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Is Your Life an Open Book?: Privacy Class Actions in the Age of Social Media

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FRALEY V. FACEBOOK, INC.: A CASE STUDY OF KEY ISSUES IN PRIVACY CLASS ACTIONS[1]

Introduction

Last December, in *Fraley v. Facebook, Inc.*, the United States District Court for the Northern District of California preliminarily approved a settlement between Facebook and a class of potentially 153 million members.[2] The *Fraley* plaintiffs alleged that Facebook's "Sponsored Stories" program had wrongfully used their names and photographs in commercial advertisements without permission.[3] They claimed that Facebook had violated California's Right of Publicity statute and Unfair Competition Law, and that Facebook's actions had resulted in unjust enrichment.[4] They sought injunctive relief, restitution, statutory damages, punitive damages, and attorneys' fees.[5]

Under the settlement agreement, Facebook will change its Terms of Use, make it easier for users to view and control account content eligible for Facebook to share as a "Sponsored Story," and provide additional access to existing parental controls to prevent the names and likenesses of their minor children from appearing in commercial advertisements on the site.[6] Facebook will also create a settlement fund of $20 million.[7]

Each member of the plaintiff class is eligible to receive a payment of $10,[8] which may be reduced on a pro rata basis, depending on how much is left in the settlement fund after payment of all other expenses.[9]

If the pro rata amount falls below $5, the Court can order a distribution of the funds to the *cy pres* recipients—non-profit organizations—in lieu of any distribution to class members.[10] If there are so many claimants that "it is not economically feasible to make any pro rata payment" to all of the claimants without exceeding the monies remaining in the settlement fund after payment of the other expenses, the balance will be distributed among the *cy pres* recipients.[11] Any *cy pres* contribution is to be divided among 14 selected organizations that "have a national focus on consumer protection, research, and education regarding online privacy and the safe use of social media, with a particular emphasis on protecting minors."[12]

Class members have until May 2013, to make a claim, object to the settlement, or opt out of the class entirely.[13] The Court will hold a Fairness Hearing in June to consider any objections and determine whether the parties' settlement agreement should be finally approved as "fair, reasonable, and adequate."[14] Plaintiffs' counsel has asked

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[1] This case study was prepared by Margaret I. Lyle, Of Counsel in Jones Day's Dallas office, and Jeffrey A.Mandell, an Associate in Jones Day's Washington office. The authors benefited greatly from the assistance and insight of M. Jerome Elmore, a partner at Bondurant Mixson & Elmore LLP in Atlanta. The opinions expressed here are those of the authors and do not necessarily reflect the views of their firms or the firms' clients.

[2] *See* Preliminary Approval of Class Settlement and Provisional Class Certification Order, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 252 (N.D. Cal. Dec. 3, 2012).

[3] *See* 2d Am. Compl., *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 22, at ¶¶ 2-3 (N.D. Cal. June 6, 2011).

[4] *See id.* at ¶¶ 107-135.

[5] *See id.* at ¶ 136.

[6] Amended Settlement Agreement and Release, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 235-1, § 2.1 (N.D. Cal. Oct. 5, 2012).

[7] *Id.* §§ 1.27, 2.2. The fund "shall be used for the payment of the costs of Taxes; Tax Expenses; Class Counsel's Fees and Costs; Plaintiffs' Incentive Awards; the costs incurred by the Escrow Agent and Settlement Administrator; the costs of delivering notice to the Class; and the claims of Authorized Claimants, and/or the distributions to *Cy Pres* Recipients." *Id.*

[8] *Id.* § 2.3.

[9] *Id.* § 2.3(a)(i).

[10] *Id.* § 2.3(a)(ii).

[11] *Id.* § 2.3(a)(iii).

[12] Def. Facebook, Inc.'s Mem. of Points & Authorities in Support of Joint Mot. for Preliminary Approval of Revised Settlement, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 240, at 37 (N.D. Cal. Oct. 6, 2012).

[13] *See* Preliminary Approval of Class Settlement and Provisional Class Certification Order, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 252 at ¶¶ 5-7 (N.D. Cal. Dec. 3, 2012).

[14] *See id.* at ¶ 13.

the Court to award each of the three class representatives an incentive payment of $12,500 and to authorize $7.5 million in attorneys' fees and more than $280,000 in litigation costs.[15]

More important (at least for present purposes) than the final outcome of the *Fraley* suit is what its procedural history teaches about the most pressing and contested issues in privacy class actions today. (The Appendix contains summaries of privacy class actions in which plaintiffs sought class certification over the last year and a half.[16]) The parties litigated a motion to dismiss that turned largely on the central questions of injury and standing. After plaintiffs' case survived that motion, the parties negotiated a settlement—only to have the Court initially reject their agreement because of concerns about the adequacy of the monetary and *cy pres* charitable relief.

Those two junctures of the *Fraley* litigation open a window into the most important issues facing courts and litigants applying the class action mechanism to privacy suits in our increasingly digitized world.

Standing

Facebook sought dismissal of the *Fraley* plaintiffs' claims, asserting the absence of a sufficient injury to establish standing or to allow recovery.[17] The Court denied the bulk of Facebook's motion, holding that the plaintiffs had sufficiently alleged injury to establish standing and to state cognizable causes of action under California's Right of Publicity statute and Unfair Competition Law.[18]

As the Court explained, Article III standing requires plaintiffs to

> satisfy three irreducible requirements: (1) they have suffered an "injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly traceable to the challenged action of the defendant"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[19]

Where plaintiffs must prove injury as an element of their claim, "'the threshold question of whether [Plaintiffs have] standing (and the Court has jurisdiction) is distinct from the merits of [Plaintiffs'] claim.'"[20] But "'the actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'"[21] That is, "a plaintiff may be able to establish constitutional injury in fact by pleading violation of a right conferred by a statute, so long as she can allege that the injury she suffered was specific to her."[22]

The Court did not find plaintiffs' injury speculative, since the complaint specifically alleged "what information belonging to each Plaintiff was used by Defendant, how Defendant used that information, and to whom that information was published."[23] Thus, the Court concluded that the alleged injuries were "concrete and particularized."

