PLAN
PROFESSIONAL LIABILITY
ATTORNEY NETWORK

"Strategies For Defending Class Actions"

October 30, 2013

Identifying The Problem: Employment Class Actions – More Than Just a Threat to the Bottom Line

Kisliuik v. ADT Sec. Servs., 263 F.R.D. 544, (C.D. Cal. 2008).

- **Facts:** Collective action alleging ADT failed to provide meal and rest breaks and proper wage statements.
- **Settlement:** $1.5 Million

Morgan v. Family Dollar Stores, 551 F.3d 1233 (11th Cir. 2008).

- **Facts**: Class action by store managers who claimed wrongful denial of over time pay.
- **Settlement**: $ 35 Million

Salvas v. Wal-mart Stores Inc., 18 Mass. L. Rep. 651(Mass. Sup. Ct. 2004).

- **Facts**: Class action accused the retailer of denying workers rest and meal breaks, refusing to pay overtime, and manipulating time cards to lower employees' pay.
- **Settlement**: $40 Million

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George v. Staples Inc. (In re Staples Inc.), 2011 U.S. Dist. LEXIS 128601 (D.N.J. Nov. 4, 2011).

- **Facts**: Assistant store managers were misclassified for tax purposes.
- **Settlement:** $42 Million

Cornn v. United Parcel Serv., Inc**,** 2006 U.S. Dist. LEXIS 20095, (N.D. Cal. Apr. 3, 2006).

- **Facts**: FLSA class action, UPS drivers claimed that UPS deducted standard meal periods from wages, even if the period was not taken.
- **Settlement**: $87 Million

Rekhter v. Washington Dept. of Social and Health Services, Case No. 07-2-895-5 (Thuston County, Washington) December 10, 2010.

- **Facts:** home health care workers class action based on cuts to benefits for in-home health care based on the "shared living rule".
- **Settlement:** $96 Million verdict. (being appealed)

In re World Com. Sec. Litig, 294 F. Supp. 2d 392 (S.D.N.Y 2003).

- **Facts:** A class action law suit alleging WorldCom had engaged in deceptive accounting practices.
- **Settlement:** $6.1 Billion

Increased Vigilance by Government Agencies

The Department of Labor

- The Department of Labor (DOL) hired 300 new investigators in 2012 and will be hiring more.
- DOL plans to add 4,700 audits each year.
- DOL received an appropriation of $238 Million for Fiscal Year 2013 for the Wage and Hour Division (WHD), which was $10 Million more than Fiscal Year 2012.

Back Wages Collected by DOL

- $172.6 Million in 2009
- $176 Million in 2010
- $224.8 Million in 2011

Other Changes by DOL

- No more opinion letters, they have moved to Administrator Interpretations, based on volume of questions asked about a specific statute or regulation.
- iPhone and iPod App to track hours.

INCREASE IN CLASS ACTIONS FILED BY EEOC

EEOC's 2013 Strategic Enforcement Plan

-6 Enforcement Priorities, including

1. Priority #1 - Eliminating barriers in hiring - including the EEOC's criminal background check initiative.
2. Priority #6 - increased enforcement against "systemic discrimination."

THE RESULT

1. EEOC v. DolGen (June 2013)
2. EEOC v. BMW (June 2013)
3. EEOC v. Case New Holland (Fiat)

THE DEFENSE STRATEGY?

1. EEOC v. Freeman (D.Md. Aug. 9, 2013)
2. EEOC v. Bloomberg (S.D. N.Y. Sep. 9, 2013)
3. Case New Holland (Fiat) v. EEOC (D.D.C. August 18, 2013)

One Potential Strategy: Effective Use of Rule 68 to Moot Potential Class Actions The "Pick Off" Strategy

- Genesis Healthcare v. Symczyk, 133 S. Ct 1523 (2013)

Facts

- Symczyk filed a class action against Genesis for deducting 30 minutes of work time for meal breaks even when employees performed worked during them.
- When Genesis answered the complaint, it served a Rule 68 offer of judgment, which included 7,500 for alleged unpaid wages and attorney's fees. Symczyk failed to respond and Genesis argued that because it offered complete relief on her individual claim, she no longer possessed a stake in the outcome of the suit, rendering the class action moot.

