

Class Action Newsletter

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RECENT DEVELOPMENTS

Antitrust/Class Action Settlement

Judge rejects proposed no-cash Microsoft class action settlement due to inadequate record on value of claims and insufficient funding of *cy pres* relief: Federal Judge J.

Frederick Motz of the District of Maryland rejected a proposed consolidated settlement of the numerous nationwide class action lawsuits brought against Microsoft in the wake of the findings against it in the Justice Department's antitrust action. The proposed settlement would not have provided any monetary payments to any of the class members, but would have called for so-called *cy pres* relief in the form of funding by Microsoft of an "eLearning Foundation" to foster computer education. Microsoft's total cash commitment would have been at least \$400 million, with the potential for contributing an additional \$100 million in matching funds. While Judge Motz rejected the argument that *cy pres* relief was *per se* inappropriate, he declined to approve the specific relief proposed in the settlement because he felt that the record as to the potential damages recoverable had not been adequately developed. Objecting plaintiffs had proffered expert testimony that non-trebled damages could range from \$10.3 billion to \$18.9 billion. The settlement proponents did not offer any evidence on likely damages. Judge Motz concluded that he could not assess the reasonableness of the proposed *cy pres* fund in light of the absence of any competing damages estimate from the settling parties. He did conclude, however, that the evidence that had been presented was sufficient to convince him that Microsoft's proposed contribution to the settlement was inadequate. The rejection of the Microsoft settlement epitomizes trial courts' increasing willingness to give close scrutiny to non-cash settlements (a practice that will be mandated by statute if the Class Action Fairness Act of 2002 is enacted – see accompanying article) and indicates the types of issues that could inform the review of such settlements. Should other courts follow Judge Motz's analysis, parties proposing non-cash settlements of significant class action lawsuits may need to be prepared to offer the kind of damages analysis called for in the Microsoft case. *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519 (D. Md. 2002).

Antitrust/Price-Fixing Class Actions

States continue to split on indirect purchaser price-fixing class actions: While it is a settled principle under federal

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House Passes Bill to Federalize Large State Law Plaintiff Class Actions; Prospects for Passage by Senate in This Term Doubtful

On March 13, 2002, the U.S. House of Representatives passed the Class Action Fairness Act of 2002, H.R. 2341. The bill is a litigation reform measure intended to channel large plaintiff class actions to federal courts, which are perceived to be less hospitable to the certification of plaintiff classes. Unlike prior bills designed to achieve the same end, the Class Action Fairness Act includes provisions that would provide some protections to plaintiff class members, albeit in some instances at the expense of attorneys representing plaintiff classes. The largely pro-business enactment passed the Republican-controlled House by a vote of 233 to 190, but faces a less certain future in the Democrat-controlled Senate. The influence of the plaintiffs' trial lawyers' lobby over the Senate leadership makes passage in this term extremely unlikely. The potential for change in control of the Senate after the fall elections does suggest, however, that action on the bill this year could lay the groundwork for consideration of the bill in the next term.

The most significant provisions of the bill from the business perspective appear in Section 4, which would change existing federal law to permit the exercise of federal jurisdiction over certain types of state law class actions not currently justiciable in federal court. While federal courts can hear any class action asserting claims under a federal statute, many class actions concerning matters such as products liability, mass torts and consumer fraud solely involve claims under state law. Federal courts can only hear state law cases if (i) all named plaintiffs are citizens of different states than all defendants and (ii) the amount in controversy exceeds \$75,000. 28 U.S.C. § 1332. As to that latter requirement, the Supreme Court has held that diversity jurisdiction is available under § 1332 only for class actions in which each class member's claim equals or exceeds \$75,000. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). Although some recent cases have held that amendments to the federal supplemental jurisdiction statute now permit federal court jurisdiction so long as the named plaintiff's claims are at least \$75,000, *see, e.g., In re Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995), federal court jurisdiction of state law class actions remains largely unavailable in many federal circuits. *See, e.g., Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 632-33 (10th Cir. 1998).

