ALSTON & BIRD

CLASS ACTION & MDL roundup

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Where the (Class) Action Is

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

There was a veritable traffic jam in the courts for the automotive industry. Manufacturers saw their antitrust efforts denied, while used-car dealerships had their stalled-out class claim go back to the starting line (for a win!). One car maker won on its home court, but another lost on the road. Meanwhile, the rubber hit the road for one tire company, but the skies were only partly sunny in a pair of sunroof cases.

A few Davids won their cases against Goliaths. Production assistants can now afford their own coffee after an entertainment giant settled for a grande. One mom will get her day in court to protect her son's privacy in a roller coaster state case. And a class of referees who were voluntold to work cried foul and had their call upheld after further review.

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 any feedback you have on this or any other publication from the Class Action & Multidistrict Litigation Team.

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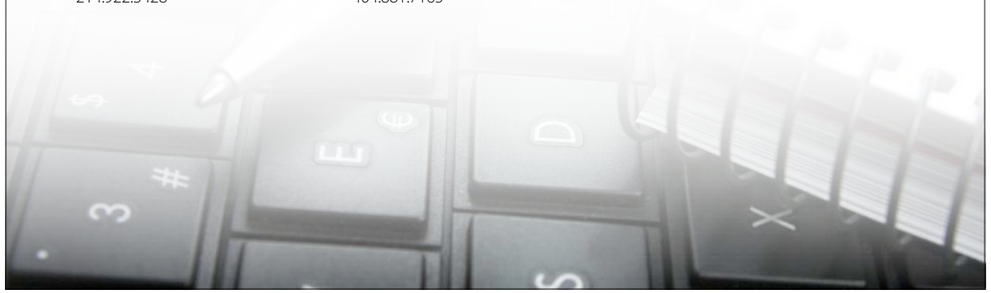

