ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021

In this issue

ALSTON & BIRD

overview

CLASS ACTION & MDL **roundup**

SUMMER 2021

Where the (Class) Action Is

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

Our partners Derin Dickerson, Cari Dawson, and Liz Brown and associate Bria Stephens presented "What to Expect When You're Expecting an MDL" for the National Bar Association, offering guidance and strategies when navigating an MDL and addressing recent trends. Please see a preview of the panel here. If you are interested in viewing the full recording, please contact Abby Forness at abby.forness@alston.com.

It may have been summer vacation for some, but the courts remained jam-packed with class actions in the second quarter. The circuit courts started heating up in the Eleventh Circuit with a Fair Credit Reporting Act class action involving prior subscription agreements. In TCPA news, the U.S. Supreme Court resolved a long-standing issue concerning the definition of an automatic telephone dialing system, or "autodialer." The Court also weighed in on a securities class action, answering two important questions central to class certification: is the generic nature of an alleged misrepresentation relevant at the class certification stage for the purpose of analyzing price impact? And do the defendants bear the burden of persuasion to prove lack of price impact when seeking to rebut the *Basic v. Levinson* presumption of reliance?

At the district level, courts continue to handle COVID-19-related lawsuits. Hundreds of businesses were seeking to cover lost income stemming from the COVID-19 pandemic with their "all-risk" policies in an insurance class action. The Pennsylvania court eventually reasoned that "damage" as used in the insurance policies did not apply to the virus's physical presence because "the pandemic impacts human health and human behavior, not physical structures."

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.

authors & editors

Cari K. Dawson
cari.dawson@alston.com
404.881.7766

David R. Venderbush
david.venderbush@alston.com
212.210.9532

Ryan P. Ethridge
ryan.ethridge@alston.com
919.862.2283

Alexander Akerman
alex.akerman@alston.com
213.576.1149

Nnola Amuzie
nnola.amuzie@alston.com
213.576.1190

Gina Angiolillo
gina.angiolillo@alston.com
213.576.2606

Charlotte M. Bohn
charlotte.bohn@alston.com
404.881.4471

David B. Carpenter
david.carpenter@alston.com
404.881.7881

F. Nicholas Chandler
nick.chandler@alston.com
404.881.7679

Sean R. Crain
sean@crain@alston.com
214.922.3435

R. Blake Crohan
blake.crohan@alston.com
404.881.4625

Ashley De Vance
ashley.devance@alston.com
213.576.1072

Matthew A. Durfee
matt.durfee@alston.com
214.922.3428

Mia Falzarano
mia.falzarano@alston.com
214.922.3439

Jamie S. George
jamie.george@alston.com
404.881.4951

Bradley Harder
bradley.harder@alston.com
404.881.7829

Alexander A. Ingoglia
alex.ingoglia@alston.com
404.881.7863

Kara F. Kennedy
kara.kennedy@alston.com
404.881.4944

Kathryn Klorfein
kathryn.klorfein@alston.com
404.881.7415

Laura A. Komarek
laura.komarek@alston.com
404.881.7880

Matthew D. Lawson
matt.lawson@alston.com
404.881.4650

Andrew J. Liebler
andrew.liebler@alston.com
404.881.4712

Katie Jo Luningham
katiejo.luningham@alston.
com404.881.7812

Rachael A. Naor
rachael.naor@alston.com
415.243.1013

Michelle C. Prendergast
michelle.prendergast@alston.com
919.862.2287

Melissa Quintana
melissa@quintana@alston.com
404.881.7548

Kristi Ramsay
kristi.ramsay@alston.com
404.881.4755

Jay Repko
jay.repko@alston.com
404.881.7683

Noelle Elaine Reyes
noelle.reyes@alston.com
212.210.9478

Jason Rottner
jason.rottner@alston.com
404.881.4527

Bria Stephens
bria.stephens@alston.com
404.881.7549

Troy A. Stram
troy.stram@alston.com
404.881.7256

Andrew T. Sumner
andy.sumner@alston.com
404.881.7414

Amanda M. Waide
amanda.waide@alston.com
404.881.4409

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021

Antitrust/RICO

Averages Not Acceptable in Antitrust Actions

In re Lamictal Direct Purchaser Antitrust Litigation, No 2:12-cv-00995 (D.N.J.) (Apr. 9, 2021). Judge Vazquez. Denying class certification.

