Class Action Watch

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Cy Pres Settlements

by Theodore H. Frank

The idea of *cy pres* (pronounced "see pray" or "sigh pray," from the French *cy pres comme possible*—"as near as possible") originated in the trust context, where courts would reinterpret the terms of a charitable trust when literal application of those terms resulted in the dissolution of the trust because of impossibility or illegality.[1] In a classic nineteenth century example, a court repurposed a trust that had been created to abolish slavery in the United States to instead provide charity to poor African-Americans.[2] The California Supreme Court endorsed the use of cy pres or "fluid recovery" mechanism in class action settlements in 1986, to distribute proceeds to a "next best" class of consumers, and many other courts have gradually adopted the procedure.[3] Cy pres settlements arise in one of three circumstances:

- There is a fixed settlement fund that exceeds the amount paid out because only a few class members have registered to be claimants;
- The court (often at the parties' behest) decides that administering a settlement by paying class members directly would be too expensive;
- The parties otherwise agree that a case shall be settled by paying a third party.

While original cy pres class action settlements provided that left-over money be distributed to a different set of consumers who may or may not coincide with the class, in recent years, left-over or specifically earmarked funds are typically given directly to a third-party charity.

Plaintiffs' lawyers have recently shown renewed interest in the cy pres mechanism in class action settlements.[4] The interest of the class attorney in a class action settlement does not entirely coincide with the interests of the class members. A defendant may be willing to spend a certain amount of money to settle a class action to avoid the expense and risk of litigation, but that money must be divided between the class and their attorneys. At the same time, a class action settlement must be approved by the court. One mechanism often used to maximize attorneys' fees are "coupons," which, if structured improperly, act to exaggerate the size of class recovery to maximize the return to plaintiffs' lawyers at a lower cost to defendants. The parties represent to the court that the value of the settlement to the class is the nominal value of the coupons; in fact, both parties expect the coupons to have a low redemption rate because

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The Supreme Court Rejects "Scheme Liability" in Securities Class Actions

by Larry Obhof

On January 15, 2008, the Supreme Court issued its decision in *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, a case heralded by commentators as the "most important securities case in decades."[1] The five-to-three *Stoneridge* majority rejected a theory of "scheme liability" that would have greatly expanded the universe of potential class action defendants.

What makes *Stoneridge* so important? In simple terms, the plaintiff sought to expand the scope of Section 10(b) actions beyond the securities markets and into the realm of ordinary

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FROM THE EDITOR

The Federalist Society publishes *Class Action Watch* periodically to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention.

Defined as a civil action brought by one or more plaintiffs on behalf of a large group of others who have a common interest, the class action lawsuit is both criticized and acclaimed. Critics say that such actions are far too beneficial to the lawyers that bring them; in that the attorney fees in settlements are often in the millions, while the individuals in the represented group receive substantially less. Proponents of the class action lawsuit see them as a mechanism to consolidate and streamline similar actions that would otherwise clog the court system, and as a way to make certain cases attractive to plaintiffs' attorneys.

Future issues of *Class Action Watch* will feature other articles and cases that we feel are of interest to our members and to society. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

Dukes, et al. v. Wal-Mart Stores, Inc. Ninth Circuit Affirms Largest Employment Discrimination Class in History

by John Beisner, Evelyn Becker & Karl Thompson

On June 21, 2004, a district court in the Northern District of California certified the largest employment discrimination class in history, consisting of approximately 1.5 *million* women who have been employed at Wal-Mart stores across the country since December 1998.[1] The complaint alleges that the class members have been subjected to a company-wide pattern or practice of gender discrimination that causes women to receive lower pay and fewer promotions than men. A divided panel of the Ninth Circuit affirmed the class certification in February of 2007,[2] then issued a revised opinion in December 2007 which reached the same result.[3] Wal-Mart's petition for rehearing en banc is currently pending.

This case raises a number of important issues central to employment discrimination class actions, including the proper role of statistics and "subjective" employment policies in class certification decisions; the relevance of punitive damages to a Rule 23(b)(2) certification; and the question of whether an employment discrimination class with more than a million members can be successfully managed, consistent with the constitutional, statutory, and employment-law rights of the parties involved.

I. The Complaint

The plaintiffs' complaint, filed on behalf of seven named plaintiffs and a class of similarly situated women, asserts a claim under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*, a statute that prohibits gender and race-based discrimination in the American workplace.[4] The complaint alleges that female employees in Wal-Mart stores suffered gender discrimination in two basic ways. First, female employees were allegedly "paid less than men in comparable positions, despite having higher performance ratings and greater seniority."[5] Second, women allegedly received fewer (and waited longer for) promotions to in-store management positions than men.[6] Wal-Mart operates approximately 3,400 different stores across the country and gives its in-store managers wide discretion to make pay and promotion decisions; the plaintiffs nonetheless asserted that "the policies and practices underlying this discriminatory treatment are consistent throughout Wal-Mart," and that "the discrimination... is common to all women who work or have worked in Wal-Mart stores."[7] The complaint sought class-wide injunctive and declaratory relief, lost pay, and punitive damages, but did not seek compensatory damages.[8]

Based on these allegations, the plaintiffs moved to certify a nationwide class under Federal Rules of Civil Procedure 23(a) and 23(b)(2), consisting of "[a]ll women employed at any Wal-Mart domestic retail store at any time since December 26, 1998 who have been or may be

subjected to Wal-Mart's challenged pay and management track promotions and policies and practices."[9]

II. The District Court's Decision

Following discovery, briefing, and a seven-hour oral argument, the district court certified the proposed class in most respects. It held that the class satisfied the requirements of Rule 23(a), including commonality, typicality, and adequacy of representation. It also held that the plaintiffs' claim for punitive damages, although potentially worth billions of dollars, did not predominate over their injunctive claims. The court further held that, despite the massive size of the class, it could successfully manage a trial of the plaintiffs' equal pay claim as to both liability and all forms of requested relief and a trial as to liability (including liability for punitive damages) and injunctive and declaratory relief on the plaintiffs' promotion claim. With respect to an actual determination of lost pay and punitive damages for the plaintiffs' promotion claims, however, the court held that the class, as proposed, was unmanageable. The plaintiffs could pursue those remedies on a classwide basis, the court held, only where "objective applicant data is available to document class member interest" in the challenged promotion.[10]

A. Commonality: "Excessive Subjectivity" and Statistics

Several aspects of the district court's ruling are worth noting, beginning with its analysis of the Rule 23(a) commonality requirement. The district court concluded that the plaintiffs had successfully raised "an inference that Wal-Mart engages in discriminatory practices in compensation and promotion that affect all plaintiffs in

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The Problem of Class Action Tolling in Mass Tort Personal Injury Litigation

by Jessica Davidson Miller & Geoffrey Wyatt

A news story breaks. A drug manufacturer has announced the surprising results of a recent study suggesting a dangerous side effect to a popular drug. Newspapers, television shows, and websites trumpet the story for days, even weeks, and speculation swirls about how many people might already have been affected. The drug is withdrawn from the market or distributed with new labeling. Lawyer advertisements continue the story as the news stories taper off. Within a month, lawsuits have been filed across the country. A mass tort has begun. But when does it end?

Many mass torts end in settlement, but a settlement is typically difficult to reach until there is some certainty about the number of claims. That number, in turn, depends greatly on when it is too late for new plaintiffs to file claims. Thus, statutes of limitations play an important role in mass tort litigation.

Just when a limitation period is over is not a simple calculation to make, however. Two doctrines are particularly important—the discovery rule and so-called *American Pipe* tolling.

In most states, a cause of action for personal injury accrues when a plaintiff discovers his claim—*i.e.,* when he knows, or should know, based on readily available information, that he has suffered an injury potentially attributable to the tortious act of another. This is referred to as the discovery rule. Once a mass tort unfolds, the information most putative plaintiffs need to be on notice of their claims is likely widely available. Such litigation is often accompanied by news reports in various media, and, if nothing else, advertisements by plaintiff lawyers seeking to enroll clients are frequently widespread. Courts often accept arguments that this kind of publicity is enough to begin the limitations clock.

A party defending a mass tort might thus be tempted to believe that the litigation would have a built-in deadline for new claims. Assuming the defendant can point to a seminal moment that triggered mass filings, the defendant could rely on that date as the "discovery" date for all prospective plaintiffs, and calculate filing deadlines in all relevant jurisdictions.

But if someone brought a class action against the defendant before time ran out, the limitations analysis becomes more complicated. That is because of *American Pipe & Construction Co. v. Utah*, a Supreme Court case that is often cited as a basis for tolling limitations periods while a putative class action is pending.[1] Many state courts, as well as federal courts applying state law, have accepted such tolling in the mass-tort context, notwithstanding the very different context in which *American Pipe* itself was decided. The predictable result has been to turn the filing of essentially frivolous class actions in personal injury mass torts into a stock tool for plaintiffs' lawyers to substantially prolong limitations

periods. This prolongation in turn negatively affects the ability of the parties to settle, because it delays the date on which the door is finally shut to new claims. As this article explains, *American Pipe* was never intended to allow this practice, and courts should not permit its use in this manner.

I. The Discovery Rule

The first question in the statute of limitations analysis is when the clock starts ticking. A cause of action accrues when a plaintiff incurs an injury, but the date of injury does not necessarily constitute *accrual* for statute of limitations purposes. For personal injury cases, most states have adopted a discovery rule. Under a typical discovery rule, a claim accrues and the limitations period begins ticking once a plaintiff is aware, or should reasonably be aware, that he has been injured, and that the injury was caused by the tortious act of another.[2] As the Tennessee Supreme Court explained in *Foster v. Harris*, the discovery rule has been deemed necessary because "no judicial remedy [i]s available to [a] plaintiff until he discovered, or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced his injury; and (2) the identity of the defendant who breached the duty."[3]

The discovery rule is consistent with the basic purposes of statutes of limitations. As the Supreme Court has explained, "[s]uch statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.... [E]ven if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation.'"[4] Enforcement of limitations periods serves institutional purposes as well. "[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."[5] These purposes are not frustrated by the discovery rule because a plaintiff cannot fairly be accused of "sleeping on his rights" when he does not even know that he has been injured, or when it is truly impossible to determine that an injury was caused by another's negligence.

It is not uncommon for a news event to supply the critical information that gives rise to a mass tort. These news events are often cited by courts as putting

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FACTA Truncation: Applicable to the Digital World?

by Shawn J. Organ

Since December 2006, much has been written about the truncation provisions in the Fair and Accurate Credit Transactions Act (FACTA), including an article in the September 2007 issue of *Class Action Watch*, and others I have penned.[1] The writings all generally identify the truncation requirement—that is, that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."[2] But an interesting and foreseeable battleground has emerged as a subset of these FACTA cases: does FACTA apply to internet transactions? These cases present a host of new and interesting issues, and federal courts decisions are just starting to emerge.

The General Truncation Requirement

By way of background, FACTA was enacted as part the Fair Credit Reporting Act on December 4, 2003. There are several aspects to FACTA, but the primary focus for our purposes will be on the truncation requirement, 15 U.S.C. § 1681c(g)(1), because it is that provision that has spawned over 300 class action lawsuits, filed throughout the country. The truncation requirement, set forth above, was phased in over time to allow large and small businesses to conform to the requirements and update the cash registers and/or Payment Card Industry ("PCI") terminals in service. It became fully phased-in as of December 4, 2006. Once fully phased-in, the class action lawsuits quickly followed.

Virtually every lawsuit leveled the same allegations: that the retailer at the checkout provided the plaintiff with a receipt with an expiration date in violation of FACTA.[3] These cases were not brought as a single plaintiff case. Rather, the lawsuits were filed seeking class certification on a state, regional, or national basis. And these class claims were not filed pursuant to § 1681o, claiming the defendant acted negligently, because under a negligence claim the plaintiff must prove actual damages, which is tough to prove and rarely amounts to much. Rather, the class allegations are always coupled with a § 1681n claim that the defendant's conduct was a "willful violation" of FACTA, thereby allowing the plaintiff class to seek statutory damages of $100 to $1,000 for each alleged violation. Although the plaintiff and any purported class experienced no actual damages, the potential damages

claim under an alleged "willful violation" quickly become staggering.[4]

To properly allege a violation, the statute requires that:

1. There must be a "person;"
2. That person must accept credit or debit cards for the transaction of business;
3. That person must "[electronically] print" more than the last 5 digits of the card number or the expiration date;
4. The last 5 digits of the card number or the expiration date must be electronically printed on the "receipt";
5. That electronically printed receipt must be printed off of a "cash register or other machine or device that electronically prints receipts for credit or debit card transactions"; and
6. That "printed" "receipt" must be provided to the cardholder at "the point of sale or transaction."[5]

With the potential for very large statutory damages, plaintiffs' lawyers quickly took note, and shortly after December 4, 2006, hundreds of class actions lawsuits were filed against traditional retailers and restaurants. Thereafter, plaintiffs leveled their sights on internet retail transactions. But with those suits came unique issues.

Internet Transactions

In a traditional brick and mortar retail store or restaurant, the credit or debit transaction is done face-to-face at the checkout counter or table. The receipt is printed by the cash register or credit/debit card PCI terminal and is typically handed to the customer. The customer signs the receipt, returns the "merchant" copy, and keeps the "customer" copy. All too often, however, the customer wads up his copy and tosses it in the nearest trash receptacle. There was concern that those customers, by throwing away their printed receipts, were opening themselves up to identity theft. The commonly articulated fear was that an unscrupulous "dumpster diver" might retrieve the receipt and use the customer's credit card number to make unauthorized purchases.[6]

Compare and contrast the typical brick and mortar transaction with an online retail transaction. With an online transaction, the customer could be anywhere in the world (as long as the retailer ships to that location), likely sitting at a computer, at home or at work. The

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Silberblatt v. Morgan Stanley: Class Action Court Protects Unnamed Class Members

by Jack Park

When a federal district court is called on to approve the settlement of a class action, it rarely, if ever, receives much input from any party that does not have a significant interest in the outcome. The class representative and class counsel want the deal approved so that they can receive its benefits, and, assuming he has not agreed to remain silent, the defendant, too, wants the deal to go forward to bind as many potential claimants as possible. The court, likewise, has a strong institutional interest in disposing of such a case. Only a limited number of unnamed class members are likely to object, and only some of those objections, however strongly felt and expressed, are likely to be helpful to the court when it determines whether the settlement is fair, reasonable, and adequate.

In *Silberblatt v. Morgan Stanley, et al.*, the court was confronted by all of these obstacles, and overcame them, slashing a requested fee award and freeing up a greater amount of the cash consideration for the class members to share.[1] The court did all this without any apparent hiccup from the defendants and without any objection by an unnamed class member. It did so independently, taking seriously its duty "to make a considered and detailed assessment of the reasonableness of the proposed settlement."[2]

The plaintiff class representative in *Silberblatt* alleged that the Morgan Stanley defendants misled him about their handling of precious metal bars or units which the plaintiff had purchased and left in their custody. The plaintiff claimed that the plaintiff class was "misled into believing that specific bars or units of precious metals were allocated to them and, therefore, not subject to claims of creditors of defendants."[3] In addition, the plaintiff alleged that the defendants charged excessive storage fees. These contentions, which the defendants denied, were packaged in a complaint that sought money damages on claims of breach of contract, breach of fiduciary duty, unjust enrichment, negligent misrepresentation, and violations of state law; but the plaintiffs did not seek declaratory or injunctive relief.