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Antitrust

- **Direct Purchasers Struggle to Find Their Bearings in Automotive Parts Suit**

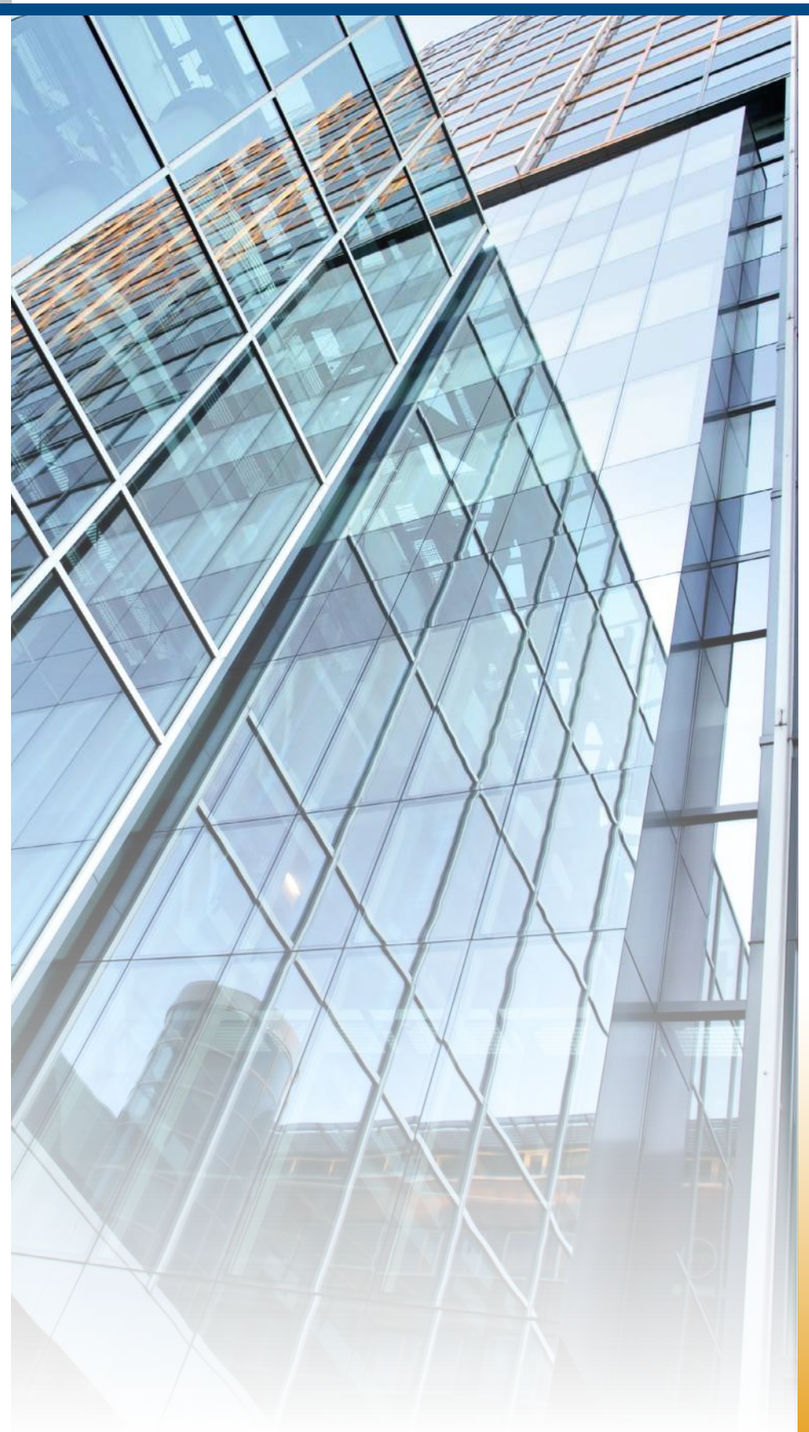
  In re Automotive Parts Antitrust Litigation, No. 2:12-md-02311 (E.D. Mich.) (Jan. 7, 2019). Judge Battani. Denying class certification.

  Three direct purchasers of automotive and industrial machinery bearings moved to certify a class in a suit against manufacturers and suppliers involving alleged price-fixing and bid-rigging. Judge Battani denied the motion on typicality and adequacy grounds, finding that the three named plaintiff direct purchasers—small distributors of bearings sold for aftermarket use in industrial applications—were situated differently from large OEM customers. For instance, the three named plaintiffs' injuries primarily related to alleged coordinated price increases, while the large OEMs' injuries could also be attributed to bid-rigging.

- **Putting the Class Cert Cart Before the *Daubert* Horse**

  Cole's Wexford Hotel Inc. v. Highmark Inc., No. 2:10-cv-01609 (W.D. Pa.) (Mar. 1, 2019). Judge Conti. Denying class certification.

  Judge Conti denied as premature Cole's Wexford's bid for class certification in an antitrust suit alleging a conspiracy to monopolize Pennsylvania health insurance markets. The hotel chain relied solely on its expert's opinion in attempting to show that the predominance requirement of Rule 23 was satisfied. But neither party addressed whether the expert's opinion was admissible under *Daubert* in their briefings. Judge Conti found this to be a crucial misstep: the court could not assess the sufficiency of the expert's evidence in establishing predominance without first determining whether the expert's proposed methodology was sufficiently reliable under *Daubert*. ■



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Alston & Bird builds from within thanks to young attorneys like **David Carpenter**, named to the *Daily Report*'s "On the Rise."

David Carpenter

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Banking, Financial Services & Insurance

Breadth Is More

Red Barn Motors Inc., et al. v. NextGear Capital Inc., No. 18-01409 (7th Cir.) (Feb. 13, 2019). Vacating order rescinding class certification and remanding.