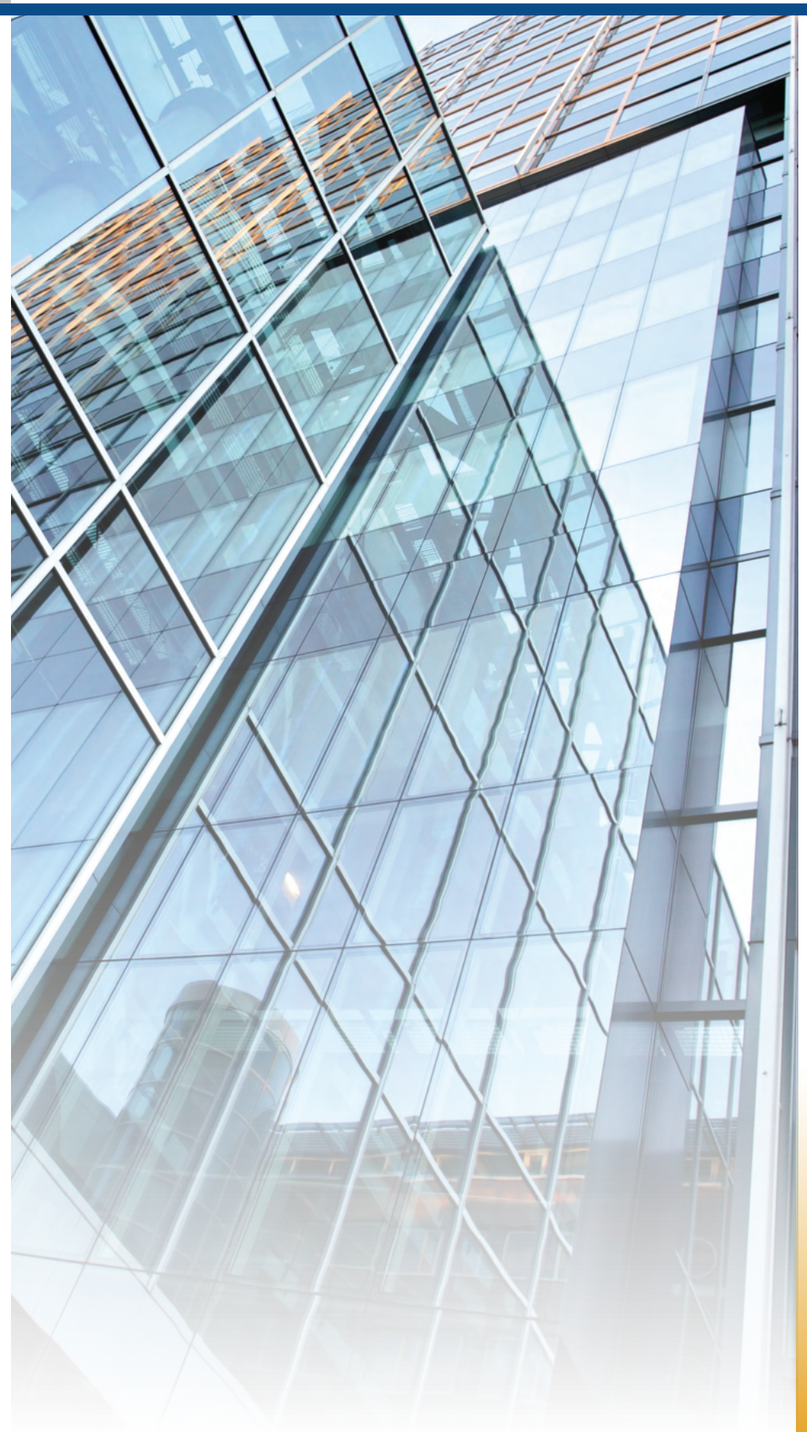
After the Third Circuit reversed an initial class certification, a district court denied certification in a pharmaceutical reverse payment case. Direct purchasers of Lamictal and its generic competitor alleged that drug manufacturers GlaxoSmithKline (GSK) and Teva Pharmaceuticals settled prior patent litigation, with GSK promising not to launch an authorized generic version of Lamictal. That improper agreement purportedly meant the direct purchasers paid more than they would have if GSK had sold an authorized generic. But GSK claimed the purchasers were not harmed because GSK lowered the prices of Lamictal anyway through a contracting strategy.

The Third Circuit had vacated the initial certification because a more "rigorous analysis" was needed to determine whether the direct purchasers' reliance on averages was acceptable in light of GSK's contracting strategy. On remand, Judge Vazquez ruled that the purchasers had not shown by a preponderance of evidence that all customers would have received a discount on price had GSK launched an authorized generic. This was a "crucial issue" given the direct purchasers' reliance on averages to establish classwide antitrust injury.

De Minimis Uninjured Class Members Not a Deal-Breaker in Generic Drug Suit

In re Ranbaxy Generic Drug Application Antitrust Litigation, No. 1:19-md-02878 (D. Mass.) (May 14, 2021) Judge Gorton. Granting class certification.

Seizing on an issue currently before the en banc Ninth Circuit, defendant Ranbaxy argued to a First Circuit district court that the plaintiffs' expert's use of aggregate pricing to establish classwide antitrust injury failed to account for substantial price variability and concealed the existence of uninjured class members. But in certifying a class, Judge Gorton ruled that so long as all or virtually all of the members of the proposed class suffered injury, the inclusion of a de minimis amount of uninjured class members is not fatal to class certification and found that the plaintiffs persuasively showed the number of uninjured class members was in the "single digits" and that they could be identified and excluded at a later stage in a manageable fashion. Thus, the plaintiffs sufficiently showed that classwide injury could be demonstrated through common evidence and that common issues predominated over individualized inquiries. ■



class-ified information

Leadership matters.

Alston & Bird Earns 12 Leadership Appointments to ABA Antitrust Section.

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021

Banking & Insurance

Faxed Advertisements Draw a Line in Coverage

Mesa Laboratories Inc. v. Federal Insurance Co., No. 20-1983 (7th Cir.) (Apr. 20, 2021). Affirming district court's judgment on the pleadings.

Mesa Laboratories was sued for sending unsolicited advertisements via fax machine. When Mesa sought a defense from its insurer, its claim was denied because its policy barred coverage for any claims "arising out of" the Telephone Consumer Privacy Act (TCPA). The Seventh Circuit affirmed the district court's finding that the insurer has no duty to defend against a specifically excluded claim that extends to common-law claims arising from the same barred conduct. The court ruled that the policy did not cover common-law claims against Mesa because the "arising out of" language excluded "the underlying conduct that forms the basis of the violation of an enumerated law, even if liability for that underlying *conduct* might exist under a legal theory that is not expressly mentioned in the policy exclusion."

Loan Recipients Win Class Certification Bid

Brice v. Haynes Investments LLC and Brice v. Stinson, Nos. 3:18-cv-01200, 3:19-cv-01481 (N.D. Cal.) (Apr. 23, 2021). Judge Orrick. Granting motion for class certification.

A group of California residents who took out short-term loans with allegedly illegally high interest rates won their class certification bid in the Northern District of California. Judge Orrick found that a class action waiver provision was unenforceable based on his prior rulings that arbitration agreements in the applicable contracts were unenforceable because the agreements sought to impose tribal laws that would have undermined statutory remedies the plaintiffs were entitled to assert.

Judge Orrick also rejected the argument that the proposed class was not ascertainable due to claimed defects in loan data because the Ninth Circuit had previously rejected an ascertainability requirement for class certification in *Briseno v. ConAgra Foods*. The court ruled that the data was sufficiently reliable and had previously been used in different proceedings to effectuate class settlements but also that Judge Orrick also ruled that common issues predominated and that the individualized issues raised by the defendants could be solved with "simpl[e] math" and "easily addressed by subclassing … or distribution formulas." Superiority was also established because any need to calculate damages of individual loans would not make the case unmanageable and could be solved through expert analysis and claims administration processes.

