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POINT OF SALE

Updates from Benesch's **Retail, Hospitality & Consumer Products** Industry Group

Media Fraud & Transparency – An Update

In a signal that the FBI's investigation into media buying and transparency is progressing, the FBI has reportedly interviewed former and current executives from multiple media buying agencies, and reports surfaced in March that the FBI had issued a subpoena seeking information from an agency client.

A person familiar with the matter told *Ad Age* that the subpoena signaled several key developments in the investigation, including that a grand jury has been impaneled and that the U.S. attorney has accrued enough evidence to convince the jury of probable cause to subpoena a client's records. Though there's no evidence that any marketers have voluntarily come forward to aid the FBI in its investigation, the agency appears poised to go after client records regardless. The FBI is reportedly using an unredacted version of the K2 report on media rebates, which includes the name of all 41 sources previously redacted. Part of the FBI's investigation has reportedly zeroed in on the out-of-home advertising sector, which generated $10 billion in ad revenues in 2018, according to the Interactive Advertising Bureau.

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In May 2019, the agency client subpoenaed was named as LVMH, which owns brands including Louis Vuitton, Moët & Chandon, Veuve Clicquot, Hennessy and Christian Dior. There is no suggestion of wrongdoing by LVMH. Rather, the FBI is believed to be looking into LVMH's U.S. media buying account, which is worth an estimated $400 million annually. The subpoena is reportedly seeking two years of financial records, e-mails and other communications between LVMH and its agency. LVMH appointed Dentsu Aegis Network as its media buying agency network in the U.S. in 2018, though Havas previously retained the account. No allegations of wrongdoing have been made against either agency.

The market has continued to evolve in response to the initial Association of National Advertisers report published in 2016 and subsequent investigation. In March 2019, the ANA launched a new initiative called the ANA Trust Consortium to help members address the issue of trust between marketers and the digital supply chain. An alliance of ANA members and their partners, the consortium will serve as a voice for brands on transparency, measurement, auditing, digital fraud and brand safety, the ANA said. Trust continues to be a key issue in the market, with 17% of respondents in an ANA study ranking trust been marketers and advertising agencies as low, 55% ranking it as moderate and 29% ranking it as high. Twenty-eight percent of respondents indicated that trust has declined in the past two to three years, with just 13% saying it's improved.

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Calls for Transparency

Brands are using their spending power to call for change in the industry, demanding more transparency in fees, metrics and the media supply chain. Marc Pritchard, Chief Brand Officer of Proctor & Gamble, the world's largest advertiser, is calling for advertisers to support an ecosystem that emphasizes quality, civility, transparency, privacy and control. In a speech to the ANA, he said the that in the face of "the inconvenient truth that we were operating in a murky, non-transparent and sometimes even fraudulent media supply chain," the industry has come together to clean up through transparency and safety. But Pritchard also said the efforts to date have not been enough, and the proliferation of digital media brings with it a "dark side" and called for the creation of a new media supply chain.

"It's time to invest our brainpower into an ecosystem that builds in quality, civility, transparency, privacy and control from the very start," he said. "A new media supply chain that levels the playing field and operates in a way that is clean, efficient, accountable and properly moderated for everyone involved. A new media supply chain that is both a force for growth and a force for good. Good for consumers, our brands, our industry and society." Pritchard laid out several actions the industry can take:

1. **Elevate quality:** Brands should partner with companies and buy media from places where the content quality is known, controlled and consistent with company values. Pritchard noted that P&G is choosing to invest in places where brands are proven safe, the content is known and controlled and where there is third-party measurement, auditing and accountability.
2. **Promote civility:** The media supply chain requires new standards of decorum to protect brands in an environment where "technology has made it far too easy to hijack conversations and disproportionately amplify negativity, divisiveness and even hate. The fact that algorithms can feed additional like-minded content based on comments can be problematic because it can foment more negativity and unintentionally end up having brands associated with horrible content."
3. **Provide a level playing field:** This can grow from a common set of rules across every platform to deliver transparency via cross-platform media measurement.
4. **Simplify privacy:** With new laws and draft legislation on the horizon, including the California Consumer Privacy Act, and companies and industries groups planning to introduce new approaches to privacy, Pritchard said the privacy landscape is becoming a complex and confusing patchwork. "In the new media supply chain, P&G is seeking *one* common privacy standard that applies to all companies, whether a consumer is in California, Florida, Ohio or any other state."
5. **Take control:** Pritchard stated that P&G is "reinventing agency models to bring more media planning and buying in-house when and where it makes sense." The company has saved nearly $1 billion in agency fees and production costs, while becoming closer to consumers, and working more closely with media providers, cutting hidden costs.

