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CURRENT ISSUES IN FEDERAL CLASS ACTIONS

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CONTENTS

INTRODUCTION

Recently, there have been a number of developments in the case law involving federal class action practice – both within the Ninth Circuit and in the United States Supreme Court. This summary is an effort to highlight the salient developments and identify issues that will be subject at some point for resolution.

For access to United States Supreme Court materials, see SCOTUSblog at https://www.scotusblog.com/.

To review video of Ninth Circuit arguments, see https://www.ca9.uscourts.gov/media/.

NATIONWIDE CLASS ACTIONS WITHIN THE NINTH CIRCUIT

On September 27, 2018, the Ninth Circuit heard in en banc *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.*). The case provides the Circuit the opportunity to clarify the standard for certifying a nationwide settlement class with the application of substantive California law.

Summarized in what follows are a number of cases which are likely to inform the court's resolution of the certification issue. Those cases are:

AMCHEM PRODUCTS, INC. v. WINDSOR

521 U.S. 591 (1997)

HANLON v. CHRYSLER CORP.

150 F.3d 1011 (9th Cir. 1998)

MAZZA v. AMERICAN HONDA MOTOR CO.

666 F.3d 581 (9th Cir. 2012)

ESPINOSA v. AHEARN (IN RE HYUNDAI & KIA FUEL ECON. LITIG.)

881 F.3D 679 (9th Cir. 2018)

Vacated by Rehearing, en banc, 897 F.3d 1003 (9th Cir. 2018)

AMCHEM PRODUCTS, INC. v. WINDSOR

521 U.S. 591 (1997)

Summary of Significant Points

1. Seminal United States Supreme Court decision regarding class certification in the context of settlement and nationwide class involving asbestos.

2. District court certified the class. The Third Circuit vacated the district court's ruling and the Supreme Court affirmed the Third Circuit.

3. Justice Ginsburg noted: the "settlement only" class "has become a stock device" acknowledging that courts have divided over the extent to which "a proffered settlement affects court surveillance under Rule 23's certification criteria."

4. Other than the limited issue of management during trial, Ginsburg ruled that a settlement class must comport with Rule 23 requirements. A court cannot just determine that the settlement is "fair" without applying the Rule 23 certification criteria.

5. The court must pay "undiluted, even heightened, attention" to class certification requirements in a settlement context."

6. The court rejected class certification because the proponents of the settlement did not meet the Rule 23(b)(3) requirement of predominance of common questions of law and fact. There were numerous disparate questions undermining class cohesion in the case. Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some members suffered no physical injury while others suffer severe health issues. Additionally, members have a different history of tobacco smoking. The exposure only plaintiffs also share little in common among themselves or with the presently injured class member. If they contract injury/disease at all, it is unclear what any individual circumstance will

manifest, what medical expenses will be incurred and what treatment will be required. Also, "[d]ifferences in state law compound these disparities."

Extended Summary

AmChem involved nationwide asbestos injury class certification in the context of settlement. Defendants were 20 companies. Plaintiffs based jurisdiction on diversity alleging various common law tort claims. The proposed settlement purported to settle claims of class members ("hundreds of thousands, perhaps millions") resident in various states. The commonality of class members was: "each was, or someday may be, adversely affected by past exposure to asbestos products manufactured by one or more 20 companies."

The district court from the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. The court separately enjoined class members from separately pursuing asbestos-related personal-injury suits pending issuance of a final order. The settlement set up a complex system for determining damages for class members who have experienced injury and another system for those who were exposed to asbestos but had not set experienced injury.

The Third Circuit vacated the district court's orders, holding the certification failed to satisfy Rule 23 requirements. Defendants petitioned for certiorari. The Supreme Court affirmed the Third Circuit.

Objectors challenged the settlement arguing that it, inter alia, unfairly disadvantaged those without currently compensable conditions. The district court rejected the objections. The objectors appealed to the Third Circuit which vacated the district court's certification. The Supreme Court granted certiorari and affirmed the Third Circuit.

Justice Ginsburg delivered an exegesis on the requirements of Rule 23(b)(3), stating "[n]o class action may be 'dismissed by or compromised without [court] approval,' preceded by notice to class members. Fed. Rule Civ. Proc. 239e)." Ginsburg notes that among the current

applications of Rule 23(b)(3), the "settlement only" class "has become a stock device" acknowledging that courts have divided over the extent to which "a proffered settlement affects court surveillance under Rule 23's certification criteria." After surveying authorities on the point, Ginsburg stated: "settlement is relevant to a class certification." What this means is that regarding "a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial." In other words, "the likely difficulties in managing a class action" for trial under Rule 23(b)(3)(D) is not relevant. However, other requirements of the rule "demand undiluted, even heightened, attention in the settlement context."

Other than the limited issue of management during trial, Ginsburg ruled that a settlement class must comport with Rule 23 requirements. A court cannot just determine that the settlement is "fair" without applying the Rule 23 certification criteria.

Ginsburg determined that the proponents of the settlement did not meet the Rule 23(b)(3) requirement of predominance of common questions of law and fact. There were numerous disparate questions undermining class cohesion in the case. Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some members suffered no physical injury while others suffer severe health issues. Additionally, members have a different history of tobacco smoking. The exposure only plaintiffs also share little in common among themselves or with the presently injured class member. If they contract injury/disease at all, it is unclear what any individual circumstance will manifest, what medical expenses will be incurred and what treatment will be required. Also, "[d]ifferences in state law compound these disparities."

Adequacy of representation presented an additional hurdle. Ginsburg concluded in accord with the Third Circuit that injured class members could not adequately represent the interests of exposed but

uninjured class members. For example, in terms of notice, persons who were exposed but not suffering injury may not even know of their exposure and therefore of their inclusion (or right to opt out) of the certified class.

HANLON v. CHRYSLER CORP.

150 F.3d 1011 (9th Cir. 1998)

Summary of Significant Points

1. Often cited Ninth Circuit decision affirmed certification of a nationwide class for settlement purposes involving defective latches on Chrysler minivans.

2. The Ninth Circuit noted that in recent years litigants have instigated lawsuits for the limited purpose of obtaining court approval of a certified class settlement. The court acknowledged that there is nothing inherently wrong with that approach although the court must pay "undiluted, even heightened, attention" to class certification requirements in a settlement context," citing *Amchem*, 521 U.S. at 620.

3. The court assessed whether the purported class met the criteria of Rules 23(a) and 23(b)(3) and concluded that it did. Class members in each had the same problem. Additionally, the differences in severity of personal injury present in *Amchem* were avoided in *Hanlon* by excluding personal injury and wrongful death claims.

4. The differences in state remedies were not sufficiently substantial so as to warrant the creation of subclasses. There were relatively small differences in damages and potential remedies. The court did not undertake a choice of law analysis.

5. Assessing a settlement proposal requires the district court to balance a number of factors:

- The strength of the plaintiffs' case;
- The risk, expense, complexity, and likely duration of further litigation;
- Class action status throughout the trial;
- The amount offered in settlement;

- The extent of discovery completed and the stage of the proceedings;
- The experience and views of counsel;
- The presence of a governmental participant; and
- The reaction of class members to the proposed settlement.

6. District court's approval of settlement will be overturned only by a clear abuse of discretion.

Extended Summary

This case involved various class actions filed in different states concerning a latch problem in Chrysler minivans. The district court certified a nationwide class in the settlement context. The district court certified the class and approved the settlement. The court of appeals affirmed applying *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Chrysler and plaintiffs' counsel commenced settlement discussions. As a result, all of the class actions were consolidated into a single class action in the District Court for the Northern District of California. The court held a preliminary hearing on a proposed settlement agreement and granted a preliminary order approving the settlement and certifying a nationwide class of minivan owners for settlement purposes only. All personal injury and death cases were excluded from the settlement. The court also ordered that no member of the settlement class could commence an action in any court asserting any of the claims subject to the settlement. Notice of the proposed settlement was served on 3.3 million minivan owners with an objection and opt-out date.

A Georgia resident (Kempton) filed a class action in Georgia state court on behalf of a putative class of Georgia residents. Kempton filed a motion to certify the class – his goal was to opt out of the *Hanlon* settlement for himself and all Georgia residents. The *Hanlon* parties obtained an order from the *Hanlon* court enjoining Kempton from proceeding. Kempton ignored the order and obtained a preliminary certification of the class in the Georgia case.

Following hearings on objections to the *Hanlon* settlement, the district court entered a final order of settlement and an award of attorney's fees.