One Potential Strategy: Effective Use of Rule 68 to Moot Potential Class Actions

The Issue

- Does an offer of judgment that provides full relief to a single plaintiff extinguish the collective class action suit when no other parties have been joined and the class has not been certified?

One Potential Strategy: Effective Use of Rule 68 to Moot Potential Class Actions

Holding

- The Supreme Court reversed 2nd Circuit and held that it was proper to dismiss the putative class action for lack of subject matter jurisdiction.

Reasoning

- A class action becomes moot when the class representative's individual claim becomes moot because she lacks any personal interest in representing others in the action. The mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied.

One Potential Strategy: Effective Use of Rule 68 to Moot Potential Class Actions

- Genesis presents a defense strategy for employers. Employers can offer a judgment to the individual named plaintiff to moot their claim and moot the class before a class is certified, or even conditionally certified under Rule 23.

Decisions Since Genesis?

Positive:

- Datascope Analytics, LLC v. Comcast Cable Communs., 2013 WL 2147948 (E.D. Pa. May 17, 2013) (where the offer of complete relief occurred before filing the class action and before the motion for certification, the class action was moot. To sustain a class complaint, the named plaintiff must have individual standing. If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, the action must be dismissed as moot).

Negative:

- PRS, LLC v. Quality Med. Staffing Agency, LLC., 2013 Dist. LEXIS 76370 (N.D. Ill. May 24, 2013) (Court declined to consider motion to dismiss modeled after successful motion in Genesis).

Second Potential Solution: Mandatory Arbitration Agreements that Prohibit Participation in Class Actions

Why Arbitration?

- Potential avoidance of class/collective actions.
- Final, binding, less time consuming, and less expensive.
- Avoidance of unpredictable jury trials.
- Avoidance of adverse publicity.
- Increased confidentiality.
- Average consumer arbitration results in a disposition on merits in 6 months – or 4 months if submitted as brief (AAA Amicus Brief, AT&T Mobility).

4 ATTACKS:

1. Unconsciable – AA are contracts of adhesion Discover Bank (& Gilmer answered that in 1991).
2. State laws may require class wide arbitration – if you require individual arbitration then you must make available class wide arbitration – Concepcion addressed this.
3. 3rd Attack – DR. Horton – cannot preempt the NLRA and concerted activity.
4. American Express "Effective Vindication Doctrine" (cost prohibitive).

The Enforceability of Arbitration Agreements that Prohibit Participation in Class Actions

The Seminal Case: AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011)

•**Facts:** Plaintiff sued AT&T for fraud and false advertising because AT&T charged sales tax on "free phones." The cell phone contract between Concepcion and AT&T provided for arbitration of all disputes, but did not permit class wide arbitration. Concepcion filed a class action on the grounds that the sales tax on the phone violated the contract; AT&T moved to compel arbitration, which prohibited class action participation.

•**Prior History:** The Ninth Circuit found that the arbitration provision was unconscionable based on state law. (The Discover Bank Rule – class action waivers in contracts of adhesion are unconscionable).

California Courts: if you require individual arbitration, then you must provide for the availability of class wide arbitration.

•**Holding: The FAA preempts state law. Ninth Circuit Reversed.**

After Concepcion

After Concepcion two California State courts went against Concepcion

1. Brown v. Ralphs Grocery Co., 197 Ca. App. 4th 489 (Cal. App. 2nd. Dist. 2011) (exempts PAGA claims from mandatory arbitration programs that disallow class action participation after finding that the FAA does not preempt state law).
2. Plows v. Rockwell Collins, 2011 WL 3501872 (C.D. Cal. Aug 8, 2011) (exempts PAGA claims from mandatory arbitration programs that disallow class action participation after finding that the FAA does not preempt state law.)

