AMERICAN BAR ASSOCIATION
Section of Environment, Energy, and Resources

Special Committee for Young Lawyers Newsletter

Vol. 3, No. 1 **March 2017**

MESSAGE FROM THE CO-CHAIRS

Cleo Deschamps and Mathew Todaro

The Special Committee for Young Lawyers (committee) aims to supply valuable information to lawyers in the early stages of their practice and to provide a forum where young practitioners get to know fellow environmental and energy lawyers. In that regard, the committee is producing podcasts introducing young members of the Section to veteran members as well as providing timely discussions on emerging issues. So far this year, the committee has published two "Section Member Spotlights" featuring stellar Section members. First, the former chair of the Section on Environment, Energy, and Resources (SEER), Sheila Slocum Hollis, shared her professional path and offered tips and advice for career advancement. In the second Spotlight, Bill Penny, also a former Section chair provided his insight on how to maximize your ABA membership. The most recent podcast focuses on the Dakota Access Pipeline, and the protests, litigation, and the impact of recent executive orders on the future of the pipeline. SEER podcasts are available on iTunes and can be accessed on SEER's webpage.

We are also excited to share this newsletter with you, the committee's first issue of 2017. Following the theme of Mr. Penny's podcast, we've included an article detailing more specifically the benefits of being active in a SEER committee. Additionally, this edition provides tips for the proper planning required to lead and manage civil discovery, a discussion of attorney fees for the prevailing party in a RCRA suit, and an analysis of whether class action certification requires an administratively feasible way to identify class members. We thank the contributing authors and hope that you find value in this and every issue.

After a successful combined newsletter last year, we are again joining forces with ABA's Environment, Energy, and Resources ("EER") Committee within the Young Lawyer's Division to produce another joint newsletter. If you would like to publish an article in this, or any future newsletter, please contact our newsletter co-chairs, Gary Steinbauer (garysteinbauer@gmail.com) or Keith Zahniser (kzahniser@hrassoc.com).

We encourage you to look out for more podcast interviews, offering glimpses of various areas of environmental and energy law from veteran Section members. And be sure to not miss our next joint newsletter this summer.

We thank you for reading and hope to see many of you in Los Angeles at SEER's Spring Conference!

Cleo Deschamps *and* **Mat Todaro** *are the co-chairs of the Special Committee on Young Lawyers.*

Visit the Special Committee for Young Lawyers website:
www.ambar.org/environyl

Special Committee for Young Lawyers Newsletter
Vol. 3, No. 1, March 2017
Gary Steinbauer and Keith Zahniser, Editors

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SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

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35th Water Law Conference
Los Angeles, CA

March 29, 2017
Environmental Summit of the Americas
Los Angeles, CA

March 29-31, 2017
46th Spring Conference
Los Angeles, CA

April 13, 2017
Breaking Ground at Standing Rock: The Dakota Access Pipeline and Environmental Justice
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April 18, 2017
Negotiating the Environmental Provisions in a Real Estate Contract
CLE Webinar

April 20, 2017
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May 18-19, 2017
Petroleum Marketing Attorneys' Meeting
Washington, DC

For full details, please visit www.ambar.org/EnvironCalendar

GETTING INVOLVED IN YOUR ABA

Ed Tormey

Have you recently joined an ABA section or committee and are now wondering what to do next? That was my situation three years ago. Having become a member of the Section of Environment, Energy, and Resources (SEER), I decided to attend SEER's annual spring conference. Imagine a setting where everyone knows and understands the types of legal issues that you handle daily! For me, that was an immediate icebreaker and I made many new friends and acquaintances. I would recommend to each of you that you attend one of your section's annual meetings. And, as a result of my attending this conference, I was asked to serve as a vice chair on one of SEER's excellent committees (Environmental Litigation and Toxic Torts). That's how easy it is to become active.

Here are some other ways to become involved in your section or committee. First, I would encourage each of you to visit your section's or committee's website to find the latest information about your group. As an example, I have included the url to my SEER committee's website (http://apps.americanbar.org/dch/committee.cfm?com=NR350800). On a section or committee website, you will likely find the topics your group plans to address that year. You may find that one of the topics is something that you have been working on in your practice. If the section or committee publishes a newsletter, a perfect way to get your name out to a larger audience is to transfer your knowledge into a noteworthy article and submit it to the newsletter. You don't have to be a law professor to write an article. ABA is looking for authors who can provide practical information on a topic to help their peers in their daily practice. To view past newsletters from your section or committee please check out your group's website.

