A $650 million termination fee that any other successful bidder would have to pay to Kinder Morgan.
- A "prohibitive" no-solicitation clause that would prevent El Paso from contacting other suitors.
- A "matching rights" provision that gives Kinder Morgan the right to match any superior bid.

He claims the proposed deal is "rife with conflict" since one of its primary beneficiaries will be affiliates of Goldman Sachs & Co., which acted as El Paso's financial adviser on merger-related matters. Goldman owns 19 percent of KMI's stock and elected two of its directors, according to the suit.

Kahn charges that the El Paso directors never tested the market to find out what the company was really worth and then agreed to a series of merger conditions aimed at discouraging competing bidders (see box).

Kahn claims that the El Paso board breached its duty by accepting an opportunistic offer that took advantage of a temporary low point in the company's stock price.

In addition, the board relied on advice from Goldman, which is "beholden" to KMI, the suit alleges.

"Goldman Sachs' loyalties lie with KMI," the complaint says.

Kahn and the other plaintiffs seek a preliminary injunction to stop the transaction and force the El Paso directors to shop for a better price.

In a statement, an El Paso representative said the suit was "absolutely without merit." WJ

Attorney:
Plaintiff (Kahn): Jessica Zeldin, Rosenthal, Monhait & Goddess, Wilmington, Del.

Related Court Document:
Kahn complaint: 2011 WL 4965130

Casino wins dismissal of class claims in secondhand-smoke suit

A Louisiana federal judge has tossed class allegations in a lawsuit that accuses Harrah's New Orleans Hotel & Casino of failing to protect its employees from exposure to secondhand smoke.

Bevrotte v. Caesars Entertainment Corp. d/b/a Harrah's New Orleans Hotel and Casino, No. 11-543, 2011 WL 4634174 (E.D. La. Oct. 4, 2011).

U.S. District Judge Sarah S. Vance of the Eastern District of Louisiana concluded that common issues do not predominate over individual ones and that a class action suit is not the superior method for resolving the dispute.

WORKERS AT RISK, SUIT SAYS

Denise Bevrotte alleges her son Maceo Bevrotte Jr. worked at Harrah's as a dealer for about 15 years and died in March 2010 from cancer caused by inhaling secondhand smoke at work.

She sued casino owner Caesars Entertainment Corp. on behalf of more than 1,000 nonsmoking employees and future employees of the New Orleans casino who were, are or will be exposed to unsafe levels of secondhand smoke in the workplace.

Harrah's breached its duty to provide its employees with a safe workplace and enacted smoking policies "driven by a desire to maximize profits at the expense of its employees' health and safety," the complaint says.

Bevrotte says Harrah's failed to take steps to mitigate secondhand smoke such as setting up smoke-free gaming areas, installing air-filtering systems and monitoring the health of employees.

Bevrotte accuses Harrah's of violating La. Rev. Stat. Ann. §§ 23:13 and 23:15, which require employers to provide a safe workplace.

In recent years, Harrah's has taken some actions to lessen secondhand smoke, according to the complaint, but these measures came "too late" to help Maceo Bevrotte.

HARRAH'S CLAIMS INDIVIDUAL ISSUES STACK THE DECK AGAINST CLASS STATUS

In its motion to dismiss Harrah's said Bevrotte's claims are not typical of the class because she is representing her son and is not a member of the class. A survival action is "fundamentally different" from claims that class members who are living would have, the casino said.

Harrah's further contended that Bevrotte is not an adequate class representative because she lacks independent knowledge about the working conditions at the casino, and her interests as her son's representative are different from those of the putative class.

Last, it said individual issues predominate regarding each employee's employment conditions, medical history, causation and damages.

'A POOR CANDIDATE FOR CLASS TREATMENT'

Siding with Harrah's, Judge Vance struck the class allegations.

The judge said common issues do not predominate as Bevrotte's "claims raise individualized and fact-intensive issues of causation and damages that cannot be adjudicated in a class-action format."

She said the alleged injuries of the putative class members cannot be attributed to a single accident but, instead, to exposure to secondhand smoke over a period of time, which makes "the causation inquiries even more particularized to each plaintiff."

"Each would bear the burden of proving that exposure to secondhand smoke

> The judge said common issues do not predominate as the plaintiff's "claims raise individualized and fact-intensive issues of causation and damages that cannot be adjudicated in a class-action format."