Insurers Immune from COVID-19 "Intrusions"

Nguyen v. Travelers Casualty Insurance Co. of America, No. 2:20-cv-00597 (W.D. Wash.) (May 28, 2021). Judge Rothstein. Granting motion to dismiss.

Consolidating actions from hundreds of businesses seeking to cover lost income stemming from the COVID-19 pandemic, the insurance policies in these cases are "all-risk" policies not limited to specific or enumerated risks. Applying Washington law, the court ruled that "damage" in the insurance policies did not apply to the virus's physical presence because "the pandemic impacts human health and human behavior, not physical structures." The plaintiffs argued that there was potential independent coverage under various specific provisions, such as communicable disease, civil and military authority, loss of business income, crises event, business access, and food contamination, but the court denied coverage under each because they all depended on a physical damage or loss to the covered property. The court cited overwhelming consensus among similar claims that COVID-19 does not cause physical intrusion, loss, or damage to property required as a condition precedent to trigger coverage in the relevant policies, and granted the defendant's motion to dismiss.

COVID-19 Travel Cancellation Insurance Claims Survive Motion to Dismiss

Gordon, et al. v. Arch Insurance Company, No. 2:21-cv-01911 (E.D. Pa.) (May 28, 2021). Judge McHugh. Granting in part and denying in part motion to dismiss.

Judge McHugh largely denied as premature an insurer's motion to dismiss a putative class action on behalf of individuals whose travel insurance claims were denied upon travel cancellation due to the coronavirus pandemic. Because the subject insurance policy included "being … quarantined" as a covered reason for cancellation and the term "quarantined" was not defined in the policy, Judge McHugh ruled that the meaning of "quarantine" would require additional factual inquiry to determine when government orders were placed by state and national governments. Judge McHugh also denied the motion to dismiss the declaratory judgment claim related to the meaning of "being … quarantined" based on the view that early dismissal could unfairly eliminate the possibility of classwide relief.

"Get your money's worth from "Eleventh Circuit Allows Article III Standing for Disclosure of Sensitive Information Relating to Debt" by **Andy Tuck**, **Donald Houser**, **Alan Pryor**, and **Stephen Simrill** in *Pratt's Journal of Bankruptcy Law*."

Andy Tuck

Donald Houser

Alan Pryor

Stephen Simrill

ALSTON & BIRD

CLASS ACTION & MDL roundup

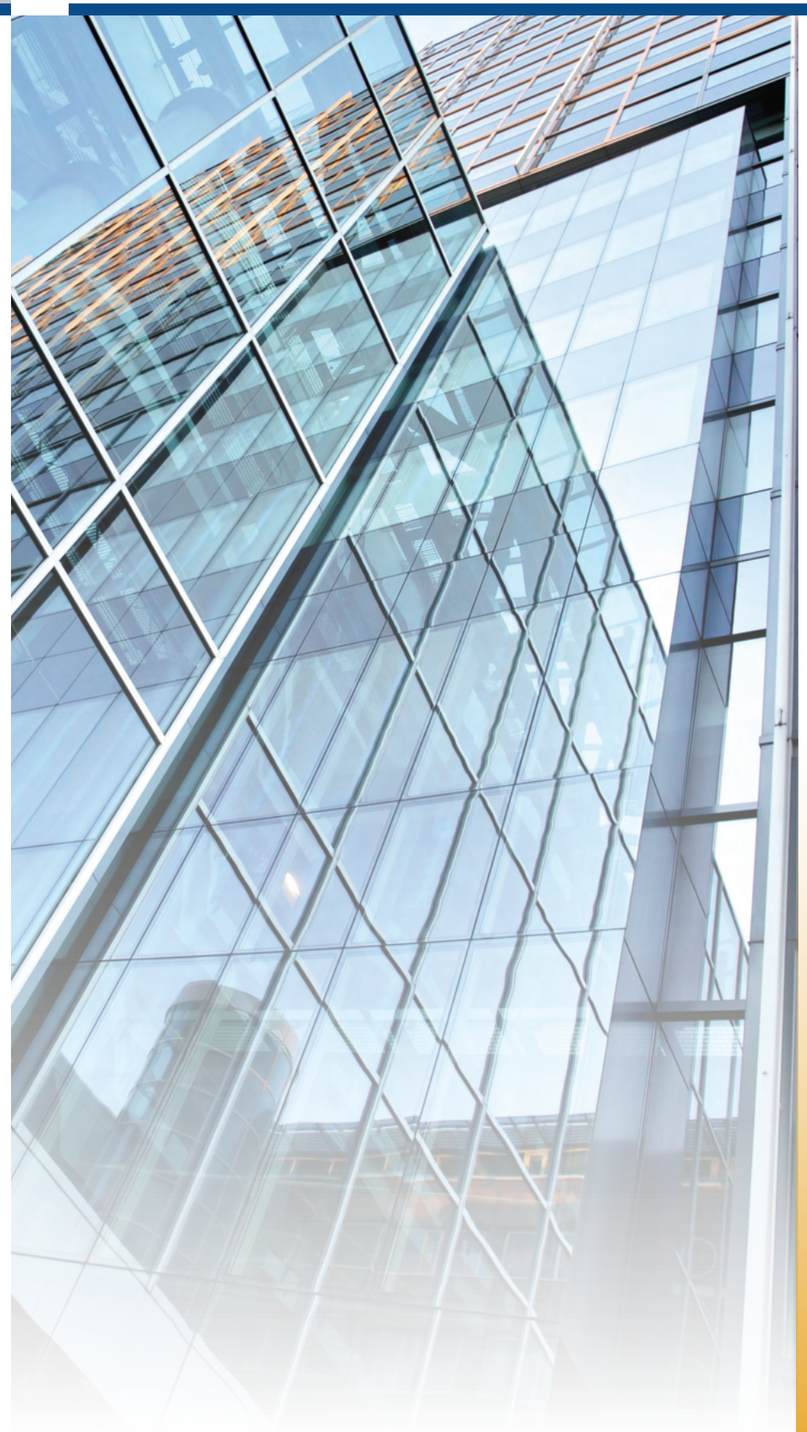
SUMMER 2021

Insurer Grinds Out a Victory in Kona Coffee Case

Travelers Indemnity Co. of America v. Luna Gourmet Coffee & Tea Co. LLC., No. 1:19-cv-02039 (D. Colo.) (Apr. 7, 2021). Judge Moore. Granting motion for summary judgment.