Although Brown and Plows exempt PAGA claims from mandatory arbitration programs waiving class action participation, the majority of California federal courts have upheld Concepcion.

Two federal California court decisions follow Concepcion and clarify that PAGA claims *are* arbitrable, Valle v. Lowe's HIW Inc., & Quevedo v. Macy's Inc.

1. Valle v. Lowe's HIW Inc., 2011 WL 3667441 (N.D. Cal. Aug. 22, 2011) (motion granted to compel the arbitration of the PAGA claim).
2. Quevedo v. Macy's Inc., 798 F. Supp.2d 1122, 1127 (C.D. Cal. June 16, 2011) (motion granted to compel the arbitration of the PAGA claim).

California and the NLRB in D.R. Horton

D.R. Horton, N.L.R.B. No. 184 (Jan. 3, 2012) (mandatory arbitration provision prohibiting class actions violates Section 8(a)(1) of the National Labor Relations Act, it interferes with the employee's right to engage in concerted activity, distinguished from Concepcion because the dispute did not involve a conflict between a federal and state law, rather one between two federal laws).

D.R. Horton's Rejection

- LaVoice v. UBS Financial Services, 2012 U.S. Dist. LEXIS 5277, 2012 WL 124590 (S.D.N.Y.) (To the extent that D.R. Horton conflicted with Concepcion the court declined to follow it.)
- Johnmohammadi v. Bloomindales's, Inc., Docket No. 11-cv-6435 (C.D. Cal. January 26, 2012) (holding D.R. Horton does not apply to a wage-and-hour class action against because the plaintiff had entered into arbitration voluntarily as a condition of her employment).

The Fifth Circuit & D.R. Horton

- The Fifth Circuit heard oral arguments February 5, 2013 in the appeal of D.R. Horton. Virtually all the courts which have considered the decision decline to follow it.

Revisiting Class Action Waivers in Other Cases

Antitrust

- American Express Co. v. Italian Colors Restaurant (In Re American Express Merchants Litigation), 133 S.Ct. 2304 (June 20, 2013) (holding that a class action waiver is enforceable even where the cost of individually arbitrating a federal statutory claim exceeds the potential recovery).
- Although American Express does not address employment law, this decision impacts the extent that courts may make similar "cost prohibitive" inquiries in class/collective actions under Title VII, the FLSA, and other federal civil rights and employment statutes.

Discrimination

- Parisi v. Goldman, Sachs & Co., 710 F.3d 483 (2d Cir. 2012) (holding that a class action waiver in an arbitration was enforceable even though the plaintiff sought to rely on "pattern or practice" evidence, noting that pattern or practice is evidence used to *demonstrate* discrimination, not a distinct claim).

But Note: Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (June 10, 2013)

- Court held that an arbitrator did not exceed his powers in authorizing class arbitration where the parties agreed that the arbitrator should decide whether their contract permitted class arbitration. "Questions of arbitrability" – such as whether a valid arbitration agreement exists or whether an arbitration agreement applies to a certain type of claim – are presumptively questions for the court to decide; however, Stolt-Nielsen clearly indicates that the Court has not yet decided whether the availability of class arbitration is a question of arbitrability.

The Fight Against Class Certification

If Rule 68 did not work and if no arbitration agreement exists excluding class action participation, then how do you defeat class certification?

Defeating Class Certification

- Rule 23(a) lays out four prerequisites that a Plaintiff must satisfy in order to maintain a class action lawsuit:
  - **Numerosity:** the class is so numerous that joinder of all members is impracticable
  - **Commonality:** there are questions of law or fact common to the class
  - **Typicality:** the claims or defenses of the representative parties are typical of the claims or defenses of the class
  - **Adequacy :** the representative parties will fairly and adequately protect the interests of the class

- These 4 prerequisites are each potential avenues to defeat class certification.

