



Class Action Services

KCC Class Action Digest

May 2020

KCC Class Action Services partners with counsel to deliver high-quality, cost-effective notice and settlement administration services. Recognized as Best Claims Administrator by *The Recorder*, *The National Law Journal*, and *The New York Law Journal*, KCC has earned the trust and confidence of our clients with our track record as a highly responsive partner.

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

In addition to industry resources, KCC offers interactive CLE-accredited courses geared toward class action settlement administration and legal notification, some of which carry Professional Responsibility CLE credit. Go to www.kccllc.com/class-action/insights/continuing-education to learn more about our courses and schedule a CLE for your law firm or industry event.

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This KCC Class Action Digest is provided by
Patrick Ivie, Executive Vice President Class Action
Services.

To request a proposal, or schedule a CLE, contact
Patrick at 310.776.7385 or pivie@kccllc.com.

BUSINESS SERVICES

Billing

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 which gave rise to a variety of claims. Plaintiffs sought class certification, while Defendant moved to preclude certification.

The Court granted certification and denied the motion to preclude. Reasoning in support of its decision, the Court first considered numerosity, finding 18,000 members sufficient. In terms of commonality, the Court found several common questions sufficient, rejecting Defendant's contention that the questions might not be susceptible to common resolution.

Turning to typicality, while Defendant argued that one of the plaintiffs did not fit into the class definition of having "obtained" services after the onset of the class period, the Court found the operative definition of "obtained" in this case was properly construed as actually receiving services, and 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 make said plaintiff atypical. The Court found adequacy satisfied.

Reviewing ascertainability, the Court found that objective criteria defined the class and that the members could be identified by company records, and that the potentiality of class members having suffered no harm was an issue on which Defendant could present defenses at a later stage.

In terms of Rule 23(b)(3) predominance, the Court first considered the breach of contract claim, and rejected Defendant's contention that certain class members knew about the billing practices and therefore suffered no harm, finding that common questions would predominate over this group of individuals, and any variation could be handled during the damages phase. The Court likewise found that the damages calculation would also 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.

For 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.

COPYRIGHT

Live Music

Kihn v. Bill Graham Archives, LLC, No. 17-cv-05343, 2020 WL 1820708 (N.D. Cal. Apr. 10, 2020) (Rogers, J.)

Plaintiffs brought suit against audio and video distributors, alleging that thousands of recordings of live performances had been sold and distributed from 2006 after being acquired from private collections without the performers' authorization. Plaintiffs moved for certification of two classes: (1) composers and (2) performers.

The Court granted the motion, reasoning in support of its decision that in terms of Rule 23, numerosity was satisfied on grounds of there likely being hundreds of class members, and found Defendant has failed to show evidence that a significant proportion of class members would opt out or would be so diminished so as to

render joinder practicable. In terms of commonality, the Court found it satisfied by virtue of Defendants' standard performance under various licensing contracts giving rise to the common questions at issue. For typicality, while Defendants argued that Plaintiffs were each subject to unique defenses, the Court found Defendants had failed to demonstrate how these defenses would become a focus of the litigation and defeat class treatment, and that otherwise, typicality had been met. For adequacy, the Court rejected Defendants' arguments that Plaintiffs lacked understanding of the claims, or that counsel lacked experience in prosecuting the specific claims as class actions, finding adequacy was met.

Turning to Rule 23(b), the Court first looked at predominance separately for each class. For the composer class, the Court found common questions predominated in establishing copyright ownership, and that whether Defendants could establish affirmative defenses against the class was not an issue for certification. The Court also found any individualized defenses alleged were likely to pertain to only a handful of class members, and individual damages calculations were not essential to finding predominance in this case. Thus, the Court found predominance met for this class.

Looking at the performer class under the "Anti-Bootlegging Act" section of the Copyright Act, the Court first looked at statutory interpretation of the burden of proof for authorization to distribute a live performance recording, and cited various cases showing the typical burden was on the potential infringer to show authorization in other sections of the Copyright Act. Therefore, the Court concluded that the same reasoning applied here, such that once a plaintiff can establish having appeared in a recording distributed by a defendant, the burden of proof is on the defendant to prove the distribution was authorized. The Court then cited cases showing this was consistent with public policy concerns relating to the Copyright Act and its associated litigation as a whole. The Court then looked at the instant case analysis of predominance and found no indication that individual issues would predominate. Thus, the Court found predominance satisfied.