Judge Moore granted an insurer's motion for summary judgment in an action arising from a coverage dispute. The lawsuit stemmed from two underlying putative class actions against coffee distributors, wholesalers, and retailers for use of the name "Kona," alleging that only coffee grown on farms located within the Kona District of the Big Island of Hawaii can be truthfully marketed as Kona coffee. One of the named defendants in the Kona lawsuits, Boyer's, ultimately sought coverage under its commercial insurance policies with Travelers, which included "advertising injury."

Judge Moore granted summary judgment on Travelers' declaratory judgment claim, ruling that it had no duty to defend or indemnify Boyer's in the Kona class actions because those actions did not sufficiently allege personal or advertising injury as defined by the insuring agreement. ■



"Don't be shy about attending "The Evolution of COI Litigation: Changing Theories and Impactful Developments in Recent Years" at the Association of Life Insurance Counsel 2021 Fall Annual Meeting Nov. 13–16 in Scottsdale, AZ."

Patrick Gennardo

Bo Phillips

Tiffany Powers

Tom Evans

Sam Park

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021

Consumer Protection

- **Eighth Circuit Unravels Investors' Class Certification Bid**

  Ford v. TD Ameritrade Holding Corp., et al., No. 18-3689 (8th Cir.) (Apr. 23, 2021). Reversing order granting class certification.

  The Eighth Circuit dealt a blow to a class of investors suing for allegedly routing orders to trading venues that do not uniformly provide the best execution. The court reversed the district court's class certification because determining that class members were economically harmed would require an individual analysis into each trade and its alternatives.

- **Water Retention Class Doesn't Hold . . . Water**

  Webb v. Trader Joe's Company, No. 19-56389 (9th Cir.) (June 4, 2021). Affirming dismissal.

  Christina Webb claimed that her own water retention testing showed that Trader Joe's was misleading consumers about the amount of retained water in its covered poultry products. The Ninth Circuit affirmed the district court's dismissal of her deceptive advertising claims as preempted by the federal Poultry Products Inspection Act, which regulates water retention data collection for covered poultry products and expressly preempts the imposition of state-law requirements above and beyond those in the PPIA. Webb's counsel admitted at oral argument that her client's data collection protocol was different from the one used by the retailer—which the Ninth Circuit held was dispositive.

- **Prior Subscriber Agreement Returns to Haunt FCRA Plaintiff**

  Hearn v. Comcast Cable Communications LLC, No. 19-14455 (11th Cir.) (Apr. 5, 2021). Reversing denial of motion to compel arbitration.

  Comcast found itself facing a Fair Credit Reporting Act class action after one of its representatives ran a credit check on Michael Hearn without permission, lowering his credit score in the process. Most troubling to Hearn was that he was not a Comcast customer at the time the credit check was run. Comcast nevertheless moved to compel arbitration, citing Hearn's prior subscriber agreement that contained a broad arbitration provision applying to "any claim or controversy related to Comcast." The district court denied Comcast's motion, but the Eleventh Circuit reversed because the claim "related to Comcast." The subscriber agreement applied to Hearn, and Comcast would not have had access to Hearn's credit information but for his preexisting agreement with Comcast. The court of appeals declined to rule on whether the subscriber agreement's broad arbitration agreement was enforceable under the Federal Arbitration Act.

- **Advertiser Class Unfriended**

  dotStrategy Co. v. Facebook Inc., No. 3:20-cv-00170 (N.D. Cal.) (June 22, 2021). Judge Alsup. Denying class certification.

  A top-level domain operator sought to represent a class of companies and individuals who advertised on Facebook's ad platform, claiming that Facebook misled them by representing it would not charge for ad clicks by fake Facebook accounts. The district court, however, found no evidence that all class members would have been exposed to the three statements at issue, which were scattered across various Facebook business webpages and would have had to have been individually searched for by each putative class member. Without uniform exposure to the alleged misrepresentations, the district court could not certify the class.

- **It's Only Natural: Plaintiffs Receive Class Certification on Second Try**

  De Lacour, et al. v. Colgate-Palmolive and Tom's of Maine Inc., No. 1:16-cv-08364 (S.D.N.Y.) (Apr. 23, 2021). Judge Wood. Granting in part and denying in part motion for class certification.

  A number of California, Florida, and New York consumers who purchased Tom's of Maine deodorant and toothpaste sued its parent company, arguing that they paid a premium price for products marketed as "natural" despite containing synthetic, artificial, or chemically processed ingredients. Judge Wood certified a class and allowed it to pursue a false advertising claim on the basis that the "natural" label is present on all the products. The court reasoned that the false or misleading nature of a uniform label is common to all class members and apt to drive the resolution of the litigation because the same generalized evidence will be used to prove that claim. But the court declined to certify a breach of warranty class for New York residents. Under New York's concept of reliance, courts must inquire into whether each buyer had knowledge of the truth or falsity of the relevant facts. ■

"You attract more class actions with honey, apparently. **Angela Spivey**, **Drew Phillips**, **Alan Pryor**, and **Ashley Escoe** explain why in "9th Circ. Honey Label Ruling Reflects 'Common Sense' Shift" in *Law360*."

Angela Spivey

Drew Phillips

Alan Pryor

Ashley Escoe

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021

Labor & Employment / ERISA

If You're Getting All the Benefits Anyway, You Lose

Gonzalez de Fuente v. Preferred Home Care of N.Y. LLC, No. 20-3985 (2nd Cir.) (June 7, 2021). Affirming district court order dismissing the case.

The Second Circuit affirmed dismissal of a putative Employee Retirement Income Security Act (ERISA) class action brought by home health care aides against their employers regarding their health plan. The participants challenged the plan's use of a captive insurance company to insure the risk of the health plan claims, alleging its use was a prohibited transaction and fiduciary breach under ERISA. Following the U.S. Supreme Court decision in *Thole v. U.S. Bank N.A.*, the district court dismissed the participants' claims for lack of standing, finding that the participants did not allege any concrete harm under ERISA because they never alleged they were denied any health care benefits promised to them under the health plan. On appeal, the participants attempted to distinguish *Thole*, arguing they suffered concrete injuries in the form of increased out-of-pocket costs and reduced coverage. The Second Circuit disagreed and affirmed the district court ruling because the participants received all the ERISA benefits they were entitled to and would continue to receive those benefits regardless of whether they won or lost the lawsuit.