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law that consumers and indirect purchasers cannot bring price-fixing claims against manufacturers under the federal Sherman Antitrust Act, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977), two recent state high court cases highlight a continuing split among the states as to whether such class actions are permitted under state law. The Massachusetts Supreme Judicial Court recently held that consumers and other indirect purchasers of products could sue manufacturers for price-fixing under the Massachusetts “mini FTC Act,” Chapter 93A of the Massachusetts General Laws, which proscribes “unfair or deceptive acts or practices.” The Massachusetts high court approved that cause of action notwithstanding its concurrent ruling that the Massachusetts Antitrust Act, Chapter 93 of the Massachusetts General Laws, would have to be interpreted consistently with the Sherman Act to prohibit indirect purchaser claims. As a result of this decision, Massachusetts now joins thirty-six other states and the District of Columbia in recognizing the right of indirect purchasers to bring price-fixing class actions under state law. *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 436 Mass. 53, 762 N.E.2d 303 (2002). On the other side of the ledger, the Connecticut Supreme Court recently elected to follow *Illinois Brick*, and ruled that neither the Connecticut Antitrust Act, Connecticut General Statutes § 35-35, nor the Connecticut Unfair Trade Practices Act (CUTPA), Connecticut General Statutes § 42-110b, allowed an indirect purchaser to assert claims for price fixing. Although CUTPA is a mini-FTC Act that is worded almost identically to Massachusetts General Laws Chapter 93A, there is a privity requirement under CUTPA which, the Connecticut court held, prohibits its use as a vehicle for indirect purchaser claims. By this ruling, Connecticut cast its lot with the minority of states that adhere to the principles stated in *Illinois Brick*. *Vacco v. Microsoft Corp.*, 260 Conn. 59, 793 A.2d 1048 (2002).

Consumer Fraud/Class Certification

Reliance cannot be presumed in case alleging fraudulent marketing scheme: The Eleventh Circuit Court of Appeals held that a trial court erred in presuming that all putative class members relied on allegedly fraudulent advertisements to participate in an automated “900 number” telephone game that often resulted in phone charges in excess of participants’ winnings. The trial court had held that reliance, an essential element of the civil racketeering claims advanced by plaintiffs, could be presumed and would not require individualized proof. The Eleventh Circuit, however, rejected that finding, stating that a presumption of reliance was inappropriate because it would shift the burden of proof from class members, who alone knew if they did or did not rely, to defendants, who had no information that would enable them to disprove individual plaintiff’s reliance. Accordingly, because that presumption was improper, individual inquiries would be necessary as to reliance, thereby making it improper to adjudicate the dispute as a class action. *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002).

Employment Law/Class Actions

The EEOC can bring a discrimination class action without satisfying Rule 23 requirements for class certification: The Seventh Circuit ruled that the Equal Employment Opportunity Commission can bring an employment discrimination action

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Section 4 of the Class Action Fairness Act would amend 28 U.S.C. § 1332(d)(2) to eliminate *Zahn’s* bar to federal jurisdiction of state law class actions where the aggregate amount in controversy as to all putative class members exceeds \$2,000,000, exclusive of interest and costs, and at least one named plaintiff lives in a U.S. state or foreign state different from any defendant. Class Action Fairness Act, § 4. The federal court jurisdictional grant of the amended § 1332(d)(2) would not include (i) single state class actions, (ii) actions against states or state officials, (iii) class actions on behalf of 100 or fewer class members, (iv) state blue sky securities actions and (v) shareholder derivative and corporate governance class actions. *Id.* Under Section 5 of the act, both defendants and non-representative plaintiff class members could remove qualifying class actions from state to federal court. *Id.*, § 5. Finally, the bill would provide an automatic right of appeal from the grant or denial of class certification. *Id.*, § 6.

The impetus to “federalize” state law class actions rests in the perception that federal courts are less amenable to certifying large national classes advancing state law claims for negligence, fraud and violation of state unfair trade practice statutes. Since 1995, federal Courts of Appeals have demonstrated an increased willingness to rule that proposed nationwide classes advancing state law claims do not satisfy the requirements for certification under Fed. R. Civ. P. 23. *See, e.g., Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-78 (7th Cir. 2001); *In re Life USA Holdings, Inc.*, 242 F.3d 136, 146-48 (3d Cir. 2001); *Barnes v. American Tobacco Co.*, 161 F.3d 127, (3d Cir. 1998); *Sprague v. General Motors Corp.*, 133 F.3d 388, 397-98 (6th Cir. 1998); *In re American Medical Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300-03 (7th Cir. 1995). State courts, by contrast, have exhibited a greater willingness to conclude that variations in facts and law from class member to class member do not bar class certification. *See, e.g., Weld v. Glaxo Wellcome Inc.* 434 Mass. 81, 91-92 (2001) (factual variations among class members do not preclude certification); *Microsoft Corp. v. Manning*, 914 S.W.2d 602, 613 (Ct. App. Tex. 1995) (application of different states’ laws would not make class unmanageable); *Delgozzo v. Kenny*, 266 N.J. Super. 169, 192, 628 A.2d 1080, 1092 (App. Div. 1993) (variations in facts and applicable law from class member to class member did not preclude certification of 25 state class). By permitting the removal of state law class actions to federal court, the Class Action Fairness Act could make it more difficult for plaintiffs to obtain certification of national plaintiff classes.