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[15] *See* Pls.' Mot. & Mem. of Law in Support of Mot. for Attorneys' Fees & Costs & Class Representatives' Service Awards, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 253, at 39 (N.D. Cal. Dec. 21, 2012).

[16] The authors are indebted to Bondurant Mixson & Elmore LLP for the preparation of the Appendix.

[17] *See* Facebook, Inc.'s Mot. to Dismiss 2d Am. Class Action Compl., *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 30 (N.D. Cal. July 1, 2011) (asserting several grounds for dismissal).

[18] *See Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 815 (C.D. Cal. 2011). The Court did dismiss plaintiffs' unjust enrichment claim as unavailable as a stand-alone cause of action under California law. *See id.* at 814-15.

[19] *Id.* at 796 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations, quotation marks, and alterations omitted)).

[20] *Id.* (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011)).

[21] *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal quotation marks omitted)).

[22] *Id.* (citing *Warth*, 422 U.S. at 501). Even if a statute creates a legal right and establishes liquidated damages as a floor for recovery of that right's violation, that does not itself end the standing inquiry. *Cf. id.* at 812 (explaining as part of standing analysis under California's Unfair Competition Law that "a mere 'expectation interest' in a statutory damage award is not a 'vested interest' for purposes of stating a claim for restitution under the UCL"). Thus, even where a plaintiff seeks statutory damages, there must be a specific, particularized injury to confer standing.

[23] *Id.* at 797.

And because the complaint alleged that plaintiffs' "individual, personalized endorsement of products, services, and brands to their friends and acquaintances has concrete, provable value in the economy at large, which can be measured by the additional profit Facebook earns from selling Sponsored Stories compared to its sale of regular advertisements,"[24] the Court held that the allegations of injury were "not conjectural or hypothetical."

The Court's analysis distinguished a number of other recent privacy class actions, many of them also decided in the Northern District of California.[25] In those cases, the plaintiffs had lacked standing because they failed to assert what personal information had been misappropriated.[26] Or they failed to assert which defendants had obtained their personal information and how,[27] or that they were personally affected by the defendant's alleged use of software to track their Internet browsing history.[28] Like earlier decisions declining to recognize an implicit injury based on the generalized economic value of personal information where plaintiffs did not allege that they had personally suffered a specific injury from defendant's use or sale of that information, in these cases the courts did not find a concrete, particularized injury.[29]

The *Fraley* Court also cited two cases that did find standing.[30] One of those was the Ninth Circuit's decision in *Krottner v. Starbucks Corp.*, which held that a group of employees had standing to seek remedies where their employer had allegedly been negligent in allowing a laptop containing their unencrypted personal information to be stolen.[31]

Other Circuits are similarly split in considering what suffices to confer standing in privacy class actions. In *Pisciotta v. Old National Bancorp*, the Seventh Circuit held that Article III's

> injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions.[32]

On that basis, the court found that plaintiffs had standing to seek recovery after a hacker obtained from their bank's website personal information that the bank had solicited from them.[33] The Eleventh Circuit, in *Resnick v. AvMed, Inc.*, held that plaintiffs had standing to bring suit for claims arising from the theft of two laptops containing their personal information from defendant's office. Unlike in most other cases, however, the *Resnick* "[p]laintiffs became

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[24] *Id.* at 799.

[25] *Id.* at 797-800 (distinguishing, *inter alia*, *Low v. LinkedIn Corp.*, No. 11-cv-01468-LHK, 2011 BL 292771 (N.D. Cal. Nov. 11, 2011); *In re iPhone Application Litig.*, No. 11-md-02250-LHK, 2011 BL 240163 (N.D. Cal. Sept. 20, 2011); *LaCourt v. Specific Media, Inc.*, No. SACV-10-1256-GW (JCGx), 2011 BL 127845 (C.D. Cal. Apr. 28, 2011); *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090 (N.D. Cal. 2011); *Cohen v. Facebook, Inc.*, No. 10-cv-5282-RS, 2011 BL 277188 (N.D. Cal. Oct. 27, 2011)).

[26] *See Low*, 2011 BL 292771, at *3-4.

[27] *See In re iPhone Application Litig.*, 2011 BL 240163, at *4.

[28] *See LaCourt*, 2011 BL 127845, at *3-4.

[29] *See Fraley*, 830 F. Supp. 2d at 798 (citing In *re JetBlue Airways Corp. Privacy Litig.*, 379 F. Supp. 2d 299, 327 (E.D.N.Y. 2005); *In re Doubleclick, Inc. Privacy Litig.*, 154 F. Supp. 2d 497, 525 (S.D.N.Y. 2001)). *See also, e.g.*, *In re Google Privacy Policy Litig.*, No. C 12-01382 PSG, 2012 BL 341343, at *4-6 (N.D. Cal. Dec. 28, 2012) (granting motion to dismiss on standing grounds); *Murray v. Time, Inc.*, No. C 12-00431 JSW, 2012 BL 218576, at *4-7 (N.D. Cal. Aug. 24, 2012) (same); *Robins v. Spokeo, Inc.*, No. 2:10-cv-05306-ODW-AGR, 2011 BL 332560, at *1-2 (C.D. Cal. Jan. 27, 2011) (same).

[30] *See id.* (citing *Krottner v. Starbucks Corp.*, 628 F.3d 1139 (9th Cir. 2010); *Doe 1 v. AOL LLC*, 719 F. Supp. 2d 1102 (N.D. Cal. 2010)). *See also, e.g.*, *Goodman v. HTC Am., Inc.*, No. C 11-1793 MJP, 2012 BL 180872, at *5-10 (W.D. Wash. June 26, 2012) (holding that plaintiffs had standing to pursue claims for economic injury based on theory that they overpaid for their phones and that their phones suffered diminution of value but that plaintiffs' claimed injury for misappropriation of personally identifiable information did not allege an injury in fact sufficient to confer standing); *In re Hulu Privacy Litig.*, No. 3:11-cv-03764-LB, 2012 BL 165087, at *7-9 (N.D. Cal. June 11, 2012) (holding that plaintiffs claims under the Video Privacy Protection Act conferred standing); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 712, 718 (N.D. Cal. 2011) (holding that allegation that Facebook violated federal Wiretap Act satisfies standing requirement but granting motion to dismiss for failure to state a claim).