When Ministerial Functions Are Not Fiduciary Duties

Bafford, et al. v. Northrop Grumman Corp., et al., No. 20-55222 (9th Cir.) (Apr. 15, 2021). Affirming in part and vacating in part dismissal of claims.

The Ninth Circuit affirmed dismissal of breach of fiduciary duty claims under ERISA that pensioners brought against a plan sponsor and related defendants based on alleged miscalculations of pension benefits. The Central District of California had previously dismissed claims based on its finding that the calculation of pension benefits was a ministerial function without a fiduciary duty. On appeal, the Ninth Circuit similarly reasoned that the nature of the act determines the fiduciary duty, and thus a breach of fiduciary duty claim may not lie even when a defendant may be fiduciary for certain other actions. The Ninth Circuit allowed the pensioners to file an amended complaint as to some of their ERISA claims and also revived state-law claims for professional negligence and negligent misrepresentation.

Failure to Satisfy Rule 23(a) Blocks Class Certification

Richardson, et al. v. City of New York, No. 1:17-cv-09447 (S.D.N.Y.) (May 12, 2021). Judge Oetken. Denying motion for class certification.

Judge Oetken denied a motion for class certification for lack of commonality. The plaintiffs sought classwide monetary and injunctive relief for the Fire Department of New York's alleged "disparate treatment of, and policies having a disparate impact on, African Americans." The court reasoned that the proposed classes covered a myriad of job titles that were "subject to the oversight of a myriad of supervisors" and that the plaintiffs failed to identify "any practice that would have disparately impacted all members of their proposed classes." The court rejected the plaintiffs' attempt to support their disparate treatment claim with statistical evidence, ruling that was insufficient because "in the wake of *Dukes*, courts have been skeptical of 'aggregated statistical evidence … derived from hundreds of employment decisions made by myriad decision makers, at different times, under mutable procedures and guidelines, in different departments, … [and] concerning employees at varying levels of experience, responsibilities, and education.'"

Retirement Plan Recordkeeper Not Liable Under ERISA

Hendricks, et al. v. Aetna Life Insurance Co., No. 2:19-cv-06840 (C.D. Cal.) (June 11, 2021). Judge Carney. Granting in substantial part motion for class certification.

The Central District of California granted in substantial part the plaintiffs' motion for class certification in an action alleging claims under ERISA for denial of plan benefits and clarification of rights and breach of fiduciary duty. The plaintiffs contend that Aetna refused to cover lumbar disc replacement surgery by classifying it as an "experimental and investigational" surgery and moved to certify a class of all persons covered by Aetna plans whose requests for the surgery were denied on those grounds. The court ruled that a common question was presented, and granted class certification, except that the class was limited to plaintiffs whose benefit denials would be subject to abuse-of-discretion review. The decision reaffirmed the importance of the commonality prong in ERISA class actions. ■

"Recognize, encourage, and promote: Join Alston & Bird's Women in Cyber for "Promotion in the Workplace and Strategies for Advancement" on October 12. Hear from and meet women succeeding in the cyber industry."

Amy Mushahwar

Kim Peretti

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021

Privacy & Data Security

SCOTUS Friends Landmark Autodialer Ruling

Facebook Inc. v. Duguid, et al., No. 19-511 (U.S.) (Apr. 1, 2021). Reversing denial of motion to dismiss.

The U.S. Supreme Court resolved a long-standing issue concerning the definition of an automatic telephone dialing system, or "autodialer," under the TCPA. The TCPA defines autodialers as equipment with the capacity both "to store or produce telephone numbers to be called, using a random or sequential number generator" and "to dial such numbers." Noah Duguid had accused Facebook of violating the statute by maintaining a database that stored phone numbers and programming its equipment to send automated text messages to users.

While the lower court dismissed Duguid's claim, the Ninth Circuit disagreed, holding that the TCPA applied to Facebook's technology used to text Duguid because of its capacity to dial automatically stored numbers. The Supreme Court reversed and remanded, concluding that to qualify as a autodialer, "a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." The Court utilized conventional rules of grammar and determined that the comma placement in the relevant provision confirmed that Congress intended for the phrase "using a random or sequential number generator" to apply equally to both preceding verbs—"store" and "produce."

It also relied on the statutory context to interpret the clause at issue. Congress passed the TCPA to address the proliferation of intrusive telemarketer phone calls from to consumers and businesses; the court explained that "expanding the definition of an autodialer to encompass any equipment that merely stores and dials telephone numbers would take a chainsaw to these nuanced problems when Congress meant to use a scalpel."

Dining on the Dark Web

In re Brinker Data Incident Litigation, No. 3:18-cv-00686 (M.D. Fla.) (Apr. 14, 2021). Judge Corrigan. Granting in part motion for class certification.

Beginning in December 2017, Brinker, the parent company of Chili's restaurants, experienced a data breach in which customers' personal and payment card information was stolen. The card information was then sold on a known marketplace for stolen payment card data. The crux of Brinker's class certification opposition was that the named plaintiffs had not established standing on behalf of the entire class. The court certified the class nonetheless, finding that customers had standing because their information was posted on the dark web, which is "likely enough to show *actual* misuse and it certainly meets the standard of some misuse." Based on this analysis, the court modified the proposed class definition to include only those customers who (1) had their data accessed by cybercriminals; and (2) incurred reasonable expenses or time spent in mitigation of the consequences of the breach. ■

"Cyber-knowledge at your leisure. Relive the "Data Breach and Privacy Litigation – Trends and Lessons Learned from the Trenches" panel from our Third Annual Cyber, Privacy, and Litigation Summit – Back to Basics and New Trends."

