ALSTON&BIRD LLP

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Class Action Round-Up

Fall 2015

Where the (Class) Action Is

Moving into the second half of 2015, there is no shortage of interesting cases across the spectrum of class action issues and claims. In this edition of the *Round-Up*, courts continue to wrestle with the ascertainability issue in cases involving alleged consumer fraud, false labeling, and even the privacy of customer data. The big issue in consumer protection, whether unaccepted settlement offers moot a named-plaintiff's claim in a putative class action, has been argued in the Supreme Court with a decision expected in 2016. Watch for our next *Round-Up* for updates on those cases.

There are a number of cases to watch in the area of worker classification, especially the issues facing the popular ridesharing service Uber, and how interns are treated by employers. Moving to the environment, class certification remains a challenge in cases involving contamination of property. Privacy and security cases remain on the docket for companies that have experienced data breaches or other allegations of mishandling of consumer data.

As usual, the *Round-Up* concludes with a list of settlements over the past quarter. We welcome your feedback about the *Round-Up*. Please enjoy reading and let us know how we can make it better.

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Antitrust

- **Guitar Buyers Play the Blues After Ninth Circuit Pulls the Hook on Conspiracy Claims**

  In re Musical Instruments & Equip. Antitrust Litig., No. 12-56674 (9th Cir.) (Aug. 25, 2015). Affirming dismissal.

  A putative class of guitar buyers failed to sufficiently allege a hub-and-spoke conspiracy among five manufacturers and Guitar Center to fix prices. The Ninth Circuit held that the complaint alleged only that Guitar Center used its substantial market power to pressure the five manufacturers to adopt similar policies via vertical agreements and that each manufacturer adopted those policies in its own interest. Such self-interested independent parallel conduct in an interdependent market cannot form the basis of a conspiracy. The court left open the possibility that Guitar Center's use of its market power has in and of itself violated the Sherman Act.

- **State Law Differences Can't Undo Certification in Polyurethane Foam Litigation**

  In re Polyurethane Foam Antitrust Litig., No. 1:10-md-2196 (N.D. Ohio) (July 21, 2015). Judge Zouhary. Denying motion to decertify class.

  Judge Zouhary refused to decertify a class of indirect polyurethane foam purchasers despite the application of different consumer protection and unfair competition laws of 15 states. The court held that common issues overwhelmed differences in state law. ■

CLASS-IFIED INFORMATION

Adam Biegel

John Snyder

Two additions bolster our Antitrust Practice in Washington, D.C.

Consumer Protection

Unaccepted Settlement Offer Does Not Moot Class

David Hooks v. Landmark Indus., Inc. d/b/a Timewise Food Stores, No. 14-20496 (5th Cir.) (Aug. 12, 2015). Reversing dismissal.

On an issue currently pending before the Supreme Court, the Fifth Circuit joined a growing number of its sister circuits holding that an unaccepted offer of judgment does not moot a named-plaintiff's claim in a putative class action. The class plaintiff alleged that an ATM company unlawfully failed to provide consumers with notice of its withdrawal fees. The ATM company then presented that individual plaintiff with a Rule 68 offer of judgment. The plaintiff rejected the offer and the district court dismissed the case as moot.

Reversing that dismissal, the Fifth Circuit highlighted that the district court's approach would allow defendants to "pick off" individual plaintiffs before class certification and "would serve to allow defendants to unilaterally moot named-plaintiffs' claims in the class action context—even though the plaintiff, having turned the offer down, would receive no actual relief."

The Supreme Court version of this issue—*Campbell-Ewald Co. v. Gomez*—was argued in October. A decision should be out in 2016.

Class Not Ascertainable? No Big Deal, Says Seventh Circuit

Mullins v. Direct Digital, LLC, No. 15-1776 (7th Cir.) (July 28, 2015). Affirming grant of class certification.