Also, you should join your group's email listserv. That way you will be sure to receive the most current information from your section or committee. To do so: (1) log onto the ABA website and then into your ABA profile; (2) click on the "Communications" hyperlink on the far left side of the screen; (3) click on the "Communication Preferences" hyperlink on the far left side of the screen; (4) scroll down to the heading "My Discussions & Newsletters" and check the box next to your committee. Also, it is likely that your section or committee will be hosting a program or two during the year. These are typically webinars and teleconferences and are easy to join. As an example, please see SEER's upcoming calendar of events at http://www.americanbar.org/groups/environment_energy_resources/events_cle.html. Also, your section or committee may produce podcasts. This is a great way to stay current on recent case law and regulations and pick up practice pointers. And you can do this while commuting to work! These podcasts are available on the ABA website and on iTunes. SEER's podcasts, for example, may be found at http://www.americanbar.org/groups/environment_energy_resources/resources/recordings.html.

To fully enjoy the benefits of being an ABA member, you should take advantage of these opportunities. Each of us wants to become more knowledgeable in our practice area for the benefit of ourselves and our clients. ABA can offer each of us ways to achieve that goal.

Ed Tormey *is General Counsel of the Iowa Department of Natural Resources. He has been in this position since 2004; prior to that time Ed worked in both private and public practice in Ohio, including serving as chief of the Ohio EPA's Office of Legal Services. He has been an ABA member since 2014.*

PROPER PLANNING REQUIRED TO LEAD AND MANAGE DISCOVERY

Stephen Riccardulli

As young associates are being integrated into litigation teams at law firms, they are often asked by partners to handle a part of discovery or even manage the discovery process. To the associate, this is a great assignment; it provides "real" experience, a chance to prove that she belongs on the team, and a challenge sufficient to promote professional and personal growth, but without unfair burden. To the partner, this seems like a safe decision. After all, what could go wrong? In terms of the specific matter, there is minimal risk involved, as there are few mistakes (other than failing to timely respond to requests for admission, for example) that may be irreparable. The real risk of mishandling discovery, however, may not be with the matter itself, but with the relationship with the client.

Today, the risk of litigation continues to rise, *see* Norton Rose Fulbright 2016 Litigation Trends Annual Survey, *available at* http://www.nortonrosefulbright.com/news/142350/norton-rose-fulbright-releases-2016-litigation-trends-annual-survey, and so do the associated costs. The driver of all litigation costs continues to be those associated with taking and responding to discovery. By some measures discovery costs represent 20 to 50 percent of all litigation costs spent in federal civil litigation. Emery G. Lee III & Thomas E. Willging, Defining the Problem of Cost in Federal Civil Litigation, 60 DUKE L.J. 765 (2010). And the challenges of electronic discovery and cross-border discovery continue to rise. *See supra* Norton Rose Fulbright 2016 Litigation Trends Annual Survey. Not surprisingly, clients are increasingly focused not only on the "wins" and "losses," but on the costs associated with each matter. Outside counsel are expected to deliver results at the right price. Indeed, a "win" that comes at too high a cost, can quickly become a "loss" in the eyes of the client, damaging the relationship between the client and its counsel. So while a misstep in discovery may not impact the end result of a matter, it may significantly increase the costs of litigation and create a difficult situation for the client and its counsel.

That is not to say that young lawyers should not lead discovery. They should. But young lawyers must also be aware of the importance of their decisions, and should be armed with the information needed to advance the client's litigation goals without unnecessarily running up the costs of discovery. Below are some "best practices" that will help accomplish this goal.

Have a Plan

When young lawyers are asked to run the discovery phase of the litigation, too often they do not possess the information needed to be successful. Armed with little more than the complaint and answer, the young lawyer is asked to take or defend discovery or both. Understandably, the young lawyer feels the urge to get started. However, before taking any action, the young lawyer should pause to be sure she understands the case and to develop a plan that will guide the discovery phase as the case moves forward.