Donald Houser

Rachel Lowe

Gavin Reinke

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021

Products Liability

Court Rejects $2 Billion Proposed Settlement to Resolve Future Claims

In re Roundup Products Liability Litigation, No. 3:16-md-02741 (N.D. Cal.) (May 26, 2021). Judge Chhabria. Rejecting proposed settlement.

A California federal judge rejected a proposed class action settlement aimed at resolving individual and potential future claims in the Monsanto MDL. The proposed settlement sought to resolve the claims of individuals who have been diagnosed with non-Hodgkin's lymphoma (NHL) but who have not yet retained counsel, as well as the claims of individuals who later develop NHL. Among other things, the proposed settlement included up to $200,000 in compensation for individuals exposed to Roundup and diagnosed with NHL and a $50 million allocation for increased payments in "extraordinary" cases.

The court found the proposal "clearly unreasonable" due to its failure to adequately protect future claimants, and essentially found the proposal inequitable. The court noted that the compensation fund was designated to last only four years, which was concerning given the length of time it takes to develop NHL. Further, while potential claimants could opt out of the compensation program and file suit, they would relinquish their right to seek punitive damages, while Monsanto gained a significant reduction in its settlement and litigation exposure.

The court also expressed concerns about how the settlement would be publicized, stating that, "the notice's message is so garbled that [potential claimants] are likely to ignore it." The court advised the parties to submit a new motion for approval if they made changes adequate to protect the interests of future claimants.

Federal Preemption Ruling Wipes Out MDL Ahead of Bellwether Trial

In re Zofran (Ondansetron) Products Liability Litigation, No. 1:15-md-02657 (D. Mass.) (June 1, 2021). Judge Saylor. Granting motion for summary judgment.

In an ongoing products liability MDL arising from allegations that the drug Zofran causes birth defects, a Massachusetts federal judge granted summary judgment to defendant GlaxoSmithKline (GSK) based on federal preemption, wiping out over 400 cases in the MDL, which had its first bellwether trial scheduled for October.

GSK renewed a previously denied motion for summary judgment, arguing that the plaintiffs' state-law claims that GSK failed to warn of dangers associated with off-label usage of Zofran during pregnancy were preempted by federal law. The court had denied GSK's prior motion, holding that its preemption arguments raised factual issues reserved for the jury. However, in light of the U.S. Supreme Court's subsequent holding in *Merck v. Albrecht* that issues of federal preemption are legal questions to be resolved by the judge, the court reversed course.

The court noted the tension between state tort law that provides for failure-to-warn claims and federal law that closely regulates drug labeling through the Food and Drug Administration (FDA), and ultimately found that federal law reigns supreme. The court concluded that even if GSK had a limited, unilateral ability to change Zofran labeling pending FDA approval, the FDA ultimately would not have approved the labeling changes the plaintiffs advanced because the FDA had previously rejected multiple requests to add warnings regarding Zofran use during pregnancy. Indeed, in 2019, GSK itself had filed a petition requesting FDA review of information about the drug's safety that plaintiffs alleged was not previously provided to the FDA. Counsel for both GSK and the plaintiffs met with the FDA, which rejected the petition and again did not require the label changes.

Judge Saylor concluded that the FDA acted pursuant to its federal statutory duty in rejecting the proposed changes, approved contrary language for Zofran labeling, and thus rejected the very warnings that the plaintiffs contended are required under state law. ■

Best Lawyers by the numbers:

213 attorneys selected;
16 Lawyers of the Year;
68 practice areas

Ones to Watch by the numbers:

