Consumer Products Litigation Update
MTMP
April 28, 2017 at the Wynn Hotel in Las Vegas
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The government through the FDA has an extremely limited bandwidth in monitoring the drugs manufactured by pharmaceutical companies. The Consumer Product Safety Commission ("CPSC"), as one of the smallest organizations in the government, provides even less oversight.[2] The reality is that manufacturers both in this country and around the world routinely sell defective products with relative impunity and scarce oversight, often to hundreds of thousands of people. Consumer products, as a topic, is rather all encompassing; it includes consumer products such as those products that compose a home, car, or hundreds of other consumer items that are routinely utilized by the public. These products are almost always cloaked in sham written warranties that are packed with terms that provide no substantive relief in the event of product failure and often contain one-sided arbitration clauses. Despite theses challenges, handling cases in this area can be lucrative and provide substantive relief to aggrieved purchasers of defective products.

This topic is scheduled to be a recurring presentation at future MTMP seminars. This particular paper reviews recent consumer product settlements, pending or potential areas for cases, and a look at a few recent and significant decisions that may impact this practice area. Finally, this paper will address the recent legislation that threatens all class actions and multidistrict litigation.

I. Recent Consumer Product Settlements

a. *MI Windows*, MDL No. 2333, U.S. District Court for the District of South Carolina, Charleston Division

On July 22, 2015, Plaintiffs' motion for final approval of class action settlement was granted. The cases involve allegations that windows manufactured by MI Windows and Doors, Inc. Contained a defect in the Glazing Tape that causes the windows to prematurely fail, resulting in water intruding into plaintiff's homes. At the time of sale, the Windows contained a defect that results in loss of seal at the bead along the bottom of the double pane glass. The loss of seal allows moisture to enter the inside of the Window, which then causes the Windows to fog up. After nearly 2 years of litigation, the parties entered into settlement whereby MIWD would repair all windows manufactured between July 1, 2000 and March 31, 2010.

Nationwide Settlement
Attorney Fees: $9,040,000

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[1] Assistance provided by Hunter Bryson, Whitfield Bryson & Mason, LLP, Raleigh office
[2] The Consumer Product Safety Commission is an independent agency of the United States government that seeks to promote the safety of consumer products by measuring the injury risk for products. They coordinate recalls, evaluate products that are the subject of consumer complaints for safety concerns, and develop uniform safety standards.

b. *Floor & Decor*, 1:15-cv-04316, U.S. District Court for the Northern District of Georgia, Atlanta Division

On January 10, 2017, Plaintiff's motion for final approval of class settlement was granted. Floor and Decor is a company who sold laminate flooring manufactured in China. Floor and Decor falsely advertised and warranted the flooring as complying with regulations restricting formaldehyde emissions issued by the California Air Resources Board known as the CARB standards. An excess of formaldehyde emissions in a home subjects residents to exposure of the gas for long periods, which can cause asthma, chronic respiratory irritation and other ailments including skin and breathing problems. The risk of health problems is significantly greater for children, the elderly, and others with acute sensitivities. Under the terms of the settlement, members can either receive a cash payment of $1.50 per square foot, or $3.00 of square foot worth of store credit. Floor and Décor also agreed to conduct home tests of the floor for any class member who requests it.

Nationwide Settlement
Attorney Fees: $4,666,666.67

c. *Chinese Drywall*, MDL No. 2047, U.S. District Court for the Eastern District of Louisiana

In December 2011, Knauf Defendants and L&W Supply Co. entered into a settlement agreement regarding claims against them in the Chinese Drywall Litigation. Knauf manufactured drywall that was purchased by thousands of consumers and installed in homes across the country. Kanuf manufactured gypsum drywall that is defective and emits levels of sulfur, methane and/or other volatile organic chemical compounds that cause corrosion of HVAC coils and refrigerator units, certain electrical wiring and plumbing components, and other household items, as well as create noxious, "rotten-egg-like" odors. It also causes allergic reactions, couching, sinus and throat infection, eye irritation, respiratory problems and other health concerns. As part of the settlement, a fund was created to remediate the homes to remove the defective drywall.