[31] *See Krottner*, 628 F.3d at 1143.

[32] 499 F.3d 629, 634 (7th Cir. 2007).

[33] *Id.* at 631, 634.

the victims of identity theft after the unencrypted laptops containing their sensitive information were stolen."[34] But in *Reilly v. Ceridian Corp.*, the Third Circuit reached the opposite conclusion.[35] In *Reilly*, "[a]n unknown hacker infiltrated Ceridian's Powerpay system and potentially gained access to personal and financial information belonging to … approximately 27,000 employees at 1,900 companies."[36] The Third Circuit affirmed the district court's dismissal for lack of standing, holding that "allegations of an increased risk of identity theft resulting from a security breach are [ ] insufficient to secure standing."[37] *Reilly* distinguished *Pisciotta* and *Krottner* by concluding that the threat of harm was more imminent in those cases, but it is far from clear that the injuries found sufficient for standing in the Seventh and Eleventh Circuits would have been enough for the Third Circuit.[38]

In the absence of a clear majority approach to the standing issue, the *Fraley* Court identified *Cohen v. Facebook, Inc.* as the only case "directly on point" and discussed it at length.[39] The similarities between the cases go well beyond the fact that Facebook was the defendant in both. The *Cohen* plaintiffs brought misappropriation claims in connection with promotion of Facebook's "Friend Finder" service, which lets a user "identify which of its e-mail address book contacts are not yet Facebook members and to invite them to join Facebook."[40] In other words, the *Cohen* plaintiffs complained that, once they used the "Friend Finder" tool, Facebook used their identities to promote the tool to other Facebook users that they knew.

In *Cohen*, "Facebook did not raise an Article III defense, but the district court dismissed the misappropriation claim under Rule 12(b)(6) upon finding plaintiffs failed to show 'how the mere disclosure to their Facebook friends that they have employed the Friend Finder service … causes them any cognizable harm, regardless of the extent to which that disclosure could also be seen as an implied endorsement by them of the service.'"[41] Even after the *Cohen* plaintiffs amended their complaint in an effort to salvage their claims, the court dismissed as unacceptably attenuated "plaintiffs' argument that 'Facebook's use of plaintiffs' names and likenesses can be seen as serving a commercial purpose, undertaken with at least the intent of achieving growth in Facebook's user base, thereby ultimately resulting in monetary gain for Facebook.'"[42]

According to the *Fraley* Court, two primary differences explain why *Cohen* was doomed and *Fraley* survived at the motion-to-dismiss stage: (1) whether the information at issue had general commercial value, and (2) whether that value was directly linked to Facebook's profits. The Court explained that, though in *Cohen* "plaintiffs were unable to show that their names and likenesses had any general commercial value, the plaintiffs "here have quoted explicit statements by Facebook's own CEO and COO that friend endorsements are two to three times more valuable than generic advertisements sold to Facebook advertisers."[43] On top of that, the *Fraley* plaintiffs "identified a direct, linear relationship between the value of their endorsement of third-party products, companies, and brands to their Facebook friends, and the alleged commercial profit gained by Facebook."[44] Those two factors combined led the Court to conclude that the plaintiffs had "alleged facts showing that their personal endorsement has concrete, measurable, and provable value in the economy at large.[45]

The first of these explanations—that the *Fraley* plaintiffs simply collected and alleged better facts to establish the value that Facebook placed on their endorsement—begins to account for the divergent outcomes. A well-pleaded

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[34] 693 F.3d 1317, 1324 (11th Cir. 2012).

[35] 664 F.3d 38, 43-44 (3d Cir. 2011).

[36] *Id.* at 40.

[37] *Id.* at 43.

[38] *See id.* at 43-44. *See also Katz v. Pershing, LLC*, 672 F.3d 64, 80 (1st Cir. 2012) (dismissing for lack of standing claims that "defendant's failure to adhere to privacy regulations" increase named plaintiff's "risk of harms associated with the loss of her data" because "the risk of harm that she envisions is unanchored to any actual incident of data breach").

[39] *Fraley*, 830 F. Supp. 2d at 800.

[40] *Id.*

[41] *Id.* (quoting *Cohen*, 798 F. Supp. 2d at 1097) (ellipses in original).

[42] *Id.* (quoting *Cohen*, 2011 BL 277188, at *3).

[43] *Id.*

[44] *Id.*

[45] *Id.* (internal citation omitted).

complaint is the necessary starting point of a federal case, and the failure to plead sufficient factual allegations to state a plausible claim for relief will often result in dismissal.[46]

The second explanation, however, demonstrates how difficult it may be for courts to draw the line on standing in privacy cases, or for the parties to predict where that line lies. The *Fraley* plaintiffs alleged that Facebook sold Sponsored Stories—advertisements bearing a user's personal imprimatur—for significantly more than it sold advertisements that did not bear such endorsements. The Court found that sufficient for a "direct, linear relationship." But the *Cohen* plaintiffs could never establish the same "direct, linear relationship." They were complaining about ads that Facebook did not sell to third-party advertisers but instead used to promote its own Friend Finder service. Thus, Facebook collected no money in exchange for those ads but allegedly hoped that they would encourage more users to utilize the Friend Finder, thereby growing Facebook's membership and increasing its reach and its advertising rates. In both cases, plaintiffs allege that Facebook gained value from advertisements containing users' personal endorsements without either compensating the users or seeking their permission. Yet this activity opened Facebook to liability to the *Fraley* plaintiffs but foreclosed recovery by the *Cohen* plaintiffs, solely because Facebook allegedly used the *Cohen* plaintiffs' identities to promote its own services instead of those belonging to its outside advertisers.