The Ninth Circuit noted that in recent years litigants have instigated lawsuits for the limited purpose of obtaining court approval of a certified class settlement. The court acknowledged that there is nothing inherently wrong with that approach although the court must pay "undiluted, even heightened, attention" to class certification requirements in a settlement context," citing *Amchem*, 521 U.S. at 620.

First the court asserted that its threshold task was to ascertain whether the proposed settlement class satisfies the requirements of Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality and adequacy of representation. On these criteria, the Ninth Circuit found compliance with each: millions of class member residing in 50 states, factual commonality as to the defective latch, typicality of claims as to the latch and no conflict in the class members. Unlike the class in *Amchem*, the class of minivan owners does not present an allocation dilemma. "Potential plaintiffs are not divided into conflicting discrete categories, such as those with present health problems and those who may develop symptoms in the future." Class members in *Hanlon* each had the same problem. Additionally, the differences in severity of personal injury present in *Amchem* were avoided in *Hanlon* by excluding personal injury and wrongful death claims. Additionally, the differences in state remedies were not sufficiently substantial so as to warrant the creation of subclasses. There were relatively small differences in damages and potential remedies. The court noted that there was no issue regarding competency of counsel.

The court next assessed whether the standards of Rule 23(b)(3) were met. The court held that there was a common nucleus of facts and potential legal remedies that dominated the litigation. "Variations in state law do not necessarily preclude a 23(b)(3) action, but class counsel should be prepared to demonstrate the commonality of substantive law

applicable to all class members." (Citing *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 821-23 (1985)). To the extent distinct remedies exist among the various state laws of class members, they are local variants of a generally homogenous collection of causes of action which include products liability, breaches of warranties, and "lemon laws. "[T]he idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims."

As to a class action being superior, the Ninth Circuit ruled that it was in *Hanlon* because, among other things, of the cost of individuals pursuing actions and the danger that some class members might be barred by local statutes of limitations.

Kempton attempted to argue that by his Georgia state action, he purported to opt Georgia residents out of the *Hanson* class and settlement. The Ninth Circuit rejected this assertion. Opting out is an individual action. One person may not purport to opt out for others.

The court upheld the notice to the class in *Hanson*. As to looking at the fairness of the settlement under Rule 23(e), the court stated that its review of the district court decision approving the settlement was "extremely limited." "It is the settlement taken as a whole rather than individual component parts, that must be examined for overall fairness." Neither the district court nor the court of appeals possess the ability to delete, modify or substitute certain provisions of the settlement. It must stand or fall in its entirety.

Assessing a settlement proposal requires the district court to balance a number of factors:

- The strength of the plaintiffs' case;
- The risk, expense, complexity, and likely duration of further litigation;
- Class action status throughout the trial;
- The amount offered in settlement;

- The extent of discovery completed and the stage of the proceedings;
- The experience and views of counsel;
- The presence of a governmental participant; and
- The reaction of class members to the proposed settlement.

The Ninth Circuit adopted the standard of other circuits in reviewing class actions settlements, namely "settlement approval that takes place prior to formal class certification requires a higher standard of fairness." Nonetheless, the court observed that "the decision to approve or reject a settlement is committed to the sound discretion of the rail judge because he is 'exposed to the litigants, and their strategies, positions and proof.'" Thus, "the district court's final determination to approve the settlement should be reversed 'only upon a strong showing that the district court's decision was a clear abuse of discretion.'" The Ninth Circuit found no such showing in *Hanlon.*

Regarding attorneys' fees, the court found no abuse of discretion.

MAZZA v. AMERICAN HONDA MOTOR CO.

666 F.3d 581 (9th Cir. 2012)

Summary of Significant Points

1. Case involved the district court's certification of nationwide class action involving collision avoidance equipment on Acura automobiles. The complaint alleged violations of various California statutes by reason of false advertising related to the equipment. The Ninth Circuit reversed.

2. In assessing application of Rule 23(b)(3), the Ninth Circuit was constrained to determine whether California law should apply to residents of foreign states in order to determine whether common issues of law predominated. The court thus undertook a choice of law analysis using California's three step government interest test.

3. The court found that California's law and the law of other states where certain class members resided are different. The Ninth Circuit determined that these other states had an interest in the application of their laws and that application of California law would impair those interests.

4. The court held that each class members' consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place. The court remanded for further proceedings – not suggesting how the district court should correct its class ruling.

5. The Ninth Circuit also ruled that common questions of fact did not predominate because an individualized case must be made for each member showing reliance upon the alleged misrepresentations.

Extended Summary

This was a nationwide class action based in diversity involving collision avoidance equipment (CMBS) on Acura vehicles. The case

alleged claims for violations of California Unfair Competition Law (UCL) False Advertising law (FAL) and Consumer Legal Remedies Act (CLRA) and for unjust enrichment. The district court certified a nationwide class of consumers who purchased or leased an Acura with the CMBS. Honda appealed claiming, among other things, that there were material differences between the laws of California and the consumer protection laws of 43 other jurisdictions in which class members purchased or leased vehicles – common issues of law did not predominate.

Honda immediately appealed the class certification receiving permission to do so pursuant to Rule 23(f). The Ninth Circuit vacated the class certification order "because it erroneously concluded that California law could be applied to the entire nationwide class, and because it erroneously concluded that all consumers who purchased or leased the Acura relied on defendant' advertisements which allegedly were misleading and omitted material information."

The court first noted that the plaintiffs satisfied their burden under Rule 23(a)(2) to show that there were questions of law or fact common to the class. The court then addressed Rule 23(b)(3) requirements, namely, whether common questions of law or fact predominate over any questions affecting only individual members and whether a class action was superior to individual actions. In so doing, the court determined which substantive law applied to the litigation.

Applying California's choice of law rules[1] (the government interest test) as the forum state (*see Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir. 2001)), the Ninth Circuit ruled that the district court abused its discretion in applying California law to the entirety of the

[1] Under California's choice of law rules, the class action proponent bears the initial burden to show that California has "significant contact or significant aggregation of contacts to the claims of ach class member." (*Wash. Mut. Bank v. Superior Court*, 24 Cal.4th 906, 921 (2001); *see also Phillips Petroleum Co. v. Stutts*, 472 U.S. 797, 822 (1985).)

class which contained members who purchased or leased their car in different jurisdictions with materially different consumer protection laws.

The government interest test consists of three steps:

1. Are the laws of each potentially affected jurisdiction the same or different?

2. If there is a difference, a court must assess each jurisdiction's interest in having its law applied to determine if a true conflict exists.

3. If the court concludes that there is a conflict, it must then carefully evaluate the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state. The court would then apply the law of the state whose interest would be more impaired if its law was not applied.

1. Conflict between California and other states' laws.

The court concluded that the differences among various state laws were material where, for example, California laws at issue have no scienter requirement while other states' statutes require scienter. California also requires reliance whereas other states do not. Remedies available among the states also differed. According to the court, these differences were not trivial or wholly immaterial.

2. Interests of foreign jurisdictions.

The Ninth Circuit essentially stated that each jurisdiction has an interest in balancing the range of products and prices offered to consumers with the legal protections afforded to them.

3. Which state interest is most impaired?

The district court did not adequately recognize that each foreign state has an interest in applying its law to transactions within its borders. "If California law were applied to the entire class, foreign states would be impaired in their ability to calibrate liability to foster commerce." With

respect to conduct within its borders, California law holds that the place of the wrong has the predominant interest. The court held that each class member's consumer protection claim should be governed by the consumer protection laws of the jurisdiction in which the transaction took place. The court remanded for further proceedings – not suggesting how the district court should correct its class ruling. Perhaps a smaller class of California residents would be appropriate or perhaps a larger class with sub classes for the various state jurisdictions would be appropriate.

Concerning predominance of common factual questions, the Ninth Circuit abused its discretion in finding common issues of fact predominate. While the California plaintiffs possessed Article III standing, the misrepresentations at issue do not justify a presumption of reliance. This is because it is likely that many class members were never exposed to the allegedly misleading advertisements. The class must be limited to those who were exposed to advertising that was alleged to be materially misleading. "We vacate the class certification decision on the ground because common questions of fact do not predominate where an individualized case must be made for each member showing reliance."

ESPINOSA v. AHEARN (IN RE HYUNDAI & KIA FUEL ECON. LITIG.)

881 F.3D 679 (9th Cir. 2018)

Vacated by Rehearing, en banc, 897 F.3d 1003 (9th Cir. 2018)[2]

To view the rehearing, click here.

Summary of Significant Points

1. The Ninth Circuit vacated class certification and settlement approval and remanded. However, the court later granted a petition for hearing en banc, thus vacating the Ninth Circuit opinion at 881 F.3d 679 (which is not citable). The hearing en banc occurred on September 27, 2018 and a decision is pending.