Nationwide Settlement
Attorney Fees: $160,000,000

d. *GAF Decking*, MDL No. 2577, U.S. District Court for the District of New Jersey

On February 27, 2017, final approval of class settlement was granted. GAF manufactures synthetic decking and is the largest manufacturer of synthetic decking in the United States. The decking is made of a composite material of wood fiber and came with a transferable 20-year warranty. Over time, the decking cracks, warps, swells, or expands well beyond what should be occurring with a product meant for the outdoors. In addition, mold and mildew or fungal substance appears that results in a slightly an unsightly and extensive discoloration over the entire decking. Eligible claimants would receive reimbursement of $2.51 per linear foot for

boards and fascia and $5.00 per linear foot for handrails. Further, eligible claimants would receive reimbursement of $2.37 per linear foot for labor.

Nationwide Settlement
Attorney Fees: Confidential

e. *Timber Tech Decking*, 1:14-cv-12409, U.S. District Court for the District of Massachusetts

The lawsuit was filed against TimberTech Ltd. ("TimberTech") and CPG International, Inc. Among other things, the lawsuit alleges that TimberTech XLM Mountain Cedar decking is subject to a defect that can cause the decking to, among other things, scorch (i.e., blacken) or fade (i.e., whiten) or manifest a surface film (i.e., blister). The lawsuit asserts a variety of claims against the defendants concerning the purported defects. The defendants deny any wrongdoing and any liability, and no court or other entity has made any judgment or other determination of any liability. Defendants have agreed to provide free replacement decking from a variety of lines and in a variety of colors because Mountain Cedar and Desert Bronze are no longer in production. In addition, for those who purchased TimberTech fasteners, free fasteners may also be supplied with the replacement decking. Additionally, members of the Settlement Class may be eligible for labor reimbursement at a rate of $4.50 per square foot for their existing TimberTech deck. Members of the Settlement Class may also be eligible for up to $100 for repair of any property damage caused by removal of the existing TimberTech Deck. Members of the Settlement Class who have not already received a replacement deck and elect not to take advantage of the repair and replacement option may be eligible for a one-time payment of $400.

Nationwide Settlement
Attorney Fees: $329,000

f. *Sears, Roebuck and Co. Front-Loading Washer Products Liability Litigation*, 1:06-cv-07023, U.S. District Court for the Northern District of Illinois

On February 18, 2016, final approval was reached ending nine years of litigation alleging certain Whirlpool designed washing machines sold by Sears were prone to stalling in the middle of a wash cycle. Specifically, the lawsuit alleges that Sears sold the Kenmore washer that contained a defect that would lead to clothes not being cleaned properly, including clothes being stained, as well as mold and mildew growing in machines. Around 10,500 class members had submitted their claims since preliminary approval. Customers who were forced to repair defective machines within a three-year warranty period will be fully reimbursed for their expenses, with no cap on the settlement funds.

Nationwide Settlement
Attorney Fees: $4,770,834

g. *Stevia Sweetener Litigation.*, 1:14-cv-00748, U.S. District Court for the Eastern District of New York

On April, 6, 2016, final approval was granted regarding a $1.5 million settlement between that the manufacturer of Stevia in the Raw, a sweetener for coffee and tea, and class members. The lawsuit alleged that Stevia in the Raw is in fact made of unnatural components despite being labeled all natural. Under the terms of the unopposed settlement, Cumberland agreed to change how it advertises its Stevia in the Raw products and class members will be entitled to a return of $2 per purchase, for up to eight purchases. The lawsuit said that the Stevia in the Raw isn't all natural since its made through extensive chemical processing and is made from genetically modified organisms and thus is not 100 percent natural.

Nationwide Settlement
Attorney Fees: $450,000

h. *Samsung Data Suit*, 3:12-md-02330, U.S. District Court for the Northern District of California

On August 25, 2016, a California judge granted final approval of a $9 million settlement between cellphone owners and Samsung, HTC and other mobile manufactures accused of using software that illegally collected user data. The software in question was a program on the phones that recorded keystrokes and message content. This program violates the Wiretap Act because the device manufacturer were able to intercept the contents of electronic communications through cell phones. The plaintiffs claim the cell phone companies were able to collect text messages, usernames, passwords and internet searches through the software. It is believed that nearly 79 million tablet and smartphone owners are covered by the settlement.

