

## A QUICK LOOK AT THE RECENT INTERPLAY BETWEEN MDLS & CLASS ACTIONS

By Leslie Pescia

From *Campbell-Ewald* to *Tyson Foods*, this past year undoubtedly presented crucial choices for the United States Supreme Court concerning the future of class action litigation. Multidistrict litigation (“MDL”), however, also posed important opportunities for class action rulings that can have a significant impact. Currently, 271 MDL dockets are pending before federal courts across the country.<sup>1</sup> Recent MDLs within the past year included class actions over data breaches and consumer privacy issues, antitrust claims, a variety of sports cases, and the Telephone Consumer Protection Act, just to name a few.

During the twelve-month period ending September 30, 2015, the Judicial Panel on Multidistrict Litigation (“JPML”) centralized 38 new MDL dockets, many of which involve class actions.<sup>2</sup> One of those 38 new MDL dockets included the class action claims against Lumber Liquidators, *In re: Lumber Liquidators Chinese-Manufactured Flooring Products Marketing, Sales Practices and Products Liability Litigation*, which was the first centralized MDL in the Eastern District of Virginia (the infamous “rocket docket”) in almost ten years. Another vast MDL docket created in December was *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation* in the Northern District of California before Judge Charles Breyer.<sup>3</sup> While there are numerous new MDLs to keep an eye on with regards to class actions, already-established MDLs provided several rulings concerning class actions within the past year to watch as well.

### Data Breach Decisions

Recent JPML hearings have produced several MDL dockets for class actions over data breaches and privacy issues such as the Target and Home Depot data breaches, the Anthem medical data breach, and the Office of Personnel Management data breach.

### Author Spotlight

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Of these cases, *In re Target Corporation Customer Data Security Breach Litigation* provided a significant class certification ruling for financial institutions seeking certification for claims over a data breach.<sup>4</sup> In 2013, Target suffered a massive data breach compromising more than 40 million payment cards. Consumers and financial institutions initiated class action lawsuits against Target in the wake of the breach, seeking to hold the retailer liable for losses related to the breach. The cases were consolidated by the JPML in the District of Minnesota before Judge Paul Magnuson. On September 15, 2015, Judge Magnuson granted the financial institutions’ Motion for Class Certification, marking the first time a federal court certified a class of payment card issuers in a lawsuit based on a data breach. In analyzing the requirements of Rule 23, Judge Magnuson found that the claims were susceptible to class-wide proof and that class certification was appropriate even if damages could not ultimately be calculated on a class-wide basis.<sup>5</sup>

This decision provides beneficial precedent for future and current data breach class actions on behalf of financial institutions; however, Judge Magnuson did note that the injuries suffered by the financial institutions were not potential future injuries but rather expenses already incurred. Thus, he went on to reason that the individualized issues regarding causation and injury were not present with regard to the financial institutions’ claims, while noting that consumer claims may not provide the same scenario.

### Second Time’s a Charm

Sometimes, plaintiffs have to fight the certification hurdle multiple times throughout litigation. Defendants regularly attempt to get classes decertified, or an appeal requires that certification be reheard, as in *In re: Blood Reagents Antitrust Litigation*.<sup>6</sup> In 2009, class actions on behalf of direct purchasers of traditional blood reagents, products used to test blood compatibility between donors and recipients, were consolidated in the Eastern District of Pennsylvania before Judge Jan DuBois. These actions alleged that duopolists in the traditional blood reagent market engaged in a

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nationwide price-fixing conspiracy that led to a dramatic increase in prices.

Judge DuBois initially certified the class in August of 2012; however, after the United States Supreme Court rendered its opinion in *Comcast v. Behrend* requiring greater scrutiny of expert witnesses, the Defendant challenged certification. The Defendant argued that the plaintiffs' expert "cherry picked" certain documents instead of using techniques such as regression analysis. The Third Circuit agreed with the Defendant that greater scrutiny of the expert was needed and vacated class certification, instructing Judge DuBois to reconsider the ruling.<sup>7</sup> On October 19, 2015, Judge DuBois again granted class certification for the class of purchasers and held that *Daubert v. Merrell Dow Pharmaceuticals* did not require regression analysis.<sup>8</sup>

#### **Reining In Cy Pres**

In January 2015, the Eighth Circuit Court of Appeals issued an opinion concerning *cy pres* disbursements in *In re BankAmerica Corp. Sec. Litig.*<sup>9</sup> The MDL centralized in the Eastern District of Missouri dealt with class actions on behalf of shareholders alleging securities violations over the 1998 merger of NationsBank and BankAmerica to form Bank of America Corporation. The MDL court approved a \$490 million global settlement in 2002.<sup>10</sup> After two distributions, and almost ten years later, nearly \$2.4 million remained in the settlement fund, so a motion was made to distribute the remaining funds *cy pres* to three St. Louis charities, which the MDL court granted.<sup>11</sup> The Eighth Circuit, however, reversed the *cy pres* award finding the district court abused its discretion and ordered the district court to allow an additional distribution to the class then consider whether a *cy pres* award of the remaining funds would be appropriate.<sup>12</sup> The Eighth Circuit focused on the principles outlined by the American Law Institute and took the opportunity to "clarify" the legal principles underlying *cy pres* distributions.<sup>13</sup>

#### **Game On**

The past year brought some new sports-related MDLs with the NFL Sunday Ticket litigation and the Pacquiao-Mayweather Boxing litigation. Both *In re National Football League's "Sunday Ticket" Antitrust Litigation*, MDL No. 2668, and *In re: Pacquiao-Mayweather Boxing Match Pay-Per-View Litigation*, MDL No. 2639, were centralized in the Central District of California. Concussion suits have also been centralized into numerous MDLs, most of which are still pending:

- *In re: National Collegiate Athletic Association Student-Athlete Concussion Injury Litigation*, MDL No. 2492, is still pending in the Northern District of Illinois;

- *In re: National Hockey League Players' Concussion Injury Litigation*, MDL No. 2551, is still pending in the District of Minnesota; and

- *In re: National Football League Players' Concussion Injury Litigation*, MDL No. 2323, is still pending in the Eastern District of Pennsylvania.