In a sign that the ascertainability movement may be stalling at the circuit level, the Seventh Circuit rejected the argument that a district court abused its discretion in certifying a consumer fraud class without first finding that the class was "ascertainable." The court held that "[n]othing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes. The policy concerns motivating the heightened ascertainability requirement are better addressed by applying carefully the explicit requirements of Rule 23(a) and especially (b)(3)." While a "court must consider 'the likely difficulties in managing a class action,'. . . it must balance countervailing interests to decide whether a class action 'is superior to other available methods for fairly and efficiently adjudicating the controversy.'"

CLASS-IFIED INFORMATION

Jeff Tsai

Jeff Tsai discusses big news on Big Data from California's attorney general.

Consumer Fraud Class Does Not Upset Sixth Circuit's Stomach: Probiotic Digestional Aid

Dino Rikos v. Procter & Gamble Co., No. 1:11-cv-0226 (6th Cir.) (Aug. 20, 2015). Reversing dismissal of plaintiff's claim and putative class action.

The Sixth Circuit affirmed a class of probiotic nutritional supplement purchasers who alleged that the advertised digestive health benefit was unproven. The Sixth Circuit agreed that the plaintiffs proved commonality and typicality because "…their claims share a common question—whether [the product] is 'snake oil' and thus does not yield

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benefits to anyone." Common issues predominated because, despite variations in advertising and "[r]egardless of how customers first heard about [the product] … they nonetheless decided to purchase the product only for its purported health benefits." The court rejected the seller's argument that predominance required the named plaintiffs to "produce actual proof at the class-certification stage of classwide injury." The court accepted the plaintiffs' damages model requesting full purchase price refunds because "there is no reason to buy [the product] except for its purported digestive benefits."

CLASS-IFIED INFORMATION

Cyber alert: Effective Cybersecurity: You Have a Breach Response Plan … Now How Do You Test It?

▪ Ascertainability a Barrier to Certification in California Federal Court Case Involving "100% Natural" Label

In re Hain Celestial Seasonings Prods. Consumer Litig., No. 8:13-cv-1757 (C.D. Cal.) (Sept. 23, 2015). Judge Guilford. Granting class certification in part.

Tea drinkers brought California consumer fraud claims against Hain because it markets 10 teas as "100% Natural." The plaintiffs alleged that Hain's "100% Natural" label is false for two reasons: (1) the products are made from ingredients that have been sprayed with synthetic pesticides; and (2) the products contain pesticide residue. The Central District of California granted class certification for injunctive relief under Rule 23(b)(2), but denied class certification under 23(b)(3). The Rule 23(b)(2) class seeks to enjoin Hain from marketing the teas as 100% natural and require it to undertake corrective advertising. For the damages claims, however, the court held that the plaintiffs did not meet the ascertainability requirement because the case involved "low-cost consumer purchases" and customers have no reliable way of remembering their purchases. Self-reporting was not a reliable method of ascertaining the class. Judge Guilford also held that the plaintiffs did not prove predominance based primarily on a lack of evidence that class members relied on product labels when deciding to buy Hain's teas.

▪ And Del Monte Foods Beats Class Certification in California Federal Court Food Labeling Class Action

Kosta v. Del Monte Corp., No. 4:12-cv-1722 (N.D. Cal.) (July 30, 2015). Judge Rogers. Denying class certification.

The district court denied certification to purchasers of a variety of Del Monte food products. Plaintiffs made false labeling allegations, pointing to labels with: (1) antioxidant claims, including a statement and symbol ("blue flag") that the products "contain antioxidants" despite failing to meet the FDA's minimal nutritional requirements; (2) a statement that the product is a "natural source" of lycopene, a nutrient for which the FDA has not established a daily value; and (3) claims of "no artificial flavors or preservatives" even though the products contain calcium chloride, citric acid, high fructose corn syrup, and carmine.

The court held that the plaintiffs failed to establish the Rule 23(a) requirements. The class was not ascertainable because the variations between the products made it difficult for class members to self-report: a purchaser likely would not recall which particular product, with which packaging and labeling, she purchased. The plaintiffs failed to establish predominance because the class members were likely exposed to disparate product information, and the plaintiffs failed to establish that materiality could be shown on a classwide basis. Finally, the plaintiffs

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also failed to offer a method of classwide proof that a "reasonable consumer" would find the challenged statements deceptive and material to class members' purchasing decision.

