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As part of our commitment to practitioners, KCC provides this resource on decisions related to class action litigation in state and federal court.

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## CONSUMER

### *Numerosity*

*Joaquin v. Directv Group Holdings, Inc.*, No. 15-cv-8194, 2020 WL 2098053 (D.N.J. Apr. 30, 2020) (Shipp, J.) Plaintiff brought state law racketeering claims against a television services provider and installer after the company set up her business with a residential account without her knowledge, and then threatened prosecution for unauthorized commercial display. Plaintiff moved for class certification, and Defendants each moved for summary judgment.

The Court denied the motion for certification with leave to refile, and deferred consideration of the summary judgment motions. In terms of class certification, in support of its decision, the Court first considered numerosity, rejecting Plaintiff's argument that Defendant had "essentially conceded" it by providing a list of 245 New Jersey businesses which were issued similar letters concerning unauthorized use. Plaintiff relied on the New Jersey case *Barkouras v. Hecker* for this proposition, but the Court noted the cited case involved defendants who explicitly conceded numerosity, while Defendants here did contest it. The Court found that the list was not offered to show joinder was impracticable, and that the list was not sufficient to show any factual similarity with respect to Plaintiff's specific residential/commercial account issue. Accordingly, numerosity was not met.

### *Billing Practices*

*McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.*, No. 18-cv-1921, 2020 WL 1970812 (D. Or. Apr. 24, 2020) (Simon, J.)

Plaintiffs brought suit against a virtual reception services provider, alleging misleading billing practices gave rise to a variety of claims. Plaintiffs sought class certification, and Defendant moved to preclude certification.

The Court granted certification, first reasoning in support of its decision that numerosity was satisfied by virtue of there being 18,000 class members. In terms of commonality, the Court found several common questions to be sufficient. In terms of typicality, while Defendant argued that one of the plaintiffs did not fit into the class definition of having "obtained" services after the class period's onset, the Court found that the operative definition of "obtained" in this case was properly construed as actually receiving services, not merely has having contracted for services. Defendant also argued the same plaintiff was atypical due to a handwritten contract modification to alter the definition of "receptionist minutes," but the Court found that the modification did not do so and that Plaintiffs satisfied typicality.

Turning then to adequacy, the Court found no conflict of interest and that the representatives and counsel were adequate. For ascertainability, the Court found the class to be defined based on objective criteria and that the members could be identified by company records, further noting that the potentiality of class members having suffered no harm was an issue against which Defendant could present defenses at a later stage.

In terms of Rule 23(b)(3) predominance, the Court first looked at the breach of contract claim, and rejected Defendant's argument that 30 members knew about the billing practices and therefore suffered no harm, but the Court found that common questions would predominate over this group of individuals, who could be dealt with in the damages phase. The Court likewise found that the damages calculation would revolve around common questions and not individual issues. For the other claims, the Court found Defendant had offered no evidence of any differing circumstances giving rise to individualized issues and therefore found predominance was met.

In terms of superiority, the Court found the class action was superior in light of the low individual recovery amount, the stalled status of the state court parallel action against Defendant, the location of class members mainly outside of Oregon, and the lack of manageability problems.

## EMPLOYMENT

### *Fair Labor Standards Act*

*Elston v. Horizon Global Americas, Inc.*, No. 19-cv-2070, 2020 WL 2473542 (D. Kan. May 13, 2020) (Vratil, J.) Plaintiff brought suit under the Fair Labor Standards Act (“FLSA”) and state wage law, alleging her employer failed to pay her for hours worked and overtime pay. Plaintiff moved for preliminary approval after a settlement was reached.

The Court overruled the motion. Reasoning in support of its decision, the Court looks at each class proposed under the agreement. In terms of the FLSA claims, the Court first considered the basis of the suit, but found Plaintiff had not submitted enough information about a bona fide dispute about specific wage amounts sought. For fairness of the settlement, the Court found some problems: (1) information was lacking as to whether the settlement fund was adequate; (2) the agreement included a confidentiality restriction against the class members; (3) the agreement lacked a recourse for opt-in members who object to their awards; (4) the release provision was overly broad. The Court found similar problems with the state law claims.

## FAIR CREDIT REPORTING ACT

### *Employer Credit Report Pull*

*Shekar v. Accurate Background, Inc.*, No. 17-cv-0585, 2020 WL 2563437 (E.D. Wis. May 14, 2020) (Adelman, J.)