In June 2017, U.S. District Judge Pratt granted class certification on claims by three used-car dealerships related to "floorplan agreements" that dated back to 2005. In "an extensive 30-page analysis," which the Seventh Circuit panel called "a model of clarity," he concluded that the plaintiffs' claims met all the requirements of Rule 23(a) and Rule 23(b)(3).

Judge Pratt subsequently rescinded class certification on NextGear's motion to reconsider. In a "terse" opinion, Judge Pratt agreed that the plaintiffs' case theory – that the floorplan agreements were ambiguous on their face – "undermines the elements of commonality and predominance for class certification" because the agreements' ambiguity "necessitates individualized proof" through extrinsic evidence.

On review, the Seventh Circuit determined that neither ambiguity, "nor the prospect of extrinsic evidence, necessarily imperils class status." Ultimately, the panel vacated the order and remanded to Judge Pratt, concluding that his order "lack[ed] sufficient reasoning for our court, on review, to ascertain the basis of its decision."

Class Cert Granted in State Farm Battle over ACV

Hicks, et al. v. State Farm Fire & Casualty Co., No. 0:14-cv-00053 (E.D. Ky.) (Feb. 21, 2019). Judge Wilhoit. Granting class certification.

Senior U.S. District Judge Henry R. Wilhoit certified a class of State Farm policyholders claiming the insurer improperly undervalued labor costs when determining the "actual cash value" owed to them for their damaged or destroyed homes. In his written opinion, Judge Wilhoit pointed to State Farm's admission that withholding labor depreciation from payments to its insureds was a common practice until July 2015 and that labor depreciation was capable of being calculated in a "common, automated manner." Judge Wilhoit concluded that all the requirements for class certification were satisfied, noting that the core question of whether State Farm's practice of depreciating labor costs was improper could be efficiently resolved in a class action.

State Farm's appeal of Judge Wilhoit's oral order granting the motion for class certification – made before issuing his written opinion – is currently pending in the Sixth Circuit. ■

"Thanks to Delaware, we are truly seeing "The Continuing Shift of Merger Litigation to Federal Courts" according to **Robert Long** and **Andy Sumner** in Transaction Advisors."

Robert Long

Andy Sumner

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Consumer Protection

- **Retailer Customer Has Quality Wardrobe but No Standing**

  Kamal v. J. Crew Group Inc., et al., Nos. 17-02345 and 17-02453 (3rd Cir.) (Mar. 8, 2019). Affirming motion to dismiss for lack of standing.

  Ahmed Kamal alleged violations of the Fair and Accurate Credit Transactions Act (FACTA) due to J. Crew's inclusion of both the first six and last four digits of his credit card number on printed receipts. The Third Circuit agreed with the district court that the putative class representative had failed to plead a concrete injury from the alleged FACTA violation because he had not alleged that anyone – other than the cashier – had seen these receipts or that his identity was stolen or credit card number misappropriated. The court of appeals concluded that Kamal had pleaded a technical violation of FACTA's ban on printing more than the last five digits of a consumer's credit card, but held that he could not plead a concrete injury simply by alleging that this technical violation increased the risk of identity theft.

- **Pharmaceutical Company Can't Get "Off" on Its Off-Label Promotion of Depression Drug**

  In re Celexa and Lexapro Marketing and Sales Practices Litigation, No. 18-01146 (1st Cir.) (Jan. 30, 2019). Reversing district court's entry of summary judgment.

  The First Circuit reversed a district court's grant of summary judgment to Forest Pharmaceuticals on the plaintiffs' RICO claims. The plaintiffs claimed economic injury stemming from Forest's improper off-label marketing of the drugs Celexa and Lexapro as effective for treating pediatric depression. The district court granted summary judgment because it determined the plaintiffs had not submitted evidence sufficient to show that the off-label uses were ineffective for that purpose.

