ALSTON & BIRD

CLASS ACTION & MDL roundup

FALL 2019

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Where the (Class) Action Is

Welcome back to the *Class Action & MDL Roundup*! Our fall edition covers notable class actions from the third quarter of 2019.

The circuit courts were busy with class actions in the third quarter. Appellate judges were able to see through several labeling cases that sought to mislead consumers – and the courts. They also ruled on the usual suspects of alphabet laws: ERISA, FACTA, and the TCPA. Not to be outdone, the California Supreme Court chimed in with a technical ruling on requirements at the certification stage.

At the district level, plaintiffs claimed victories despite some long odds in a case that pit experts against each other and another involving remanufactured goods (another running theme this quarter). Defendants had better luck keeping one case in federal court and throwing out another for specious methodology.

We wrap up the *Roundup* with a summary of class action settlements finalized in the second quarter. We hope you enjoy this installment and, as always, welcome any feedback you have on this or any other publication from the Class Action & Multidistrict Litigation Team.

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.

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Antitrust & RICO

Rail Shippers' Class Cert Bid Runs off the Tracks

In re Rail Freight Fuel Surcharge Antitrust Litigation, No. 18-7010 (D.C. Cir.) (Aug. 16, 2019). Affirming denial of class certification.

A putative class of rail shipping customers alleged that each one was injured by the alleged conspiracy and put forward a damages model showing that the proposed class consisted of 16,065 members. Just one problem: The damages model also showed that 2,037 members of the proposed class suffered no injury from any conspiracy. The court of appeals affirmed the district court's denial of class certification because the plaintiffs were left with no common proof of injury as to 12.7% of the class—a more than de minimis amount.

No Issue with Certifying Issue Class

In re Suboxone Antitrust Litigation, No. 2:13-md-02445 (E.D. Pa.) (Sept. 26, 2019). Judge Goldberg. Granting class certification.

In addition to certifying a Rule 23(b)(3) class of direct purchasers of a drug used to combat opioid addiction, Judge Goldberg certified a Rule 23(c)(4) issue class of end payors. The defendant drug manufacturer argued against the issue class, claiming that liability issues could not be separated from antitrust injury and damages, which necessarily required individualized inquiry. But Judge Goldberg held that the end payors' motion for class certification did not—and need not—seek to prove all required liability elements. And the liability issues that the end payors did identify all focused on the drug manufacturer's conduct.

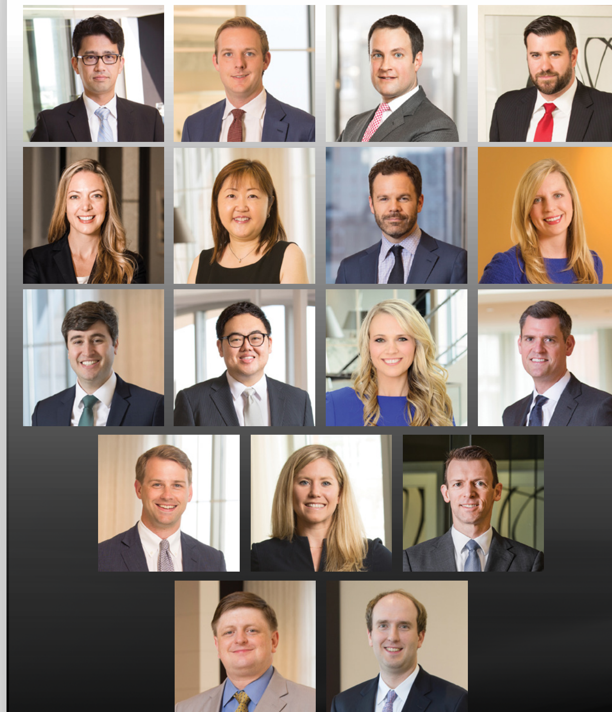
A Canned Response to the Battle of the Experts?

In re Packaged Seafood Products Antitrust Litigation, No. 3:15-md-02670 (S.D. Cal.) (July 30, 2019). Judge Sammartino. Granting class certification.

In considering whether to certify various classes of tuna purchasers, Judge Sammartino heard three days' worth of argument on each side's competing regression model. Although neither party moved to strike the other's expert, Judge Sammartino emphasized her role as gatekeeper under *Daubert* and made clear she could resolve factual disputes between dueling experts as part of Rule 23's "rigorous analysis." But her ultimate decision struck a familiar chord: at class certification, she did not need to determine which competing model was most accurate, and her only concern was whether the purchaser's model was capable of showing classwide impact. Therefore, despite "serious" and potentially "persuasive" critiques of the purchasers' model, she certified the class. ■

class-ified information

Congratulations to our 2020 class of 17 new partners!