While the pleadings may identify the claims and basic facts of the dispute, such information alone may be insufficient to design a strong and cost-effective discovery plan. The associate needs to know not only the causes of action and facts at issue, but also needs to understand the client's litigation strategy—i.e., the themes to be advanced in the litigation; the elements of each claim or affirmative defense asserted; the strengths and weaknesses of the client's case; and the facts needed to support (or defend) anticipated motions. This information will allow the young lawyer to prepare a targeted discovery plan designed to capture (or provide) the information needed to advance the client's interests.

The lack of a targeted discovery plan may result in a broad, scattershot approach that often involves multiple types of discovery being served

simultaneously. Further, the requests tend to be over-inclusive, requesting large volumes of documents and data to be collected and reviewed. While such an approach may obtain the evidence needed to prosecute or defend the action, the broad discovery approach undoubtedly will increase the cost of discovery for the client.

Therefore, the need for a "complete picture" of the litigation argues for keeping the young lawyer apprised of—if not included in—strategy sessions with the client and senior litigation team members. A young lawyer tasked with preparing a discovery plan should be sure to understand the client's objectives and the agreed-to litigation strategy. This is also true for those lawyers handling a single discovery task—e.g., drafting a single set of discovery requests or covering a deposition. Each discovery task is a piece to a much larger puzzle. To be successful, each lawyer should understand where her respective task fits into the larger strategy.

Some Stones Should Remain Unturned

It was once thought, particularly from the defense perspective, that discovery should be conducted on a "leave no stone unturned" basis. This approach resulted in counsel requesting all information that may be relevant to the claims or defenses over years of discovery. That approach is rarely appropriate today. Not only is this approach viewed by clients as costly and inefficient, courts are also less tolerant of extended discovery schedules. A broad approach simply takes too long. Unless the discovery plan is targeted, a young lawyer runs the risk of not being able to develop the case before discovery closes. Clients expect outside counsel to identify the key information needed to prosecute the matters and to design discovery requests so as to obtain the needed discovery.

Drafting targeted discovery requests takes time. Too often young lawyers borrow from prior discovery requests. While the prior discovery requests may help orient the associate to the particular practices of the senior litigation team members, the prior requests are unlikely to be sufficiently targeted to the specific case at issue. As each case is different, so too should be the discovery requests.

It is easy to underestimate the time needed to prepare strong discovery requests. Indeed, crafting the requests to accomplish the goals of the litigation strategy takes considerable effort. A young lawyer should be prepared to dedicate the time required to draft the requests and to allow for review by a senior team member. Requests that are rushed out the door rarely are properly prepared. Either they are too broad, or worse, fail to request the information needed for the case. Only with proper planning can good discovery requests be prepared.

Know the Rules

Today, parties face increasing limits on discovery. Federal and state procedural rules, local court rules, and individual judges all place limits on the type and number of discovery requests that may be served. When designing a discovery plan, a young lawyer should keep in mind any such limitations. Failing to comply with any of these rules may result in discovery disputes, motion practice, and an inability to obtain the information needed during discovery, all of which increase the client's costs. Moreover, failing to understand the discovery limits will not be excused easily by the client or the senior litigation members.

The Discovery Plan Is a Living Document

As cases proceed and as facts are uncovered, the litigation strategy often changes. A change in the litigation strategy, or a decision to file a newly identified motion for summary judgment, for example, may necessitate discovery that was not identified when the plan originally was developed. Thus, the discovery plan needs to be compared regularly against the litigation strategy. This requires continued communication between the young lawyer leading the discovery and the senior litigation team. Only then can the young lawyer

be sure that the plan remains properly targeted to obtain the information that is needed to advance the client's interests.

A discovery plan that is thoughtfully designed early in the case, but fluid enough to evolve along with the litigation strategy, is necessary for an efficient discovery process. With these considerations in mind, the young attorney can lead a discovery process sufficient to obtain the information needed to prosecute the matter without incurring unnecessary costs to the client.

