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CLASS ACTION & MDL roundup

SPRING 2021

In this issue

- Where the (Class) Action Is
- COVID-19 Litigation
- Antitrust/RICO
- Banking & Insurance
- Consumer Protection
- Labor & Employment/ERISA
- Privacy & Data Security
- Products Liability
- Securities
- Settlements

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overview

Where the (Class) Action Is

Welcome back to the ***Class Action & MDL Roundup***! Our spring edition covers notable class actions from the first quarter of 2021.

Click here to watch the latest installment of our video highlight. This quarter, our partner Rachel Lowe explores how parties will leverage the Ninth Circuit's opinion in *Olean Wholesale Grocery Cooperative Inc., et al. v. Bumble Bee Foods LLC, et al.*

As 2020 has come to an end, the courts are seeing the result of a tumultuous year as the impact of COVID-19 continues to rock the boat. In this edition of the ***Roundup***, our team follows significant cases making their way through the courts and looks at decisions impacting the higher-education, travel, and pharmaceutical industries.

After an eventful 2020, 2021 shows no sign of slowing down. The amount of added sugar in a "nutritious" breakfast has come into question in a California court. The consumer protection class action was given a second chance when the California judge found the plaintiffs' renewed class certification damages model matched their theory of liability, granting class certification. There was double trouble in a S.D.N.Y court, where plaintiffs advanced two theories of antitrust liability against drug manufactures. The score on administrative feasibility is now 5 to 3 in the district courts. The Eleventh Circuit, previously agreeing with the First, Third, and Fourth Circuits, had a change of heart. It now joins the Second, Sixth, Eighth, and Ninth Circuits in holding that administrative feasibility is not a prerequisite for class certification under Rule 23 to obtain class certification. Will the courts be able to come to an agreement on this issue affecting product liability class actions?

We wrap up the ***Roundup*** with a summary of class action settlements finalized in the first quarter. We hope you enjoy this installment and, as always, welcome your feedback on this issue.

The Class Action & MDL Roundup is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

CLASS ACTION & MDL roundup

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COVID-19 Litigation

The numerous class actions filed in the wake of the COVID-19 pandemic continue to work their way through the courts. In this section, we highlight some of these recent decisions and provide updates on some of the trends that have been developing.

Employee WARNs That COVID Is Not a Natural Disaster

Benson v. Enterprise Holdings Inc., et al., No. 6:20-cv-00891 (M.D. Fla.) (Jan. 4, 2021). Judge Dalton.

Judge Dalton denied Enterprise's motion to dismiss a class action by rental car employees claiming that Enterprise violated the Worker Adjustment and Retraining Notification (WARN) Act by "dismissing them with little to no notice" due to the COVID-19 pandemic. The court rejected Enterprise's defense based on the WARN Act's notice exception, which exempts employers from the notice requirement if a "mass layoff is a *direct result* of a natural disaster." Judge Dalton ruled that "Defendants' facilities or staff didn't disappear overnight, suddenly wiped out. Instead, COVID-19 caused changes in travel patterns and an economic downturn, which affected Defendants—so the natural disaster defense doesn't apply." Judge Dalton deemed the "unforeseeable business circumstances exception" to be the "proper focus." Because that WARN Act exception does not fully exempt employers but only softens the notice requirement, Enterprise employees stated a claim for a WARN Act violation sufficient to survive the motion to dismiss.

Higher Ed & COVID Class Actions: Courts Split on Tuition Refund Cases

Marbury v. Pace University, No. 1:20-cv-03210; ***In re Columbia Tuition Refund Action***, No. 1:20-cv-03208 (S.D.N.Y.) (Feb. 26, 2021). Judge Furman.

Courts across the country continue to grapple with the dozens of class actions filed against colleges and universities following their move to online instruction in the wake of the COVID-19 pandemic. Although many courts have granted motions to dismiss filed by institutions of higher education, some courts have allowed student-plaintiff complaints to proceed.

As a general matter, courts dismissing these cases on the pleadings have done so when tuition refund claims were based on general allegations that tuition and fees were paid with the assumption that in-person instruction would take place. Absent specific promises on the part of a college or university that courses would be conducted in person, courts have typically granted defendants' motions.

Some courts, however, have denied dismissal—in part or fully. For example, Judge Furman denied Pace University's motion to dismiss the student-plaintiffs' contract claim related to instructional format services because the university allegedly promised on its course registration portal that on-campus courses would be taught in person. In contrast, Judge Furman dismissed the instructional format contract claim from Columbia students because they were unable to point to any specific in-person instructional promise made by the school and the vague "on-campus experience" marketing statements were insufficient to support a claim. The Pace and Columbia students also alleged they had paid mandatory fees for the semester to use campus facilities and take part in campus activities and those fees had not been refunded. Based on those allegations, Judge Furman denied both institutions' attempts to dismiss the contract claims based on the availability of campus facilities and activities.

> "Vaccines are readily available. Can employers require their employees to be vaccinated? Get the answer to this and other questions in "COVID-19 Vaccines: Seven Questions for Employers.""

