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	Speaker: Jennifer Wagner
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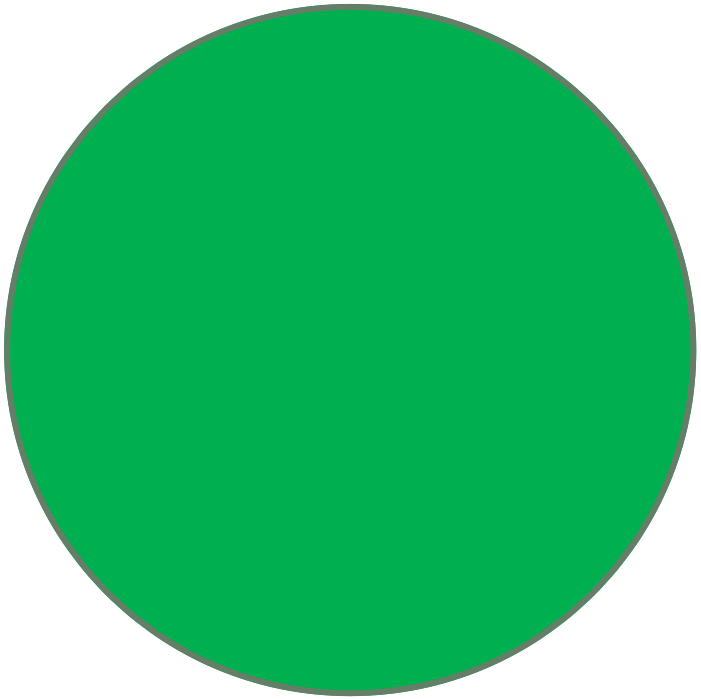

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"...only a lunatic or a fanatic sues for $30."

Carnegie v. Household Int'l, Inc., 376 F. 3d 656, 661 (7th Cir. 2004)

Richard Posner

American jurist

Richard Allen Posner is an American jurist and economist who was a United States Circuit Judge of the United States Court of Appeals for the Seventh Circuit in Chicago from 1981 until 2017, and is a ... Wikipedia

Born: January 11, 1939 (age 78), Brooklyn, New York City, NY

Spouse(s): Charlene Horn

Appointed by: Ronald Reagan

Children: Eric Posner, Kenneth A. Posner

Education: Yale College, Yale University, Harvard Law School

PORTLAND NEWS

Lawsuit claims Grand Central Bowl charges hidden 2% fee

Updated Nov 17;
Posted Nov 16

Gallery: Grand Central Bowl

BP loses lawsuit in Multnomah County, will stop charging 35 cents for debit purchases

BP plans to appeal a decision that could leave it paying $200 to customers who paid a 35-cent fee to use their debit cards to buy gas at Arco and AmPm stations. In the meantime, the company will stop charging the 35-cent fee on debit purchases. *(Simon Dawson/AP Photo)*

By Laura Gunderson | The Oregonian/OregonLive
Email the author | Follow on Twitter
on January 31, 2014 at 7:59 PM, updated January 31, 2014 at 8:01 PM

The Common Fund Doctrine

Common Fund Doctrine refers to a principle that a litigant who creates, discovers, increases, or preserves a fund to which others also have a claim is entitled to recover litigation costs and attorney's fees from that fund. That doctrine is an **equitable** doctrine designed to prevent **unjust enrichment**.

Common-Fund Doctrine Law and Legal Definition | USLegal, Inc.
https://definitions.uslegal.com/c/common-fund-doctrine/

About this result Feedback

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STEVEN SCHARFSTEIN, individually and on behalf of all other similarly situated persons, Plaintiff, vs. BP WEST COAST PRODUCTS, LLC, a Delaware limited liability company Defendant.	Case No. 1112-17046 AMENDED GENERAL JUDGMENT

THIS MATTER was tried before a jury from January 14, 2014, through February 4, 2014. The case was tried by David Sugerman, Tim Quenelle and Amy Johnson ("class counsel") on behalf of Plaintiff Steven Scharfstein, individually and representing a class, and by David Harris, Abby Risner, Brad Daniels, Doug Berry and Lois Rosenbaum on behalf of Defendant BP West Coast Products LLC ("defendant" or "BPWCP"). Scott Shorr and Josh Ross also appeared on behalf of the class. William F. Gary, Sharon A. Rudnick and Susan D. Marmaduke also appeared on behalf of defendant.

The class is defined as Plaintiff Steven Scharfstein ("plaintiff" or "Scharfstein") and all consumers who, between January 1, 2011, and August 30, 2013, bought BP-branded gasoline, including gasoline plus additional items, at Oregon ARCO stations or Oregon *arcopx* minimarkets, who paid with a debit card and who were charged with a debit card fee (the "class"). Excluded from the class are 2,441 former class members who filed valid opt-out forms and are specifically identified in Exhibit A to this judgment, which is incorporated herein by reference. ORCP 32 O. These 2,441 excluded class

Inc.; Belmont Auto Service Inc.; BP American Production Company; TP Liberty L.L.C; and SKR Inc. As a result of a clerical error, the Limited Judgments did not dismiss the claims against Defendant Jamal M H Al-Soudani Inc. The Court intends this General Judgment to dismiss all of the claims against all of the defendants except Defendant BPWCP.

Based upon the foregoing,

IT IS HEREBY ORDERED AND ADJUDGED as follows.

1. Defendant is permanently enjoined from charging a $0.35 debit card fee at its Oregon ARCO and *ampm* stations in addition to its price for gasoline, unless that condition is clearly and conspicuously advertised on its street signs and pumps in compliance with OAR 137-020-0150(3)(d).

2. Defendant is permanently enjoined from charging more than the total amount registered on the gasoline pump at the selected unit price for the gasoline sold at its ARCO and ARCO *ampm* stations in Oregon.

3. Subject to Paragraphs 5 and 6 below, Plaintiff Steven Scharfstein and the class members are entitled to an award of $200 each as statutory damages under ORS 646.608(u), ORS 646.638(1), and ORS 646.638(8)(a).

4. Subject to Paragraphs 5 and 6 below, Plaintiff Steven Scharfstein and the class members shall have, take and recover judgment against defendant in the aggregate amount of $343,245,800.

5. Upon the affirmance of this General Judgment after the exhaustion of all available appeals, Plaintiff Steven Scharfstein and the class members who filed claims shall have, take and recover from defendant $8,000,000, payable as follows: the amount of $1,585,600 in attorney fees and $292,892 in costs payable to class counsel pursuant to ORS 646.638(3); and the amount of $6,121,508 payable to the class as partial payment of

the Common Fund attorney fee judgment in Paragraph 6 below. Pursuant to ORS 82.010(2)(a) and ORS 18.042(2)(f), interest on the portion of the judgment described in this paragraph 5 shall not begin to run until 14 days after the appellate judgment issues from the appellate court of last resort.

6. Plaintiff Scharfstein shall have, take and recover judgment payable from the Common Fund for attorney fees in the aggregate amount of $66,277,860 for the benefit of and payable to Class Counsel. The final attorney fee amount will be allocated pro rata to the claim of each class member that either filed a claim or is deemed to have filed a claim.

7. Pursuant to ORCP 32 O, the Oregon State Bar shall have, take and recover judgment against defendant in the amount of $55,027,100 for the funding of legal services provided through the Legal Services Program established under ORS 9.572.

8. Pursuant to ORCP 32 O, the Oregon Community Foundation shall have, take and recover judgment against defendant in the amount of $33,027,100 for the purposes stated in the May 11, 2016 Order Granting Plaintiff's Fourth Amended Motion to Adopt Proposed Plan of Allocation of Unclaimed Proceeds (ORCP 32 O).

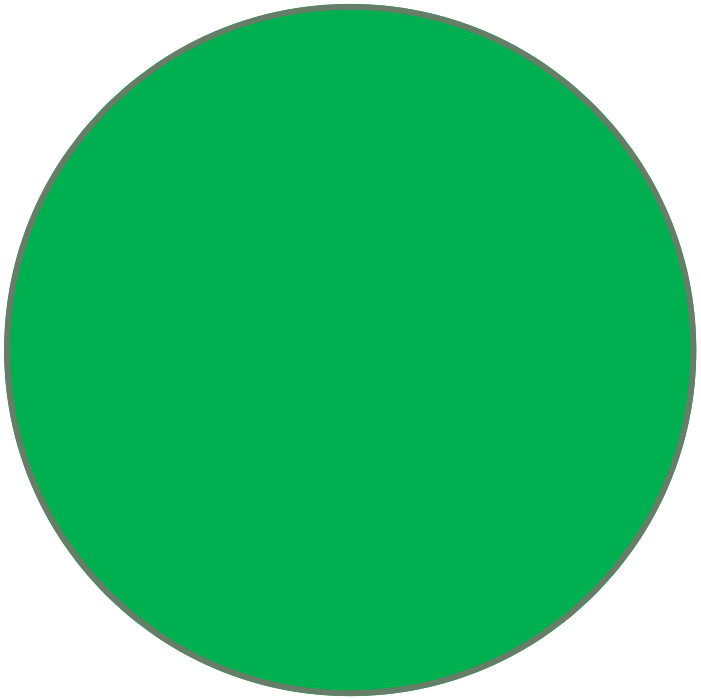
9. The claims against Defendant Jamal M H Al Saudani Inc. are hereby dismissed.

MONEY AWARD

1. Judgment Creditors: Steven Scharfstein and the class defined above. (Excluded from the class and this judgment are those former class members who filed valid opt out claims and are listed in Exhibit A to this Judgment)

Steven Scharfstein
52 Touchstone Drive
Lake Oswego, OR 97035

Class Break Over



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Offers of Judgment

- State and federal rules permit **offers of judgment** before trial
- Offer of judgment rules encourage early **settlement of cases**
- An **unaccepted** offer can shift fees and costs in favor of a defendant

Offer of Judgment

"… a party defending against a claim may serve on an opposing party **an offer to allow judgment on specified terms**… If the judgment that the offeree finally obtains **is not more favorable** than the unaccepted offer, the offeree **must pay the costs** incurred after the offer was made."

FRCP 68

Offer to Allow Judgment

"... any party against whom a claim is asserted may ... serve upon any other party asserting the claim **an offer to allow judgment** to be entered against the party making the offer for the sum, or the property, or to the effect therein specified. ... **If the offer is not accepted** ... it shall be deemed withdrawn ... and may be filed ... after the case has been adjudicated ...**only if the party asserting the claim fails to obtain a judgment more favorable than the offer**... In such a case, the party asserting the claim **shall not recover costs ... or attorney fees** incurred after the date of the offer, but the party against whom the claim was asserted **shall recover from the party asserting the claim** costs and disbursements ... from the time of the service of the offer.