2. In certifying the class and approving the settlement, the district court did not conduct a choice of law analysis as to whether California law should apply to out-of-state putative class members. In a word, the district court did not follow *Mazza*.

3. The three-judge panel vacated the district court's rulings because it did not follow *Mazza* and conduct a choice of law analysis.

4. The case is significant in that the en banc court may reject *Mazza* insofar as *Mazza* required a choice of law analysis to determine whether California law should apply to putative class members outside of California. If it does, the question then is what analysis the Ninth Circuit will adopt for the certification of a settlement class and approval of a class settlement.

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[2] The court may rehear an appeal en banc. (28 U.S.C. § 46; Fed. R. App. P. 35.) In an en banc rehearing, the court consists of eleven judges. (Ninth Circuit Rule 35-3.) Grounds for a rehearing en banc include (1) a panel's disposition creates an "intracircuit conflict" and en banc consideration is "necessary to secure or maintain uniformity of the court's decisions;" or (2) the proceeding involves "a question of exceptional importance". (Fed. R. App. P. 35(a).)

Extended Summary

This is a nationwide class action and class settlement involving misleading information by Kia and Hyundai regarding fuel efficiency. The Ninth Circuit vacated class certification and remanded. District court jurisdiction existed by way of the Class Action Fairness Act, 28 U.S.C. § 1332(d).[3]

To begin, the court asserted: "When a district court . . . certifies for class action settlement only, the moment of certification requires heightened attention[.] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999) (internal quotation marks and citation omitted). The court stated that a plaintiff must satisfy as an evidentiary matter the criteria of Rule 23(a) and one of the three class action types in Rule 23(b). Here, the relevant subsection was 23(b)(3).

In addressing Rule 23(b)(3), the district court must consider the impact of potentially varying state laws because "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Castano v. Am. Tobacco Co.,* 84 F.3d 734, 742 (5th Cir. 1996). The variances, however, must be material.

In determining whether predominance is defeated by variations in state law, the court first must look at whether the forum state's substantive law may be constitutionally applied to the claims of a nationwide class. (See footnote 1, above, under *Mazza*.) If plaintiff meets this requirement, the court then must apply the forum state's choice of law rules to determine whether the forum state's law or the law of multiple states apply to the claims. If class claims will require adjudication under the laws of multiple states, then the court must determine whether common questions will predominate over individual

[3] One plaintiff class member is diverse, at least 100 plaintiffs, and amount in controversy exceeds $5,000,000.

issues and whether litigation of a nationwide class may be managed fairly and efficiently.

In this case, the court cited numerous times to *Mazza* and its application of the governmental interest choice of law test. The court then proceeded to apply *Mazza* in this respect to the facts before it. In so doing, the court made the point that a court may not justify its decision to certify a settlement class on the ground that the proposed settlement is fair to all putative class members. According to the court, such an approach renders Rule 23 criteria meaningless.

The court vacated the district court's certification of a nationwide settlement class because the district court:

1. did not undertake a choice of law analysis and failed to look at any differences among state statutes in considering the issue of predominance of law and fact;[4]

2. was wrong to conclude that it did not need to do a choice of law analysis on the ground that the settlement was fair; and

3. included in the class purchasers of used cars without any evidence that they were exposed to the defendants' false advertising.

[4] The district court was of the view that settlement relieved it of the responsibility of undertaking a choice of law analysis. The Ninth Circuit stated: "While the district court was correct that it need not consider litigation management issues in determining whether to certify a class, the Rule 23(b)(3) predominance inquiry focuses on whether common questions outweigh individual questions, an issue that preexists any settlement."

CLAY v. CYTOSPORT, INC.

No. 3:15-cv-00165-L-AGS, 2018 U.S. Dist. LEXIS 153124 (S.D. Cal. Sept. 7, 2018)

Summary of Significant Points

1. Among other things, the district court certified nationwide class actions involving application of California's Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and False Advertising Law (Bus. & Prof. Code, § 17500 et seq.) Certification was not in context of settlement.

2. The court applied the *Mazza* choice of law analysis. However, unlike in *Mazza*, where the Ninth Circuit rejected application of California consumer protection statutes and vacated class certification, the court determined that California law could legitimately apply to a class consisting of in-state and out-of-state residents because all of the conduct at issue occurred entirely in California.

Extended Summary of Decision

This is a nationwide class action involving misrepresentations in the sale and marketing of protein shake and powder products (e.g., Muscle Milk). The complaint alleged violations of various California, Florida and Michigan statutes. The complaint identified two classes involving numerous different products (one for liquid protein shakes and one for powder protein) and subclasses for California, Florida and Michigan residents under each state's statutes. There are nationwide classes for California's False Advertising Law (FAL) and Unfair Competition Law (UCL) and two subclasses for each state involving the liquid protein shakes and protein powder products.

The district court certified the subclasses. As to nationwide classes involving California's FAL and UCL, the district court followed *Mazza* and undertook a choice of law analysis.

The defendant argued that this case was similar to *Mazza*, and just as *Mazza* rejected certification, the court should have done so in the instant case. The district court rejected the defendant's argument. It distinguished *Mazza* and noted that California's FAL and UCL expressly applied to conduct generated in California and disseminated to the public in any state. The court was of the view, unlike what the circumstances were in *Mazza*, that all of the conduct at issue occurred entirely in California: "All allegedly false representations were made on Defendant's product labels, and all products were sold with labels. All final decisions regarding the labels were made and approvals were given in California, where Defendant is incorporated and maintains its principal place of business. Defendant distributed its products nationwide."

Mazza distinguished as follows:

1. Advertisements emanating from California "very limited;"

2. Consumers exposed to other materials in physical dealerships across the country, at the discretion of each dealership;

3. The "communication of the advertisements to the claimants and their reliance thereon ... took place in the various foreign states, not in California."

IN RE QUALCOMM ANTITRUST LITIGATION

No. 17-MD-02773-LHK, 2018 U.S. Dist. LEXIS 168484 (N.D. Cal. Sept. 27, 2018)

This is a nationwide class action asserting violations of California's Cartwright Act (antitrust) based upon indirect purchaser claims concerning electronic technology.

The court certified the nationwide class. In so doing, and applying *Mazza*, the court undertook a choice of law analysis.

Addressing the second step (other states' interests) of the choice of law analysis, the court concluded that other states did not have an interest in foreclosing their residents from gaining the protection of California's Cartwright Act. "The other states' interest in preventing excessive antitrust recovery for defendants is not implicated in the present case where the sole defendant is a California resident." This distinguished *Qualcomm* from *Mazza*.

CALIFORNIA CASES APPLYING CALIFORNIA LAW NATIONWIDE

***Clothesrigger, Inc. v. GTE Corp.,* 191 Cal.App.3d 605 (1987)**

Reversed denial of certification of a nationwide class under California UCL where "the fraudulent misrepresentations and unfair business practices . . . emanated from California."

***Diamond Multimedia Sys., Inc. v. Superior Court*, 19 Cal.4th 1036 (1999)**

California Supreme Court held Blue Sky securities law applies nationwide.

***Wershba v. Apple Comp. Inc.*, 91 Cal.App.4th 230 (2001)**

Affirmed certification of nationwide settlement class under California law because "representations upon which the causes of action rested . . . Necessarily emanated from California" at Apple's headquarters.

***Rutledge v. Hewlett Packard Co.,* 238 Cal.App.4th 1164 (2015)**

Post *Mazza*, Court of Appeal reversed denial of certification of nationwide class of consumers who bought notebook computers from Hewlett-Packard, a California company because "the alleged injuries occurred in California where HP conducted the repairs" and not foreign states where plaintiffs resided.

CALIFORNIA CASES REFUSING TO APPLY CALIFORNIA LAW NATIONWIDE

***Sullivan v. Oracle Corp.*, 51 Cal.4th 1191 (2011)**

UCL did not apply to a California-based company's failure to pay overtime for work performed in other states.

***Wilson v. Frito-Lay North America Inc.*, 961 F.Supp.2d 1134 (N.D. Cal. 2013)**

UCL, FAL and CLRA did not apply in false ad case with defendant based outside of California where none of the purchases were in California.

***Conde v. Sensa*, No. 14-cv-51 JLS WVG, 2016 U.S.Dist. LEXIS 144313 (S.D. Cal. Oct. 17, 2016)**

False advertising case involving weight loss product sold by California-based defendant in which class certification denied due to lack of predominance given different state laws had to be applied, not California law.

