ALSTON & BIRD

CLASS ACTION & MDL roundup

SUMMER 2019

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overview

CLASS ACTION & MDL roundup

SUMMER 2019

Where the (Class) Action Is

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

The Supreme Court granted cert on a pair of ERISA cases that revived one ruling thought settled and upended another with a circuit split. Wrong numbers were dialed in a pair of TCPA cases, with one dismissal reversed on appeal and another finding that wrong numbers protected the defendant from class certification. A Florida court stopped a glyphosate class action in its tracks, and a New York court put the brakes on a class of 67,000 car owners. But plaintiffs came through with several wins, including an employee stock ownership plan case, a fight against a Ponzi scheme, and medical insurance claims.

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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Banking, Financial Services & Insurance

Auto Accident Victims Can Chase Insurer for Underpaid Medical Expenses

Peoples v. United Services Automobile Association, et al., No. 2:18-cv-01173 (W.D. Wash.) (Apr. 26, 2019). Judge Lasnik. Granting class certification..

The Western District of Washington certified a class of over 1,100 USAA claimants who were allegedly shortchanged for certain medical bills following auto collision claims. USAA allegedly denied coverage to the claimants for $200 of medical expenses (on average) because they exceeded a "reasonable amount for the service provided," which the plaintiffs claim was a violation of the Washington Consumer Protection Act. The court found that the class satisfied the numerosity and commonality requirements, noting that "the key common question capable of classwide resolution is whether USAA's denial or reduction of insurance benefits solely because the provider's charge for a certain procedure or treatment exceeds a database threshold violates" the insurer's statutory obligation to pay reasonable expenses, the regulatory requirement to conduct a reasonable investigation, and/or the prohibition against denying payment of a claim on grounds not listed in state statutes. The court also denied USAA's argument that the named class representative was atypical, finding that the representative had standing despite USAA's suggestion that her health care provider covered any uninsured expenses. Finally, the court found that common issues predominate over individual issues because under the plaintiffs' theory of the case, the only individual issue would be "the tabulation of unpaid medical expenses." ■

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It's our honour to announce our new London office, housed at the epicenter of the world's financial hub.

Andrew Petersen

James Ashe-Taylor

Rich Willis

Consumer Protection

Sad Saks: Dismissal Reversed Because Standing Is Different from Adequacy

Nunez v. Saks Inc., No. 17-56281 (9th Cir.) (May 30, 2019). Reversing dismissal.

Saks customer Randy Nunez complained that Saks had labeled its own product line as having a greater "market price" than actual sales price despite there being no external market for the store's own product brands. The district court tossed Nunez's case, finding that he lacked standing to assert claims on behalf of putative class members due to the broad variety of branded products sold by the retailer.

The Ninth Circuit disagreed, finding that the district court "should have deferred consideration of whether he was an adequate representative until the class certification stage of proceedings." After all, Nunez had standing to pursue his individual claims, and his complaint allegations met the requirement of Rule 9(b). The court of appeals did hold, however, that Nunez could not pursue injunctive relief because of failure to allege imminent harm, though it granted him the opportunity to amend his complaint on remand.

"The consumer safety bell tolls for the board. **Angela Spivey**, **Andrew Phillips**, and **Alan Pryor** explain why in their article "The Blue Bell Ice Cream Listeria Outbreak and Its Fallout" for *Food Safety News*."

Angela Spivey

Andrew Phillips

Alan Pryor

ERISA

Supreme Court Will Hear IBM Workers' Stock-Drop Case

Jander v. Retirement Plans Committee of IBM, No. 17-03518 (2nd Cir.) (Dec. 10, 2018). No. 18-1165 (U.S.) (June 3, 2019). Writ of certiorari granted.

The U.S. Supreme Court agreed to review a Second Circuit decision that revived a proposed ERISA class action brought by IBM workers who claim that their retirement savings should not have been invested in overvalued IBM stock. The Second Circuit decision was notable because it seemingly revived the somewhat dormant public stock-drop cases following the Supreme Court's 2014 ruling in *Fifth Third Bancorp v. Dudenhoeffer*, which made it more difficult for plaintiffs to prevail on claims that failure to remove company stock from a benefit plan before a stock drop constitutes a breach of fiduciary duty. In seeking review from the High Court, IBM's retirement plans committee argued that the Second Circuit wrongly applied the "more harm than good" standard found in *Dudenhoeffer*, which asks judges to decide whether a good steward of workers' savings would think that taking action before a stock decline would do more harm than good. If a "prudent fiduciary" could reasonably see taking action as capable of causing harm, then failing to take action doesn't constitute a fiduciary breach. It is expected that the Supreme Court's decision will expand upon—or at least clarify—the scope of the *Dudenhoeffer* standard.