The complaint also sought certification of a plaintiff class composed of all persons who entered into contracts for the purchase of precious metals from or through the defendants from February 19, 1986, through August 26, 2005. While the court granted the motion to certify the class, that class suffered from two major deficiencies. First, given that the statute of limitations was six years, many of the class members had stale claims. Second, while there were some 23,000 class members, when the case was settled only some 500 had active accounts; the other 22,500 accounts had been closed. The court considered both of these facts in evaluating the fairness of the proposed settlement.

After the parties conducted discovery, including a number of depositions, and engaged in mediation, they reached a settlement. That settlement, which the court described as a "potpourri," included both monetary and non-monetary consideration.[4] The defendants agreed to pay $1.5 million in cash and to revise their sales brochures, third-party agreements, and forward pricing policies. Valuing the combination of monetary and non-monetary relief at $4,335,000, class counsel asked the court to approve an attorneys' fee of $783,900, plus expenses.

The court explained that, while notice of the settlement was mailed to more than 24,317 individuals and published in the *Wall Street Journal*, only twenty-seven class members opted out, and no one objected to the settlement or the fee application. In addition, only counsel for the parties spoke at the hearing, and no witnesses were called.[5] In other words, as frequently happens, the court had little help from the parties or unnamed class members in evaluating the settlement.

Nonetheless, the court found flaws in its terms with respect to both the cash and non-cash relief. As to the cash total of $1.5 million, the court found that amount to be fair, reasonable, and adequate to the class members, pointing out that it was 37.5 % of the full amount of all customer payments. It noted that the contractual claims would have been difficult to prove, explaining:

> It is fair to observe that defendants' statements did not drive home the point that no specific metals were segregated for the particular purchaser. Yet, no single document indisputably excluded the possibility of unallocated holdings. For example, a silver purchaser was not given the number of a specific bar owned by him, which would have pointed toward an allocated purchase.[6]

In addition, none of the class members had actually suffered a loss from the seizure of his unallocated holding by a creditor of the defendants. Finally, the planned allocation of 80% of the cash to those class members who incurred storage fees after January 1, 2000, and 20% to those who incurred fees before that date, was not unfair given the statute of limitations (six years) and the difficulty of proving older claims.

With respect to the non-monetary consideration, the court found the proposed valuation of that relief to be unproven. The plaintiff class' expert valued that non-monetary consideration at more than $1 million. He did so by valuing the changes in customer disclosure, on the website, and to the customer brochure equally, with each being worth $339,502.39 to some unknown number of class members. The court observed, "A well-crafted letter on fancy, embossed stationery sent by overnight courier to each of the 500 holders could have conveyed the same information with much the same effectiveness at a fraction of the combined value exceeding $1 million."[7] In addition, the defendants reserved the right to change the terms of their agreements, making the valuation of the changes "inherently uncertain."[8] Third, the expert treated accounts inconsistently and invariably in a way that maximized their putative value. The court concluded that while the non-monetary relief had some value, that value

> has not been proven. The methodology offered by the plaintiff's expert is so flawed as to be entitled to little weight. It assumes continued holdings for valuing one item but assumes the opposite in valuing another. It places a value on disclosures without knowing to how many investors the disclosures would be made.[9]

The inclusion of a reduction in the cap on storage fees as part of the non-monetary relief prompted the court to consider the Class Action Fairness Act of 2005 (CAFA). In particular, the court noted, but did not resolve, the question of whether the reduction in storage fees constituted a "coupon." Under CAFA, the court must consider the "actual value" of any coupons that are part of the compensation that goes to the class members and take the redemption rate of those coupons into account when assessing the attorneys' fee to be paid to class counsel.[10] The court observed that the reduction in storage fees looked like a coupon to the extent that it could be viewed as "a discount on a future purchase."[11] The similarity was not complete, however, because the discount was neither transferable nor limited to class members. Ultimately, there was no evidence of the reduction's value. Even so, the court explained, "That an item of non-monetary consideration may not fall within the statute's use of the term 'coupon' does not make it any less worthy of close judicial scrutiny."[12]

The uncertain valuation of the non-monetary consideration led the court to reduce the fee request. As the court noted, if the request for fees and expenses were granted in full, counsel would get 63% of the cash consideration of $1.5 million. Such a recovery would be

"an unfair result."[13] Instead, the court concluded that an award of 20% of the cash consideration, or $300,000, plus expenses of $150,016.44, would be reasonable under the circumstance. The court explained that, with a lodestar figure of $1,310,853, the award was a negative multiplier of 4.4.[14] A negative multiplier was necessary in this case because, if the fee application were not reduced, it would have consumed a large part of the common fund. That said, in cases with much larger common funds, positive multipliers, including positive multipliers of 4.4 or more, have been approved.[15]

As the court recognized in *Silberblatt*, when a court is called on to approve a fee application in a class action, it "act[s] as a fiduciary who must serve as the guardian of the rights of absent class members."[16] That is, a fiduciary for unnamed class members, not class counsel, class representatives, or defendants. In order to do that, the *Silberblatt* court had to overcome inertia and other obstacles. The unnamed class members should be grateful that it did.

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Endnotes

1 524 F. Supp. 2d 425 (S. D. N.Y. 2007).

2 524 F. Supp. 2d at 428 (quoting Weinberger v. Kendrick, 698 F. 2d 61, 82 (2d Cir. 1982)).

3 *Id.*, at 429.

4 *Id.*, at 427.

5 *Id.*, at 428.

6 *Id.*, at 429.

7 *Id.*, at 430.

8 *Id.*, at 431.

9 *Id.*

10 *See* 28 U.S.C. § § 1712(a), (c), and (d).

11 524 F. Supp. 2d at 432.

12 *Id.*

13 *Id.*, at 427.

14 *Id.*, at 434.

15 *See, e.g., In re* Xcel Energy, Inc., 364 F. Supp. 2d 980 (D. Minn. 2005) (approving a multiplier of 4.7 to justify an award of some $20 million from a common fund of $80 million in a securities class action).

16 524 F. Supp. 2d at 433 (quoting Central States Southeast and Southwest Areas, Health and Welfare Funds v. Merck-Medco Managed Care, L.L.C., 504 F. 3d 249-50 (2d Cir. 2007).

"Reverse Bifurcation" Approach to Punitive Damages Trials in West Virginia

by Mark A. Behrens & Christopher E. Appel

Defendants in West Virginia trial courts are increasingly being forced to confront a novel "reverse bifurcation" approach to decide punitive damages in mass tort cases. The approach calls for a determination of a defendant's liability for punitive damages before basic issues of compensatory liability and damages have been decided. Defendants are challenging the procedure, arguing that putting the "cart before the horse" violates procedural due process guarantees found in the U.S. Constitution.

At time of press, a petition for writ of certiorari was pending before the U.S. Supreme Court in one such challenge. That appeal, *Chemtall, Inc. v. Stern*, involves a medical monitoring class action brought by coal preparation plant workers against manufacturers and sellers of an industrial water cleaner in the Circuit Court for Marshall County, West Virginia.[1] The trial plan, proposed by plaintiffs and approved wholesale by the trial court, will have the jury determine the liability of defendants for punitive damages and set a punitive damages "multiplier" prior to class certification, before a full determination of the defendants' liability for medical monitoring, and before any medical monitoring damages have been determined. The West Virginia Supreme Court of Appeals refused defendants' request to intervene, concluding that appellate review of the trial plan would be premature before "complete development of all the facts and testimony and after a trial of all the issues."[2] One justice dissented, stating that "the appropriateness of punitive damages cannot, and should not, be determined prior to a finding of underlying liability."[3]

The U.S. Supreme Court recently declined to hear another appeal raising similar issues, *Philip Morris USA v. Accord*.[4] That action involves a three-stage trial plan that consolidated more than 700 separate personal-injury actions brought by individual smokers against several tobacco companies in the Circuit Court for Ohio County, West Virginia. In Phases I and I(A) of the upcoming trial, the jury will be asked to determine whether each defendant's conduct merits punitive damages and will set

a punitive damages "multiplier" for each defendant. The same jury will decide certain elements of compensatory liability based entirely on aggregate proof. In Phase II proceedings, different fact-finders will determine whether each plaintiff has established the remaining elements of his or her liability claims and is entitled to compensatory damages. The Phase I multiplier will then be used to fix the particular dollar amount of punitive damages owed by each defendant to each individual plaintiff. The West Virginia Supreme Court of Appeals refused defendants' request for a writ of prohibition to stay the proceedings.[5]

Defendants challenging West Virginia's "reverse bifurcation" approach argue that the procedure is foreclosed by the U.S. Supreme Court's recent decisions in *State Farm Mutual Automobile Insurance Co. v. Campbell*[6] and *Philip Morris USA v. Williams*.[7] Those decisions emphasize that punishment must be focused on the defendant's conduct toward the plaintiff, may be imposed only after a defendant has had a full opportunity to defend against the charge, and should only be imposed when the plaintiff's proven compensatory damages are insufficient to serve the state's objectives of deterrence and punishment. The West Virginia approach also conflicts with decisions from other courts.[8]

Critics argue that the West Virginia approach appears intended to wield a heavy club to pressure defendants to settle mass tort claims. Defendants may find it virtually impossible to receive a fair trial once the jury considers issues relevant to punitive damages. They may be branded as "bad actors" before the jury even considers whether they are legally responsible for any specific plaintiff's harm.

Typically in a bifurcated trial, juries determine punitive damages issues only *after* compensatory liability and damages have been determined. This procedure prevents evidence that is highly prejudicial and relevant only to the issue of punishment from being heard by jurors and improperly considered when they are determining basic liability. Such evidence may include inflammatory documents or the net worth of the defendant. Juries may be instructed to ignore such evidence in determining basic liability, but it is often difficult, as a practical matter, for jurors to do so. By deferring consideration of evidence relevant only to punitive damages, the standard bifurcated trial approach is intended to limit the potential for bias.[9] The West Virginia approach seems intended to do the opposite—it maximizes the likelihood of bias and prejudice.

West Virginia courts have been the focus of widespread criticism for their handling of class actions and other mass tort cases. The state ranked at the bottom of a 2007 State Liability Systems Ranking Study conducted for the U.S. Chamber Institute for Legal Reform.[10] The growing use of "reverse bifurcation" is likely to reinforce the perception that West Virginia courts mete out justice in an unfair manner, particularly when the defendant is a large out-of-state corporation.

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Endnotes

1 No. 07-1033 (U.S., petition filed Feb. 8, 2008).

2 *See* State *ex rel.* Chemtall, Inc. v. Madden, 655 S.W.2d 161, 167 (W.Va. 2007).

3 *Id*. at 169 (Benjamin, J., concurring in part and dissenting in part).

4 No. 07-806, (U.S., petition filed Dec. 17, 2007), *cert. denied*, 2008 WL 482117 (U.S. Feb. 25, 2008)

5 *See* State *ex rel*. Philip Morris USA v. Recht, No. 072903 (W. Va. Nov. 7, 2007) (unreported). An earlier decision of the West Virginia Supreme Court of Appeals addressed similar issues. *See In re* Tobacco Litig., 624 S.E.2d 738 (W. Va. 2005).

6 583 U.S. 408 (2003).

7 127 S. Ct. 1057 (2007).

8 *See In re* Simon II Litig., 407 F.3d 125, 138 (2d Cir. 2005); Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417-19 (5th Cir. 1998); Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (per curiam), *cert. denied,* 128 S. Ct. 96 (2007); Southwestern Refining Co., Inc. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000).

9 *See* Victor E. Schwartz *et al*., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1018-19 (1999); Victor E. Schwartz & Christopher E. Appel, *Putting the Cart Before the Horse: The Prejudicial Practice of a "Reverse Bifurcation" Approach to Punitive Damages*, 2 Chas. L. Rev. -- (forthcoming).

10 The American Tort Reform Foundation has called the entire state a "judicial hellhole."

Supreme Court Rejects "Scheme Liability" in Securities Class Actions

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business operations. The defendants were customers and suppliers to Charter Communications, Inc., the company that issued the securities in question. They did not directly mislead investors, "but were business partners with those who did."[2] If accepted by the Court, the plaintiff's theory of scheme liability could have extended the Section 10(b) private right of action to cover any transactions involving publicly-traded companies, so long as those transactions are later incorporated into the public company's financial statements. Such a "sweeping expansion" of the right of action would have exposed customers, suppliers, and other secondary actors to billions of dollars in liability when *other parties* make misstatements to the market.[3]

The Supreme Court prudently declined to extend the private right of action. It is well established that a plaintiff seeking to impose primary liability for securities fraud must prove reliance on *the defendant's* deceptive conduct, not on the conduct of other parties. This requirement ensures that there is a causal connection between the defendant's misrepresentation and the plaintiff's injury. The *Stoneridge* plaintiff, however, did not rely on the defendants' alleged acts when purchasing or selling securities. Congress has repeatedly declined to extend the private right of action to cover such circumstances. The Court's decision in *Stoneridge* respects that choice. The opinion also sends a strong signal that policymaking, including the decision to create or expand a cause of action, is properly left to Congress.

Section 10(b) of the Securities and Exchange Act makes it unlawful "[t]o use or employ, in connection with the purchase or sale of any security… any manipulative device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe."[4] Pursuant to this section, the SEC promulgated Rule 10b-5, which makes it unlawful "[t]o employ any device, scheme, or artifice to defraud… [or] engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person … in connection with the purchase or sale of any security."[5] Rule 10b-5 encompasses only conduct already prohibited by Section 10(b).[6]

Although the text of the Securities and Exchange Act does not provide for a private cause of action for Section 10(b) violations, the Supreme Court has found an implied private right of action in the statute and Rule 10b-5.[7] A plaintiff bringing a Section 10(b) private action must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[8]

The Supreme Court has made clear that the implied private right of action does not extend to aiders and abettors of securities fraud. In *Central Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, the Court held that "a private plaintiff may not maintain an aiding and abetting suit under § 10(b)."[9] The lack of a private action for aiding and abetting is not an oversight—Congress imposed other forms of secondary liability as part of the 1934 Act. Thus, *Central Bank* points to the "deliberate congressional choice" against imposing secondary liability in private securities fraud actions.[10]

This does not mean that secondary actors are always free from liability. Any person or entity that "employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies" may still be liable as a *primary* violator under Rule 10b-5, as long as all of the usual requirements for liability are met.[11] For example, primary liability could attach where the secondary actor himself disseminates or transmits false information to investors, such as when an accountant knowingly certifies false financial statements or an attorney knowingly prepares false opinion letters.[12] Aiding and abetting, however, falls short of the mark. A plaintiff "must show reliance on *the defendant's* misstatement or omission to recover under 10b-5."[13] By its very nature, a claim for aiding and abetting seeks to impose liability on a secondary actor for facilitating the primary actor's misstatements or omissions. Investors rely upon *those* misstatements or omissions—which are made only by the primary actor—when purchasing or selling securities. Investors are not aware of, and thus do not rely on, the conduct of the secondary actor. A plaintiff's reliance on representations made by someone other than the defendant cannot form the basis of liability.[14]

Congress specifically considered the issue of secondary liability in the aftermath of *Central Bank*. "Instead of heeding calls for the restoration of private aiding-and-abetting liability, Congress sought to 'remov[e] the plaintiffs' class action bar from the equation.'"[15] Congress therefore enacted Section 20(e), which gives the SEC,

but not private litigants, the authority to prosecute parties who provide "substantial assistance" to those engaged in securities fraud.[16] "Congress decided, both when it enacted Section 20(e) in 1995 and again when it enacted Sarbanes-Oxley in 2002—*not* to extend the right to enforce this liability to private plaintiffs."[17] Thus, Congress has consistently rejected the idea of secondary liability in private securities fraud actions, both before and after *Central Bank*.