Nationwide Settlement
Attorney Fees: $2,250,000

i. *Hyundai Motor Engine Sui,* 3:15-cv-01685, U.S. District Court for the Northern District of California

On January 31, 2017, A judge gave final approval to Hyundai's settlement to owners of Hyundai Sonatas with defective engines. The Sonota engines had a defect in which the connecting rod is transported throughout the vehicles' engines via contaminated oil. This defect usually manifested after the warranty period expired and lead to catastrophic engine failure. Further, the engine was defective in that the channels of lubrication in the engine were insufficient and the engine failure was accelerated. Class members were eligible to receive all out of pocket money spent on repairs in full for vehicles within the class period. Many drivers had their Sonota quit while driving and some had sustained injuries as a result of engine failure.

Nationwide Settlement
Attorney Fees: $750,000

j. *Watts Regulator Company, a Plumbing Manufacturer*, 8:15-cv-00061-JFB-FG3, U.S. District Court for the District of Nebraska

On April 12, 2017 a plumbing supply company saw a judge grant final approval on a $14 million settlement between themselves and homeowners alleging defective water heaters caused massive plumbing damage to their homes. Watts Regulator Company manufactures water supply and heater connectors. The connectors are used in supplying water to common household appliances including toilets, faucets, washing machines, dishwashers, and icemakers. The water heater and connector were alleged to have a defective shut-off device and that the inner-tubing in certain connectors malfunction, causing major water damage. Class members are able to receive replacement connectors and 25% of all property damage that resulted from the Connectors.

Nationwide Settlement
Attorney Fees: $4,000,000

k. *Norcold Refrigerators*, 8:13-cv-00081, U.S. District Court for the Central District of California

On October 25, 2016 a California judge stamped final approval on a $36 million dollar settlement between Norcold and a class of consumers who alleged the company's gas absorption refrigerator that is typically installed in RVs and boats, have a cooling unit issue which may cause the boiler tubes to corrode and leak flammable gas which could increase the risk of a fire. Class members can receive reimbursement for all losses sustained from the refrigerator leaks or an extension of warranty coverage for their existing refrigerator. It is alleged that at least 2,000 fires were caused as a result of the gas leads from Norcold refrigerators since 1999.

Nationwide Settlement
Attorney Fees: $9,000,000

l. *Brasscraft Plumbing Products*, BC493276, in the Superior Court of the State of California, County of Los Angeles

On September 7, 2016, a California Judge gave final approval to a settlement between Brasscraft and consumers who alleged that its yellow brass plumbing components and subcomponents that are made from yellow brass are low quality. Specifically, it is alleged that the products are leaking and corroding through the corrosion process of dezincification, and such dezincification has served to impede the useful life of plumbing systems. The plumbing lines leak due to the corrosion of the Brasscraft products. The products are contained in connectors, integral fittings which are incorporated into the plumbing lines in homes as part of the original construction of their home. Class members may receive payment for replacement valves, and reimbursement for property damage due to Brasscraft leaks.

Nationwide Settlement
Attorney Fees: $5,000,000

m. *Subaru Hood Defect Litigation*, 1:15-cv-07210, U.S. District Court for the District of New Jersey

On September, 1, 2016, a New Jersey District Court judge has agreed to settle a class action alleging certain Subaru vehicles that have a Vehicle that causes the hood to fly open at high speeds and crack the windshield. The Lawsuit alleges that Subaru would not do anything to fix the defect plaguing 2006 B9 Tribecas despite the National Highway Traffic Safety Administration receiving 17 complaints regarding the issue. The named Plaintiff alleged the hood on her own Subaru flew open without warning in May 2015 while she was traveling 65 miles per hour. She managed to pull over to the side of the road despite having her view of the road blocked by the open hood. The impact of the hood cracked her windshield and knocked the review mirror out of place, she claimed. It is estimated that Subaru sold at least 18,000 of the vehicles at issue.

Nationwide Settlement
Attorney Fees: Confidential

n. *TurboTax Class Action*, 3:16-cv-02029, U.S. District Court for the District of New Jersey

On April 14, 2016, a New Jersey Judge approved a class action alleging that Intuit's TurboTax terms and conditions to try to avoid legal duties to consumers is a violation of the New jersey Truth in Consumer Contract, Warranty and Notice Act. The act is designed to prevent businesses from dodging too much of their legal responsibilities to consumers. By attempting to absolve Intuit from all possible liability, the TurboTax terms and conditions try to avoid legal duties to consumers that are well-established in New Jersey statutes and court opinions. Specifically, the terms in conditions said the company is not liable to those product users who may experience harm such as a computer virus, theft, deletion or breach of information. They also believe the language on the website improperly stripped consumers of their rights under the New Jersey Products Liability Act, Punitive Damages Act, and state Uniform Commercial Code. Violations of the TCWNA are $100 per violation.