Supreme Court to Weigh In on Circuit Split on "Actual Knowledge" Requirement

Sulyma v. Intel Corp. Investment Policy Committee, No. 17-15864 (9th Cir.) (Nov. 28, 2018). No. 18-1116 (U.S.) (June 10, 2019). Writ of certiorari granted.

The U.S. Supreme Court agreed to consider when the statute of limitations begins to run for claims of fiduciary breach under ERISA. The Court will review the Ninth Circuit's holding that workers have "actual knowledge" of an ERISA violation (triggering the statute of limitations) only when they have *actually read* financial documents that would alert them to the existence of wrongdoing or have been told of the wrongdoing. The Ninth Circuit's narrow definition of actual knowledge conflicts with several other circuits, which have held that mere receipt of financial disclosure documents is sufficient to satisfy the "actual knowledge" requirement for statute of limitations purposes.

Second Circuit Declines to Review Lower Court Decision in ERISA Class Action

Cornell University, et al. v. Cunningham, No. 19-00324 (2nd Cir.) (June 19, 2019). Denying appeal.

Cornell University will not get a chance for interlocutory review of a decision to certify a class of 28,000 current and former workers in an ERISA suit over alleged mismanagement of retirement savings. The Second Circuit rejected Cornell's argument that the case presented a recurring question of exceptional importance regarding plaintiffs who lacked standing to sue if they weren't harmed. This is one of many cases targeting the fees associated with retirement plans offered at prominent universities.

Moms Don't Get Certified, but Get Another Shot

Condry, et al. v. United Health Group Inc., et al., No. 3:17-cv-00183 (N.D. Cal.) (May 23, 2019). Judge Chhabria. Denying motion for class certification.

A California district court declined to certify three classes of mothers alleging that UnitedHealth Group failed to cover lactation services in violation of the Employee Retirement Income Security Act (ERISA) and Affordable Care Act. The court highlighted that two of the three classes—which included individuals who were not reimbursed for *in-network* claims—could not be certified because the named plaintiffs only alleged violations stemming from refusals to reimburse for *out-of-network* claims. The court also emphasized that liability could not be determined classwide because, in some instances, UnitedHealth Group properly denied reimbursement. Ultimately, however, the court decided to grant the plaintiffs leave to take "another shot" at certification, citing "the complexity of the evidence presented and the questions involved."

"**Liz Broadway Brown** Explains How FAMU Prepared Her for the Legal Profession," and *rolling out* explains why it recognized her with its Justice for All award.

Liz Broadway Brown

200 attorneys, 13 Lawyers of the Year, 68 practice areas, across all 9 U.S. offices.

California Federal Judge Certifies ERISA Class Action, Refuses to Inquire into Merits

Hurtado, et al. v. Rainbow Disposal Co. Inc. Employee Stock Ownership Plan Committee, et al., No. 8:17-cv-01605 (C.D. Cal.) (Apr. 22, 2019). Judge Staton. Granting class certification.

Judge Staton granted certification to the proposed class in an ERISA suit. The plaintiffs are participants in a waste removal company's employee stock ownership plan who allege the plan's stake in the company was improperly sold without the participants' input. According to the plaintiffs, the former executive chairman and president of the company amended the plan to enable a sale of the plan's shares in the company and failed to negotiate the best price for the plan because they were secretly negotiating future jobs during the process. The defendants argued that class certification was not warranted because, among other arguments, the plaintiffs' case was flawed. Judge Staton, however, declined to inquire into the merits of the plaintiffs' claim beyond what was necessary for the certification motion.

Privacy & Data Security

Dislike Button: Social Network Alleged to Use ATDS in Texting Class Members

Duguid v. Facebook Inc., No. 17-15320 (9th Cir.) (June 5, 2019). Reversing dismissal of TCPA claims.

Noah Duguid received multiple messages from Facebook alerting him that his account had been accessed from an unrecognized device or browser. Duguid found this peculiar, noting that he was not a Facebook customer or user. He claimed that Facebook used an automatic telephone dialing system (ATDS) to send him the messages while ignoring his repeated attempts to terminate the text alerts. The district court dismissed Duguid's case, holding that he had failed to properly allege that Facebook used an ATDS when contacting him.