ORCP 54 E

William G. Fig, OSB No. 952618
Laurie R. Hager, OSB No. 012715
SUSSMAN SHANK LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089
Telephone: (503) 227-1111
Facsimile: (503) 248-0130
E-Mail: lhager@sussmanshank.com
wfig@sussmanshank.com

Attorneys for Ditech Financial LLC fka Green Tree Servicing LLC

IN THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

In re JAMES BROOKS, Debtor.	Case No. 14-35998-pcm13
JAMES BROOKS, Plaintiff, v. DITECH FINANCIAL LLC fka GREEN TREE SERVICING LLC, Defendant.	Adv. Proc. No. 17-03160-pcm OFFER OF JUDGMENT

Pursuant to FRCP 68, defendant Ditech Financial LLC fka Green Tree Servicing LLC ("Ditech") hereby offers to allow judgment against it and in favor of plaintiff James Brooks in the total amount of $25,000. This offer is inclusive of all claims alleged by plaintiff against Ditech in this adversary proceeding, including, but not limited to, any claim for sanctions, penalties, punitive damages, costs, disbursements, and attorney fees.

//

SUSSMAN SHANK LLP, ATTORNEYS AT LAW
1000 SW BROADWAY, SUITE 1400, PORTLAND, OREGON 97205-3089
TELEPHONE (503) 227-1111 | FACSIMILE (503) 248-0130

William L. Larkins, Jr., OSB #812882
Danielle Hunsaker, OSB #045365
Brett Applegate, OSB #132944
Larkins Vacura Kayser LLP
121 SW Morrison St., #700
Portland, OR 97204
wlarkins@lvklaw.com
dhunsaker@lvklaw.com
bapplegate@lvklaw.com
Telephone: 503-222-4424

Attorneys for Defendant U.S. Bank National Association

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

RAFAEL MAIA DE OLIVEIRA and **JESSICA ANN MAIA DE OLIVEIRA** Debtors	Case No. 16-34353-tmb7 Adv. Proc. No. 17-03039 **OFFER OF JUDGMENT**
RAFAEL MAIA DE OLIVEIRA, Plaintiff, v. **U.S. BANK NATIONAL ASSOCIATION,** Defendant.	

To: **Rafael Maia De Oliveira, through his attorney Michael Fuller, Olsen Daines, US Bancorp Tower, 111 SW 5th Ave., Suite 3150, Portland, Oregon 97204**

Pursuant to Fed. R. Bankr. P. 7068 and Fed. R. Civ. P. 68, defendant U.S. Bank National Association ("U.S. Bank") hereby offers to allow judgment to be taken against it by plaintiff Rafael Maia De Oliveira in the amount of $5,000, exclusive of costs incurred as of the

date of this offer, reasonable attorney fees incurred as of the date of this offer, and costs and fees incurred in connection with prosecuting any petition for fees and costs. Any entitlement by plaintiff to costs or attorney fees, and the amount thereof, shall be determined by the Court after acceptance of this offer.

Pursuant to Fed. R. Civ. P. 68(b), evidence of this offer is not admissible except in a proceeding to determine costs. If this offer is not accepted in writing and received by U.S. Bank within 14 days after it is served, it shall be deemed withdrawn. U.S. Bank further provides notice under Fed. R. Civ. P. 68(d) that in the event plaintiff rejects this offer and fails to recover a judgment on more favorable terms, plaintiff must pay the costs that U.S. Bank incurs after the date of this offer.

DATED: September 13, 2017.

LARKINS VACURA KAYSER LLP

William L. Larkins, Jr., OSB #812882
wlarkins@lvklaw.com
Danielle Hunsaker, OSB #045365
dhunsaker@lvklaw.com
Brett Applegate, OSB #132944
bapplegate@lvklaw.com
Ph: 503-222-4424

Attorneys for Defendant U.S. Bank National Association

OlsenDaines
Attorneys at Law

Delivered by Email

September 25, 2017

US Bank National Association
c/o attorney Danielle Hunsaker
121 SW Morrison Street, Suite 700
Portland, Oregon 97204
dhunsaker@lvklaw.com

RE: Acceptance of Offer of Judgment
Oliveira v US Bank (17-03039)

Ladies and Gentlemen,

Now that US Bank has accepted liability in his case, my client has decided to accept its attached offer of judgment dated September 13, 2017.

Please let us know if the attached proposed judgment is acceptable to file with your electronic signature. The judgment includes a grant of additional time under LBR 9021-1(d) in hopes the parties can resolve fees and costs short of a formal application and prove up hearing. Thank you.

Sincerely,

s/ Michael Fuller
Partner

Enclosures Offer of Judgment
Proposed Judgment

DISTRICT OF OREGON
FILED
November 03, 2017
Clerk, U.S. Bankruptcy Court

Below is a Judgment of the Court. If the judgment is for money, the applicable judgment interest rate is:

TRISH M. BROWN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF OREGON

Rafael Maia De Oliveira **Jessica Ann Maia De Oliveira,** Debtors. **Rafael Maia De Oliveira,** Plaintiff, v. **U.S. Bank National Association,** Defendant.	Case No. 16-34353-tmb7 Adv. Proc. No. 17-03039 **STIPULATED LIMITED JUDGMENT**

Based upon the stipulation of the parties and the terms of the offer of judgment made by US Bank on September 13, 2017 and accepted by plaintiff on September 25, 2017,

IT IS ADJUDGED that US Bank shall pay plaintiff $5,000.

IT IS ADJUDGED that US Bank shall pay plaintiff reasonable attorney fees and costs incurred as of September 13, 2017, and reasonable attorney fees and costs incurred in connection with prosecuting any petition for fees and costs.

IT IS ORDERED that within 30 days after entry of this judgment, if the parties are unable to stipulate to an amount of reasonable fees and costs, plaintiff shall file a fee petition and cost bill.

####

Presented by and stipulated to by:

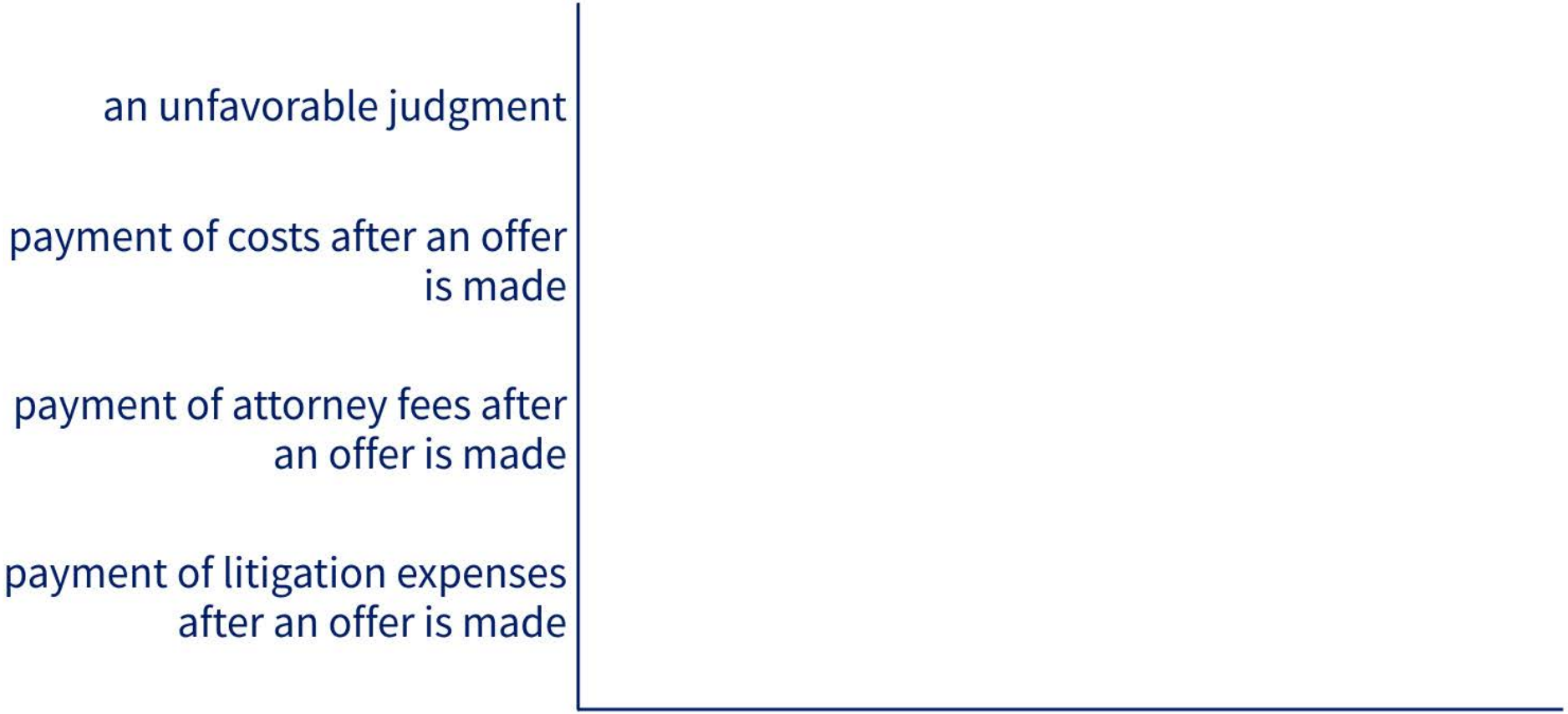
/s/ Michael Fuller
Michael Fuller, OSB No. 09357
Olsen Daines PC
Special Counsel for Plaintiff
US Bancorp Tower
111 SW 5th Ave., Suite 3150
Portland, Oregon 97204
michael@underdoglawyer.com
Direct 503-201-4570

Stipulated to by:

/s/ Bret Applegate
Brett Applegate, OSB #132944
Larkins Vacura Kayser LLP
Of Attorneys for US Bank
121 SW Morrison St., #700
Portland, Oregon 97204
bapplegate@lvklaw.com
Telephone 503-222-4424

According to *Campbell-Ewald*,
what is the sole sanction under FRCP 68?

According to Campbell-Ewald, what is the sole sanction under FRCP 68?



Poll Everywhere
Start the presentation to see live content. Still no live content? Install the app or get help at **PollEv.com/app**

What was the basis for Campbell's argument that its offer mooted Gomez's claim?