Nationwide Settlement
Attorney Fees: Confidential

II. **Pending Consumer Product Cases**

a. Fieldturf, MDL No. 2779,

From 2005 to 2012, FieldTurf manufactured, marketed, and sold an artificial turf product called "Duraspine," to schools, colleges, and cities. FieldTurf advertised Duraspine as having a useful life of 10+ years. During this time, it is estimated that the company received $570 million in revenue from its Duraspine product. However, FieldTurf's internal documents reveal that as early as 2006 the company suspected Duraspine was defective based on early customer complaints. The Duraspine artificial turf was designed to "stand up" after heavy use. However, as time went on FieldTurf started to receive reports from customers that the artificial grass fibers were splitting, breaking off, and "laying down." A team of FieldTurf executives traveled to several athletic fields in 2007 to examine the Duraspine failures for themselves and found that their customers' complaints were true: the artificial grass fibers were splitting, breaking off, and

laying down. These fields had large areas where only black rubber pellets, called infill, was left. Despite these reports, FieldTurf continued to sell Duraspine to schools, colleges, and cities for hundreds of thousands of dollars per field. In 2011, FieldTurf filed a federal lawsuit against its sole supplier of the artificial grass fibers used to construct FieldTurf's Duraspine product. In its lawsuit, FieldTurf claimed that Duraspine had an inherent defect that caused the artificial grass fibers to prematurely break down due to sun exposure. FieldTurf and its supplier settled the case for an undisclosed amount. Despite this lawsuit alleging that Duraspine product was defective, FieldTurf continued to sell the product. Even more, numerous schools have reported that their complaints to FieldTurf were met either with silence or a denial of any problem. Other schools report that FieldTurf acknowledged the defect but offered a choice between replacing a field with more of the same defective product or paying $175,000 for a non-defective product. Numerous schools and other entities have now filed suit against FieldTurf. In response, FieldTurf filed a motion with the JPML for transfer and consolidation, which is currently pending

b. Roundup, MDL No. 2741, U.S. District Court for the Northern District of California

MDL 2741 is the Roundup Products Liability Litigation. As we all know, Roundup, which is manufactured by Monsanto, is non-selective herbicide used to kill weeds that commonly compete with the growing crops. Roundup contains glyphosate and a multitude of ingredients, specifically the surfactant Polyethoxylated tallow amine and or adjuvants and other so called "inert" ingredients. On March 20, 2015, the International Agency for Research on Cancer (IRAC) issued an evaluation of several herbicides, including glyphosate. The evaluation was based on studies of exposures to glyphosate in several countries around the world and it traces the health implications from exposure to glyphosate since 2001. The IRAC classified glyphosate as a group 2A herbicide, which means that it is probably carcinogenic to humans. They concluded that the cancers most associated with glyphosate exposure are non-Hodgkin lymphoma and other hematopoietic cancers including: lymphocytic lymphoma/chronic lymphocytic leukemia, B-cell lymphoma, and multiple myeloma. Nevertheless, Monsanto since it began selling Roundup, has represented it as safe to humans and the environment. Indeed, Monsanto has repeatedly proclaimed and continues to proclaim that glyphosate based herbicides, including Roundup, create no unreasonable risks to human health or to the environment.

c. *Atlas Roofing Corporation Chalet Shingle Products Liability Litigation*, MDL No. 2495, U.S. District Court for the Northern District of Georgia

Atlas is a roofing company who designs and manufactures roofing products, primarily shingles. Primarily, the shingles are used on residential homes. In order to comply with the applicable building codes and industry standards represented by Atlas, asphalt shingles are manufactured from a rolled glass fiber felt that is impregnated and coated with asphaltic material. Atlas markets that its Shingles are "Products that will give your home the curb appeal, lasting protection, and peace of mind needed to shelter your family and protect your investment." Over time, the shingles began to manifest a number of different defects. The Shingles are manufactured in a manner that permits moisture to intrude creating a gas bubble that permits blistering and cracking. Because the shingles blister, it leads to early granule loss and degradation in the life expectancy of the Shingles; thus, making them neither durable nor suitable for use as a building product.