The Ninth Circuit disagreed, holding that Duguid "plausibly suggested" technology within the TCPA's definition of an autodialer by alleging that Facebook had used a program to send large volumes of text messages to phone numbers stored in a database. The Ninth Circuit also joined the Fourth Circuit in holding that a 2015 amendment to the TCPA, which excepts calls "made solely to collect a debt owed to or guaranteed by the United States," is content-based and incompatible with the First Amendment. But rather than accepting Facebook's invitation to toss out the entire TCPA, it simply severed the "debt-collection exception" as an unconstitutional restriction on speech.

Customers Still Shopping for Viable Claims Stemming from Supermarket Data Breach

Alleruzzo, et al. v. SuperValu Inc., et al., No. 18-01648 (8th Cir.) (May 31, 2019). Affirming dismissal.

The Eighth Circuit has upheld the dismissal of putative class claims from customers of SuperValu and related stores based on a 2014 hack of customer financial information. The circuit court agreed that the customers failed to allege a "special relationship" between the defendant grocers and its customers that would trigger an affirmative duty to protect financial information under Illinois negligence law. The trial court properly rejected the named plaintiff's description of his efforts to monitor his credit after the breach and remediate a single fraudulent charge as an allegation of actual harm for his consumer protection claims.

Plaintiff Dials Up Wrong Strategy in "Wrong Number" TCPA Action

Revitch v. Citibank N.A., No. 3:17-cv-06907 (N.D. Cal.) (Apr. 28, 2019). Judge Alsup. Denying motion for class certification.

Jeremy Revitch sought to represent a class of individuals who received calls from Citibank but were not listed in Citibank's records as the intended recipient of the calls. His problem? He attempted to define the proposed class to only include individuals who received calls from Citibank about *someone else's* account. Citibank provided evidence that a phone number can be flagged as "wrong" in Citibank's system even when it is the customer's correct number. For example, a customer seeking to avoid a call about his delinquent account could reply with "wrong number" when he answers a call.

Revitch claimed this issue could be accounted for by conducting a "reverse lookup" to investigate for instances where the name of the user identified does not match the name of the account holder listed in Citibank's records. But the court noted multiple flaws with this methodology, including that a single phone number can be associated with multiple accounts owned by different people. Overall, the court found that Citibank put forward an evidentiary basis from which to conclude that adjudicating whether or not members of the class consented to calls was not susceptible to common proof and denied the plaintiff's request for class certification on that ground.

GoDaddy's Arguments Against Class Certification Are a No-Go

Jason Bennett v. GoDaddy.com LLC, No. 2:16-cv-03908 (D. Ariz.) (Apr. 8, 2019). Judge Silver. Granting class certification.

Jason Bennett is a small business owner who purchased services from GoDaddy.com. Although Bennett provided a contact number to GoDaddy, he claims that he never provided prior express written

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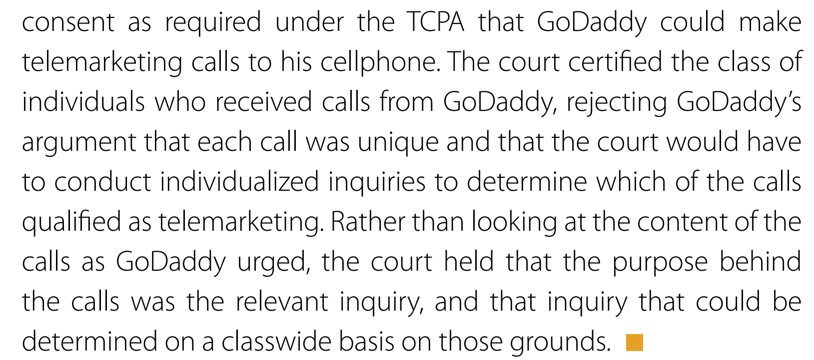
Stay in fashion with "Hot Topics in Privacy Litigation" from **Kristy Brown** at the State Bar of Georgia Class Actions Seminar, October 4, in Atlanta.

Kristy Brown

"Like many others, *Legal Newsline* turned to **Jeffrey Dintzer** to answer the question "Is Congress' Rush to Regulate PFAS Part of 'Hysteria' Fed by Plaintiffs Lawyers?""