Pritchard's roadmap for the industry was endorsed by the ANA, with president Bob Liodice outlining steps the association is taking to support the plan, such as increasing governance of measurement and data transparency standards. Pritchard said P&G will direct its advertising dollars to companies adhering to the roadmap.

In-House Trend Accelerates

As calls for transparency become louder, brands are taking more control over media buying by building out their in-house agencies. Though the trend of in-housing has been impacting the market for some time, it appears to be accelerating in the current environment of mistrust.

- In March, WPP confirmed that Walmart had decided to move website ad sales and related analytics work currently handled by Triad in-house. Triad reportedly told employees it would enforce non-compete clauses of their contracts, even to bar them from transitioning to Walmart Media Group, which is taking over the ad operations. Walmart is expected to add hundreds of employees as part of the transition.
- PepsiCo is in the process of building out an in-house team dedicated to bringing together data and media planning. The North American group will be known internally as the media and consumer data team and will have a mandate to combine the "science of data with media insights and activation" to shape Pepsi's digital media and adtech strategies. Pepsi has been slowly bringing its marketing functions in house for several years, with former president Brad Jakeman saying in 2015 he expected the agency model to break. Outside of North America, the company has been pressuring media agencies to provide stronger online results through innovation, such as the use of blockchain.
- Anheuser-Busch InBev is building out its first in-house creative agency using data-driven insights to create more local and personalized content. Known as Draftline, the in-house agency has been assembling a significant creative team, giving Ab InBev more control as its looks to rebuild the value of brands such as Budweiser and Bud Light.
- Target launched Roundel, a revamped in-house agency and media network formerly known as Target Media Network. Roundel will create campaigns and content for other brands, including those not sold within Target stores. Target Media Network was initially launched in 2016 as a program for vendor partners and subsequently rolled out to all national advertisers. Since its launch, it has seen double-digit growth, but there were concerns about it being tied too tightly to Target. The rebrand is meant to separate Roundel from Target.

- Verizon, which launched an in-house agency in 2017, has said internal teams can be more efficient because they're already rooted in the company's values, messaging and creative tone. Since its launch, the in-house agency, known has 140, has worked to develop an integrated production model, which saw Verizon return to Super Bowl advertising for the first time in seven years. That campaign reportedly drove a 367-times lift in positive brand mentions.
- Liberty Mutual said it has seen tangible benefits from bringing its creative, digital media planning and buying, consumer insights and data-analytics functions in-house. The company has built out its digital media planning and buying, consumer insights, and data-analytics teams and established a creative agency called Cooper Giants over the past few years. It now handles 80% of its creative work in-house, which has allowed the company to cut agency fees by nearly 30%.
- In contrast, Reebok is bucking the in-house trend and relying mostly on external agencies to handle its big campaign work. Though it has small in-house PR, creative and media teams, VP of marketing Melanie Boulden said the company relies on external agencies for big global campaigns to ensure its message is consistent across markets.