Looking next at Rule 23(b)(2), the Court found the injunctive relief sought was not individualized so as to be impermissible with claims seeking monetary relief, and that the relevant due process concerns were diminished where a Rule 23(b)(3) class is also certified. Therefore, the Court found certification appropriate under this section as well.

SETTLEMENT ISSUES

Objector

Douglas v. The Western Union Company, Inc., No. 19-1868, 2020 WL 1847074 (7th Cir. Apr. 13, 2020) (Sykes, J.)

After Plaintiffs brought suit for violation of the Telephone Consumer Protection Act ("TCPA") against Defendant, alleging the receipt of unsolicited text messages, the United States District Court for the Northern District of Illinois approved a class settlement, ruling in the process that an objector was not a class member. The objector appealed the Court's denial of the objector's motion for fees and an incentive award associated with their objection.

The Seventh Circuit dismissed the appeal for lack of standing, reasoning in support of its decision that the objector did not object to the district court's ruling that she was not a class member. The Court relied on the United States Supreme Court's decision in *Marino v. Ortiz*, which held that a nonparty must seek to intervene for purposes of appeal and found that the objector had not done so.

Denial of Preliminary Approval

Perez v. All Ag, Inc., No. 18-cv-00927, 2020 WL 1904825 (E.D. Cal. Apr. 17, 2020) (Drozd, J.)

After Plaintiffs brought suit against their employers alleging several labor claims under state statutes, the Private Attorney General Act (“PAGA”), and the Fair Labor Standards Act (“FLSA”), the parties agreed to a class settlement and Plaintiffs sought preliminary approval.

The Court denied the request. Reasoning in support of its decision, the Court pointed to issues with the structure of the settlement and certain inconsistencies specific to the agreement itself, and to the agreement’s adherence to the relevant statutory frameworks.

As a threshold matter, the Court noted a class definition inconsistency, pointing out that the dates for the class and the dates for the claims conflicted, and needed correction. Turning then to the settlement’s structure and monetary terms, the Court noted that the allocation of funds between the class fund and penalties fund contravened the statutory limits set forth in PAGA. Similarly, the Court found that the FLSA claim required a demonstration of the defendants’ liability before a settlement could be approved, as failing to do so would contradict public policy in requiring employers to comply with FLSA.

The Court also expressed concern about allocating the payment of the employer’s portion of payroll taxes from the unpaid wages fund, instead of from the employer directly. The Court also looked at fees and costs and determined the attorney fee award was unjustifiably high under the percentage of the fund method of calculation, and that the costs claimed were not calculated using a detailed log of expenses. Finally, the Court saw problems with the allocation of settlement administration costs.

Vote for KCC in *The Legal Intelligencer* and *Texas Lawyer's "Best of"*

KCC Class Action Services would appreciate your vote for "Best Claims Administrator" for the *The Legal Intelligencer* and *Texas Lawyer's "Best of"* reader poll.

Thanks to the support of our clients and colleagues, we have been recognized in the past.

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

The Legal Intelligencer

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Vote for KCC on question 15 (Best Claims Administrator)
and question 29 (Business Escrow Services).

The voting period is scheduled to run through **June 12, 2020**.

Texas Lawyer: Austin, Dallas, and Houston

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Vote for KCC on question 32 (Best Claims Administrator)

The voting period is scheduled to run through **June 19, 2020**.

KCC appreciates your vote!

With experience administering over 6,500 settlements, KCC's team knows first-hand the intricacies of class action settlement administration. At the onset of each engagement, we develop a plan to efficiently and cost-effectively implement the terms of the settlement. Our domestic infrastructure, the largest in the industry, includes a 900-seat call center and document production capabilities that handle hundreds of millions of documents annually. In addition, last year, our disbursement services team distributed over half a trillion dollars.