Stephen Riccardulli *has been a partner at Norton Rose Fulbright since 2015 and is based in the firm's New York office. Stephen focuses his practice on complex litigation matters, including class actions and multiparty mass tort cases. He has extensive experience defending corporations in complex commercial, toxic tort, and products liability litigation matters. Stephen has particular experience defending groundwater contamination cases. He also has represented clients in enforcement actions with the U.S. Environmental Protection Agency and various state agencies.*

RESOURCE CONSERVATION AND RECOVERY ACT ATTORNEYS' FEES: A GUIDE TO THE "PREVAILING PARTY"

Andrew Yamanaka Belter

Resource Conservation and Recovery Act Fee-Shifting Provision

One issue worth exploration, clarification, and guidance is the fee-shifting provision of the Resource Conservation and Recovery Act (RCRA) because parties must be aware how to successfully litigate a RCRA case and avoid costly missteps, such as failing to recover attorneys' fees. First, under the American Rule, parties to a lawsuit generally foot their own attorneys' fees "absent explicit statutory authority" to the contrary. *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health & Human Res.*, 532 U.S. 598, 602, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). However, RCRA contains explicit statutory authority that "[t]he court, in issuing any final order in any action bought pursuant to this section or section 6976 of this title, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or substantially prevailing party, whenever the court determines such an award is appropriate." 42 U.S.C. § 6972(e). Thus because attorneys' fees are dependent on a party "prevailing," this article seeks to clarify and guide litigating parties on how courts construe "prevailing or substantially prevailing party."

U.S. case law is straightforward that "prevailing or substantially prevailing" means something beyond proving liability or even obtaining all relief sought when obtained without judicial sanctioning. The Supreme Court of the United States holds that a party prevails either by "obtain[ing] an enforceable judgment . . . or comparable relief through a consent decree or settlement . . . [that] directly benefit[s the plaintiff] at the time of the judgment or settlement." *Farrar v. Hobby*, 506 U.S. 103, 111, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) (internal citations omitted). Furthermore, the Supreme Court stated that "'a plaintiff [must] receive at least some relief on the merits of [its] claim before [it] can be said to prevail,'" such that the relief "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Buckhannon*, 532 U.S. at 603–04 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987)); *Farrar*, 506 U.S. at 111–12, 113 S. Ct. 566. This alteration of the legal relationship must be "judicially sanctioned"; a lawsuit that results in a voluntary change between the parties is insufficient to trigger RCRA's fee-shifting provision. *Buckhannon*, 532 U.S. at 605, 121 S. Ct. 1835. Thus, a potential losing party can enter a settlement agreement or voluntarily provide the sought-after relief, absent a judicial order, to avoid paying attorneys' fees.

Settlement Agreements Are Not Enough to "Prevail"

One specific example of how courts interpret RCRA's fee-shifting provision is that a party cannot recover litigation costs when the defendant's agreement to conduct the cleanup was obtained through a settlement agreement. *Litgo New Jersey Inc. v. Comm'r New Jersey Dep't of Envtl. Prot.*, 725 F.3d 369, 394 (3d Cir. 2013). In *Litgo*, the district court determined that defendant was liable for violating RCRA; however, the district court did not grant relief but, rather, decided to determine if injunctive relief was appropriate at a subsequent hearing. *Id.* at 398–99. Prior to that subsequent hearing, the parties entered into a settlement agreement, so the district court never determined if injunctive relief was appropriate. *Id.* at 399. Because the district court never determined if injunctive relief was appropriate and because of the voluntary nature of a settlement agreement, the district court denied payment of litigation costs when it determined that plaintiffs did not "prevail" nor "substantially prevail." *Id.* at 398. Agreeing with that reasoning, the Third Circuit Court of Appeals affirmed the decision. *Id.* Plaintiffs argued that they "reserve[d] their right to seek litigation costs from the United States as a 'prevailing party' under Section 7002(e) of RCRA." *Id.* at

393. However, both the district court and court of appeals were unpersuaded by that argument, and they reasoned that plaintiffs did not prevail because the parties entered into a settlement agreement before any court decided whether injunctive relief was proper. *Id.* at 399. Thus, the relief was voluntary and not the result of an enforceable judgment on the merits, and accordingly, plaintiffs were not "prevailing parties" and could not recover attorneys' fees. *Id.*