  The First Circuit reversed, finding that the evidence of efficacy is conflicting, which is the "hallmark" of factfinding, not grounds for summary judgment. The court also rejected Forest's assertion that the plaintiffs failed to show but-for causation. It noted Forest's promotional spending aimed at convincing doctors to prescribe its drugs to pediatric patients and held that a positive correlation between this promotional spending and drug sales could support a finding that Forest's off-label marketing caused the plaintiffs to pay for ineffective drugs.

- **Ninth Circuit Won't Revive Cardiovascular Health Class Action**

  Dachauer v. NBTY Inc. and Nature's Bounty Inc., No. 17-16242 (9th Cir.) (Jan. 10, 2019). Affirming summary judgment.

  Paul Dachauer alleged that the labels on Nature's Bounty vitamin E supplements falsely claimed the supplements support cardiovascular health and promote immune function, immune health, heart health, and circulatory function. According to Dachauer, the supplements do not prevent cardiovascular disease and may increase the risk of all-cause mortality. The district court disagreed and granted Nature's Bounty's motion for summary judgment. The Ninth Circuit affirmed, finding that the majority of the plaintiff's claims were preempted and that the remaining claims lacked evidence that vitamin E supplements are actually harmful.

- **California Court Sold On Arguments of Sold-Out Hotels**

  Buckeye Tree Lodge and Sequoia Village Inn LLC v. Expedia Inc., et al., No. 3:16-cv-04721 (N.D. Cal.) (Mar. 13, 2019). Judge Chhabria. Granting and denying motions for class certification.

  A class of hotel owners filed Lanham Act claims related to Expedia's alleged practice of falsely labeling as "sold out" hotels that were never available to be booked through Expedia, and then steering customers to similar, competitor hotels that can be booked through Expedia. In certifying a class for injunctive relief claims, the district court rejected Expedia's argument that the plaintiffs lacked standing simply because Expedia had removed all named plaintiffs from its

"You'll definitely have a firm grasp of the consumer lending arena if you keep up with the Consumer Finance ABstract, a new blog from our Consumer Financial Services Team."

website. It held that the plaintiffs had sufficiently demonstrated a "likelihood of future injury" because there was no evidence that Expedia had made a meaningful attempt to eliminate the practice, even if it had selectively removed the hotels at issue.

The district court denied the plaintiffs' bid to certify a money-damages class on predominance grounds, however, finding that the plaintiffs had failed to proffer a model or legitimate theory for estimating disgorgement-of-profits damages.

Misleading Infant Formula Claims Crawl Along

Hasemann, et al. v. Gerber Products Co., No. 1:15-cv-02995 (E.D.N.Y.) (Feb. 20, 2019). Judge Brodie. Granting in part motion to certify class.

Judge Brodie certified subclasses of Florida and New York consumers on claims related to Gerber's alleged deceptive labeling of its Good Start Gentle (GSG) infant formula. The plaintiffs' claims centered around a label affixed to some, but not all, units of GSG, which declared that it was the "1st & Only Routine Formula TO REDUCE THE RISK OF DEVELOPING ALLERGIES."

In certifying the subclasses, Judge Brodie noted that, while some units may not have been labeled with the representations, none explicitly disclaimed it. Consequently, he found typicality was satisfied because the representations could be understood to apply to the full product line. The court further called it a "near certainty" that every consumer was exposed to the alleged misrepresentation because diminished risk of allergy was a consistent and prominent theme among Gerber's various marketing campaigns for GSG. Thus, it held that classwide questions predominate for the Florida and New York subclasses. On the other hand, the court declined to certify the other proposed subclasses due to common-law requirements of reliance, which cannot be proven classwide.

Court (Weed) Kills Class Certification

Blitz v. Monsanto Company, No. 3:17-cv-00473 (W.D. Wis.) (Jan. 2, 2019). Judge Conley. Denying motion for class certification.