Key Findings

Development	Summary	Implications
FBI issues subpoenas in connection with media buying probe	The FBI subpoenaed an agency client in connection with its media buying probe and has also reportedly interviewed multiple agencies. This would have required the empanelment of aA grand jury, signaling that the U.S. Attorney has accrued enough evidence to convince the jury to allow the issuance of subpoenas.	In the wake of this probe, many of the world's largest brand advertisers are pressing for heightened transparency in the industry. These companies are using their spending power to drive changes and have accelerated the shift of media buying to in-house agencies.
Digital ad fraud continues to climb	With growth in digital advertising comes increased digital advertising fraud. Economic losses for bot fraud alone are expected to reach a whopping $5.8 billion in 2019.	As with the traditional media space, digital ad fraud is spurring efforts to bolster self-transparency through initiatives such as TAG and Ads.txt. Increased scrutiny of the industry, however, has raised questions about whether self-regulation is enough. Legislative action may be the next step to increased transparency in the digital media space.
Califronia consumer privacy act driving need for complaince	The CCPA will take effect in 2020. Efforts to extend the private right of action under the CCPA were shelved, reducing the risk of class action litigation, but compliance remains important amid a global push to regulate privacy.	With a patchwork of state-level legislation such as CCPA emerging, groups such as the ANA are pressing for uniform federal regulation. Absent that, however, brands need implement compliance measures in advance of the CCPA's effective date.
***Lamps Plus* ruling limits class actions**	The Supreme Court held in *Lamps Plus* that employees and consumers are bound by arbitration clauses that automatically waive the right to pursue class-wide claims.	The case is the latest in a series to tighten limits on class-wide arbitration. It comes amid the increasing popularity of mandatory arbitration in employment space.
Price inflation claims continue to mount	Despite an overall downward trend in antitrust litigation, an array of price inflation suits are ongoing, including significant suits brought against large food companies.	Retail companies that may be impacted by these cases – which could involve significant payouts – and should consider whether or not to opt out of a class action in order to file individual claims.

Digital Ad Fraud

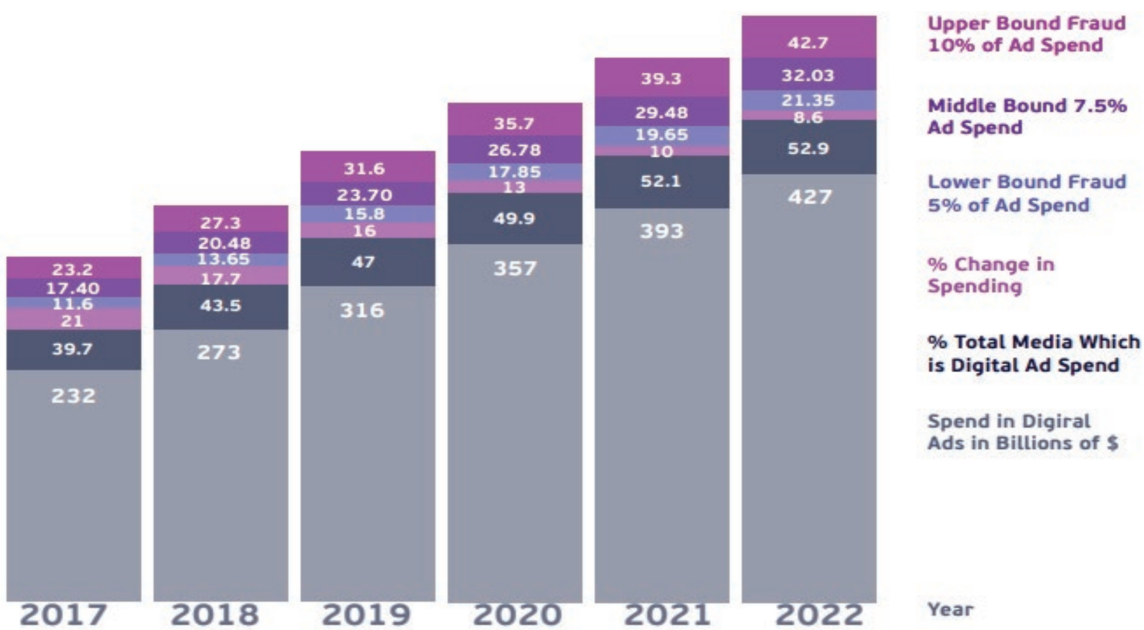
While the FBI investigation into agency media buying practices plays out, brands are also continuing to feel the impact of fraudulent digital advertising. Digital ad revenues reached $107.5 billion in 2018, according to the Interactive Advertising Bureau, compared to $71 billion for TV ad revenues. While digital advertising continues to see growth, research published by CHEQ, which is developing an ad verification service, suggests that 18% of the 4.1 billion ad requests made in the U.S. across 1.2 million websites between October 2018 and February 2019 were fraudulent. Of that, 77% was "sophisticated invalid traffic" (SIVT), meaning it uses advanced malicious methods to defraud the advertising ecosystem. CHEQ found that U.S. desktop-based fraud accounted for 55% of total online fraud, while mobile accounted for 46%.