Conditions of Carriage Carry Airline Cases

Ide, et al. v. British Airways PLC, No. 1:20-cv-03542 (S.D.N.Y.) (Mar. 26, 2021); ***Bombin v. Southwest Airlines Co***., No. 5:20-cv-01883 (E.D. Penn.) (Mar. 29, 2021); ***Rudolph, et al. v. United Airlines Holding Inc., et al***., No. 1:20-cv-02142 (N.D. Ill.) (Feb. 12, 2021); ***Fensterer v. Capital One Bank*** (USA), N.A., No. 1:20-cv-05558 (D.N.J.) (Mar. 5, 2021).

In recent decisions related to airline ticket refund lawsuits, courts have continued to hold that the conditions of carriage govern. *Ide v. British Airways* ruled that the general conditions of carriage, which allow customers to choose one of three remedies, apply to all customers, and *Bombin v. Southwest* held that the plaintiff asserted a valid claim for breach of contract based on the failure to operate as scheduled clause of the contract of carriage, which allows for refunds. Courts have also rejected force majeure arguments in the context of airline ticket refund cases. The judge in *Rudolph v. United Airlines* denied the

defendants' motion to dismiss in part because under the contract of carriage, the flight cancellation at issue constituted a schedule change or irregular operation and not a force majeure event.

Courts have also issued rulings unrelated to conditions of carriage that may be helpful to defendants. For example, in *Fensterer v. Capital One Bank*, the court dismissed a putative class action as moot because the defendant produced evidence showing that it had processed a full refund to the plaintiff, and in *Ide*, the court found that the Airline Deregulation Act limits recovery to compensatory damages.

Steady Streak of Dismissals for PPP Agents

M&M Consulting Group LLC v. JP Morgan Bank N.A., et al., No. 8:20-cv-01318 (C.D. Cal.) (Jan. 6, 2021). Judge Selna.

The Central District of California continued the consistent trend of federal courts dismissing claims related to agent fees under the Paycheck Protection Program (PPP). The plaintiff alleged that the defendant banks failed to pay fees to agents who assisted small businesses in acquiring federal loans under the PPP. The court held that "absent an agreement between agent and lender … lenders are not required to pay agent fees under the text of the CARES Act or its implementing regulations."

Coronavirus Vaccine Case Survives Motion to Dismiss

McDermid v. Inovio Pharmaceuticals Inc., No. 2:20-cv-01402 (E.D. Pa.) (Feb. 16, 2021). Judge Pappert. Denying motion to dismiss.

While many coronavirus securities class actions alleging falsity based on statements expressing positive outlooks despite the pandemic have struggled to survive motions to dismiss, the plaintiffs earned a victory at the pleading stage when the court denied the defendant's motion to dismiss. The plaintiff alleged that the company manipulated its share price by overexaggerating its ability to create a coronavirus vaccine. The company publicly stated that it had "constructed" a vaccine in three hours, when it had only "designed" a vaccine in that amount of time. The court found that the plaintiff sufficiently pleaded loss causation and an inference of scienter and that the statements were misleading. The result gives plaintiffs a blueprint for succeeding in the otherwise-unsuccessful realm of pandemic-related securities claims.

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Antitrust/RICO

S.D.N.Y. Gives Hard Pass to "Hard Switch" Antitrust Theory

In re Namenda Indirect Purchaser Antitrust Litigation, No. 1:15-cv-06549 (S.D.N.Y.) (Feb. 11, 2021). Judge McMahon. Granting class certification for pay-for-delay, denying for hard switch.

Indirect purchaser plaintiffs advanced two theories of antitrust liability against drug manufacturers related to the Alzheimer's drug Namenda. First, the plaintiffs alleged that the manufacturers of Namenda entered into a pay-for-delay scheme with generic manufacturers. Second, they alleged that the makers of Namenda effectuated a "hard switch" between the immediate-release version of Namenda (which had a quickly approaching patent expiration date) and the extended-release version of Namenda (which had a later patent expiration date) by withdrawing the immediate-release version from the market. Judge McMahon had no problem certifying a class under the first theory, ruling that pay-for-delay theories typically raise common questions of law and fact that predominate over individualized issues. But she declined to certify a class under the hard switch theory, ruling that determining whether drug users started using the extended-release version as a result of the hard switch tactics—as opposed to, for example, preferring the properties of an extended-release drug—would require a highly individualized level of inquiry.

CLASS ACTION & MDL roundup

SPRING 2021

NEW RANKINGS, NEW ACCOLADES:

Chambers USA 2021 ranks 61 Alston & Bird practices and 103 of our lawyers from all 10 of our U.S. offices.

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Banking & Insurance

Class Conquered by Virus Exclusion

Eye Care Center of New Jersey, et al. v. Twin City Fire Insurance Co., No. 2:20-cv-05743 (D.N.J.) (Feb. 8, 2021). Judge McNulty. Dismissing case.

A New Jersey district court dismissed class claims brought by Eye Care Center of New Jersey alleging that insurer Twin City Fire Insurance Co. should be liable for losses that the eye care center incurred when it stopped conducting non-emergency medical procedures due to COVID-19 governmental restrictions. The court rejected the eye care center's argument that the "virus" exclusion within the underlying policy did not apply because the virus was not physically present at the subject property. The court ruled that the exclusion applies to coverage for losses caused generally by the spread of the virus because the subject policy contains no textual limitation indicating that the virus must be present at the property at issue.