▪ . . . And Avon Escapes Class Certification in New York Federal Court Case Involving Skin Care Products Brochures

In re Avon Anti-Aging Skincare Creams and Prods. Mktg. & Sales Practices Litig., 1:13-cv-00150 (S.D.N.Y.) (Sept. 30, 2015). Judge Oetken. Denying class certification.

Avon customers sought a class to pursue false labeling claims based on ANEW brand product labels claiming that the products "reverse wrinkles," "repair wrinkles," and "rebuild collagen." The trial court denied class certification on several grounds. The plaintiffs failed to establish that the falsity of the brochures was amenable to generalized proof. The plaintiffs also failed to demonstrate that the brochures were regularly given to Avon customers, resulting in "material variation in the representations made" and "the kinds or degrees of reliance by the persons to whom they were addressed." The court also rejected the plaintiffs' proposal for ascertaining the class, which involved "mini-trials" of comparing class member affidavits to Avon's records of orders. ■

Employment

Uber Drivers Unhappy with Their Share

O'Connor v. Uber Techs., Inc., No. 13-cv-3826 (N.D. Cal.) (Sept. 1, 2015). Judge Chen. Granting motion for class certification in part and denying in part.

In a highly publicized case, a district court certified a class of 160,000 California Uber drivers suing the ridesharing company. The drivers claimed that they were Uber's employees rather than independent contractors, meaning that they deserved associated employment protections under California law. Among their claims was that they should have been given the tips allegedly received by the company through its fee structure with passengers. The district court certified the class as to the issue of whether the drivers qualify as employees and whether the drivers deserve the entire gratuity paid to Uber, but denied certification as to certain claims for certain expense reimbursement claims.

Sixth Circuit Un-Punches Wal-Mart Employees' Clock in Bias Suit

Phipps v. Wal-Mart Stores, Inc., No. 13-6194 (6th Cir.) (July 7, 2015). Reversing dismissal.

The Sixth Circuit's rule prohibiting *American Pipe* tolling based on a previous purported class action that had been denied class certification was held to not apply to new *subclasses* of plaintiffs pursuing the same claims. An action was brought on behalf of a regional class of female Wal-Mart employees who were part of the nationwide class in the original *Wal-Mart v. Dukes* case where the Supreme Court rejected class certification. The Sixth Circuit held that they were entitled to tolling of the statute of limitations from the pendency of the *Dukes* case, and as a result, their claims were not time-barred.

CLASS-IFIED INFORMATION

Jim Evans

"Independence Days in Court": Jim Evans examines the independent contractor classification in *Workforce* magazine.

Second Circuit Creates New Test for Determining Whether Unpaid Interns Are Employees

Glatt v. Fox Searchlight Pictures, Inc., Nos. 13-4478, 13-4481 (2d Cir.) (July 2, 2015). Vacating partial summary judgment for plaintiffs and class certification.

The Second Circuit took on the issue of whether unpaid interns are "employees" entitled to compensation under the Fair Labor Standards Act (FLSA) and New York State Labor Law—a question of first impression in the Second Circuit. Recognizing the importance of preserving experiential learning opportunities, the court chose to adopt a seven-factored, non-exhaustive set of considerations that focus on the "primary beneficiary" of the internship. Based on the new test, the court found that the employment status of the class of unpaid interns would result in a highly individualized inquiry that defeated class certification.

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Chipotle Employees Upset over Paycheck Deductions, Class Certification Denial Unappealable

Munoz v. Chipotle Mexican Grill, Inc., No. B249505 (Cal. Ct. App.) (June 30, 2015). Holding that denial of class certification is not appealable where plaintiffs are also pursuing PAGA claim.

Two former employees sued Chipotle, challenging its policy of requiring employees to purchase slip-resistant shoes as a condition of employment and deducting the cost from the employees' paychecks without obtaining their written authorization. The trial court denied class certification because there were too many subclasses in which individual issues predominated.