d. *Ethicon, Inc., Pelvic Repair System Products Liability Litigation*, MDL No. 2337, U.S. District Court for the Southern District of West Virginia

Johnson and Johnson created the Gynecare Prolift designed to treat pelvic organ prolapse. The Prolift was and is offered as an anterior, posterior or total repair system. In a study published in August 2010 in the Journal of the American College of Obstetricians and Gynecologists, it was concluded that there is a high (15.6%) vaginal mesh erosion rate with the Prolift, "with no difference in overall objective and subjective cure rates. This study questions the value of additive synthetic polypropylene mesh for vaginal prolapse repairs." Numerous studies published in influential medical journals have reached similar conclusions. Upon information and belief, Defendants misrepresented the risks inherent in the use of the Product in its applications for approval to the FDA and to other governmental persons and/or agencies. The injuries and conditions that stem from the product include, mesh erosion, mesh contraction, infection, fistula, inflammation, scar tissue, organ perforation, dyspareunia, blood loss, neuropathic and other acute and chromic nerve damage, pelvic floor damage, pelvic pain, urinary and fecal incontinence, and prolapse of organs.

e. *Abilify Products Liability Litigation*, MDL No. 2734, U.S. District Court for the Northern District of Florida

Bristol-Myers Squibb manufactured Abilify, which is prescribed for depression, bipolar I disorder, and schizophrenia. Abilify is manufactured as tablets, oral solution, and injection. Abilify, when taken as prescribed and intended, causes and contributes to an increased risk of serious and dangerous side effects including, without limitation, uncontrollable compulsive behaviors such as compulsive gambling. In or around November 2015, Canadian regulators concluded there is "a link between the use of aripiprazole and a possible risk of pathological gambling or hypersexuality" and found an increased risk of pathological (uncontrollable) gambling and hypersexuality with the use of Abilify. Despite these warnings and advisories in Europe and Canada for the same drug sold to patients in the United States—the labeling for Abilify in the United States contains no mention that pathological gambling has been reported in patients prescribed Abilify.

f. *Lumber Liquidators Chinese-Manufactured Laminate Flooring Durability Marketing and Sales Practices Litigation,* MDL No. 2743, U.S. District Court for the Eastern District of Virginia

Lumber Liquidators manufactured Chinese Laminate hardwood flooring which was advertised and marketed as scratch resistant and durable laminate flooring. However, the Laminates are not AC3-compliant or durable. An AC3-rated laminate is considered in the industry as suitable for general household use, including high traffic areas such as hallways and kitchens. Lumber Liquidators on its website, describes the suitability of AC3- rated laminates as "Residential, heavy Traffic: Suitable for all areas." However, the laminates are not AC3 rated and are not AC3 compliant due to recent product testing. Such failures that have evidenced are: visible and unsightly scratching in normal everyday use, including but not limited to pet traffic;

wear patterns that expose and deteriorate the photographic paper layer of the laminate that is supposed to be protected by the wear layer for twenty five to thirty years; chipping; fading; warping; and staining.

o. *Takata Airbag Products Liability Litigation,* MDL No. 2599, U.S. District Court for the Southern District of Florida

Takata is a Japenese company who manufactures airbags installed in millions of vehicles from 10 different automotive companies in the United States. Generally, the number of lives saved and injuries prevented from airbags far outweighs the slight risk they pose. However, Takata airbags have killed 16 people worldwide and injured at least 150. In 2004 in Alabama, a Takata airbag exploded in a Honda Accord, shooting out metal fragments and severely injuring the car's driver. Honda and Takata could not explain it, and deemed it an anomaly. It would be until 2015 until Takata formally acknowledged the safety risk and issued a nationwide recall. A design defect in the airbag inflator-a metal cartridge containing a chemical propellant, can cause the inflator to rupture and shoot out metal shards in the vehicle. The airbag flaw has been described as "in effect a live hand grenade in front of a driver and a passenger." In 2015, the U.S. Department of Traffic hit Takata with a record $200 million fine for delaying and denying the release of information that could have prevented motorist harm. Then, in January 2017, Takata pled guilty to criminal misconduct and reached a $1 billion settlement with the U.S. Department of Justice. While $850 million of that sum is for automakers impacted by defective Takata airbags, and $25 million serves as a fine, and $125 million will be reserved for victim compensation. Still, victims of exploding Takata airbags continue to file personal injury lawsuits against the company.

