

CLASS ACTIONS OVERVIEW

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I. CLASS ACTIONS AND TORT REFORM HISTORY

- 1995 – PSLRA (Private Securities Litigation Reform Act)
 - One of only 2 vetos of Bill Clinton’s administration that were overridden (the other related to line item veto).
- 2005 – CAFA (Class Action Fairness Act)
- 2017(???) – FICALA (Fairness In Class Action Litigation Act)

II. CASE ORIGINATION

- a. Look around you (literally: in your house, your bills, your mail). Have friends and talk to them. Talk to co-counsel. Surf the web. Read.
 - Discover Card/Bank Payment Protection Plan cases
- Discover Financial Services has reached a \$10.5 million class action lawsuit settlement over allegations it duped its customers into signing up for the fee-based products: Discover Payment Protection (formerly known as Discover Account Guard), Identity Theft Protection (formerly known as Profile Protect), Wallet Protection (formerly known as The Register), and Credit Score Tracker. As a result, consumers who were enrolled in one of these products between 2004 and 2011 may be eligible to receive up to \$30 from the Discover product class action settlement.
- The proposed Discover settlement will resolve eight class action lawsuits filed across the country that were consolidated in February 2011 into *In Re: Discover Payment Protection Plan Marketing and Sales Practice Litigation*. The allegations in the Discover Payment Protection class action lawsuit include, among other things, that:
 - (1) Consumers were enrolled in Products without their consent;
 - (2) Discover and its sales agents misrepresented and omitted material facts regarding the cost of the Products;
 - (3) Discover and its sales agents misled consumers by hiding the true nature of telemarketing calls and misrepresenting that consumers would receive promotional materials prior to enrollment;

- (4) Discover misrepresented the date of enrollment for Products;
- (5) Consumers enrolled in Discover Payment Protection improperly were charged an amount equal to .89/100 multiplied by their account balance each month rather than .89 cents for each full \$100 of their account balance;
- (6) Certain consumers were enrolled in Discover Payment Protection despite being ineligible for benefits;
- (7) The fees for Products are unconscionably high; and
- (8) Consumers improperly were denied Discover Payment Protection benefits.

b. Key considerations.

- Arbitration Issues?
 - AT&T v. Concepcion: Federal Arbitration Act preempts state laws that prohibit class arbitration waivers in contracts.
 - Daily Fantasy Sports/DraftKings/FanDuel cases
- Other Cases Already Underway?
- Strong Liability?
- Viable Defendant(s)?
- Research, research, research.

c. Client Retention.

- Retainer/Contingency Fee Agreements.
 - Know Your State Rules/Requirements.
 - Duties of Class Representative.

III. COMPLAINT.

- Jurisdiction and Venue.
 - Federal or State?
 - CAFA Jurisdiction?
 - Citizenship of plaintiff?
 - Generac Order

- Substantive Facts.
 - Pleading standards
 - Twombly and Iqbal: Facts “plausibly give rise to an entitlement to relief”
- Claims.
 - Antitrust
 - Consumer Fraud/UDAP
 - Product Defect
 - Building Products
 - Mercury Marine/DD250 Motors case
 - Mercedes Benz Tele-Aid case
 - False Labelling
 - “All Natural”
 - Honest Company/Jessica Alba case
 - Civil Rights
 - Los Alamos National Labs case/Equal Pay Act
- Class Definition.
 - Class Period.
 - Nationwide, Multi-State or Single State Only.
 - Ascertainability.
 - CIRCUIT SPLIT -- The Third Circuit’s “heightened” standard requires that (1) the class is “defined with reference to objective criteria,” and (2) there is a “reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.” On the other hand, the minority of circuits, led by the Seventh Circuit, hold that the “administrative” concerns of ascertainability are properly addressed under

a careful application of Rule 23(a) and especially Rule 23(b)(3), and ascertainability only requires an objectively defined class.

IV. ORGANIZATION OF CASES AND COUNSEL.

- MDL Proceedings.
 - Motion Filed at JPML
 - MDL Hearings.
- Appointment of Interim Lead Counsel.
 - Co-Leads.
 - Executive Committees/Plaintiffs' Steering Committees.

V. CLASS CERTIFICATION

- Check Local Rules (CD of CA – 90 Day Rule)
- Discovery.
 - Rule 26(f) Conference.
 - Initial Disclosures, Document Requests, Interrogatories.
 - 30(b)(6) and 30(b)(1) Depositions.
 - Protective Orders.
 - Privilege Logs.
- Expert Report.
 - Communications Protected, except for
- (i) relate to compensation for the expert's study or testimony;
- (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
- (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.
 - Providing Expert w/ Documents.
 - Daubert Motions and Hearings.

- Class Motion.
 - 23(a)
 - Numerosity
 - Commonality
 - Typicality
 - Adequacy
 - 23(b)(3) – Damages.
 - Predominance of common issues
 - Superiority/Manageability
 - Trial Plan
 - 23(b)(2) – Injunctive Relief.
 - 23(c)(4) – Individual Issues.
 - Entran III
- Class Certification Hearing.
- 23(f) Appeal.

VI. TRIAL.

- NCAA Restricted Earnings Coach Litigation (Judge Vratil; District of Kansas 1998).
- Entran III (Judge Jackson; District of Colorado 2016).
- MO Corrections Officers/Pre and Post-Shift Activity (Judge Joyce; Cole County, MO 2017).

VII. SETTLEMENT.

- Mediation.
- Reverse Auction.
- Competing Camps.

- Entran II
- Preliminary Approval.
 - Notice.
 - Opt-Outs.
 - Objectors.
- Final Approval and Fairness Hearing.

VIII. CLAIMS ADMINISTRATIVE.