Jeffrey Dintzer



consent as required under the TCPA that GoDaddy could make telemarketing calls to his cellphone. The court certified the class of individuals who received calls from GoDaddy, rejecting GoDaddy's argument that each call was unique and that the court would have to conduct individualized inquiries to determine which of the calls qualified as telemarketing. Rather than looking at the content of the calls as GoDaddy urged, the court held that the purpose behind the calls was the relevant inquiry, and that inquiry that could be determined on a classwide basis on those grounds. ■

Products Liability

Florida Judge Dismisses Lawsuit Alleging Weed Killer in Cereal

Doss v. General Mills Inc., No. 0:18-cv-61924 (S.D. Fla.) (June 14, 2019). Judge Scola. Granting motion to dismiss.

A Florida federal judge dismissed a putative class action brought by a consumer who claims that General Mills failed to disclose that its Cheerios cereal contains the possibly carcinogenic weed killer glyphosate. The court held that the plaintiff did not have standing to bring the lawsuit because she did not allege that she suffered a concrete, particularized, and imminent injury and instead asserted only hypothetical health risks and economic loss resulting from her purchase of the cereal under false pretenses. Although the plaintiff argued that General Mills breached its warranty by marketing Cheerios as "wholesome goodness for toddlers and adults," the complaint did not contain any allegations that the manufacturer was under a legal obligation to disclose the presence of glyphosate or its potential to be harmful. In fact, the Environmental Protection Agency and Food and Drug Administration regulate trace pesticides in foods and expressly permit oat-based products like Cheerios to contain glyphosate without any sort of disclosure to consumers. The court concluded that even if the cereal the plaintiff purchased "contained a significant amount of glyphosate, which she does not allege, or even any glyphosate, which she also does not allege, there is no allegation that she did not receive, at a minimum, the product General Mills said it was offering."

New York Judge Denies Class Cert in Brake Defect Case

Marshall v. Hyundai Motor America, No. 1:12-cv-03072, *Miller v. Hyundai Motor America*, No. 1:15-cv-04722 (S.D.N.Y.) (June 14, 2019). Judge McMahon. Denying motion for class certification.

Purchasers of Hyundai Sonatas brought a putative class action, alleging that Hyundai misrepresented the quality and warranty policies of the vehicles and breached its "bumper-to-bumper" express limited warranty by denying coverage for brake parts that it knew corroded prematurely. After class discovery, the plaintiffs moved to certify a class of approximately 67,000 individuals who purchased vehicles in New York and Pennsylvania. The court denied the motion for class certification because "individual issues predominate no matter the theory plaintiffs are pursuing—even those … that raise common issues." Determining whether each proposed class member's brakes failed as a result of the allegedly concealed defect, as opposed to unrelated issues, will devolve into numerous mini-trials. In addition, the court ruled that the plaintiffs' "failure to recall" and other consumer protection claims did not support a class action. Deception does not constitute actual injury or ascertainable loss, the elements of reliance and causation require individualized proof that the class members would have acted differently had the information about the defective brake components been disclosed to them at the time they purchased or leased the vehicles, and the "price premium" theory of classwide damages is too speculative.

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There's nothing autonomous about "Privacy and Cybersecurity." **Todd Benoff** will explain why at the ADAS & AV Legal Issues & Liabilities World Congress, October 22–23, in Detroit.

Todd Benoff

"Nobody has quite the "Grit, Fearlessness, and a Flair for the Creative" that **Cari Dawson** has, as *Harvard Law Today* learned in its interview."

Cari Dawson

Securities

S.D.N.Y. Tells the Plaintiff to Go Fish

Zheng v. Pingtan Marine Enterprise LTD., et al.
No. 1:17-cv-03807 (E.D.N.Y.) (Mar. 31, 2019). Judge Irizarry.
Granting motion to dismiss with prejudice.

Judge Irizarry granted Pingtan Marine's motion to dismiss and dismissed a putative securities class action with prejudice. The plaintiff alleged that the company and two of its officers made false and misleading statements about Pingtan Marine's fishing licenses. The court granted Pingtan Marine's motion to dismiss in its entirety, holding that the amended complaint failed to adequately plead loss causation, a material misrepresentation or omission, or a strong inference of scienter. The court noted that the third-party analyst report the plaintiff based her claims on largely recited Pingtan's and other sources' reports, and held that negative journalistic characterization of previously disclosed facts does not demonstrate loss causation. Because the court found that the plaintiff would not be able to cure her pleading deficiencies with an amended complaint, the court dismissed the action with prejudice. ■

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One of the "very best litigators in the business." The ***Los Angeles Business Journal*** named **Chuck Cox** one of the "Top Litigators and Trial Lawyers in Los Angeles."