p. *Pella Corporation Architect and Designer Series Windows Marketing, Sales Practices and Products Liability Litigation,* MDL No. 2514, U.S. District Court for the District of South Carolina, Charleston Division

Pella Corporation manufactures windows that are aluminum clad windows named the Designer and Architect Series windows. The Designer and Architect Series windows are defectively designed, in that the cladding permits water penetration to expose the interior woods components without adequate wood preservative, draining, or evaporation, as such the cladding causes and contributes to cause an increase in the moisture content of the wood components beyond their capacity to resist wood rot and microbial colonization. This wood rot resulting from the defective design and manufacture does not become visible upon ordinary inspection and is not detectible until years after installation. Many homeowners with the Designer and Architect Series windows often have moisture continuously and repeatedly cause damage in and around the Windows and to other property in the home including walls and floors. The windows permitted mold growth and mineral deposits that have affected the interior space.

III. **Discussion of Recent Significant Decisions**

a. *Briseno v. ConAgra*, ___ F.3d ___ (9th Cir. Jan. 3, 2017) – "Administratively Feasible"

ConAgra challenged the labeling of cooking oil as "100% Natural" when the oil is made from bioengineered ingredients. Court held that Rule 23 does not require plaintiffs to establish an "administratively feasible" means of identifying putative class members. This decision deepened the splits amongst circuits on whether Rule 23 requires putative class members to demonstrate "administrative feasibility" as a separate prerequisite to class certification. The 6th and 7th Circuits have also rejected the 3rd Circuit's "administratively feasible" requirement.

b. *Hoai Dang v. Samsung Electronics Co.*, Ltd. et al., Case No. 15-16768 (9th Cir.) - Arbitration

One of the great barriers for consumers in the class action context is arbitration clauses. Some companies place arbitration provisions in purchasing contracts (e.g. warranty booklets), which state that if you have an issue with the product, that the sole remedy is to go through arbitration on an individual basis.

Case alleges that the value of the Samsung Galaxy SIII has dropped due to Samsung's illegal patent infringement. Plaintiffs seek the money they lost due to the decrease in value of the phones. Samsung sought to have the case dismissed because there was an arbitration provision in the phones' warranty booklets. This warranty required consumers with a complaint to go to arbitration instead of through the court system. The lower district court held agreed with Samsung in that the plaintiff had to resolve his claims through arbitration. On January 19, 2017, the 9th Circuit reversed the lower court's decision. Specifically, the Court held that the Plaintiff was not given adequate notice that the warranty booklet contained an arbitration provision, nor did the plaintiff explicitly agree to the arbitration provision.

c. *Langan v. Johnson & Johnson Consumer Companies Inc.*, Case No. 13-cv-01471 D. Conn.) – recent class certification.

On March 13, 2017, federal judge for the District of Connecticut certified a class of consumers of Johnson & Johnson baby wash over its "Natural Oat Formula" labeling. Plaintiff argued that the label is misleading because the products contain Avena Sativa (Oat) Kernel Extract, as well as other ingredients. In reality, the products contain less than 1% natural non-water ingredients (the products contain over 60% natural ingredients if you count the water as a natural ingredient). The Defendant argued that the products really do use a "natural oat formual" apart from all the other chemicals in the product, so the product is not misleading. The judge granted class certification and, in the same order, denied both parties' motions for summary judgment.

Another interesting aspect of this case is that the defendant argued that because the class representative is a close personal friend of one of the lead attorneys and because she did not pay close attention to the case's progress throughout litigation, that she cannot be class

representative. The court rejected this argument stating that there is no requirement that a class representative have a detailed knowledge of the case and that there is not sufficient evidence that shows the representative's relationship with lead counsel creates no less than a fundamental conflict with the other class members.

d. *Spokeo, Inc. v. Robins*, 578 U.S. ___ (2016) – FCRA Pleading Requirements

Spokeo operates a "people search engine" which complies information on individuals. The allegations in this case were that Spokeo was a "consumer reporting agency" and thus subject to the FCRA compliance procedures. The plaintiff alleged that Spokeo violated the FCRA when it disseminated inaccurate information about him. SCOTUS hinted that Spokeo's "harmless" technical violations of the FCRA might not meet the Article III requirement that a plaintiff must suffer a "concrete" injury.

Even though the *Spokeo* decision was handed out less than a year ago, there has been a ton of litigation since post-*Spokeo* trying to grapple with what a "concrete" injury is.