PERSONAL JURISDICATION OF ABSENT CLASS MEMBERS

BRISTOL-MYERS SQUIBB CO. v SUPERIOR COURT

___ U.S. ___, 137 S.Ct. 1773, 198 L.Ed.2d 395 (2017)

Summary of Significant Points

In a mass tort case in state court, where general jurisdiction over the defendant does not exist, personal and specific jurisdiction over each of the over 600 named plaintiffs is necessary. The United States Supreme Court rejected the California Supreme Court's "sliding scale" approach to specific jurisdiction. Under this approach, "the more wide ranging the defendant's forum contacts [though not leading to general jurisdiction], the more readily is shown a connection between the forum contacts and the claim."

Query: What impact will *Bristol* (not a class action) have on nationwide class actions? Will personal jurisdiction be required over absent non-resident class members or is personal jurisdiction over named class member sufficient?

Extended Summary

In June 2017, the United States Supreme Court issued its opinion in *Bristol-Myers Squibb Co. v. Superior Court*, ___ U.S. ___, 137 S.Ct. 1773, 198 L.Ed.2d 395 (2017). *Bristol-Myers* was a mass tort case involving whether the California superior court had personal jurisdiction over the claims (based upon California law) of named plaintiffs resident in other states. The California Supreme Court ruled that the California court possessed jurisdiction. The United States Supreme Court reversed. **As discussed herein, the larger question is whether *Bristol-Myers,* not a class action, will be used to defeat jurisdiction in nationwide class actions involving non-resident class members.**

In *Bristol-Myers*, the plaintiffs asserted damages from the drug Plavix. There were 86 plaintiffs resident in California and 592 residents from 33 other states who filed eight separate complaints in the California Superior Court alleging 13 claims under California law. Bristol-Myers

Squibb ("BMS") is headquartered in New York and incorporated in Delaware. It maintains substantial operations in both New York and New Jersey. It engages in certain business activities and sells Plavix in California. However, BMS did not develop, create a marketing strategy for, manufacture, label, package or work on the regulatory approval for Plavix in California. The non-resident plaintiffs did not assert that they obtained the drug from a California source, that they were injured by the drug in California or that they were treated for any injuries in California.

BMS moved to quash service of summons on the non-residents' claims. The superior court denied the motion ruling that California courts possessed general jurisdiction over BMS "[b]ecause [it] engages in extensive activities in California." On review, the Court of Appeal held that while general jurisdiction was lacking, the court possessed specific jurisdiction over the claims. The California Supreme Court affirmed. In so doing, the Court applied a unique "sliding scale" approach to specific jurisdiction. Under this approach, "the more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim." *Bristol-Myers Squibb Co. v. Superior Court,* 1 Cal.5th 783, 790 (2016).

In reversing the California Supreme Court, the United States Supreme Court reviewed the concepts of "general" and "specific" jurisdiction. The Court was of the view that "specific" jurisdiction controlled the suits but found that there was no affiliation between California as a forum and the underlying controversy – there was no activity or occurrence in California that would support specific jurisdiction. The Court stated that "the California Supreme Court's 'sliding scale approach' is difficult to square with our precedents."

> The present case illustrates the danger of the California approach. The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and the nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not

> purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California—and allegedly sustained the same injuries as did the nonresidents—does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, "a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction." This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents. Nor is it sufficient—or even relevant—that BMS conducted research in California on matters unrelated to Plavix. What is needed—and what is missing here—is a connection between the forum and the specific claims at issue.

Bristol-Myers, 137 S.Ct. at 1781(citation omitted..

The Court suggested that the plaintiffs could join in suing BMS in states that possessed general jurisdiction over BMS such as New York or Delaware. Alternatively, persons resident in a particular state "could probably sue together in their home States. The Court rested its decision on the 14th Amendment as it applied to state court jurisdiction. The Court did reserve judgment on whether its analysis would apply to exercise of personal jurisdiction in federal court under the 5th Amendment.

QUESTIONS WHICH *BRISTOL-MYERS* POSES

1. Does *Bristol-Myers* apply to federal litigation?

2. Does *Bristol-Myers* apply when subject matter jurisdiction is based on diversity of citizenship?

3. Does *Bristol-Myers* apply when subject matter jurisdiction is based upon a federal question?

4. Does *Bristol-Myers* eliminate nationwide or multi-state class actions?

AL HAJ v. PFIZER, INC.

338 F.Supp.3d 815 (E.D. Ill. 2018)

This case involved a nationwide class action alleging Pfizer charged more for extra strength Robitussin than regular strength when the regular strength contained a higher level of active ingredients. Relying upon *Bristol-Myers,* Pfizer moved to strike the nationwide class action allegation from the complaint on the ground that Pfizer was not subject to specific jurisdiction as to absent class member whose claims lacked a requisite nexus with Illinois.

The district court denied the motion and refused to apply *Bristol-Myers* to a class action. The court stated: "The key question here is whether absent class members are parties for purposes of assessing personal jurisdiction over defendant - if so, then specific jurisdiction must be assessed as to each absent class member's claim, and each absent class member's claim, and if not, then not." The court went on to note that absent class members are treated as parties for certain purposes and not as parties for other purposes. As for personal jurisdiction, the court held that absent class members should not be treated as parties to the suit:

> Pfizer's submission, then, boils down to this: Although absent class members are *not* parties for purposes of diversity of citizenship, amount in controversy, Article III standing, and venue, they *are* parties for purposes of personal jurisdiction over the defendant. That cannot be right. Personal jurisdiction shares a key feature with those other doctrines: each governs a court's ability, constitutional or statutory, to adjudicate a particular person's or entity's claim against a particular defendant. In that context—and recall the Supreme Court's admonition that "context" determines whether an absent class member counts as a party for purposes of determining "the applicability of various procedural rules,"—absent class members are not parties.

> Unlike named parties, "a class-action plaintiff is not required to fend for himself. The court and named plaintiffs protect his interests." Indeed, "an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." Precisely because absent class members are along for the ride, it makes sense that they are not parties for the purpose of constitutional and statutory doctrines governing whether a court has the power to adjudicate their claims.

Id. at 820 (citations omitted).

OTHER POST *BRISTOL-MYERS* CASES

Cases Holding *Bristol-Myers* Does Not Apply To Class Actions And Does Not Require Personal Jurisdiction As To Each Absent Class Member

Sanchez v. Launch Tech. Workforce Sols., LLC, 297 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018)

Molock v. Whole Foods Mkt., Inc., 297 F. Supp. 3d 114, 127 (D.D.C. 2018)

Casso's Wellness Store & Gym, L.L.C., No. 17-2161, 2018 U.S. Dist. LEXIS 43974 *11-*16 (E.D. La. March 19, 2018)

Feller v. Transam. Life Ins. Co., No. 2:16-cv-01378-CAS-AJW, 2017 U.S. Dist. LEXIS 206822, *46-*48 (C.D. Cal. Dec. 11, 2017)

In re Chinese-Manufactured Drywall Prods. Liab. Litig., No. 09-2047, 2017 U.S. Dist. LEXIS 197612, *31 (E.D. La. Nov. 30, 2017)

Fitzhenry-Russell v. Dr. Pepper Snapple Group, No. 17-cv-00564 NC, 2017 U.S. Dist. LEXIS 155654, *13-*14 (N.D. Cal. Sept. 22, 2017)

Cases Holding *Bristol-Myers* Applies To Class Actions And Requires Personal Jurisdiction As To Each Absent Class Member

Chavez v. Church & Dwight Co., No. 17 C 1948, 2018 U.S. Dist. LEXIS 82642, *29-*31 (N.D. Ill. May 16, 2018)

Practice Mgmt. Support Servs., Inc. v. Cirque du Soleil, Inc., 301 F. Supp. 3d 840, 860-62 (N.D. Ill. Mar. 12, 2018)

DeBernardis v. NBTY, Inc., No. 17 C 6125, 2018 U.S. Dist. LEXIS 7947, *2-*7 (N.D. Ill. Jan. 18, 2018)

McDonnell v. Nature's Way Products, LLC, No. 16 C 5011, 2017 U.S. Dist. LEXIS 177892, *9-*10 (N.D. Ill. Oct. 26, 2017)

APPROACHES TO DEALING WITH POTENTIAL APPLICATION OF *BRISTOL-MYERS*

In order to address potential application of *Bristol-Myers*, a plaintiff seeking to present a class claim may:

1. file in a state that possesses general jurisdiction over the defendant.

2. file concurrently class actions in the several states where putative class members reside and specific jurisdiction exists.

3. file a single nationwide class action and risk application of *Bristol-Myers*.