Chuck Cox

"Take it to the banc. In *Law360*, **Bo Phillips**, **Sam Park**, and **Jonathan Kim** reveal the open secret that "Courts Are More Rigorously Scrutinizing Class Settlements" after the full Ninth Circuit reversed a panel's earlier decision."

Bo Phillips

Sam Park

Jonathan Kim

Settlements

SeaWorld on the Hook for Overcharging Passholders

Herman v. SeaWorld Parks & Entertainment Inc., No. 8:14-cv-03028 (M.D. Fla.) (Apr. 29, 2019). Judge Scriven. Approving settlement.

Judge Scriven granted final approval to a settlement between annual passholders and SeaWorld. The passholders alleged that SeaWorld violated the Electronic Funds Transfer Act by illegally renewing annual contracts with passholders and collecting unauthorized payments from them. The court had previously denied SeaWorld's arguments that automatic renewal did not constitute an "act" under the statute and instead granted the plaintiffs' class certification and summary judgment motions. The Eleventh Circuit denied SeaWorld's appeal of those orders, finding that Judge Scriven's decision was not final or appealable since she had not yet decided the issue of damages. The $11.5 million settlement includes $2.88 million (25%) in attorneys' fees, and the named class representatives each received $10,000 individual awards.

$30 Million Settlement Approved in Shoddy Roofing MDL

In re IKO Roofing Shingle Products Liability Litigation, No. 2:09-md-02104 (C.D. Ill.) (Apr. 11, 2019). Judge Shadid. Approving settlement.

Judge Shadid approved a $30 million settlement in favor of more than a million unhappy purchasers of IKO Manufacturing's shingles. The company promised that the shingles would last as long as 50 years and that the promise was backed by an "iron-clad" warranty. When the plaintiffs attempted to take advantage of their warranties, IKO allegedly made it difficult for them to file a claim. As part of the $30 million settlement, IKO agreed to extend existing and expired warranties by five years for the entire class.

Final Settlement Caps Claims for Misclassification and Overtime

Conley v. Cabot Oil and Gas Corp., No. 2:17-cv-01391 (W.D. Pa.) (Apr. 2, 2019). Judge Bissoon. Approving settlement.

Judge Bissoon granted final approval of a $3.56 million settlement in this class action alleging that Cabot Oil and Gas Corp. violated the Fair Labor Standards Act and Pennsylvania Minimum Wage Act by misclassifying workers as independent contractors and failing to pay them for working overtime. The lead plaintiff worked for the company between 2013 and 2015 before filing suit in 2017, and the court granted him a $15,000 enhancement award. Class counsel were awarded $1,188,083.33 in attorneys' fees, which represented 33% of the settlement fund, along with $25,000 for counsel's costs and expenses and up to $25,000 for reimbursement of the settlement administrator. No class members objected to the settlement, and only three of them requested to be excluded before the court's final approval of the settlement.

Chancellor Approves Class ACT Settlement

Carr v. New Enterprise Associates Inc., et al., No. 2017-0381 (Del. Ch.) (Apr. 4, 2019). Chancellor Bouchard. Approving settlement.

Chancellor Bouchard of the Delaware Chancery Court approved a $9 million settlement of shareholder dispute claims. The litigation arose out of a dispute between Kenneth Carr, a co-founder of Advanced Cardiac Therapeutics (ACT) and its controlling stockholder, New Enterprise Associates Inc. (NEA). Carr alleged that two NEA and ACT board members improperly gained control of ACT through a preferred stock purchase (which was not offered to Carr) and that Carr's interest, along with other shareholders, was diluted through a series of transactions, along with the value of ACT's holdings.

Following mediation between Carr and NEA and after Carr's claims against the individual board members were dismissed, the parties settled for $9 million. Carr's attorney reported that "this is the amount we would have aimed for" at trial, calling it "an ideal result." Chancellor Bouchard approved the settlement as "fair and reasonable" and awarded Carr an incentive fee of $175,000, approximately $1.9 million in attorneys' fees (including $258,000 in expenses), and $1.6 million to the law firm that represented Carr as lead class plaintiff. ■

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Get your "Privacy Updates and the New General Data Protection Regulation (GDPR) Requirements" from **Liz Broadway Brown** at the CCWC 15th Annual Career Strategies Conference, September 25–27, in Chicago.

Liz Broadway Brown

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