Dentist's COVID-19 Coverage Claim Considered Toothless

Berkseth-Rojas v. Aspen American Insurance Co., No. 3:20-cv-00948 (N.D. Tex.) (Jan. 12, 2021). Judge Fitzwater. Dismissing case.

Judge Fitzwater dismissed a dentist's proposed class action for coverage of lost business income and other expenses due to the COVID-19 pandemic. Dr. Christie Jo Berkseth-Rojas had an "all risk" policy with Aspen that provided coverage "for all direct physical damage" or loss, which she argued should cover claims for costs incurred to prevent the spread of COVID-19 and the loss of full functionality of her dental practice—for example, her installation of a plexiglass shield at the reception desk. Judge Fitzwater disagreed, ruling that direct physical damage or loss required something more than mere loss of use or function and that Berkseth-Rojas failed to allege her property had been actually contaminated or infiltrated by COVID-19. He granted leave to file a second amended complaint.

COVID-19 Coverage Claim Fails to Overcome "Lysol and a Rag"

Town Kitchen LLC v. Certain Underwriters at Lloyd's, London, et al., No. 1:20-cv-22832 (S.D. Fla.) (Feb. 26, 2021). Judge Moreno. Dismissing case.

Judge Moreno dismissed a restaurant's lawsuit for coverage of loss or damage to the business due to the COVID-19 pandemic. Town Kitchen LLC had an "all risk" policy that provided "business interruption coverage" in the event of a "direct physical loss," which Town Kitchen argued should apply based on two theories: loss of use due to the high risk of transmission of physical coronavirus particles inside the premises or physical contamination due to the statistical certainty that coronavirus particles were present at the property. Judge Moreno rejected both arguments. First, he reasoned there was no loss of use because "the property did not change. The world around it did. And for the property to be usable again … the world must change." Second, he applied Florida law that a structure that merely needs to be cleaned has not suffered a direct and physical loss, holding that coronavirus particles may be eliminated "with Lysol and a rag. At this point in the pandemic, it is widely accepted that life can go on with hand sanitizer and disinfecting wipes." The court concluded that "harm from COVID-19 stems from having living, breathing human beings inside one's business—it is not damage done to the physical business itself."

Judge Slams Door on Auto Biz's Virus Coverage Suit

Frank Van's Auto Tag LLC v. Selective Insurance Co. of the Southeast, No. 2:20-cv-02740 (E.D. Pa.) (Jan. 27, 2021). Judge Pratter. Dismissing case.

Judge Pratter dismissed Frank Van's Auto Tag's insurance coverage suit for COVID-19-related claims, ruling that the car company failed to allege that the state's closure orders caused a physical loss. Because Frank Van's could not show a connection between its financial losses and the physical condition of its insured property, the court ruled that a virus exclusion and its anti-concurrent clause precluded all damages resulting from COVID-19 and government closure orders. The auto biz had hoped the court would jump on board its argument

"**Bo Phillips** helps you go to bat for your clients even when it's "Déjà vu All Over Again: New Angles on Old Theories in Life and Annuity Class Actions" at the Federation of Defense & Corporate Counsel 85th Annual Meeting at The Greenbrier, WV, August 3."

Bo Phillips

that a "physical loss" was not limited to tangible changes because the shutdown orders prevented access to and use of its busines, resulting in a "physical loss" that should have been covered under the policy. But Judge Pratter pumped the brakes on that argument, explaining that as soon as the shutdown order was lifted, the auto shop could "immediately resume business, without a period of restoration," meaning it did not incur a physical loss that would have been covered under its insurance policy. The court granted leave to amend.

Delaware Allows Insurance Coverage for Bad-Faith Conduct

RSUI Indemnity Co. v. Murdock, et al., No. 154, 2020 (Del.) (Mar. 3, 2021). Affirming summary judgment.

The Delaware Supreme Court affirmed judgment in favor of David Murdock and Dole Food Company Inc. in a lawsuit brought by their excess liability insurer RSUI Indemnity Company after Murdock took Dole private. RSUI sought a declaratory judgment that its directors and officers (D&O) insurance policy did not cover settlements arising from claims for breach of fiduciary duty and violation of federal securities laws in connection with the merger. The Delaware Supreme Court disagreed, holding that Delaware law permitted corporations to obtain D&O insurance for liabilities arising from bad-faith conduct and that the policy's contractual exclusion of fraudulent conduct did not apply here. The Delaware Supreme Court also held that responsibility for settlement payments should be reallocated to uninsured parties only if the conduct of those parties increased the settlement, which when applied here meant that RSUI properly bore responsibility for the full amount because it failed to show that any uninsured parties increased the amount of settlements for claims against Murdock and other insured entities.

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Consumer Protection

Plaintiffs Avoid Arbitration by Never Downloading App

O'Hanlon v. Uber Technologies Inc., No. 19-3891 (3rd Cir.) (Mar. 17, 2021). Affirming denial of motion to compel arbitration.