Banking, Financial Services & Insurance

Eleventh Circuit Won't Look Back – Overturns Certification of "Injunction" Class

AA Suncoast Chiropractic Clinic P.A. v. Progressive American Insurance Co., No. 17-13003 (11th Cir.) (Sept. 12, 2019). Reversing class certification.

The Eleventh Circuit reversed an order certifying an "injunction" class under Rule 23(b)(2) after determining that the true relief sought by the group of plaintiffs was really for damages and should have been pursued as a Rule 23(b)(3) class. Not mincing words, the Eleventh Circuit called out the plaintiffs' "ploy" to "lop off [their claim's] damages-based warts and recast their claim as one for injunctive relief." According to the court, an injunction was an inappropriate remedy for the class as certified because the plaintiffs were really a "damages" class seeking redress for a past harm, rather than a forward-looking remedy as is proper in a Rule 23(b)(2) injunctive class. The plaintiffs chose to style their claim as one for injunctive relief rather than attempting to satisfy the more difficult hurdles of predominance and superiority under Rule 23(b)(3) because their damages claims were "studded with individualized issues that put Rule 23(b)(3) certification out of the question."

"Issue" Class Certified in *Forex* Foray

In re Foreign Exchange Benchmark Rates Antitrust Litigation, No. 1:13-cv-07789 (S.D.N.Y.) (Sept. 3, 2019). Judge Schofield. Granting partial class certification.

In 2014, investors brought a putative class action against 16 banks for allegedly manipulating the benchmark rates used in foreign exchange transactions. By September 2017, 15 banks settled, leaving a lone defendant in the case. The plaintiff-investors asked Judge Schofield to certify two classes pursuant to Rule 23(b)(3), both alleging a Section 1 violation. Judge Schofield denied certification under Rule 23(b)(3), finding that judicial economy would be outweighed by the fact-intensive inquiries necessary to resolve the plaintiffs' claims and that such inquiries would render the case "unmanageable." However, Judge Schofield certified a class under Rule 23(c)(4) on two issues: whether there was a conspiracy to widen spreads in the "spot" market, and whether the bank participated in the conspiracy if it existed.

Federal circuits are currently split on the proper standard for "issue-class certification" under Rule 23(c)(4). The U.S. Supreme Court recently denied certiorari of a Sixth Circuit decision endorsing a "broad" view of Rule 24(c)(4), which means, depending on the circuit, defendants may face issue classes in the future even when certification under Rule 23(b) isn't appropriate.

Learn more about "Preparing, Responding, and Recovering from a Cyber Incident: Tools and Techniques" with **Kate Hanniford** during this webinar on March 3.

Kate Hanniford

Consumer Protection

The Ninth Circuit Affirms Judgment on "Polishing the Apple" Claims

English v. Apple Inc., No. 17-15251 (9th Cir.) (July 25, 2019). Affirming in part and reversing in part summary judgment.

Fabrienne English filed a class action against Apple regarding AppleCare+ warranty coverage alleging that Apple misrepresented that AppleCare+ replacement iPhones would be new when in fact they could be used or contain used parts. English argued that Apple's presentation of AppleCare+ replacement iPhones in a "sealed plain white box and a plastic film on the device" creates "an overall impression on a consumer that the device is new." The plaintiff cited Apple's terminology to refer to this "ceremonious presentation of the service units" as "polishing the Apple."

The district court found this argument unconvincing, finding that English failed to present any evidence to show that consumers' expectations under AppleCare+ were connected to receiving their replacement units in a plain white box. The Ninth Circuit agreed, concluding that, even assuming the way Apple presents the AppleCare+ replacement iPhones to customers is a representation of some kind, the presentation would not mislead the reasonable consumer.

Seventh Circuit Offers Second Helping in Diet Cat Food Case

Vanzant, et al. v. Hill's Pet Nutrition Inc., et al., No. 17-3633 (7th Cir.) (Aug. 20, 2019). Reversing grant of motion to dismiss.

Holly Vanzant purchased Hill's Pet Nutrition's "Prescription Diet" brand of cat food and alleged that it was deceptively labeled because it was not materially different from nonprescription cat food. The district court dismissed her claim under the Illinois Consumer Fraud and Deceptive Business Practices Act for lack of specificity in alleging fraud and through the application of a statutory safe harbor for conduct authorized by the FDA. But the Seventh Circuit held that the plaintiffs' complaint was pleaded with the particularity required under Rule 9(b) because it properly alleged that the labeling was both deceptive and unfair and was not required to plead reliance on any deceptive representations. Additionally, the Seventh Circuit found that FDA guidelines do not explicitly authorize Hill's use of this labeling because pet food intended to treat or prevent disease requires approval of a new drug application, which Hill did not have for this particular product.

