COZEN O'CONNOR

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COMMERCIAL DISPUTES OBSERVER

NEWS ON CONTEMPORARY ISSUES

## MESSAGE FROM THE CHAIR

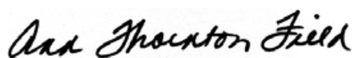
### TO THE FRIENDS OF COZEN O'CONNOR:

I open this issue by congratulating Patrick O'Connor and Steve Cozen who were awarded The Musser Award for Excellence in Leadership by Temple University's Fox Business School. This is the highest honor given by Fox Business School and it not only recognizes their leadership qualities in business, but also their accomplishments in the community. Pat and Steve have devoted countless hours over the years to efforts beyond the walls of Cozen O'Connor. This award honors their outstanding achievements and service.

Congratulations also are due to the twenty-five attorneys from six of the firm's national offices who have been selected for inclusion in the 2009 edition of The Best Lawyers in America. Lawyers were selected for inclusion in the 2009 edition of The Best Lawyers in America based on a rigorous peer–review survey that has been developed and refined for nearly 25 years. The current edition is based on 1.8 million confidential evaluations by only the top attorneys in the country. The Cozen O'Connor offices with Attorneys recognized are Cherry Hill, Denver, Miami, New York, Philadelphia, and Washington, DC.

Lastly, recognition is due to Hayes Hunt and Larry Bowman for their recent service as faculty members at the National Institute for Trial Advocacy's (NITA) 37th Annual National Trial Session, held in Louisville, Colorado. NITA is the nation's leading provider of legal advocacy skills training and focuses on training lawyers to promote justice through effective and ethical advocacy. At the most recent trial session, Hayes and Larry taught participants new ways to improve their performance in direct and cross examinations, laying foundations, delivering opening statements and closing arguments, performing voir dire, and provided instant critiques of their performances. What an honor to serve as faculty, well done!

Thank you and may 2009 bring you health and happiness.



**Ann Thornton Field**
*Chair,* Commercial Litigation Practice Group

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# RECENT DEVELOPMENTS REGARDING FINANCIAL SERVICES

## SEVENTH CIRCUIT HOLDS REMEDY OF MORTGAGE RESCISSION AVAILABLE UNDER THE TRUTH IN LENDING ACT MAY NOT BE AWARDED ON A CLASS BASIS

In *Andrews v. Chevy Chase Bank,* No. 07-1326 (7th Cir. Sept. 24, 2008), the Seventh Circuit court vacated the district court's certification of such a class, holding "as a matter of law that a class action for the rescission remedy under TILA may not be maintained."

Plaintiffs filed their putative class action in the federal court in Wisconsin, alleging that Chevy Chase violated the Truth In Lending Act (TILA) by failing to adequately disclose certain aspects of its adjustable rate mortgage product. The district court granted summary judgment for plaintiffs, and then certified a class under Rule 23(b)(2), providing that class members must receive notice of their right to rescind their mortgages, a remedy provided by TILA. This ruling spawned a mass of TILA class action lawsuits, in particular for claims involving alleged errors in the provision of Notices of Right to Cancel under TILA, as well as for the payment option disclosures for adjustable rate mortgages.

*"This ruling spawned a mass of TILA class action lawsuits, in particular for claims involving alleged errors in the provision of Notices of Right to Cancel under TILA, as well as for the payment option disclosures for adjustable rate mortgages."*

The Seventh Circuit court ruled that the class certified by the district court would be incompatible with the requirements for a class action set forth in the Federal Rules of Civil Procedure. The rules require that common questions predominate over individual questions and that a class action be the superior method of resolving the borrowers' claims. A class with such disparate claims could not satisfy these requirements.

The court found support for its conclusion in the text and history of the TILA statute, which specifically limit the damages available in a class action. It reasoned that a limitation that would be inconsistent with the enormous costs that class-wide rescission would impose on lenders. Specifically, the court decided that Congress did not intend to allow class actions for rescission claims under TILA because the rescission remedy "appears to contemplate only individual proceedings." While TILA does not explicitly prohibit the use of class actions for rescission, the court did not find this fact dispositive because the remedy is "written with the goal of making the rescission process a private one." The court noted the "individual" character of the rescission remedy for a borrower, which makes it "procedurally and substantively unsuited to deployment in a class action." It reasoned further that "a host of individual proceedings would almost certainly follow in the wake of the certification of a class whose loan transactions are referable to rescission."