The point here is not that *Cohen* was wrongly decided, or that *Fraley* was, but that it is hard to see how both can be correct. The *Fraley* Court, in considering whether the plaintiffs had alleged an injury sufficient to state a claim under the Right of Publicity statute, embraced the view that one need not be a celebrity to have an identity with commercial value:

> [C]ourts have long recognized that a person's "name, likeness, or other attribute of identity can have commercial value," even if the individual is obscure. … In a society dominated by reality television shows, YouTube, Twitter, and online social networking sites, the distinction between a 'celebrity' and a 'non-celebrity' seems to be an increasingly arbitrary one.[47]

Whatever one's opinion of the sociological and economic theories underlying the Court's rationale, it reflects the ongoing debate about what individual identity means in contemporary society and whether social media and the digital world have themselves brought about fundamental changes in what personal information is and does. The *Cohen* court, which reached the opposite conclusion on standing from the *Fraley* Court, presumably would not have embraced the *Fraley* Court's observation "that a person's 'name, likeness, or other attribute of identity can have commercial value,' even if the individual is obscure."[48]

The Original Settlement

Policy issues are even more prominent when a court evaluates a proposed class action settlement for fairness in the context of a privacy claim. In *Fraley*, those policy issues came to the fore in an unusual fashion. After the Court denied Facebook's motion to dismiss, the parties engaged in extensive discovery and, apparently, contemporaneous mediation sessions under the guidance of a retired judge.[49] In the summer of 2012, plaintiffs moved for approval of the parties' settlement agreement,[50] and Facebook filed its own brief in support of the settlement agreement.[51]

The proposed settlement agreement would have required Facebook "to make certain changes to the Statement of Rights and Responsibilities it contends governs use of its site, and to implement certain additional mechanisms to

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[46] *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

[47] *Fraley*, 830 F. Supp. 2d at 807-08 (quoting *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825 n.11 (9th Cir. 1974)).

[48] *Id.* at 807 (quoting *Motschenbacher*, 498 F.2d at 825 n.11).

[49] *See* Def. Facebook, Inc.'s Mem. of Points & Authorities in Support of Joint Mot. for Preliminary Approval of Revised Settlement, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 240, at 6-7 (N.D. Cal. Oct. 6, 2012) (explaining that parties exchanged more than 1000 discovery requests, produced more than 200,000 pages of documents and data, and conducted 21 fact and expert depositions).

[50] *See* Pls.' Mot. for Preliminary Approval of Class Action Settlement, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 181 (N.D. Cal. June 20, 2012).

[51] *See* Def. Facebook, Inc.'s Br. in Support of Pls.' Mot. for Preliminary Approval of Settlement, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 188-3 (N.D. Cal. July 2, 2012).

give users greater information about, and control over, how their names and likenesses are employed in connection with Sponsored Stories."[52] The agreement also provided for "Facebook making a *cy pres* payment of $10 million dollars [*sic*] to certain organizations involved in internet privacy issues," and allowed plaintiffs to apply for up to $10 million in attorneys' fees, "without objection by Facebook."[53]

After the first judge assigned to the case recused herself,[54] the Honorable Richard Seeborg—the judge who had dismissed *Cohen v. Facebook*—was assigned to the *Fraley* case.[55]

In August 2012, Judge Seeborg denied the motion for preliminary approval of the settlement agreement, noting "questions regarding the proposed settlement" that could not be appropriately postponed to the final-approval stage, given the expense of class notice and the likely class confusion if the settlement were ultimately disapproved.[56] Acknowledging that "the legal standard applicable to preliminary approval is liberal,"[57] Judge Seeborg identified several issues—including the "[p]ropriety of a settlement that provides no monetary relief directly to class members"[58] and "[t]he amount of the *cy pres* payment"[59]—that concerned him enough to deny preliminary approval. He suggested that "in light of the issues" identified, "the parties may elect to negotiate for modifications to their agreement, or plaintiffs may present a renewed motion for preliminary approval of the existing agreement, with additional evidentiary and/or legal support directed at ameliorating the listed concerns."[60]

Judge Seeborg's first two concerns focused on the amount of money the settlement agreement made available. He agreed "that it would be impractical to the point of meaninglessness to attempt to distribute the proposed $10 million in monetary relief" among more than 70 million class members.[61] Thus, although the settlement agreement said that the $10 million could be distributed to class members if it was economically feasible to do so, the Court treated it as presumptively a *cy pres* distribution that would go only to non-profit organizations.[62] That conclusion led the Court to ask several pointed questions.

Most provocatively, in a query that likely chills both plaintiffs' lawyers and the defense bar equally, the Court wondered whether "notwithstanding the strong policy favoring settlement, are some class actions simply too big to

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[52] *See* Order Denying Mot. for Preliminary Approval of Settlement Agreement, Without Prejudice, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 224, at 1 (N.D. Cal. Aug. 17, 2012).

[53] *Id.* "A *cy pres* remedy, sometimes called 'fluid recovery,' is a settlement structure wherein class members receive an indirect benefit (usually through defendant donations to a third party) rather than a direct monetary payment." *Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004)). The "*cy pres* doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011); *see also, e.g.*, *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 30 (1st Cir. 2012) ("In class actions, courts have approved creating *cy pres* funds, to be used for a charitable purpose related to the class plaintiffs' injury, when it is difficult for all class members to receive individual shares of the recovery and, as a result, some or all of the recovery remains.").

[54] *See* Order of Recusal, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 209 (N.D. Cal. July 11, 2012) (the Hon. Lucy H. Koh recusing herself). Judge Koh has handled several other privacy class actions, including *Dunbar v. Google, Inc.*, No. 5:12-cv-003305-LHK, 2012 BL 324883 (N.D. Cal. Dec. 12, 2012); *Low*, 2011 BL 292771; *In re iPhone Application Litig.*, 2011 BL 240163; *Farrington v. McAfee, Inc.*, No. 10-CV-01455-LHK., 2010 BL 233793 (N.D. Cal. Oct. 05, 2010).

[55] *See* Order, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, [No Dkt. No.] (N.D. Cal. July 12, 2012).

[56] *See* Order Denying Mot. for Preliminary Approval of Settlement Agreement, Without Prejudice, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 224, at 2 (N.D. Cal. Aug. 17, 2012).