Ninth Circuit Refuses to Kill the California *McGill* Rule on Arbitration

Blair v. Rent-A-Center Inc., No. 17-17221 (9th Cir.) (June 28, 2019). Affirming denial of motion to compel arbitration.

The Ninth Circuit applied the California Supreme Court's holding from *McGill v. Citibank N.A.*, 393 P.3d 85 (Cal. 2017), that a contractual agreement purporting to waive a party's right to seek public injunctive relief in any forum is unenforceable under California law. The Ninth Circuit held that the *McGill* rule does not run afoul of the Federal Arbitration Act because it does not "deprive parties of the benefits of arbitration." Moreover, according to the circuit court, public injunctive relief under California's consumer-protection statutes does not require procedural formalities inconsistent with arbitration. Any arbitration agreement purporting to waive a party's ability to seek public injunctive relief in any forum is now, under the Ninth Circuit rule, unenforceable.

MRS BPO Dinged with FDCPA QR Violation

Dinaples v. MRS BPO LLC, et al., No. 17-3633 (3rd Cir.) (Aug. 12, 2019). Affirming grant of motion on liability.

Donna Dinaples received a collection letter related to her credit card account from the defendant that contained a QR code printed on the face of the envelope which, if scanned, revealed Dinaples's internal account number with the collection agency. The Third Circuit had previously held that a debt collector violated the Fair Debt Collection Practices Act (FDCPA) when it sent a collection letter in an envelope displaying the debtor's internal account

"There's a bill sitting on Capitol Hill that could portend "Change in TCPA Compliance Is on the Horizon," according to **David Carpenter** and **Kelley Connolly Barnaby** in *Law360*."

David Carpenter

Kelley Connolly Barnaby

number with the collection agency. The Third Circuit's decision in this appeal extended that ruling—holding that MRS BPO LLC violated the FDCPA by printing the account-identifying QR code on the face of the envelope.

Apple Left with Bitter Taste Following Class Cert Loss

Maldonado, et al. v. Apple Inc., et al., No. 3:16-cv-04067 (N.D. Ca.) (Sept. 17, 2019). Judge Orrick. Granting motion for class certification and denying motion for summary judgment.

Vicki Maldonado purchased AppleCare and received a remanufactured replacement device. She then complained that Apple breached its warranty by sending consumers remanufactured replacement devices, which were not "equivalent to new in performance and reliability" as required under the AppleCare agreements. The court rejected Apple's argument that commonality and typicality requirements could not be met because the alleged issues suffered by the class representatives' replacement devices were not likely to be consistent across the class. Rather, the court found that Maldonado had presented classwide evidence that all such devices may not be equivalent to new. The district court concurrently dismissed Apple's motion for summary judgment, finding that Maldonado had presented a viable theory of liability by arguing that remanufactured replacement devices were not equivalent to new and that all remanufactured replacement devices are inferior because load conditions exist across all such devices.

Salad Dressing Manufacturer Relishes Class Cert Victory

Korte v. Pinnacle Food Groups, No. 3:17-cv-00199 (S.D. Ill.) (Sept. 11, 2019). Judge Yandle. Denying motion for class certification.

Individuals in Illinois and Missouri who purchased Wish-Bone branded salad dressing labeled "E.V.O.O. – Dressing Made with Extra Virgin Olive Oil" argued that this labeling was deceptive and violated Illinois and Missouri consumer protection laws because the salad dressing contained a blend of multiple oils, not only Extra Virgin Olive Oil. The court rejected the plaintiff's motion for class certification, finding that the ascertainability requirement was not met because the class definition's timeframe was overbroad and expanded to the present date despite the defendant's modification of its labeling in December 2017. Additionally, the court found that the plaintiff failed to meet the typicality and adequacy requirements because no evidence was offered to show any significant volume of consumer complaints that the salad dressing label was deceptive and the plaintiff's claim appeared to be "idiosyncratic or possibly unique."

Order Denying Class Certification in Swimming Pool Case Gets Deflated

Noel v. Thrifty Payless Inc., No. S246490 (Cal.) (July 29, 2019). Reversing and remanding denial of class certification.

The California Supreme Court has ruled that California class action law has no ascertainability requirement at the certification stage. The supreme court reversed denial of class certification after a lower court ruled that a consumer failed to present any evidence on the ascertainability of the class. The supreme court held that no evidentiary requirement exists at the class certification level to demonstrate how individual class members will be identified under California law. ■

Environmental

Chem Companies Can't Extinguish Risky Fire

Hardwick v. 3M Co., No. 2:18-cv-01185 (S.D. Ohio) (Sept. 30, 2019). Judge Sargus, Jr. Denying motion to dismiss.