REUTERS/Tim Shaffer

during employment at Harrah's Casino was responsible for his or her injuries," the judge explained.

Even if the causation element of the case could be tried as a class action, the individualized damage claims "would make this case a poor candidate for class treatment," she said.

"Even among those who could allege medical injuries, the damages would vary widely from basic respiratory problems to, as with Ms. Bevrotte's son, serious illness and eventual death," she said.

Finally, Judge Vance said adjudication of the case as a class action would not be the superior method.

Plaintiffs such as Bevrotte could "recover substantial amounts," which gives "ample incentive for them to proceed on an individual basis," she added. WJ

Attorneys:
Plaintiff: Jalila Jefferson-Bullock, Jefferson & Jefferson, New Orleans

Defendant: Roy Clifton Cheatwood, Baker Donelson Bearman Caldwell & Berkowitz, New Orleans

Related Court Document:
Opinion: 2011 WL 4634174

See Document Section C (P. 43) for the opinion.

SECURITIES FRAUD

Shareholder suits: Chinese oil outfit an 'empty shell'

A second shareholder lawsuit against Chinese oil recovery outfit Sinotech Energy Ltd. has been filed in federal court in Manhattan after a news outlet reported the company is nothing more than an "empty shell."

Gustafson et al. v. Sinotech Energy Ltd. et al., No. 1:11-cv-06905-GBD, complaints consolidated (S.D.N.Y. Oct. 14, 2011).

Roger and Germaine Hein-Gustafson filed the class-action suit in the U.S. District Court for the Southern District of New York against Sinotech Energy Ltd., a Cayman Islands-chartered corporation, demanding a jury trial and compensatory damages.

The Sept. 30 complaint was merged with a similar August complaint Oct. 14.

The suits are typical of a mounting wave of shareholder complaints alleging shell games by Chinese companies that are incorporated in the United States or off shore but have all their assets located in China.

The Gustafson complaint names six of Sinotech's board members, including its CEO and CFO, as well as underwriting companies that signed off on statements filed with the Securities and Exchange Commission.

According to the complaint, Sinotech boasted exponential growth between late 2010 and August 2011, both in profits and the amount of business it obtained.

For the first quarter of 2011, for instance, Sinotech claimed to have sales of $22.8 million, more than a 200 percent increase over the same period in 2010. Also, gross profits supposedly were up 191 percent over the 2010 first quarter.

By May this year, CFO Boxun Zhang was predicting sustained growth for the company for years to come, and CEO Guoqiang Xin claimed Sinotech was "ideally positioned to profit" from China's ever-expanding oil needs.

The suits are typical of a mounting wave of shareholder complaints of shell games by Chinese companies that are incorporated in the United States or off shore but have all their assets located in China.

In an Aug. 4 release on the 2011 third-quarter results, Sinotech claimed to have exceeded expectations. With sales of more than $293 million, and gross profits of more than $21 million, the company revised its 2011 revenue guidance upward from a range of $100 million to $105 million to $108 million to $112 million.

Then the bombshell hit. An Aug. 16 report published on alfredlittle.com, an investment and analysis website focused on China's business world, said Sinotech was little more than an empty shell.

According to that report, the company's only import agent, which accounted for more than $100 million worth of drilling equipment orders, had no signs of operation and a negligible revenue base.

Sinotech's only chemical supplier also appeared to be "an empty shell, with no revenues, a deserted office and no signs of production activity," according to the suit. Its five largest subcontractors also allegedly were nothing more than shell companies with almost no reserves and unverifiable operations.

Trading on Sinotech shares was halted the day the report was issued and has not resumed, the suit says.

The Gustafsons claim Sinotech and its officers lied from the beginning in a scheme to defraud the public and artificially inflate share prices, which have since plummeted.

The suit also names the underwriters of the IPO — UBS AG, UBS Securities LLC, Citigroup Global Markets and Lazard Capital Markets — as well as Sinotech's former accountant, Grant Thornton, which allegedly certified financial statements included with the SEC registration statement.