DEFENDANT CHALLENGING JURISDICTION

Defendants must take care on the timing of challenging jurisdiction over unnamed class members. With respect to personal jurisdiction, Rule 12(b)(2) of the Federal Rules of Civil Procedure provides: "(b) Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: [¶] (2) lack of personal jurisdiction." Rule 12(h)(1)(B) of the Rules provides in relevant part: "A party waives any defense listed in Rule 12(b)(2)–(5) by: [¶] (B) failing to either: (i) make it by motion under this rule; or (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course."

With regard to the foregoing, note *Tredinnick v. Jackson National Life Insurance Company*, No. 4:16-CV-00912 (E.D. Tex. May 9, 2018), (Memorandum Opinion and Order) available on Pacer. In *Jackson*, the defendant interposed an objection and argument as to personal jurisdiction under *Bristol* as part of its opposition to class certification. The district court held that this was too late, citing Federal Rule of Civil Procedure Rule 12(h). The fact that the defendant had raised jurisdiction as a defense in its answer was insufficient. By litigating the merits and waiting until class certification to litigate jurisdiction, the defendant waived the defense of jurisdiction. "Even where the defense was asserted in a timely answer, delay in challenging personal jurisdiction by motion to dismiss may result in waiver." (Slip Opinion, 10-14; citing cases.) The defendant challenged this ruling in seeking and obtaining the right for an interlocutory appeal under Rule 23(f). That appeal is pending.

STANDING IN DATA BREACH CLASS ACTIONS – IS THE RISK OF FUTURE HARM ENOUGH?

Standing in class action data breach cases is the subject of much recent federal appellate activity. The principal issue addressed in the current cases is whether complaining parties whose data has been breached have suffered injury sufficient to establish Article III standing.

The Supreme Court currently is considering whether to grant certiorari in the case that presents this issue for resolution. In *Zappos.com v. Stevens,* 888 F.3d 1020 (9th Cir. 2018), Petition for Writ of Certiorari pending No. 19 225, The Question Presented in the Petition is:

> Whether individuals whose personal information is held in a database breached by hackers have Article III standing simply by virtue of the breach even without concrete injury, as the U.S. Courts of Appeals for the 3rd, 6th, 7th, 9th and District of Columbia Circuits have held, or whether concrete injury as a result of the breach is required for Article III standing, as the U.S. Courts of Appeals for the 1st, 2nd, 4th and 8th Circuits have held

The following commences with a presentation of two Supreme Court standing opinions relevant to the issue (see *Clapper v. Amnesty International, USA* (2012) 568 U.S. 398 (2016) and *Spokeo v. Robins* ___ U.S. ___, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016)) along with a discussion of the federal appellate decisions that have addressed the issue, including *Zappos*.

CLAPPER v. AMNESTY INTERNATIONAL USA

568 U.S. 398 (2012)

Summary of Significant Points

(a) To establish Article III standing, an injury must be "concrete, particularized and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."

(b) "[T]hreatened injury must be "certainly impending" to constitute 'injury in fact' and

(c) "[A]llegations of possible future injury" are not sufficient.

Extended Summary

Clapper was a 5-4 decision written by Justice Alito. It was not a class action. The case involved a claim by various groups and individuals, including attorneys and human rights, labor, legal and media organizations that sought to enjoin section 702 of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1881a as unconstitutional. Section 702 permits the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are **not** "United States persons" and are reasonably believed to be located outside the United States. The plaintiffs claimed that they engaged in sensitive international communications with individuals who they believe were likely targets of the section.

The district court granted summary judgment against the plaintiffs on the ground that the plaintiffs did not have standing. The Second Circuit reversed, holding that respondents showed (1) an "objectively reasonable likelihood" that their communications will be intercepted at some time in the future, and (2) that they are suffering present injuries resulting from costly and burdensome measures they take to protect the confidentiality of their international communications from possible surveillance.

After granting certiorari, the Supreme Court held that the plaintiffs did not have Article III standing. According to the Court:

(a) To establish Article III standing, an injury must be "concrete, particularized and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."

(b) "[T]hreatened injury must be "certainly impending" to constitute 'injury in fact'; and

(c) "[A]llegations of possible future injury" are not sufficient.

The plaintiffs' standing theory rested on a speculative chain of possibilities that does not establish that their potential injury is certainly impending or is fairly traceable to section 702. First, it was highly speculative whether the Government would imminently target communications to which plaintiffs are parties. Second, even if plaintiffs could demonstrate that the targeting of their foreign contacts were imminent, they could only speculate as to whether the Government would seek to use section 702 authorized surveillance instead of one of the Government's numerous other surveillance methods which are not challenged. Third, even if the plaintiffs could show that the Government would seek authorization to target plaintiffs' foreign contacts under section 702, they could only speculate as to whether such authorization would be forthcoming. Fourth, even if such authorization were received, it is unclear whether the Government would succeed in acquiring those contacts' communications. Lastly, even if the Government were to target respondents' foreign contacts, plaintiffs could only speculate as to whether their own communications with those contacts would be incidentally acquired.

The Court also rejected the plaintiffs' argument that the risk of surveillance requires them to take costly and burdensome measures to protect the confidentiality of their communications. In doing so, the Court stated that the plaintiffs could not manufacture standing by choosing to

make expenditures based on hypothetical future harm that is not certainly pending.

SPOKEO, INC. v. ROBINS

___ U.S. ___, 136 S.Ct. 1540, 194 L.Ed.2s 635 (2016)

Summary of Significant Points

An injury in fact must be both particularized **and** concrete. Concreteness requires an injury to be "de facto," namely, to actually exist, to be real and not "abstract."

"The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."

On the other hand, a bare violation of statutory procedural right may not be sufficient as a matter of fact on its own to demonstrate injury. For example, a statutory procedural violation related to a data breach involving one's zip code may not be sufficient to allege injury under the Fair Credit Reporting Act.

Extended Summary

Spokeo, a class action, was an 6-2 decision which Justice Alito drafted. Spokeo operates a "people search" engine which searches a wide spectrum of data bases to gather and provide personal information about individuals to a variety of users, including employers wanting to evaluate prospective employees. Plaintiff discovered that his Spokeo generated profile contained inaccurate information and filed a class action alleging that Spokeo failed to comply with Fair Credit Reporting Act of 1970, 15 U.S.C §1681 et seq. (FCRA) requirements regarding reporting accuracy of data related to individuals.

The district court dismissed the action for lack of the plaintiff's Article III standing. The Ninth Circuit reversed, holding that the plaintiff had adequately alleged injury in fact. The Supreme Court vacated the Ninth Circuit's ruling and remanded. According to the Court, the injury-in-fact standing requirement requires a plaintiff to show that he or she

suffered "an invasion of a legally protected interest" that is "concrete and particularized and "actual or imminent, not conjectural or hypothetical." The Court found that the Ninth Circuit only addressed "particularized" aspect of injury-in-fact but failed to consider the "concreteness" requirement. An injury in fact must be both particularized **and** concrete. Concreteness requires an injury to be "de facto," namely, to actually exist, to be real and not "abstract."

A "concrete" injury need not be a "tangible." Intangible injuries can be concrete. In determining whether an intangible harm constitutes injury-in-fact, "both history and the judgment of Congress play important roles." As to history, it is important to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.

As to Congress, that institution is well positioned to identify intangible harms that meet minimum Article III requirements, thus its judgment is "instructive and important." Congress may elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law. This does not mean, however, that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person so sue to vindicate that right. "Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [the plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."

Having stated the foregoing, the Court emphasized: "This does not mean, however, that the **risk** of real harm cannot satisfy the requirement of concreteness." (Emphasis added). Certain tort victims, for example, victims of slander per se, can recover "even if their harms may be difficult to prove or measure." Similarly,

> The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.

Id. at 1549.

In the case before it, the Court noted that Congress sought to curb the dissemination of false information by adopting procedures under FCRA designed to decrease that risk. Nevertheless, the plaintiff in *Spokeo* could not satisfy the demands of Article III by alleging a bare procedural violation of FCRA without alleged other injury. Such a violation may not result in any harm – for example, an incorrect zip code revealed in a Spokeo search is unlikely to cause any harm.

> Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete. It did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement. We take no position as to whether the Ninth Circuit's ultimate conclusion — that Robins adequately alleged an injury in fact — was correct.

Id. at 1550.

ZAPPOS.COM, INC. v. STEVENS

888 F.3d 1020 (9th Cir. 2018)

Summary of Significant Points

Risk of future misuse of personal information stolen as a result of an unlawful computer hack is sufficient to support Article III standing. The information taken in the data breach gives hackers the means to commit fraud or identity theft.