Judge Sargus denied chemical companies' motion to dismiss for lack of subject-matter jurisdiction in a class action alleging that the companies knowingly exposed class members to per- and polyfluoroalkyl substances (PFAS). The chemical companies argued that firefighter Hardwick's mere exposure to PFAS found in firefighting foam did not constitute an injury in fact. But Judge Sargus agreed with Hardwick that he had alleged an injury in fact because the PFAS in his blood allegedly put him at an increased risk of disease. Judge Sargus rebuffed the defendants' other argument as well, holding that the complaint sufficiently requested medical monitoring, which was within the court's power. Indeed, according to Judge Sargus, the court's equitable powers to "remedy past wrongs is broad." Ultimately, any determination on the exact nature of the relief waits for another day.

"**Jeffrey Dintzer** and **Nathaniel Johnson** investigate for *The Daily Journal* how a federal court "Decision on Standing in PFAS Cases Raises Serious Concerns" about the level of injury necessary to proceed on a claim."

Jeffrey Dintzer

Nathaniel Johnson

Labor & Employment

Tennessee Medical Dispute Law Preempted by ERISA

Dialysis Newco Inc. v. Community Health System Group Health Plan, No. 18-40863 (5th Cir.) (Sept. 11, 2019). Reversing denial of motion to dismiss.

The Fifth Circuit held that a Tennessee law designed to simplify physician lawsuits against insurance companies over disputed medical bills was preempted by the Employee Retirement Income Security Act (ERISA). The Tennessee law sought to make it easier for doctors to sue insurers for underpayments and required plan administrators to honor assignments made to third-party health care providers. In finding the law preempted, the panel noted that the arrangement would necessarily "relate to" the administration of those plans. ERISA broadly preempts state laws that relate to arrangements otherwise subject to ERISA. Disputes between ERISA and state laws frequently arise when states attempt to regulate ERISA-governed health plans. Therefore, "the Tennessee statute purporting to invalidate any such anti-assignment clauses [contained in ERISA plans] is itself preempted by ERISA."

Judge Not So Sweet for Class Cert Suit Against Chocolatier

Salazar v. See's Candy Shops Inc., et al., No. BC651132 (L.A. Super. Ct.) (July 15, 2019). Judge Nelson. Denying motion for class certification.

A California state court judge denied certification to a proposed class of workers accusing See's Candy of denying them rest and meal breaks. One worker sought to represent two different classes of her fellow employees—those who had to work alone and were effectively denied breaks and those who did not get breaks when they worked more than 10 hours. But the judge found that the workers failed to meet the required commonality prong for class certification because there were too many individualized questions in the case. It would be hard, the judge reasoned, to determine on a classwide basis whether the candy company's policies cost class members their breaks. The workers will have to proceed individually if they wish to continue their claims against the company. ■

"Leaders in Law 2019 Nominee **Jesse Jauregui** delves into "AB 5 and Independent Contracting in California" for the *Los Angeles Business Journal*."

Jesse Jauregui

Privacy & Data Security

Facebook Must Face Trial in Face-Scanning Class Action

Patel, et al. v. Facebook Inc., No. 18-15982 (9th Cir.) (Aug. 8, 2019). Affirming grant of class certification.

Nimesh Patel filed suit against Facebook under the Illinois Biometric Information Privacy Act (BIPA) on behalf of a class of consumers whose facial profiles were subject to collection, storage, and use by the social media giant's facial-recognition software. The Ninth Circuit followed the trial court in ruling that the class claims satisfied *Spokeo*'s concrete injury requirement; the invasion of personal, concrete privacy interests was the precise harm the Illinois statute protected against. Because the effects of Facebook's facial-recognition software (allowing recognition of a person in pictures beyond those uploaded by the user or those in which the user was "tagged") also created a material risk of harm (from future loss of privacy), *Spokeo*'s standing requirements were satisfied.

The Ninth Circuit also rejected Facebook's argument that class certification was impossible due to the "extraterritoriality doctrine," which prevents application of a statute outside the state unless the statute so intends. Facebook insisted that the BIPA was not designed to have an extraterritorial effect, but the court of appeals disagreed, holding that the statute reasonably contemplates application to individuals in Illinois even if some relevant activities occurred out of state.

Massive TCPA Award Massively Reduced

Golan, et al. v. FreeEats.com Inc., et al., No. 17-3156 (8th Cir.) (July 16, 2019). Affirming judgment but reducing damages award.