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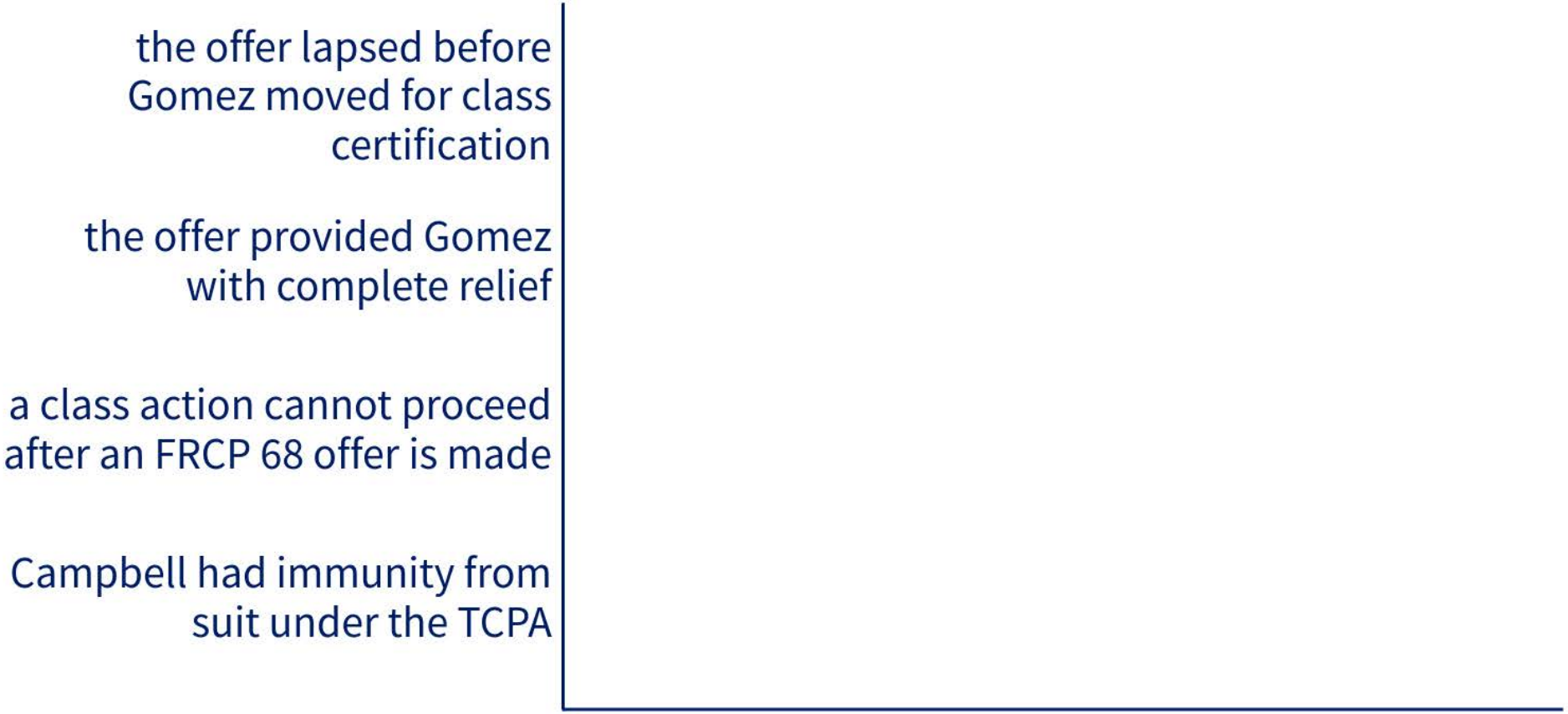

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What was the main holding of the *Campbell-Ewald* opinion?

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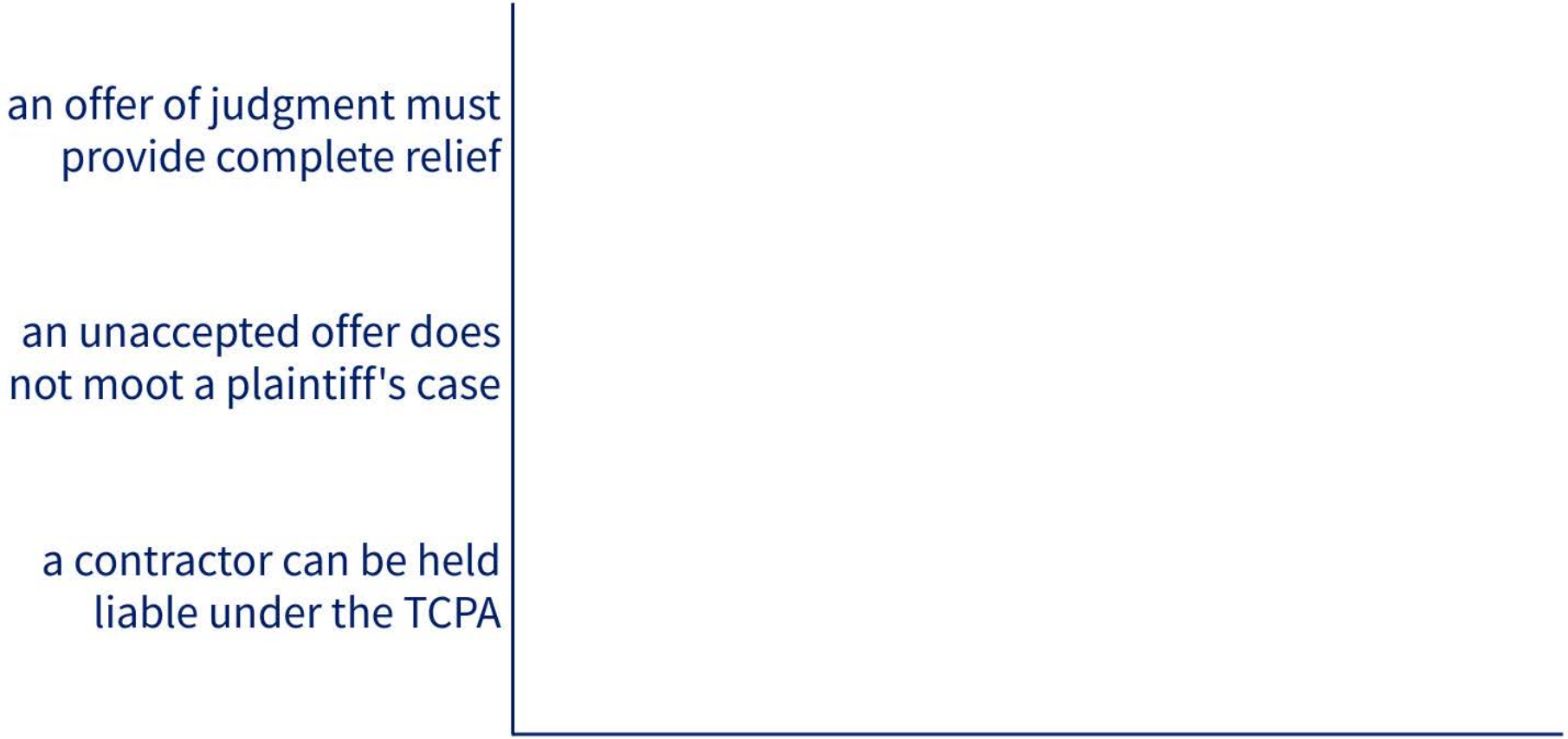

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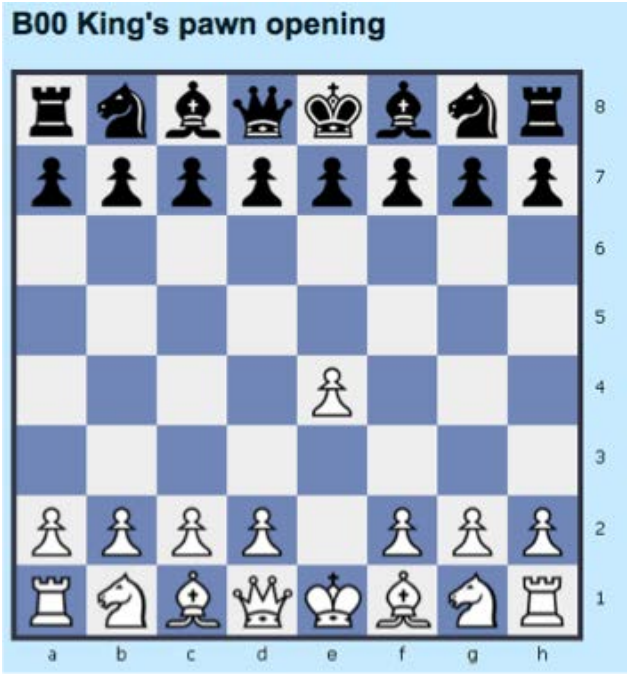
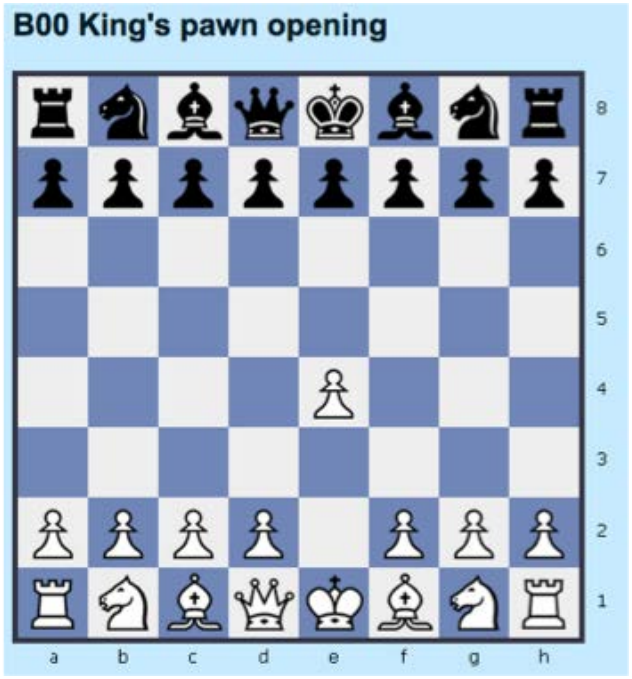
In sum, HN8[↑] LEdHN[8][↑] [8] an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, so the District Court retained jurisdiction to adjudicate Gomez's complaint. That ruling suffices to decide this case. We need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount. That question is appropriately reserved for a case in which it is not hypothetical.

Litigation Tactics



Next Move	# of Games	Last Played	Winnings percentage White / Draw / Black
1... c5	697378	2017	36.1 % 29.7 % 34.3 %
1... e5	398920	2017	41.1 % 29.8 % 29 %
1... e6	222716	2017	38.7 % 30.7 % 30.6 %
1... c6	119768	2017	37.3 % 33.1 % 29.6 %
1... d6	74066	2017	40.8 % 27.8 % 31.4 %
1... d5	61150	2017	42 % 27.2 % 31.8 %
1... g6	51040	2017	37.4 % 28.1 % 34.5 %
1... Nf6	40036	2017	37.8 % 29 % 33.1 %
1... Nc6	11575	2017	41 % 24.8 % 34.1 %
1... b6	4643	2017	46.6 % 21.2 % 32.3 %
1... a6	1066	2017	44.8 % 19.5 % 35.9 %
1... g5	138	2007	38 % 36.7 % 25.4 %
1... f5	62	2009	64.5 % 19.4 % 16.1 %
1... a5	57	2009	61.4 % 29.8 %
1... Nh6	52	2011	57.7 % 19.2 % 23.1 %
1... f6	43	2007	65.1 % 23.3 %
1... h6	40	2016	47.5 % 22.5 % 30 %
1... h5	26	2015	57.7 % 15.4 % 26.9 %
1... Na6	23	2007	30.4 % 17.4 % 52.2 %
1... b5	23	2014	60.9 % 26.1 %