[57] Order Denying Mot. for Preliminary Approval of Settlement Agreement, Without Prejudice, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 224, at 2 (N.D. Cal. Aug. 17, 2012) (footnote omitted).

[58] *Id.* at 2.

[59] *Id.* at 4.

[60] *Id.* at 2.

[61] *Id.* at 2.

[62] In summarizing the settlement terms at the beginning of the Order, Judge Seeborg did not even mention the possibility that the settlement fund could be disbursed as individual payments to class members but took it as a given that there would be so many claimants that the money would be distributed to cy pres recipients. *See id.* at 1.

settle?"[63] Noting that California's Right of Publicity law allows for statutory damages of $750 per violation, the Court questioned whether tens of millions of potential claims could be settled for a total of $10 million. Though the Court allowed that "[i]t very well may be, as Facebook argues, that plaintiffs' chances of obtaining a judgment awarding such statutory damages to class members are remote," nevertheless "their potential availability must be considered in evaluating the fairness of any settlement."[64] The Court then considered the argument—raised by plaintiffs and the defendant alike—that the size of the proposed class made a settlement requiring even minimal cash payments to all claimants impracticable: "For example, even paying each class member the modest sum of $10, might require a settlement fund of $1 billion (assuming a class size of 100 million), apart from administration costs."[65] But the Court also expressed discomfort with the idea that the solution to a potentially massive damages calculation was a much smaller *cy pres* award, asking "Can a *cy pres*-only settlement be justified on the basis that the class size is simply too large for direct monetary relief?"[66]

Judge Seeborg had practical, as well as theoretical, concerns about the *cy pres* award. He recognized that the parties presented the injunctive remedies—Facebook's changes to its Terms of Service and its user interface—as the "primary purpose" of the settlement. But his "problem with treating the *cy pres* element of the recovery as effectively a 'bonus,' such that *any* payment could be seen as fair, adequate, and reasonable, is that the injunctive relief relates only to Facebook's future conduct," whereas "the *cy pres* payment is compensation for *past* alleged wrongdoing" by Facebook.[67] Concerned that the injunctive relief provided by the proposed settlement "cannot serve as meaningful consideration for a release of class members' claims for damages," the Court saw the amount of the *cy pres* payment as "critically important to evaluating the appropriateness of the settlement."[68] Judge Seeborg allowed that the parties may have negotiated an acceptable *cy pres* amount—given that "the plaintiffs' potential recovery at trial must be estimated, and the appropriate discounts applied for the uncertainties, risks, and costs of litigation"—but cautioned that the Court did not yet have sufficient information to make that determination. [69] He warned that "plaintiffs must show that the *cy pres* payment represents a reasonable settlement of past damages claims, and that it was not merely plucked from thin air, or wholly inconsequential to them, given their focus on prospective injunctive relief."[70]

These practical, arithmetic concerns are thus intertwined with the theoretical considerations Judge Seeborg outlined. Yet some other courts have expressed little concern about approving settlements in massive privacy class actions, where the only financial remedies took the form of *cy pres* distributions.[71]

Judge Seeborg's discussion of the *cy pres* calculation raises another important—and contested—issue. The defendant had justified the *cy pres* amount by beginning with the class's potential recovery, then applying "a percentage discount for the uncertainties and expenses of litigation," and finally discounting the resulting figure "by

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[63] *Id.* at 3.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 2. Another recent case attempted to finesse this problem by approving a settlement in which defendants provided $12.5 million to pay administrative expenses and $8.8 million in attorneys' fees, costs, and incentive awards for class representatives, with the remainder going either to pay claims submitted or to disbursal as a *cy pres* award, but also offered all class members a $20 credit toward future purchases; as the court noted, "[t]he total settlement will approximate $38 million if the entire class use the credits and make claims for reimbursement," though defendants had to deposit only one-third of that amount into the settlement fund. *In re EasySaver Rewards Litig.*, No. 09-cv-2094 AJB (WVG), Dkt. Nos. 255 & 258, at 5 (S.D. Cal. Feb. 4, 2013).

[67] *Id.* at 4 (citing *Dennis v. Kellogg Co.*, 687 F.3d 1149, 1156 (9th Cir. 2012)).

[68] *Id.* In another recent case, the parties sidestepped this issue by limiting their settlement to injunctive relief (along with fees for plaintiffs' counsel and incentive awards for the class representatives), but expressly providing that "no release is provided by any Class Members except the Named Plaintiffs." *Kim v. Space Pencil Inc.*, No. 3:11-cv-03796-LB, 2012 BL 313364, at *1-2 (N.D. Cal. Nov. 28, 2012).

[69] Order Denying Mot. for Preliminary Approval of Settlement Agreement, Without Prejudice, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 224, at 4 (N.D. Cal. Aug. 17, 2012).

[70] *Id.* at 4-5.

[71] *See, e.g.*, *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012); *In re: Netflix Privacy Litig.*, No. 5:11-cv-00379 EJD, 2012 BL 180874 (N.D. Cal. July 5, 2012); *In re Google Buzz Privacy Litig.*, No. 5:10-cv-00672, Dkt. No. 129 (N.D. Cal. June 2, 2011).

an additional amount ," since "only a relatively small percentage of class members actually file claims and receive payouts from the settlement fund."[72] As the Court saw it, "[t]hat analytical approach would result in this *cy pres* settlement being analogous to one calling for direct cash payments to class members, but where any unclaimed settlement funds revert to the defendant."[73] Judge Seeborg allowed that "such reversionary provisions are not necessarily prohibited," but he labeled them "problematic."[74]

Judge Seeborg is hardly the first jurist to question *cy pres* awards in class action settlements. The Seventh Circuit, in a widely-cited opinion authored by Judge Richard Posner, calls *cy pres* awards in the class action context "purely punitive" because "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else."[75] In a Fifth Circuit decision reversing a district court's approval of a *cy pres* distribution of unclaimed settlement funds, Judge Edith Jones's concurrence labeled the practice "inherently dubious" and questions whether "a doctrine associated with the voluntary distribution of a gift" could be applied "to the entirely unrelated context of a class action settlement, which a defendant no doubt agrees to as the lesser of various harms confronting it in litigation."[76]