Plaintiff brought suit alleging that Defendant furnished a consumer report to his potential employer in violation of the Fair Credit Reporting Act (“FCRA”). Plaintiff had moved for certification and was denied, and now moved for leave to file an amended motion for certification with a narrower class.

The Court denied the motion, reasoning that the proposed new class definition was still overbroad in that it included persons who could not have been injured by Defendant’s conduct, and that it would require the Court to make numerous individual inquiries on the preliminary question of standing. Accordingly, the Court defined a more appropriate class, and found its proposed class met the elements of Rule 23(a) in terms of numerosity by virtue of 569 members, commonality on the question of whether the Defendant maintained strict procedures for accurate reporting, and typicality and adequacy under Plaintiff as representative. The Court also found its class met Rule 23(b)(3), in predominance of the common questions at issue with a low likelihood of individualized damage hearings, and superiority due to the low individual recovery amount per claim. Accordingly, the Court granted Plaintiff 30 days to accept or reject the class as it defined.

## REAL ESTATE SETTLEMENT PROCEDURES ACT

*Edmondson v. Eagle National Bank*, No. 16-cv-3938, 2020 WL 2571079 (D. Md. May 21, 2020) (Gallagher, J.) Plaintiffs brought suit certain mortgage servicers, alleging they were victims of an illegal kickback scheme in violation of the Real Estate Settlement Procedures Act (“RESPA”). Plaintiffs moved for class certification.

The Court granted the motion. Reasoning in support of its decision, the Court first looked at standing, as to whether Plaintiff Edmonson had suffered a concrete harm in not being charged an excessive fee and found that this Plaintiff had proffered enough evidence to meet the requirement. For Plaintiff Clark, the Court looked at whether her bankruptcy case might eliminate her standing, but the Court decided it need not look at this Plaintiff as a potential substitution to Edmonson at this time.

In terms of class certification, the Court examined predominance in combination with commonality, and found Plaintiffs had alleged a sufficient common question concerning RESPA which predominated over individual issues (whether the information and publicity concerning prior litigation and enforcement proceedings would have prompted a reasonable person to uncover the facts underlying the RESPA claims), and had proffered enough evidence to show that a low number of individualized hearings would be needed, if at all. Turning next to superiority, the Court found the predominance of common questions would allow greater efficiency in a class action to adjudicate the potentially thousands of claims at issue.

In terms of the other elements of Rule 23(a), the Court found Plaintiff Edmonson's claim to be typical of the class claims. In terms of adequacy, the Court found that Plaintiff Edmonson had not attended the three hearings held during litigation, but that it was not aware of any communication problems between Edmonson and class counsel that might impact representation in the case.

The Court then decided to amend the class, as Plaintiff had not rebutted Defendants' contention about employees who had been terminated outside of the class period.

## SECURITIES

*SEB Investment Management AB v. Symantec Corp.*, No. 18-cv-02902, 2020 WL 2306490 (N.D. Cal. May 8, 2020) (Alsup, J.)

Plaintiff brought shareholder suit under the securities laws, alleging insider trading and fraudulent accounting practices led to investment damages. Plaintiff moved for certification.

The Court granted the motion. Reasoning in support of its decision, the Court analyzed the motion under Rule 23. For numerosity, the Court found an estimate of hundreds of thousands of class members to be sufficient. For commonality, the Court found that the allegation of misrepresentation against the class was sufficient.

Looking at typicality, while Defendant contended that the lead plaintiff had disproportionate trading activity that might give rise to unique defenses, the Court found upon further analysis that the disproportion was not that dramatic, and that the possibility of a unique defense was not a reason to deny certification, especially in that the lead plaintiff's claim was typical of that of the class. As such the Court found typicality met.

For adequacy, while Defendant argued that the lead plaintiff lacked standing to bring a date-specific Section 20A claim for one of the dates at issue, the Court found the lead plaintiff was a member of the class proposed under Section 20A generally, and as such this was sufficient for adequacy without derailing certification upon the specific date challenged.

Turning next to predominance, Defendant had challenged on two issues: reliance and damages calculation on a class-wide basis. The Court found Plaintiff was entitled to the Basic presumption, and Defendants' arguments presented loss causation issues prematurely and failed to rebut the presumption. The Court also found Defendants' attack on Plaintiff's damages model also inquired prematurely into loss causation, which the Court found need not be analyzed at the certification stage.

The Court certified the class without further analysis.

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