An Example of How to Assure That You Prevail

More recently, another responsible party sought to exploit how courts interpret RCRA's fee-shifting provision when, in *National Exchange Bank & Trust*, defendant notified plaintiff that it was prepared to undertake a full remediation of the fuel leak on the property that was "'essentially' the relief the plaintiff was seeking under RCRA." *Nat'l Exch. Bank & Trust v. Petro-Chem. Sys., Inc.*, No. 11-CV-134, 2014 WL 1089589, at *2 (E.D. Wis. Mar. 19, 2014), *appeal dismissed* (June 30, 2014). Plaintiff refused this offer because an offer not including an admission of liability under RCRA would foreclose recovery of attorneys' fees for costs incurred up to that point. *Id.* at *2. Based on that refusal, defendant later argued that any attorneys' fees incurred after the offer were not recoverable because plaintiff could have accepted the offer and obtained all that to which it was entitled. *Id*. The court held that plaintiff's refusal did not limit plaintiff's ability to recover all attorneys' fees because the offer was less than what plaintiff would lawfully be entitled to obtain, should it prove its case in court. *Id.* The court reasoned that because defendant's offer did not admit RCRA liability, acceptance of that offer and successful remediation could have foreclosed recovery of attorneys' fees and costs incurred up to that point. *Id.* at *3. Defendant additionally rejected plaintiff's counteroffer that defendant accept liability under RCRA and enter into a consent decree requiring it to clean up the property. *Id*. Moreover, defendant acknowledged that under its settlement offer, it sought to reserve the ability to challenge any demand for attorneys' fees and costs. *Id.* Therefore, the court concluded that plaintiff was entitled to recover litigation costs for the prosecution of its RCRA claim over the entirety of the case. *Id.* at *4.

Implicit in this last case is that (1) the defendant was seemingly attempting to effect a cleanup while avoiding letting the plaintiff "prevail," (2) the plaintiff was savvy enough to demand an admission of RCRA liability and a consent decree to effect a cleanup in order to assure that any agreement would firmly establish it had "prevailed," and (3) the court understood the potential consequences to the plaintiff had it accepted the defendant's offer; thus, future litigating parties can learn from this situation to better advocate for their clients. First, if you find your client on the "wrong end" of a RCRA action and foresee the court holding against your client, attempt to enter into a settlement agreement that lacks a binding court order to effect a cleanup. Second, if you find your client about to prevail on a RCRA action, require the violating party to enter into a consent decree that admits RCRA liability and admits that your client is the prevailing party, and, if possible, even agreeing to pay attorneys' fees. Finally, pay close attention to any new developments concerning "prevailing or substantially prevailing" case law so that you are in the best position to advocate for your clients.

Andrew Yamanaka Belter *is currently a third-year law student at Marquette University Law School in Milwaukee, Wisconsin. Andrew graduated summa cum laude with a double major in biology and economics from the University of Wisconsin–Milwaukee. Currently, he works as a law clerk at Machulak, Robertson & Sodos, and serves on the Marquette Law Review. After graduation, he hopes to focus on environmental law issues.*

IS AN ADMINISTRATIVELY FEASIBLE WAY TO IDENTIFY CLASS MEMBERS REQUIRED FOR CLASS CERTIFICATION?

Ameri R. Klafeta

Rule 23(a) and (b) of the Federal Rules of Civil Procedure set out the requirements that plaintiffs must meet to maintain a class action in federal court. Nothing in Rule 23 specifically discusses the identification of class members at the class certification stage. Many courts, however, interpret the rule to include an implied requirement that the class must be ascertainable. Some courts have gone further and declined to certify classes where plaintiffs have not provided an administratively feasible plan to identify class members. "Administrative feasibility" is generally understood to be the means of identifying class members through a manageable process that does not rely on much, if any, individual inquiry. *See* William B. Rubenstein & Alba Conte, *Newberg on Class Actions* § 3:3 (5th ed. 2011). Whether a class may be certified in the absence of a showing of an administratively feasible plan to identify class members is the subject of a growing circuit split.

