

# RECENT DEVELOPMENTS

## CLASS ACTIONS

### NAMED PLAINTIFF HAD NO STANDING TO FILE CLASS ACTION

DaimlerChrysler Corp. v. Inman, \_\_\_\_ S.W.3d \_\_\_\_ (Tex. 2008).

**FACTS:** Inman, Castro, and Wilkins sued DaimlerChrysler (“Chrysler”) on behalf of a nationwide class, alleging that Gen-3 seatbelt buckles were defective. Each plaintiff owned a vehicle manufactured by Chrysler that was equipped with Gen-3 seatbelt buckles. No one had been hurt by the seatbelt unlatching too easily and only one of the three plaintiffs had actually experienced it. The plaintiffs sued to have their buckles replaced with ones that were harder to unlatch. After plaintiffs filed their petition, Chrysler moved for summary judgment on the ground that plaintiffs’ pleadings failed to state a viable cause of action. The trial court denied Chrysler’s motion and granted class certification.

Chrysler appealed, arguing that the case should be dismissed because plaintiffs had not sustained any cognizable injury and, therefore, lacked standing to assert their claims. The court of appeals rejected Chrysler’s argument but reversed the class action certification and remanded the case for further proceedings. Chrysler petitioned the Texas Supreme Court for review to consider its argument that plaintiffs lacked standing to assert their claims.

**HOLDING:** Reversed and dismissed.

**REASONING:** A person who buys a defective product can sue for economic damages, but the law is not well developed on the

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degree to which the defect must actually manifest itself before it is actionable. A court has no jurisdiction over a claim made by a plaintiff without standing to assert it. To have standing, a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical. A plaintiff does not lack standing simply because he cannot prevail on

the merits of his claim; he lacks standing because his claim of injury is too slight for a court to afford redress.

In *M.D. Anderson Cancer Center v. Novak*, the court held that Novak was not deceived or injured by a fund raising letter he received and he did not have standing individually to assert fraud. 52 S.W.3d 704 (Tex. 2001). The entire action was dismissed for want of jurisdiction. The court distinguished *M.D. Anderson* from the case at hand because after Novak decided the letter was false he could not be deceived or injured. Here the plaintiffs still had the possibility of injury even if it had not yet occurred.

The court looked further at *Rivera v. Wyeth-Ayerst Laboratories*, where the court held that Rivera had no standing to sue because she had not been harmed by the medication that was voluntarily recalled and had harmed others who failed to

heed to the warnings posted with the medicine. 283 F.3d 315 (5th Cir. 2002). The court contrasted *Rivera* with *Cole v. General Motors Corp.*, wherein the court held that Cole had standing to sue because the side air bags defect could cause the air bags to deploy at any moment and injury was only a matter of time. 484 F.3d 717 (5th Cir. 2007).

The court determined that any injury to plaintiffs in the present case was too remote. The court held that plaintiffs did not have standing because they were not “personally aggrieved” and their injuries were not “concrete” and “actual or imminent.” If the named plaintiffs in a putative class action do not have standing to assert their own individual claims, the entire action must be dismissed. The court reversed the judgment of the court of appeals and dismissed the case for want of jurisdiction.

The dissent argued that the majority was incorrect because they improperly focused on the party rather than the issue to be adjudicated. Each named plaintiff alleged a personal interest in the case and a type of injury that is generally redressable under Texas law, which requires *only* (1) a real controversy between the parties that (2) will be actually determined by the judicial declaration sought. As both of those conditions were satisfied here, the class representatives had standing to prosecute their claims. The dissent continued that absent a full record, the plaintiffs’ claims of economic injury could not yet be ruled upon, making the dismissal for want of subject matter jurisdiction incorrect. The dissent concluded that whether a recovery for a claim is permitted is a separate question from whether class certification is appropriate; therefore, the plaintiffs had established a concrete injury in fact and had standing to pursue this class action.

### COURT VACATES CLASS ACTION ATTORNEYS’ FEES AWARD

In re High Sulfur Content Gasoline Prods. Liab. Litig., \_\_\_\_ F.3d \_\_\_\_ (5th Cir. 2008).

**FACTS:** After settling a class action lawsuit, \$6.875 million was allocated to pay attorneys’ fees for a total of 79 plaintiffs’ attorneys. The court appointed a five-member fee committee to allocate the fee award among the attorneys, consisting of 5 attorneys who participated in the case. The committee invited plaintiffs’ attorneys to submit statements explaining their contributions to the common benefit of the class and evaluating the contributions of other attorneys.

The committee presented its proposed fee allocation at an ex parte hearing. None of the other 74 attorneys were notified of the hearing, nor were they shown the allocation proposal. The court’s order (a) placed under seal the allocation list; (b) prohibited each plaintiffs’ attorney from disclosing to anyone, including his clients and other attorneys, the amount of his award under penalty of sanctions to be imposed by the court; (c) required fees, costs, and expenses to be “distributed immediately;” (d) mandated that fee award checks bear a full and final release; and (e) established the district court’s process for dealing with any objections to fee awards. After reviewing the proposal for only 20 minutes, the district court signed the fee allocation without modification. The

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other attorneys requested the district court to reconsider its order and unseal the allocation list. The court denied the motion and refused to unseal the allocation list.

