

# Federal Class Action Developments



HERMAN N. (RUSTY) JOHNSON, JR.  
UNITED STATES MAGISTRATE JUDGE  
NORTHERN DISTRICT OF ALABAMA  
DECEMBER 1, 2017

# Recent Supreme Court Cases & Developments



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# *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017)

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- **Holding:** Federal courts of appeals lack jurisdiction under 28 U. S. C. §1291 to review an order denying class certification (or, as in this case, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice.
- Rule 23(f) (whereby a party must obtain permission from courts of appeals to appeal a class determination) remains the predominant vehicle for interlocutory review of class action grants or denials.
- 8-0

*CalPERS v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017)

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- **Holding:** The public pension fund's untimely filing of its individual complaint under Section 11 of the Securities Act of 1933 more than three years after the relevant securities offering is ground for dismissal under Section 13 of the act.
- The *American Pipe* tolling rule – whereby class actions toll the SOLs for individual claims – does not apply to statutes of repose.
- 5-4

*Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017)

*Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017)

*Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)

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- ***Spokeo Holding***: Because the Ninth Circuit failed to consider both aspects of the injury-in-fact requirements -- an injury in fact must be both concrete and particularized, but the Ninth Circuit's observations concerned only "particularization" -- its Article III standing analysis was incomplete.
- 6-2
- ***Pedro Holding***: plaintiff suing under Fair Credit Reporting Act suffered concrete injury when Equifax failed to promptly remove parents' defaulted bank account from her credit report.
  - Concrete harm akin to defamation, and plaintiff lost time attempting to resolve and credit score dropped.
- ***Perry Holding***: plaintiff suing under the Video Privacy Protection Act has Article III standing to sue for sharing of his viewing activity without consent.
  - Traditional harm involved.

- **Campbell-Ewald Holding:** 1) An unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the district court retains jurisdiction to adjudicate the plaintiff's complaint and class action claims.
- "We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."
- 6-3.
- *Family Med.*: "Thoughtful, well-reasoned decisions have emerged on both sides of the issue; however, there appears to be an emerging consensus against a finding of mootness."
- "[T]he Eleventh Circuit has held that even if such offers were successful in extinguishing the named plaintiffs' claims, "the class claims remain live, and the named plaintiffs retain the ability to pursue them." *Stein v. Buccaneers Ltd. Partnership*, 772 F.3d 698, 704 (11th Cir. 2014)

- **Holding:** a “primary defendant” represents one who may be directly liable to a class, and who may suffer potential exposure to a significant portion of the class and a substantial loss as compared to other defendants.
- CAFA home state exception to removal of minimal diversity class actions: 2/3 of class and primary defendant(s) are citizens of state where suit is filed. 28 U.S.C. § 1332(d)(4)(B).
- Class action remanded to state court because private company not a “primary defendant.”

# Heightened Scrutiny of Class Settlements

- *In re Subway Footlong Sandwich Marketing & Sales Practices Litigation*, 869 F.3d 551 (7th Cir. 2017)
  - Sandwich less than 12 inches.
  - Same amount of bread; baking process sometimes results in sandwich less than 12 inches.
  - Class settled for injunctive relief whereby Subway would take measures to ensure, to extent practicable, sandwiches are 12 inches; named plaintiffs \$500 incentive awards; class counsel \$525,000.
  - Settlement was “utterly worthless” and should have been “dismissed out of hand.”
  - Same odds of receiving sandwich less than 12 inches still exists after injunction.

# Pending Supreme Court Cases

*Epic Systems Corp. v. Lewis*  
*Ernst & Young LLP v. Morris*  
*National Labor Relations Board v. Murphy Oil USA*

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- Nos. 16-285, 16-300, & 16-307
- Oral Argument: October 2, 2017
- Statutes at issue:
  - Federal Arbitration Act, 9 U.S.C. § 2
    - ✦ Arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.””
  - National Labor Relations Act, 29 U.S.C. § 157
    - ✦ Employees shall have the right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection.
- Question Presented:
  - Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act.
  - Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis.

# *Cyan, Inc. v. Beaver County Employees Retirement Fund*

- No. 15-1439
- Oral Argument: November 28, 2017
- Statutes at issue:
  - Securities Litigation Uniform Standards Act of 1998 (SLUSA),
    - ✦ “No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging” either “(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security” or “(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.” 15 U.S.C. § 77p(b).
    - ✦ A defendant may remove “[a]ny covered class action brought in any State court involving a covered security, as set forth in subsection (b)” —thus allowing the preclusion determination to be made by a federal court. 15 U.S.C. § 77p(c).
    - ✦ The district courts shall have jurisdiction, concurrent with State courts, except as provided in section 77p of this title with respect to covered class actions, of actions to enforce any liability created by this subchapter. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. 15 U.S.C. § 77v(a) (ellipses omitted).
- Question Presented:
  - Whether state courts lack subject-matter jurisdiction over “covered class actions,” 15 U.S.C. § 77v(a), that allege only claims under the Securities Act of 1933.