Ron Golan sued FreeEats.com alleging millions of robocalls were made to consumers to promote a movie. His reward was, as the Eighth Circuit described it, a "shockingly large" $1.6 billion damages award. After prevailing at trial, Golan requested the statutory $500-per-call penalty for the 3,242,493 calls at issue, which totaled $1,621,246,500. The trial court granted the motion to reduce the amount on due process grounds and awarded Golan and his class $32,424,930, or $10 per call.

The Eighth Circuit agreed with the trial court, recognizing that while nothing in the Telephone Consumer Privacy Act (TCPA) itself allows for a reduction in damages, due process considerations warranted reduction of the award. In particular, the Eighth Circuit cited the defendants' plausible belief that they were not violating the TCPA, the limited duration of the marketing campaign, and the prior consent of call recipients warranted the reduction. The court of appeals rejected the defendants' argument that the receipt of two robocalls did not satisfy the *Spokeo* standard, holding that these nuisance-like harms are traditionally protected against by tort law and are sufficient to support a finding of concrete injury.

D.C. Circuit Adds to *Spokeo* Split

Jeffries v. Volume Services America Inc., No. 18-7139 (D.C. Cir.) (July 2, 2019). Reversing grant of motion to dismiss.

Doris Jeffries accused Centerplate (a concessionaire) of printing entire credit card numbers on customer receipts in violation of the Fair and Accurate Credit Transactions Act (FACTA). The trial court dismissed the class action, finding that, under the Supreme Court's *Spokeo* decision, Centerplate's printing of more than five credit card numbers on a receipt was insufficient to demonstrate a concrete injury in fact. Key in that analysis was the fact that the class plaintiff immediately noticed that the entire number was printed and kept the receipt.

The D.C. Circuit thought otherwise, holding that Centerplate's "egregious" violation of FACTA drastically increased the class plaintiff's risk of having her identity stolen. The court explained that the disclosure of an entire credit card number was "sufficient information for a criminal to defraud" the class plaintiff and that she was unable to use her credit card with the vendor without incurring an increased risk of identity theft. The D.C. Circuit's opinion potentially deepens an existing circuit split between the D.C. and Eleventh Circuits and the Third Circuit over the number of exposed digits required to create a risk of concrete injury under FACTA.

"The CCPA is up and running. Don't hide from "California Privacy Law Compliance Strategy for In-House Counsel," by **Kim Peretti**, **Amy Mushahwar**, and **Kate Hanniford** for *Law360*."

Kim Peretti

Amy Mushahwar

Kate Hanniford

Hotel Guest Must Stay in the MDL

Simon, et al. v. Marriott International Inc., et al., Nos. 8:19-cv-02879, -01792 (D. Md.) (Sept. 20, 2019). Judge Grimm. Denying plaintiffs' motion to remand to state court.

Aryeh and Sassya Simon filed suit in state court in Connecticut seeking to represent all U.S. citizens who are domiciled abroad and whose personal information was compromised, accessed, or stolen in the Marriott data breach. Marriott removed the case to the federal court based on diversity jurisdiction under the Class Action Fairness Act (CAFA), and the case was then transferred to the District of Maryland for inclusion in the pending multidistrict litigation. The MDL class consists of all persons whose personal information was a part of the Marriott data breach, meaning the class is broad enough to include the Simons and other U.S. citizens domiciled abroad.

The Simons filed a motion to remand, arguing that the court did not have subject-matter jurisdiction because U.S. citizens who are domiciled abroad are not a citizen of any state; therefore, they cannot be diverse from any defendant, and CAFA diversity requirements are not met. The court denied the motion, reasoning that the Simons did not offer any legitimate basis for the need to litigate their claims separately from the MDL.

Retroactive Waiver Won't Undo Present Jury Verdict

Wakefield v. ViSalus Inc., No. 3:15-cv-01857 (D. Or.) (Aug. 21, 2019). Judge Simon. Denying motion for class decertification.

Eight weeks after a three-day jury trial and a $925 million verdict in favor of the plaintiffs, ViSalus moved to decertify the class of individuals who received telephone calls that used an artificial or prerecorded voice in violation of the TCPA. In its motion, ViSalus relied on a retroactive waiver of the express written consent requirements created by a 2012 FCC rule. ViSalus applied for the waiver in September 2017, nearly two years after the plaintiff filed her complaint. Importantly, ViSalus did not plead consent as an affirmative defense in its answer, and ViSalus disclaimed any reliance on consent as a defense in pretrial proceedings. Accordingly, no discovery was conducted on the issue of consent nor was the jury asked to determine if the issue related to consent, and the court denied the motion to decertify the class, reasoning that class certification remains proper and meets the requirements of Rule 23.

Reverse-Lookup Strategy Spells Doom for TCPA Class

Hunter v. Time Warner Cable, No. 1:15-cv-06445 (S.D.N.Y.) (Aug. 14, 2019). Judge Oetken. Denying motion for class certification.