The combined cases have been assigned to U.S. District Judge George B. Daniels. WJ

Attorney:
Plaintiff: Mark I. Gross, Pomerantz Haudek Grossman & Gross, New York

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Sykes v. Lofton & Lofton Management	Ill. Cir. Ct. (Cook)	2011-CH-34724	10/5/11	Lofton & Lofton Management violated the Illinois Wage Payment and Collection Act when it manipulated the number of hours plaintiffs worked in order to unlawfully withhold payment of wages.	Compensatory and statutory damages, fees, expenses and costs
Worix v. Medassets Inc. 2011 WL 5186160	Ill. Cir. Ct. (Cook)	2011-CH-35609	10/13/11	Medassets Inc. failed to maintain proper procedures to safeguard patients highly sensitive medical records including names, birthdays and Social Security numbers from a computer hard drive.	Class certification; actual, statutory and punitive damages; interest; fees and costs
Boytim v. Brigham Exploration Co. 2011 WL 4947249	Tex. Dist. Ct. (Travis)	D-1-GN-11-003205	10/17/11	Brigham Exploration Co. and co-defendants failed to discharge their fiduciary duties to maximize share value and conduct an appropriate process in a proposed sale of the company to Statoil ASA.	Class certification, injunctive relief, fees and costs
Duncan v. Brigham Exploration Co.	Tex. Dist. Ct. (Travis)	D-1-GN-11-003215	10/18/11	Brigham Exploration Co., Statoil ASA and co-defendants failed to discharge their fiduciary duties to maximize share value and conduct an appropriate sale process.	Class certification, injunctive relief, fees and costs
Fioravanti v. Brigham Exploration Co.	Tex. Dist. Ct. (Travis)	D-1-GN-11-003258	10/24/11	Brigham Exploration Co. and Staoil ASA and failed to discharge their fiduciary duties to maximize share value and conduct and appropriate sale process.	Class certification, injunctive relief, fees and costs
Schwimmer v. Brigham Exploration Co.	Tex. Dist. Ct. (Travis)	D-1-GN-11-003317	10/28/11	Brigham Exploration Co. and Staoil ASA and failed to discharge their fiduciary duties to maximize share value and conduct and appropriate sale process.	Class certification, injunctive relief, fees and costs
Ohler v. Brigham Exploration Co.	Tex. Dist. Ct. (Travis)	D-1-GN-11-003418	11/7/11	Brigham Exploration Co., Statoil ASA and Fargo Acquisition failed to discharge their fiduciary duties to maximize share value and conduct an appropriate sale process.	Class certification, injunctive relief, fees and costs
Klymenko v. Cornerstone Exteriors 2011 WL 5186308	Ill. Cir. Ct. (Cook)	2011-CH-36137	10/18/11	Cornerstone Exteriors engaged in deceptive and fraudulent practices against customers who contracted for certain home repair services of the defendant while acting as a public insurance adjuster without a valid license.	Class certification, declaratory relief, actual and punitive damages, costs, expenses and fees
Old Town Pizza of Lombard v. All Ways Paving	Ill. Cir. Ct. (Cook)	2011-CH-36198	10/19/11	All Ways Paving sent fax advertisements to plaintiff Old Time Pizza of Lombard without prior express invitation and permission, causing damages to the plaintiffs.	Class certification and representation, injunctive relief, $75,000 in damages, fees and costs
Bearing Brokers v. National Commercial Lending & Equity 2011 WL 5016599	Ill. Cir. Ct. (Cook)	2011-CH-36620	10/21/11	National Commercial Lending & Equity violated the Telephone Consumer Protection Act by sending unsolicited fax advertisements to Bearing Brokers and others, causing plaintiffs to suffer damages in the form of paper, ink and toner wasted.	Damages, injunctive relief and costs

Westlaw Court Wire is a Thomson Reuters news service that provides notice of new complaints filed in state and federal courts nationwide, sometimes within minutes of the filing.