# *Hall v. Hall*

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- No. 16-1150
- Oral Argument: January 16, 2018
- Statutes at issue:
  - 28 U.S.C. § 1291
    - ✦ The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . and the District Court of the Virgin Islands . . . .
- Question Presented:
  - Whether the clarity *Gelboim v. Bank of America* gave to multidistrict cases should be extended to single district consolidated cases, so that the entry of a final judgment in only one case triggers the appeal-clock for that case.

# Probable 2018 Amendments to Fed. R. Civ. P. 23

# Rule 23

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- **(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses**

- \* \* \* \* \*

- **(2) Notice.**

- \* \* \* \* \*

- **(B) For (b)(3) Classes.** For any class certified under Rule 23(b)(3)—**or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)**—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. **The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means.** The notice must clearly and concisely state in plain, easily understood language:

- \* \* \* \* \*

# Rule 23, cont.

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- (e) **Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified **class—or a class proposed to be certified for purposes of settlement**—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
  - (1) **Notice to the Class**
    - ✦ (A) **Information That Parties Must Provide to the Court.** The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.
    - ✦ (B) **Grounds for a Decision to Give Notice.** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:
      - (i) approve the proposal under Rule 23(e)(2); and
      - (ii) certify the class for purposes of judgment on the proposal.
  - (2) **Approval of the Proposal.** If the proposal would bind class members ~~under Rule 23(e)(3)~~, the court may approve it only after a hearing and **only** on finding that it is fair, reasonable, and adequate **after considering whether:**
    - ✦ (A) the class representatives and class counsel have adequately represented the class;
    - ✦ (B) the proposal was negotiated at arm's length;
    - ✦ (C) the relief provided for the class is adequate, taking into account:
      - (i) the costs, risks, and delay of trial and appeal
      - (ii) the effectiveness of any ~~the~~ proposed method of distributing relief to the class, including the method of processing class-member claims, ~~if required~~;
      - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
      - (iv) any agreement required to be identified under Rule 23(e)(3); and
    - ✦ (D) the proposal treats class members ~~are treated~~ equitably relative to each other.

# Rule 23(e), cont.

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- **(3) Identification of ~~Side~~ Agreements.** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- **(4) New Opportunity to Be Excluded.** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- **(5) Class-Member Objections.**
  - ✦ **(A) In General.** Any class member may object to the proposal if it requires court approval under this subdivision (e); ~~the objection may be withdrawn only with the court's approval.~~ **The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.**
  - ✦ **(B) Court Approval Required for Payment In Connection With an Objection** ~~to an Objector or Objector's Counsel.~~ Unless approved by the court after a hearing, no payment or other consideration may be provided ~~to an objector or objector's counsel~~ in connection with:
    - **(i) forgoing or withdrawing an objection, or**
    - **(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.**
  - ✦ **(C) Procedure for Approval After an Appeal.** If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

## Rule 23(e), continued

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- **(f) Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, **but not from an order under Rule 23(e)(1).** ~~if a petition for to appeal is filed~~ **A party must file a petition for permission to appeal** with the circuit clerk within 14 days after the order is entered, **or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf.** An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.
- \* \* \* \* \*

# CAFA Legislaton

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# Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017

- The first major proposed reform since the Class Action Fairness Act passed in 2005
- Passed by the House on March 9, 2017
- Purposes:
  - “Assure fair and prompt recoveries for class members and multidistrict litigation plaintiffs with legitimate claims.”
  - “Diminish abuses in class action and mass tort litigation that are undermining the integrity of the United States legal system.”
  - “Restore the intent of the framers of the United States Constitution by ensuring federal court consideration of interstate controversies of national importance consistent with diversity jurisdiction principles.”

# Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, cont.

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- **Highlights:**
  - Prohibits the federal court from granting certification of a class action seeking monetary relief for personal injury or economic loss unless the party seeking the class action proves that each class member suffered the same type and scope of injury as the named class representatives.
  - Prohibits the federal court from granting certification of a class action unless the class is defined with objective criteria.
  - Requires the class to provide a reliable and feasible way for the court to
    - ✦ Determine whether the class members falls within the class definition; and
    - ✦ Distribute any monetary relief to the majority of the class members
  - Requires putative class action complaints to include numerous disclosures to uncover and prohibit what the bill deems “conflicts of interest” between class counsel and class representatives
  - Requires discovery to be stayed during the pendency of any motion to transfer, motion to dismiss, motion to strike class allegations, or other motion to dispose of the class allegations
  - Requires class counsel to disclose third-party litigation funding
  - Limits MDLs to pretrial proceedings only by prohibiting the use of MDL procedures for any trial “unless all parties to the civil action consent to trial of the specific case sought to be tried.”