Leona Hunter and Anne Marie Villa alleged that they and numerous others received wrong-number calls from Time Warner, which used an artificial or prerecorded voice in violation of the TCPA. In efforts to identify potential class members, the plaintiffs' expert compared Time Warner call records to the names of individuals associated with those phone numbers through reverse-lookup data provided by LexisNexis. The court denied class certification after finding that the methodology was unreliable and that determining whether individuals who received calls consented would require further individualized inquiry. ■

Products Liability

Ninth Circuit Gives a Green Light to Plaintiff's Benefit of the Bargain Damages Model

Nguyen v. Nissan North America Inc., No. 18-16344 (9th Cir.) (July 26, 2019). Reversing denial of class certification and remanding.

The Ninth Circuit reversed the district court's denial of class certification in a lawsuit alleging that Nissan violated state and federal warranty laws by knowingly selling vehicles with defective hydraulic clutch systems. Although the district court was correct that seeking damages for the faulty performance of the clutch system would require an individualized analysis that would defeat predominance, its ruling was based on a misconception of the plaintiff's theory of liability. The plaintiff alleged that the defective clutch is itself the injury, regardless of whether it caused performance issues. Moreover, the plaintiff seeks to recover the difference in value between the non-defective vehicles that Nissan promised and the defective vehicles that were delivered. The circuit court held that the plaintiff's benefit-of-the-bargain model provides a standardized classwide-damages figure because the class members' out-of-pocket payments are immaterial. The panel noted that whether the plaintiff's "proposed calculation of the replacement cost is accurate, whether the clutch was actually defective, and whether Nissan knew of the alleged defect are merits inquiries unrelated to class certification."

Defendant's Records Insufficient to Ascertain Class of RV Refrigerator Owners

Papasan v. Dometic Corp., No. 1:16-cv-22482 (S.D. Fla.) (July 24, 2019). Judge Scola, Jr. Denying motion for class certification.

A federal judge denied a motion for class certification filed by RV owners who alleged that they did not receive the benefit of the bargain when they purchased the defendant's defective refrigerators. The plaintiffs sought certification of nine subclasses based on the various states in which the refrigerators were purchased and argued that potential class members could be identified through the defendant's sales and warranty records. Accepting the existence of an implicit ascertainability requirement under Rule 23, the court ruled, as a threshold matter, that when putative class plaintiffs propose to identify class members through a defendant's records, they must establish that the records are in fact useful for identification purposes and that the process will be "administratively feasible." The court concluded that the plaintiffs in this case did not meet that ascertainability standard because they provided no evidence that the defendant's records identified which RVs contained defective refrigerators given that the company does not sell its products directly to consumers but only to RV manufacturers and dealers. Because CAFA was the only source of federal jurisdiction and no class could be certified, the court dismissed the consolidated class action complaint without prejudice for lack of subject-matter jurisdiction.

Class Representatives Have Standing Only for Products They Purchased

Blobner v. Artemis Marketing Corp., No. 8:17-cv-01676 (M.D. Fla.) (July 24, 2019). Judge Moody, Jr. Denying motion for class certification.

A consumer alleged that Rooms To Go engaged in deceptive and unfair business practices by selling bonded leather furniture in Florida that could not hold up in a hot and humid environment. Based primarily on his own sofa and chaise lounge, the plaintiff claimed that all the company's bonded leather furniture must be defective. The court found, however, that Rooms To Go sold hundreds of different products upholstered with bonded leather made by numerous companies. The court ruled that a plaintiff lacks standing to challenge products that he did not purchase, which was fatal to the proposed class.

Bo Phillips knows the pitfalls of large classes of plaintiffs in a single lawsuit. He'll explain in the January 22 webinar "Class Action Litigation: Avoiding Legal Ethics Violations and Malpractice Liability."

Bo Phillips

Court Strikes Ex-Football Players' Class Allegations in Defective Helmet Suit

Jones v. BRG Sports Inc., No. 1:18-cv-07250 (N.D. Ill.) (Aug. 1, 2019). Judge Kennelly. Granting motion to strike class allegations.