The *Stoneridge* complaint alleged that Charter Communications, Inc. engaged in a pervasive fraudulent scheme intended to artificially boost its reported financial results.[18] Among other things, Charter overstated its operating cash flow by hundreds of millions of dollars for both 2000 and 2001.[19] The market price of Charter's securities fell substantially when its financials were eventually restated to reflect economic reality.[20] Stoneridge Investment Partners subsequently brought a securities fraud class action on behalf of Charter's shareholders. In addition to Charter and its executives, the plaintiff named as defendants Arthur Anderson, LLP, which had served as Charter's independent auditor during the class period, and two equipment vendors, Scientific-Atlanta, Inc. and Motorola, Inc. (the "Vendors").

How could the plaintiff sue the Vendors for *Charter's* misstatements? Stoneridge Investment Partners attempted to circumvent the limitations of *Central Bank* by pleading a theory of "scheme liability." The plaintiff alleged that the Vendors entered into "wash" transactions with Charter—transactions that had no economic substance but enabled Charter's overstatement of its revenue and operating cash flow. Charter agreed to pay the Vendors excessive amounts for the set-top cable boxes they provided, with the understanding that the Vendors would then use the additional funds to purchase advertising from Charter.[21] The companies drafted documents to make it appear as though the transactions were unrelated. For example, "Scientific-Atlanta sent documents to Charter stating—falsely—that it had increased production costs."[22] The set-top box agreements were backdated to make it appear as though they were negotiated a month before the advertising agreements.[23]

According to Stoneridge Investment Partners, the Vendors' actions had the purpose and effect of furthering Charter's scheme to overstate its revenue and cash flow.[24] Charter improperly capitalized its increased equipment expenses, but treated the returned advertising fees as immediate revenue.[25] This allowed Charter to inflate its revenue and operating cash flow by approximately $17 million in the fourth quarter of 2000.[26] Stoneridge Investment Partners argued that the Vendors were more than aiders and abettors of Charter's fraud—they were *primary* violators because "they engaged in classic fraudulent behavior themselves."[27]

Although Stoneridge Investment Partners labeled its theory "scheme liability," the allegations set out a model example of the type of secondary liability already prohibited by *Central Bank*.[28] The plaintiff alleged "fraudulent practices engaged in *by Charter*… to present a false picture of financial growth and success."[29] The Vendors' deceptive acts did not relate to the purchase or sale of securities—they involved the sale of goods and the purchase of advertising. The Vendors played no role in preparing Charter's misleading financial statements;[30] they "did not themselves disseminate the false information to the securities market."[31]

The plaintiff's claims closely resembled the statutory definition of aiding and abetting. Section 20(e) defines aiding and abetting liability, for the purposes of SEC enforcement actions, as "knowingly provid[ing] substantial assistance" to one who commits securities fraud. Stoneridge Investment Partners used similar terms to describe its allegations against Scientific-Atlanta and Motorola: "Respondents engaged in… deceptive conduct in transactions with a public corporation… that *enabled the publication* of artificially inflated financial statements *by the public corporation*, but… Respondents themselves made no public statements."[32] In short, Stoneridge and its lawyers sought to impose liability against the Vendors because they engaged in business transactions with Charter, and *Charter* later accounted for those transactions improperly.[33]

The *Stoneridge* decision makes clear that this chain of events is too remote to impose liability on the Vendors. Secondary actors can be held liable for securities fraud where *all* of the requirements for primary liability are met. The *Stoneridge* complaint, however, is deficient in at least one regard: it does not allege that Stoneridge Investment Partners (or any other investors) relied upon the Vendors' statements when purchasing or selling Charter's stock.[34] Reliance is an essential element of the Section 10(b) cause of action. The requirement ensures that there is a causal connection between the defendant's misrepresentation and the plaintiff's injury.[35]

While courts will often presume reliance on the part of shareholders, neither reason for that presumption applies to the facts in *Stoneridge*.[36] The Vendors had no duty to disclose facts to Charter's shareholders.[37] Because the Vendors' deceptive acts were not communicated to

the public, the fraud-on-the-market doctrine does not apply.[38] Thus, the only possible reliance in *Stoneridge* is indirect. It was Charter, not the Vendors, which filed the fraudulent financial statements. Investors relied only on *Charter's* deceptive acts when purchasing or selling its stock. Stoneridge Investment Partners tried to side-step this problem by arguing that in an efficient market investors rely not only upon the public documents relating to a security but also upon the transactions those statements reflect.[39] Under this theory, the cause of action could reach any company with which the issuer does business, because all transactions with the issuer are ultimately incorporated into its financial statements. The *Stoneridge* decision rejects this expansive theory of indirect reliance, bluntly stating that "there is no authority" for such a rule.[40]

Like the Court in *Central Bank*, the *Stoneridge* majority emphasizes that Congress has considered the issue of secondary liability and made a deliberate choice not to extend the private right of action. "Petitioner's theory," Justice Kennedy writes, "would put an unsupportable interpretation on Congress' specific response to *Central Bank*."[41] "Were we to adopt this construction… we would undermine Congress' determination that this class of defendants should be pursued by the SEC and not by private litigants."[42] The majority also sends a strong signal that courts should not be in the business of creating or expanding causes of action. The Court will not find an implied cause of action unless the underlying statute demonstrates the intent to create one.[43] Where courts have already created a cause of action—such as the implied private right of action found in Section 10(b) and Rule 10b-5—the decision to extend the cause of action must be made by Congress, not the courts.[44]

In retrospect, of course, the claim that *Stoneridge* is the "most important securities case in decades" may seem a bit hyperbolic. That is only true because we know the outcome. Adopting the plaintiff's theory of scheme liability would have been a significant departure from settled law. The Section 10(b) cause of action would have extended beyond the securities markets into the realm of ordinary business operations.[45] As the Court aptly states, "the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees."[46]

The practical results of this change would have been significant. If securities class actions were untethered from the element of reliance, there would be little limitation on the number of potential class action defendants or the scope of their potential liability. Any transaction ultimately accounted for in a public company's financial statements could become the subject of a claim for securities fraud. Section 10(b)'s implied cause of action would effectively reach "the whole marketplace in which the issuing company does business."[47] The consequences of such an expansive rule are not lost on the Court. The *Stoneridge* majority emphasizes that scheme liability would "expose a new class of defendants," including innocent parties, to increased "uncertainty and disruption."[48] According to the Court, this would effectively raise the cost of doing business in the United States, thereby deterring foreign investment and shifting securities offerings away from domestic capital markets.[49]

Of course, whether "scheme liability" would cause unintended harm is a separate question from whether the plaintiff's theory properly fits within Section 10(b). Even where *Stoneridge* discusses the practical consequences of the plaintiff's theory, it is clear that the Court bases its decision on law rather than policy. For example, although the majority worries aloud that scheme liability would "reach the whole marketplace," the Court does not rely on that fact. The majority rejects the plaintiff's theory because "there is no authority" for such a broad expansion of the implied right of action.[50] "Congress rather than the courts controls the availability of remedies for violations of statutes."[51] Congress has chosen not to extend the private right of action to cover this type of liability, and the *Stoneridge* decision respects that choice, properly deferring to the legislative branch.[52]

It is worth mentioning what *Stoneridge* does *not* do. The Court does not absolve secondary actors from all liability. Parties engaging in or facilitating securities fraud can (and should) be punished. Secondary actors are still subject to criminal penalties and civil enforcement by the SEC.[53] The SEC may obtain injunctive relief, issue administrative orders, and impose large civil penalties on any companies engaged in aiding and abetting fraud.[54] These enforcement mechanisms are not toothless. In fiscal year 2006 alone, the Commission initiated 914 investigations, 218 civil proceedings, and 356 administrative proceedings.[55] That same year, the Commission recouped over $3.3 billion in disgorgement and other penalties.[56] Similarly, the Department of Justice's Corporate Fraud Task Force has obtained more than 1,200 corporate fraud convictions in the past five years.[57] Some states' securities laws also permit state authorities to seek fines and restitution from aiders and abettors.[58]

Nor are secondary actors immune from private suit. *Stoneridge* does not affect shareholders' ability to pursue actions against secondary actors who commit primary violations.[59] As before, a plaintiff may allege primary liability where all of the usual requirements, including reliance, are met. The securities statutes also provide an express private right of action against accountants and underwriters in certain circumstances.[60] Where a party's fraud involves transactions unrelated to the purchase or sale of securities—such as the sale of goods or purchase of advertising—plaintiffs will have causes of action for fraud. They just will not have claims for *securities* fraud. That limitation is consistent with the statutory scheme, which was designed to provide remedies for securities-related misconduct, and not as a catchall federal remedy for fraud.[61]

Although *Stoneridge* had the potential to be the "most important securities case in decades," the Court's decision is perhaps best viewed as an affirmation of the status quo. The plaintiff's theory of scheme liability, if accepted by the Court, would surely have had far-reaching effects. The Court, however, dutifully applied *Central Bank* and respected Congress' decision not to extend the private right of action to cover this type of liability. The decision places noticeable emphasis on the separation of powers. Indeed, the majority suggests that the courts, moving forward, must be more respectful of Congress' role as the creator of federal statutory claims.

Stoneridge shows the Supreme Court's reluctance to find new implied causes of action or to expand existing ones. Congress, not the courts, determines the remedies for violations of federal statutes. And the majority opinion correctly leaves that kind of policymaking to the legislative branch.

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Endnotes

1 Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008); *see* Richard A. Epstein, *Primary and Secondary Liability Under Securities Law: The Stoneridge Investment Saga*, Oct. 9, 2007, *available at* <http://www.pointoflaw.com/columns/archives/004373.php> (describing *Stoneridge* as "one of the most important securities law cases in decades"); Edward Iwata, *Fewer Lawsuits Charge Securities Fraud*, ABC News, Oct. 7, 2007, *available at* <http://abcnews.go.com/Business/story?id=3700843&page=1> (describing *Stoneridge* as "the most important securities-fraud case in decades").

2 *See* Lyle Denniston, *Court Limits Securities Fraud Lawsuits*, Jan. 15, 2008, *available at* <http://www.scotusblog.com/wp/uncategorized/court-limits-securities-fraud-law> ("The Supreme Court, in one of the most important securities law rulings in years, decided Tuesday that fraud claims are not allowed against third parties that did not directly mislead investors but were business partners with those who did.").

3 Brief for the United States as Amicus Curiae at 9, Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (Case No. 06-43)[*hereinafter* "Brief for the United States"].

4 15 U.S.C. § 78j(b).

5 17 C.F.R. § 240.10b-5.

6 *Stoneridge*, 128 S. Ct. at 768; *see also* United States v. O'Hagan, 521 U.S. 642, 651 (1997) ("Liability under Rule 10b-5… does not extend beyond conduct encompassed by § 10(b)'s prohibition.").

7 *Stoneridge*, 128 S. Ct. at 768 (citing Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 & n.9 (1971)).

8 *Id.* (citing Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 341-42 (2005)).

9 511 U.S. 164, 191 (1994).

10 *See id.* at 184 ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere.").

11 *Id.* at 191.

12 *See* Brief for Richard I. Beattie, et al., as Amici Curiae at 14, Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (Case No. 06-43) ("[T]he sort of liability-producing conduct by a secondary actor that the [*Central Bank*] Court had in mind … was the dissemination or transmission of materially inaccurate information to investors by the secondary actor itself, such as an accountant's act of certifying misleading financial statements or an attorney's preparation of false opinion letters.") (quotations and alterations omitted).

13 *Central Bank*, 511 U.S. at 180 (emphasis added).

14 *See* Anixter v. Home-Stake Production Co., 77 F.3d 1215, 1225 (10th Cir. 1996) (quoting *Central Bank*, 511 U.S. at 177).

15 Brief of the Washington Legal Foundation as Amicus Curiae at 20, Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (Case No. 06-43) (quoting 4 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 7:308, at 7-506 (2d ed. 2006)).

16 *See id.*; *see also* 15 U.S.C. § 78t(e) ("For purposes of *any action brought by the Commission*… any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter… shall be deemed to be in violation of such provision ….") (emphasis added).

17 *See* Brief for Former SEC Commissioners and Officials and Law and Finance Professors as Amici Curiae at 12, Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (Case No. 06-43)[*hereinafter* "Brief for Former SEC Commissioners"] (citing S. Rep. No. 104-98, at 48 (1995); H.R. Rep. No. 107-414, at 54 (2002); 148 Cong. Rec. S6584 (daily ed. July 10, 2002)). Congress has been explicit in rejecting private aiding and abetting liability. For example, according to the Senate Committee Report

accompanying the 1995 bill, "provid[ing] for private aiding and abetting liability actions under Section 10(b) would be contrary to [the bill's] goal of reducing meritless securities litigation." S. Rep. No. 104-98, at 48 (1995).

18 *In re* Charter Communications, Inc., Securities Litigation, 443 F.3d 987, 989 (8th Cir. 2006).

19 *See, e.g.*, Brief for the United States at 23 (noting that Charter's operating cash flow was overstated by $195 million in 2000 and by $292 million in 2001).

20 *See* Brief for Petitioner at 9, Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008) (Case No. 06-43)[hereinafter "Brief for Petitioner"].

21 *Stoneridge*, 128 S. Ct. at 766.

22 *Id.* at 767.

23 *Id.*

24 *See, e.g.*, Brief for Petitioner at 14 ("Respondents' deceptive acts had the purpose and effect of furthering the fraudulent scheme."); *id.* at 38 ("the scheme in which Respondents engaged had the purpose and effect of artificially increasing Charter's revenue and cash flow reflected in Charter's financial statements").

25 It is worth noting that Charter could have accounted for these transactions in a way that would have rendered its financial statements accurate. Indeed, the Vendors properly accounted for the transactions in their financial statements. They "booked the transactions as a wash, under generally accepted accounting principles." *Stoneridge*, 128 S. Ct. at 767.

