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## CONSUMER

### *Fuel Surcharges*

*Adelphia, Inc. v. Heritage-Crystal Clean, Inc.*, No. 2-18-0791, 2019 IL App (2d) 180791-U (unpublished opinion) (Ill.App.Ct. Jun. 17, 2019) (Jorgensen, J.)

Plaintiff mechanic shops filed suit against a waste removal service, alleging the improper charging of fuel surcharges outside of their contracts. After the trial court granted certification of three classes, one for each cause of action, Defendants sought interlocutory appeal, arguing that certification was inappropriate due to time bars, failure to state a claim, vagueness of definition, insufficiency in satisfying certification elements, and the presence of affirmative defenses requiring individual inquiries.

The Court affirmed the trial court's order. Reasoning in support of its position, the Court first found no abuse of discretion in the lower court's factual findings and determined that the lower court was not prematurely determining the merits of the claims, beyond consideration of the evidence for certification purposes. In terms of the limitations periods, while Defendants argued that the surcharges began to appear in 2005, and thus the limitations period began then, and that individual inquiries were needed to determine when each member first noticed these charges, the Court found this affirmative defense had not been raised in the lower court, and thus had been forfeited. Here, the Court supported its conclusion on the basis that Defendants had raised 13 affirmative defenses already in the case, but not this one. Looking next at the sufficiency of claims, the Court found these arguments were also not sufficiently raised in the lower court, and thus were forfeited.

Turning to class certification, the Court first looked at Defendant's argument that three overlapping classes unnecessarily divided and created conflicts of interest for what should be one class, but that the classes were also unascertainable and subject to standing problems. The Court found some of these bases were forfeited as above, but addressed the question of overlapping claims and found no abuse of discretion occurred. The Court further found that any overlap in damages would be resolved in proving damages for each member, and a single notice could be sent to all class members.

Next, the Court found commonality and typicality met by the allegation of Defendants' conduct against the class as a whole on a variety of common questions, and found predominance was met and not defeated by the variance in the surcharges, because the dispositive issues were common in the case. As such, the Court found no abuse of discretion on certification elements.

## EMPLOYMENT

### *Wage & Hour*

*Alvarez v. Office Depot, Inc.*, No. 17-cv-7220, 2019 WL 2710750 (C.D. Cal. Jun. 27, 2019) (Gutierrez, J.) Plaintiff brought suit against a former employer, alleging wage and hour violations under state law. After Defendant removed to federal court, Plaintiff sought to certify three subclasses.

The Court denied the motion, reasoning in support of its decision first that, in terms of the first proposed subclass, Plaintiff was not a member of that subclass, and sufficient time to add a suitable class representative had passed. The Court denied certification of that subclass.

In terms of the second subclass, the Court found no factual allegations about the underlying claim in the complaint, and noted that Plaintiff had introduced a new theory of liability not contained in the pleadings. While Plaintiff argued that the theory was logically implied within the scope of the theories in the pleadings, the Court

found this was insufficient to give Defendant fair notice in the complaint of the claim and the “grounds upon which it rests.” Accordingly, the Court thus denied the motion to certify the second subclass.

Turning to the third subclass, the Court found the lack of predominance dispositive. Here, the Court reasoned that a key issue (whether class members were employees at the time of their drug testing) was a fact-specific determination requiring individual inquiries as to whether class members were under Defendant’s control. The Court also looked at the question of whether class members accepted employment offers unconditionally before being informed of the drug testing requirement, and found this was not a consistent policy, and would not likely be capable of class-wide adjudication. Accordingly, the Court ruled that predominance could not be met.

### *Misclassification*

*Duggan v. High Impact Marketing, LLC*, No. 18-cv-00209, 2019 WL 2870103 (S.D. Miss. Jul. 3, 2019) (Starrett, J.)

Plaintiff brought suit for violation of the Fair Labor Standards Act (“FLSA”) against a former employer and its officers, alleging that he had been misclassified as an independent contractor and improperly compensated in contravention of minimum wage and overtime laws. Plaintiff moved for conditional class certification.

The Court granted the motion in part, amending the proposed class to account for the facts that: (1) one of the locations at issue was not owned by Defendants; and (2) the class definition was not worded so as to take account of the applicable statute of limitations. In addition, the Court found that it had not been demonstrated that one opt-in plaintiff worked for Defendants.

In terms of matters bearing upon notice of the certification, the Court found Plaintiff’s request for personal information of class members to be not properly discoverable due to privacy concerns, and also that it would be improper for consent to join forms to be returned to Plaintiff’s counsel, ruling instead that those forms should be sent to the court’s clerk. The Court granted the modified motion otherwise.

## **FAIR DEBT COLLECTION PRACTICES ACT**

*Vandehey v. Client Services, Inc.*, No. 18-cv-1669, 2019 WL 2403201 (E.D. Wis. Jun. 7, 2019) (Griesbach, J.) Plaintiff brought suit for violation of the Fair Debt Collection Practices Act (“FDCPA”) against Defendants, alleging the transmission of a form debt collection letter with materially false and misleading content. Plaintiff moved for class certification.