A class of disabled individuals alleged that Uber discriminated against them by not offering "wheelchair accessible vehicles" in and around Pittsburgh. Uber filed a motion to compel arbitration, arguing that the named plaintiffs, who had never downloaded Uber's app or accepted its terms of service, were still bound by Uber's mandatory arbitration clause because of the Third Circuit's equitable estoppel exception. The district court denied the motion, ruling that the plaintiffs had standing to sue despite never downloading the app because they based their claims on federal disability law, not Uber's terms of use, and the plaintiffs had not "knowingly exploited" the terms for their benefit—avoiding the equitable estoppel exception. The Third Circuit affirmed the lower court's denial of the motion to compel arbitration, holding that the plaintiffs neither availed themselves of Uber's terms of service nor received any benefit from them.

Engine Left Searching for Answers After Standing Decision Reversal

Cabrera v. Google LLC, No. 19-16466 (9th Cir.) (Jan. 4, 2021). Reversing dismissal of putative class action complaint.

The Ninth Circuit gave new life to a putative class action against Google accusing the company of overcharging for ads through AdWords, a service that places ads on websites and charges for each click. The district court erred in holding that the plaintiff lost standing to sue when he sold the company that advertised on his AdWords account. The consumer's standing was only partly premised on ownership of the AdWords account—which was not listed in the asset purchase agreement governing the sale of the company—and the consumer continued to manage the account after he sold his business.

Biscuit Lovers Receive Class Certification on Second Bite

McMorrow, et al. v. Mondelēz International Inc., No. 3:17-cv-02327 (S.D. Cal.) (Mar. 8, 2021). Judge Bashant. Granting motion for class certification.

A California judge granted Patrick McMorrow's renewed motion for class certification, certifying both a California class and New York class of consumers who purchased Mondelēz International's belVita breakfast biscuits that were labeled as nutritious despite the biscuits' high amount of added sugar. Judge Bashant had previously denied a motion for class certification, ruling that the class's damages model did not match its theory of liability and thus was deficient under U.S. Supreme Court precedent, which requires that a damages model measure only the damages attributable to the plaintiff's theory of harm. The prior damages model did not seek to measure the price premium attributable only to the term "nutritious." McMorrow's renewed motion sought to remedy that issue with a new classwide damages model. Finding that the plaintiffs' renewed class certification damages model matched their theory of liability, the court granted class certification.

"Retailers need to beware of unknowingly violating laws. Get in the express lane with "Below-Cost Pricing Brings Potential Liabilities" in *Progressive Grocer* by **Valarie Williams** and **Laura Komarek**."

Valarie Williams

Laura Komarek

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Labor & Employment / ERISA

Ninth Circuit Reverses Employers' Wage Statements and Timekeeping Win

Ward, et al. v. United Airlines Inc., No. 16-16415; ***Vidrio, et al. v. United Airlines Inc.***, No. 17-55471; ***Oman, et al. v. Delta Air Lines Inc.,*** No. 17-15124 (9th Cir.) (Feb. 2, 2021). Reversing summary judgment dismissal in part.

The Ninth Circuit reversed summary judgment wins by major airlines in a consolidated appeal of three class actions brought by pilots and flight attendants. The Central and Northern Districts of California had granted summary judgment in favor of United Airlines and Delta Airlines and dismissed claims based on California's wage statement and timekeeping regulations, holding that Section 226 of the California Labor Code—which contains certain wage statement requirements—did not apply. On appeal, the Ninth Circuit certified the Section 226 questions to the California Supreme Court, which answered that Section 226 did apply. Accordingly, the Ninth Circuit ultimately remanded that issue to the district courts with instructions to evaluate whether the employers' wage statements complied with Section 226. As part of its ruling, the court rejected several jurisdictional arguments made by the airlines, holding that the dormant commerce clause did not prevent application of California's wage statement law and that neither the Airline Deregulation Act nor the Railway Labor Act preempted the lawsuits. The Ninth Circuit's ruling helps clarify the application of California employment law to employee plaintiffs in the heavily regulated airline industry.

Retirement Plan Recordkeeper Not Liable Under ERISA

Harmon, et al. v. Shell Oil Co., et al., No. 3:20-cv-00021 (S.D. Tex.) (Mar. 30, 2021). Judge Brown. Granting motion to dismiss for failure to state a claim.

The Southern District of Texas dismissed Employee Retirement Income Security Act (ERISA) claims brought against Fidelity Investments, the recordkeeper of a retirement plan for Shell Oil Company employees. The complaint alleged that Fidelity breached its fiduciary duties to

Shell workers by sharing plan participant data, including names, ages, and investment history, with other Fidelity entities to enhance their ability to market to Shell workers. The court parsed the text of ERISA and corresponding federal regulations to conclude that the definition of "plan assets" under ERISA did not include "data" and cited several district court decisions from other circuits to further bolster its analysis. As a result, the court concluded that ERISA could not provide relief to the plaintiffs and dismissed their claims against Fidelity for failure to state a claim. Separate claims against Shell and other defendants remain pending. ■

A BATTLE FOR RESPECT

Association of Corporate Counsel – Georgia hosted **BJay Pak** and others for "Racism & Bias: A Discussion of Asian Hate & Anti-Asian Violence" during Asian American & Pacific Islander Heritage Month.

BJay Pak

Privacy & Data Security

"Alexa, Please Send This Case to Arbitration"

Tice v. Amazon.com Inc., No. 20-55432 (9th Cir.) (Feb. 19, 2021). Reversing denial of motion to compel arbitration.