A Wisconsin district court declined to certify a class of Wisconsin consumers who purchased Monsanto's Roundup weed-killing product that contained the label "Glyphosate targets an enzyme found in plants but not in people or pets." Thomas Blitz had alleged that Roundup labeling misled him into believing the product was safe to use around people and pets, despite the main ingredient in the product having been registered as a pesticide with the EPA since 1974. Although the court found the proposed class satisfied the requirements for numerosity, commonality, typicality, and adequacy, it denied class certification because individual questions of material inducement predominated questions common to the class. ■

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Bo Phillips will make sure you get your fill from the webinar "Food and Beverage Class Actions: Litigating False Advertising, Labeling, Slack-Fill Packaging or Food Safety Claims" on July 10.

Bo Phillips

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Environmental

- **High Court Declination Gives Toxic Tort Plaintiffs Alternative Certification Option**

  Behr Dayton Thermal Products LLC v. Martin, No. 18-472 (U.S.) (Mar. 18, 2019). Denying certiorari.

  The environmental class action against Behr survives another day. Last year, the Sixth Circuit certified a class of residents asserting groundwater pollution claims as an "issue class" under Rule 23(c)(4). Behr argued to the Supreme Court that the Sixth Circuit's ruling nullified Rule 23(b)(3)'s predominance requirement and directly contravened its sister circuit's holding that predominance be a prerequisite to issue class certification.

  Despite the circuit split and amici briefing from the Chamber of Commerce and other industry groups, the Supreme Court declined to take up the case. The Court's decision leaves in place the broad interpretation of Rule 23(c)(4) in the Sixth Circuit and endorses a seldom-used tool for class certification—particularly in toxic tort actions. Expect creative plaintiffs to use the "issue certification" maneuver more frequently in the near future.

- **Landfill Wins Early Dismissal of Smelly Odor Suit**

  Baptiste v. Bethlehem Landfill Co., No. 5:18-cv-02691 (E.D. Pa.) (Mar. 13, 2019). Judge Kenney. Dismissing class action.

  Residents in rural Pennsylvania sued a nearby 224-acre waste facility, claiming that the landfill's "offensive" odors caused the residents repeated discomfort. Despite a well-documented history of improper maintenance and management, the court granted the landfill's motion to dismiss. It held that the residents' public nuisance, private nuisance, and negligence claims each suffered from defects – to wit: no special injury as required for public nuisance, no neighboring landowners as required for private nuisance, and no duty to plaintiffs as required for negligence.

Baptiste reminds us that Rule 12(b)(6) motions can be a potent weapon in environmental class actions. Plaintiffs often shoehorn common-law claims into unique fact patterns against highly regulated defendants; those claims are particularly susceptible to early dispositive motions. ■

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Our San Francisco office grows with the addition of environmental partner **Greg Christianson**.

Greg Christianson

"Apparently, there's another Roundup in the world. **Clay Massey** talks about the other one and why "Bayer Vows to Keep Fighting Roundup Cases After $2B Verdict" with Agri-Pulse."

Clay Massey

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Labor & Employment

- **Supreme Court Rules Truckers Can't Be Compelled to Arbitrate FLSA Claims**

  New Prime Incorporated v. Oliveira, No. 17-340 (U.S.) (Jan. 15, 2019). Affirming First Circuit's denial of motion to compel arbitration.

  The U.S. Supreme Court ruled that New Prime Inc. could not compel arbitration against a class of plaintiffs alleging that the interstate trucking company failed to pay independent contractor truck-driver apprentices the proper minimum wage under the federal Fair Labor Standards Act. New Prime contented that the plaintiffs were required to arbitrate their wage-and-hour claims because they were not covered by Section 1 of the Federal Arbitration Act (FAA), which exempts from arbitration "contracts of employment of … workers engaged in foreign or interstate commerce." It argued that this exemption did not apply because the plaintiffs were independent contractors and therefore were not subject to any "contracts of employment."