The Offer of Judgment Opening



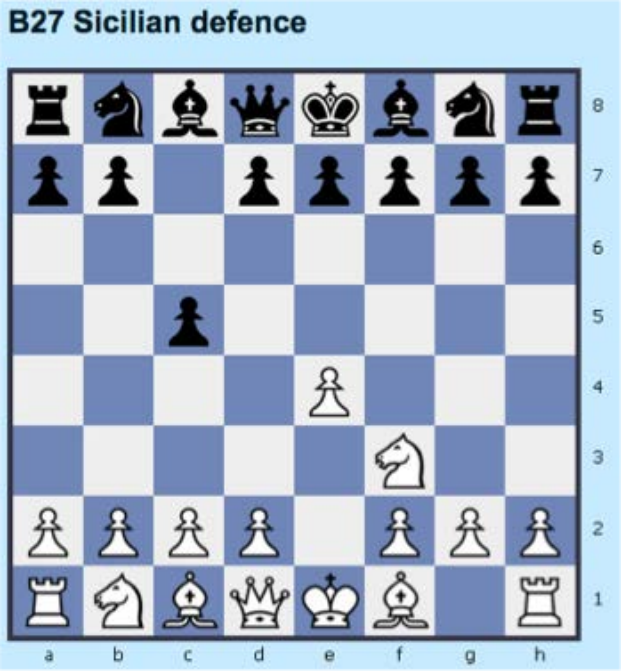
1. Plaintiff files complaint, alleges TCPA robo-call violation, prays for $1,500

The Offer of Judgment Opening

1. Plaintiff files complaint, alleges TCPA robo-call violation, prays for $1,500

2. **Defendant serves $1,500 offer of judgment**

The Offer of Judgment Opening



1. Plaintiff files complaint, alleges TCPA robo-call violation, prays for $1,500
2. Defendant serves $1,500 offer of judgment
3. **Plaintiff lets offer lapse**

The Offer of Judgment Opening

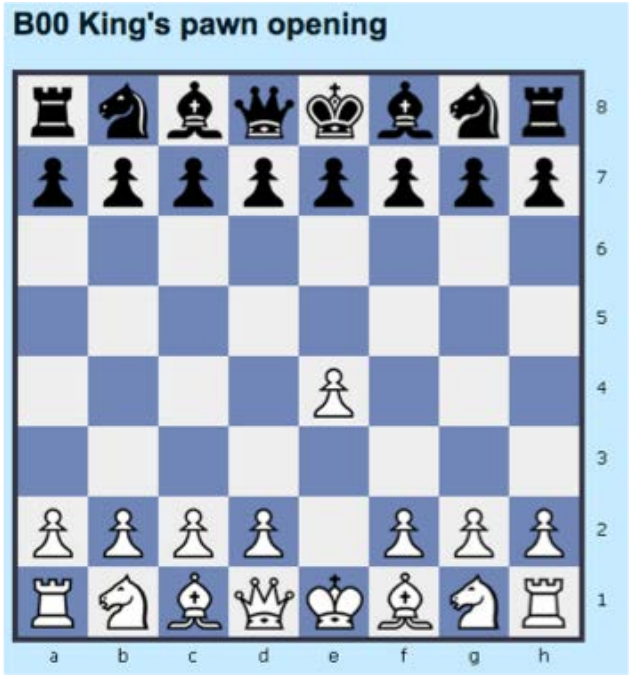
1. Plaintiff files complaint, alleges TCPA robo-call violation, prays for $1,500
2. Defendant serves $1,500 offer of judgment
3. Plaintiff lets offer lapse
4. **Defendant pays $1,500 into account payable to plaintiff, files motion for entry of judgment**

The Offer of Judgment Opening

1. Plaintiff files complaint, alleges TCPA robo-call violation, prays for $1,500
2. Defendant serves $1,500 offer of judgment
3. Plaintiff lets offer lapse
4. **Defendant pays $1,500 into account payable to plaintiff, files motion for entry of judgment**

PLAINTIFF WINNING PERCENTAGE: 25%

The Offer of Judgment Opening



1. Plaintiff files complaint, alleges TCPA robo-call violation, prays for $1,500, and declaratory relief that defendant "willfully" violated the TCPA, and an order requiring defendant to appear at a future Court hearing to ensure it has finally adopted procedures to comply with the TCPA"

The Offer of Judgment Opening

1. Plaintiff files complaint, alleges TCPA robo-call violation, prays for $1,500, and declaratory relief that defendant "willfully" violated the TCPA, and an order requiring defendant to appear at a future Court hearing to ensure it has finally adopted procedures to comply with the TCPA"

2. Defendant serves $1,500 offer of judgment

3. Plaintiff lets offer lapse

4. **Defendant pays $1,500 into account payable to plaintiff, files motion for entry of judgment**

PLAINTIFF WINNING PERCENTAGE: 75%

20.

CAUSE OF ACTION

11 U.S.C. § 362(k) / 11 U.S.C. § 105

11 U.S.C. § 362(a) imposed an affirmative duty on defendant to promptly terminate all collection activity against plaintiff after learning plaintiff filed bankruptcy. Defendant's violation of 11 U.S.C. § 362(a)(6) as alleged in this complaint was "willful" because its acts and omissions were intentional, it had prior actual knowledge of the automatic stay, its conduct was unreasonable, and any alleged mistake of law was not a defense. Under 11 U.S.C. § 362(k), plaintiff and the putative class members are entitled to compensation for actual damages, proportional punitive damages, and reasonable fees and costs from defendant in amounts to be decided by the Court. Under 11 U.S.C. § 105 and this Court's inherent authority, plaintiff and the putative class members are entitled to an order requiring defendant to notify all members of the putative Oregon class that they are under no obligation to pay defendant's pre-petition debt, an order requiring defendant to return all moneys collected on account of pre-petition debt from members of the putative class during the automatic stay, and an order requiring defendant to appear at a continued status conference to confirm it has implemented procedures to receive notices from the bankruptcy noticing center and to comply with the automatic stay in future cases.

Attorney Fees Framework

- Under the **American rule**, consumers must pay their own fees.
- A **fee shifting statute** is an exception to the American rule.
- Courts use the **loadstar method** to decide fee motions.
- The **common fund doctrine** encourages class action attorneys to work on **contingency**.
- Defendants use **offers of judgment** to encourage settlement.

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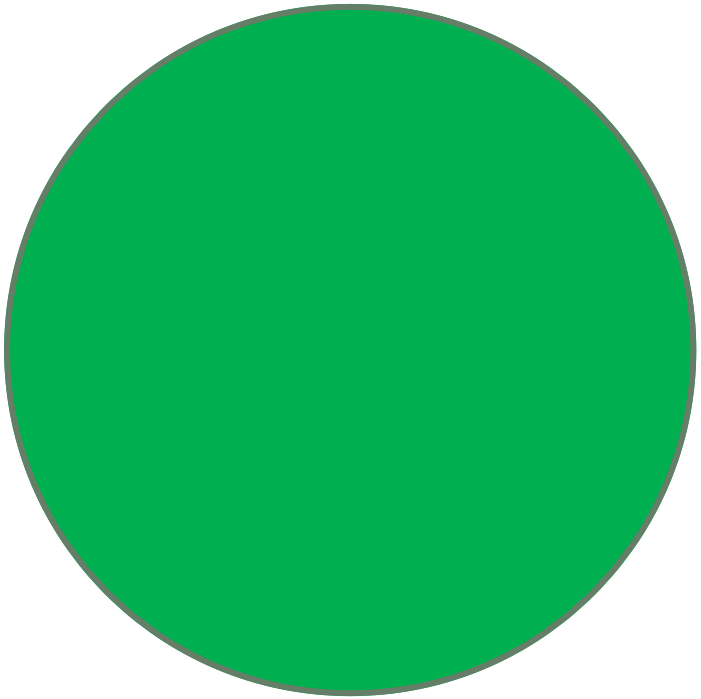

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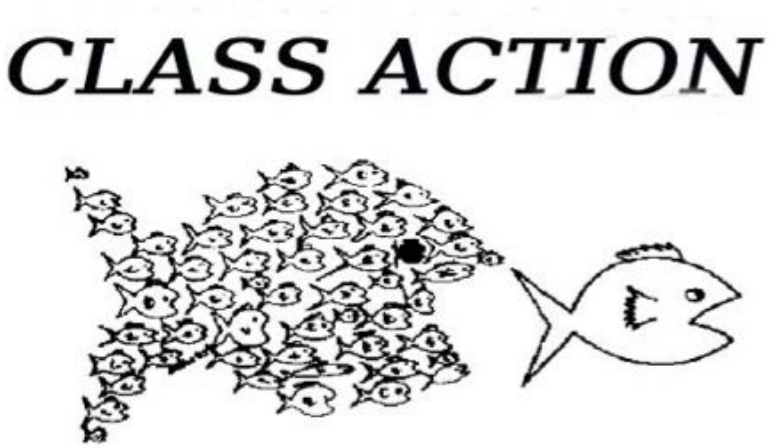
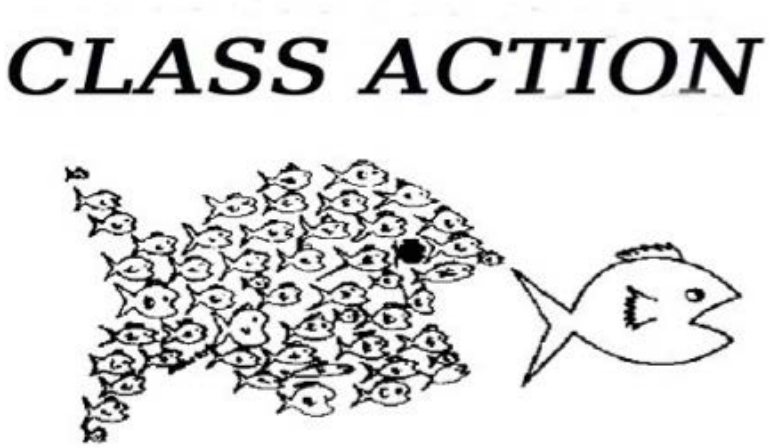
Why consider a class action?



- Common fund doctrine
- Shine a light on corporate practices
- Change corporate practices
- Individual case not cost effective
- Someone else already filed a class action

Prefiling Considerations



- **FIRST LEVEL CONSIDERATIONS**

  – Far better to turn down the case than to take on a case that goes bad.

Credit: David Sugerman, Class Action Seminar

OREGONLIVE
The Oregonian

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KBR verdict: $85 million awarded to 12 Oregon soldiers for toxic exposure in Iraq; defense contractor guilty of negligence

By Mike Francis | The Oregonian/OregonLive
on November 02, 2012 at 3:45 PM, updated November 03, 2012 at 5:38 AM

comments

Motoya Nakamura / The Oregonian

From left are Charles Seamon, Aaron St. Clair, Jason Arnold, attorney David Sugerman, and Rocky Bixby in front of the federal court, shortly after the KBR verdict was announced Friday afternoon.