The issue on appeal concerned the appealability of the class certification denial, and specifically, whether the availability of claims under California's Private Attorneys General Act (PAGA) precluded the application of the death knell doctrine. The appellate court concluded that the inability to proceed as a class action did not sound the death knell of the plaintiffs' claims because they have ample financial incentive to pursue the remaining representative claims under PAGA. Accordingly, the trial court's order denying class certification was not appealable. ■

CLASS-IFIED INFORMATION

Doug Hinson

Doug Hinson will co-chair ACI's ERISA Litigation conference on Chicago's Magnificent Mile, March 1–2, 2016.

Environmental

Eighth Circuit: No Class Certification Where There Is No Actual Damage to Class Land

Smith v. ConocoPhillips Pipe Line Co., No. 14-2191 (8th Cir.) (Sept. 15, 2015). Reversing class certification.

A unanimous Eighth Circuit panel reversed certification of a class of landowners allegedly impacted by a Phillips 66 pipeline leak. The court rejected the landowners' arguments that claims of decreased property values and fear of potential negative health impacts of nearby pollution could support a nuisance claim. The Eighth Circuit joins several other courts requiring an actual physical invasion of property.

Steel Mill Beats Neighbors' Contamination Claims

Grubb v. Nucor Steel Marion Inc., No. 3:14-cv-0158 (N.D. Ohio) (Aug. 24, 2015). Judge Zouhary. Denying class certification.

Judge Zouhary denied class certification for homeowners who blamed a nearby steel mill for contaminating their property with manganese. The putative class failed to submit sufficient proof of both contamination and the Rule 23 requirements. The opinion provides a road map for class certification of trespass and nuisance related to airborne emissions.

CLASS-IFIED INFORMATION

Four Alston & Bird attorneys join together in the 2015 edition of *Who's Who Legal: Environment*.

WV Chemical Spill Class Moves Forward, Partially

Good v. American Water Works Company, Inc., No. 14-cv-1374 (S.D. W.Va) (Oct. 8, 2015). Judge Copenhaver. Certifying the liability class but denying the damages class.

The district court split the baby in the dispute concerning the well-publicized January 2014 chemical spill in West Virginia that left 300,000 without drinking water. On liability, the court held the class was appropriate as the claims arose from "singular factual circumstances." On damages, however, the court rejected the proposed class due to "shaky" expert reports. Though the experts said the spill caused $77 million in damages to businesses and $51 million to residents, the court ultimately found that their reports could not account for each class member's losses in the days after the spill. Now, the monster class—224,000 members—moves forward. As does a potential tidal wave of individual damage claims. ■

Privacy

- **Time to Certify Class Argument to *Time* Magazine**

  Fox v. Time, Inc., No. 2:12-cv-14390 (E.D. Mich.) (July 27, 2015). Judge Steeh. Granting class certification.

  Judge Steeh certified a class of magazine subscribers who claim that *Time* sold their personal information to marketing companies in violation of Michigan's Video Rental Privacy Act. The Act regulates those selling or renting written materials. The court rejected *Time*'s ascertainability argument even though *Time* lacked subscription purchase records of the class members who had subscribed through third-party websites. The court held that, at the class certification stage, the question is not whether *Time* had records in its possession, but whether it is "administratively feasible" for the court to determine whether particular individuals are class members. The court found that it could do so using objective class member criteria, third-party billing and subscription records, and other evidence like email subscription confirmations.

- **Seventh Circuit Undercuts *Clapper*, Opens Door for "Future Harm" Lawsuits**

  Remijas v. The Neiman Marcus Group, LLC, No. 14-3122 (7th Cir.) (July 20, 2015). Reversing dismissal for lack of Article III standing.