Certain “plaintiff-friendly” measures appearing in Section 3 of the bill leave the business-oriented jurisdictional provisions of the Class Action Fairness Act. Specifically, Section 3 would insert at 28 U.S.C. §§ 1711-1717 a so-called “consumer class action bill

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seeking compensatory and punitive damages on behalf of a class of minority employees without satisfying any of the requirements for certification of a class action under Fed. R. Civ. P. 23. In so ruling, the court recognized the continuing viability of the Supreme Court's decision in *General Telephone of the Northwest v. EEOC*, 446 U.S. 318 (1980), which held that the EEOC's enabling statute conferred the right to seek class relief as part of its enforcement powers. Rule 23 does not limit those enforcement powers because they have been expressly granted by statute. Thus, in contrast to recent cases holding that private plaintiffs must surmount stringent hurdles to obtain certification of private discrimination class actions seeking money damages, see, e.g., *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), the continued viability of *General Telephone* indicates that the EEOC faces no such barriers. This suggests that there is a higher degree of potential damages exposure in employment discrimination cases involving the active participation of the EEOC, which wields the most credible threat to seek and obtain class-type relief. *In re Bemis Co.*, 279 F.3d 419 (7th Cir. 2002).

Securities/Class Certification

"Fraud-on-the-market" presumption held not to apply to permit class certification where misrepresentation is not publicly disseminated: The Seventh Circuit recently held that a plaintiff class consisting of all holders of Jefferson Savings Bancorp stock could not seek damages as a class against a broker who allegedly made false statements to eleven of his customers that Jefferson was certain to be acquired at a premium in the near future. Other than the broker's eleven customers, the certified class consisted entirely of persons who had not heard or acted on the broker's alleged misrepresentations. Nonetheless, the trial court concluded that such persons' reliance—an essential element of the claim—could be presumed under the doctrine of "fraud-on-the-market." The fraud-on-the-market doctrine presumes that all holders of a stock trading publicly in an efficient market have "relied" on any material factual misrepresentations because the stock's price will incorporate the impact of those misrepresentations. *Basic, Inc. v. Levinson*, 485 U.S. 224, 241-49 (1988). The Court of Appeals stated that the trial court's reliance on the fraud-on-the-market doctrine was erroneous. Writing for the panel, noted "law and economics" adherent Judge Frank Easterbrook rejected the applicability of the efficient market presumption where the alleged misrepresentation was made only to a small number of the broker's customers and not to the market at large. In the absence of any data or econometric evaluation showing that the private statements moved the overall stock price, Judge Easterbrook concluded that "extension" of the fraud-on-the-market doctrine was not warranted on the facts of that case, thus preventing the assertion of a claim based on the broker's wrongdoing by anyone who had not actually received and acted on the alleged misrepresentation. While Judge Easterbrook cast his decision as an attempt to avoid expansion of the fraud-on-the-market doctrine beyond its current scope, the ruling may signal an increased judicial willingness to reexamine the economic foundations of the fraud-on-the-market presumption. *West v. Prudential Securities, Inc.*, 282 F.3d 935 (7th Cir. 2002). □

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of rights" that would confer certain protections on members of certified plaintiff classes, including (i) requiring a hearing and written judicial findings before approval of any proposed settlement that does not result in cash payments to the class; (ii) prohibiting proportionally larger payments to certain class members based either on their geographic proximity to the court or their status as representative plaintiff; (iii) mandating "plain English" notices of class certification or of proposed settlements; and (iv) prohibiting the issuance of protective orders, even as to discovery documents not filed in court, absent express judicial findings that the order is consistent with the public interest and that confidentiality concerns outweigh the public interest in disclosure.