CHEQ estimates that marketers could lose $23 billion a year in online ad spending (see chart, below) as a result of ad fraud in 2019, with the potential range for ad fraud between 5% of total digital ad spend and 10%. CHEQ predicts that market expenditures for online digital ads will reach upwards of $427 billion in 2022, driving the direct costs of ad fraud could to $32 billion. Taking into account indirect economic and social costs, the impact of ad fraud could reach $30 billion in 2019. CHEQ data suggests that up to 30% of ads – or 21 trillion online ads – are affected by fraud each year.

The ANA and White Ops estimate that economic losses due to bot fraud could reach $5.8 billion in 2019, 11% less than the $6.5 million in losses in 2017. The ANA and White Ops expect that, for the first time ever, more fraud will be stopped in 2019 than will succeed amid "unprecedented industry collaboration." Despite the positive outlook, some industry members remain skeptical. John Montgomery, GroupM's Executive Vice President of Brand Safety, said that while these improved statistics are encouraging, "the potential financial risk is still high for marketers who do not take robust actions to avoid ad fraud." Louis Jones, the Executive Vice President of Media and Data for 4A's, attributed part of the success in reducing fraud to measures the association has taken to increase security for members, such as the introduction of the Advertiser Protection Bureau (APB). Others questioned whether the ANA cherry-picked the data to "protect the status quo," and criticized the report as "misguided" and based on "flawed logic" since it's based on a small sample of overall advertising.

The report suggests that efforts by initiatives such as Ads.txt and the Trustworthy Accountability Group (TAG) are paying off, reducing the supply and demand for traffic from vendors caught selling bot traffic. However, some reports suggest Ads.txt, which has experienced a steady adoption rate and positive feedback from marketers, is still vulnerable to fraud. According to DoubleVerify, for instance, bad actors have found ways to work around the Ads.txt through a scheme targeting high profile news and entertainment publishers, which may have already cost advertisers up to $80 million a year. IAB Tech Lab attributed the scam to improper implementation, rather than Ads.txt itself. Increasing scrutiny of the industry has raised questions about whether self-regulation will be sufficient to hold off legislation or whether the industry will ultimately find itself subject to stringent laws.

Potential Range for Ad Fraud (CHEQ)



California Consumer Privacy Act

Amid a global trend toward formal recognition of individual rights to privacy, heightened regulatory requirements and increasingly negative public sentiment following data breaches, brands are adopting strategies to prepare for data privacy laws, including the California Consumer Privacy Act (CCPA), which is slated to go into effect in 2020. With a patchwork of privacy laws emerging as individual states adopt bills with varying guidelines, industry members such as P&G and associations such as the ANA and IAB have called for a single federal privacy law. In the absence of a unified law, however, consumer and retail brands need to be cognizant of compliance requirements – and the potential for litigation – under emerging state laws.

With similar requirements to GDPR, CCPA is considered the strictest consumer privacy law in the U.S. The law mandates heighted transparency, establishes new consumer rights surrounding personal information, and sets limitations on differential treatment of consumers who share personal information. It grants consumers the right to know what personal information is being collected, why it is being collected and whether their information is being sold or disclosed and to what entities. In contrast to GDPR's "opt-in" approach, CCPA allows them to "opt-out" of the sale of their personal information and have their data deleted.

The law's scope reaches across industry lines and impacts all for-profit companies that process personal information for California residents. The law establishes two enforcement avenues – actions by the state attorney general and, as it stands, a narrow right to sue over data breaches. The state AG has broad authority to enforce the statute and can impose penalties under the Unfair Competition Law and civil damages of up to $7,5000 per violation. The existing version of CCPA gives violators a 30-day window to rectify any alleged wrongdoing before facing penalties.

Details are the law could still be tweaked in the state legislature, with lawmakers proposing amendments to clarify some of the issues surrounding the law. Trade bodies, including the ANA and IAB, sent a letter to the state AG expressing general support for the CCPA but calling for clarity on the scope of "personal information" and raising concerns about non-discrimination requirements eroding services such as loyalty programs. The advertising bodies have been working to establish a reputation for self-regulation, but their comments signal a desire for ensure compliance with the impending laws.

