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## CLASS CERTIFICATION

### *Decertification*

*Red Barn Motors, Inc. v. Nextgear Capital, Inc.*, No. 18-1409, 2019 WL 575279 (7th Cir. Feb. 13, 2019) (Rovner, J.)

After car dealership operators brought suit against Defendants at a financing company, alleging unwarranted interest charges in violation of RICO and state law, and the United States District Court for the Southern District of Indiana certified the class, then subsequently decertified the class on a motion for reconsideration, Plaintiffs appealed.

The Seventh Circuit vacated and remanded, holding that the district court failed to provide adequate reasoning for its decertification ruling. The Court reasoned that while the district court's analysis of the original certification decision was a "model of clarity and thoroughness," the decertification decision was granted with a mere mention that ambiguous contract terms involve a review of extrinsic evidence and individualized inquiries, which undermines commonality and predominance.

The Seventh Circuit upon review found that the parties agreed that the contract was in fact standard and unambiguous, and would have been capable of class-wide resolution even with analyzing extrinsic evidence. The Court also noted the district court had rejected the same commonality argument in the original certification decision. Absent further explanation, the Court determined it could not uphold the decertification.

## CONSUMER

### *Rental Cars*

*Spotswood v. Hertz Corp.*, No. 16-cv-1200, 2019 WL 498822 (D. Md. Feb. 7, 2019) (Bennett, J.)

Plaintiff brought suit against a rental car company, alleging improper fines were charged for customers' damage to vehicles. Plaintiff moved for certification and sought to exclude two declarations and a record which had not been properly submitted in discovery.

The Court denied the motions. Relevant here, in terms of class certification, the Court found plaintiff had not identified an administratively feasible method of locating class members from Defendant's voluminous computer records. In terms of numerosity, the lists of fees charged to customers did not show an association with any putative class members, meaning numerosity could not be demonstrated.

In terms of commonality, the Court found that Plaintiff made allegations which could only proceed on a narrow legal basis which required case-by-case reviews, and also that customers could have opted for arbitration by selecting certain contract provisions in their transactions—which impacted typicality as well.

Finally, in terms of adequacy, the Court found Plaintiff was subject to unique defenses inapplicable to other class members, and was not subjected to other defenses of other class members. The Court also found that Plaintiff's relationship with proposed counsel created a conflict of interest with the proposed class.

### *Data Breach*

*Southern Independent Bank v. Fred's, Inc.*, No. 15-cv-799, 2019 WL 1179396 (M.D. Ala. Mar. 13, 2019) (Watkins, J.)

A bank brought suit against a retail chain, alleging various costs to its customers' credit card accounts resulting from Defendant's negligent failure to maintain adequate cybersecurity. Plaintiff moved for certification, and each party brought a *Daubert* motion to exclude. Defendant also moved for leave to file a sur-reply.

The Court denied certification and the *Daubert* motions, and granted the motion for a sur-reply. Relevant here, the Court analyzed the request for class certification under Rule 23. First reasoning that numerosity was satisfied on the basis of 2,500 financial institutions in a similar position, the Court then found commonality satisfied on grounds of common questions.

Turning to typicality, while Defendant argued that Plaintiff was subject to unique causation and damages defenses, the Court found that similarities between the legal theories of Plaintiff and the class were strong enough that a single negligence claim arises from the same pattern or practice.

In terms of adequacy, while Defendant argued that Plaintiff was inadequate for the same reasons as those applicable to typicality, the Court cited its response above, and found no conflicts between Plaintiff and the class, as well as that Plaintiff's interest was aligned with the class, and thus would be adequate.

Turning then to Rule 23(b)(3) predominance, the Court found that while for negligence cases such as this one, the alleged breach was a common element for all states, here, the need to prove the other negligence elements would lead to individualized inquiries into differing statutory and case law approaches to the economic loss doctrine, as well as differing standards of the duty of care and statutory bars.

Plaintiff also argued that individualized damages questions did not defeat certification, but the Court found that individualized damages do defeat certification when they are so complex and fact-specific as to create an intolerable burden on the Court, and that this was the case here. Accordingly, class certification was denied.

### *Travel*

*Buckeye Tree Lodge and Sequoia Village Inn, LLC v. Expedia, Inc.*, No. 16-cv-04721, 2019 WL 1170489 (N.D. Cal. Mar. 13, 2019) (Chhabria, J.)

Hotel owners brought suit against a travel agency company, alleging misdirection of customers by listing their hotels falsely as "sold out." Plaintiffs moved for certification of a class for injunctive relief, and another for monetary relief.

The Court denied certification of a monetary relief class, but granted certification for an injunctive relief class, after narrowing the proposed class definition. Reasoning in support of its decision, in terms of the Rule 23(b)(2) class, the Court found that the only disputes were on commonality and typicality. In terms of commonality, the Court found that multiple common questions applied to a narrower class of property owners listed on Expedia, which could be established by common evidence of consumer research or surveys. While Defendant argued that there would not be common answers due to differing language used, the Court found that the language did not differ significantly, and that for injunctive relief, the current language could be sufficient. For typicality, Defendant argued that this was defeated by the myriad of ways in which plaintiffs' information landed on its sites. The Court found that this factor affected the proposed class definition, but did not preclude certification of an injunctive relief class.