  In rejecting this argument, the Court examined Congress's intent when it referred to "contracts of employment" in the FAA. Ultimately, it determined that "*at the time Congress enacted the [FAA]*," the phrase "contract of employment" was used to describe work agreements involving independent contractors and did not necessarily signal a formal employer-employee relationship. Therefore, the Court determined the agreements to drive trucks for New Prime qualified as "contracts of employment of … workers engaged in foreign or interstate commerce," even if the plaintiffs were ultimately considered independent contractors.

- **Class of Home Mortgage Consultants Certified in "Clawed Back" Wage Suit**

  Kang v. Wells Fargo Bank N.A., No. 5:17-cv-06220 (N.D. Cal.) (Feb. 6, 2019). Judge Freeman. Granting motion for class certification.

  Judge Freeman certified a class of Wells Fargo home mortgage consultants and private mortgage bankers (HMCs) asserting that Wells Fargo "clawed back" their wages that are paid out of employees' sales commissions. The class alleges that Wells Fargo violated numerous wage-and-hour laws because HMCs were not paid for tasks unrelated to sales that Wells Fargo required them to do. In certifying the class, Judge Freeman found that the claims were "grounded in a common compensation plan applicable to all class member HMCs." Judge Freeman also dismissed Wells Fargo's argument that different work habits by HMCs should defeat predominance, noting that the Ninth Circuit rejected a nearly identical argument in *Vaquero v. Ashley Furniture*: "Defendants either paid or did not pay their sales associates for work performed."

- **District Court Strikes Down Portions of DOL's New Association Health Plan Rule**

  State of New York v. U.S. Department of Labor, et al., No. 1:18-cv-01747 (D.D.C.) (Mar. 28, 2019). Judge Bates. Invalidating portions of the rule.

  A federal district court judge struck down a major portion of the Department of Labor's (DOL) newly issued association health plan rule, which purportedly allows small businesses and the self-employed to buy health insurance on the large-group market. In striking down portions of the rule, Judge Bates held that the rule was intended as an unlawful "end run" around the Affordable Care Act (ACA). Judge Bates found the DOL's expansion of those persons whom it considers to be an "employer" under ERISA ignored "Congress's clear intent" that the law cover large companies' benefit plans, not plans for small businesses and individuals. He further held that, by allowing small businesses and individuals to buy health care plans from the large-group insurance market, the rule violated the

"Forewarned is forearmed. Tune in to Lorman's webinar "Dealing with Class Action Lawsuits Regarding Retirement Plans and Fees" with **Emily Costin** on August 20."

Emily Costin

ACA, which created a "careful statutory scheme distinguishing rules that apply to individuals, small employers, and large employers." The rule's interpretation also "sows discord among the Final Rule, ERISA, and the ACA." Judge Bates remanded the final rule to the DOL, which intends to appeal.

Restaurant Chain Shakes Employees Subject to Arbitration Agreements

Vigueras v. Red Robin International Inc., et al., No. 8:17-cv-01422 (C.D. Cal.) (Feb. 21, 2019). Judge Selna. Granting in part and denying in part a motion to decertify an arbitration subclass.

In October 2018, the court certified six subclasses of California Red Robin employees alleging various wage and hour, meal and rest break, and related employment claims. One of the certified subclasses included all putative class members who signed arbitration agreements because the circumstances under which the employees signed the agreements were not specified at that time and therefore the court could not determine whether the agreements were enforceable.

When this issue ripened, Red Robin filed a motion to decertify this subclass. After determining the arbitration agreement is enforceable, Judge Selna held that the agreement's plain language does not include employees who signed the agreement after the plaintiff filed the class action. Judge Selna granted Red Robin's motion to decertify those employees who signed the arbitration agreement before the lawsuit was filed, but denied it for employees who filed it thereafter.

Touchdown for "Voluntary" Referees

Keith Ernst, et al. v. ZogSports Holdings LLC, No. 2:18-cv-09043 (C.D. Cal.) (Feb. 21, 2019). Judge Klausner. Granting motion for class certification.