IV. **Discussion of Class Action/MDL Bill**

The alleged "Fairness in Class Action Litigation Act," H.R. 985, would pose significant hurdles to class actions and give companies cart blanch to deceive innocent consumers en masse. It is far more egregious than the bill proposed in 2016 and seeks to place significant restrictions on class action attorneys while forcing none of the same limitations on the corporate defense attorneys. The Bill passed in the House of Representatives on March 9, 2017. Class action attorneys are lobbying strongly to defeat the proposed bill, which, among other things would impose the following restrictions on the ability to practice class action litigation:

Conflicts of Interest

Class action complaint to disclose relationship between class rep and counsel and "circumstances under which each class representative or named plaintiff agreed to be included in the complaint and shall identify any other class action in which any proposed representative or named plaintiff has a similar role. No class certification if the named plaintiff is a relative of, present/former employee of, present/former client of/has contractual relationship with class counsel (except for the class action, itself).

This section presumes conflicts of interest exist only for attorneys who represent victims of massive corporate wrongdoing and that corporate defense attorneys have no such conflicts. It presumes that plaintiff's lawyers inherently have conflicts that only Congress can resolve. However, no evidence exists to support such a problem, and longstanding ethics rules in each of the states govern conflicts of interest and discipline attorneys for wrongdoing.

- This is an overreach of license regulation.
- Prejudices plaintiff's attorneys who represent individuals.

- The section of the Bill is ridiculously broad in scope in terms of subsequent representation of clients.
- Restriction on contract.

Class Action Injury

No class certification if each class member didn't suffer "same type and scope of injury as the named representative."

- This is defined as same type and scope of injury as the named class representative. Many damages analyses are highly individualized yet arising out of the same theory of damage.
- Destroys ability of civil rights victims to join together to end discriminatory practices.

Class Member Benefits

- Ascertainability: Codifies and requires ascertainability, a standard used by some courts to identify class members. However, several circuit courts have found that ascertainability is an unnecessary requirement. The Judicial Conference, the policy-making arm of the federal courts, is finishing proposed amendments to Rule 23, and passed on an amendment on ascertainability because it is being sorted out in the courts.
- Limits on Attorneys' Fees: No attorneys' fees distributed until monetary recovery to class completed. This essentially keeps plaintiff's attorneys from being paid, while defense counsel is incentivized to drag out settlement processes while collecting a check.

Money Distribution

- Requirement to report settlement data to the Judicial Conference and to the House and Senate Judiciary Committees.
- Designed to frustrate settlements and increase costs.
- Attorneys cannot be paid until reporting is completed.
- Fees determined based upon claims made.

Issue Certification

Federal Rule of Civil Procedure 23(c)(4) permits courts to certify classes with respect to particular issues. The Bill seeks to eliminate issue classes, which would in turn eradicate class actions where injunctive relief is essential.

Stay of Discovery

- Automatic stay of discovery during MTD stage of litigation.

Third-Party Litigation Funding Disclosure

- Third party litigation funding disclosure.

- There is no reason why this should only apply to plaintiff's counsel.
- Harassment of individual consumers, investors and employees.

Automatic Appeals

Allows for automatic appeals from an order granting or denying class certification, whereas now there is discretion to do so.

- Will tie up appeals court and delay access to justice.

This legislation creates significant problems for class action litigation and access to justice. For example:

- Adds years of delay, expense and disruption: Automatic appeal, in the middle of every case of the class certification order. Adds 3 years to the life of the case.
- Civil Rights injuries are never identical and already subject to rigorous judicial review: have to show that each class member has suffered the same type of scope of injury. At early stages of litigation, often impossible to identify all victims or precise nature of each injury. But injuries may never be "the same" – some may have been overcharged different amounts, or in an employment case the extent of injuries may be dependent on range of factors like job, tenure, status, salary, etc. This would overturn well established SC precedent in the *Teamsters* matter from 4 decades ago.
- Early identification of class members is unnecessary: has been rejected by many circuits. Low value claims often only avenue for relief class action.
- Unworkable standards for attorneys' fees: fee shifting disrupted. Fees would be calculated based on value of equitable relief. Very difficult for a judge to put a price tag on much equitable relief.
- Conflicts of interest: entirely one sided, place burdens and restrictions to attorneys who represent victims of fraud. Implies conflicts only exist for plaintiff lawyers.