The Ninth Circuit has shown itself amenable to *cy pres* settlements in principle, but has repeatedly expressed concerns about whether the settling parties have chosen appropriate recipients for the *cy pres* funds.[77] Yet in another recent class action involving Facebook, the Ninth Circuit rejected challenges to a settlement that provided for creation of a $9.5 million fund, from which "approximately $3 million would be used to pay attorneys' fees, administrative costs, and incentive payments to the class representatives," while the balance would be used to establish "a new grant-making organization" that would distribute the money.[78] The court dismissed objections that the settlement's structure impermissibly left unknown what entities would ultimately receive the settlement funds and that the presence of a Facebook executive on the three-member board of directors for the grant-making organization created a conflict of interests.[79] Judge Kleinfeld dissented because, in his view, the "settlement perverts the class action into a device for depriving victims of remedies for wrongs, while enriching both the wrongdoers and the lawyers purporting to represent the class."[80] Specifically, he complained about approving a *cy pres* award to an organization that has no past performance for the court to examine: "For all we know it will fund nothing but an 'educational program' amounting to an advertising campaign for Facebook. That would appear to satisfy the articles and bylaws, and Facebook, after all, together with class counsel and their nominees, will run it."[81]

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[72] *Id.* at 5.

[73] *Id.*

[74] *Id.* (citing *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011)).

[75] *Mirfasihi*, 356 F.3d at 784.

[76] *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (Jones, J., concurring). Notably, in her concurrence Judge Jones considers the same reversionary question that Judge Seeborg mentions in *Fraley*. Judge Jones, however, reaches the opposite conclusion: "[i]n the ordinary case, to the extent that something must be done with unclaimed funds, the superior approach is to return leftover settlement funds to the defendant."*Id.* at 482 (citing *Wilson v. Sw. Airlines, Inc.*, 880 F.2d 807, 813 (5th Cir. 1989)).

[77] *See, e.g.*, *Dennis*, 687 F.3d at 1153-54 (reversing approval of a class action settlement in part because "the *cy pres* portions of the settlement are not sufficiently related to the plaintiff class or to the class's underlying false advertising claims"); *id.* at 1157 (quoting *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1308-09 (9th Cir. 1990)) ("A *cy pres* award must be 'guided by (1) the objectives of the underlying statute(s) and (2) the interests of the silent class members,' and must not benefit a group 'too remote from the plaintiff class.'"); *Nachshin*, 663 F.3d at 1036 (reversing approval of a class action settlement including *cy pres* distributions "made on behalf of a nationwide plaintiff class" but "distributed to geographically isolated and substantively unrelated charities"); *id.* at 1039 ("When selection of *Cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court. Moreover, the specter of judges and outside entities dealing in the distribution and solicitation of settlement money may create the appearance of impropriety.").

[78] *Lane*, 696 F.3d at 817.

[79] *See Lane*, 696 F.3d at 820-22.

[80] *Id.* at 826 (Kleinfeld, J., dissenting). The Ninth Circuit later denied rehearing *en banc*, with six dissenters to that denial.

[81] *Id.* at 834.

As with the standing analysis, there are no clear or easy answers to the questions posed by *cy pres* awards. As Judge Posner explained, the *cy pres* idea was engrafted onto class action law, in theory "to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement (or the judgment, in the rare case in which a class action goes to trial) to the class members."[82] Whether charitable distribution is the best substitute, which charities are best supported in each case, and what, if any, influence the court or the parties should retain over the use of the money after its distribution are all questions on which the law continues to develop.

The Revised Settlement

In December 2012, the *Fraley* Court approved a revised settlement agreement between the parties.[83] The Court's Order, which largely adopted the proposed order submitted by the parties, provides no further insight into its thinking.[84] The biggest change in the revised settlement was to the structure of the settlement fund. Whereas the initial agreement called for a $10 million fund for payment of administrative costs and either awards to class members or *cy pres* distribution, along with a separate $10 million earmarked to pay incentive fees to class representatives and fees to plaintiffs' counsel, under the revised settlement Facebook would put $20 million into a single fund, from which all expenses—administrative costs, incentive payments, attorneys' fees, and the distribution to class members and/or *cy pres* recipients—would be paid.[85] The revised settlement also addressed one of Judge Seeborg's concerns by ensuring that, should the Court grant final approval for the settlement, "[i]n no circumstance will any portion of the Settlement Fund revert to Facebook."[86] It addressed another of Judge Seeborg's concerns by giving Facebook "the right to oppose Class Counsel's request" for fees and costs.[87]

Facebook's memorandum supporting the revised settlement agreement may have helped Judge Seeborg reconsider his concern about the propriety of using a relatively small *cy pres* award to settle a class action that alleged huge damages. Arguing that the class "had exceedingly low odds of obtaining a substantial recovery,"[88] Facebook reiterated its arguments that the plaintiffs suffered no injury, relying heavily on Judge Seeborg's decision finding no injury in *Cohen v. Facebook*.[89] Even if plaintiffs were injured, they still could not recover, Facebook argued, because the plaintiffs consented—both expressly and impliedly—to Facebook's actions, because federal law preempted plaintiffs' theory of recovery for members of the minor subclass, and because provisions of state and federal law barred recovery, among other reasons.[90] Facebook went on to argue that the $20 million settlement fund "accounts for the possibility—although exceedingly remote—that Plaintiffs might have recovered statutory damages."[91] Facebook argued that most, if not all, class members would not be entitled to collect statutory damages even in the best possible scenario for plaintiffs and that "due process would preclude the aggregation of $750 statutory penalty awards across even a tiny fraction of the putative Class."[92] And it relied heavily on the Ninth

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[82] *Mirfasihi*, 356 F.3d at 784.

[83] *See* Preliminary Approval of Class Settlement & Provisional Class Certification Order, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 252 (N.D. Cal. Dec. 3, 2012).