Haley Tice complained that Amazon violated the California Invasion of Privacy Act (CIPA) by creating permanent recordings of users' voices and Alexa communications. The district court concluded that the plaintiff's "surreptitious recordings" claim was not subject to arbitration, explaining in part that the CIPA claim was "criminal in nature."

The Ninth Circuit disagreed, ruling that arbitrators are not precluded from evaluating whether civil claims and civil remedies sought under the CIPA are subject to arbitration. The circuit court also held that the district court too narrowly construed the arbitration clauses as limited to the plaintiff's "use" of the Alexa devices. Rather, the arbitration clauses broadly applied to "any dispute or claim relating in any way to … use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com" and to any dispute arising from the user agreement or Alexa. As a result, an arbitrator must decide whether the plaintiff's "surreptitious recording" claim is beyond the scope of arbitration.

Fast Food Customers Left Holding the Bag in Data Breach Standing Fight

Tsao v. Captiva MVP Restaurant Partners LLC, No. 18-14959 (11th Cir.) (Feb. 4, 2021). Affirming dismissal.

Fast-food customers sued a restaurant group based on its telling the customers that their personal information—including cardholder names, credit card numbers, card expiration dates, and CVVs—"may have been accessed" during a data breach that occurred between 2017 and 2018. After the trial court dismissed the case for lack of standing, the Eleventh Circuit held that: (1) the plaintiff had no standing to sue based on the theory that he and a proposed class of PDQ customers are exposed to a substantial risk of "future identity theft" even though neither the plaintiff nor the class members had suffered any misuse

of their information; and (2) the plaintiff's efforts to mitigate future identity theft were not an injury present and concrete enough to confer standing.

The circuit court explained that allegations about the "increased risk" of identity theft only supposed by reports defining identity theft or outlining general risks of identity theft were simply vague, conclusory allegations that would not be enough to confer standing. Mere evidence of a data breach alone does not satisfy the requirements of Article III standing, and standing based solely on an increased risk of identity theft certainly will not make the cut.

Class Damages Model Hits Target in TCPA Case

Gordon v. Robinhood Financial LLC, No. 2:19-cv-00390 (E.D. Wash.) (Jan. 25, 2021). Judge Rice. Granting motion for class certification.

Isaac Gordon claimed that he received an unsolicited text message from Robinhood about its referral program. Under the referral program, current customers elect to send a text message, which Robinhood generates and sends, inviting another individual to join Robinhood's investment program. Gordon sought to certify a class of Washington residents who received similar text messages from Robinhood without having given their affirmative consent.

The court ruled that Gordon satisfied the requirements for class certification. Consistent with Ninth Circuit law, the court ruled specifically that a plaintiff does not need "to demonstrate an administratively feasible way to identify class members."

No Availability in Court for Data Breach Victims

Rahman v. Marriott International Inc., No. 8:20-cv-00654 (C.D. Cal.) (Jan. 12, 2021). Judge Carter. Granting motion to dismiss.

Arifur Rahman alleged that he and proposed class members were victims of a cybersecurity breach at Marriott when two employees of the franchise in Russia accessed their personal information without authorization. Marriott admitted the breach, notified the customers of the breach, and confirmed that no sensitive information such as social security numbers, credit card information, or passwords were compromised.

Among the "best in the business":
Kim Peretti named to Cybersecurity Docket's 2021 "Incident Response 40."

Kim Peretti

In granting Marriott's motion to dismiss, the court agreed that Rahman lacked standing because the information obtained through the breach lacked the degree of sensitivity required by the Ninth Circuit to establish injury in fact. The court also declined Rahman's "creative but unsubstantiated" argument that the value of his personal information diminished as a result of the breach.

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Products Liability

Fifth Circuit Rules *Daubert* Applies with Full Force at the Class Certification Stage

Prantil v. Arkema Inc., No. 19-20723 (5th Cir.) (Jan. 22, 2021). Vacating granting of class certification.

The Fifth Circuit further deepened an existing circuit split, joining three other circuit courts in holding that *Daubert* standards apply with "full force" at the class certification stage. The Fifth Circuit vacated the lower court's order granting class certification to plaintiffs who brought a putative class action against a chemical manufacturer after the defendant's factory released toxic emissions across a seven-mile radius following Hurricane Harvey. The Fifth Circuit vacated the class certification order because the lower court relied on certain of the plaintiffs' experts in granting certification but failed to conduct as full of a searching assessment of the experts' reports under *Daubert* as it would have outside the certification stage. The Fifth Circuit cited with approval the Third Circuit's view that application of "Daubert at the certification stage [is] a natural extension of the Supreme Court's admonition in *Wal-Mart Stores, Inc. v. Dukes*" that courts should conduct a "rigorous analysis" under Rule 23. The Fifth Circuit joined the Third, Seventh, and Eleventh Circuits in holding that "the *Daubert* hurdle must be cleared when scientific evidence is relevant to the decision to certify."

11th Circuit Chooses a Side, Widening Circuit Split on Administrative Feasibility

Cherry v. Domestic Corp., No. 19-13242 (11th Cir.) (Feb. 2, 2021). Vacating dismissal and denial of class certification.