Extended Summary

Zappos is a class action related to a hack of servers of the online retailer Zappos.com resulting in the alleged theft of names, account numbers, passwords, email addresses, billing and shipping addresses, telephone numbers, and credit card and debit card information of more than 24 million Zappos customers. Several of Zappos customers filed putative class actions in federal courts around the country asserting that Zappos had not adequately protected their personal information. The lawsuits were consolidated for pretrial proceedings.

The focus of the appeal involved plaintiffs who **did not** allege that the hackers used stolen information about them to conduct subsequent financial transactions. (The district court, however, determined that those plaintiffs who did allege such use had standing.) The district court dismissed the plaintiffs' claims for lack of Article III standing. These plaintiffs appealed, and the Ninth Circuit reversed.

The Ninth Circuit was of the view that its earlier opinion in *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010), governed. In *Krottner*, a thief stole a laptop containing personal information of 97,000 Starbuck's employees. Some employees sued Starbucks with the only alleged harm being an "increased risk of future identity theft." The Ninth Circuit determined that this was sufficient for Article III standing: the plaintiffs in *Krottner* had "alleged a credible threat of real and immediate harm" because of the theft of the laptop.

In *Zappos*, the Ninth Circuit first addressed whether *Krottner* was still good law in view of *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), discussed above. The court concluded that *Clapper* did not require rejection of *Krottner*. According to the Ninth Circuit, "[u]nlike in *Clapper*, the plaintiffs' alleged injury in *Krottner* did not require a speculative multi-link chain of inferences." The thief in *Krottner* obtained all of the information he needed to open accounts or spend money in the *Krottner's* plaintiffs' names. The Ninth Circuit further distinguished *Clapper* on the ground that it was especially rigorous because the case arose in a sensitive national security context involving intelligence gathering and foreign affairs and because the plaintiffs were seeking to declare actions of the executive and legislative branches unconstitutional. Additionally, the court of appeals noted that since *Clapper*, the Supreme Court in *Susan B. Anthony List v. Driehaus*, ___ U.S. ___, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014), stated "[a]n allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Id.* at 2341 (quoting *Clapper*, 568 U.S. at 414 & n.5) (internal quotation marks omitted).

Thus, according to the Ninth Circuit, *Krottner* is not clearly irreconcilable with *Clapper* and remains binding. The court went on to hold that *Krottner* controls and that the *Zappos* plaintiffs had sufficiently alleged standing:

> Plaintiffs allege that the type of information accessed in the Zappos breach can be used to commit identity theft, including by placing them at higher risk of "phishing" and "pharming," which are ways for hackers to exploit information they already have to get even more PII. Plaintiffs also allege that their credit card numbers were within the information taken in the breach—which was not true in *Krottner*. And Congress has treated credit card numbers as sufficiently sensitive to warrant legislation prohibiting merchants from printing such numbers on receipts—specifically to reduce the risk of identity theft. *See* 15 U.S.C. § 1681c(g) (2012). Although there is no

> allegation in this case that the stolen information included social security numbers, as there was in *Krottner*, the information taken in the data breach still gave hackers the means to commit fraud or identity theft, as Zappos itself effectively acknowledged by urging affected customers to change their passwords on any other account where they may have used "the same or a similar password."

Id. at 1027-28. The court also found support for standing by the fact that those plaintiffs who alleged that the hackers misused their data and who the district court ruled had standing demonstrated that misuse of the data for those who were the subject of the appeal was a real risk and not speculative.

Zappos filed a Petition for Writ of Certiorari in the Supreme Court which is currently pending and which claims a conflict among various circuits.

Zappos Petition for Writ of Certiorari pending No. 19 225.

Issue Presented To The Supreme Court: "Whether individuals whose personal information is held in a database breached by hackers have Article III standing simply by virtue of the breach even without concrete injury, as the Third, Sixth, Seventh, Ninth, and D.C. Circuits have held, or whether concrete injury as a result of the breach is required for Article III standing, as the First, Second, Fourth, and Eighth Circuits have held."

Control-click for Petition for Writ of Certiorari.

Control-click for Opposition to Petition.

Control-click for Reply.

CASES WHICH ZAPPOS CLAIMS ARE IN CONFLICT WITH RESPECT TO STANDING IN DATA BREACH CASES WHERE THERE IS A BARE ALLEGATION OF BREACH BUT NO ALLEGATION OF ACTUAL MISUSE AFTER THE BREACH

Standing Exists

Third Circuit

In re Horizon Healthcare Services Inc. Data Breach Litigation, 846 F.3d 625, 634-41 (3d Cir. 2016)

Sixth Circuit

Galaria v. Nationwide Mutual Insurance Co., 663 Fed. Appx. 384, 387-90 (6th Cir. 2016)

Seventh Circuit

Dieffenbach v. Barnes & Noble, Inc., 887 F.3d 826 (7th Cir. 2018)

Ninth Circuit

Zappos.com, Inc. v. Stevens, 888 F.3d 1020 (9th Cir. 2018)

Krottner v. Starbucks Corp., 628 F.3d 1139 (9th Cir. 2010)

DC Circuit

Attias v. CareFirst, Inc., 565 F.3d 620, 625-29 (DC Cir. 2017)

Standing Does Not Exist

First Circuit

Katz v. Pershing, LLC, 672 F.3d 64, 78-79 (1st Cir. 2012)

Second Circuit

Whalen v. Michaels Stores, Inc., 659 Fed. Appx. 89, 90 (2d Cir. 2017)

Fourth Circuit

Beck v. McDonald, 848 F.3d 262 (4th Cir. 2017); compare *Hutton v. National Board of Examiners in Optometry Inc.*, 892 F.3d 613, 619-24 (4th Cir. 2018) (finding standing because of use of credit card by cyber thief)

Eighth Circuit

Alleruzzo v. SuperValu, Inc., 870 F.3d 763, 768-72 (8th Cir. 2017)

ARBITRATIONS AND CLASS ACTIONS

EPIC SYSTEMS CORP. V. LEWIS

___ U.S. ___, 138 S.Ct. 1612, 200 L.Ed. 2d 889 (2018)

Employees who entered with employers into contract providing for individualized arbitration proceedings to resolve employment disputes were not entitled to litigate Fair Labor Standards Act and related state-law overtime claims through class or collective actions in federal court. Three cases were involved before the court, exemplified by *Ernst & Young LLP v. Morris*.

Morris involved a claim for failure to pay overtime. The plaintiff sued under the FLSA claim on behalf of a nationwide class under the FLSA's collective action provision. 29 U.S.C. § 216(b). He also sought to pursue his state law claim as a class action under Rule 23. The defendant Ernst & Young moved to compel arbitration. The district court granted the motion but the Ninth Circuit reversed, concluding that an agreement requiring individualized arbitration proceedings violates the Nation Labor Relations Act (NLRA) by barring employees from engaging in the concerted activity of pursuing claims as a class or collective action. 29 U.S.C. § 157.

The Supreme Court reversed. In so doing, it rejected the argument that the NLRA's language regarding concerted activity precluded waiving a class action remedy in the arbitration of employment disputes, either as a defense under the savings clause of 9 U.S.C. § 2 or as a matter of statutory interpretation.

CASES APPLYING *EPIC SYSTEMS*

The following cases have thus far applied *Epic Systems*:

Herrington v. Waterstone Mortgage Corp., 907 F.3d 502 (7th Cir. 2018)

O'Connor v. Uber Technologies, Inc., 904 F.3d 1087 (9th Cir. 2018)

Miner v. Ecolab, Inc., 74 Fed. Appx. 399 (9th Cir. 2018)

Gaffers v. Kelly Services, Inc., 900 F.3d 293 (6th Cir. 2018)

Armstrong v. Michael Stores, Inc., 17-CV-06540-LHK, 2018 U.S. Dist. LEXIS 208976 (N.D. Cal. Dec. 11, 2018)

Appel v. Concierge Auctions, LLC, 17-cv-2263-BAS-MDD, 2018 U.S. Dist. LEXIS 169593 (S.D. Cal. Oct. 1, 2018)

Anderson v. Safe Streets USA LLC, 2:18-cv-00323-KJM, 2018 U.S. Dist. LEXIS 147473 (E.D. Cal. Aug. 29, 2018)

Guerrero v. Haliburton Energy Servs., 1:16-cv-01300-LJO-JLT, 2018 U.S. Dist. LEXIS 125472 (E.D. Cal. July 26, 2018)

Heidrich v. PennyMac Financial Servs., Inc., 2:16-cv-02821-TLN-EFB, 2018 U.S. Dist. LEXIS 115644 (E.D. Cal. July 11, 2018)

Compare

Whitworth v. SolarCity Corp, 336 F.Supp.3d 1119 (N.D. Cal. 2018). Non PAGA claims ordered to arbitration. PAGA claims not subject to arbitration. (See *Sakkab v. Luxottica Rtail N. Am., Inc.*, 803 F.3d 425, 431 (9th Cir. 2015).) According to the district court, *Epic* did not overrule *Sakkab*; that is an open issue.[5]

[5] In *Iskanian v. CLA Transportation Los Angeles, LLC*, 59 Cal.4th 348, 384 (2014), the California Supreme Court held: "We conclude that where, as here, an employment agreement compels the waiver of representative claims under the PAGA, it is contrary to public policy and unenforceable as

Gomez v. MLB Enter. Corp., 15-cv-3326(CM), 2018 U.S. Dist. LEXIS 96145 (S.D.N.Y. June 5, 2018). Court acknowledged *Epic* but ruled that the defendants had materially breached the arbitration agreements by failing to participate in arbitration. Thus, plaintiffs who were parties to the agreements could nonetheless participate in a class suit against the defendants.