**HOLDING:** Vacated and remanded.

**REASONING:** In a class action settlement, the district court has an independent duty to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel. FED. R. CIV. P. 23. The court's duty to review attorneys' fees is no less compelling in common fund cases. To fulfill its duty, "the district court must not cursorily approve the attorneys' fees provision of a class settlement or delegate that duty to the parties." The fee allocation must use the "lodestar method" by determining the reasonable number of hours expended on litigation and the reasonable hourly rate. The district court may adjust the lodestar upward or downward after it scrutinizes the twelve factors set forth in *Johnson v. Georgia Highway Express*, and must not merely ratify a pre-arranged compact. 488 F.2d 714 (5th Cir. 1974).

The district court claimed that it assessed the reasonableness of the fee allocation and considered the *Johnson* factors when it approved the class action settlement and set aside \$6.875 million for attorneys' fees. The circuit court stated that the district court failed to fulfill its duty to further scrutinize the allocation. First, the hearing lasted only 20 minutes and no sworn depositions or affidavits were taken into the record. Second, the hearing was ex parte, so the other attorneys were not present to challenge the fee committee's statements. Third, the record lacks evidence of a *Johnson* review. The record strongly suggests that at the time of the ex parte hearing the court possessed no documents upon which it could base findings for individual attorneys' fees.

Additionally, the fee allocation violated the 10-day stay on fee distribution required by the Federal Rules of Civil Procedure because the court's order required immediate payment of the fees. Also, a fee hearing's format must be fair by containing the procedural minima of due process. Here, the process did not allow the other attorneys to be heard. The circuit court vacated the district court's order and remanded for accordant proceedings.

## COURT MUST REVIEW CLASS ACTION SETTLEMENT

In re Syncor ERISA Litig., 516 F.3d 1095 (9th Cir. 2008).

**FACTS:** Syncor International Corp. ("Syncor"), a health care services company, merged with Cardinal Health, Inc. ("Cardinal") on January 1, 2003. Prior to the merger, Syncor was the administrator and fiduciary of the Syncor Employee's Saving and Stock Ownership Plan ("the Plan"), a retirement plan governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. Committee members appointed by Syncor's board of directors administered the Plan. Syncor's board of directors also had final decision-making authority regarding all aspects of the Plan's administration.

Syncor announced that Cardinal Health, Inc. ("Cardinal") would acquire Syncor in a stock-for-stock merger. The agreement stated Syncor employees would receive 0.52 shares of Cardinal stock in exchange for each share of Syncor stock. Cardinal, by conducting a due diligence review of Syncor, discovered that a Syncor board member was bribing doctors at Taiwanese government hospitals to push Syncor products. That

same board member, along with another board member, continued to allow the retirement plan to hold and acquire Syncor stock despite knowledge of the bribery scheme. Syncor's stock price dropped and Cardinal reduced the exchange rate to 0.47 shares of Cardinal for each Syncor share. Because of this loss, a class action complaint was filed on behalf of participants in the plan.

The class action complaint alleged that Syncor and the committee members breached their fiduciary duties in violation of ERISA §§ 404(a)(1)(A)-(D) and § 405. The district court ordered the parties to comply with mandatory settlement procedures. Syncor filed motions for summary judgment. The parties signed a proposed settlement agreement and informed the court by leaving a message with the court clerk and sending a letter to the court. That same day, the court drafted an order granting the motions for summary judgment. The following day, the parties requested the court not to issue a ruling on the motions. The court entered the motions anyway and denied the proposed settlement. The plaintiffs filed motions under Federal Rules of Civil Procedure ("FRCP") 60(b) and 59(e). The court denied both motions and the plaintiffs appealed.

**HOLDING:** Reversed and remanded.

**REASONING:** FRCP 23(e) requires judicial approval before a settlement becomes final. The court previously held that the judicial requirement of approval does not affect the binding nature of a settlement agreement. The court found that because parties bound themselves to a settlement agreement and because proper notice of the agreement had been given to the district court, the district court should not have granted the motions for summary judgment and entered final judgment against the plaintiffs.

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Judicial policy

favors voluntary conciliation and settlements in dispute resolution. The court found that the district court had an obligation to protect unnamed class members because they were not involved in negotiating the settlement. The court held the district court abused its discretion by entering the final judgments and refusing to vacate the final judgments under FRCP 60(b) and 59(e). The district court thus should have reviewed the settlement document as required under FRCP 23(e). The court also held the district court erred when it did not review the settlement agreement prior to entry of its judgments.

## E-MAILED CLASS ACTION WAIVER NOT ENFORCEABLE

Skirchak v. Dynamics Research Corp., 508 F.3d 49 (1st Cir. 2007).