The Eleventh Circuit officially joined the Second, Sixth, Eighth, and Ninth Circuits in holding that administrative feasibility is not a prerequisite for class certification under Rule 23 to obtain class certification. The court vacated the district court's dismissal and denial of class WARN Act certification, which alleged that the defendant sold to putative class members potentially millions of defective refrigerators for use in recreational vehicles between 1997

and 2016. The Eleventh Circuit reversed the district court's judgment, which was based on its holding that the plaintiffs could not obtain certification because the plaintiffs failed to demonstrate a feasible method for identifying absent class members.

The Eleventh Circuit broke from its own prior, unpublished decisions that had previously joined in the First, Third, and Fourth Circuits' approach of applying a heightened standard of proof of a "manageable process that does not require much, if any, individual factual inquiry" to ascertain absent class members. The Eleventh Circuit held that administrative feasibility "has no connection to Rule 23(a)" and therefore is not an inherent part of the ascertainability inquiry and that while administrative feasibility retains some relevance to the superiority prong of Rule 23(b)(3), it is not a prerequisite for class certification but a post-certification issue where the plaintiff "proves administrative feasibility by explaining how the district court can locate the remainder of the class *after* certification."

Plaintiffs Key In on Common Defects to Transform into a Certified Class

In re MacBook Keyboard Litigation, No. 5:18-cv-02813 (N.D. Cal.) (Mar. 8, 2021). Judge Davila. Certifying class and seven subclasses.

A California federal judge certified a class alleging claims against Apple under the Song–Beverly Consumer Warranty Act and other statutory consumer protection laws, as well as seven state subclasses. The plaintiffs allege that Apple knowingly released defective "butterfly" keyboards on certain MacBook models between 2015 and 2019. The court rejected Apple's argument that the plaintiffs could not prove a common defect in light of Apple's changing designs for the slimmer keyboard across models and throughout the class period. The judge found common questions existed among the putative class where the plaintiffs alleged the same type of defects across models. Judge Davila also rejected Apple's argument that the class representatives did not buy the 2019 MacBook model and therefore were not representative of the class. The court ultimately certified the classes, ruling that the facts would be the same across all MacBook models at issue so that commonality and typicality requirements were satisfied under Rule 23. ■

"Let **John Redding** read the data, then join him for "Trends in Consumer Complaints and Disputes," part of the CDIA 2021 Virtual Law & Industry Conference, July 13."

John Redding

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Securities

Second Circuit Bolsters Post-Merger Section 14(a) Defenses

Gray v. Wesco Aircraft Holdings Inc., No. 20-1530 (2nd Cir.) (Feb. 26, 2021). Affirming dismissal.

The Second Circuit affirmed the district court's dismissal of the plaintiff's post-merger Section 14(a) claim that a board of directors violated Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 by allegedly making false and misleading statements and intentionally omitting information from the company's definitive proxy statement to coax shareholders into approving a merger at a price below the company's true intrinsic value. The plaintiff pointed to analyst estimates of potential offer amounts and the company's internal initial projections as evidence of a higher intrinsic value. The Second Circuit rejected those arguments as speculative and conclusory, ruling that the complaint did not sufficiently plead that the shareholders faced "a genuine choice 'between the Merger and the achievement of the Internal Projections.'"

Courts have already begun adopting the Second Circuit's opinion. For example, in *Karp v. First Connecticut Bancorp Inc.*, Alston & Bird scored a victory at summary judgment when the District of Maryland cited *Gray* to support its ruling that the plaintiff had not successfully pleaded loss causation. The Second Circuit's decision sharpens a defendant's ability to argue that the plaintiff did not sufficiently plead or show economic loss.

Student Loan Servicer Investor Action Proceeds

Pope v. Navient Corp., et al., No. 1:17-cv-08373 (D.N.J.) (Mar. 11, 2021). Judge Kugler. Granting class certification.

A New Jersey federal judge certified a class of investors alleging a student loan servicer engaged in a scheme to push borrowers into forbearance. In particular, investors alleged that the student loan company knew that encouraging forbearance programs allowed it to operate more efficiently and that its customer service representatives were encouraged to steer borrowers toward forbearance as a result,

even if it was not the customers' best option. Investors alleged that forbearance provided more income to the student loan servicer as a result of accrued interest and allowed customer service representatives to avoid engaging in longer conversations about alternative options. In granting class certification, Judge Kugler noted that the suit was "replete with common questions of law and fact," including questions about whether the company violated securities laws by misleading investors about the alleged forbearance scheme. The student loan servicer is facing a potential $4 billion judgment in a separate suit by the Consumer Financial Protection Bureau with similar factual allegations, in addition to claims by the attorneys general of Illinois, Washington, Pennsylvania, California, and Mississippi.

Pharmaceutical Company Investors Win Cert

In re Teva Securities Litigation, No. 3:17-cv-00558 (D. Conn.) (Mar. 9, 2021). Judge Underhill. Granting class certification.

Investors obtained class certification for claims alleging that a pharmaceutical company engaged in a massive price-fixing scheme. The consolidated action consists of 25 separate cases alleging that the company violated federal and state securities laws by misrepresenting the reasons for the company's financial success. In granting class certification, Judge Underhill rejected the defendants' arguments that the investors' expert's efficient market tests amounted to "junk science" and were "unreliable," noting that these tests had been accepted by numerous other courts.