The Court granted the motion, reasoning in support of its decision that in terms of numerosity, 6,814 members sufficed. For commonality, the Court found the use of form letters indicated the issues were common to the class, and that typicality was also satisfied on that basis. For adequacy, the Court found no conflicts and that counsel was qualified. Looking next at predominance, the Court found this was easily met by the commonality evidence.

In terms of superiority, while Defendant argued the potential for individual recoveries of \$1000 statutory damages exceeded the likely share for each class member, limited to a percentage of Defendant’s low net worth, the Court noted that Defendant had submitted no evidence of its net worth, and Plaintiff did not have the burden to show Defendant’s net worth at this stage. As such, the Court found superiority was met.

## SECURITIES

*Endochoice Holdings, Inc. v. Raczewski*, No. A19A0151, A19A0152, 2019 WL 2710198 (Ga.Ct.App. Jun. 28, 2019) (Gobeil, J.)

Plaintiffs (*Raczewski, et al*) brought a securities fraud action against a medical device company (Endochoice) and various investment companies, alleging violations of the Securities Act of 1933 in connection with an initial public offering. After a class was certified under Georgia law, Defendants appealed, arguing adequacy and predominance were not met.

The Court affirmed, reasoning in support of its decision first that in terms of adequacy, while Defendants had argued that Plaintiffs were inadequate due to lack of knowledge and participation, and that Plaintiffs' abandonment of certain claims had prejudiced absent class members, Plaintiffs had demonstrated sufficient evidence of knowledge and participation for the trial court to find adequacy, and that abandoning the claims at issue (which were not proper to Plaintiffs) did not prejudice the class members who wished to pursue them, as the claims were tolled upon commencement of the class action. Thus, the Court found no abuse of discretion as to adequacy.

Turning to predominance, the Court first considered Defendants' "investor knowledge" defense in terms of whether it required individualized inquiries, and ruled that it relied mainly on whether offered materials contained a misstatement, and that no evidence had been presented to show individual investor knowledge might be needed. As such, the Court found no abuse of discretion.

## TELEPHONE CONSUMER PROTECTION ACT

### *Text Messages*

*Clough v. Revenue Frontier, LLC*, No. 17-cv-411, 2019 WL 2527300 (D. N.H. Jun. 19, 2019) (Barbadoro, J.) Plaintiff brought suit for violation of the Telephone Consumer Protection Act ("TCPA") against Defendants, alleging unsolicited text messages were sent by an automatic system. Plaintiff moved for certification, and Defendants objected on standing.

The Court granted the motion. Reasoning in support of its decision, the Court first considered standing, finding the receipt of the text message resulting in nuisance and invasion of privacy was sufficient for standing. Next, in terms of ascertainability, the Court found the class sufficiently defined by objective criteria.

In terms of the Rule 23 requirements, the Court first round numerosity satisfied by virtue of there being 18,937 class members. In terms of commonality, the Court found a variety of common issues, and that the content of the message did not defeat commonality, as the sending of the message was at issue. The Court found that typicality was met as well, as the allegation was that the messages were sent as a campaign to each member as a group.

Turning next to adequacy, while Defendants contended that Plaintiff had made false statements under oath about unrelated matters in his testimony, the Court found these did not damage Plaintiff's ability to represent the class, because the statements in question were not relevant to the claim. Defendants also made arguments concerning Plaintiff's history involving TCPA litigation and relationship to counsel, which the Court rejected.

In terms of predominance, the Court found every issue common in the case, and the potentiality of an express

consent defense did not defeat predominance here, without evidence having been submitted. For superiority, the Court found all factors pointed to superiority, on efficiency grounds.

### *Calls*

*Rodriguez v. Premier Bankcard, LLC*, No. 3:16CV2541, 2019 WL 2567722 (N.D. Ohio Jun. 21, 2019) (Carr, J.) Plaintiffs brought suit for violation of the TCPA against Defendant, alleging improper receipt of repeated calls made through an auto-dialer without express consent. Defendant offered judgment on individual claims before a motion for certification was filed, and Plaintiffs accepted. Plaintiffs then sought class certification.

The Court denied class certification, and reserved judgment on Plaintiff's request to authorize notice of settlement to the class. Reasoning in support of its decision, the Court first looked at mootness, and found the settlement of Plaintiff's claims without a pending motion for certification rendered the case moot, and the pick off exception did not apply. The Court also found Plaintiffs were not under compulsion or duress when they accepted the offer and had a meaningful choice to accept or reject the offer, which was not driven by coercive acts of the Defendant.

Turning next to the alternative argument that an "inherently transitory" exception to mootness might apply, the Court found the exception applied to the ongoing need for injunctive relief, but the evidence in this case showed Defendant had ceased the conduct in question. Furthermore, the Court found that an offer of judgment did not render the claim inherently transitory, and found no evidence before it to show the class

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