*In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation*, MDL No. 2541, is also still pending in the Northern District of California. By the time of publication of this article, the JPML will also have decided if the fantasy of a fantasy football MDL will become a reality as both the DraftKings, Inc., and Fanduel, Inc., litigation will be heard by the panel on January 28, 2016, in Fort Myers, Florida.<sup>14</sup>

#### **Closing Time**

Merck & Co., Inc. finally saw an end to its MDL, *Merck & Co. Inc. Securities, Derivative, & ERISA Litigation*, in the U.S. District Court for the District of New Jersey. Merck's Vioxx problems have been news for more than a decade, including product liability suits, criminal charges, and millions of dollars in fines. While most of the suits concerning the company's painkiller settled a few years ago, the MDL class action on behalf of Merck shareholders had still been moving forward in the District of New Jersey. The shareholders brought claims against the drug manufacturer for failing to adequately inform them of the risks of Vioxx and misleading them about a study reporting that Vioxx caused five times more heart attacks than another painkiller. The investors further alleged Merck and its executives misrepresented the company's value and engaged in insider trading. Judge Stanley Chesler certified the class in January of 2013 and held that the shareholders' losses arose from the same conduct and, thus, could be evaluated on common proof. Prior to certification, though, plaintiffs informed the Court they no longer sought certification of claims under the Securities Act. In January 2016, Merck announced that it agreed to pay \$830 million to settle the shareholder claims in the MDL.<sup>15</sup> While Merck still faces some individual lawsuits on behalf of individuals who opted out of the class, it can finally close the book on the MDL.

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A handful of other MDLs came to a close within the last year as well, including *In re: Neurontin Marketing and Sales Practices Litigation*, MDL No. 1629, in the United States District Court for the District of Massachusetts, which officially ended in 2015 after Pfizer agreed to a \$325 million settlement in November 2014. *In re: Genetically Modified Rice Litigation*, before Judge Catherine Perry in the Eastern District of Missouri, was finally terminated on September 11, 2015, after nearly a decade of litigation and a \$750 million settlement with Bayer AG in 2011. Likewise, the Sony data breach litigation, *In re: Sony Gaming Networks and Customer Security Data Breach*, in the Southern District of California, ended in September 2015 after Sony agreed to a settlement prior to the class certification hearing.<sup>16</sup>

The past year brought many key decisions in MDLs across the country for class action issues, and the upcoming year is sure to do the same. This year, though, the U.S. Supreme Court decisions concerning class actions will likely shape the certification stages of the current MDLs in new ways.

1. Pending MDLs by District as of January 15, 2016; *available at*: <http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2672-TO-2015-12-08.pdf>
2. Statistical Analysis of Multidistrict Litigation, Fiscal Year 2015; U.S. Judicial Panel on Multidistrict Litigation; *available at*: [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Statistical\\_Analysis\\_of\\_Multidistrict\\_Litigation-FY-2015.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical_Analysis_of_Multidistrict_Litigation-FY-2015.pdf)
3. Pending MDLs by District as of January 15, 2016; *supra* n.1.
4. *In re Target Corp. Customer Data Sec. Breach Litig.*, 309 F.R.D. 482 (D. Minn. 2015).
5. *Id.* at 489.
6. *In re: Blood Reagents Antitrust Litigation*, 2:09-md-02081 (E.D. Pa.).
7. *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183 (3d Cir. 2015).
8. 509 U.S. 579 (1993).
9. No. 13-2620 (8th Cir. Jan. 8, 2015).
10. *See In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 704-05, 714 (E.D. Mo. 2002), and 227 F. Supp. 2d 1103 (E.D. Mo. 2002).
11. *In re BankAmerica Corp. Sec. Litig.*, No. 4:99-MD-1264, 2013 WL 3212514, at \*1, \*6 (E.D. Mo. June 24, 2013).
12. *In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060 (8th Cir. 2015).
13. *Id.*
14. JPML Notice of Hearing Session, December 16, 2015, *available at*: [http://www.jpml.uscourts.gov/sites/jpml/files/Hearing\\_Order-1-28-2016.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Hearing_Order-1-28-2016.pdf)
15. Sophia Pearson, "Merck to Pay \$830 Million to Settle Vioxx Securities Claims," Bloomberg, January 15, 2016, *available at*: <http://www.bloomberg.com/news/articles/2016-01-15/merck-to-pay-830-million-to-settle-vioxx-securities-claims>.
16. Multidistrict Litigation Terminated Through September 30, 2015, *available at*: [http://www.jpml.uscourts.gov/sites/jpml/files/JPML\\_Cumulative\\_Terminated\\_Litigations-FY-2015.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Cumulative_Terminated_Litigations-FY-2015.pdf).