26 *Id.*; *see also In re* Charter Communications, Inc., 443 F.3d at 989-90.

27 Brief for Petitioner at 26; *see id.* ("They participated in transactions that they knew to be shams, and they falsified records about those transactions.... This is just the kind of conduct that the language of Section 10(b) and Rule 10b-5 forbids.").

28 This point was made succinctly in a brief filed by a group of former SEC officials and prominent law and finance professors: "Petitioner's 'scheme liability' theory is simply a semantic ploy designed to recast secondary conduct as a primary violation." Brief for Former SEC Commissioners at 5; *id.* at 10 (same).

29 Brief for Petitioner at 5 (emphasis added).

30 *Stoneridge*, 128 S. Ct. at 767.

31 Brief for Petitioner at 38.

32 *Id.* at i (emphasis added).

33 *See In re* Charter Communications, Inc., 443 F.3d at 991 ("plaintiffs contend that the Vendors are liable to Charter's investors on the basis that they engaged in a business transaction that Charter improperly accounted for") (citation and alteration omitted).

34 *See Stoneridge*, 128 S. Ct at 769 ("[R]espondents' acts or statements were not relied upon by the investors … as a result, liability cannot be imposed upon respondents.").

35 *Id.*

36 Courts will presume reliance in two circumstances. First, if there is an omission of material fact by one who has a duty to disclose, an investor to whom the duty was owed need not prove reliance. *Id.* (citing Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153-54 (1972)). Second, under the fraud-on-the-market doctrine, reliance is presumed when a defendant's misstatements become public because that information is reflected in the market price of the security. *See id.* (citing Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988)).

37 *Id.*

38 *See id.* ("their deceptive acts were not communicated to the public"); *id.* at 770 ("respondents' deceptive acts… were not disclosed to the investing public").

39 *See id.* at 770.

40 *Id.*

41 *Id.* at 771.

42 *Id.*

43 *See id.* at 772 ("Though the rule once may have been otherwise … it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.") (citations omitted).

44 *Id.* at 773 ("Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend the cause of action is for Congress, not for us.").

45 *See id.* at 770 ("The petitioner invokes the private cause of action under § 10(b) and seeks to apply it beyond the securities markets—the realm of financing business—to purchase and supply contracts—the realm of ordinary business operations.").

46 *Id.* at 771.

47 *Id.* at 770.

48 *Id.* at 772.

49 *Id.*

50 *Id.* at 770.

51 *Id.* at 773 (quoting Wilder v. Virginia Hospital Assn., 496 U.S. 498, 509 n.9 (1990)).

52 *Id.* ("The decision to extend the cause of action is for Congress, not for us.")

53 *See id.* at 773 (citing 15 U.S.C. § 78ff (providing for criminal penalties) and 15 U.S.C. § 78t(e) (providing or civil enforcement by the SEC)).

54 *See, e.g.*, 15 U.S.C. §§ 78u, 78u-3.

55 U.S. Securities and Exchange Commission, 2006 Performance and Accountability Report 8 (2006).

56 *Id.*

57 Department of Justice, Fact Sheet: President's Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity (July 17, 2007).

58 *Stoneridge*, 128 S. Ct. at 773 (citing Del. Code Ann., Tit. 6, § 7325 (2005)).

59 *Id.* at 773-74 (citing *Central Bank*, 511 U.S. at 191).

60 *Id.* at 773 (citing 15 U.S.C. § 77k).

61 *See* Marine Bank v. Weaver, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.")

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a *common* manner."[11] This inference of commonality, in turn, was based mainly on two kinds of evidence: "facts and expert opinion," tending to demonstrate "the existence of company-wide policies and practices," and statistical evidence raising an inference of discrimination.[12]

Strikingly, the most "common" feature of Wal-Mart's "company-wide policies and practices" was its delegation of wide discretion to individual in-store managers to make pay and promotion decisions with relatively little guidance. Wal-Mart argued that this discretion weighed heavily against a finding of commonality, because it meant that the pay and promotion decisions in each store were controlled by different decision-makers. But the district court disagreed, concluding that this delegation of authority constituted a policy of "excessive subjectivity" that actually supported a finding of commonality.[13] The court acknowledged that, in itself, a policy delegating employment decisions to the discretion of in-store managers would not necessarily support a finding of commonality. But in this case, the court reasoned, the plaintiffs had shown a "nexus" between Wal-Mart's "excessive[ly] subjectiv[e]" policies and its alleged gender discrimination by supplying evidence of "gender stereotyping and a corporate culture of uniformity" within Wal-Mart.[14] In light of this additional evidence, the court concluded, the plaintiffs had raised an inference that the subjectivity functioned as a "conduit for gender bias to potentially seep into the system."[15]

The plaintiffs' evidence of Wal-Mart's "culture of uniformity" and "gender stereotyping," however, was inferential. The court concluded that there was ample evidence that Wal-Mart had a "strongly imbued" and centralized corporate culture that functioned to "guide managers in the exercise of their discretion."[16] But the court did not identify which aspect of this culture was sexist or discriminatory. Evidence of "gender stereotyping" was supplied by the plaintiffs' expert sociologist, but he did not actually conclude that Wal-Mart managers were biased. Rather, he testified that Wal-Mart was "vulnerable" to gender bias, because its policy of giving managers relatively unfettered discretion to make employment decisions permitted them to act based on stereotypes.[17] The court expressly acknowledged that the plaintiffs' sociologist could not "definitively state how regularly stereotypes play a meaningful role in employment decisions at Wal-Mart."[18] But it nonetheless decided that his testimony about Wal-Mart's vulnerability to such stereotyping was sufficient to "raise[] an inference of corporate uniformity and gender stereotyping that is common to all class members," even if a jury might later decide not to credit his testimony.[19]

The second main basis for the court's commonality conclusion was the plaintiffs' statistical evidence of discrimination. According to the court, the plaintiffs presented "largely uncontested descriptive statistics" showing that "women working in Wal-Mart stores are paid less than men in every region," that "the salary gap widens over time even for men and women hired into the same jobs at the same time," and that "women take longer to enter into management positions."[20] As the court acknowledged, however, the key question in a discrimination case is whether such disparities are due to gender discrimination or something else. The plaintiffs' expert performed a regression analysis for hourly and salaried employees grouped by geographic *region* and concluded that there were statistically significant disparities between men and women that only gender could explain. Wal-Mart, in turn, presented regression analyses conducted at a store-by-store level,[21] which concluded that there was no "broad-based gender differential in pay for hourly employees," and gender disparities only in "limited instances."[22]

The court held that this mixed evidence supported a finding of commonality. It did not hold that Wal-Mart's expert was incorrect or challenge her findings; rather, it focused on the plaintiffs' analysis, concluding that their region-by-region analysis was entitled to weight—despite the fact that actual employment decisions were made at a store-by-store level—because those decisions were made "within parameters and guidelines that are highly uniform, and within a strong corporate culture."[23] The court acknowledged that, in the end, a jury might find store-by-store data more convincing. But, because the plaintiffs' statistical approach was "*a* reasonable" approach, it could constitute evidence in support of class certification.[24]

B. Rule 23(b)(2): Punitive Damages as "Secondary in Nature"

The district court's Rule 23(b)(2) analysis also bears mention. Noting that the plaintiffs' punitive damages claims might reach *billions* of dollars in potential liability, Wal-Mart argued that such damages would "overwhelm"

the plaintiffs' claims for injunctive relief, rendering a 23(b)(2) class inappropriate.[25] The court, however, had "little difficulty" in concluding that despite the potentially massive value of the punitive damages claim, equitable relief predominated.[26] Injunctive and declaratory relief, the court reasoned, would "achieve very significant long-term relief in the form of fundamental changes to the manner in which Wal-Mart makes its pay and promotions decisions nationwide."[27] "Against this backdrop," the court asserted, the claim for punitive damages "appears secondary in nature."[28] The court also credited the named the plaintiffs' assertions that their central motivation for the lawsuit was to improve opportunities for women at Wal-Mart.

C. Manageability: Are Employment Discrimination Classes Manageable if Teamsters is "Unworkable on its Face"?

Finally, the district court's analysis of manageability was also significant. The court proposed to try the plaintiffs' claims in a two-stage trial. In Stage I, the plaintiffs would attempt to prove liability, showing that Wal-Mart had "engaged in a pattern and practice of discrimination against the class," and that Wal-Mart was liable for punitive damages because this pattern and practice was "undertaken maliciously or recklessly."[29] This phase of the trial would be manageable, the court concluded, because it would focus on the single issue of whether there was a class-wide pattern or practice of discrimination. In Stage II, the plaintiffs would have to prove that they were entitled to their requested remedies, and (in the case of monetary relief) show the amount to which they were entitled.

The court acknowledged that Stage II presented greater manageability challenges. With respect to the plaintiffs' promotions claims, the court recognized that not every class member could be presumed entitled to relief. Rather, only those plaintiffs who had actually applied for or sought a promotion were entitled to a recovery. Under the Supreme Court's opinion in *International Brotherhood of Teamsters v. United States*, a court generally holds additional hearings to determine each class member's entitlement to relief.[30] At such hearings, individual class members are required to demonstrate that they are entitled to the relief sought (for example, by demonstrating that they have applied for a promotion). The burden then shifts to the employer, who has the opportunity to "prove that the class member[s] w[ere] denied the job or promotion for lawful reasons."[31]

As the court recognized, "holding individual hearings" for 1.5 million class members is "impractical on its face," rendering the "traditional *Teamsters*" approach infeasible.[32] But the court concluded that it could dispense with *Teamsters* hearings, and instead administer a lost pay remedy for the plaintiffs' promotions claim "through the use of a formula approach."[33] The court proposed using a formula to calculate a "lump sum amount that represents the employer's total liability for backpay to the class" and then dividing the lump sum among those class members who were qualified for and interested in the promotion, and thus "at least *potentially* victimized by the employer's discriminatory policy."[34] This approach, the court reasoned, would work for those promotions which had been advertised within Wal-Mart, and for which data regarding the applicants existed. But for class members who were allegedly interested in promotions that were never posted on Wal-Mart's system, the court concluded that administering a class-wide backpay remedy would be impossible, as there was "no objective applicant data" that would enable it to determine whether the class members were interested in and qualified for the promotion.[35]

With respect to the plaintiffs' equal pay claim, the court concluded that it could determine backpay and punitive damages remedies for the entire class "without resort to a formula approach."[36] Using objective data from Wal-Mart's personnel system, the court reasoned, it could identify "the *actual* victims of any proven discriminatory pay policy" by examining data such as "job history, seniority, job review ratings, weeks worked," and other factors.[37] Wal-Mart pointed out that the available data did not include "dozens of factors identified in a survey of Store Managers as being relevant to pay decisions."[38] But the court discounted this argument, reasoning that "'unrealistic exactitude [was] not required'" in determining backpay awards.[39] The court also concluded, as it had for plaintiffs' promotion claim, that it did not have to hold hearings at which the actual decisionmakers could testify about the reasons they made particular employment decisions. Such hearings, the court reasoned, were "simply unnecessary" where both eligibility for and the amount of backpay could be determined from data.[40]

III. The Ninth Circuit's Decision

After the district court certified the class, Wal-Mart appealed and the plaintiffs cross-appealed under Rule 23(f). In a majority opinion written by Judge Pregerson, the Ninth Circuit affirmed the district court, concluding that it had correctly applied the requirements of Rule 23(a) and Rule 23(b)(2), and correctly concluded that trial of the class action would be manageable.[41]

A. Commonality: Centralized Culture as a "Nexus" Between Subjectivity and Statistics

With respect to commonality—the main point of contention under Rule 23(a)—the majority concluded that the plaintiffs had presented at least four kinds of evidence suggesting a common "corporate policy of discrimination": (1) unchallenged "[f]actual [e]vidence" demonstrating that Wal-Mart "operates a highly centralized company that promotes policies common to all stores and maintains a single system of oversight;" (2) expert sociological testimony stating that "gender stereotypes are especially likely to influence personnel decisions when they are based on subjective factors;" (3) statistical evidence tending to show gender discrimination on a regional level; and (4) anecdotal evidence reinforcing the inference of discrimination.[42]

The majority acknowledged that the plaintiff's sociologist had "failed to identify a specific discriminatory policy at Wal-Mart," but rejected Wal-Mart's argument that this rendered his opinion regarding Wal-Mart's vulnerability to gender discrimination unreliable.[43] While a jury might "ultimately agree" that, absent a "specific discriminatory policy promulgated by Wal-Mart," the sociologist's conclusion was "hard to believe," that conclusion was nonetheless "properly analyzed" and tended to show a "common question of fact—*i.e.*, does Wal-Mart's policy of decentralized, subjective employment decision making operate to discriminate against female employees?"[44]

The majority also acknowledged that the plaintiffs' statistician had conducted his research on the regional, rather than store-by-store, level. But, consistent with the district court, the majority reasoned that the appropriate level of statistical analysis "depends largely on the similarity of the employment practices and the interchange of employees at the various facilities."[45] According to the plaintiffs' statistician, a store-by-store analysis would not capture "the effect of district, regional, and company-wide control over Wal-Mart's uniform compensation policies and procedures," the "dissemination" of these policies as a result of frequent movement of store managers, or Wal-Mart's "strong corporate culture."[46] In light of this explanation, the panel concluded, the district court did not abuse its discretion in crediting this analysis and concluding that it supported the contention that Wal-Mart's corporate structure and policies led to a "pattern or practice" of discrimination.[47]

In a separate section of its opinion, the court specifically discussed the role of "[s]ubjective [d]ecision-[m]aking" in the Rule 23(a) commonality analysis.[48] The court acknowledged that discretionary decision-making *alone* is insufficient to demonstrate commonality. However, the court also suggested that it was "well-established that subjective decision-making is a 'ready mechanism for discrimination.'"[49] Thus, the panel concluded, decentralized, subjective decision-making could—and did—contribute to an inference of discrimination in this case:

> Plaintiffs produced substantial evidence of Wal-Mart's centralized company culture and polices, thus providing a nexus between the subjective decision-making and the considerable statistical evidence demonstrating a pattern of discriminatory pay and promotions for female employees.[50]

In short, even though there was no actual evidence of company-wide discriminatory policies, the statistical evidence of discrimination, coupled with (non-discriminatory) company-wide policies, was sufficient to raise an inference that gender bias might be systematically "seep[ing] into the system" through managers' exercises of discretion.[51] The court also affirmed the district court's conclusions that the named plaintiffs were typical of the class and would represent it adequately.