  The Seventh Circuit held that the U.S. Supreme Court's decision in *Clapper v. Amnesty International USA* did not raise an Article III standing bar for the data breach class claims of 350,000 Neiman Marcus customers. The Northern District of Illinois had held that purported class members lacked standing because they did not face the "certainly impending" harm required by *Clapper*. The Seventh Circuit reversed, explaining that a showing of "substantial risk" of harm can suffice to establish Article III standing under *Clapper*. The plaintiffs plausibly alleged a substantial risk of future harm from the data breach and nonspeculative costs incurred by the plaintiffs, including credit monitoring fees and pursuit of relief for unauthorized charges. These qualified as "concrete" present and future injuries. Neiman Marcus's breach notification to customers and offer of free credit monitoring for a year, before the scope of the breach was known, supported this conclusion. The plaintiffs' other injury allegations of overpayment on various Neiman Marcus products, loss of private information, and delay in notification, although "problematic" and "abstract," did not defeat standing.

- **Ninth Circuit Affirms Netflix VPPA Class Action Dismissal**

  Mollett v. Netflix, Inc., No. 12-17045 (9th Cir.) (July 31, 2015). Affirming dismissal.

  The Ninth Circuit agreed that displaying registered Netflix users' viewing histories, queues, and other information on their televisions without a password did not violate the Video Privacy Protection Act (VPPA). A putative class alleged that the display impermissibly disclosed information to third parties, like subscribers' families, friends, and guests. But a subscriber's decision to allow display of the otherwise password-protected information on a registered device—such as

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The verdict is in: Alston & Bird Named "Overall Litigation Department of the Year."

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a television—is an allowable "disclosure to the consumer" under the VPPA. The subscriber's incidental disclosure of this information after Netflix's lawful "disclosure to the consumer" is beyond Netflix's control. Thus, Netflix cannot be liable under the VPPA.

▪ J. Crew Can't Undress FACTA Lawsuit.

Kamal v. J. Crew Group, Inc., No. 2:15-cv-0190 (D.N.J.) (Aug. 4, 2015). Judge Martini. Denying motion to dismiss.

A New Jersey district judge refused to dismiss a putative class action against J. Crew stemming from the company's alleged printing of more than the last five digits of credit card numbers on customer receipts in violation of the Fair and Accurate Credit Transactions Act (FACTA). The court concluded that the plaintiff pleaded a willful violation of FACTA with allegations that J. Crew was aware of the 12-year-old statute and had insured itself against FACTA liability. That demonstrated that J. Crew knew of the "obvious and unjustifiably high risk of violating FACTA."

▪ FTC Lands Critical Endorsement from Third Circuit

FTC v. Wyndham Worldwide Corp., No. 14-3514 (3d Cir.) (Aug. 24, 2015). Affirming denial of motion to dismiss.

The District of New Jersey blessed the Federal Trade Commission's (FTC) authority to bring lawsuits under the unfairness prong of Section 5 of the FTC Act in a data breach suit against Wyndham that allegedly cost consumers $10.6 million in fraudulent charges. The Third Circuit rejected Wyndham's argument that the FTC lacked authority for the suit, holding that the FTC has no duty to publish regulations detailing what constitutes "reasonable" data security standards, Wyndham was not entitled to know with ascertainable certainty the FTC's interpretation of what cybersecurity practices are required by the Act, and Wyndham had fair notice because it could reasonably foresee that a court could construe its conduct as falling within the Act.

▪ No (Retention) Private Right of Action, Says Ninth Circuit Panel

Rodriguez v. Sony Computer Ent., No. 12-17391 (9th Cir.) (Sept. 4, 2015). Affirming dismissal.

The Ninth Circuit affirmed the dismissal of a putative class action alleging that two Sony entities violated the VPPA by retaining the plaintiff's personal information beyond the Act's statutory limits and by disclosing it to other Sony entities. The panel held that the VPPA's legislative history did not show any congressional intent to create a private right of action, the VPPA's unlawful retention provision does not contemplate and does not provide liability for a video service provider's knowing retention of personal information any form of relief, and Sony made the alleged intercorporate disclosures in the ordinary course of business, making them exempt from the VPPA's nondisclosure requirements. ■

Product Liability

- **Ten Years Later, Class Certified in Washing Machine Case Based on Lowered Predominance Requirement**

  Leonard v. Sears Roebuck & Co., 1:06-cv-7023 (N.D. Ill.) (July 20, 2015). Judge Rowland. Certifying Illinois class.