The Third Circuit's View

The Third Circuit has held that administrative feasibility is a prerequisite to class certification. *See, e.g.*, *Byrd v. Aaron's Inc.*, 784 F.3d 154, 162–63 (3d Cir. 2015). It has pointed to several general concerns justifying the requirement. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013). First, one of the significant benefits of a class action is efficiency by litigating common issues together. If a class cannot be ascertained in an economical manner, the Third Circuit has held that the "significant benefits of a class action are lost." *Id.* Second, the court has recognized that an administratively feasible means of determining class membership protects defendants' due process rights by giving them an opportunity to challenge the evidence of class membership. *Id.* at 309–10. Third, the requirement protects absent class members by allowing them to identify themselves to determine if they want to opt out of a class. *Id.* at 307. Further, the requirement protects class members' interest in making sure that the available class recovery is not diluted by claims that should not be paid, while defendants pay only those claims for which they are actually liable. *Id.* at 310. Applying this requirement, for example, the Third Circuit vacated certification of a class of purchasers of a dietary supplement when it was undisputed that purchasers did not retain receipts or packaging, and even the named plaintiffs could not accurately recall their purchases. *See Carrera*, 727 F.3d at 304–05.

The Eleventh Circuit has similarly recognized an administrative feasibility requirement. *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 948 (11th Cir. 2015) ("[A] plaintiff establishes Rule 23's implicit ascertainability requirement by proposing an administratively feasible method by which class members can be identified."). The First, Second, and Fourth Circuits have referred to administrative feasibility, but have not clearly applied the requirement. *See Briseno v. ConAgra Foods, Inc.*, No. 15-55727, -- F.3d --, 2017 WL 24618, at *5 n.6 (9th Cir. Jan. 3, 2017) (discussing cases).

The Ninth Circuit's Decision in *Briseno v. ConAgra Foods, Inc.*

The Ninth Circuit is the most recent circuit to weigh in on whether there is a "administrative feasibility" requirement for class certification. *Briseno v. ConAgra Foods, Inc.*, No. 15-55727, -- F.3d --, 2017 WL 24618, at *1 (9th Cir. Jan. 3, 2017), involves consumer fraud allegations regarding cooking oil labeled as "100% natural." The district court certified, in part, 11 statewide classes of persons "who have purchased Wesson Oils within the applicable statute of limitations periods[.]" *Id.* at *2. ConAgra contended that there would be no administratively feasible way for consumers to reliably identify themselves as part of the class. It argued that consumers do not generally save grocery receipts and are not likely to remember details of individual cooking oil purchases. *Id.* at *3. Basing its decision on

statutory interpretation, the Ninth Circuit held that Rule 23's language imposes no administrative feasibility prerequisite to certification. *Id.* at *4.

The Ninth Circuit's decision in *Briseno* relies heavily on the Seventh Circuit's holding in *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015). The Seventh Circuit reasoned that Rule 23's explicit requirements balance the countervailing considerations for certifying a class. *Id.* A requirement to show an administratively feasible plan upsets this balance by giving one factor in the balance absolute priority. *Id.* As a result, class actions may be barred "where class treatment is often most needed: in cases involving relatively low-cost goods or services, where consumers are unlikely to have documentary proof of purchase." *Id.* The Sixth and Eighth Circuits have also rejected such a heightened, preliminary ascertainability requirement. *See Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 995–96 (8th Cir. 2016); *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015).

In its opinion in *Briseno*, the Ninth Circuit walked through each of the Third Circuit's justifications for requiring plaintiffs to show administrative feasibility. It concluded that Rule 23 and the claims administration process in class actions already take these concerns into account. *Briseno*, 2017 WL 24618, at *5–10. Methods such as auditing currently exist to weed out fraudulent or inaccurate claims, and defendants may challenge absent class members' claims when they file for damages. *Id.* at *8–9. Moreover, the court held, neither Rule 23 nor the Due Process Clause requires actual, individual notice to each class member in all circumstances. *Id.* at *6–7. Accordingly, adopting the Seventh Circuit's reasoning, the Ninth Circuit held that imposing a feasibility requirement to protect theoretical rights of absent class members would come at the expense of any possible recovery for all class members. *Id.* at *7.

Conclusion

This issue bears watching as it continues to develop through the courts. It may have important implications for environmental class actions, which are already generally regarded as difficult to certify due to the individual issues typically involved in establishing whether a plaintiff has been injured and, if so, the cause.

Ameri R. Klafeta *is an attorney with Eimer Stahl LLP in Chicago. She has broad experience in complex and class action litigation, including environmental and mass tort matters. She may be reached at aklafeta@eimerstahl.com.*