[84] *See* [Proposed] Preliminary Approval of Class Settlement & Provisional Class Certification Order, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 235-2 (N.D. Cal. Oct. 5, 2012).

[85] *See* Am. Settlement Agreement & Release, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 235-1, §§ 2.2-2.7 (N.D. Cal. Oct. 5, 2012). In addition to the nearly $8 million that plaintiffs' counsel requested for fees, costs, and incentive payments, *see* Pls.' Mot. & Mem. of Law in Support of Mot. for Attorneys' Fees & Costs & Class Representatives' Service Awards, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 253, at 39 (N.D. Cal. Dec. 21, 2012), Facebook has estimated that administrative costs will consume between $776,000 and $3.4 million, *see* Def. Facebook, Inc.'s Mem. of Points & Authorities in Support of Joint Mot. for Preliminary Approval of Revised Settlement, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 240, at 10 (N.D. Cal. Oct. 6, 2012).

[86] Def. Facebook, Inc.'s Mem. of Points & Authorities in Support of Joint Mot. for Preliminary Approval of Revised Settlement, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 240, at 8 (N.D. Cal. Oct. 6, 2012).

[87] *Id.*

[88] *Id.* at 16.

[89] *See id.* at 17-18 (citing *Cohen*, 2011 BL 277188, at *3).

[90] *See id.* at 18-29.

[91] *Id.* at 32.

[92] *Id.* (citing *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003)).

Circuit's decision in *Lane v. Facebook, Inc.*, for the proposition that the court "'must evaluate the fairness of a settlement as a whole, rather than assessing its individual components,'"[93] and to illustrate that a settlement providing a *cy pres* award that averages out to only a few cents per potential claimant can meet the standards for judicial approval.[94] The memorandum also gave further details on what the injunctive relief will require of Facebook.[95]

The *Fraley* Court may give us the benefit of further analysis when it rules on final approval for the revised settlement, as expected this summer. That analysis, along with ongoing developments in privacy class actions all over the country, will help shape the law in this area and define who can sue and what kind of remedies may be available to plaintiffs alleging violations of their privacy.

[93] *Id.* at 30 (quoting *Lane*, 696 F.3d at 818-19).

[94] *Id.* at 33 (quoting *Lane*, 696 F.3d at 823).

[95] Order Denying Mot. for Preliminary Approval of Settlement Agreement, Without Prejudice, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 224, at 6 (N.D. Cal. Aug. 17, 2012); *see also* Def. Facebook, Inc.'s Mem. of Points & Authorities in Support of Joint Mot. for Preliminary Approval of Revised Settlement, *Fraley v. Facebook, Inc.*, No. 3:11-cv-01726-RS, Dkt. No. 240, at 11-12 & n.4 (N.D. Cal. Oct. 6, 2012).

APPENDIX: SELECTED RECENT PRIVACY CLASS ACTION CASES[96]

Below is a collection of cases that sought class certification with respect to privacy related issues over the last year and a half.

DATA BREACHES

Resnick v. AvMed, Inc., 693 F.3d 1317 (11th Cir. 2012). The Eleventh Circuit reversed a lower court's dismissal of a putative class action arising out of two laptops containing members' sensitive information being stolen from the defendant's office. The named plaintiffs became victims of identity theft ten and fourteen months later. A two-judge majority of an Eleventh Circuit panel concluded that the customers had standing because, *inter alia*, their allegations that they became victims of identity theft and suffered monetary damages as a result constituted an injury in fact, and their allegations were sufficient to "fairly trace" their injury to the corporation's failures. As a result the customers, in addition to establishing standing, sufficiently alleged causation because they alleged a nexus between the data breach and the identity theft. The case was brought under Section 395.3025 of the Florida Statutes, which protects medical information. The decision in *Resnick* is important because it departs somewhat from many previous cases in finding both standing and cause of action even though there was a gap of 10-14 months between the theft of the information and the alleged use of that information and no direct evidence that the subsequent criminal activity used the specific stolen information. Some commentators believe that the *Resnick* decision has substantially lowered the bar for plaintiffs regarding establishing standing and surviving a Rule 12(b)(6) motion and may lead the way to increased litigation in this field.

In *Resnick*, there was an actual injury in that the named plaintiffs' information was actually used later by criminals, although, as the defendants argued, there was no proof that the private information subsequently used by criminals was information stolen from the defendant's office. Most cases prior to *Resnick* have held that a mere hypothetical future injury was not sufficient to establish Article III standing. See, for example, ***Reilly v. Ceridian Corp.***, 664 F.3d 38 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 2395 (2012), and ***Whitaker v. Health Net of California, Inc.***, No. 11-0910, 2012 U.S. Dist. LEXIS 6545 (E.D. Calif. January 19, 2012).

Judge Richard Bierman of the United States District Court for the Southern District of New York in his order in ***Hammond v. Bank of New York Corp.***, No. 08-6060, 2010 U.S. Dist. LEXIS 71996 (S.D.N.Y. June 25, 2010), lists more than twenty cases, most brought as purported class actions, in which plaintiffs sought damages for loss of personal identification information through accident or theft and noted that, while there is a split of authority as to how to analyze the cases, most have concluded that the plaintiffs had either no Article III standing to pursue the matter or simply failed to state a claim. For example, the Seventh Circuit in ***Pisciotta v. Old National Bancorp.***, 499 F.3d 629 (7th Cir. 2007), concluded that the increased risk of identity theft attributable to the data breach was sufficient to confer standing, but dismissed the case for failure to state a claim under state law.

DEBT COLLECTION

Thomasson v. GC Servs. Ltd. P'ship, 275 F.R.D. 309 (S.D. Cal. 2011) Granted class certification in a case in which the plaintiffs alleged that the debt collector monitored, without the plaintiffs' consent, telephone communications during which the plaintiffs provided personal information in violation of The Fair Debt Collection Act (FDCPA).

Meyer v. Portfolio Recovery Assocs., No. 11-56600, 2012 WL 6720599 (9th Cir. Dec. 28, 2012) Affirmed the district court's grant of provisional class certification in the context of a debt collector who contacted a debtor on the debtor's cellular telephone number, which number was

[96] We gratefully acknowledge Bondurant Mixson & Elmore LLP in Atlanta for preparation of this Appendix.

obtained through skip-tracing without the debtor’s consent in violation of the Telephone Consumer Protection Act (TCPA).