In a potentially precedent-setting verdict, a Portland jury found defense contractor KBR Inc. was negligent, but did not commit fraud

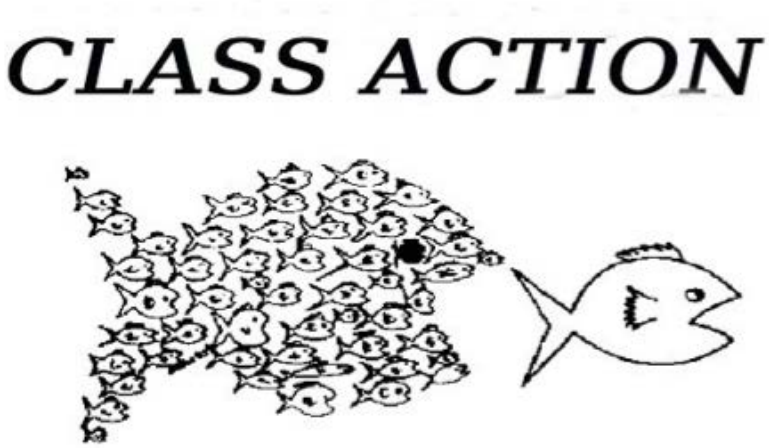

REUTERS
Davos
The Trump Effect
Politics
North Korea
Technology
Myanmar
#HEALTH NEWS
MAY 14, 2015 / 7:00 PM / 3 YEARS AGO
Court vacates $85 million award for Oregon National Guardsmen in Iraq health case
Shelby Sebens
PORTLAND, Ore. (Reuters) - The 9th U.S. Circuit Court of Appeals overturned on Thursday a jury verdict awarding $85 million to 12 Army National Guardsmen who accused defense contractor KBR of failing to protect them from cancer-causing chemicals when they served in Iraq.

Oregon delegation outraged that KBR lawyers want $850K in fees from sick National Guard soldiers

Larry Roberta, a former Marine and police officer, became disabled after his military service in Iraq. He's one of 12 Oregon plaintiffs whose judgment against the military contractor KBR was overturned on appeal. *(Rob Finch/The Oregonian 2009)*

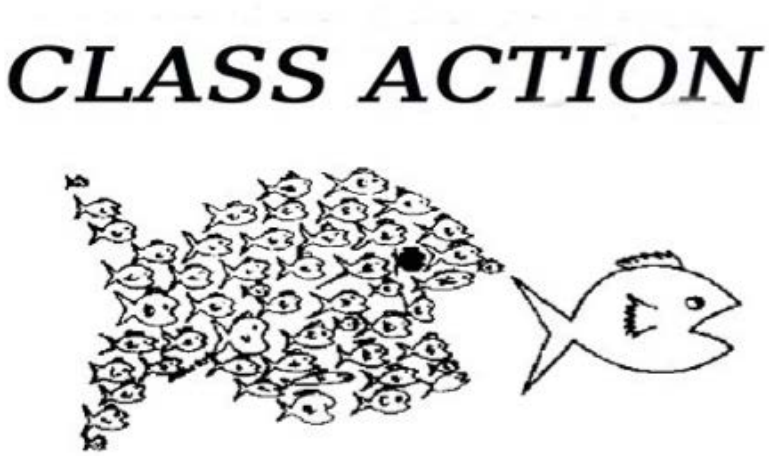
By Bryan Denson | The Oregonian/OregonLive
on July 20, 2015 at 4:02 PM, updated July 21, 2015 at 7:27 PM

Prefiling Considerations



- **FIRST LEVEL CONSIDERATIONS**
  - Far better to turn down the case than to take on a case that goes bad.
  - Is it worthwhile to you (firm, family, future), the Court, the Jury?

Prefiling Considerations



- **FIRST LEVEL CONSIDERATIONS**
  - Far better to turn down the case than to take on a case that goes bad.
  - Is it worthwhile to you (firm, family, future), the Court, the Jury?
  - Liability must be strong

Michael Fuller
@UnderdogLawBlog

Replying to @curbcrusher

The cans said they had 473mL of beverage but they only had 443mL. Our client wanted his day in court, and he got it. I'm the first to champion our victories on social media so I figure it's only fair to publicize the losses too...

contains about 6% less beverage than advertised.

TRUE
Starbucks's can contains 100% of the beverage as advertised.

3:50 PM - 12 Nov 2017

1

TRUTH IN ADVERTISING?

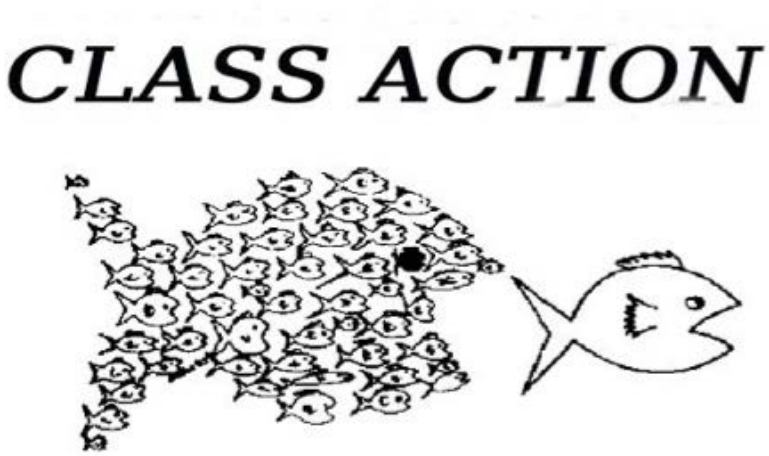
FALSE
Rockstar Inc.'s can contains about 6% less beverage than advertised.

TRUE
Starbucks's can contains 100% of the beverage as advertised.

TRUE
Monster's can contains 100% of the beverage as advertised.

Source: Columbia Food Laboratories, Inc. March 24, 2017

Prefiling Considerations



- **FIRST LEVEL CONSIDERATIONS**
  - Far better to turn down the case than to take on a case that goes bad.
  - Is it worthwhile to you (firm, family, future), the Court, the Jury?
  - Liability must be strong
  - Is the claim certifiable after *Pearson*
  - Economics
  - Arbitration and class action waivers

Arbitration and Class Action Waivers

Caution
As of: January 20, 2018 8:21 PM Z

AT&T Mobility LLC v. Concepcion

Supreme Court of the United States

November 9, 2010, Argued; April 27, 2011, Decided

No. 09-893

Reporter
563 U.S. 333 *; 131 S. Ct. 1740 **; 179 L. Ed. 2d 742 ***; 2011 U.S. LEXIS 3367 ****; 79 U.S.L.W. 4279; 161 Lab. Cas. (CCH) P10,368; 52 Comm. Reg. (P & F) 1179; 22 Fla. L. Weekly Fed. S 957

AT&T MOBILITY LLC, Petitioner v. VINCENT *CONCEPCION* et ux.

Subsequent History: Related proceeding at *McArdle v. AT&T Mobility LLC, 2011 U.S. Dist. LEXIS 83566 (N.D. Cal., July 29, 2011)*

On remand at, Remanded by *Laster v. AT&T Mobility LLC, 663 F.3d 1034, 2011 U.S. App. LEXIS 23232 (9th Cir. Cal., Nov. 21, 2011)*

Prior History: [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Laster v. AT&T Mobility LLC, 584 F.3d 849, 2009 U.S. App. LEXIS 23599 (9th Cir. Cal., 2009)

Disposition: Reversed and remanded.

Core Terms

arbitration, arbitration agreement, unconscionable, contracts, parties, courts, consumer, procedures, revocation, agreement to arbitrate, proceedings, grounds, waivers, enforceable, requires, class action, disputes, state law, pre-empted, customer, duress, terms, class-action, irrevocable, bilateral, discovery, save, bargaining power, exculpatory, invalidated

Case Summary

Procedural Posture
Respondent customers brought a putative class action suit against petitioner cellular telephone service provider in district court, alleging false advertising and fraud. The district court denied the provider's motion to compel arbitration, and the United States Court of Appeals for the Ninth Circuit affirmed. The Supreme Court granted certiorari.

Overview

The contract between the customers and the provider established dispute proceedings and provided for arbitration of unresolved disputes. The contract precluded class arbitration. The Ninth Circuit found that the arbitration provision was unconscionable under California's Discover Bank rule, which provided that class-action waivers in consumer contracts of adhesion were unconscionable in cases where a party with superior bargaining power was alleged to have cheated large numbers of consumers out of individually small sums of money. The Supreme Court held that the Federal Arbitration Act (FAA) preempted the Discover Bank rule. The saving clause under *9 U.S.C.S. § 2* did not permit application of the California rule; nothing in the saving clause suggested an intent to preserve state law rules that stood as an obstacle to the accomplishment of the FAA's objectives. The overarching purpose of the FAA was to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings; requiring the availability of class arbitration was inconsistent with the FAA.

Outcome
The Ninth Circuit's judgment was reversed and remanded. 5-4 Decision; 1 concurrence; 1 dissent.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN1 **Federal Arbitration Act, Arbitration Agreements**

9 U.S.C.S. § 2 of the Federal Arbitration Act makes agreements to arbitrate valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

HN2 **Federal Arbitration Act, Arbitration Agreements**

See *9 U.S.C.S. § 2*.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Business & Corporate Compliance > ... > Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

HN3 **Federal Arbitration Act, Arbitration Agreements**

9 U.S.C.S. § 2 has been described as reflecting both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract. In line with these principles, courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

Contracts Law > Defenses > General Overview

Contracts Law > Defenses > Coercion & Duress > General Overview

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN4 **Federal Arbitration Act, Arbitration Agreements**

The final phrase of *9 U.S.C.S. § 2* permits arbitration agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract. This saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Arbitration Agreements