Christopher Murphy, a member in Cozen O'Connor's Chicago office, whose practice includes financial services litigation, believes that the *Andrews* ruling is a significant victory for lenders and their assignees. The sheer width and breadth of the fully available damages for a rescission claim, on a class scale, would crush even those entities that are above the struggles in the current financial market. The credit market would have difficulty bearing another contraction based on this sort of exposure, as compared to the losses and write-offs from the decline in value of the underlying properties.

For more information, or to discuss the effect and impact of *Andrews v. Chevy Chase Bank,* No. 07-1326 (7th Cir. Sept. 24, 2008), please call Chris Murphy at (312)382-3155.

*For more information, or to discuss the effect and impact of Riegel v. Medtronics, Inc., 128 S. Ct. 999 (Feb. 22, 2008), please call Chris Murphy at 312.382.3155.*

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# RECENT DEVELOPMENTS REGARDING ANTITRUST LAW

## MASSACHUSETTS DISTRICT COURT STATES SCHEME TO INFLATE WHOLESALE PRICE OF PRESCRIPTION DRUGS DOES NOT CONSTITUTE PER SE ANTITRUST VIOLATION

In *New England Carpenters Heath Benefits Fund v. McKesson Corporation,* 573 F.Supp.2d 431 (D.C.MA 2008), the District Court of Massachusetts granted McKesson's Motion to Dismiss Plaintiffs' proposed national class action based on the allegations that the drug wholesaler engaged in unlawful price-fixing by entering into an agreement with First DataBank, a publishing company, to inflate the "average wholesale price" ("AWP") for numerous prescription pharmaceuticals in violation of the Sherman Act and various state antitrust laws. The scheme allegedly increased the AWP from 20% to 25% for over 400 brand-name, self-administered drugs sold through retail pharmacies. This "price fixing conspiracy" was intended to "cause over-reimbursement . . . and thereby increase retail pharmacy profit margins on the sales of the Marked Up Drugs to the detriment of the Classes."

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Plaintiffs contended that the alleged "conspiracy" in this case qualifies as a "per se" unreasonable restraint on trade. The District Court, however, noted that to qualify for "per se" treatment, a defendant's conduct must fall into a category recognized as having "manifestly anticompetitive effects." While, McKesson and First DataBank were not competitors, Plaintiffs argued that this was a "distinction without a difference" because the harm resulting from the alleged price-fixing conduct was similar to that caused by the traditional horizontal restraints which trigger the "per se" treatment. The court disagreed, noting that McKesson's conspiracy to charge higher prices is not sufficient by itself to establish an "antitrust injury." Adding that "both antitrust and ordinary contract or tort claims may sometimes arise out of the same body of conduct," antitrust claims are concerned "with conduct that stifles competition."

In analyzing the Plaintiffs' claim, the Court noted the Plaintiffs' failure to show any anticompetitive effect in any relevant market resulting from the higher prices. The fundamental flaw in the Plaintiffs' claim was that the alleged conspiracy between McKesson and the publisher did not appear to involve any lessening of competition. Purchasers may have been harmed by the scheme, the court noted, but not through any reduction of competition. Looking to the Supreme Court decision in *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998), the District Court held that while the defendant's conduct "hurt consumers by raising telephone service rates," the increased rates did not result from "a less competitive market for removal services;" therefore dismissal of the complaint was warranted.

George Gowen, a member of the Cozen O'Connor Philadelphia office, believes the *New England Carpenters* ruling properly followed the Supreme Court's guidance on antitrust claims. George, who has counseled corporate clients on antitrust issues, thinks that the dictates of a free market system should require plaintiffs, particularly class plaintiffs, to continue to face a high bar for the establishment of a direct injury allegedly resulting from anti-competitive activities.

*For more information, or to discuss the effect and impact of New England Carpenters Heath Benefits Fund v. McKesson Corporation, 573 F.Supp.2d 431 (D.C.MA 2008), please call George Gowen at 215.665.2781.*

Comments in the Cozen O'Connor *Commercial Disputes Observer* are not intended to provide legal advice. Readers should not act or rely on information in the *Observer* without seeking specific legal advice from Cozen O'Connor on matters which concern them.