An amendment introduced by state Sen. Jackson in February would have eliminated the grace period and expand a consumer's right to bring civil action for damages under the act. The amendment, which would expose companies that collect consumer data up to the risk of class action litigation, was shelved by lawmakers in May over concerns about costs to company and the courts, despite having previously passed by a 6-1 vote by the Judiciary Committee. While the risk of class actions may have been mitigated with the shelving of the Jackson amendment, and the California AG has warned that it is ill-equipped to prosecute data privacy and will likely be able to take only a handful of the most serious cases each year, companies across the U.S should still be aware of the heightened compliance risk.

Another amendment, which is progressing through the legislative process, would address one industry concern by explicitly allowing company to offer loyalty programs. There may be a six-month grace period under which companies won't face CCPA-related state enforcement actions, but the existing consumer private right of action will go into effect starting next January.

Privacy regulation may be on industry's radar, as a Gartner survey shows "accelerating privacy regulation" was the top emerging risk in Q1 2019, but compliance activities may not be keeping up. For example, only an estimated 14% of companies affected by the California law are now compliant, as 86% of respondents to a TrustArc survey said they had not completed their compliance preparations. The survey found that 16% of companies hadn't yet started to work toward compliance, while 9% had made plans but not started implementation and 19% had started implementing. Only 16% indicated that they were well on their way to compliance. Nearly three quarters (71%) of survey respondents said they expect to spend more than $1 million to meet the requirements.

The passage of CCPA represents a notable shift in regulatory enforcement related to privacy, and it has triggered debate about the need for privacy law at the national level. It has also pushed legislators in states such as New York, Massachusetts, New Mexico, Utah and Washington to propose their own legislation, which could prove even stricter than California's. As the Gartner survey shows, accelerating privacy regulation is a risk with "very rapid velocity" and companies across the U.S. need to ensure they are paying attention to ongoing developments in the space and adequately preparing for compliance.

Lamps Plus v. Varela Ruling

The Supreme Court ruled in *Lamps Plus v. Varela* that employees and consumers bound by arbitration clauses automatically waive the right to pursue class-wide claims, unless their contracts explicitly allow for such collective proceedings. The case is the latest in a series of rulings lending greater weight to the 1925 Federal Arbitration Act (FAA), tightening limitations on class-wide arbitration and allowing companies to use arbitration provisions to prohibit class actions in court. The split-court decision overturns a Ninth Circuit ruling that allowed class arbitration based on California state rules on ambiguous contracts.

The case originated in California, where lighting retailer Lamps Plus was sued after a hacker duped an employee into disclosing tax information for about 1,300 company workers. Employee Frank Varela filed a putative class against the company after a fraudulent federal income tax return was filed in his name. Lamps Plus sought to compel individual arbitration based on the arbitration clause in Varela's employment contract, which states that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings relating to my employment."

A federal district court sent the case to arbitration, however, the court allowed arbitration to proceed for the entire class, and the Ninth Circuit upheld the district court's ruling using principles under state law that construe ambiguity against the party that created the provision. Lamps Plus appealed to the Supreme Court, and in a 5-4 ruling, the court determined the Ninth Circuit's ruling was erroneous because the FAA "requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis." The court held that parties need to agree to class arbitration because it is "markedly different from different the 'traditional individualized arbitration' contemplated by the FAA."

According to the chief justice, arbitration clauses are voluntary agreements between parties, and do not provide the necessary "contractual basis" for compelling class arbitration. Chief Justice John Roberts wrote "neither silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself." The majority opinion also pointed to the benefits of private dispute resolution, such as lower costs, improved efficiency and speed and the ability to choose adjudicators to resolve specialized issue – benefits which it says are absent in class arbitration. Citing the *AT&T Mobility LLC v. Concepcion* ruling, the majority wrote that class arbitration "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."