Constitutional Law > Supremacy Clause > Federal Preemption

Contracts Law > Defenses > Unconscionability > Arbitration Agreements

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

Contracts Law > Defenses > Coercion & Duress > General Overview

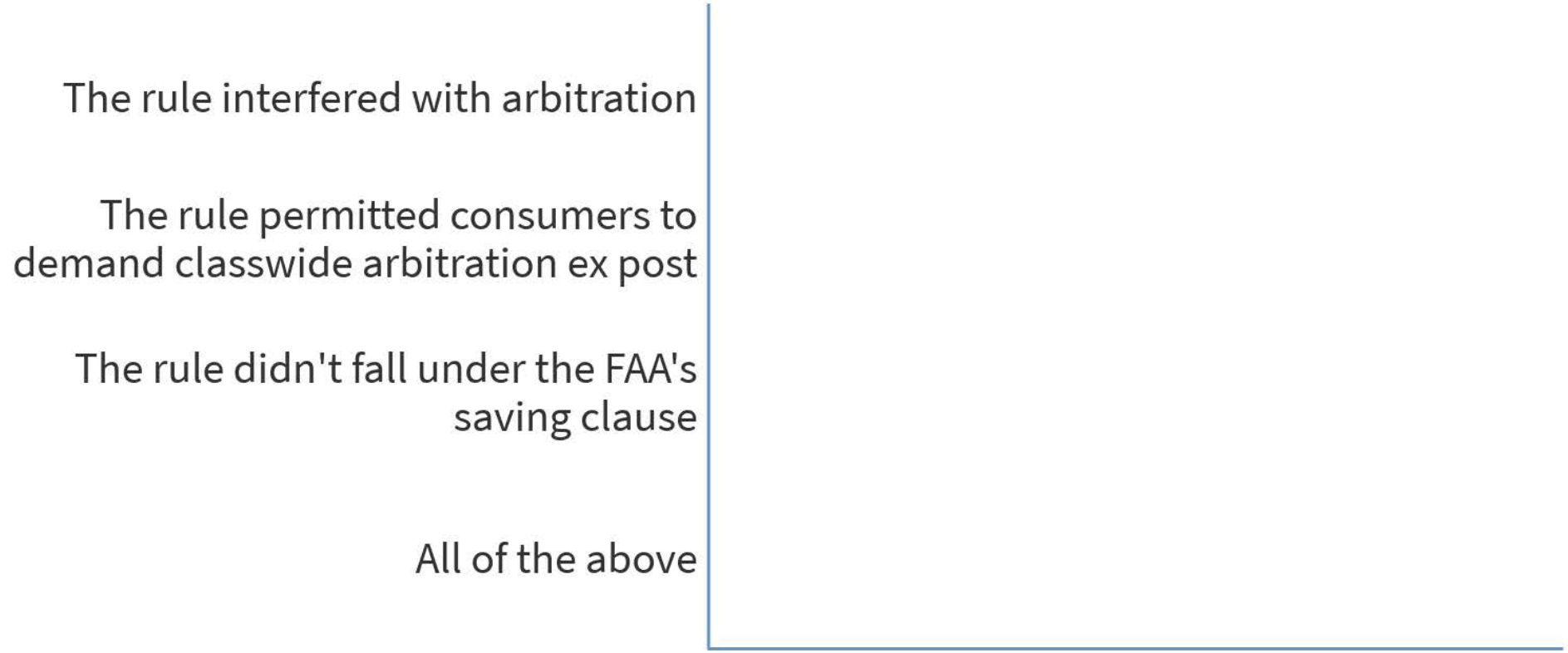
HN5 **Federal Arbitration Act, Arbitration Agreements**

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the Federal Arbitration Act (FAA). But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. The FAA's preemptive effect may extend even to grounds traditionally thought to exist at law or in equity for the revocation of any contract. A court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what the state legislature cannot.

Business & Corporate Compliance > ... > Arbitration > Federal Arbitration Act > Scope

Under *Concepcion*, why was California's Discover Bank rule pre-empted by the Federal Arbitration Act?

Under Concepcion, why was California's Discover Bank rule pre-empted by the Federal Arbitration Act?



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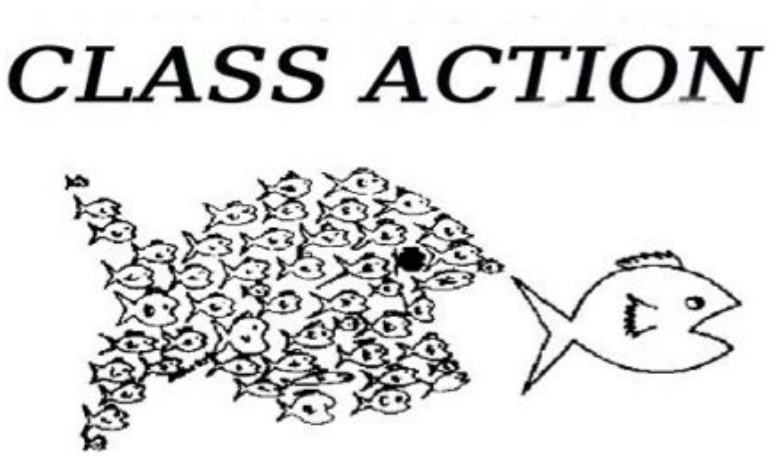
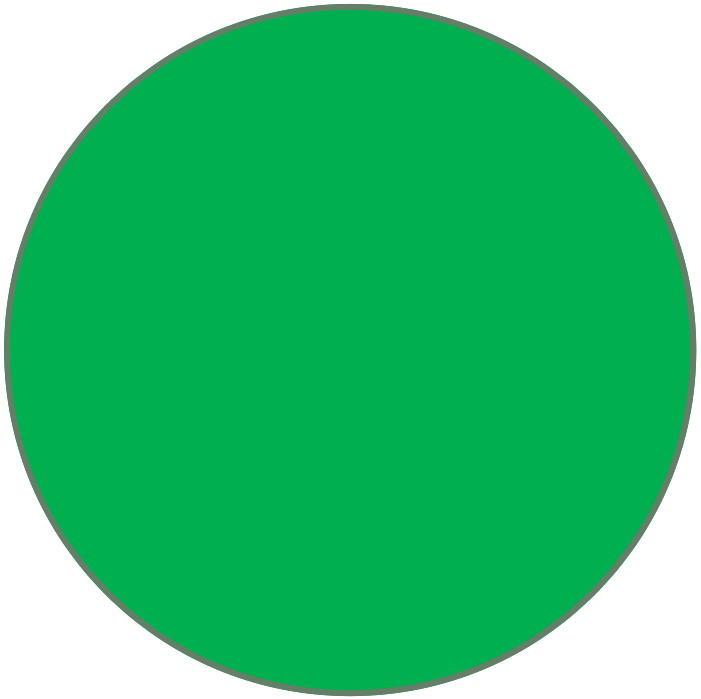
Prefiling Considerations



- **SECOND LEVEL CONSIDERATIONS**
  - Time horizons and uncertainty, legislative changes and case law changes, defendant's financial future
  - How does this case make a difference?
  - Sizing up the class and the defendant
  - Sizing up the costs

Class Break Over



Week 3 – Class Actions

5:30	Today's agenda
	Speaker: Jennifer Wagner
6:15	Break
	Class action common funds
	Offers of judgment
6:30	Break
	Prefiling considerations
	Rule 23
	Rule 32
7:00	Break
	Mutidistrict litigation
	Class settlement
7:20	Next week's agenda

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FRCP 23 – CLASS ACTIONS

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so **numerous** that joinder of all members is impracticable;

(2) there are questions of law or fact **common** to the class;

(3) the claims or defenses of the representative parties are **typical** of the claims or defenses of the class; and

(4) the representative parties will fairly and **adequately** protect the interests of the class.

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ORCP 32 – CLASS ACTIONS

A Requirement for class action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

A(1) The class is so **numerous** that joinder of all members is impracticable;

A(2) There are questions of law or fact **common** to the class;

A(3) The claims or defenses of the representative parties are **typical** of the claims or defenses of the class;

A(4) The representative parties will fairly and **adequately** protect the interests of the class; and

A(5) In an action for damages, the representative parties have complied with the **prelitigation notice provisions** of section H of this rule.

HN2 **Deceptive & Unfair Trade Practices, State Regulation**

Under Or. Rev. Stat. § 646.638(6), a claim must be brought one year from discovery of unlawful conduct.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN3 **Class Actions, Certification of Classes**

See Or. R. Civ. P. 32(C)(1).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN4 **Prerequisites for Class Action, Commonality**

See Or. R. Civ. P. 32(G).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN5 **Class Actions, Certification of Classes**

The standards that govern class certification are set out in Or. R. Civ. P. 32. Under that rule, a class certification determination divides into two basic inquiries. First, the trial court must determine if the action meets five prerequisites: The class must be so numerous that simple joinder is impracticable ("numerosity"); there must be questions of law or fact common to the class ("commonality"); the named representatives' claims must be typical of those of the class ("typicality"); the named representatives must be individuals who will adequately protect the interests of the class ("adequacy"); and prelitigation notice requirements must have been complied with ("notice"). Rule 32(A)(1)-(5). If any one of the five requirements is not satisfied, the case cannot go forward as a class action, Rule 32(B).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

HN6 **Class Actions, Certification of Classes**

If all five requirements under Or. R. Civ. P. 32(A)(1)-(5) are met, the second basic inquiry comes into play: whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy, Rule 32(B). The plaintiff must prevail on the superiority question before the action may be maintained as a class action. The rule identifies eight factors pertinent to assessing superiority. The third factor is one that frequently drives class certification decisions: the extent to which questions of law or fact common to the members of the class predominate over any questions affecting only individual members, Rule 32(B)(3). Neither the "predominance" factor nor any of the other seven, however, is controlling. Rather, the trial court has considerable discretion in weighing all of the factors that apply in a given case and determining if a class action will be a superior means of litigating the class claims. The trial court's determination that action may proceed as a class action is largely a decision of judicial administration and, in making such decisions the trial court is customarily granted wide latitude.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN7 **Class Actions, Certification of Classes**

Factors governing class certification include whether a separate action on the class members' claims will risk inconsistent adjudications or impair the ability of class members to protect their interests; whether individual members of the class have an interest in individually controlling the action on their claim; whether a class action will be unmanageable; and whether the class members' claims are too small to justify the expense of litigating them on an individual basis, Or. R. Civ. P. 32(B)(1), (4), (7), (8).

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN8 **Class Actions, Certification of Classes**

purchase price. As a function of logic, not statutory text, when the claimed loss is the purchase price, and when that loss must be as a result of a misrepresentation, reliance is what connects the dots to provide the key causal link between the misrepresentation and the loss.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN23 **False Advertising, State Regulation**

Under the Unlawful Trade Practices Act, Or. Rev. Stat. §§ 646.605 to 646.656, what a plaintiff must prove is that (1) the defendant committed an unlawful trade practice; (2) plaintiff suffered an ascertainable loss of money or property; and (3) plaintiff's injury (ascertainable loss) was the result of the unlawful trade practice. Plaintiff must suffer a loss of money or property that was caused by the unlawful trade practice. Whether, to prove the requisite causation, a plaintiff must show reliance on the alleged unlawful trade practice depends on the conduct involved and the loss allegedly caused by it. The answer requires reasoned analysis of the claim, not labeling.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN24 **Class Actions, Certification of Classes**

Class certification is not appropriate where a legitimate defense will require individual inquiries; class action is procedural device and does not erode the substantive rights of parties or deprive defendant of presenting factual and legal defenses.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN27 **Class Actions, Certification of Classes**

Sustaining a class action where the claim requires a large number of individual members to have the same subjective states of mind is difficult. For at least some commodities, the only logical explanation for a consumer's purchase may be that the product has, or is represented to have, an essential quality, without which it would be worthless. For products that are worthless without a particular represented characteristic or quality, a defendant who asserts that individual inquiries are needed to establish that the product was purchased for other reasons may be dreaming up a theoretical defense requiring individual inquiries for which there is little basis in fact. When a consumer's choice to engage in activity or buy a product involves irrational motivations, it is all but patent that individual inquiries will be required to determine why the individual members of a large class make the choices they make.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN28 **Class Actions, Certification of Classes**

A trial court's role in deciding whether to certify a class is to make a preliminary forecast of how the adjudication of the issues at trial likely will play out. The predominance standard is not satisfied where record establishes that state of mind of individual class members will legitimately be in issue and will require separate adjudications of claims of numerous members of class.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > Special Proceedings > Class Actions > General Overview

HN29 **Deceptive & Unfair Trade Practices, State Regulation**

In general terms, a cause of action does not accrue under the discovery rule until the claim has been discovered or, in the exercise of reasonable care, should have been discovered. The

Unlawful Trade Practices Act, *Or. Rev. Stat. §§ 646.605 to 646.656*, statute of limitations begins running when a plaintiff knows or should have known of the allegedly unlawful conduct. In class actions, the extent to which a statute of limitations defense is likely to entail highly individualized inquiries of class members depends on the nature of the claim and the specific facts involved.