B. Rule 23(b)(2): Identifying the "Primary Goal" of the Litigation

Turning to Rule 23(b), the court acknowledged that certification under Rule 23(b)(2) was inappropriate in cases where "'the appropriate final relief relates... predominantly to money damages.'"[52] But it rejected the view that the monetary claims necessarily predominated because the case involved billions of dollars in potential liability. "[S]uch a large amount," the panel reasoned, was "principally a function of Wal-Mart's size, and the predominance test turns on the *primary goal* of the litigation—not the theoretical or possible size of the damage award."[53] Those putative class members who were still employed by Wal-Mart, and who therefore had standing to seek injunctive and declaratory relief, would, the court continued, reasonably have brought their claims, absent even the possibility of monetary relief, in order "to put an end to the practices they complain of."[54] The court was therefore "confident" that the primary relief sought by such plaintiffs "remains declaratory and injunctive in nature."[55]

The majority did, however, agree with Wal-Mart that those putative class members who no longer worked at Wal-Mart lacked standing to seek injunctive or declaratory relief. The majority acknowledged that it would be "difficult to say that" such plaintiffs would have sued, absent the possibility of monetary relief.[56] The court therefore remanded to the district court to determine the

"appropriate scope of the class" in light of any evidence regarding which class members were Wal-Mart employees when the lawsuit was filed.[57]

C. Manageability: An Alternative Approach under Hilao

Finally, the panel affirmed the district court's conclusion that trial of most of the class claims was manageable. On appeal, Wal-Mart argued that the district court's trial plan violated the Due Process Clause, Title VII as interpreted in *Teamsters*, and the Rules Enabling Act by denying it the opportunity to present rebuttal evidence in its own defense as to each class member.[58] In its first opinion, the majority expressly rejected these arguments and upheld the district court's trial plan. In its revised opinion, the majority changed course. Expressing "no opinion regarding" Wal-Mart's objections to the district court's "tentative trial plan," it suggested instead that "there are a range of possibilities—which may or may not include the district court's proposed course of action—that would allow this class action to proceed in a manner that is both manageable and in accordance with due process."[59] As a result, it concluded, manageability and due process did not bar class certification.

To illustrate this "range of possibilities," the majority reproduced several pages of block quotes from *Hilao v. Estate of Ferdinand Marcos*, a case in which the Ninth Circuit affirmed a district court's determination of compensatory damages for a class with approximately 10,000 members.[60] The district court in *Hilao* randomly selected 137 individual claims for trial, based on a statistician's testimony that 137 trials would achieve a 95% probability that "'the same percentage [of claims] determined to be valid among the examined claims would be applicable to the totality of claims filed.'"[61] The court held a jury trial on compensatory damages as to the 137 claims, which resulted in judgment for 135 claimants. The court then entered an award for the remaining class members based on the average of these awards. On appeal, the Ninth Circuit held that this procedure comported with due process because it prevented the defendant from having to pay damages for invalid claims, and permitted the plaintiffs to bring what would otherwise have been an unmanageable volume of claims. The *Wal-Mart* majority concluded that a similar procedure could be used in the *Wal-Mart* case. In addition to rendering the trial manageable, such a procedure would, the majority reasoned, "allow Wal-Mart to present individual defenses in the randomly selected 'sample cases,' thus revealing the approximate percentage of class members whose unequal pay or non-promotion was due to something *other* than gender discrimination."[62]

IV. Judge Kleinfeld's Dissent

Judge Kleinfeld dissented, taking issue with nearly all of the majority's conclusions. Initially, he asserted, the purported class did not satisfy any of the Rule 23(a) requirements except numerosity. "The only common question plaintiffs identify with any precision," Judge Kleinfeld suggested, was "whether Wal-Mart's promotion criteria are 'excessively subjective.'"[63] But that common issue had *no* "clear relationship to sex discrimination in pay, promotions, or terminations,"[64] and thus was not a common issue actually relevant to the plaintiffs' claims. Although the plaintiffs' sociologist concluded that subjective pay and promotion systems are "vulnerable" to sex discrimination, merely leaving promotion decisions to the discretion of lower-level supervisors should, "as the Supreme Court recognized in *Watson v. Fort Worth Bank & Trust*[,]" raise "no inference of discriminatory conduct' because '[i]t is self-evident that may jobs... require personal qualities that have never been considered amenable to standardized testing.'"[65]

The only concrete evidence of actual discrimination, Judge Kleinfeld continued, was that "around 2/3 of Wal-Mart employees are female, but only about 1/3 of its managers are female."[66] But "as the Supreme Court [also] recognized in *Watson*, '[i]t is entirely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.'"[67] "Not everybody wants to be a Wal-Mart manager," he observed, and "Plaintiffs' statistics do not purport to compare women who want to managers at Wal-Mart with men who want to be managers at Wal-Mart, just female and male employees, whether they want management jobs or not."[68]

Judge Kleinfeld also concluded that the class lacked typicality. Each of the named plaintiffs, he pointed out, had a different experience at Wal-Mart. Some still worked for the company; others had quit; others had been fired for alleged misfeasance. "Some claim sex discrimination, some claim mixed motive race and sex discrimination, some appear to claim only race discrimination. Some claim retaliation, and some appear to claim unfairness but not discrimination."[69] The defenses to these claims, Judge Kleinfeld continued, were similarly uncommon, ranging from proving that the particular plaintiffs' adverse treatment was based on poor performance or actual misfeasance, to settling claims that appeared to have merit. Thus, "[w]hatever the 'vulnerability' to sex discrimination of the 'corporate culture' of this national corporation with no centralized system for promotion, the

various Plaintiffs' claims and Wal-Mart's defenses against them do not resemble one another."[70]

Judge Kleinfeld also concluded that the named the plaintiffs would not "fairly and adequately protect the interests of the class."[71] "Women who still work at Wal-Mart and who want promotions have an interest in the terms of an injunction;" but to "women who have quit or been fired and do not want to return... compensatory and punitive damages are what matter."[72] Class members who are managers "have interests in preserving their own managerial flexibility under whatever injunction may issue."[73] "Those who face strong defenses, such as if they did indeed steal time or money, have a considerable interest in a fast, mass settlement, while those who have impressive performance records have an interest in pushing their individual cases to trial."[74]

Judge Kleinfeld also concluded that the class did not meet the requirements of Rule 23(b)(2). In Judge Kleinfeld's view, it was "risible" to say that injunctive and declaratory relief predominated, because the claim for punitive damages would likely be in the *billions* of dollars.[75] "For anyone but the richest people in the world," he reasoned, "billions of dollars are going to predominate over words and solemn commands and promises about how to behave in the future. What Wal-Mart cashier or stocker would care much about how the district court told Wal-Mart to run its business after getting enough cash to quit?"[76]

Judge Kleinfeld reserved his sharpest criticism for the proposed trial plans. The district court's plan, he asserted, "violates Wal-Mart's constitutional rights to due process and jury trial."[77] Under the plan, "[t]here will never be an adjudication," let alone by a judge and jury, "to determine whether Wal-Mart owes any particular woman the money it will be required to pay, nor will any particular woman ever get a trial to establish how much she is owed."[78] But "[u]nder both the Seventh Amendment and the statute applicable to punitive damages in Title VII cases, Wal-Mart is entitled to trial by jury of these issues."[79] Further, Judge Kleinfeld pointed out, there was no legitimate way for the jury or court to decide upon a punitive damages award, "since the jury will never make a compensatory damages award," and thus could never calculate the ratio of punitive to compensatory damages, as required by the Supreme Court.[80]

The majority's proposed procedure based on *Hilao*, he asserted, was equally unsatisfactory. Initially, the circumstances that rendered the procedure in *Hilao* necessary were not present here, because unlike the plaintiffs in *Hilao*, the plaintiffs here "can obtain individual counsel where they live and do not face the problems of proving injuries suffered in a foreign country."[81] Moreover, where "*Hilao* included a plan to have a 'random sample of 137 claims' go to jury trial," under the majority's plan, "no individual cases will go to trial."[82]

Judge Kleinfeld also suggested that a class action in this case was wholly unnecessary. Class actions, he observed, need "special justification" because they are an exception to the "'usual rule that litigation is conducted by and on behalf of the individual named parties only.'"[83] They are designed to solve an attorneys' fee problem: the problem that small recoveries do not provide a sufficient inventive for individuals to bring solo actions to uphold their rights. But this problem "does not pertain here."[84] "Much of the bar now earns a living by litigating sex discrimination claims," and such cases offer "good liability, high damages potential, and collectibility."[85] These features "'eliminate financial barriers that might make individual lawsuits unlikely to infeasible,' so [that] women discriminated against by Wal-Mart do not need a class action. They can, with contingent fee agreements, afford to hire their own lawyers and control what the lawyers do for them."[86]

In conclusion, Judge Kleinfeld emphasized that it was not simply Wal-Mart but also "[w]omen employed by Wal-Mart who have suffered sex discrimination" who "stand to lose a lot if this sex discrimination class action goes forward."[87] Even if the plaintiffs win, "[w]omen who have suffered great loss because of sex discrimination will have to share the punitive damages award with many women who did not. Women entitled to considerable compensatory damages in addition to lost pay will be deprived of them. Women who have left Wal-Mart will get injunctive and declaratory relief of no value to them... If the settlement is mostly words for the women and money for the lawyers, a realistic possibility, it will be a pyrrhic victory indeed."[88]

V. Some Key Issues

As Judge Kleinfeld's vehement dissent suggests, the Wal-Mart class action raises serious and unsettled issues. One of these is the proper role of subjective decision-making and statistical evidence in class certification under Rule 23. While this issue is not new, it arises in a particularly acute form in this case. The paradigm instance of a subjective decision-making process resulting in common injury is a wholly subjective decision-making process that affects multiple persons at a single facility, where all the affected persons are subjected to the *same* subjective decision-maker.[89] In *Wal-Mart*, by contrast, the putative class members were not exposed to the subjective

judgments of the same decision-maker but worked under *thousands* of different managers at approximately 3,400 different stores across the country. The Ninth Circuit and the district court acknowledged this difficulty, and pointed out that, in addition to this policy of subjectivity, Wal-Mart had a strong centralized culture. But, as the dissent pointed out, the plaintiffs made *no* showing that this centralized culture was in itself sexist or discriminatory in any way. The holdings discussed above thus appear to employ a relatively permissive definition of "commonality."

The plaintiffs offered their most concrete evidence of discrimination through statistical evidence. But here, too, the opinions discussed adopt a relatively permissive view of the kind of statistical evidence sufficient to turn an allegation of discrimination into an initial showing of class-wide discriminatory treatment. Wal-Mart's analysis indicated that, on a store-by-store basis, there was no statistically significant evidence of discrimination at the large majority of stores. Neither the district court nor the Ninth Circuit held that this analysis was fundamentally flawed or incorrect. Rather, they simply accepted the plaintiffs' regionally aggregated data as sufficient to "create a common question as to the existence of a pattern and practice of gender discrimination at Wal-Mart."[90] This implies that the presence of a statistical disparity at *some* level of aggregation—even if it is squarely contradicted by affirmative evidence of *non*-discrimination at the level at which decisions are actually made—is sufficient to support a claim of class-wide discriminatory treatment.

If this is correct, it may encourage employers to seek to avoid liability through measures that go beyond simply policing their employment policies and practices for true discrimination. In particular, they may seek to ensure that there is *no* way to produce any kind of statistical case, no matter at what level of aggregation, that their policies have a statistically disparate impact. As a plurality of the Supreme Court has observed (in a passage quoted by Judge Kleinfeld in his dissent),

> [i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces.[91]

But an "inevitable focus on statistics" could "put undue pressure on employers to adopt inappropriate prophylactic measures."[92] As the Court plurality also observed,

> [i]f quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met.[93]

But, of course, "[p]referential treatment and the use of quotas by public employers can violate the Constitution, and it has long been recognized that legal rules leaving any class of employers with little choice but to adopt such measures would be far from the intent of Title VII."[94]

The *Wal-Mart* case also presses the question of when claims for punitive damages become so predominant that they render inappropriate a Rule 23(b)(2) class. The district court and Ninth Circuit concluded that, consistent with Rule 23(b)(2), the plaintiffs could seek punitive damages and backpay amounting to billions of dollars. But to Judge Kleinfeld, the massive amount of monetary compensation the plaintiffs seek in this case plainly belies any claim that pecuniary claims are "incidental" to their case, or that their requests for injunctive relief are predominant.

Finally, this case raises the question of how, if at all, a class with 1.5 *million* members can be managed consistent with the Constitution, employment law, and the Rules Enabling Act. As suggested above, it is a standard tenet of employment law that, in an employment discrimination lawsuit, employers are entitled to the opportunity to put on evidence showing that particular plaintiffs are not entitled to relief because they were "denied an employment opportunity for lawful reasons."[95] As Judge Kleinfeld observed, however, the decisions in this case would leave Wal-Mart without that opportunity. The district court's trial plan—which the panel continued to characterize as potentially "viable"[96]—gives employers no opportunity at all to "rebut" the plaintiffs' prima facie case. And the panel's alternative procedure, based on *Hilao* and involving trial of a small number of test cases chosen by lottery, would similarly deny Wal-Mart the opportunity in all but a small number of randomly selected test cases. Further litigation in this case will determine whether that limited opportunity is sufficient to satisfy Title VII, *Teamsters*, the Rules Enabling Act, and the requirements of due process.[97]

Endnotes

1 Dukes, et al. v. Wal-Mart Stores, Inc. ("*Dukes I*"), 222 F.R.D. 137, 141-42 (N.D. Cal. 2004).

2 *See* Dukes, et al. v. Wal-Mart Stores, Inc., 474 F.3d 1214 (9th Cir. 2007).

3 *See* Dukes, et al. v. Wal-Mart Stores, Inc. ("Dukes II"), 509 F.3d 1168 (9th Cir. 2007). The Panel issued the revised opinion in response to a Wal-Mart petition for rehearing en banc. *Dukes II* denied the petition for rehearing en banc as moot in light of the new opinion, but expressly gave the parties leave to file new petitions for rehearing. It is Wal-Mart's second petition for rehearing en banc that is now pending.

4 *See Dukes I*, 222 F.R.D. at 141; *see also* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin....").

5 *Dukes I*, 222 F.R.D. at 141.

6 *See id*.

7 *Id*.

8 *Id*.

9 *Id*. at 141-42. Federal Rule of Civil Procedure 23(b)(2) permits class certification when the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

10 *Dukes I*, 222 F.R.D. at 183.

11 *Id*. at 166 (emphasis added).

12 *Id*. at 145. The court also relied on a third category of evidence, "anecdotal evidence" of "discriminatory attitudes held or tolerated by management," consisting of declarations from the named plaintiffs and 114 putative class members. *Id*. at 145, 165-66.

13 *Id*. at 149; *see id*. at 149-51.

14 *Id*. at 150.

15 *Id*. at 152.

16 *Id*. at 153.

17 *Id*. at 154.

18 *Id*.

19 *Id*.

20 *Id*. at 155.