In terms of the Rule 23(b)(3) class seeking monetary relief in the form of disgorgement of profits earned from allegedly false advertisement, the Court found Plaintiffs had failed to proffer a model or theory for calculating common damages. Thus, the Court found individual questions on damages likely to predominate. The Court also looked at Plaintiffs' alternative request for a Rule 23(c)(4) limited class action to decide common issues of liability, but found Plaintiffs had failed to show how such would materially advance the disposition of the case as a whole, rather than merely certifying an injunctive relief class.

## EMPLOYMENT

### *Disability Discrimination*

*Harris v. Union Pacific Railroad Co.*, No. 16-cv-381, 2019 WL 460388 (D. Neb. Feb. 5, 2019) (Bataillon, J.) Former employees brought suit against a railroad company, alleging disability discrimination under the Americans with Disabilities Act (“ADA”) and Genetic Information Nondiscrimination Act (“GINA”) in being automatically excluded from employment under “fitness for duty” policy after they had disclosed specific health conditions. Plaintiffs moved for certification.

The Court granted the motion, reasoning in support of its decision first that numerosity was satisfied by virtue of there being approximately 7,000 potential class members. In terms of commonality, the Court found that the claim alleged was a common claim, a finding not precluded by any need to evaluate each class member’s requisite job classification individually. Typicality was satisfied by the Court’s finding that the claims and defenses of Plaintiffs were typical of the class. In terms of adequacy, the Court found a common interest between Plaintiffs and the class members, and that they would vigorously prosecute the class’s interests with competent counsel.

In terms of predominance, while Defendant contended that individual claims and factual issues would predominate and that some potential class members lacked standing, the Court found the class to be sufficiently cohesive, and faced with a pattern of discrimination. In terms of superiority, the Court found that the common questions and Defendant’s affirmative defenses made a class action superior in this case.

## FAIR DEBT COLLECTION PRACTICES ACT

*Gomes v. Portfolio Recovery Assocs., LLC*, No. 18-cv-21872, 2019 WL 978806 (S.D. Fla. Feb. 28, 2019) (Altonaga, J.)

Plaintiff brought suit under the Fair Debt Collection Practices Act (“FDCPA”) and an analogous Florida statute against a debt collection company, alleging misrepresentation of facts and other violations. Plaintiff sought to certify a class of individuals who suffered both statutory violations and actual damages, although the complaint requested certification of two classes (one per statute, each having a different limitations period).

The Court denied the motion, reasoning in support of its decision that while ascertainability, numerosity and commonality were not at issue, typicality and predominance were not satisfied.

In terms of typicality, while the Court disagreed that individualized inquiries defeated typicality, it did however find that predominance was defeated by virtue of the requirement that each member have actual damages, which would lead to the need for individualized inquiries in order to prove causation.

## NOTICE

*Rosas v. Sarbanand Farms, LLC*, No. 18-cv-0112, 2019 WL 859225 (W.D. Wash. Feb. 22, 2019) (Coughenour, J.)

Foreign national migrant workers brought suit against their employer and a visa processing company. After the Court certified a class, Plaintiffs sought approval of their notice plan.

The Court granted that request in part and denied it in part. Reasoning in support of its decision, the Court considered each method of notice proposed in turn. First, with respect to text messaging, the Court approved

it, primarily because paper mail delivery in Mexico was not reliable, and many class members did not have U.S. addresses, but phone numbers were available. Second, in terms of a radio campaign in Mexico and various U.S. cities (which Plaintiffs asserted were specific areas class members worked and resided in the past), the Court approved, noting that cell phone service and email access may not always be available to class members. Third, in terms of web-based media notice, the Court found placement of the full notice on two sites appropriate, and deferred ruling on proposed Facebook notice pending further information.

The Court then looked at the proposed notice content and found both the publication notice and full notice were sufficient to explain the necessary class action details, but ordered some modifications to correct ambiguities, and ordered Plaintiffs to provide alternative opt-out methods to account for the communication system problems described above.

## SECURITIES

*Rooney v. Ezcorp, Inc.*, No. 15-cv-00608, 2019 WL 691205 (W.D. Tex. Feb. 19, 2019) (Sparks, J.)  
Plaintiff brought suit for securities fraud against payday loan company, alleging that misrepresentations made by the company's CEO violated securities laws. Plaintiff moved for certification.

The Court granted the motion, reasoning in support of its decision that numerosity was satisfied by reference to approximately 50 million outstanding shares during the class period. In terms of commonality, the Court found the allegations at hand implicated multiple common questions. In terms of typicality, the Court found that Plaintiff's claims were typical of the class and there were no unique defenses conflicting between them.

In terms of adequacy, while Defendants argued Plaintiff was not adequate under a provision of the Private Securities Litigation Reform Act, the Court found Rule 23's adequacy standard was the governing standard. Defendants also argued inadequacy on grounds of the Plaintiff's residence in Ireland, but the Court ruled that Defendants had not established a basis for this leading to a finding of inadequacy. Defendants also argued Plaintiff was not aware of the happenings in the suit, but the Court found he had demonstrated sufficient knowledge of the subject matter to be an adequate representative for the class.

Turning then to predominance, the Court then rejected Defendants' arguments that (1) proving reliance would lead to individualized inquiries, reasoning that the class was entitled to the *Basic* presumption of reliance due to the nature of the misrepresentations made, and Defendants had failed to rebut that presumption with sufficient evidence of price non-impact; and (2) Plaintiff had not provided a sufficient damages model, reasoning that Plaintiff's expert had clearly articulated a means for calculating damages on a class-wide basis, consistent with Plaintiff's theory of liability. Accordingly, predominance was satisfied.

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