The district court granted conditional class certification to plaintiff flag football team members who argued that the for-profit organizer of the league, ZogSports, should pay them for the mandatory time that they were required to "volunteer" as referees in order to play in the league. ZogSports's policy, according to the plaintiffs, requires that for each game a team plays, it must provide a "volunteer" referee for another team's game to assist the paid referee. The judge granted conditional certification for the plaintiffs to pursue their Fair Labor Standards Act claims, finding that the plaintiffs did not need to show an employee relationship with ZogSports during the notice stage; rather, they can establish the more lenient standard of showing that they are similarly situated to other potential members of the class by showing they were "victims of a single decision, policy, or plan."

Flight Attendants Win, but Airline Gets Points for Good-Faith Efforts

Bernstein, et al. v. Virgin America Inc., et al., No. 3:15-cv-02277 (C.D. Cal.) (Jan. 16, 2019). Judge Tigar. Granting summary judgment on damages.

After a previous finding that Virgin America had failed to pay flight attendants for hours worked and shorted their overtime pay, the district court granted summary judgment on the issue of damages and awarded $77 million to a class of Virgin flight attendants. The judge did, however, reduce the flight attendants' requested payout by $8 million, finding that Virgin made a good-faith effort to comply with its obligations under the law.

California Clothing Retailer Hung Out to Dry for Forcing Employees to Call In Before Shifts

Ward v. Tilly's Inc., No. B280151 (Cal. App.) (Feb. 4, 2019).
Reversing dismissal of complaint and remanding.

A California appeals panel held that Tilly's employees sufficiently alleged claims against the clothing retailer for violating Industrial Welfare Commission Wage Order 7. According to the putative class action complaint, Tilly's assigned its employees a combination of regular and "on-call shifts." The plaintiffs further alleged that employees were required to contact their stores two hours before the start of their on-call shifts to determine whether they needed to report to work, and that they were subjected to discipline if they failed to contact their stores before on-call shifts, if they contacted the stores late, or if they refused to work on-call shifts.

The appeals panel found these call-in requirements were inconsistent with being truly off duty because they imposed significant limitations on "how employees can use their time both two hours before an on-call shift, when they must be available to contact Tilly's, and during the on-call shift itself, when employees must be available to work." Thus, it held that these telephonic reporting practices triggered the reporting-time pay requirement of Wage Order 7, but it also emphasized that employers do not trigger the reporting-time pay requirements merely by expecting workers to check their schedules. ■

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Privacy & Data Security

- **Cruise Line TCPA Class Sinks and Swims on Rule 23 Motion**

  McCurley v. Royal Seas Cruises Inc., No. 3:17-cv-00986 (S.D. Cal.) (Mar. 27, 2019). Judge Bashant. Granting motion for class certification.

  Royal Seas Cruises allegedly violated the Telephone Consumer Protection Act (TCPA) by hiring a lead-generation service to organize automated calls to potential customers, ultimately directing the recipients to cruise line salespeople. In a thorough 65-page order, the court held that a modified class of call recipients survived both a Rule 23 analysis and a jurisdictional challenge. The court rejected Royal's argument that the class lacked standing under *Spokeo* because proof of class member injuries would require individualized inquiries. The court rejected that argument by focusing on declarations from the named plaintiffs attesting that they did not provide their personal information to Royal or its lead generator, did not consent to be called by Royal, and received automated calls made by Royal or on Royal's behalf.

  In rejecting Royal's predominance argument, the court held that the cruise company had not shown that individualized inquiries of consent would predominate because Royal had not provided actual evidence of prior consent and because the issue of consent is otherwise capable of classwide resolution. Key to the first finding was that the "opt-in" form providing the purported class-member consent made no mention of Royal, its lead generator, or any third-party digital marketing companies involved in Royal's lead-generation scheme. The court's second finding was undergirded by the fact that Royal's consent theory centered on a "100% opt-in" theory, while the plaintiffs' theory was also classwide in nature. The class plaintiffs' victory was not a complete one because the court declined to certify the proposed class under Rule 23(b)(2) because the primary relief sought by the plaintiffs was monetary.