21 The district court asserted that Wal-Mart's statistician "ran a separate regression analysis for (a) each of the Specialty Departments within each store, (b) each grocery division within each store, and (c) the remainder of each store." *Id.* at 156. The Court of Appeals accepted this determination, concluding that Wal-Mart's statistician had "reviewed data at the sub-store level." *Dukes II*, 509 F.3d at 1181 n.8. In its first petition for rehearing en banc, however, Wal-Mart indicated that its expert had in fact conducted a store-level analysis, "as plaintiffs' own expert concedes." Petition for Rehearing En Banc, Dukes, et al. v. Wal-Mart, No. 04-16688 (9th Cir. filed Feb. 20, 2007) (internal citations omitted).

22 *Dukes I,* 222 F.R.D. at 156.

23 *Id*. at 157.

24 *Id*. at 159.

25 *Id*. at 170.

26 *Id*. at 171.

27 *Id*.

28 *Id*.

29 *Id*. at 173.

30 431 U.S. 324 (1977).

31 *Dukes I*, 222 F.R.D. at 176.

32 *Id*.

33 *Id*.

34 *Id*. at 177.

35 *Id*. at 182.

36 *Id*. at 183.

37 *Id*. at 184.

38 *Id*.

39 *Id*. (quoting Shipes v. Trinity Indus., 987 F.2d 311, 317 (5th Cir. 1993)).

40 *Id*. at 185.

41 The Court issued its original opinion affirming the district court, with a dissent by Judge Kleinfeld, in February of 2007. As noted above, after Wal-Mart petitioned for rehearing en banc, the Court withdrew its original opinion and issued a new opinion, with Judge Kleinfeld again dissenting.

42 *Dukes II*, 509 F.3d at 1178.

43 *Id*. at 1179.

44 *Id*.

45 *Id*. at 1181.

46 *Id*.

47 *Id*.

48 *Id*. at 1182.

49 *Id*. at 1183 (quoting Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072, 1075 (9th Cir. 1986)).

50 *Id*.

51 *Dukes I*, 222 F.R.D. at 152

52 *Dukes II*, 509 F.3d at 1186 (quoting Fed. R. Civ. P. 23(B)(2), Adv. Comm. Notes to 1966 amend.).

53 *Id*. at 1186.

54 *Id*. at 1189.

55 *Id*.

56 *Id*.

57 *Id*.

58 The Rules Enabling Act, 28 U.S.C. § 2072(a)-(b), provides that "general rules of practice and procedure... shall not abridge, enlarge or modify any substantive right."

59 *Dukes II*, 509 F.3d at 1191.

60 103 F.3d 767 (9th Cir. 1996).

61 *Dukes II,* 509 F.3d at 1191 (quoting *Hilao*, 103 F.3d at 782).

62 *Id*. at 1193 n.22.

63 *Id*. at 1194.

64 *Id*.

65 *Id*. (quoting *Watson*, 487 U.S. 977, 990, 999 (1988)).

66 *Id*.

67 *Id*. (quoting *Watson*, 487 U.S. at 992).

68 *Id*. at 1194-95.

69 *Id*. at 1195-96.

70 *Id*. at 1196.

71 *Id*.

72 *Id*.

73 *Id*.

74 *Id*.

75 *Id*.

76 *Id*. at 1197.

77 *Id*.

78 *Id*.

79 *Id*.

80 *Id*.

81 *Id*. at 1198.

82 *Id*.

83 *Id*. at 1199 (quoting Califano v. Yamasaki, 442 US 682, 700-01 (1979)).

84 *Id*.

85 *Id*.

86 *Id*.

87 *Id*.

88 *Id*.

89 *See, e.g.*, Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 151 (single facility), 159 n. 15 (wholly subjective decisionmaking process).

90 *Dukes I*, 222 F.R.D. at 155.

91 *Watson*, 487 U.S. at 992 (plurality op.) (internal quotation marks omitted).

92 *Id*.

93 *Id*. at 992-93 (internal quotation marks and citations omitted).

94 *Id*.

95 Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977); *see also* Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 148 (2000).

96 *Dukes II*, 509 F.3d at 1193.

97 *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063 (2007) (due process requires that a defendant have "an opportunity to present every available defense").

Cy Pres Settlements

Continued from page 1

for many class members, "the right to receive a discount [or coupon] will be worthless."[5] The class attorneys then capture the lion's share of the actual settlement. There are countless examples where the nominal or even the predicted values of the coupons that justified a huge attorneys' fee far outstripped the actual redemption rate.[6] In a recent settlement (a nationwide Sears class action in Cook County, Illinois), plaintiffs' attorneys received about $1 million, while the 1.5-million member class redeemed claims at under a 0.1% rate for a total of $2,402.[7] Such settlements benefit defendants in the short run by permitting them to pay off class action attorneys cheaply, but hurt defendants in the long run by creating a mechanism by which class action attorneys can profitably bring weak cases.

The Class Action Fairness Act (CAFA), passed in 2005, has drawn de jure[8] and de facto[9] scrutiny to the issue of coupon settlements by requiring attorneys' fees in coupon settlements to be tied to the actual value of the redeemed coupons. But CAFA does not provide the same scrutiny to cy pres settlements and trial lawyers are shifting to that mechanism to accomplish the same task of maximizing return from weak cases.

Judge Richard Posner has argued that cy pres is a misnomer in the class action context:

> [Cy pres] doctrine is based on the idea that the settlor would have preferred a modest alteration in the terms of the trust to having the corpus revert to his residuary legatees. So there is an indirect benefit to the settlor. In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to judgment) to the class members. There is no indirect benefit to the class from the defendant's giving the money to someone else. In such a case the "cy pres" remedy (badly misnamed, but the alternative term—"fluid recovery"—is no less misleading) is purely punitive.[10]

But sometimes cy pres is less a matter of being punitive and more a matter of disguising the true cost of a settlement to the defendant to maximize the share of the actual recovery received by the plaintiffs' attorneys. If the beneficiary is related to the defendant, or the defendant otherwise benefits from the payout, then the contingent attorneys' fee can be exaggerated by claiming that the value to the class is equal to nominal value of the payment

to the beneficiary; as in the coupon scenario, the defendant is willing to make a larger nominal contribution to settle the case than the actual cost to the defendant. For example, a California state court settlement of a derivative action against Larry Ellison, alleging insider trading, settled when Ellison agreed to pay $100 million to a charity chosen by Oracle—even though the billionaire has previously stated that his fortune would go to charity.[11] The only real expense to Ellison was the $22 million attorneys' fee.

Further ethical problems arise if the beneficiary is related to the judge. The *New York Times* recently documented the problem of charities soliciting judges for leftover settlement money.[12] In a mass-tort inventory settlement of fen-phen cases in Kentucky, tens of millions of dollars intended for plaintiffs was diverted to a newly created charity where the judge who approved the settlement and three of the plaintiffs' attorneys sat as board members, each receiving tens of thousands of dollars for their service. The settlement also provided a million dollars to the alma mater of one of the trial lawyers, which then hired the attorney for a $100,000/year no-show job. (Three of the attorneys are under indictment, and the judge was removed from office.)[13] While this is obviously an extreme case, it does illustrate the ethical problems associated with judges choosing or approving charitable destinations for settlement money.

More frequently, if the beneficiary is related to the plaintiffs' attorneys, or the plaintiffs' attorneys otherwise benefit from the payout, the award rewards trial lawyers twice: first by providing *cy pres* recovery to an organization that supports the agenda or causes of the trial lawyers bringing the case, and then a second time by basing attorneys fees on the first amount. Cy pres donations to law schools certainly provide further incentive for those institutions to support continued expansion of class action law; cy pres awards also regularly go to "public interest" law firms that provide litigation support for the trial bar.

In July 2007, Judge Colleen Kollar-Kotelly granted a motion to award $5.1 million of unclaimed antitrust settlement funds to George Washington University to create a "Center for Competition Law" on the grounds that it would "benefit the plaintiff class and similarly situated parties by creating a Center that will help protect them from future antitrust violations and violations of other competition laws."[14] The lead plaintiffs' attorney, Michael Hausfeld, was a GWU Law alumnus.[15] Other beneficiaries included the Naderite Public Citizen[16] and the Impact Fund, a trial lawyer organization that expressly lobbies for such awards.[17] In a Madison County, Illinois settlement where only $20 million of the $60 million award was left unclaimed, plaintiffs' lawyers Korein Tillery negotiated with Pfizer over the distribution of the remaining $20 million: $5 million each to the Illinois Institute of Technology (for its law school and biomedical research program), University of Chicago Hospitals and the Centers for Disease Control; $3 million to the United Way of Metropolitan Chicago; and $2 million to Lubavitch Chabad of Illinois. Korein Tillery took no discount on its $20 million attorneys' fee.[18] Such problems go beyond trial lawyers and civil lawsuits; Richard Epstein has criticized a government settlement with Bristol-Myers Squibb requiring them to endow a chair of ethics at the District of New Jersey U.S. Attorney's alma mater, Seton Hall Law School.[19]

There are several possible responses to the issue of unfettered cy pres awards, which frequently have too little scrutiny from courts, despite the clear conflicts of interest they present between class members and their attorneys. The American Law Institute's controversial Draft of the Principles of the Law of Aggregate Litigation proposes limiting cy pres to "circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim."[20] This would imply that a settlement distribution should go to class members who have filed a claim, although some courts have rejected such a solution as a windfall to class members, especially when the number of class members filing claims is small relative to the size of the class.[21]

Illinois has passed legislation requiring at least half of any cy pres award to go to qualifying "nonprofit charitable organizations that have a principal purpose of promoting or providing access to justice for low income residents."[22] Such a resolution effectively taxes cy pres awards, reducing the incentive to divert settlement money into entirely self-serving charities. And while one may question the efficacy of Illinois's choice, better that the legislature be lobbied over the appropriate way to spend cy pres funds than the judicial branch.

There is another possible solution that has not received adequate attention, however. CAFA bases fee awards in coupon settlements on the actual redeemed value of the coupons; if coupons are donated to charity, those coupons cannot be used to calculate a fee award.[23] The same principle should apply when cash is involved. Contingent-fee attorneys should be rewarded only for benefits going directly to the class. Moreover, if a cy pres settlement benefits the plaintiffs' bar directly or indirectly, that settlement should offset the contingent fees. A $20 million cy pres award to Public Citizen or the Impact

Fund should count as part of the attorneys' fee award, not as a justification for additional attorneys' fees. Such a mechanism would give plaintiffs' attorneys the proper incentive to align their interests with those of the class when devising a settlement: if the class members do not get paid, the attorneys do not get paid.

Some might object that such limits would deter contingent-fee class actions when there is no identifiable class or when it is infeasible to distribute settlement funds in a lawsuit where damages are small. But that objection perhaps identifies an advantage, rather than a disadvantage, of tying fees to actual class recovery. A lawsuit where the cost of litigation is greater than the benefit to the class suggests that the social costs are greater than the social benefits. To the extent there is wrongdoing, it should be a job for public, rather than private, attorneys general. An elected official should at least hypothetically balance costs and benefits to society at large in deciding whether to bring suit and faces (at least potential) political consequences if taxpayer resources are wasted in meaningless suits. This is far from a guarantee of good behavior, but at least there would be checks in the political process; entrepreneurial plaintiffs' lawyers seeking rents through the class action mechanism have no such check, and thus act in the public interest only through occasional fits of serendipity.

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Endnotes

1 Susan Beth Farmer, *More Lessons From the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General,* 68 Fordham L. Rev. 361, 391-93 (1999); Richard Posner, Economic Analysis of Law 509-10 (4th ed. 1992); Bryan A. Garner, Black's Law Dictionary 392 (7th ed. 1999). "Justification for the use of the doctrine [in the middle ages] was laid on the shoulders of the donor, the idea being since the object of the testator in donating the money to charity was to obtain an advantageous position in the kingdom of heaven, he ought not to be frustrated in this desire because of an unexpected or unforeseen failure." *Id.* (quoting Edith L. Fisch, The Cy Pres Doctrine in the United States 4 (1950)).

2 Jackson v. Phillips, 96 Mass. 539 (1867). *But see* Evans v. Abney, 396 U.S. 435 (1970) (upholding Georgia Supreme Court's dissolution of trust providing for segregated municipal park).

3 State v. Levi Strauss & Co., 41 Cal. 3d 460, 715 P.2d 564, 224 Cal. Rptr. 605 (1986).

4 *See, e.g.,* Remarks of Michael Hausfeld, "Class Action Fairness Act: Two Years Later," Federalist Society, Washington, D.C. (Feb. 14, 2007).

5 Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & Contemp. Probs. 97, 108 (1997).

6 James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443 (2005).

7 Ted Frank, "Moody v Sears: Lawyers, $1M. Class, $2,402," Overlawyered weblog, http://www.overlawyered.com/2007/05/moody_v_sears_lawyers_1m_class.html (May 5, 2007).

8 28 U.S.C. § 1712.

9 E.g., Synfuel Technologies, Inc. v. DHL Express (USA), Inc., 463 F.3d 646 (7th Cir. 2006) (rejecting coupon settlement, though scrutiny under CAFA not required).

10 Mirfahisi v. Fleet Mortgage Corp., 356 F.3d 781, 784 (7th Cir. 2004).

11 Ted Frank, "Final update: Oracle settlement," Point of Law blog, http://www.pointoflaw.com/archives/001875.php (Nov. 23, 2005) ("That the plaintiffs are settling for pennies on the dollar with no benefit to the corporation on whose behalf they're ostensibly suing, as well as the fact that a Delaware court has already absolved Ellison of the same charges, suggests that even the plaintiffs recognize the suit as meritless."); Michael Paige, *"Judge OKs Ellison's $122M Settlement,"* Market Watch, Nov. 22, 2005; Peter Branton, *Wealth of Experience*, IT Weekly (Jul. 9, 2006) ("I think after a certain amount, I'm going to give almost everything I have to charity because what else can you do with it?").

12 Adam Liptak, *Doling Out Other People's Money*, N.Y. Times (Nov. 26, 2007).

13 Ted Frank, "Fen-Phen Zen," American.com (Apr. 4, 2007).

14 Diamond Chemical Co. v. Akzo Nobel Chemicals B.V., No. 01-2118 (May 14, 2007) ("Diamond I"); Diamond Chemical Co. v. Akzo Nobel Chemicals B.V., No. 01-2118 (Jul. 10, 2007); George Washington University press release, July 11, 2007.

15 Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (Dec. 3, 2007).

16 Bruce Mohl, *Reilly Turns to Private Enforcement of Item Pricing*, Boston Globe (June 27, 2004) (settlement of consumer fraud litigation with $3.2 million to the private attorneys, $3.9 million to "an eclectic group of charitable, consumer, and nonprofit groups," and $425,000 to the Massachusetts Attorney General's Office).

17 *See* http://www.impactfund.org/New/pages/support/cypres.htm.

18 Ameet Sachdev, *Charities Reaping Lawsuit Dividends*, Chi. Tribune (Sep. 9, 2007).

19 Richard A. Epstein, *The Deferred Prosecution Racket*, Wall St. J. (Nov. 28, 2006).

20 § 3.08. *See also* Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423 (2d Cir. Jan. 4, 2007); Liptak, *supra* note 12.

21 Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ 4911 (S.D.N.Y. Jul. 5, 2007).