**FACTS:** Plaintiffs Joseph Skirchak and Barry Aldrich were employed by Dynamics Research Corporation ("DRC"). Roughly a year prior to the plaintiffs' resignation, on the Tuesday before the

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Thanksgiving holiday, DRC emailed its employees a memo asking the employees to read three attached documents. The memo did not require any acknowledgement from the employees. The first attachment was a two-page document describing the new dispute resolution program (“program”). This attachment said that the new program “does not limit or change any substantive legal rights of our employees.” The second attachment described the new program in detail. The document was 15 pages long with 18 pages of appendices. The class action waiver clause was not contained in the body of the document, but rather in Appendices A and B. The final page of Appendix A stated that employees consented to the new program by returning to work the next Monday.

Shortly after Skirchak resigned, he filed a complaint with the U.S. Department of Labor (“DOL”) alleging that DRC violated the Fair Labor Standards Act (“FLSA”). Following the DOL’s investigation, DCR agreed to return \$75,000 to its employees and to change their policies. The plaintiffs then filed a class action suit against DRC alleging violations of the FLSA and the Massachusetts Minimum Fair Wage Law. The plaintiffs claimed damages beyond the relief obtained as a result of the DOL’s investigation. DRC moved to dismiss and compel arbitration per the company’s program. The district court issued an order compelling arbitration but struck the clause barring class action. DRC appealed the striking of the class action clause.

**HOLDING:** Affirmed and remanded.

**REASONING:** The court determined that it must follow state law in determining whether the terms of the program were unconscionable. Under Massachusetts law, when a waiver of statutory rights is at issue, the waiver must be both knowing and voluntary. The Massachusetts Supreme Judicial Court held a waiver to be unconscionable if it resulted in oppression and unfair surprise to the disadvantaged parties.

Here, the court found the waiver of the class action at bar to be oppressive and an unfair surprise to the employees of DRC. The timing, language, and format of the program documentation obscured the waiver of class action. The court stated several events that raised unconscionability concerns including: 1) the obscurity of the waiver clause; 2) the timing of the email just before Thanksgiving break; 3) the failure to require a response by employees; 4) the statement that the new program would not limit or change any substantive legal rights; 5) that the memo failed to give notice; and 6) the shortness of time the employees had to consider the waiver clause. Adding to the finding of unconscionability, the court also noted that DRC veered from its normal business practices by e-mailing an employee policy change and not requiring a response. The court also noted that when DRC made personal policy changes in the past, it offered training to employees, mailed documentation to the employees’ homes and announced changes at company wide meetings.

## MISCELLANEOUS

### SUPREME COURT LIMIT SUITS OVER MEDICAL DEVICES

Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008).

**FACTS:** Charles Riegel suffered a myocardial infarction shortly after undergoing coronary angioplasty. His right coronary artery was diffusely diseased and heavily calcified. His doctor inserted Medtronic’s Evergreen Balloon Catheter to dilate his artery. The label stated the catheter should not be used on patients with diffuse or calcified stenoses. The label also warned that the catheter should not be filled greater than 8 atmospheres. Riegel’s doctor inflated the catheter to 10 atmospheres, causing it to burst. Riegel developed a heart block resulting in the need for an emergency coronary bypass.

Medtronic received pre-market approval for a Class III device from the Food and Drug Administration (“FDA”) for its Evergreen Balloon Catheter in 1994. The Medical Device Amendments of 1976 (“MDA”) established a rigorous review for Class III devices. Section 360(k)(a) of the MDA grants express federal preemption for oversight of medical devices. Specifically, § 360(k)(a) states, “no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement . . . (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.”

Riegel sued Medtronic alleging its catheter was designed, labeled, and manufactured in a manner that violated New York

common law. The district court held that the MDA preempted Riegel’s common law claims. The court of appeals affirmed and Riegel appealed.

**HOLDING:** Affirmed.

**REASONING:** The Court found that the FDA’s pre-market approval imposes requirements to the catheter under the MDA since such approval is specific to individual devices. Previously the Court held that general federal requirements for devices might not be subject to the MDA preemption provision. Devices approved by the FDA for pre-market approval are individually reviewed for safety and effectiveness. The specificity of FDA reviews entitles pre-market approvals to preempt state regulatory laws.

The Court held the Riegel’s common law claims were preempted by § 360(k)(a). The Court found that state common law, like state statutes regulating medical devices, may be preempted by § 360(k)(a). State requirements for medical devices that are different from, or in addition to, federal requirements are pre-empted under the MDA only to the extent that they are “different from, or in addition to” the requirements imposed by federal law. Thus, § 360k does not prevent a state from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case “parallel,” rather than add to, federal requirements.

### PROPERTY CODE § 53.055 DOES NOT REQUIRE THAT A LIEN AFFIDAVIT BE FILED WITH THE COUNTY CLERK BEFORE THE REQUIRED NOTICE IS GIVEN

Arias v. Brookstone, L.P., \_\_\_ S.W.3d \_\_\_ (Tex. App.—Houston [1st Dist.] 2007).