  Nearly 10 years after the litigation was initially filed, an Illinois federal judge certified a class of Illinois consumers suing Sears Roebuck and Co. for allegedly defective washing machines that collect mold. The court initially denied certification four years ago based on lack of predominance. But the Seventh Circuit's intervening class certification affirmance in a nearly identical washing machine litigation (plus Sixth Circuit affirmance in another washing machine litigation) created a "mandate" that required certification. "Sears' perseverance in opposing class certification is overwhelmed by the constancy of the appellate court conclusions pointedly holding otherwise."

- **Class Certification Vacated by Appellate Court in Volvo Leaky Sunroof Case**

  Neale v. Volvo Cars of N. Am. LLC, No. 14-1540 (3d Cir.) (July 22, 2015). Vacating class certification.

  The Third Circuit determined that a class of Volvo owners was improperly certified in a case where the car owners complained about defective sunroof drainage systems. There was too much "guesswork" in piecing together class claims. Although the ultimate holding was in favor of the defendant, the court disagreed with the Second and Eighth Circuits in concluding that unnamed putative class members need not establish Article III standing for class certification and the standing of the class representative is sufficient.

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Peter Masaitis

Peter Masaitis looks at the machinery behind two cases pending before the Supreme Court in "The Rise of No-Injury Class Actions" in *Law Journal Newsletters*.

Mackenzie Heller

Take a road trip with Peter Masaitis and Mackenzie Heller to *Law360* and "Recalls: What Is the Auto Manufacturer's Real Goal?"

- **Cymbalta Class Certification Motion Denied for Second Time**

  Saavedra v. Eli Lilly & Co., 2:12-cv-9366 (C.D. Cal.) (July 21, 2015). Judge Wilson. Denying class certification.

  A California federal judge has again rejected class certification for Cymbalta purchasers in New York and Massachusetts. Plaintiffs did not demonstrate how alleged misrepresentations caused them to overpay for the drug. The court denied certification the first time because plaintiffs did not establish a proper damages model. ■

RICO

- **Class RICO Claims Return to Life**

  Reyes v. Netdeposit LLC, No. 14-1228 (3d Cir.) (Sept. 2, 2015). Vacating certification denial.

  Bank customers will get a second chance to seek class status in a case alleging racketeering fraud by Zions First National Bank and its payment processing units. The Third Circuit accepted the customers' argument that high return rates for telemarketers through Zions's Automated Clearing House (ACH) System proves that Zions knowingly provided shady operators banking services in violation of RICO and thus might, by itself, be enough to establish Zions's liability classwide. ■

CLASS-IFIED INFORMATION

Catch up on the implications of the DOJ bowing to the clamor for prosecutions of individual corporate employees in investigations of corporate misconduct.

Securities

- **Goldman Sachs Investor Class Certified**

  In re Goldman Sachs Group, Inc. Sec. Lit., No. 1:10-cv-3461 (S.D.N.Y.) (Sept. 24, 2015). Judge Crotty. Certifying class of investors.

  The Southern District of New York certified a class of investors in Goldman stock between 2007 and 2010 claiming that they were harmed by conflicts of interest related to collateralized debt obligation transactions. The main dispute at class certification centered on whether the proposed class met the predominance requirements. Both parties submitted expert evidence and market analyses tracing Goldman stock prices related to public misstatements and other events. Finding that the defendants failed to demonstrate a complete lack of price impact, the court certified the class, noting that it was insignificant that the misstatements had no impact on stock price at the time they were made. ■

CLASS-IFIED INFORMATION

Mary Gill

Courtney Quiros

Corporate boards should be wary of "Access to Internal Investigation Records," say Mary Gill and Courtney Quiros in the *D&O Diary*.

Settlements

Antitrust

In re High-Tech Emp. Antitrust Litig., No. 5:11-cv-2509 (N.D. Cal.) (Sept. 2, 2015). Judge Koh. Approving $415 million settlement.