# RECENT DEVELOPMENTS REGARDING CONSUMER CONTRACT LAW

## CELL PHONE CUSTOMER HELD TO HAVE STANDING TO BRING DECLARATORY JUDGMENT ACTION OVER MERE THREAT OF EARLY TERMINATION FEE IN SEEKING TO END SERVICE CONTRACT

In *Bechtold v. Sprint Nextel Corporation,* 2008 U.S. Dist. Lexis, S.D.IL (October 30, 2008), the District Court for the Southern District of Illinois denied Sprint's Rule 12(b)(6) Motion to Dismiss on the grounds that the Plaintiff had sufficiently alleged an actual controversy in his complaint.

The question before the court was whether the mere threat to a consumer of being assessed an early termination fee by a cellular telephone provider could be considered "coercive," such that the reasonable consumer would comply with the disputed contract rather than risk incurring the wrongful fee. The District Court noted that the threat of an overdue bill showing up on his or her credit report is a huge potential negative consequence for the consumer and therefore most consumers would choose to pay the early termination fee rather than chance having to spend the time and money necessary to correct or explain an overdue bill reported to credit agencies. Similarly, it is unlikely that a corporation like Sprint would bother to bring a legal action against a consumer in order to recover the relatively small amount of the early termination fee.

In denying Sprint's Motion to Dismiss, the court held that this is a situation in which the plaintiff's claim is as "ripe" as it is ever going to be. The consumer should not have to wait until he is billed on an canceled contract, refuse to pay the bill, face the nightmare of adverse credit reporting, and wait for actual litigation or the threat of litigation before he can bring an action to prove that the alleged contract is invalid. Rather, the mere threat of imposing an early termination fee on a consumer who disputes that a valid contract exists can be called coercive and provide grounds for the consumer to bring a declaratory judgment regarding the contract.

This ruling is particularly significant because Bechtold's Complaint was an Amendment to a prior action, *Appleby v. Sprint Nextel Corp.,* 2008 U.S. Dist. LEXIS 35702 (S.D. Ill., May 1, 2008). There, the Court found that Appleby's Complaint contained numerous allegations of wrongful conduct toward other consumers, but did not sufficiently allege that Appleby herself was injured by such wrongful conduct. The Court granted a similar Motion to Dismiss by Sprint on the grounds that Appleby could not establish that she had standing to bring suit, because she could not point to a direct injury attributable to Sprint's actions.

Eric Berger, a member in Cozen O'Connor's New York office believes there are potentially dangerous implications to this ruling with respect to when commercial contract disputes become ripe for adjudication. The District Court's decision provides a very broad foundation from which a consumer-plaintiff may sustain a claim in a contract setting. He continues to advise his clients regarding that one means of reducing potential litigation in these scenarios is with the insertion of carefully crafted mandatory arbitration clause into the contracts.

*For more information, or to discuss the effect and impact of Bechtold v. Sprint Nextel Corporation, 2008 U.S. Dist. Lexis, S.D.IL October 30, 2008), please call Eric Berger at 212.908.1279.*

# RECENT DEVELOPMENTS REGARDING EMPLOYER LIABILITY LAW

## TEXAS SUPREME COURT HOLDS AN EMPLOYER OWES NO DUTY TO WARN ITS EMPLOYEES OF KNOWN AND OBVIOUS HAZARDS

In *Brookshire Grocery Company v. Goss,* No. 07-0085 (Tex. Aug. 29, 2008) (per curiam), the Texas Supreme Court reversed a jury verdict and affirmation on appeal wherein a grocery store was found negligent when its employee was injured when she attempted to maneuver around a loaded cart in a deli cooler. Because any danger inherent to stepping around such carts is commonly known, the court held that the employer had no duty to warn employees of the risk or provide specialized training to avoid that hazard.