78 attorneys selected;
28 practice areas

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021

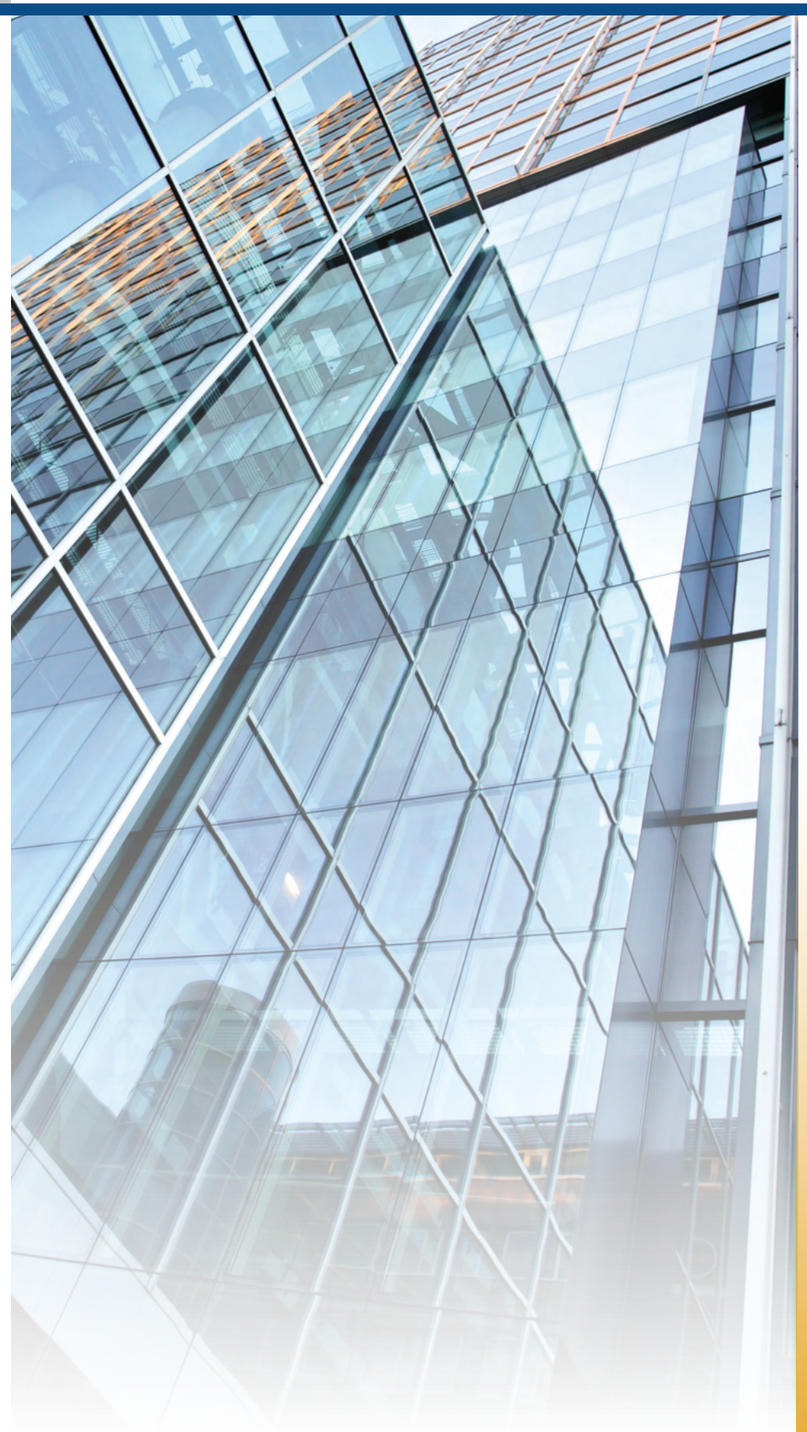
Securities

- **Supreme Court Answers Two Key Questions: Yes and Sometimes**

Goldman Sachs Group Inc., et al. v. Arkansas Teacher Retirement System, et al., No. 20-222 (U.S.) (June 21, 2021). Vacating Second Circuit decision and remanding.

The U.S. Supreme Court vacated the Second Circuit's opinion affirming a district court's class certification order in this years-long securities litigation. In the opinion, the Court was tasked with addressing two questions central to class certification in securities class actions. First, the Court considered whether the generic nature of an alleged misrepresentation is relevant at the class certification stage for purposes of analyzing price impact. The Court answered this question in the affirmative, directing district courts to take into account *all* record evidence relevant to price impact at the class certification stage—including evidence concerning the generic nature of the statements at issue—even if that evidence also touches on materiality or other merits-based issues.

Second, the Court addressed whether defendants bear the burden of persuasion to prove lack of price impact when seeking to rebut the *Basic v. Levinson* presumption of reliance. The Court confirmed that defendants bear the burden of persuasion; however, it cautioned that the burden is implicated only when the district court finds the evidence submitted for and against price impact is equal—a situation that "rarely arise[s]." The decision is significant because it gives defendants the ability to defeat the *Basic* presumption of reliance through evidence that previously could not be considered at the class certification stage. ■



"Can your disclosures stand up to shareholder scrutiny? That's just one of many "Key Trends in Recent Cyber-Related Securities Class Actions" featured by **Cara Peterman** and **Sierra Shear** in *Law360*."

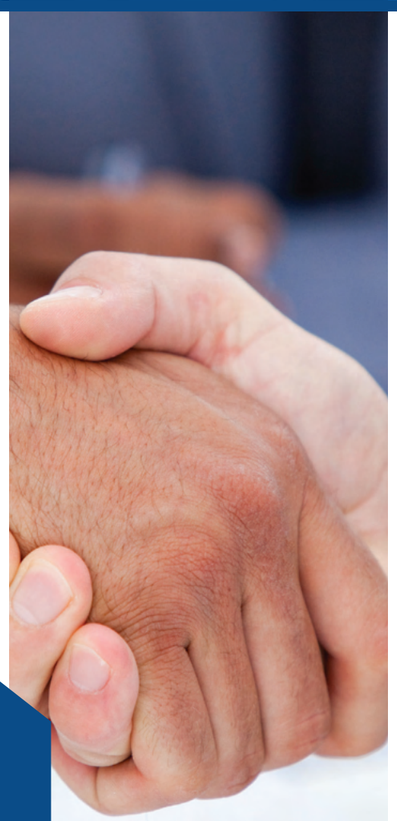
Cara Peterman

Sierra Shear

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021



Settlements

Consumers Drive Away with Final Settlement Approval

In re Kia Engine Litigation, No. 8:17-cv-00838 (C.D. Cal.) (May 10, 2021). Judge Staton. Granting final approval of $1.3 billion settlement.

Judge Staton granted final approval of a $1.3 billion deal for consumers who purchased or leased Hyundai and Kia vehicles that suffered from premature engine failure. Nearly $1 billion worth of the settlement deal is attributed to the estimated value of the lifetime warranty coverage that consumers will receive on the engine short block in affected vehicles. Class members will also receive reimbursement for any past repair expenses, including rental car and towing service fees, as well as goodwill payments for those class members whose engines failed or caught fire. The deal also provides reimbursement for the difference in the value of the vehicle for any class members who sold or traded in their car before getting the recommended repair. The class excludes all claims for death, personal injury, property damage, and subrogation.

The consolidated class actions alleged that Hyundai and Kia knowingly sold vehicles with faulty engines that could seize, fail, or potentially catch fire and that rather than properly disclose the underlying defects, the manufacturers issued limited safety recalls and never addressed the underlying issues with the engines. Attorneys representing the class will walk away with more than $7 million in fees and costs, and the 21 named plaintiffs will each receive $3,500 incentive payments.

Class Counsel Awarded Seven Figures in Missouri Settlement

Allicks v. Omni Specialty Packaging LLC, No. 4:19-cv-01038 (W.D. Mo.) (May 28, 2021). Judge Kays. Approving $8.5 million settlement.

Judge Kays granted final approval of a class action settlement arising from alleged deceptive and fraudulent labeling of O'Reilly tractor hydraulic fluid. The class brought claims under the Missouri Merchandising Practices Act, as well as for breach of warranty, fraudulent misrepresentation, negligent misrepresentation, negligence, and unjust enrichment. Judge Kays approved $5,000 incentive awards to each class representative, approximately $2.1 million to class counsel as attorneys' fees, and $25,000 to class counsel as expenses.

Chicken Antitrust Settlement Approved

In re Broiler Chicken Antitrust Litigation, No. 1:16-cv-08637 (N.D. Ill.) (June 29, 2021). Judge Durkin. Approving settlement.

In granting final settlement approval, Judge Durkin determined that the terms of the settlement agreements were fair, reasonable, and adequate to the settlement class and dismissed all claims against the defendants on the merits and with prejudice. The settlement class will include "all persons who purchased Broilers directly from any of the Defendants or any coconspirator identified in this action, or their respective subsidiaries or affiliates for use or delivery in the United States" during a period spanning over a decade.