Evon v. Law Offices of Sidney Mickell, 688 F.3d 1015 (9th Cir. 2012) Reversed the district court’s denial of class certification in the context of a debt collector sending collection notices addressed to the debtor “in care of” debtor’s employer in violation of the FDCPA.

Agne v. Papa John’s Int’l, Inc., No. C10-1139-JCC, 2012 WL 5473719 (W.D. Wash. Nov. 9, 2012) Granted plaintiff’s motion for class certification in the context of a business that downloaded a system onto its registers that tracked phone numbers of customers and their order information and forwarded this information to a marketing company that sent messages to the customers without their prior consent in violation of the TCPA.

DISPLAY OF CREDIT OR DEBIT CARD NUMBERS AND/OR EXPIRATION DATES

Bateman v. Am. Multi-Cinema, Inc., 623 F.3d 708 (9th Cir. 2010) rev’g 252 F.R.D. 647 (C.D. Cal. 2008). Held that the district court abused its discretion by denying class certification in a case in which the business issued receipts on which the first four and the last four digits of the credit cards were displayed in violation of the Fair and Accurate Credit Transactions Act (FACTA).

Stillmock v. Weis Mkts., Inc., 385 F. App’x 267 (4th Cir. 2010) (same), rev’g No. 07-cv-1342-MJG, 2009 WL 595642 (D. Md. Mar. 5, 2009). Held that the district court abused its discretion by denying class certification in a case in which a retail store issued credit card and debit card receipts printed in violation of the FACTA truncation requirements. The district court, however, was free to consider other issues that might prevent class certification on remand.

Armes v. Sogro, Inc., No. 08-C-0244, 2011 WL 1197537 (E.D. Wis. Mar. 29, 2011). Granted class certification in the context of a business displaying all sixteen numbers of the customers’ credit or debit cards coupled with expiration dates in violation of FACTA.

Keller v. Macon Cnty. Greyhound Park, Inc., No. 3:07-cv-1098-WKW, 2011 WL 1085976 (M.D. Ala. Mar. 24, 2011). Granted class certification in a case in which the business exposed all sixteen numbers of the customers’ credit or debit cards in violation of FACTA.

Rogers v. Khatra Petro, Inc., No. 2:08-cv-294, 2010 WL 3894100 (N.D. Ind. Sept. 29, 2010) (same).

In re Toys “R” Us – Delaware, Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litig., MDL No. 08-01980, 2010 WL 5071073 (C.D. Cal. Aug. 17, 2010). Denied class certification in the context of a business that displayed more than the last four digits of its customers’ credit card numbers on the receipts, in violation of FACTA. The court’s decision was based primarily on the grounds that plaintiffs could not satisfy the superiority prong of Rule 23(b)(3). The fact that the plaintiffs were seeking damages between $2.9 Billion and $29 Billion arising from an administrative error seemed to be the driving force behind the decision.

Rowden v. Pac. Parking Sys., Inc., 282 F.R.D. 581 (C.D. Cal. 2012). Denied class certification in the context of a city generating parking receipts on which the expiration dates from credit or debit cards used to pay for the tickets were exposed.

Bush v. Calloway Consol. Group River City, Inc., No. 3:10-cv-841-J-37-MCR, 2012 WL 1016871 (M.D. Fla. Mar. 26, 2012). Granted class certification where a business printed receipts containing the expiration date of its customers’ credit or debit cards.

Engel v. Scully & Scully, Inc., 279 F.R.D. 117 (S.D.N.Y. 2011). Granted class certification in the context of a business displaying all sixteen numbers and the expiration date of customer’s credit or debit cards.

DRUG TESTING

Lebron v. Wilkins, 277 F.R.D. 664 (M.D. Fla. 2011). Granted class certification in the context of a Florida state statute requiring applicants for benefits under the federal Temporary Assistance for Needy Families ("TANF") program to submit to a drug test as a condition of eligibility for TANF benefits.

RACIAL PROFILING

Floyd v. City of New York, 283 F.R.D. 153 (S.D.N.Y. 2012). Granted class certification in the context of a plaintiff challenging the New York Police Department's policies, practices, and customs regarding the stopping and/or frisking of persons in the absence of a reasonable articulable suspicion that criminal activity "had taken, is taking, or is about to take place" in violation of the plaintiff's rights under the Fourth and Fourteenth Amendments.

STORAGE OF PERSONAL INFORMATION

Rothman v. Gen. Nutrition Corp., No. 11-cv-03617-SJO, 2011 WL 6940490 (C.D. Cal. Nov. 17, 2011). Denied class certification in a case in which the plaintiff alleged that the business "requested and/or required" her to provide the billing zip code of her credit card and stored this information on its computer in violation of the California Song-Beverly Credit Card Act. The court arrived at this conclusion because of a defective class definition that included individuals that had not suffered the statutory violation. In addition, because there were a variety of ways in which the consumer's information could have been recorded legitimately, there was a lack of commonality as well.

UNAUTHORIZED USE OF PERSONAL INFORMATION

Dioquino v. Sempris, LLC, No. 11-cv-05556-SJO, 2012 WL 6742528 (C.D. Cal. Apr. 9, 2012). Denied class certification in a case in which the plaintiff alleged that the defendant deducted $24.95 from her bank account without her consent using the personal information that she provided to the defendant to cover the cost of the initial item only. The court concluded that class certification was inappropriate because the pre-requisites of ascertainability, commonality and typicality were not met. Of particular importance was that there was not sufficient uniformity between sales pitches, scripts and conversations with sales personnel.

PRISONER LITIGATION

Murray v. Young, No. 3:CV-12-1673, 2012 WL 5398628 (M.D. Pa. Nov. 5, 2012). Denied class certification in the context of a pro se plaintiff seeking to challenge the mandatory biography requirement for advancement in the prison's special management unit program primarily because a prisoner would not be an adequate representative for a class.