RECENTLY FILED COMPLAINTS FROM WESTLAW COURT WIRE*

Case Name	Court	Docket #	Filing Date	Allegations	Damages Sought
Sims v. Stonebridge Benefit Services 2011 WL 5062004	Ill. Cir. Ct. (Cook)	2011-CH-27100	10/25/11	Stonebridge Benefit Services and J.C. Penney Co. continuously charged and debited consumers' credit cards and bank accounts without authorization and failed to cancel plaintiffs' enrollment in membership programs, despite the plaintiffs' multiple attempts.	Class certification; declaratory relief; economic, actual, consequential, statutory, compensatory and punitive damages; restitution; interest; fees and costs
Vollmar v. ATR INT Inc.	Ill. Cir. Ct. (Cook)	2011-CH-37432	10/27/11	ANR INT violated the Illinois Consumer Fraud and Deceptive Business Practices Act by using deceptive and false representations to induce consumers to buy its "Pherlure Pheromone Cologne" worth far less than what they paid for it.	Class certification, actual and punitive damages, injunctive relief, restitution, disgorgement, interest, fees and costs
Abdallah v. Shenandoah Condominium Association	Ill. Cir. Ct. (Kane)	11L000600	10/31/11	Defendant condominium association inflated invoices for expenses resulting in injury and loss to plaintiffs.	In excess of $50,000, reimbursement of legal fees, reimbursement of losses and costs
Morerro v. Fifth Third Bank 2011 WL 5217039	Ill. Cir. Ct. (Cook)	2011-CH-38111	11/2/11	Fifth Third Bank failed to pay employees' overtime compensation, in violation of the Illinois Wage Payment and Collection Act.	Class certification and representation, declaratory relief, compensatory damages, interest, fees and costs
Reid v. Neighborhood Assistance Corp.	Ill. Cir. Ct. (Cook)	2011-CH-37979	11/2/11	Neighborhood Assistance Corp. of America failed to pay its current and former mortgage consultants their earned wages in violation of the Illinois Residential Mortgage License Act and Secure and Fair Enforcement for Mortgage Licensing Act.	Back wages, punitive damages, fees and costs
Chappell v. Autovest LLC	Ill. Cir. Ct. (Cook)	2011-CH-38464	11/4/11	Autovest violated the Illinois Colletion Agency Act and the Illinois Consumer Fraud Act by collecting class members' debts without a license.	Compensatory, actual, nominal and punitive damages; injunctive relief; expenses; interest; fees and costs
Walker v. Horizon Group XVII LLC	Ill. Cir. Ct. (Cook)	2011-CH-38489	11/7/11	Horizon Group XVII failed to disclose in writing code violations affecting dwelling units and common areas at the buildings under the defendant's management in Chicago from the 12 months before entering into rental agreements or renewals with dozens of tenants.	Class certification, exemplary damages, expenses, fees and costs

Westlaw Court Wire is a Thomson Reuters news service that provides notice of new complaints filed in state and federal courts nationwide, sometimes within minutes of the filing.

SUIT SAYS FRUIT SNACKS ARE UNHEALTHY

Labels on General Mills' fruit snacks, including Fruit Roll-Ups, deceive customers by falsely advertising the healthy nature of the products, according to a San Francisco federal court suit filed by the watchdog group Center for Science in the Public Interest. The labels prominently display that the products are low in fat and a good source of vitamin C, the complaint says, but far less obvious is the fact that the products contain artificial additives including partially hydrogenated oil. The misleading labels deceive consumers into paying more for what they believe is a healthier snack than other similar products, the complaint says. The suit alleges that the Minnesota-based General Mills violated Minnesota and California false-advertising and unfair-business-practices laws. It seeks injunctive relief and monetary damages on behalf of a nationwide class of consumers who purchased the products since 2005.

Lam v. General Mills Inc., No. 11-05056, complaint filed (N.D. Cal. Oct. 14, 2011).

Related Court Document:
Complaint: 2011 WL 5007335

Scan this code with your QR reader to see the complaint on Westlaw.

FIRM COVERED UP THEFT OF 82,000 PATIENT RECORDS, SUIT SAYS

MedAssets Inc. waited two months to notify 82,000 people that a hard drive containing their personal health and financial information had been stolen, an Illinois state court lawsuit says. Brandon Worix sued the medical billing firm on behalf of a nationwide class, alleging the company negligently failed to safeguard highly sensitive information in violation of state and federal consumer fraud laws. The information lost included the names and Social Security numbers of 32,000 patients within the county's health system. The data was not encrypted or password protected, the complaint says. The theft occurred on June 24, the suit says, but the company did not contact patients until August and failed to fully disclose what information was lost or what steps patients should take. The suit seeks damages and three years of credit monitoring.