Securities Class Action Settlement for Dialysis Company Investors

Peace Officers' Annuity and Benefit Fund of Georgia, et al. v. DaVita Inc., et al., No. 1:17-cv-00304 (D. Colo.) (Apr. 13, 2021). Judge Martinez. Approving $135 million settlement.

Judge Martinez approved a $135 million settlement between the dialysis company DaVita Inc. and its investors, who alleged that DaVita made material misstatements and omissions about a purported scheme to steer patients away from government insurance plans and into commercial plans that would pay DaVita higher dialysis reimbursement rates. As a result of this alleged scheme, the investors claimed that they paid artificially inflated prices for DaVita stock between February 2015 and October 2017.

The parties reached this settlement after Judge Martinez dismissed 22 of 27 alleged misstatements and after the government declined to intervene in a related case against DaVita, but before the plaintiffs' class certification motion was fully briefed. Ultimately, there were no objections or opposition to the settlement agreement. After payment of costs and fees, any funds left over from the settlement will be contributed to one of three cy pres award recipients that support treatment for end-stage kidney disease, investor education, or free legal services.

"Class actions aren't just for U.S. courts anymore. Our London team explains why in "Across the Horizon: Growing Class Action Risks in the UK and EU."

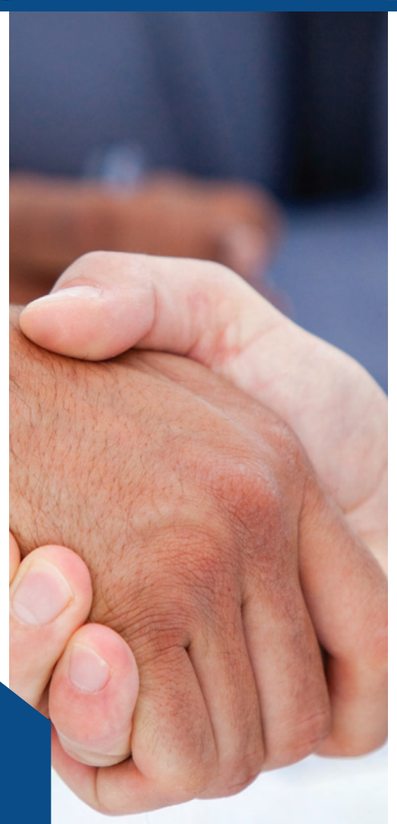
Paul Morris

Alex Shattock

ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2021



Modest Multiplier Motivates Award of Attorneys' Fees

In re London Silver Fixing Ltd. Antitrust Litigation, No. 1:14-md-02573 (S.D.N.Y.) (June 15, 2021). Judge Caproni. Awarding $11.4 million in attorneys' fees.

Judge Caproni awarded $11.4 million in attorneys' fees to counsel for a class of plaintiffs who negotiated a $38 million settlement with Deutsche Bank as part of a case involving allegations that Deutsche Bank and other financial institutions engaged in a conspiracy to fix prices for silver futures. The $11.4 million fee award represented 30% of the settlement fund, which the court held consistent with awards in similar cases. Class counsel initially reported a lodestar figure of $34 million for 61,260 hours worked from 2014 through October 2020. The court held that the total number of hours worked was excessive for certain tasks, but otherwise reasonable given the "very modest" lodestar multiplier of 0.33.

Attorneys Win Big in Novel Trespass to Chattels Class Action

Grace, et al. v. Apple Inc., No. 5:17-cv-00551 (N.D. Cal.) (Mar. 31, 2021). Judge Koh. Approving $18 million settlement.

A California district court approved an $18 million class settlement resolving claims that Apple allowed the application FaceTime to fail on iPhone 4 and iPhone 4S devices in order to save money. In doing so, the district court approved a $5 million attorneys' fee award, which represented 28% of the total settlement—3% higher than the 25% benchmark rate for attorneys' fees in the Ninth Circuit. The district court stated that the 3% upward adjustment was appropriate because of the skill demonstrated by class counsel, as evidenced by the novelty of the class's "trespass to chattels" claim and the technical nature of the subject matter.

Settlement Right on Time for Delivery Service Plaintiffs (and Their Attorneys)

In re Blue Apron Holdings Inc., No. 1:17-cv-04846 (E.D.N.Y.) (May 10, 2021). Judge Garaufis. Approving $13.25 million settlement.

A New York district court approved a $13.25 million class settlement resolving investor claims that Blue Apron—the subscription cooking service—made misleading statements about its on-time delivery rate that caused the company's stock price to fall following its IPO. In doing so, the district court also approved a $3.3 million attorneys' fee award, which represented 25% of the total settlement. Lead class counsel had informed the district court that they contributed more than 1,170 hours across three years to resolve the case.

Class Collects Nearly 65% of Lost Funds from Debt Collector

Thaxton, et al. v. Collins Asset Group LLC, et al., No. 1:20-cv-00941 (N.D. Ga.) (June 21, 2021). Judge Ross. Approving $15.75 million settlement.

Judge Ross approved a $15.75 million settlement between Collins Asset Group and a class of investors who alleged that they loaned money to defendants Diversified Financing, Sonoqui, and ALT Money through intermediaries in a scheme that provided them with promissory notes indicating that their money would be loaned to Collins Asset Group for investment in its debt collection business. Class members alleged that Collins Asset Group illegally used shell companies to sell them unregistered and illegal securities and to avoid repaying them for their investments. Collins denied that it engaged in any unlawful activity and denied that Diversified Financing and Sonoqui were its shell companies. The settlement agreement allocated 25% of the $15.75 million settlement payment, or $3.9 million, to class counsel for attorneys' fees. The remainder will be dispersed to class members according to a pro rata formula based in part on the amount they loaned for the investment. In total, the settlement will recover nearly 65% of the approximately $24 million lent to Collins as part of the alleged scheme. ■

ALSTON
& BIRD

www.alston.com

Atlanta | Beijing | Brussels | Charlotte | Dallas | Fort Worth | London | Los Angeles | New York | Raleigh | San Francisco | Silicon Valley | Washington, D.C.