The prohibition on routine protective orders to bar the disclosure of discovery material is a novel enactment that would provide significant benefits to persons advancing claims against businesses. On the other hand, provisions conditioning settlement approval on the conduct of a hearing and written judicial findings simply duplicate requirements set forth in proposed amendments to Fed. R. Civ. P. 23 that are awaiting final rules committee and Supreme Court approval. See Advisory Committee on the Federal Rules of Civil Procedure, Report of the Civil Rules Committee (May 14, 2001, rev. Jul. 31, 2000). Moreover, other aspects of the "bill of rights" are a deliberate slap at the plaintiff's class action bar, including the heightened scrutiny that will be given to non-cash settlements. The latter provision typifies a growing sentiment against "strike suits" in which companies buy off class action counsel in settlements that provide no cash to the class and hefty attorneys' fees to plaintiffs' attorneys. One Florida judge, in a recent decision rejecting such a proposed no-cash settlement, likened the plaintiffs' attorneys to "squeegee boys" who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off." *Fruchter v. Florida Progress Corp.*, No. 99-6167 (Fla. Circuit Ct. 2002) (Baird, J.) (reported in *The Recorder*, Apr. 17, 2002). Those who share that judge's skepticism of the motives of the plaintiffs' class action bar have found a voice in the Class Action Fairness Act.

The trial lawyers' lobby is unlikely to let that challenge go unanswered. Given the directness of the bill's attack on their interests, there is every expectation that the plaintiffs' trial bar will muster its lobbying resources to portray the legislation as an attempt to impose undue restrictions on meritorious litigation in the post-Enron era. Views on the legislation have already divided on partisan lines within the legal community. As reported in the April 17, 2002, issue of *United States Law Week*, testimony by the plaintiffs' and defense bars at a recent hearing on H.R. 2341 by the American Bar Association Task Force on Class Actions ignored potential areas for common ground and instead advocat-

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ed either for adoption or defeat of the legislation. George E. Pickle, Jr. of the general counsel's office at Shell Oil Co. lauded the bill as a remedy for "drive by certifications" claimed to be prevalent in certain state courts, whereas Richard Middleton of the American Trial Lawyers Association (ATLA) opposed the legislation as a "jurisdictional restraint bill" that would create "reverse forum shopping" by enabling defendants to pick and choose their courts. *ABA Group Reviewing Class Action Issues Hears Divided Testimony on Proposed Reform*, 70 U.S.L.W. 2644 (Apr. 14, 2002). Plaintiff's securities lawyer Daniel Krasner went so far as to call the bill the "Class Action Emasculation Act." *Id.* at 2645.

Ultimately, the opposition of ATLA and other allied plaintiffs' class action advocacy groups will frustrate attempts to pass the bill through the Senate. According to Mark Buse, Vice President of Government Relations in the Washington office of ML Strategies (a consulting affiliate of Mintz Levin), the bill cannot become law unless the Democratic-controlled Senate allows the issue to be duly considered. Senate consideration of the Class Action Fairness Act, however, is unlikely to occur because ATLA will use its allies in the Senate, both on the Judiciary Committee and in the Senate as a whole, to thwart any efforts to move the bill.

Buse, who formerly was the Republican Staff Director for the Senate Commerce, Science and Transportation Committee, points out that organizational control of the Senate will change if only one Democratic held seat changes hands in the upcoming November elections. Buse points to possibilities for turnover in South Dakota, Missouri, and/or Minnesota. Such a change would make Senate consideration of the Class Action Fairness Act during the 108th Congress exceedingly likely. Any votes taken this year will not only lay the groundwork for future consideration of the measure, but will tend to "lock in" votes upon which a majority coalition large enough to ensure passage of the bill could be built. □

Recent Cases Highlight Difficulties of Recovering Damages in Privacy Class Actions

According to a recent Harris Poll, 90 percent of Americans are concerned about perceived threats to their privacy. Seeking to capitalize on this hot button issue, plaintiffs' lawyers have increasingly targeted businesses for privacy class actions. However, as demonstrated by the outcomes of two recent privacy class actions—one of which was dismissed entirely, *Smith*

v. Chase Manhattan Bank, USA, N.A., and one of which plaintiffs have agreed to settle without any recovery of money damages, *In re DoubleClick, Inc. Privacy Litigation*—plaintiffs in such cases are finding it difficult to prove and obtain money damages on a class-wide basis.