Worix et al. v. MedAssets Inc., No. 11-CH-35609, complaint filed (Ill. Cir. Ct., Cook County Oct. 13, 2011).

Related Court Document:
Complaint: 2011 WL 5186160

Scan this code with your QR reader to see the complaint on Westlaw.

$239 MILLION SALE CHEATS DRUG FIRM INVESTORS, SUIT SAYS

Anadys Pharmaceuticals' directors breached their duty to shareholders by giving drug giant Hoffman-LaRoche the company's pioneering hepatitis medicines at an unfair discount in a $239 million merger, a California state court lawsuit alleges. Shareholder Miguel Angel Alonso Maestro says the directors have a duty to get the best price for the company in a sale, but alleges the board agreed to an unfair sale process that produced an unfair price. The merger, announced Oct. 14 by Anadys CEO Steve Worland, effectively caps the stock at a paltry $3.70 a share, the suit says. The suit seeks a preliminary injunction to halt the merger until the directors can shop for a better offer or negotiate a better deal and asks the court to hold the Anadys directors and officers individually responsible for damage caused by the offer.

Maestro v. Anadys Pharmaceuticals Inc. et al., No. 37-2011, complaint filed (Cal. Super. Ct., S.D. County Oct. 21, 2011).

Related Court Document:
Complaint: 2011 WL 5065258

Scan this code with your QR reader to see the complaint on Westlaw.

ATM OPERATORS SAY VISA, MASTERCARD FIXED PRICES

The National ATM Council and several independent ATM operators filed a class-action suit in federal court Oct. 12, alleging Visa and MasterCard fixed the price of ATM access fees in violation of antitrust laws. The plaintiffs say the companies prohibit them from charging lower prices for transactions not affiliated with the defendants. "Visa and MasterCard are the ringleaders, organizers and enforcers of a conspiracy among U.S. banks to fix the price of ATM fees in order to keep the competition at bay," plaintiffs' attorney Jonathan Rubin of Rubin PLLC said in a statement. If granted certification, the proposed class would be about 200,000 ATM operators in the country.

National ATM Council Inc. et al. v. Visa Inc. et al., No. 11-CV-01803, complaint filed (D.D.C. Oct. 12, 2011).

Related Court Document:
Complaint: 2011 WL 4826966

Scan this code with your QR reader to see the complaint on Westlaw.

DYNEX TO SETTLE ASSET-BACKED-BONDS SUIT FOR $7.5 MILLION

Dynex Capital Inc. has agreed to pay $7.5 million to settle a 2005 suit alleging the Virginia-based lender defrauded investors in securities backed by loans for mobile homes, according to the plaintiff's lawyers. "We're pleased because the settlement represents a real recovery in terms of the percentage of maximum recoverable damages had plaintiff prevailed on all aspects of liability and damages at trial and on appeal," attorney Joel Laitman of Cohen Milstein Sellers & Toll said in an Oct. 6 statement. The settlement is subject to the approval of U.S. District Judge Harold Baer of the Southern District of New York. The securities paid dividends drawn from pools of mobile -home loans or installment-sales contracts, according to the class-action suit.

The suit also named as defendants former Dynex President Thomas Potts and current COO Stephen Benedetti.

In re Dynex Capital Inc. Securities Litigation, No. 05-CV-1897, settlement announced (S.D.N.Y. Oct. 6, 2011).

EEOC SUES TRUCK COMPANY FOR GENDER BIAS

Prime Trucking Inc. discriminated against female applicants for driver positions when it required they be trained only by women and then failed to provide a sufficient number of trainers, the Equal Employment Opportunity Commission alleges in a federal class-action lawsuit. The company then put the female applicants on a waiting list, which frequently meant job placement was delayed or denied for women, while male applicants received training right away, the agency says. The EEOC is suing on behalf of Deanne Roberts and similarly situated female applicants from 2003 until the present. The agency says it anticipates that Prime Trucking will counter that its policy is legitimate because it was established to reduce sexual harassment claims by female trainees. The company provides truck freight services in Mexico, the U.S. and Canada.

Equal Employment Opportunity Commission v. Prime Trucking Inc., No. 11-03367, complaint filed (W.D. Mo. Sept. 22, 2011).

CASE AND DOCUMENT INDEX