High school and college football players in 18 states who used Riddell brand helmets from 1975 to the present alleged that they were injured because of the helmets' defective designs and inadequate warnings. Judge Kennelly granted BRG's motion to strike class allegations because the complaint demonstrated on its face that allowing the case to proceed as a putative class action would be futile. The court found that, while some of the design defect issues appear to be "relatively amenable" to common resolution, the core of the case rested on individualized questions. Each plaintiff used different Riddell products, for different lengths of time, at various levels of play, and in different positions on the field, and sustained different numbers of concussions and other injuries. The court also noted that there were "seemingly limitless" confounding causal mechanisms and possible extenuating circumstances, including family and medical history, age, diet, and lifestyle, that may affect each putative class member's response to head injuries. The plaintiffs suggested that the issues of duty, breach, foreseeability, and knowledge may be amenable to class treatment using issue-specific classes provided for by Rule 23(c)(4), but the court disagreed. Although certifying 18 separate issue classes may formally avoid the predominance issues, it would not resolve the enormous manageability problems presented by the requested class.

Third Time's Not a Charm in Defective Sunroof Lawsuit

Neale v. Volvo Cars North America LLC, No. 2:10-cv-04407 (D.N.J.) (Sept. 26, 2019). Judge Arleo. Denying motion for class certification.

A New Jersey federal judge denied the plaintiffs' third motion for class certification in a lawsuit alleging that Volvo sold vehicles with defective sunroofs. The court provided guidance on the critical numerosity issue that requires the plaintiffs to present either direct or circumstantial evidence specific to the problems and products involved in the litigation so that the court can determine whether there are in fact sufficiently numerous parties to warrant class action treatment. In this case, the plaintiffs submitted sales figures from Volvo showing the number of new class vehicles sold or leased in each of the four proposed class states. However, under the plaintiffs' putative class definition, only those state residents who still have their vehicles or who incurred out-of-pocket expenses associated with the sunroof defect would qualify as class members. If a putative class is some subset of a larger pool, the trial court may not infer numerosity from sales numbers for the larger pool alone; instead, the plaintiffs must submit evidence that the court can use to engage in a rigorous analysis and conclude that each of the four proposed classes is sufficiently numerous. The court found that the plaintiffs would likely be able to demonstrate numerosity by comparing Volvo's sales data to commercially available vehicle-registration data and granted leave to refile on the issue of numerosity.

Settlements

Deal Insures Cracking Good Settlement

American Chiropractic Association, et al. v. American Specialty Health Inc., et al., No. 2:12-cv-07243 (E.D. Pa.) (Aug. 29, 2019). Judge Quiñones Alejandro. Approving $11.2 million settlement.

Judge Quiñones Alejandro granted final approval to a settlement between chiropractors and two insurance companies. The chiropractors alleged that the insurance companies arbitrarily denied out-of-network plan benefits claims for chiropractic services based on the companies' utilization management review procedures. The case had previously been dismissed by the district court and revived by the Third Circuit before the parties engaged in two years of extensive discovery. The court approved the agreement, which provided for a contingency fee to the plaintiffs' attorneys of one-third of the settlement fund—amounting to just under $4 million of the $11.2 million settlement. The court found that, based on the lodestar calculation and the over 10,000 hours of attorney time spent working on the case, this award was likely less than what the plaintiffs' attorneys would have earned by billing for the actual hours worked. The agreement also provided for nonmonetary benefits from the insurance companies, including increasing the number of out-of-network providers and chiropractic associations to their advisory committees.

Bank Pays to Disconnect Claims by Recipients of Unsolicited Survey Calls

Hossfeld v. Compass Bank, et al., No. 2:16-cv-02017 (N.D. Ala.) (Sept. 12, 2019). Judge Axon. Approving $1.15 million settlement.

Judge Axon granted final approval for a $1.15 million settlement between Compass Bank and a putative class of noncustomers who received unsolicited autodialed survey calls from the bank's marketing partner. The putative class alleged that the bank violated the TCPA by placing the unsolicited calls. The bank's motion to dismiss previously failed when the district court found that placement of unsolicited calls amounted to sufficient harm to give the customers standing. The judge also granted class counsel's bid for more than $383,000 in attorneys' fees and $34,000 in costs, and approved a $15,000 incentive award for the named plaintiff.

Despite Objections, Attorneys Awarded 30 Percent of Class Fund

In re Lithium Ion Batteries Antitrust Litigation, No. 4:13-md-02420 (N.D. Cal.) (Aug. 16, 2019). Judge Gonzalez Rogers. Approving $113 million settlement.

In the long-standing lithium-ion batteries antitrust litigation, a California district court recently approved a $49 million settlement agreement made by the remaining defendants, bringing the settlement fund for all defendants to a total of $113 million. The court also approved an attorneys' fee award of $33.8 million—roughly 30 percent of the class fund. Over objections, the court held that the 30 percent award was reasonable given how long the case had been pending (6.5 years), the substantial time devoted by counsel, and the other work counsel has foregone in light of the case.

NCAA Updates Concussion Rules and Commits $70 Million for Medical Monitoring

In re NCAA Student-Athlete Concussion Injury Litigation, No. 1:13-cv-09116 (N.D. Ill.) (Aug. 12, 2019). Judge Lee. Approving $75 million settlement.