Defeating Class Actions:

Numerosity

Numerosity: prove that the group is not so numerous, and thus separate joinder of each member is practicable, or that the class definition is inadequate.

- Plaintiffs can often demonstrate a large number of class members, but "before analyzing the Rule 23(a) requirements, or as part of the numerosity inquiry, a court must determine whether the **class definition** is adequate." O'Neill v. The Home Depot U.S.A., Inc., 243 F.R.D. 469 (S.D. Fla 2006).
- Therefore, can argue that the **class definition** is inadequate: overly broad, etc.

Defeating Class Actions:

Commonality and Typicality

- Commonality refers to the class characteristics as a whole and typicality concerns the individual characteristics of the class members in relation to the class.
- Prado-Steinman v. Bush, 221 F.3d 1266, 1278-79 (11th Cir. 2000). "The commonality and typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a **sufficient nexus** exists between the **legal claims** of the **named class representative** and those of **individual class members** to warrant class certification."
    - Certification under Fed.R.Civ.P. 23(b)(3) requires that common questions of law or fact **predominate** and that class treatment be **superior** to other methods of adjudicating class members' claims.

Defeating Class Action:

Adequacy

Adequacy: prove the representative party will not adequately protect the interests of each member of the class.

- To satisfy this requirement, Plaintiffs often mention that the hired counsel will "vigorously prosecute this action" and is competent, is experienced handling class actions, etc.
- In order to refute this requirement, can argue that Plaintiff has an individualized claim that differs from the rest of the class

Defeating Class Certification

O'Neill v. The Home Depot U.S.A., Inc., 243 F.R.D. 469 (S.D. Fla 2006).

- **Facts:** Plaintiff argued that Home Depot's damage waiver included in its Rental Agreements to rent tools to customers was deceptive as the customer is not informed about the scope of the damage waiver, nor that it is optional. (Plaintiff alleged it was presented as a required charge).
- **Certification:** "The decision to certify is within the broad discretion of the district court . . .", but "with this great power comes great responsibility; the awesome power of a district court must be exercised within the framework of rule 23."
- To certify the class, Plaintiff alleged:
  - **Numerosity:** Damage waiver was part of 615, 615 rental transactions in Florida
  - **Commonality:** Plaintiff set out at least 7 common questions of law and/or fact.
  - **Typicality:** Plaintiff alleged his claims are typical of the class as a whole, and that there are no conflicts between his claims and the claims of other class members.
  - **Adequacy:** Plaintiff hired counsel with a great deal of experience in class actions who would vigorously prosecute this case

Defeating Class Certification

O'Neill v. The Home Depot U.S.A., Inc., 243 F.R.D. 469 (S.D. Fla 2006).

•Court denied Plaintiff's Motion for Class Certification - ***numerosity, commonality*** and ***typicality*** were not satisfied.

•**Numerosity:** The proposed class consisted of Florida customers who purchased damage waivers beginning on November 30, 2000 –**overly broad**

- Class definition included individuals who may have benefitted from the same actions which formed the basis of Plaintiff's claims and individuals who may have been informed by Home Depot about the details of the damage waiver, contrary to Plaintiff's experiences.

•**Commonality/Typicality:** Plaintiff alleged a common claim among the members of the proposed class is whether Home Depot has a practice of failing to disclose the optional nature of the damage waiver.

- **However,** Plaintiff conceded that Home Depot has a written policy to tell customers that the damage waiver is optional. Thus court ruled Plaintiff's claims were really based on alleged violations of Home Depot's written policy by individual employees. Therefore, in order to establish the proposed class claim, O'Neill would have to demonstrate that each individual class member was misled by a Home Depot employee when that member rented equipment from Home Depot.

Defeating Class Certification

Larry McGuinness v. San Antonio Spurs, Case No. 13-1358 CA-23, in the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, FL

•**Facts:** San Antonio Spurs sent four players, Tim Duncan, Tony Parker, Manu Ginobili, and Danny Green, home before the game against the Miami Heat on November 29, 2012.