"How are courts scrutinizing COVID-19 allegations in the motion to dismiss phase? Learn "Lessons from COVID Securities Rulings on Dismissal Bids," in *Law360* from **Robert Long**, **Elizabeth Clark**, **Sierra Shear**, and **Alexander Ingoglia**."

Robert Long

Elizabeth Clark

Sierra Shear

Alexander Ingoglia

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Settlements

Female Employees Finalize Equal-Pay Settlement

Chen, et al. v. Western Digital Corp., et al., No. 8:19-cv-00909 (C.D. Cal.) (Jan. 5, 2021). Judge Staton. Approving $7.75 million settlement.

A California district court approved a $7.75 million class settlement resolving claims that Western Digital failed to pay its female employees equally to its male employees. In doing so, the district court approved a $2.38 million attorneys' fee award, which represented 31% of the total settlement—6% higher than the 25% benchmark rate for attorneys' fees in the Ninth Circuit. The district court also awarded the class representative a service fee of $18,000, concluding that the $30,000 initially requested was "unreasonably high."

Large Class Settles Without Objection

Perks, et al. v. Activehours Inc., et al., No. 5:19-cv-05543 (N.D. Cal.) (Mar. 25, 2021). Judge Freeman. Approving $12.5 million settlement.

A California district court approved a $12.5 million class settlement resolving claims that Activehours Inc.—which does business as Earnin—failed to properly disclose how use of its paycheck advance application could lead to overdraft or insufficient funds fees. In concluding that the settlement was reasonable—including a $900,000 class counsel fee award—the court emphasized that none of the more than 270,000 class members objected to, or opted out of, the settlement. This was particularly noteworthy, given that the court also found the method used to inform the class of the settlement was highly effective and adequate in light of the fact that 95% of the class had received proper notice via email.

Exposed Consumers Settle After Breach

In re Google Plus Profile Litigation, No. 5:18-cv-06164 (N.D. Cal.) (Jan. 25, 2021). Judge Davila. Approving $7.5 million settlement.

Judge Davila granted final approval of a $7.5 million class action settlement arising from a data breach that exposed millions of accounts on the Google+ social media platform. The settlement class

includes all persons residing within the United States who had a consumer Google+ account for any period between January 1, 2015 and April 2, 2019, and who had their private profile information exposed due to bugs from the data breach. The plaintiffs alleged that Google failed to timely notify users of the initial breach, and the approved settlement resolves their claims for unfair and unlawful business practices, negligence, invasion of privacy, and violating California's Customer Records Act.

Attorneys Secure $3.7 Million Fee in Insurance Company Investor Lawsuit

Keippel v. Health Insurance Innovations Inc., et al., No. 8:19-cv-00421 (M.D. Fla.) (Mar. 23, 2021). Judge Jung. Approving $11 million settlement.

Judge Jung approved a nearly $4 million attorneys' fee award for the attorneys who negotiated an $11 million settlement for the investors' consumer fraud claims related to low-value health insurance products. According to Judge Jung, the attorneys' fee award was "fair and reasonable" given the thousands of hours that class counsel devoted to resolving the case. In addition, the judge approved $377,837 for reimbursement of litigation expenses.

Magnificent Mile Settlement Approved

Dou, et al. v. Carillon Tower/Chicago LP, et al., No. 1:18-cv-07865 (N.D. Ill.) (Feb. 4, 2021). Judge Kocoras. Approving $50 million settlement.

Judge Kocoras granted final approval of a settlement agreement arising from a $50 million investment fraud related to a planned Carillon Tower project set to be a 42-story mixed-use skyscraper on Chicago's Magnificent Mile. The settlement resolves a complex litigation involving more than 50 investors alleging violations of the federal Securities Exchange Act, the Illinois Securities Law, breach of contract, tortious conversion, fraud, and breach of fiduciary duty. Judge Kocoras concluded that the settlement was entered in good faith and directed Carillon to fund an escrow account that will fully refund the principal $500,000 investment and $50,000 investment fee each settling class member put toward the project.

Outstanding service, professional excellence: 29 Alston & Bird attorneys recognized in the 2021 Acritas Stars.

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An End to an Overtime Suit

Aiuto v. Publix Super Markets Inc., No. 1:19-cv-04803 (N.D. Ga.) (Mar. 29, 2021). Judge May. Approving $7.2 million settlement.

Judge May granted final approval of a $7.2 million settlement to resolve a class action against the supermarket chain for allegedly violating the Fair Labor Standards Act (FLSA) by wrongly classifying its deli and bakery managers as exempt from overtime pay. The settlement arises from the plaintiffs' claims that they continued to complete tasks and undertook responsibilities that classified them as eligible for overtime pay under the FLSA. Ultimately, over 1,000 people opted into the settlement class, including Publix managers who were denied overtime pay between October 2016 and April 2019.

Quick Settlement in Case of ATM Fees for Balance Inquiries

Figueroa v. Capital One N.A., et al., No. 3:18-cv-00692 (S.D. Cal.) (Jan. 21, 2021). Judge Miller. Approving $13 million settlement.