Goss was working in the deli department of a Brookshire Grocery store when she went to retrieve items from a deli cooler that had been packed with various "lowboy" carts

stocked two to three feet high with frozen turkey and ham dinners for the upcoming Thanksgiving holiday. She successfully stepped over the cart and entered the cooler, but when exiting, she hit her shin on the lowboy, causing her to fall and injure her back. Goss sued Brookshire, alleging that it failed to adequately warn employees of the risks of maneuvering around lowboy carts. She asserts that she should have been warned that "entering a confined space such as the cooler with a lowboy cart there is dangerous, because you may get into a situation where you will injure yourself." A Texas jury found Brookshire negligent and awarded Goss damages. The court of appeals affirmed the judgment, concluding that Brookshire owed Goss a duty to warn of the safe handling of lowboys and that its failure to warn of the attendant risks caused Goss's injury.

In reversing the verdict, the Supreme Court of Texas noted that the threshold question here is one of duty. This approach to the analysis is significant because employers who do not subscribe to the Texas Worker's Compensation Act (which Brookshire did not -- under Section 406.033 of the Texas Labor Code) are denied the common law defenses of assumption of the risk and contributory negligence. The court reasoned; however, that a lack of "duty" is not an affirmative defense. It "depends on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant."

The court noted that it has previously held that an employer "owes no duty to warn of hazards that are commonly known or already appreciated by the employee" and even when a dangerous condition is not part of an employee's regular duties, there is no duty owed if the employee already knows about the danger. There was no evidence that Brookshire's keeping a loaded lowboy in a cooler was unusually dangerous. Moreover, to the extent that stepping over a lowboy is dangerous, it held that it is a danger apparent to anyone, including the plaintiff.

Tia Ghattas, a member in Cozen O'Connor's Chicago office who has represented numerous defendants in premises liability cases, was pleased to see the Texas Supreme Court take such a rational stance on what should be a individual's common sense duty. Too often, plaintiffs present claims based on the argument that the law permits them to be as oblivious and foolish as possible – and it is someone else's duty to protect them from themselves.

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*For more information, or to discuss the effect and impact of Brookshire Grocery Company v. Goss, No. 07-0085 (Tex. Aug. 29, 2008) (per curiam), please call Tia Ghattas at 312.382.3116.*

## RECENT DEVELOPMENTS REGARDING LABOR AND EMPLOYMENT LAW

### COURT DETERMINES NONRESIDENTS ARE ENTITLED TO DAILY OVERTIME PAY FOR WORK PERFORMED FOR CALIFORNIA COMPANY

In *Sullivan v. Oracle Corporation,* 547 F.3d 1177 (9th Cir. 2008), the U.S. Court of Appeals for the Ninth Circuit determined that an employer who employs out-of-state residents to perform work in California is required to pay overtime pursuant to the California Labor Code.

Plaintiffs were employees of Oracle who resided outside of California. They worked as instructors training customers on Oracle software implementations. This required them to periodically perform work in California, ranging from as few as five days to approximately thirty days each year. Oracle classified these instructors as "teachers" under the California Labor Code, which exempted them from the requirement of mandatory overtime pay. The plaintiffs alleged that Oracle misclassified them as exempt from overtime and sought compensation for unpaid overtime under California law and the federal Fair Labor Standards Act (FLSA).

The district court granted summary judgment to Oracle. It held that relevant provisions of California law did not, or could not, apply to the work performed by the plaintiffs because of their out-of-state residency. The Ninth Circuit; however, reversed the ruling stating that nonresidents who work in California are governed by California's overtime laws, not the laws of

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that employee's home state. The court held that California residents would be substantially disadvantaged in the labor market by the cheaper labor that would be made available if a California employer could avoid the state's overtime requirements by hiring nonresidents. The court also reasoned in its choice of law analysis that California has a strong interest in applying its Labor Code to the work performed by plaintiffs in California, particularly where the other respective states of interest either have failed to express an interest in wages paid to its residents or provide no protection to its workers employed outside of the state's borders.

While the court's reasoning on the choice of law question took into account that Oracle maintains its headquarters and principal place of business in California, the opinion did not clearly address its effect on a non-Californian employer. It is not beyond reason to advise all that all employers therefore should ensure that nonresident employees are compensated in the same manner as residents of California, not the laws of that employee's state. The complexity of this ruling is immediately apparent. For example, California requires payment of daily overtime for non-exempt employees after 8 hours worked in one day and at double time for any work in excess of 12 hours in one day. Most other states (and the FLSA) only require weekly overtime after 40 hours.