•Larry McGuinness, a practicing attorney who attended the game, filed a class action suit, alleging that the team's head coach, Gregg Popovich, made the decision to "secretly" send the Spurs best players home without the knowledge of the 16,000 fans attending the game against the Heat.

•**Certification:** To certify the class, McGuinness alleged:

- **Numerosity:** 16,000 potential class members (fans who attended the Spurs game against the Heat)
- **Commonality:** Plaintiff's claims raise questions of law and fact common to the claims raised by each member of the Class
  - Whether the Spurs acts and omissions were the legal cause of the economic damages sustained by Plaintiff and the 16,000 class members (i.e., all class members paid a higher "premium price" for the game tickets than they would have paid if they had known the star players would sit out)
- **Typicality:** Plaintiff's claims are typical of the claims of the class members as they have been damaged in the same manner
- **Adequacy:** Plaintiff is a member of the class and has retained competent counsel who will vigorously prosecute this lawsuit (incidentally, himself)

After Class has been Certified: Ways to Resolve the Case
1) Settlement Pools

- In re Skechers Toning Shoe Products Liability Litigation, No. 3:12–CV–00204, 2013 WL 2010702 (W.D. Ky. May 13, 2013). Skechers was sued for consumer fraud based on its advertising that Skeckers' toning shoes provide health benefits without scientific proof
  - Pursuant to Fed. R. Civ. P. 23(e)(1), notice of the class settlement was given via direct mailings to the more than 250,000 potential class members.
  - The settlement documents were made available to the class via website.
  - A toll-free telephone number was established to address class members' questions concerning the settlement.
- Pursuant to the settlement agreement, Skechers established a $40 million non-reversionary fund for the payment of class claims.
- Disbursement amounts were available to class members who timely submitted their claims, based on the cost of initially purchasing the shoes:

Type of Shoes	Initial Amount	Maximum Amount
Shape–Ups	$40.00	$80.00
Podded Sole Shoes	$27.00	$54.00
Tone–Ups (Non–Podded Sole)	$20.00	$40.00
Resistance Runner	$42.00	$84.00

After Class has been Certified: Ways to Resolve the Case
2) Coupons

States of N.Y. and Md. v. Nintendo of America, Inc., 775 F. Supp. 676 (S.D. N.Y. 1991).

•The Settlement Agreements provided for relief in the form of **$5.00 coupons** that could be redeemed when purchasing any Nintendo video game cartridge that could be played on a Nintendo **eight-bit video game console**.

•Qualified purchasers for the coupon were those who purchased Nintendo's **eight-bit video game console** between June 1, 1988, and December 31, 1990

But see, In re HP Inkjet Printer Litigation, 716 F. 3d 1173 (9th Cir. 2013).

•**28 U.S.C. §1712 Coupon settlements:** passed by Congress to regulate the perceived abuse of coupon settlement, such as situations where the class attorney is paid in cash while the class members receive coupons or vouchers

- Result: increased judicial scrutiny of coupon settlements

After Class has been Certified: Ways to Resolve the Case

3) Cash Rebate

True v. American Honda Motor Co., 749 F. Supp. 2d 1052 (C.D. C.A. 2010).

- **Facts:** Plaintiffs alleged the class members were exposed to false and misleading advertising regarding the fuel economy of Honda Civic Hybrids
- **Settlement:** The primary relief offered was a $500 or $1000 rebate given to class members who would purchase another Honda or Acura over the next nineteen months. Specifically, class members were able to select from one of two rebate options:
    - **Option A** was a $1,000 cash rebate for those class members who would **sell or trade** in their Honda Civic Hybrid *and* purchase a new Honda or Acura - rebate was non-transferable.
    - **Option B** was a $500 cash rebate for those class members who **retain** their Honda Civic Hybrid *and* purchase a new Honda or Acura - rebate was transferable.