Civil Procedure > Trials > Bench Trials

Governments > Legislation > Statute of Limitations > General Overview

Civil Procedure > Special Proceedings > Class Actions > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN30 **Trials, Bench Trials**

If the statute of limitations has run on individual class members' claims, those claims are barred. The defendant is not liable on them. A statute of limitations defense is approached like other issues that go to the merits on liability. If the facts are undisputed, the defense can appropriately be resolved on summary judgment. But if disputed facts must be resolved to determine if a claim is time barred, those facts must be resolved by the finder of fact at trial.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Governments > Legislation > Statute of Limitations > General Overview

HN31 **Class Actions, Certification of Classes**

For purposes of a class certification decision, when a statute of limitations defense is not just a theoretical or frivolous issue, but instead has a legitimate basis given the nature of the claim and the facts, a trial court should consider it along with other central issues in the case in the predominance inquiry.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN32 **Class Actions, Certification of Classes**

Or. R. Civ. P. 32(G) commits issue class certification, in significant part, to the discretion of the trial court. The particular claim or issue to be certified for class treatment must satisfy all prerequisites for class certification under *Rule 32(A)(1)* except numerosity, i.e., commonality, typicality, adequacy, and notice. Beyond that, the rule merely provides that, when "appropriate" under the general standards for class certification, the trial court "may" order a class action with respect to a particular claim or issue.

Counsel: William F. Gary, Harrang Long Gary Rudnick, P.C., Eugene, argued the cause and filed the briefs for petitioner on review. With him on the briefs was Sharon A. Rudnick.

Scott A. Shorr, Stoll Stoll Berne Lokting & Shlachter PC, Portland, argued the cause and filed the brief for respondent on review. With him on the brief was Charles S. Tauman, Charles S. Tauman PC, Portland.

Phil Goldsmith, Portland, filed the brief for amicus curiae Oregon Trial Lawyers Association.

Judges: Before Balmer, C.J., and Kistler, Walters, Linder, Brewer, and Baldwin, JJ., and DeVore, J. pro tempore.** Walters, J., concurred and filed an opinion.

Opinion by: LINDER

Opinion

[7] [*90] LINDER, J.**

Plaintiffs are two individuals who purchased Marlboro Light cigarettes in Oregon. Defendant Philip Morris is the company that manufactures, markets, and sells Marlboro Lights. Plaintiffs [***2] brought this action under Oregon's Unlawful Trade Practices Act [**8] (UTPA),[1] alleging that defendant misrepresented that Marlboro Lights would deliver less tar and nicotine than regular Marlboros and that, as a result of that misrepresentation, plaintiffs suffered economic losses. Plaintiffs did not bring the action to remedy only their own claimed losses, however. Rather, they moved to certify a class consisting of approximately 100,000 individuals who had purchased at least one pack of Marlboro Lights in Oregon over a 30-year period—from 1971 to 2001. The trial court denied plaintiffs' motion after concluding that individual inquiries so predominated over common ones that a class action was not a superior means to adjudicate the putative class's UTPA claim.

On appeal, in a divided *en banc* decision, a majority of the Court of Appeals disagreed with the trial court's predominance assessment, concluding that the essential elements of the UTPA claim could be proved through evidence common to the class. *Pearson v. Philip Morris, Inc., 257 Ore. App. 106, 172, 306 P.3d 665 (2013)*. The majority remanded to the trial court to reconsider whether, [***3] without the trial court's predominance assessment, a class action was a superior means of litigating the class claims. *Id.* We allowed defendant's petition for review. On review, the parties' arguments frame several issues for our resolution, including the appropriate standards for determining whether common issues predominate for purposes of the class action certification decision, and what a private plaintiff in a UTPA case of this nature must prove.[2] As we will explain, we conclude [*91] that the trial court properly denied class certification, and accordingly, we reverse the contrary decision of the Court of Appeals and remand to the trial court for further proceedings on the individual plaintiffs' claims.[3]

I. BACKGROUND

**Landau, J., not participating.

[1] The UTPA is codified at *ORS 646.605* to *ORS 646.656*. The specific provisions under which plaintiffs brought this action are cited and discussed later.

[2] As we later discuss, as an alternative to class certification, plaintiffs also sought certification of an "issue class"—that is, a class for purposes of resolving one or more elements of, but not the entire, UTPA claim. The trial court denied issue class certification, and the Court of Appeals remanded for reconsideration of that ruling as well. On review, both parties renew their arguments in that regard. We consider whether the trial court correctly declined to certify an issue class [***4] after first determining if it correctly denied full class certification.

[3] Plaintiffs unsuccessfully applied to the Court of Appeals for an interlocutory appeal of the order denying class certification under *ORS 19.225*. After the interlocutory appeal was denied, the trial court proceeded with the UTPA claims of the two named plaintiffs and granted summary judgment for defendant on the ground that plaintiffs' UTPA claims were preempted by federal law. Plaintiffs appealed that judgment, challenging both the denial of the motion for class certification and the grant of summary judgment. While that appeal was pending, the United States Supreme Court decided *Altria Group, Inc. v. Good, 555 U.S. 70, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008)*, which held that *HN1* federal law does not preempt state claims based on the false advertising of cigarettes. On appeal, defendant conceded that the grant of summary judgment on federal preemption grounds was error in light of *Altria*. The case therefore must be remanded to the trial court for further proceedings on the individual plaintiffs' claims.

A. Development and Labeling of Marlboro Lights

In the 1950s, governmental and health organizations began to publicize information about the link between lung disease and tar and nicotine in cigarette [***5] smoke, which in turn gave rise to increasing concerns among the public about the dangers of smoking cigarettes.[4] In an effort to capitalize on those growing health concerns, cigarette manufacturers introduced new varieties of cigarettes that they advertised as delivering lower levels of tar and nicotine. Although [***9] the public health community generally supported the idea of offering smokers low tar and nicotine alternatives, no accepted or approved method for measuring the tar and nicotine yields of cigarettes existed. Thus, "low" and "lower" tar and nicotine claims by cigarette manufacturers could not be substantiated. The Federal Trade Commission (FTC), which regulates the cigarette manufacturing industry, [*92] therefore initially prohibited cigarette manufacturers from marketing their cigarettes based on low tar and nicotine claims.

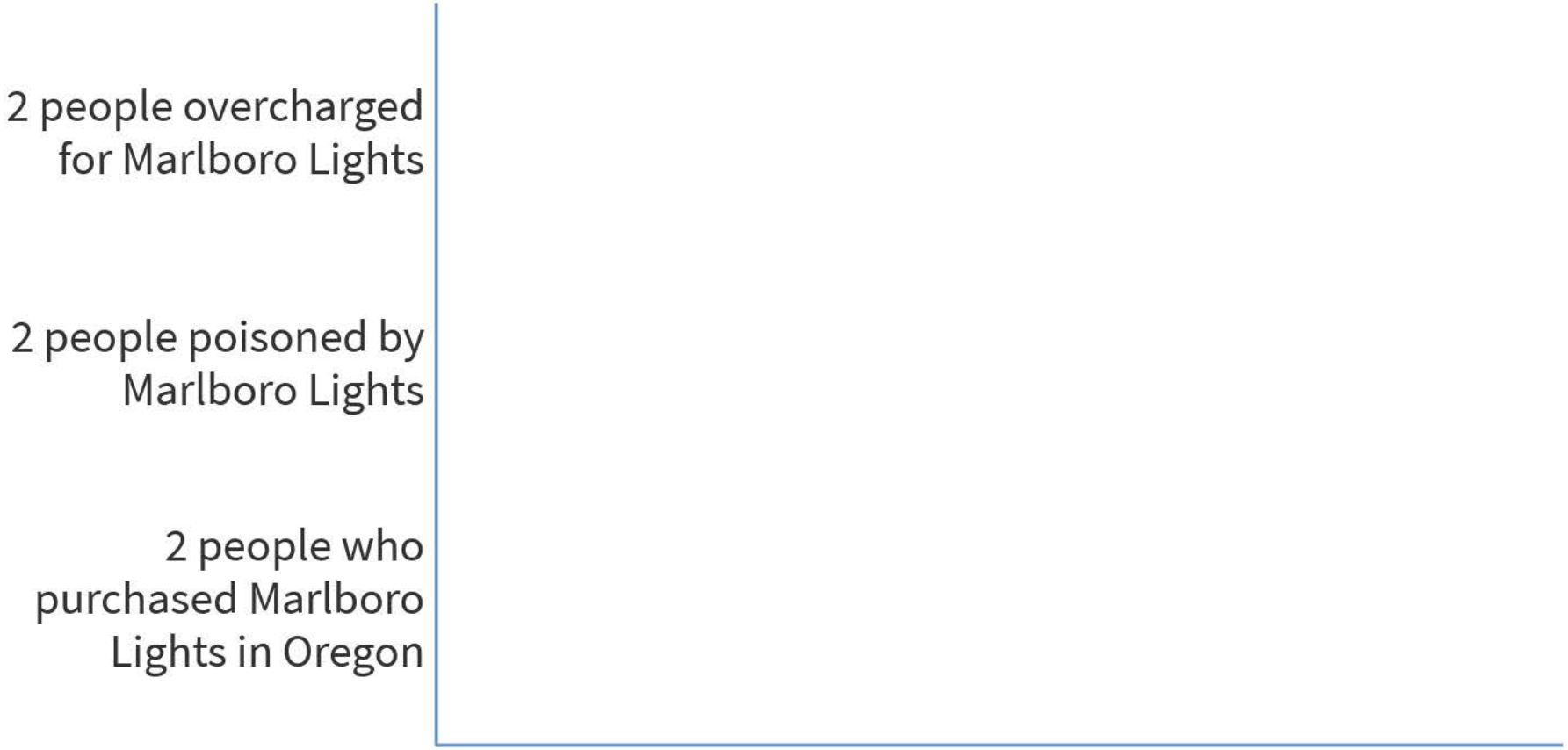
Eventually, however, the FTC devised a standardized method for measuring tar and nicotine yields of cigarettes. The "FTC method" used a machine that captured and analyzed substances that were drawn into the machine as it "smoked" a cigarette. The machine regulated variables such as the placement of the cigarette in the machine, the volume of each "puff," the frequency of puffs, and the portion of the cigarette smoked. In 1967, the FTC instructed cigarette manufacturers that they could represent their cigarettes as having lower tar than regulars if, and only if, the cigarette had a tar yield of 15 milligrams or less as measured by the FTC method.