Less than two years after the case was filed, Judge Miller approved a $13 million settlement between Capital One and a class of its customers who alleged that the bank wrongfully charged them $2 fees for checking their balance while making cash withdrawals at ATMs between April 2008 and June 2020. The settlement of $13 million represents 33% of the estimated $39 million in total damages. The settlement allocates $20,000 in incentive awards to the lead plaintiffs, $3.9 million to the plaintiffs' counsel, approximately $915,000 for costs of litigation and settlement administration, and approximately $8 million to class members. There are about 1.6 million eligible class members who paid at least one balance inquiry fee, and the average settlement payment will be $5.09, with the highest payment being $1,602.08. Notice of the settlement reached 95% of all known class members, 39 of whom requested exclusion from the settlement, and none of whom filed objections. As part of the settlement, Capital One agreed to change its disclosures and reduced notice and administration costs by performing significant data analysis.

Face Scanning Suit Sees Settlement Approved

In re Facebook Biometric Information Privacy Litigation, No. 3:15-cv-03747 (N.D. Cal.) (Feb. 26, 2021). Judge Donato. Approving $650 million settlement.

Judge Donato granted final approval of a $650 million settlement in a biometric privacy class action against Facebook for its use of facial recognition technology. Deeming the settlement a "landmark result," Judge Donato lauded the result as "one [of] the largest settlements ever for a privacy violation" and one that will put at least $345 into the hands of every class member who files a claim. Thanks to an innovative notice and claims procedure, the case generated 1.6 million claims and saw just three objections. The settlement comes after intense litigation over a "new and untested statute, the Illinois Biometric Information Privacy Act (BIPA)." The case was originally filed in 2015 by a class of Illinois Facebook users who alleged that Facebook collected and stored their biometric data through digital scans of their faces without prior notice or consent. The plaintiffs were able to establish an injury in fact for purposes of Article III standing and ultimately won a heavily contested class certification motion. As a result of the settlement, Facebook has agreed to set its "face recognition" default setting to "off" for all Facebook users and to delete any existing and stored face templates for the class members. The plaintiffs didn't get *everything* they sought, however, as Judge Donato cut both the attorneys' fees by more than $12 million and also trimmed the incentive awards for the three class representatives from $7,500 to $5,000 each.

No Heat Results from Microwave Dispute

Hamm, et al. v. Sharp Electronics Corp., No. 5:19-cv-00488 (M.D. Fla.) (Jan. 7, 2021). Judge Moody. Approving $103 million settlement.

Judge Moody approved a settlement between Sharp and a class of users and purchasers of allegedly defective microwave drawers that led to premature failure. The settlement agreement included an extended warranty for plaintiffs and the option for consequential damages for costs incurred from repairing the faulty microwave installations. In approving the settlement, the court

considered the information that the parties had exchanged through informal discovery, the mediator's report on each party's factual and legal theories, and the opinions and inspections from several knowledgeable and qualified experts on microwaves. The settlement was deemed fair when considering the potential recovery to the plaintiffs and the risks involved with continuing the litigation.

Privacy Breaches Affect Pay Day

Wickens, et al. v. Thyssenkrupp Crankshaft Co., No. 1:19-cv-06100 (N.D. Ill.) (Jan. 26, 2021). Judge Dow. Approving $894,000 settlement.

Thyssenkrupp Crankshaft Co. will be paying hundreds of its workers who accused it of failing to abide by federal wage laws and for using a biometric time clock to track their hours in a manner that violated Illinois's BIPA. The company was accused of unlawfully requiring employees to verify their biometric data by scanning fingerprints to clock in and out of work without first explaining the "complete purpose" of its biodata collection and providing a publicly available schedule governing data retention and destruction under Illinois privacy law. The settlement provided class members compensation for their unpaid overtime work and other qualifying hours and included statutory damages for failure to compensate pay bonuses awarded for attendance, consistency, and job training.

Mortgages, Student Loans, and the American Dreamers

Perez v. Wells Fargo Bank, N.A., No. 3:17-cv-00454 (N.D. Cal.) (Jan. 8, 2021). Judge Chesney. Approving settlement.

Wells Fargo defended against a class action composed of individuals with lawful Deferred Action for Childhood Arrivals (DACA) status. DACA recipients are often referred to as "Dreamers"; they are not U.S. citizens or permanent residents, and thus they often do not enjoy the rights and opportunities to access economic resources, despite their legal status. The class of national residents alleged that Wells Fargo unlawfully discriminated against them under both California state and federal civil rights laws by making them ineligible for student loans, unsecured credit cards, unsecured personal loans, secured and unsecured small business loans, and mortgages. While the court did

not make any determinations regarding the merits of the case, Wells Fargo agreed to amend its lending policies to allow DACA recipients to be eligible for credit and loans and to make cash payments to class members who were previously denied a credit card, loan, or mortgage due to their DACA status.

New York Opioid Fallout Lawsuits Settle

People of the State of New York v. McKinsey & Co Inc., No. 400001/2021 (N.Y. Sup. Ct.) (Mar. 12, 2021). Judge Garguilo. Approving $32 million settlement.

Judge Garguilo of the Suffolk County Supreme Court approved a $32 million settlement agreement between the New York attorney general and McKinsey & Co. for the company's purported role in the growth of the opioid epidemic. The settlement resolves one of many lawsuits brought by a number of states that are attempting to address the health crisis caused by prescription opioids. The New York settlement is part of a larger $573 million agreement to resolve nationwide allegations.

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