Unlike securities class actions in which the "damage" to the class can easily be computed based on the decline in stock price, no such straightforward means of measuring damages has been identified in the privacy realm. Indeed, because the consequences of an invasion of privacy are inherently personal in nature, plaintiffs have generally been left to argue that the class-wide harm is the "disclosure" or "use" of their personal information itself, rather than any particular consequences that plaintiffs suffered as a result of such disclosure or use, which inevitably would vary so greatly across individuals that a class action could not be maintained. As *Chase Manhattan* and *DoubleClick* demonstrate, some courts have proven reluctant to embrace such a theory of class-wide damages. Accordingly, except in those instances where statutory minimum damages are available, plaintiffs may often be left to settle for purely structural relief (*DoubleClick*), or in some cases, obtain no relief at all (*Chase Manhattan*). If this trend continues, it ultimately may dampen the enthusiasm of the plaintiffs' bar for pursuing privacy and confidentiality-based claims by means of a class action.

1. *Smith v. Chase Manhattan Bank*

On April 15, 2002, a New York appellate court affirmed the dismissal of a putative class action against Chase Manhattan Bank. *See Smith v. Chase Manhattan Bank*, 2001 WL 1843934 (N.Y. App. Div., 2d Dept., April 15, 2002). According to the Complaint in that action, the defendant Chase allegedly sold and disclosed confidential financial information about its customers—including their names, addresses, phone numbers, account or loan numbers, and information regarding their account balances and specific purchases—to third party vendors, who in turn used this information to direct targeted mailings and telemarketing calls to Chase customers. Notwithstanding the highly sensitive nature of the financial information at issue, the trial court granted Chase's motion to dismiss the Complaint, in its entirety, for failure to sufficiently allege actual damages suffered by the putative plaintiff class. The Appellate Division for the Second Department affirmed.

The Appellate Division held that, even assuming Chase violated promises it made to its customers in its own privacy policy by selling and disclosing confidential financial information to third parties without authorization (as alleged in the Complaint), such deceptive disclosure, without more, is insufficient to state a claim for unfair and deceptive trade practices under New York General Business Law § 349, or

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for breach of a contractual duty of confidentiality. Rather, to bring such claims, a plaintiff must allege, and prove, that he or she suffered some tangible harm as a result of the alleged deceptive disclosure. Put another way, New York law requires deceptive disclosure plus injury, and does not allow the deceptive disclosure itself to constitute the injury. *Chase Manhattan*, 2001 WL 1843934, at ** 1-2. The Appellate Division then ruled that the only further class-wide “harm” alleged by plaintiffs—that as a result of Chase’s deceptive disclosure and sale of confidential information to third party vendors, class members received unwanted mail and phone solicitations—“does not qualify as actual harm” because no cognizable injury occurred when “class members were merely offered products and services which they were free to decline.” *Id.* at *2.¹

In contrast, New York courts have upheld individual claims for breach of confidentiality in circumstances where, as a result of the disclosure, the plaintiff allegedly suffered some identifiable harm, such as the loss of employment or consortium. *See, e.g., MacDonald v. Clinger*, 84 A.D.2d 482, 486, 446 N.Y.S.2d 801 (4th Dept. 1982) (plaintiff had cognizable claim against his psychiatrist for breach of confidentiality where psychiatrist disclosed confidential information about plaintiff to plaintiff’s wife, allegedly causing deterioration of plaintiff’s marriage, loss of plaintiff’s job, extreme financial difficulties, and emotional distress requiring further psychiatric treatment); *Tighe v. Ginsberg*, 146 A.2d 268, 271, 540 N.Y.S.2d 99 (1989) (plaintiff has valid cause of action against physician for breach of confidentiality where physician used confidential information to plaintiff’s detriment by disclosing it to plaintiff’s employer, causing plaintiff to suffer psychological problems). However, proof of particularized harm of this nature by definition requires plaintiff-by-plaintiff individualized inquiries, and therefore is incompatible with the maintenance of a class action.

2. *In re DoubleClick, Inc. Privacy Litigation*

Later this month, a federal district court in the Southern District of New York will conduct a hearing to decide whether to grant final approval to the first significant settlement of a privacy class action. DoubleClick, Inc, the world’s largest provider of Internet advertising services and products, has agreed to a nationwide settlement that requires it to modify its privacy policies and practices and pay \$1.8 million in plaintiffs’ attorneys’ fees, but that does not obligate DoubleClick to pay any monetary damages to the plaintiff

class. This no-cash settlement further highlights the difficulties of recovering money damages in class actions alleging breaches of confidentiality and/or privacy, and may provide a model for the resolution of other Internet privacy cases through similar structural relief.