22 Public Act 095-0479, codified at 735 ILCS 5/2-807 (2007).

23 28 U.S.C. § 1712(e).

Class Action Tolling in Mass Tort Personal Injury Litigation

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plaintiffs on notice of their claims. One Pennsylvania court, for example, held that events giving rise to extensive media coverage of a medical device triggered discovery as a matter of law because the coverage would have put anyone exercising "due diligence" on notice of his or her claims.[6] In *Martin v. Dalkon Shield Claimants Trust*, the plaintiff brought a product liability lawsuit over an allegedly defective contraceptive device, and the defendant moved for summary judgment on the ground that the plaintiff's claim was time-barred. In granting the defendant's motion, the court observed that the plaintiff failed to make any inquiry regarding the cause of her injury in the face of, *inter alia*, "published news accounts, articles in medical journals and reports by the Food and Drug Administration" confirming a link between IUDs and spontaneous abortions.[7] Accordingly, the court refused to apply the discovery rule, reasoning that where "a plaintiff fails to obtain information which is readily available, she has not acted with reasonable diligence."[8]

Some courts have been careful to emphasize that the plaintiff need not have actually been aware of the news coverage. Because the discovery rule is an objective test, what is relevant is whether the coverage was so substantial as to put a *reasonable* plaintiff on notice.[9] Thus, the same media event that precipitates a mass tort might also trigger accrual for statute-of-limitations purposes. But the statute-of-limitations inquiry will usually not stop there. Once a plaintiff files the first class action in a nascent mass tort—an event that not uncommonly transpires within days of media coverage—a question of tolling arises. In mass-tort personal injury cases, such tolling should not be available. But in order to explain why this is so, it is first necessary to explain the origin and application of the *American Pipe* doctrine.

II. The *American Pipe* Doctrine as Originally Conceived

In *American Pipe & Construction Co. v. Utah*, the U.S. Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."[10] Under the *American Pipe* rule, former members of a putative class can toll limitations periods to preserve their right to file suit in the event that their class is not certified.[11] The Court reached that conclusion after considering the purposes of statutes of limitations and of Rule 23, the federal class action rule.

First, the Court noted that Rule 23 was adopted to improve the efficiency of the class action device, in part "to avoid, rather than encourage"—as the old class-action rule had done—"unnecessary filing of repetitious papers and motions."[12] But because class certification decisions could often linger beyond the end of limitations periods—as had happened in the *American Pipe* case itself—this efficiency purpose of Rule 23 would be undermined unless plaintiffs could count on the pendency of the action to toll their claims. Otherwise, "class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable."[13]

Second, the Court found it important that the class members had acted reasonably in relying upon the pendency of the class action. It explained that certification had been denied (1) "'not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy);'" (2) "'not for lack of standing of the representative;'" and (3) not "'for reasons of bad faith or frivolity.'"[14] Rather, class certification had been denied by the district court "solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable.'"[15] "[A]t least where class action status has been denied" on these grounds, the Court held, tolling is appropriate.[16] Otherwise, in cases "where the determination to disallow the class action [is] made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket, a rule requiring successful anticipation of the determination of the viability of the class would breed needless duplication of motions."[17]

Third, the Court noted that its tolling rule would not, as applied in *American Pipe*, disturb the purposes of the statutes of limitations. "The policies of ensuring essential fairness to defendants and barring a plaintiff who 'has slept on his rights'... are satisfied when" the class action is such that it "notifies the defendants not only of the substantive claims being brought against them, but also the number and generic identities of the potential plaintiffs who may participate in the judgment."[18] Thus, the Court was satisfied that such class actions provide defendants with "the essential information necessary to determine both the subject matter and size of the

prospective litigation," the primary concerns addressed by limitations rules.[19]

Justice Blackmun, joining the opinion and concurring in the judgment, nonetheless issued a word of caution. "Our decision... must not be regarded as an encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights."[20] He also noted that tolling would be limited to cases like the one before the Court, where the claims "invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit,"[21] a sentiment that would later be echoed by other justices on the Court.[22]

III. American Pipe in Mass Tort Cases

Most courts have assumed that *American Pipe* tolling principles apply to any pending class action, regardless of the nature of the substantive claims raised. This reading of *American Pipe* is too uncritical. Savvy plaintiff lawyers are aware of the benefits of this approach to the doctrine, and have exploited it precisely to serve this purpose of extending limitations periods by filing class actions that in truth have no hope of certification.[23] The problem for both sides is that the oftentimes successful attempt to expand limitation periods delays resolution of mass torts, to the detriment of plaintiffs who did file their suits in a timely manner and defendants who seek to put a mass tort behind them.

The reasoning of the *American Pipe* decision does not translate well to the mass-tort context. First, because mass-tort cases are almost never certified, they are not the kinds of cases that present certification decisions that hinge on subtle distinctions. Parties on both sides can safely predict that certification will be denied; the only question is when. Reliance on a pending class is thus unreasonable in the mass tort context. The case in *American Pipe*, by contrast, was one of a genre of cases whose prospects for certification entailed "considerations that may vary with... subtle factors" and thus made difficult "successful anticipation of the determination of the viability of the class,"[24] making reliance on the possibility of certification reasonable.

Furthermore, the individualized nature of personal injury claims is such that a defendant is not fairly put on notice of all the claims against him by the filing of a class action. Such cases typically involve widely varying facts with respect to the nature of the injury, the character and duration of exposure to the harmful product, family and medical history, the content of any warning read by or available before or at the time of injury, and a host of other factors unique to each plaintiff. Not surprisingly, each case in a mass tort requires extensive individualized discovery, involving "evidence, memories, and witnesses" that are unique to each case, including, by way of example, family members, treating physicians, and other witnesses and documents to which defendants cannot possibly have access without knowing the actual identity of each plaintiff. Defendants have no way of knowing the number of claims that would be encompassed by such an action, let alone the identities of the witnesses or their evidence. Personal injury suits in the mass tort context are thus unlike the *American Pipe* case, in which the Court noted the "probability of common issues of law and fact,"[25] and in which there could be no doubt that individual claims "invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit."[26]

In addition, as previously discussed, extending the doctrine to mass-tort personal injury cases has encouraged plaintiff lawyers to file class actions merely to achieve an illegitimate tolling benefit for unnamed members of the purported class. They are thus precisely the kinds of cases Justices Blackmun and Powell warned about in their concurring opinions in *American Pipe* and *Crown, Cork*. In mass tort personal injury cases, tolling serves no efficiency purpose—the solitary virtue of *American Pipe* tolling—because the vast majority of plaintiffs file individual complaints notwithstanding the hypothetical availability of class-action tolling. Indeed, in many cases *American Pipe* is all the more unnecessary in light of tolling agreements reached by parties which waive limitations defenses for those plaintiffs who sign up before the time on their claims has run out. By saving the courts from excess filings, plaintiffs who sign such agreements serve the purposes of *American Pipe*. It would thus be redundant at best and counterproductive at worst to apply *American Pipe* tolling to the mass tort context.

Finally, class action tolling in the context of mass tort proceedings also leads to injustice. If plaintiffs are allowed to slumber and not assert their claims while others have pursued their claims in mass litigation, the parties—plaintiffs and defendants alike—cannot get a grasp of the size or scope of the litigation until years after the deadlines contemplated by the applicable statutes of limitations. Without understanding the size or scope of the litigation, the parties are shackled in searching for ways to resolve the litigation, leaving the claims of individual plaintiffs—some of whom may be ill or elderly, languishing until the doors are deemed closed.

Not every court has been blind to the disconnect between the policy underpinnings of *American Pipe* and the realities of mass tort litigation. Several jurisdictions have held that *American Pipe* tolling is simply unavailable for mass-tort personal injury cases. These courts have looked to the purposes of *American Pipe* and found them to be ill-served by applying the doctrine to such cases, because mass tort personal injury cases are widely recognized as uncertifiable and because the varying nature of personal injury claims are such that the details of one plaintiff's case do not generally put a defendant on notice of the claims of nameless class members. On the basis of these considerations, the more carefully reasoned opinions on the issue have uniformly rejected tolling.[27]

Other courts have limited the application of *American Pipe,* but have thus far refused to discard it fully in the mass-tort context. In New Jersey, for example, an appellate court held that *American Pipe* should be available in mass-tort litigation, but strongly suggested that such tolling should be available only where a plaintiff seeking to avail himself of its tolling benefit could prove that he actually relied upon a pending class action.[28] Other states have limited *American Pipe* tolling to class actions that were filed in courts within the same state, refusing to allow "cross-jurisdictional" tolling.[29] These rulings constrain the application of *American Pipe* tolling in the mass tort context, but they all proceed from the premise that such tolling should be available in the first place. Courts that have not already addressed the issue should go further and bar or substantially limit the application of *American Pipe* tolling in mass tort personal injury cases.

CONCLUSION

The *American Pipe* doctrine is an ill-suited transplant for mass tort personal injury litigation. Although a parallel exists at the most general level between the facts of *American Pipe* and the average mass tort plaintiff defending the timeliness of his or her claim by pointing to a pending personal injury class action—both address the intersection between class actions and statutes of limitations—the reasoning of *American Pipe* simply does not translate in this foreign context. Neither of the purposes served by tolling in *American Pipe*—efficiency of the litigation and fair notice to defendants of the number and nature of claims against them—is served by tolling in the mass tort context. To the contrary, it is the potential abuses warned of, but not present, in *American Pipe* that are facilitated by the application of its tolling rule in the mass tort setting. For these reasons, courts should carefully analyze claims for tolling in mass tort cases and decline the invitation to follow *American Pipe* as a universal rule.

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Endnotes

1 414 U.S. 538 (1974).

2 *See, e.g.*, Foster v. Harris, 633 S.W.2d 304, 305 (Tenn. 1982).

3 *Id.* Some states observe a stricter rule, under which a claim accrues upon discovery of injury, even if the identity of a tortfeasor is unknown. *E.g.*, Robinson v. Graves, 456 So. 2d 793, 794-95 (Ala. 1984) (holding that tolling of statute of limitations in absence of a known defendant is only possible by filing a claim against a fictional defendant). A shrinking minority of states observe no general discovery rule at all. *E.g.*, Johnston v. Dow & Coulombe Inc., 686 A.2d 1064, 1065-66 (Me. 1996) (explaining discovery rule is recognized only in "three discrete areas: legal malpractice, foreign object, and negligent medical malpractice and asbestosis"); *see also* Griffin v. Unocal Corp., No. 1061214, --- So. 2d ---- (Ala. Jan. 25, 2008) (adopting discovery rule for period during which a plaintiff is unaware of latent injury).

4 Burnett v. N.Y. Cent. R. Co., 380 U.S. 424, 428 (1965) (quoting Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944)).

5 *Id.*

6 *See* Martin v. Dalkon Shield Claimants Trust, No. 93-2652, 1994 U.S. Dist. LEXIS 16395, at *11-12 (E.D. Pa. Nov. 20, 1994).

7 *Id.*

8 *Id.* at *11.

9 *E.g.*, Miller v. A.H Robins Co., Inc., 766 F.2d 1102, 1106 (7th Cir. 1985).

10 414 U.S. 538, 554 (1974).

11 Originally, *American Pipe*'s rule applied only to "purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status," *id.* at 553, but the rule was later extended. *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 350 (1983) ("[t]he filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' not just as to intervenors" (quoting *American Pipe*, 414 U.S. at 554)).

12 *Id.* at 550.

13 *Id.* at 553.

14 *Id.* (quoting State v. Am. Pipe & Constr., 473 F.2d 580, 584 (1973)) (omitting footnote).

15 *Id.* at n.9.

16 *Id.* at 552.

17 *Id.* at 553-54.

18 *Id.* at 554-55 (quoting Burnett v. New York Central Railroad Co., 380 U.S. 424, 428 (1965)).

19 *Id.* at 555.

20 *Id.* at 561 (Blackmun, J., concurring).

21 *Id.* at 562.

22 *See* Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 355 (1983) (Powell, J., concurring) ("[W]hen a plaintiff invokes *American Pipe* in support of a separate lawsuit, the district court should take care to ensure that the suit raises claims that 'concern the same evidence, memories, and witness as the subject matter of the original class suit,' so that 'the defendant will not be prejudiced.'" (quoting *American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring))).

23 *See* Mitchell A. Lowenthal & Norman Menachem Feder, *The Impropriety of Class Action Tolling for Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 573 (1996) ("The message, at least to cynics, is that by filing a class action on behalf of the client you found today you may be able to represent the client you only find tomorrow.").

24 414 U.S. at 553-54,

25 *Id.* at 553.

26 *Id.* at 562 (Blackmun, J., concurring).

27 *See, e.g.*, Jolly v. Eli Lilly & Co., 751 P.2d 923, 937-38 (Cal. 1988) (admonishing that personal injury plaintiffs "would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations. *The presumption, rather, should be to the contrary....*" (emphasis added)); *see also* Philip Morris USA, Inc. v. Christensen, 905 A.2d 340, 358-60 (Md. 2006) (expressing support for *Jolly*'s presumption against tolling in the mass tort context); *In re* Rezulin Prods. Liab. Litig., MDL No. 1348, 2005 WL 26867, at *3 (S.D.N.Y. Jan. 5, 2005) (noting that the "wisdom of adopting the *American Pipe* rule in mass tort cases is, to say the least, highly debatable"); Barela v. Showa Denko K.K., No. 93-1469 LH/RLP, 1996 U.S. Dist. LEXIS 7830, at *16 (D.N.M. Feb. 28, 1996) (expressing doubt whether a federal court should adopt *American Pipe* tolling for a state that had not adopted the doctrine in a mass-tort personal injury case in light of the fact that "most federal courts... refuse to permit the use of the class-action device in mass-tort cases" (citation and internal quotation marks omitted)).

28 *See* Staub v. Eastman Kodak Co., 726 A.2d 955, 967 (N.J. Supr. Ct. App. Div. 1989).

29 *See, e.g.*, Portwood v. Ford Motor Co., 701 N.E.2d 1102, 1103, 1105 (Ill. 1998).

FACTA Truncation:

Applicable to the Digital World?

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customer selects the item(s) for purchase and begins the checkout process. The process varies to some extent between retailers, but generally speaking the first step will be to provide identification and contact information such as your name, address, the shipping address (if different than the billing address), an email address for confirming emails, and a retyping of your email address to confirm it and other non-financial information. Often, that non-financial identification information is confirmed with the next screen, identifying either that the information has been input correctly or—as many online shoppers are all too familiar—that the highlighted boxes where the customer has failed to provide the information or input it incorrectly.

Once the name, address, and contact information are conveyed the customer is asked to provide financial information to begin the process of making the purchase. That information includes the type of credit or debit card you are using (VISA, MasterCard, Discover), your credit card number, your expiration date, and your CVV code number (often referring you to the three digits on the back of your card or four digits on the front.) [7] Typically, after inputting the financial information, that information, along with your order, are confirmed on the next screen. Once the order is placed, you may receive any combination of (1) an order confirmation email, (2) an order shipped email, and/or (3) a receipt email. Sometimes, rather than a receipt sent by email, the receipt is shipped with the product.