The majority said the state contract rule is based on a public policy concern – that being the need to address inequality in parties' bargaining power – rather than an effort to discern the meaning of the contract. The justices said federal law does not permit judges to leverage such state contract rules to reimagine agreements to individually arbitrate disputes, citing the "foundational FAA principle that arbitration is a matter of consent." The majority, citing the Conception ruling, said class arbitration, to the extent it is established by state law instead of consent, runs afoul of the FAA. While Varela argued that the rule doesn not conflict with the FAA because it is neutral and gives equal weight to arbitration agreements and other contracts, the majority held that "an equal treatment principle cannot save from preemption general rules 'that target arbitration either by name or by more subtle methods, such as by 'interfering with fundamental attributes of arbitration.'"

In dissent, Justice Ruth Bader Ginsburg, joined by Justices Stephen Breyer and Sonia Sotomayor, said the majority had extended beyond the reach of the FAA's role in resolving commercial disputes to tilt the scales in favor of businesses and "deny to employees and consumers 'effective relief against powerful economic entities.'" Ginsburg said the court's decisions have led to a proliferation of mandatory arbitration clauses in employment and consumer contracts, adding that "employees and consumers forced to arbitrate solo face severe impediments to the 'vindication of their rights.'" Her comments align with findings suggesting that the increasing popularity of mandatory arbitration in the employment space has limited workers access to the courts, with estimates that more than 55% of American workers (60 million) cannot access the courts on employment issues. Ginsburg pointed to industry trends, however, that have softened the impact of the court's rulings, noting that some companies have stopped requiring employees to arbitrate sexual harassment clams or extended their no-forced-arbitration policy to a broader range of claims.

Justice Elena Kagan, whose dissent was joined by Ginsburg, Beyer and Sotomayor, took issue with the majority's position that class arbitration undermines the benefits of arbitration, saying such a view cannot "justify displacing generally applicable state law about how to interpret ambiguous contracts." She argues that the FAA requires courts to enforce arbitration agreements according to their terms but does not "federalize basic contract law." Even if the majority were right to view the agreement as ambiguous, Kagan argued "a plain-vanilla rule of contract interpretation" as applied in California and other states, requires that the contract be read against the drafter. As such, the contract at issue would permit class proceeding as the agreement "carries no hint of consent to surrender altogether—in arbitration as well as court—the ability to bring a class proceeding." Kagan also said the 2010 Stolt-Nielsen precedent does not support the majority's position, as that case involves a joint avowal that the parties have never resolved the class arbitration agreement rather than an absence of explicit language about the matter.

Antitrust – Price Inflation

Although the number of new antitrust case filings in 2018 reached its lowest level since 2011, an assortment of price inflation suits are making their way through the courts, form generic price fixing allegations by insurers and state attorneys general, to consumer litigation over inflated water chemical prices and a collection of class action suits over meat, dairy and seafood prices.

Large food producers are feeling the impact this litany of price fixing suits, among the most advanced of which are targeting producers of chicken. Direct purchasers of broiler chickens, indirect buyers that resold the chickens and indirect purchases who bought the chicken for consumption have filed claims against poultry producers such as Perdue, Tyson Foods and Koch foods. After the initial suit was filed in 2016, a series of civil actions over the price inflation of chicken have been filed. They have yet to be consolidated into multidistrict litigation. Most recently, for instance, Walmart joined other retailers such as Sam's Club to file an antitrust suit in Arkansas federal court alleging that chicken producers conspired to inflate prices for broiler chicken by entering illicit deals and restricting trade from 2008 to 2016.

To emphasize the breadth of these food cases, excluding multi-district litigation, the top five defendants for antitrust cases filed between 2016 and 2018 were all from the chicken industry, four of which were Tyson units – Tyson Food, Inc. (47 cases), Tyson Breeders, Inc. (34), Tyson Chicken, Inc. (24) and Tyson Poultry, Inc. (34) and Sanderson Farms (32).

The *Interchange* case has shown that payouts from price inflation claims can be significant. In that case – the largest ever class action settlement of a U.S. antitrust case – Visa and Mastercard agreed to pay between $5.54 billion and $6.24 billion to a class of merchants for allegedly inflating swipe fees, a/k/a "interchange fees." In that case, several large merchants opted out of an initial settlement, which was struck down by a federal appeals court, to litigate the claims. As with the *Interchange* case, retail companies need be cognizant of these ongoing price inflation cases to take stock of whether they may be impacted and carefully weigh whether or not to opt out of a class action in order to file individual claims.

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