The proposed settlement would resolve the nineteen (19) putative class actions pending against DoubleClick (in both federal and state court), all of which assert statutory and common law privacy claims arising out of DoubleClick’s transmission and implanting of so-called “cookies” on the computer hard drives of persons visiting websites affiliated with DoubleClick or that run DoubleClick on-line banner advertisements. “Cookies” are small electronic files that tag an Internet user’s hard drive with a numerical code, by which DoubleClick can then track information about the web pages visited by that user and create an Internet user profile. Plaintiffs allege that DoubleClick “secretly” gathers this data from Internet users without their consent and then uses it to send users unwanted web banner advertisements while they are on-line. Plaintiffs also allege that, after DoubleClick purchased the direct marketing company Abacus Direct, Inc. in June of 1999, DoubleClick began merging the Internet user profiles in its own database with the names and addresses in Abacus’ marketing database, in violation of DoubleClick’s preexisting privacy policy that information gathered from users on-line would not be bundled with their personally identifiable information.

For purposes of settlement only, the federal district court in the Southern District of New York (where all thirteen federal actions pending against DoubleClick have been consolidated) has certified a nationwide class consisting of “all persons in the United States who have had any information about their computers or about them gathered by DoubleClick as a result of their Internet activity or who have had DoubleClick cookies placed upon their computers or browsers from January 1, 1996 through and including March 28, 2002.” If final approval is granted by the district court, DoubleClick would be required to adhere to certain privacy practices and policies for the two-year period following the settlement effective date, including but not limited to:

- i) Inclusion in its privacy policy of easy-to-read explanations of its on-line ad services;
- ii) Institution of internal policies to ensure routine purging of data collected on-line;

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¹ The Appellate Division also rejected plaintiffs’ purported claim under the New York statute prohibiting the “unauthorized use” of a person’s name, portrait, or picture for “advertising purposes or for the purposes of trade,” New York Civil Rights Law §§ 50, 51. The court held that this statutory provision is designed to prevent the dilution of the commercial value of a person’s name, in an associational sense, and was “never intended to address the wrongs complained of by plaintiff.” *Chase Manhattan*, 2001 WL 1843934, at * 3.

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- iii) Execution of a public information banner ad campaign, consisting of 300 million on-line banner advertisements on-line, “to invite consumers to learn more about how to protect their privacy on the Internet”;
- iv) Programming of all new “cookies” to expire no more than five years after the date on which the cookie is implanted;
- v) Commitment that an Internet user’s data gathered under one version of DoubleClick’s privacy policy “will not be used in a manner materially inconsistent with that privacy policy unless DoubleClick has that Internet user’s permission to do otherwise;
- vi) Taking of steps to require that any successor-in-interest does not use data gathered by DoubleClick in a manner inconsistent with privacy policy under which data was collected;
- vii) Commitment that any personally identifiable information collected by DoubleClick will not be merged with other “clickstream” data gathered by DoubleClick cookies unless certain conditions are met, including “conspicuous notice and opt-in by the Internet user”; and
- viii) Retention of a national independent accounting firm to conduct two annual reviews of DoubleClick’s compliance with the settlement terms.

See Official Court Notice of Pendency and Proposed Settlement of Class Action, *In re DoubleClick, Inc. Privacy Litigation*, Master File No. 00-CIV-0641-NRB (S.D.N.Y. Mar. 29, 2002). As noted, the settlement obligates DoubleClick to adhere to this code of conduct for **two years** only, and does not require DoubleClick to pay **any** monetary damages to the plaintiff class. Rather, DoubleClick’s only monetary obligation under the settlement is to pay up to \$1.8 million in attorneys’ fees, a small amount considering that this award will be spread across thirty-one different law firms that represented the plaintiffs in the various DoubleClick privacy actions.