John J. Soltys, a member of Cozen O'Connor's Seattle office, did not find the Ninth Circuit ruling surprising; however he noted that it could have far reaching implications. The ruling does not address the variety of other differences California Labor Law has with other states, including the accrual of vacation days and mandated meal breaks. The Sullivan decision allowed the plaintiffs to collect overtime on the basis of individual days worked in California. California law considers vacation accrues with each day of service under California law, whereas other states allow unused vacation to be forfeited. Sullivan begs the question as to whether its calculus should be performed for any similar conflicts. – advises his corporate clients to be very wary of the planning necessary to comply with California Labor laws when sending non-resident employees into the state.

*For more information, or to discuss the effect and impact of Sullivan v. Oracle Corporation, 547 F.3d 1177 (9th Cir. 2008), please call Jack at 206.224.1276.*

# DIRECTORY OF OFFICES

## PRINCIPAL OFFICE: PHILADELPHIA

1900 Market Street • Philadelphia, PA 19103-3508
P: 215.665.2000 or 800.523.2900
F: 215.665.2013

*For general information please contact:*
Joseph A. Gerber

### ATLANTA
SunTrust Plaza
303 Peachtree Street, NE
Suite 2200
Atlanta, GA 30308-3264
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F: 404.572.2199
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Contact: Thomas McKay, III

### CHICAGO
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Chicago, IL 60606-6000
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F: 312.382.8910
Contact: Tia C. Ghattas

### DALLAS
2300 Bank One Center
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Dallas, TX 75201-7335
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F: 214.462.3299
Contact: Anne L. Cook

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F: 832.214.3905
Contact: Joseph A. Ziemianski

### LONDON
9th Floor, Fountain House
130 Fenchurch Street
London, UK
EC3M 5DJ
P: 011.44.20.7864.2000
F: 011.44.20.7864.2013
Contact: Simon D. Jones

### LOS ANGELES
777 South Figueroa Street
Suite 2850
Los Angeles, CA 90017-5800
P: 213.892.7900 or 800.563.1027
F: 213.892.7999
Contact: Huey P. Cotton

### MIAMI
Wachovia Financial Center
200 South Biscayne Boulevard
Suite 4410
Miami, FL 33131
P: 305.704.5940 or 800.215.2137
F: 305.704.5955
Contact: Richard M. Dunn

### NEW YORK
45 Broadway Atrium, Suite 1600
New York, NY 10006-3792
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F: 212.509.9492
Contact: Geoffrey D. Ferrer

### NEWARK
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Newark, NJ 07102-5211
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F: 973.353.8404
Contact: Rafael Perez

### SAN DIEGO
501 West Broadway, Suite 1610
San Diego, CA 92101-3536
P: 619.234.1700 or 800.782.3366
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Contact: Blanca Quintero

### SANTA FE
125 Lincoln Avenue, Suite 400
Santa Fe, NM 87501-2055
P: 505.820.3346 or 866.231.0144
F: 505.820.3347
Contact: Harvey Fruman

### SEATTLE
Washington Mutual Tower
1201 Third Avenue, Suite 5200
Seattle, WA 98101-3071
P: 206.340.1000 or 800.423.1950
F: 206.621.8783
Contact: Jodi McDougall

### TORONTO
One Queen Street East, Suite 1920
Toronto, Ontario M5C 2W5
P: 416.361.3200 or 888.727.9948
F: 416.361.1405
Contact: Christopher Reain

### TRENTON
144-B West State Street
Trenton, NJ 08608
P: 609.989.8620
Contact: Rafael Perez

### WASHINGTON, DC
The Army and Navy Building
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Washington, DC 20006-4007
P: 202.912.4800 or 800.540.1355
F: 202.912.4830
Contact: Barry Boss

### WEST CONSHOHOCKEN
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Suite 400, P.O. Box 800
West Conshohocken, PA 19428-0800
P: 610.941.5400 or 800.379.0695
F: 610.941.0711
Contact: Ross Weiss

### WILMINGTON
Chase Manhattan Centre, Suite 1400
1201 North Market Street
Wilmington, DE 19801-1147
P: 302.295.2000 or 888.207.2440
F: 302.295.2013
Contact: Mark E. Felger

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