The lowered tar and nicotine levels measured by the FTC method did not necessarily reflect reality for human smokers, however. The [***7] FTC was aware of that fact. Indeed, in hearings that the FTC held before adopting its testing method, the tobacco industry expressed concerns that, due to considerable variations in individual smoker behavior, the FTC's method did not, and could not, measure the amount of

[4] Because this case arises on a motion for class certification, the facts in the record have been developed for that specific purpose, and do not necessarily reflect the factual record that would be made at trial on either the class claims or the claims of the individual plaintiffs. The parties do not dispute many of the facts that we recite by way of general background. [***6] The parties do, however, disagree on certain other facts—and the inferences to be drawn from those facts—that the trial court considered in deciding the extent to which plaintiffs' claims would entail common or individualized inquiries. We take up those disputes, and the respective roles of the trial and appellate courts in resolving contested facts of that kind, in our later analysis of class certification issues.

Who were the plaintiffs in *Pearson*?

Who were the plaintiffs in Pearson?



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In *Pearson*, how did Philip Morris allegedly violate the UTPA?

In Pearson, how did Philip Morris allegedly violate the UTPA?

by misrepresenting that Marlboro Lights deliver less tar than regular Marlboros

by misrepresenting the actual price of Marlboro Lights

by charging the same for Marlboro Lights as regular Marlboros

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Week 3 – Class Actions

5:30	Today's agenda
	Speaker: Jennifer Wagner
6:15	Break
	Class action common funds
	Offers of judgment
6:30	Break
	Prefiling considerations
	Rule 23
	Rule 32
7:00	Break
	Mutidistrict litigation
	Class settlement
7:20	Next week's agenda

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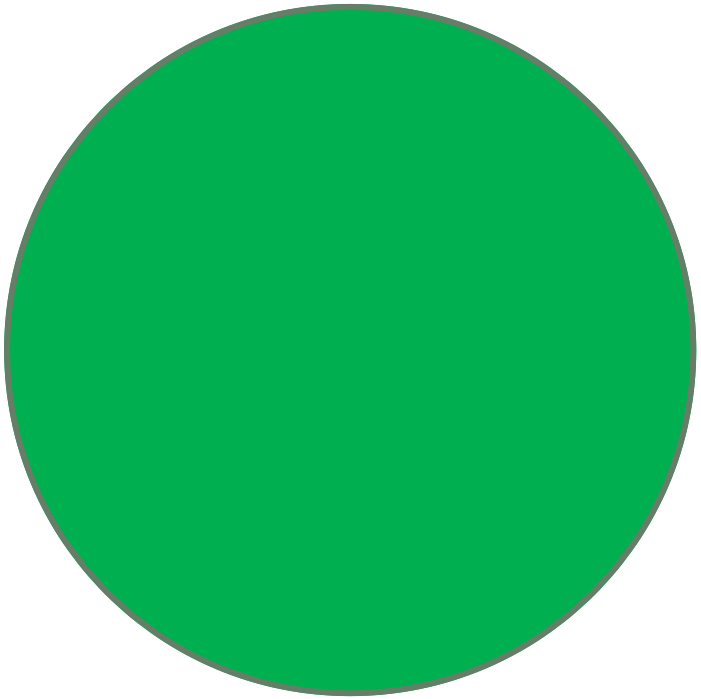
Class Break Over



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UNITED STATES

Judicial Panel on Multidistrict Litigation

Search

Sarah S. Vance, Chair | Thomasenia P. Duncan, Panel Executive

Jeffery N. Lüthi, Clerk of the Panel

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Case Locator (PACER) »

E-Filing (CM/ECF) »

JPML CM/ECF E-Filing »

Welcome

Welcome to the official website for the United States Judicial Panel on Multidistrict Litigation.

Hours and directions »

For information on the January 25, 2018, hearing session to be held in Miami, FL, including the hearing session order, the notice of oral argument schedule and any amendments click here >>

Activity in Case MDL No. 2828 IN RE: Intel Corp. CPU Marketing, Sales Practices and Products Liability Litigation
Motion to Transfer - Initial Motion

JPMLCMECF@jpml.uscourts.gov
to JPMLCMDECF

Jan 8 (13 days ago)

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United States

United States Judicial Panel on Multidistrict Litigation

Notice of Electronic Filing

The following transaction was entered by Levitt, Adam on 01/08/2018 at 12:39:52 PM EST and filed on 01/08/2018
Case Name: IN RE: Intel Corp. CPU Marketing, Sales Practices and Products Liability Litigation
Case Number: MDL No. 2828
Filer:
Document Number: 1

Docket Text:
MOTION TO TRANSFER (INITIAL MOTION) with Brief in Support. -- 5 Action(s) -- from California Northern District Court (5:18-cv-00046,5:18-cv-00074), Indiana Southern District Court (1:18-cv-00029), Oregon District Court (6:18-cv-00028), New York Eastern District Court (1:18-cv-00065) - Suggested Transferee Court: N.D. California - Filed by: *Plaintiffs Stephen Garcia, Anthony Stachowiak, Richard Reis, and Zachary Finer* (Attachments: # (1) Brief Brief in Support of Motion for Transfer of Actions, # (2) Schedule of Actions, # (3) Service List, # (4) Complaint CAN 5:18-00046, # (5) Complaint CAN 5:18-00074, # (6) Complaint INS 1:18-00029, # (7) Complaint OR 6:18-00028, # (8) Complaint NYE 1:18-00065)(Levitt, Adam)

In *BMS*, why couldn't the plaintiffs certify a national class action in California?

In BMS, why couldn't the plaintiffs certify a national class action in California?

The state court lacked specific jurisdiction over the defendant

There was no link between California and the non-California class members

Defendant was not a resident of California

The state court lacked general jurisdiction over the defendant

All of the above

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Mediation Fee Schedule

Hon. Ariel E. Belen (Ret.)

PROFESSIONAL FEES

$650 per hour

CASE MANAGEMENT FEE

- The Case Management Fee includes access to an exclusive nationwide panel of judges, attorneys, and other ADR experts, dedicated services including all administration through the duration of the case, document handling, and use of JAMS conference facilities including after hours and on-site business support. Weekends and holidays are subject to additional charges.
- The Case Management Fee is reassessed on cases that continue beyond originally scheduled professional time.
- Professional Fees include time spent for sessions and pre- and post-session reading and research time.

Mediations
Initial non-refundable fee of $300 per party, applies to first 10 hours of professional time
Time in excess **of initial 10 hours**.....12% of Professional Fees

Discovery, Special Master, Reference, Appraisal and Neutral Analysis Matters
See Neutral's individual general fee schedule.

CANCELLATION/CONTINUANCE POLICY

	Cancellation/Continuance Period	*Fee*
1 day or less	14 days or more prior to session	100% REFUNDABLE, except for time incurred
2 days or more	30 days or more prior to session	100% REFUNDABLE, except for time incurred
3 days or more	45 days or more prior to session	100% REFUNDABLE, except for time incurred
Sessions of any length	Inside the cancellation/continuance period	NON-REFUNDABLE

- Unused session time is non-refundable.
- Session fees are non-refundable if time scheduled (or a portion thereof) is cancelled or continued within the cancellation period unless the Neutral's time can be rescheduled with another matter. The cancellation policy exists because time reserved and later cancelled generally cannot be replaced. In all cases involving non-refundable time, the party causing the continuance or cancellation is responsible for the fees of all parties.
- A retainer for anticipated preparation and follow-up time is billed to the parties. Any unused portion is refunded.
- All fees are due and payable upon receipt of invoice and payment must be received in advance of session. JAMS reserves the right to cancel your session if fees are not paid by all parties by the applicable cancellation date and JAMS confirms the cancellation in writing.
- Receipt of payment for all fees is required prior to service of an order or award.

JAMS agreement to render services is with the attorney, the party, and/or other representatives of the party.

IN THE CIRCUIT COURT FOR THE STATE OF OREGON

FOR MULTNOMAH COUNTY

CHRIS HARRIS, individually and on behalf of all other similarly situated persons, Plaintiff, vs. **MT. HOOD MEADOWS OREG., LLC**, an Oregon limited liability company, Defendant.	Case No. 16CV39854 **JOINT MOTION TO CERTIFY AND APPROVE CLASS SETTLEMENT** Oral Argument: Requested Estimated Time: 30 Minutes Court Reporting: Requested

UTCR 5.050 STATEMENT

This is a joint motion and the parties do not expect discussion with the Court to exceed 30 minutes. The parties request official court reporting services.

CASE BACKGROUND

1. **Google Ad Campaign**

In November 2016, defendant advertised its value passes on Google Ads, resulting in a price discrepancy of $120.00 to 18 Oregon consumers. Fuller decl. ¶ 2.

2. **Complaint**

On November 27, 2016, plaintiff filed a complaint against defendant seeking equitable relief, and fees and costs under ORS 646.638. Complaint ¶ 21.

3. **ORCP 32H Notice**

On December 2, 2016, plaintiff sent defendant an ORCP 32H notice offering to settle if defendant provided refunds to the class and reimbursed class counsel's fees and costs. Fuller decl. ¶ 3.

4. **ORCP 32I Compliance**

As a result of plaintiff's complaint, defendant stopped its ad campaign and paid maximum statutory damages of $200.00 to each class member under ORS 646.638. Tragethon decl. ¶ 8.

MOTION #1 – MOTION TO CERTIFY CLASS

A trial court's determination that an action may settle as a class action "is largely a decision of judicial administration" and "the trial court is customarily granted wide latitude" in making such decisions. See, e.g., *Pearson v. Philip Morris, Inc.*, 358 Or 88, 107 (2015).

1. **The Court should approve this joint motion for class action settlement, as all ORCP 32A requirements are met.**

Each of the requirements for class settlement under ORCP 32A are met. Under the proposed settlement, all potential class members have been paid or will receive maximum statutory damages, and defendant's compliance with ORCP 32I bars any further claim for class damages. Fuller decl. ¶ 4.

ORCP 32A(1) is met because joinder of all 18 class members is impracticable and unnecessary for the purposes of settlement – each member has already received all they could realistically hope to recover if the case proceeded to trial. *Id.* at 5.

Under ORCP 32E and L, after each class member has received notice and has been given an opportunity to respond, the parties request that the Court approve the following settlement terms:

A. Each class member shall receive a single payment of $200.000 from defendant, representing maximum statutory damages available under ORS 646.638.

B. Class representative Chris Harris shall receive an additional incentive payment of $200.00 from defendant.

C. Class counsel shall receive payment of reasonable fees and costs in the amount of $7,500.00 from defendant under ORS 646.638.

D. Each class member shall release defendant from all claims related to this controversy.

E. Defendant denies all liability and agrees to settle only to avoid continued litigation expenses.

As of the date of this motion, class counsel's costs total $1,172.00, and class counsel's rates and time incurred is as follows:

Attorney	Billable Rate	Billable Hours
Michael Fuller	$385 per hour	46.9 hours
Robert Le	$385 per hour	12.5 hours

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Next Week – UTPA

5:30	Today's agenda
	Class actions (cont.)
	Pop quiz
5:45	Break
	UTPA elements
	Fee shifting chart
	Damages chart
6:15	Break
	Statute of limitations chart
	Parrott v. Carr Chevrolet
6:30	Speaker: Young Walgenkim