Judge Lee granted final approval of a $75 million settlement in this class action alleging that the NCAA was aware of health risks associated with concussions but failed to implement rules necessary to protect student-athletes from sustaining concussive injuries. The class consists of approximately 4 million student-athletes who played an NCAA-sanctioned sport before July 2016. Under the settlement, the NCAA will allocate $70 million to medically monitor class members for concussive injuries over 50 years, commit $5 million to concussion-related research that it otherwise would not have funded, and improve its concussion-

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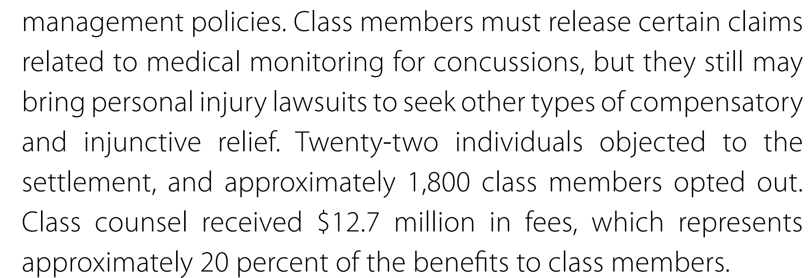
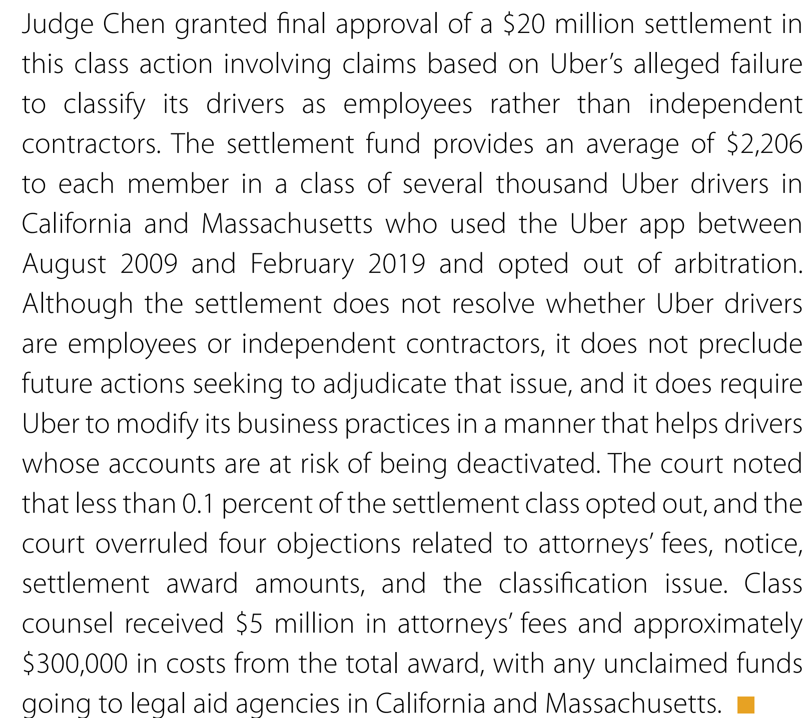


management policies. Class members must release certain claims related to medical monitoring for concussions, but they still may bring personal injury lawsuits to seek other types of compensatory and injunctive relief. Twenty-two individuals objected to the settlement, and approximately 1,800 class members opted out. Class counsel received $12.7 million in fees, which represents approximately 20 percent of the benefits to class members.



Settlement, but No Resolution of Employment Status, for Rideshare Drivers

O'Connor v. Uber Technologies Inc., No. 3:13-cv-03826 (N.D. Cal.) (Sept. 13, 2019). Judge Chen. Approving $20 million settlement.

Judge Chen granted final approval of a $20 million settlement in this class action involving claims based on Uber's alleged failure to classify its drivers as employees rather than independent contractors. The settlement fund provides an average of $2,206 to each member in a class of several thousand Uber drivers in California and Massachusetts who used the Uber app between August 2009 and February 2019 and opted out of arbitration. Although the settlement does not resolve whether Uber drivers are employees or independent contractors, it does not preclude future actions seeking to adjudicate that issue, and it does require Uber to modify its business practices in a manner that helps drivers whose accounts are at risk of being deactivated. The court noted that less than 0.1 percent of the settlement class opted out, and the court overruled four objections related to attorneys' fees, notice, settlement award amounts, and the classification issue. Class counsel received $5 million in attorneys' fees and approximately $300,000 in costs from the total award, with any unclaimed funds going to legal aid agencies in California and Massachusetts.

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