Comparatively, the online transaction is more complex and contains multiple steps, unlike the simple and routine credit or debit transaction at a brick and mortar retailer. Consequently, the online transaction does not lend itself cleanly and easily to a FACTA analysis—but that has not deterred plaintiffs from seeking its application and courts from wrestling with FACTA's scope.

The Courts Begin to Weigh-In

Three cases in particular have begun to shape the landscape for internet transaction FACTA cases—*Stubhub,*[8] *MovieTickets.com,*[9] and *Bose.*[10]

Stubhub. The *Stubhub* case, decided July 2, 2007, was the first to comment on one of the key issues unique to FACTA internet cases: can the requirement that the

defendant "electronically print" the receipt be satisfied by an electronic email receipt sent to the plaintiff?

Stubhub is an online ticket broker for concerts and sporting events and, according to its website, "[t]he largest ticket marketplace in the world, based on sales."[11] According to the plaintiff, Stubhub violated FACTA by "provid[ing] Plaintiff with one or more electronically printed receipts on each of which Defendants printed… the expiration [date] of Plaintiff's credit or debit card."[12] These alleged "electronically printed receipts" were emails sent to the plaintiff. Stubhub moved to dismiss the plaintiff's complaint, arguing that it "does not and indeed cannot state a claim for relief under [15 U.S.C. §] 1681c(g) because [Defendant] did not 'print' the [receipt] within any reasonable interpretation of the word."[13]

The court correctly noted that the term "print" is not defined in the statute.[14] The court further stated that "the statute should be construed to give the term its ordinary meaning,"[15] and that "[d]ictionary definitions are commonly consulted to 'clarify'… ordinary meanings."[16]

With that, the court seemed poised to entertain the battle of competing definitions. *Webster's Third New Int'l Dictionary* provides that "print" means "to make an impression in or upon."[17] But the court noted that, for example, the *Merriam-Webster's Collegiate Dictionary*, 10th ed., defines "print" as "to display on a surface (as a computer screen) for viewing." It seemed like a fair fight until the court held that even the definition cited by Stubhub supports the plaintiff's position. Without any elaboration, it held that "Plaintiff's [Complaint] is consistent with the claim that Defendant 'made an impression' on Plaintiff's computer screen including credit or debit card information in violation of 15 U.S.C. § 1681c(g)."[18] Concluding that an email is sufficient to meet the print requirement, the motion to dismiss was denied.[19]

Interestingly, however, although the motion was denied and the court had made no finding that the statute was ambiguous on its face, the court went on, in dicta, to address the "intent of Congress" in enacting FACTA. The court stated, "had Congress desired [to exclude online transactions], they would have explicitly done so, as they did for 'transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by and imprint or copy of the card…. Failure to do so supports Plaintiff's interpretation of 'print' as being facially reasonable."[20] But in *MovieTickets.com* the same "language of the statute" analysis was considered—with a quite different result.

MovieTickets.com. On February 13, 2008, Judge Gold of the United States District Court, Southern District of Florida, expressly declined to follow *Stubhub* and *1-800-Flowers.com*, "because neither considered the plain meaning of the word 'printed,' within the context of the entire § 1681c(g)…."[21] On that basis, the court granted defendant MovieTicket.com's motion to dismiss.

In that decision, it noted that "[a]lthough the word 'print' in § 1681c(g) is not defined in the statute, the meaning of 'print' in § 1681c(g) is crucial to this case."[22] In attempting to determine the meaning of "print," the court said that several canons of statutory construction guided its analysis of these issues.[23] In applying the canons of statutory construction, the court stated:

> [C]ourts always begin the interpretation of a statute by looking at the plain language of the statute itself[24]…. Court's 'read the statute using the normal meanings of its words,' while considering the entire context of the statute[25]…. To this end, canons of construction are tools which assist courts in focusing on the context of the entire statute, as opposed to looking at one word in isolation[26]…. Applying these canons of statutory construction, I conclude that the plain meaning is evident from the language of the statute.[27]

To that end, the court held that, "[b]y emailing Plaintiff an 'Order Confirmation,' Defendant has not printed a receipt under 1681c(g)."[28] The court, in so holding, stated that "Plaintiff does not allege that Defendant ever sent Plaintiff physical, paper copy of the emails at issue."[29] Here, the court also relied upon a dictionary definition of "print," this time turning to *Webster's New World Dictionary*, 2d College Ed.:

> 1. to mark by pressing or stamping; make a print on or in 2. to press or stamp (a mark, letter, etc.) on or in a surface 3. to draw, trace, carve, or otherwise make a (a mark, letter, etc.) on a surface 4. to produce on the surface of (paper, etc.) the impression of ink type, plates, etc. by means of a printing press….[30]

The court stated that based on these dictionary definitions of "print," one draws the "common sense impression that a 'printed' item is something physical and tangible that can be impressed or marked upon, such as a printed paper."[31] Confirming his common sense impression, Judge Gold stated that "[w]hen § 1681c(g) is looked at as a whole, it is clear that this subsection focuses on paper receipts electronically printed by a cash register or other machine and provided to consumers at the point of sale or transaction."[32]

In contrast to *Stubhub*, where the court concluded that the statute was silent on excluding internet transactions from FACTA's scope, the *MovieTickets.com*

court found silence to have a different impact. "[T]he language of the statute only addresses printed receipts [meaning, according to this Court, physically printed on paper at the point of sale].... Congress included no language to specifically extend the statute's restrictions to email transmissions, and such silence is controlling."[33]

Bose. In *Ehrheart v. Bose Corporation,* the United States District Court for the Western District of Pennsylvania wrestled with a different issue. In *Bose* the issue was where (or when) the "point of the sale or transactions" lies in an internet FACTA case.[34]

The facts were simple and undisputed. The plaintiff—about one week after FACTA went into effect—telephoned the Bose Factory Store to purchase headphones with her credit card.[35] The headphones were shipped and there was a receipt in the package, exactly as she would have received in the store, containing her credit card's expiration date.[36] Although Ehrheart did not experience identity theft or any other harm as a result of the receipt containing her credit card's expiration date, she filed suit against Bose—one of several she filed against various defendants under FACTA—seeking statutory damages, and to certify a class of similarly situated individuals.[37]

Bose argued that because the order was taken over the phone, Ehrheart was not provided an electronically printed receipt at "the point of the sale or transaction."[38] Bose argued that the point of the sale or transaction "denotes a "precise location within a store."[39] Ehrheart responded that "the phrase [point of the sale] refers not to a place, but 'to an event in time, *i.e.*, when payment (or exchange) is being made with a merchant.'" [40]

The court, finding that this was a question of first impression, denied the underlying motion, concluding that FACTA could apply even though the transaction took place over a phone, and not face-to-face. In reaching that conclusion, the court also commented not that there is not a point of sale (a physical location) because it is a telephonic transaction, but rather, that the point of sale is a "time or event":

> The Plaintiff points out that although Congress has used the term "point of sale" to apply to a location, it has also used the phrase to identify a point in time. For example, Section 707(b)(5) of the National Oilheat Research Alliance Act of 2000, 42 U.S.C. § 6201, (repealed), addressed assessments on oil imported by the owner "after the point of sale". *See* § 707(b)(5). She also cites case law in which the term "point of sale" was used to refer to a foreclosure sale in a bankruptcy proceeding. *In re Lenton Brunson McGill*, 78 B.R. 777, 779 (Bankr.D.S.C.1986). According to Ehrheart, logic requires the court to find that the phrase "point of sale or transaction" is ... meant to refer to the sale or transaction itself, thereby excluding all other instances where a cardholder may, for legitimate reasons, request and be provided with a receipt bearing their [sic] credit/debit card information."
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> * * *
>
> Having carefully reviewed the parties' submissions on this issue against the background of relevant law, the court is convinced that there is no definitive legal authority addressing the meaning to be assigned to the phrase "point of sale or transaction" as that phrase is used in FACTA. The words do not appear to have a fixed meaning, but have been defined instead by the context in which they are used. The term has been applied to denote a time or an event, as opposed to a location.[41]

With these three cases the courts have begun to wrestle with the question of whether FACTA applies to internet transactions and, if so, how it applies. The decisions reflect that the issue is far from settled. The vast differences between them raise yet another interesting question: if the courts cannot agree on whether FACTA applies to internet transactions, how can any retailer have acted willfully (knowingly or recklessly) in allegedly violating the statute?

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Endnotes

1 Ted Frank, *Omission in FACTA Might Be Windfall for Plaintiff's Bar*, Class Action Watch, September 2007; Shawn J. Organ & Mark Herrmann, *If Your Company Accepts Credit Cards, You Need to Read This*, The Metropolitan Corporate Counsel, October 2007; Shawn J. Organ & Kasey Ingram, *FACTA Truncation – A Small Answer to Identity Theft or a Big Problem for Businesses?*, CCH Financial Privacy Law Guide, Oct. 17, 2007.

2 The Fair Credit Reporting Act ("FCRA"), 15 U.S.C § 1681c(g)(1).

3 There are cases alleging a violation of the truncated credit card number requirement, but they are relatively few.

4 In the suit against Cost Plus the court noted that the company's net worth is approximately $316 million, with net income for fiscal 2005 of approximately $20 million, yet plaintiffs were seeking between $340 million and $3.4 billion for alleged violations related to the truncation of the expiration date. Spikings v. Cost Plus, Inc., Case No. CV 06-8125-JFW (AJWx), 2007 U.S. Dist. LEXIS 44214, at *4 (C.D. Cal. May 25, 2007).

5 § 1681c(g):

(g) Truncation of credit card and debit card numbers

(1) In general

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business

shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transactions.

(2) Limitation

This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.

(3) Effective date

This subsection shall become effective –

(A) 3 years after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and

B) 1 year after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.

6 There is active debate over what, if any, import the expiration date has related to identity theft. "Some credit industry watchers believe that, like the appendix, a credit card expiration date is one of those things that used to be a lot more practical than it is now." Dana Dratch, *Why Do Credit Cards Expire?*, www.bankrate.com/brm/news/cc/20050202a1.asp. While one credit card company and some banks acknowledge that the expiration date provides one more verification point for fraud protection *in manually processed transactions* (if expired, the card is rejected), in the United States that is of little significant because manually processes transactions are rare. *Id*. What all banks agree upon, however, is that having an expiration date allows: (1) the card to be replaced periodically, before the magnetic strip wears out; (2) updates to the magnetic strip, where information is stored, and (3) the bank a reason to be in communication with their consumer every so often to market other services. *Id*.

7 This is the Card Verification Value code ("CVV"). This is an authentication feature developed by the credit card companies to reduce fraud in internet transactions. It requires the cardholder to enter the information during the transaction to prove that the consumer has the card in their hand. It is a three or four digit code that provides a cryptographic check of the information embossed on the card. Each credit card company has its own name for the CVV code, but it works the same for each credit card company. Visa refers to the code as "CVV2"; MasterCard calls it "CVC2"; American Express and Discover refer to the code as the "Card ID" or "CID".

8 Vasquez-Torres v. Stubhub, Inc., Case No. CV 07-1328 (PSG) (SSx), 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. July 2, 2007)

9 King v. MovieTickets.com, Case No. 07-22119-Civ-Gold/Turnoff, Order Granting Motion to Dismiss (S.D. Fla. Feb. 13, 2008) at 11 (MovieTickets.com Decision at __").

10 Ehrheart v. Bose Corp., Case No. 07-350, 2008 WL 64491 (W.D. Pa. Jan. 4, 2008).

11 Http://stubhub.com/about-us.

12 Vasquez-Torres v. Stubhub, 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. July 2, 2007) at *1.

13 *Id.* at *2.

14 *Id.*

15 *Id.* at *6 (citing BP Am. Prod. Co. v. Burton, 127 S.Ct. 638, 643, 166 L. Ed. 2d 494, 502 (2006).

16 *Id.* at *6-*7 (citing U.S. v. Carter, 421 F.3d 909, 911 (9th Cir. 2005)).

17 *Id.* at *7.

18 *Id.*

19 In a similar case, *Grabein v. 1-800-Flowers.com, Inc.*, Case No. 07-22235 (S.D. Fla. Jan 29, 2008)(Huck, J.), that Court also denied a motion to dismiss largely following the *Stubhub* analysis.

20 Vasquez-Torres v. Stubhub, 2007 U.S. Dist. LEXIS 63719 (C.D. Cal. July 2, 2007) at *9.

21 King v. MovieTickets.com, Case No. 07-22119-Civ-Gold/Turnoff, Order Granting Motion to Dismiss (S.D. Fla. Feb. 13, 2008) at 11 (MovieTickets.com Decision at __").

22 MovieTickets.com Decision at 6.

23 *Id.*

24 *Id.* at 6-7 (citing Snapp v. Unlimited Concepts, Inc., 208 F.3d 928, 934 (11th Cir. 2000).

25 *Id.* at 7 (citing Penn v. City of Montgomery, 381 F.3d 1059, 1062 (11th Cir. 2004)("We do not look at one word or term in isolation, but instead we look to the entire statutory text.").

26 *Id.* (citing CBS, Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1225 (11th Cir. 2001)).

27 *Id.* at 7-8.

28 *Id.* at 8.

29 *Id* at 10.

30 The court also noted that "Print," as defined in the online Merriam-Webster Dictionary (www.m-w.com), as of February 7, 2008, is (1)(a) "to impress something in or on" (b) "to stamp (as a mark) in or on something."

31 MovieTickets.com Decision at 9.

32 *Id.* at 10.

33 *Id.* (citing CBS, Inc. v. Primetime 24 Joint Venture, 245 F.3d 1217, 1226 (11th Cir. 2001)).

34 Ehrheart v. Bose Corp., Case No. 07-350, 2008 WL 64491 (W.D. Pa. Jan. 4, 2008).

35 *Id.* at *2.

36 *Id.*

37 *Id.*

38 *Id.* at *3.

39 *Id.*

40 *Id.*

41 *Id.* at *4 (citing *See e.g.,* Utica Mut. Ins. Co. v. Bancinsure, Inc., No: 4-06-cv664, 2007 WL 2860237 at * 11 (E.D.Missouri, September 25, 2007) (evaluating fraud after the point of sale when customers attempted to return purchases); Caremark, Inc. v. Goetz, 395 F.Supp.2d 683, 692 (D.Tenn.2005) (noting that insurer reimbursed at a lower rate for claim filed after the point of sale); Anderson v. Equitable Life Assur. Soc'y. of U.S., 248 F.Supp.2d 584, 592 (S.D.Miss.2003) (assessing whether there had been fraudulent concealment after the point of sale when plaintiffs were sent annual policy summaries); Ford Motor Co. v. Lloyd Design Corp., 184 F.Supp.2d 665, 676 (E.D.Mich.2002) (protecting trademarks required that court tolerate at least some confusion as to source or sponsorship after the point of sale).

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