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Supreme Court Denies Class Certification In Antitrust Action Based On Failure To Prove Classwide Damages

Earlier this week, the Supreme Court emphasized the importance, in determining whether to certify a class action, of enforcing the requirement under F.R.C.P. 23(b)(3) that "questions of law or fact common to class members predominate" over individual questions. In *Comcast Corp. v. Behrend*, No. 11-864 (Mar. 27, 2013), the Court reversed a decision by the Third Circuit that had upheld class certification. The complaint alleged that Comcast had violated the antitrust laws by "clustering" its cable systems -- i.e., acquiring multiple systems in a metropolitan area -- and that such "clustering" raised the prices paid by cable subscribers because it discouraged potential competitors from "overbuilding" their own systems in the same area.

The Court ruled that class certification would be proper only if the plaintiffs could establish a classwide methodology for determining damages caused by the alleged exclusion of overbuilders. The plaintiffs' damages expert offered a classwide system for determining damages, but conceded that it included damages caused by factors other than the exclusion of overbuilders. The Court found that the need to separate out these other damages, which would require more individualized damage determinations for class members, meant that the plaintiffs had failed to show that a common question of fact -- the amount of damages -- was predominant. In reaching this decision, the Court rejected the holding of the Third Circuit that requiring such proof of damages at the class certification stage was improper and should be left for a determination at trial. The decision signals a continued willingness of the Court carefully to scrutinize decisions in the class certification area.

Supreme Court Restricts Right Of Plaintiffs To Avoid Removal To Federal Court Of Cases Under The Class Action Fairness Act

Under the Class Action Fairness Act, class actions filed in state court may be removed to federal court if, among other things, the aggregate value of the claims of the class exceeds a $5 million threshold. In *The Standard Fire Ins. Co. v. Greg Knowles*, No. 11-1450, (S.Ct. March 19, 2013), the Supreme Court held that removal could not be defeated by a stipulation in the complaint that it did not seek damages over that threshold. The Court reasoned that a class-action plaintiff in a case where no class has yet been certified lacks authority to bind the class by limiting its damages. Since, absent the stipulation, the aggregate damages of the purported class would have exceeded $5 million, the Court held that the case was properly removed.

Spouses May Waive Marital Privilege By Using Work Email To Communicate

The Fourth Circuit recently held that email communications between spouses sent through an employer's email system could not be considered "confidential" and, therefore, were not protected by the marital privilege. In *United States v. Hamilton*, No. 11-4847 (4th Cir. Dec. 13, 2012), a jury convicted the defendant of bribery and

extortion. The defendant had used his position as a member of the Virginia House of Delegates to help a public university obtain funding for a program in exchange for a job with that university. In emails he sent from his work account, he discussed with his wife their financial difficulties, their hope that the university would employ him, and how much income he hoped to earn from the university.

The Fourth Circuit rejected the defendant's argument that those emails were protected by the marital privilege on the ground that he had no reasonable expectation that they would remain confidential. The defendant's employer had implemented a computer policy in 2008 that required its employees to acknowledge (by pressing a key to log onto their computers) that they would have no expectation of privacy in using its computer system. Although the messages at issue were sent in 2006, the Fourth Circuit found that the defendant did not take any steps to protect the emails in question once the employer's policy was implemented and, thus, waived the marital privilege.

In-House Counsel's Failure To Preserve Leads To Default Judgment, Adverse Inference, And Monetary Sanction

In *Day v. LSI Corporation*, Docket No. CIV-11-186-TUC-CKJ, the United States District Court for the District of Arizona granted, in part, the plaintiff-employee's motion for entry of a default judgment and imposed additional sanctions against the defendant-employer, concluding that the employer's in-house attorney had a "culpable mind" and acted willfully in failing to carry out the company's preservation obligations.

The court found that even though in-house counsel immediately issued a written document retention notice after the employee complained of discrimination in an exit interview and after the employee's attorney sent the company a letter setting forth various contractual and other claims, the retention notice fell short of fulfilling the company's obligations because in-house counsel did not transmit it to all persons who he knew or should have known potentially had relevant knowledge and unduly limited the sources of documents to be searched and preserved.

Stored Communications Act Prevents Email Service Providers From Complying With Subpoenas For Content Of Emails

A recent Northern District of California decision has restricted the right of litigants to obtain certain information from third-party email service providers. The Stored Communications Act (SCA) prohibits a service provider from knowingly disclosing the contents of a wire, oral, or electronic communication, which is defined as "any information concerning the substance, purport, or meaning of that communication." In *Optiver Australia Pty. Ltd. & Anor. v. Tibra Trading Pty. Ltd. & Ors*., No. C 1280242 (N.D. Cal. Jan. 23, 2013), a trading firm sued several former employees in the Federal Court of Australia for allegedly copying its proprietary source code and using it to found a new company. Suspecting that many key emails were sent through Google email accounts, the firm filed for judicial assistance pursuant to 28 U.S.C. § 1782 (which authorizes the district courts to enforce discovery requests from foreign judicial proceedings) to serve a subpoena on Google for documents sufficient to identify the recipient(s), sender, subject, date sent, date received, date read, and date deleted of emails, email attachments, and instant messages during a specific time period from certain email addresses. The court partially granted a motion to quash the subpoena to Google because it held that the subject lines of emails and seeking information about emails containing certain terms would constitute "content" under the SCA.

For more information, please contact your Arnold & Porter attorney or one of the following:

Kenneth Chernof, Partner
Washington, DC
tel: +1 202.942.5940
Kenneth.Chernof@aporter.com

Phil Horton, Partner
Washington, DC
tel: +1 202.942.5787
Philip.Horton@aporter.com

John Lombardo, Partner
Los Angeles
tel: +1 213.243.4120
John.Lombardo@aporter.com

Brussels | Denver | London | Los Angeles | New York

Northern Virginia | San Francisco | Silicon Valley | Washington DC

arnoldporter.com