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a matter of state law." The Court went on to rule that the FAA did not preempt non-waiver of PAGA claims. It is interesting that a dissent in *Sakkab v. Luxottica Rtail N. Am., Inc.*, 803 F.3d at 440 opined that the FAA preempted the result in *Iskanian*.

POTENTIAL CHALLENGES TO CLASS ACTION WAIVERS

1. Language of the arbitration agreement/provision. (*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (fundamentally "arbitration is a matter of contract"); *Dish Network L.L.V. v. Ray* 900 F.3d 1240, 1242-1243 (2018) (arbitrator construed arbitration provision to allow for arbitration of class claim)).

2. Opt outs. (*See Campanelli v. Image Healthcare laundry Specialist, Inc.*, 15-cv-04456-PJH, 2018 U.S. Dist. LEXIS 215287 (N.D. Cal. Dec. 21, 2018) (Rule 23 class could not include persons subject to arbitration class action waiver)).

3. Refusal to participate in arbitration (e.g., fail to pay fees) (*Pre-Paid Legal Servs., Inc. v. Cahill*, 786 F.3d 1287, 1289 (10th Cir. 2015) (failure to pay arbitration fees effectively negates right to engage in arbitration); *Gomez v. MLB Enter. Corp.*, 15-cv-3326(CM), 2018 U.S. Dist. LEXIS 96145 (S.D.N.Y. June 5, 2018) (failure to participate in arbitration was a material breach allowing participation in class action)).

4. *McGill v. Citibank*, 2 Cal.5th 945 (2017)

A provision in a predispute arbitration agreement that waives the statutory right to seek in any forum public injunctive relief under California's Consumers Legal Remedies Act, Unfair Competition Law or False Advertising law is contrary to California public policy and thus unenforceable under California law. The Federal arbitration Act does not preempt this rule of California law or require enforcement of the waiver provision.

The California Supreme Court relied upon the "savings clause" of the FAA (9 U.S.C. § 2):

> More fundamentally, Citibank's argument misunderstands the nature of the FAA's saving clause. As noted above, that clause provides that an arbitration agreement may be declared unenforceable "upon such grounds as exist at law or

> in equity for the revocation of any contract." (9 U.S.C. § 2.) The high court has explained that this clause "explicitly retains an external body of [state] law governing revocation." (Arthur Andersen LLP v. Carlisle (2009) 556 U.S. 624, 630 [173 L. Ed. 2d 832, 129 S. Ct. 1896].) Under it, "'[s]tate law' … is applicable to determine which contracts are binding … and enforceable under" the FAA, "'*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" (Arthur Andersen, at pp. 630–631.) As previously explained, the contract defense to the waiver at issue here—"a law established for a public reason cannot be contravened by a private agreement" (Civ. Code, § 3513)—*is* a "ground[]" that "exist[s]" under California law "for the revocation of any contract." (9 U.S.C. § 2; see Little, supra, 29 Cal.4th at p. 1079.) Thus, applying this defense to invalidate the waiver does not "*modify* the FAA," as Citibank asserts; it *implements* the FAA *as written.*

Id. at 954.

Query, whether the United States Supreme Court, in view of *Epic* and its narrow application of the savings clause of the FAA, would reject the California Supreme Court's decision?

EVIDENTIARY REQUIREMENTS FOR EXPERTS ON CLASS CERTIFICATION MOTION – ADMISSIBLE EVIDENCE OR NOT?

SALI v. CORONA REGIONAL MEDICAL CENTER

909 F.3d 996 (9th Cir. 2018)

Recently, the Ninth Circuit decided *Sali v. Corona Regional Medical Center*, 909 F.3d 996 (9th Cir. 2018). In *Sali*, the Ninth Circuit ruled that evidence submitted in connection with a class certification motion need not be admissible evidence.

Sali involved the defendants objection to the admissibility of the contents of the declaration of a paralegal relevant to the plaintiffs damages claims. The defendant asserted that the declaration was unsupported by personal knowledge and constituted improper expert testimony. The district court struck the declaration. The Ninth Circuit reversed.

The court acknowledged that the plaintiff bears the burden of affirmatively demonstrating "through evidentiary proof that the class meets the prerequisites of Rule 23(a) and that the trial court must conduct a 'rigorous analysis' to determine whether the party seeking certification has meet the prerequisites of rule 23" Yet, the court rejected the notion that plaintiff's evidence must be admissible at the certification stage.

> Therefore, in evaluating a motion for class certification, a district court need only consider "material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement." . . . The court's consideration should not be limited to only admissible evidence.

The court relied upon the following:

1. A class certification order while important is also preliminary, may be changed and is inherently tentative;

2. Evidence is unlikely to be fully developed at the class certification stage;

3. Court is not deciding the merits; rather it is deciding Rule 23 requirements;

4. Regarding expert testimony, "a court should evaluate admissibility under the standard set forth in *Daubert* [509 U.S. 579 (1993)]. *Ellis*, 657 F.3d at 982 [ensure evidence is reliable]. But Admissibility must not be dispositive. Instead, an inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage."

HAMILTON v. TBC CORP.,

328 F.R.D. 359 (2018)

Hamilton is a post *Sali* case applying *Sali.* In connection with a motion to certify a class, the defendant moved to strike expert declarations. The court denied the motions to strike:

> In the context of a class certification motion, however, it is "an abuse of discretion where a 'district court limited its analysis of whether' class plaintiffs satisfied a Rule 23 requirement 'to a determination of whether Plaintiffs' evidence on that point was admissible.'" *Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623, 631 (9th Cir. 2018) (quoting *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 982 (9th Cir. 2011)). Because a class certification decision is preliminary and uncertain, "[i]nadmissibility alone is not a proper basis to reject evidence submitted in support of class certification." *Id*. at 632. Instead, a district court should "consider material sufficient to form a reasonable judgment on each [Rule 23(a)] requirement." Id. (quoting *Blackie v. Barrack,* 524 F.2d 891, 901 (9th Cir. 1975)). For instance, "[t]he court may consider whether the plaintiff's proof is, or will likely lead to, admissible evidence." *Id*. at 634.
>
> But a district court should not "dispense with the standards of admissibility entirely" and should still "evaluate admissibility under the standard set forth in *Daubert*." *Id.* at 633-34. Although "admissibility must not be dispositive," the court must consider whether the expert opinion is ultimately admissible when weighing that evidence at the class certification stage. *Id*. at 634.
>
> Under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and its progeny, a court must

> assess [an expert's] reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance, but the inquiry is a flexible one. Shaky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof . . . Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry. And it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline.
>
> *Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969-70 (9th Cir. 2013) (internal quotations and citations omitted).

Hamilton, 328 F.R.D. at 372-73.

The district court reviewed the two expert declarations at issue. One declaration, according to the court, met the *Daubert* standard of reliability. However, the court found that the other declaration contained "noticeable deficiencies" but nonetheless refused to strike it: "Keeping in mind the Ninth Circuit's admonition that district courts should not limit its certification analysis to Plaintiffs' evidence and that 'shaky' but admissible evidence should be attacked through cross-examination, contrary evidence, and application of the burden of proof, the Court declines to strike Pearl's opinion at this stage of the proceedings."

Comment: The reference here to "'shaky' but admissible evidence" is unsettling. How can "shaky" evidence be admissible evidence?