The willingness of plaintiffs’ counsel to settle for zero damages is not surprising on the heels of the district court’s ruling in March 2001 dismissing all of the federal privacy actions against DoubleClick for failure to state a claim. See *In re DoubleClick, Inc. Privacy Litig.*, 154 F. Supp. 2d 497 (S.D.N.Y. 2001). If upheld on appeal, the dismissal of the federal actions would eliminate the possibility of the certifica-

tion of a nationwide class, as the remaining state actions (pending in California and Texas) seek certification of statewide classes only.² While plaintiffs’ appeal of the dismissal of the federal actions is still pending (and now has been stayed in light of the proposed settlement), there is little doubt that the district court’s ruling played a crucial role in the decision of plaintiffs’ counsel to agree to a settlement for zero damages. Most notably, in granting the motion to dismiss the federal actions, the district court ruled that plaintiffs could not bring a claim under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq.* because they could not plead, or prove, compliance with the \$5,000 minimum damages requirement under the statute. 154 F. Supp. 2d at 520-26 (citing 18 U.S.C. § 1030(e)(8)(A)). Judge Buchwald held that while the statute permits damages to be aggregated across individuals when determining compliance with the \$5,000 threshold for a statutory violation, no class-wide aggregation is possible here because each cookie is placed on a separate computer, and therefore involves a separate statutory violation. *Id.* at 520-23. The court further determined that, given this constraint, no plaintiff could possibly reach this \$5,000 minimum under any of the three damages theories alleged in its Complaint.

First, while plaintiffs alleged that some members of the class incurred costs in “securing” their computer systems from DoubleClick intrusion, it was undisputed that any such costs were *de minimis* because users “can easily and at no cost prevent DoubleClick from collecting information about them by simply selecting options on their browsers or downloading an ‘opt-out cookie’ from DoubleClick’s website.” *Id.* at 524-25. Second, while plaintiffs alleged that as a result of DoubleClick’s use of their private information, members of the class were subjected to unwanted web banner advertisements and therefore lost the “economic value” of their time, the court held that even if this theory of injury were cognizable at all, such damage would again be *de minimis*, as having one’s attention diverted by a web advertisement is no different than having one’s attention diverted by a television commercial or newspaper advertisement. *Id.* at 525; *see also Smith v. Chase Manhattan Bank, USA, N.A.*, Index No. 3070/2000, slip op. at 12 (N.Y. Supr. Ct. July 27, 2000), *aff’d* 2001 WL 1843934 (N.Y. App. Div., 2d Dept., April 15, 2002) (“defendant, by its actions, might well have contributed to the scourge of our modern times—junk mail and junk telephone calls (euphemistically called ‘telemarketing’) but, nevertheless, its actions and deceptions do not rise

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² After the district court’s March 2001 decision dismissing all of the federal claims, plaintiffs continued to prosecute suits against DoubleClick in California and Texas state court, but those actions are limited to California and Texas residents only, and do not seek certification of a nationwide class. In any event, before either the California or Texas state courts could take up the issue of class certification, the parties entered into the nationwide settlement discussed above.



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to the level of an actionable wrong”). Finally, the district court noted that while the collection of demographic information undoubtedly has value to marketers such as DoubleClick, “we are unaware of any court that has held the value of this collected information constitutes damage or unjust enrichment to the collectors.” *In re DoubleClick*, 154 F. Supp. 2d at 525-26.

3. Conclusion

Both the court’s decision dismissing all claims in *Chase Manhattan* and the proposed no-cash settlement on the heels of the trial court’s dismissal of the federal damages claims in *DoubleClick* highlight the difficulties of proving and obtaining class-wide money damages in privacy class actions. To the extent this trend continues, it may ultimately have a chilling effect on the filing of such suits altogether.

On the other hand, businesses still face substantial potential exposure in connection with their privacy practices and policies. Although no such remedies were available

in either *Chase Manhattan* or *DoubleClick*, in those cases where plaintiffs can assert a claim under a statute that provides for statutory minimum damages without any obligation for plaintiffs to establish actual damages, privacy class actions still have a substantial “in terrorem” effect, with the threat of a statutory award of \$25 or \$75 per class member creating a strong incentive for the defendant to agree to a monetary settlement. Further, even in those instances where no statutory minimum damages are available, a high degree of exposure will remain for individual privacy claims asserted by persons with some particularly compelling sets of facts, such as a plaintiff who lost a job, a marriage, or had his or her financial identity stolen on account of the alleged disclosure of confidential information. After all, it is precisely because the most compelling privacy cases turn on facts and circumstances unique to the affected individuals that proof of actual injury on a class-wide basis is so problematic. □

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