Judge Lucy H. Koh approved a settlement of antitrust claims that Apple Inc., Google Inc., and other tech companies conspired not to poach each other's employees. The $415 million settlement was $90.5 million more than a proposed settlement rejected one year before. Judge Koh found it reasonable in light of the strong evidence of conspiracy, stating that it "should send a strong message to defendants."

In a separate opinion, Judge Koh awarded class counsel $40 million in fees using the lodestar method (less than half the $81 million requested). The court also awarded nearly $800,000 to the lone objector to the original settlement, whose efforts ultimately increased the settlement amount by more than 25 percent.

Banking

In re Bank of New York Mellon Corp. Foreign Exch. Transactions Litig., No. 1:12-md-2335 (S.D.N.Y.) (Sept. 24, 2015). Judge Kaplan. Approving class settlement.

The Bank of New York Mellon agreed to pay $335 million to settle claims of fraudulent misrepresentations about foreign exchange rates. In separate settlements, the bank agreed with government regulators to pay back charges to clients and to fire executives involved in the alleged fraud.

CLASS-IFIED INFORMATION

Kyle Wallace

After proposing a new jurisdictional framework for Georgia's highest appellate courts, Kyle Wallace was named to the governor's Appellate Jurisdiction Review Commission.

Consumer Protection

Tait v. BSH Home Appliances Corp., No. 8:10-cv-0711 (C.D. Cal.) (July 27, 2015). Judge Carter. Approving class settlement and attorneys' fees.

BSH Home Appliances Corporation and consumers settled class claims that BSH sold defective washing machines prone to grow mold, despite court concern that the settlement was "less than ideal." Although original estimates put the settlement value at nearly $42.5 million, only 3 percent of the class members submitted claims, meaning BSH's actual payout was just over $1 million. The court reluctantly approved $4 million in attorneys' fees, concluding that while the fees exceeded the actual class recovery, it was justified by the "hotly contested litigation, spanning over five years, including an appeal in the Ninth Circuit and petition for review in the Supreme Court."

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Employment

Sanchez v. Frito-Lay Inc., No. 1:14-cv-0797 (E.D. Cal.) (Aug. 5, 2015). Judge Ishii. Rejecting settlement.

Accepting the recommendation of the magistrate judge, Judge Anthony W. Ishii rejected a proposed class settlement in an employee suit against Frito-Lay alleging unpaid wages, overtime, and other violations of California labor law. The plaintiffs failed to provide sufficient evidence that the settlement class suffered the same injuries as the named plaintiff. The settlement also was plagued with other deficiencies, including an unfair distribution scheme, an excessive incentive award, and excessive attorneys' fees.

Krueger v. Ameriprise Fin. Inc., No. 0:11-cv-2781 (D. Minn.) (July 13, 2015). Judge Nelson. Approving class settlement and attorneys' fees.

Judge Susan Richard Nelson approved a $27.5 million class settlement of ERISA claims alleging that the fiduciaries of the Ameriprise Financial 401(k) plan breached their duties by investing plan assets in underperforming funds managed by an Ameriprise subsidiary. In a separate order, the court approved class counsel's request for $9.9 million in fees and costs (amounting to one-third of the monetary settlement).

The court held the class counsel had earned the large award. An intervening Eighth Circuit decision that vacated nearly two-thirds of a $36.9 million award on similar claims against a 401(k) fiduciary had contributed to the "great risk" class counsel faced and posed a "very real possibility of dismissal or denial of class certification."

Securities

Hill v. State St. Bank Corp., No. 15-1193 (1st Cir.) (July 24, 2015). Affirming settlement and attorneys' fee award.

The First Circuit affirmed a $60 million class settlement of shareholder claims over State Street's revenue recognition practices, rejecting the objectors' argument that the $10 million fee award was excessive. The First Circuit held that the objectors had "no standing to complain about the fee award" because they wouldn't benefit from a reduction. The court also rejected notification objections because the district court delayed the settlement hearing and allowed objectors to be heard despite the published deadline. ■