CIRCUIT SPLIT

Admissible Evidence Required

Unger v. Amedisys Inc., 401 F.3d 316, 319 (5th Cir. 2005)

Messner v. Northshore Univ. Health Sys., 669 F.3d 802, 812 (7th Cir. 2012)

In re Blood Reagents Antitrust Litigation, 783 F.3d 183, 187 (3d Cir. 2015)

Admissible Evidence Not Required

Zurn Pex, 644 F.3d 604, 612-13 (8th Cir. 2011)

CENTRAL DISTRICT CASES RULING ADMISSIBLE EVIDENCE NOT NECESSARY

Pre *Sali*

***Garter v. Cty. of San Diego*, 15cv1868-MMA (NLS), 2017 U.S. Dist. LEXIS 185548 (S.D. Cal. Nov. 7, 2017)** ("District [c]ourts may consider all material evidence submitted by the parties and need not address the ultimate admissibility of evidence proffered by the parties.");

***In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 965 n.147 (C.D. Cal. 2015)** ("[T]he court can consider inadmissible evidence in deciding whether it is appropriate to certify a class.");

***Arredondo v. Delano Farms Co.*, 301 F.R.D. 493, 505 (E.D. Cal. 2014)**;

***Keilholtz v. Lennox Hearth Prods., Inc.*, 268 F.R.D. 330, 337 n.3 (N.D. Cal. 2010)** ("On a motion for class certification, the Court may consider evidence that may not be admissible at trial.");

***Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 599 (C.D. Cal. 2008)** ("[A] motion for class certification need not be supported by admissible evidence.");

***Bell v. Addus Healthcare, Inc.*, 2007 U.S. Dist. LEXIS 78950, 2007 WL 3012507, at *2 (W.D. Wash. Oct. 12, 2007)** ("[Rule] 23 does not require admissible evidence in support of a motion for class certification . . . .").

Post *Sali*

***Kassman v. KMPG LLP*, 11 Civ. 3743 (LGS), 2018 U.S. Dist. LEXIS 203561 (Nov. 30, 2018**) ("The Second Circuit has yet to rule on the standard for motions to strike lay witness evidence at the class certification stage, but "most district courts addressing this question have held that evidence need not be admissible under the Federal Rules of Evidence -- or that the rules should not be applied strictly -- on a motion for class certification." *Flores v. Anjost Corp.*, 284 F.R.D. 112, 124 n.3 (S.D.N.Y. 2012) (collecting cases); *accord Sali v. Corona Reg'l Med. Ctr.*, 889 F.3d 623, 632 (9th Cir. 2018); *but see Unger v. Amedisys Inc.*, 401 F.3d 316, 319 (5th Cir. 2005) ("[F]indings must be made based on adequate admissible evidence to justify class certification."). This authority is persuasive. The parties' arguments concerning testimony challenged under the Federal Rules of Evidence are considered only to evaluate the weight of the evidence and not its admissibility.")

***Magadia v. Wal-Mart Assocs.*, 17-CV-00062-LHK, 2018 U.S. Dist. LEXIS 193504 (Nov. 13, 2018)** (inadmissibility alone is not a proper basis to reject evidence submitted in support of class certification.)

***Cottman v. Naskren*t, CCV-17-02045-PHX-JJT, 2018 U.S. Dist. LEXIS 154347 (D. Ariz. Sept. 11, 2018)** ("When ruling on a motion to certify a class, courts may exert 'greater evidentiary freedom' and consider evidence that may ultimately be inadmissible at trial.")

***Weisberg v. Takeda Pharms. U.S.A., Inc.*, CV 18-784 PA (JCx), 2018 U.S. Dist. LEXIS 146376 (Aug. 21, 2018)** ("The plaintiff's evidence need not be admissible, but it must be persuasive.")

***Moussouoris v. Microsoft Corp*., C15-1483JLR, 2018 U.S. Dist. LEXIS 112792, *36 n. 7 (June 25, 2018) (**"Moreover, contrary to Microsoft's contentions (see Surreply at 3), evidence does not need to be admissible to

be considered at the class certification stage, see *Sali v. Corona Reg'l Med. Ctr*., 889 F.3d 623, 2018 WL 2049680, at *5 (9th Cir. 2018). Thus, unlike the summary judgment cases Microsoft cites (see Surreply at 3), the court is not limited to considering only admissible evidence.")

CLASS ACTION AND ARBITRATION CASES PENDING OR DECIDED BEFORE THE UNITED STATES SUPREME COURT OCTOBER 2018 TERM

***Lamps Plus Inc. v. Varela*, No 17-988**

Issue: "Whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements."

Control-Click Transcript or Audio for a record of the October 29, 2018 oral argument.

Comment: The Ninth Circuit agreed with the plaintiff and allowed him to pursue a class arbitration where the arbitration agreement did not mention class relief. During oral argument, Chief Justice Roberts called class arbitrations a "poison pill" which would undermine the purpose of arbitration. Justice Kagen sided with the plaintiff, noting that general clauses typically include all things inside it – a general arbitration clause addressing "disputes, claims or controversies" would seem to cover class-wide arbitration.

***Frank v. Gaos*, No. 17-961**

Issue: "Whether, or in what circumstances, a *cy pre* award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be 'fair, reasonable, and adequate.'"

Control-Click Transcript or Audio for a record of the October 31, 2018 oral argument.

Comment: Under the settlement, defendant Google's payment would be $8.5 million involving a class of more than 100 million members. The litigation involved Google's practice of sharing information about customer internet searches. After attorney's fees, the amount per class member would be $06.5. Because it would cost more than $06.5 to distribute the funds to class members, the court distributed the fund to non-profits and educational institutions involved in internet privacy issues.

One commenter stated: "[t]his case will not produce a ringing endorsement of cy pre settlements, as the attitudes of the justices suggested perspectives ranging from deep skepticism to well-settled hostility." Standing of the class action plaintiffs under *Spokeo v. Robins*, ___ U.S. ___, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016), is also an issue and may well be the deciding issue.

***PDR Network LLC v. Carlton & Harris Chiropractic Inc.*, No. 17-1705**

Issue: **"**Whether the Hobbs Act required the district court in this case to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act."

Argument calendared for March 25, 2019.

***New Prime Inc. v. Oliveira*, No. 17-340, 139 S.Ct. 532, 202 L.Ed.2d 536 (2019)**

Holding: A court, rather than an arbitrator should determine whether the Federal Arbitration Act's Section 1 exclusion for disputes involving the "contracts of employment" of certain transportation workers applies before ordering arbitration. The Supreme Court went on to rule that the language "contracts of employment" was not limited to the employer-employee master-servant relationship but encompassed independent contractor truck drivers.

Control-click January 15, 2019 Opinion; Transcript or Audio for oral argument.

Comment: Ronald Mann, SCOTUSblog post January 15, 2019: "Neil Gorsuch's opinion for a unanimous court rejects a claim for arbitration for the first time in a string of more than a dozen of the Supreme Court's cases stretching back more than a decade. Indeed, I doubt the court has rejected such a claim in any previous decision since the turn of the millennium."

Henry Schein, Inc. v. Archer & White Sales, Inc. **No. 17-1272, ___U.S.___, 139 S.Ct. 524, 202 L.Ed.2d 480 (2019).**

Holding: When parties had agreed that an arbitrator should decide the gateway question of arbitrability, the matter had to be decided by the arbitrator, and a "wholly groundless" exception to arbitration was not available under the FAA to enable courts to block transferring a dispute to arbitration. In the case, the arbitration provision provided: "Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina."

Control-click for January 8, 2019 Opinion; Transcript or Audio for oral argument.

Comment: This was Justice Kavanaugh's first opinion for the Court.

CONCLUSION

In summary,

* In *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, the Ninth Circuit should soon clarify application of California substantive law to nationwide class actions in the settlement context.

* Following *Bristol-Myers Squibb Co. v. Superior Court*, ___ U.S. ___, 137 S.Ct. 1773, 198 L.Ed.2d 395 (2017), a substantial question has arisen in the case law as to whether the forum court in a nationwide class action must have personal jurisdiction over each putative class member.

* In data breach cases, courts are grappling with the issue of what is "concrete" injury to establish Article III standing in federal class actions. This is relevant to "future" harm that plaintiffs risk from a data breach. A petition for certiorari is presently pending in *Zappos.com, Inc. v. Stevens,* 888 F.3d 1020 (9th Cir. 2018), that, if granted, will resolve a split among the circuits on the issue.

* The Supreme Court continues to uphold arbitration provisions, including provisions waiving the right to pursue class relief.

* Regarding expert evidence submitted in support of a motion to certify a class, the Ninth Circuit does not require admissible evidence. There is, however, a different view in federal courts outside of California. The Supreme Court may ultimately need to resolve the split.

* Lastly, there are a number of class action and arbitration cases pending in the Supreme Court that should provide further guidance to litigants. Perhaps, most significantly, the Court will address the use of *cy*

pre awards of class action proceeds that provide no direct relief to class members to settle class action cases.