- **Only Statewide Plaintiffs Cruise Ahead in TCPA Vacation Call Case**

  Bakov v. Consolidated World Travel Inc., No. 1:15-cv-02980 (N.D. Ill.) (Mar. 21, 2019). Judge Leinenweber. Granting motion to certify statewide class and denying motion to certify nationwide class.

  Angel Bakov sued Consolidated World Travel for allegedly directing an Indian technology company to call 1.6 million consumers without prior express written consent in violation of the TCPA. Citing the Supreme Court's *Bristol-Myers* decision, Judge Leinenweber determined that his court lacked jurisdiction over plaintiffs who neither lived in Illinois nor suffered injuries in the state.

  By contrast, the court certified a statewide class of Illinois citizens, rejecting the cruise company's argument that class members would not be reliably ascertainable or able to present common questions of fact given differences in the phone calls the plaintiffs received. The court allowed class members to submit affidavits identifying themselves as call recipients meeting the requisite criteria. And because the proposed class all received pre-recorded phone calls from the same company, marketing the same vacation package, commonality was satisfied.

- **Illinois Workers' BIPA Suit Will Stand Again in State Court**

  Johnson v. United Airlines Inc., et al., No. 1:17-cv-08858 (N.D. Ill.) (Mar. 18, 2019). Judge Kendall. Granting plaintiffs' motion for relief from judgment.

  In a privacy class action brought by former United Airlines employees against their employer, the Northern District of Illinois voided its earlier judgment dismissing the case and remanded it back to state court. In its earlier decision, the court had concluded that the plaintiffs lacked standing by not alleging that United had actually disclosed private information in violation of the Illinois Biometric Information Privacy Act (BIPA). The former employees then asked the court to revisit its prior decision, arguing that a federal district court may not dismiss a case on the merits if it lacks jurisdiction to hear the case in the first place. The court agreed, voiding its earlier decision and remanding the case to state court.

Congratulations to **Kim Peretti** for her latest awards: Cybersecurity Docket's 2019 "Incident Response 30" list and 2019 "Top Lawyer" for cybersecurity by *Washingtonian* magazine.

Kim Peretti

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CLASS ACTION & MDL roundup

Amusement Park Loses Roller Coaster Privacy Case In Illinois Court

Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186 (Ill.) (Jan. 25, 2019). Reversing decision dismissing case.

Stacy Rosenbach purchased a season pass to the Six Flags theme park for her son and alleged that the park violated BIPA when it obtained her son's fingerprint as part of Six Flags' security process for pass holders without obtaining his consent or disclosing its policy. The court of appeals ruled that an individual who raises a "technical violation of the statute without alleging some injury or adverse effect is not an aggrieved person" and lacks the statutory standing needed to file the suit. The Illinois Supreme Court reversed and remanded, saying that an individual need not allege any actual injury or adverse effect beyond the violation of a statutory right to qualify as an "aggrieved" person under BIPA. Because the case is in Illinois state court, Article III standing arguments under *Spokeo* were not considered. ■

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Products Liability

Court Dismisses Nutty Class Action Against Car Maker

Wozniak v. Ford Motor Co., No. 2:17-cv-12794 (E.D. Mich.) (Jan. 4, 2019). Judge Murphy. Granting motion to dismiss.

A Michigan federal judge dismissed a proposed nationwide class action brought by purchasers of Ford vehicles that contain defectively designed lug nuts. The plaintiffs claim that Ford breached its new-vehicle limited warranty because it did not repair or replace the lug nuts when notified that they deform and swell. Although the plaintiffs asserted that Ford violated the consumer protection laws of all 50 states, the court discovered that the named plaintiffs only alleged injuries in 27 states and therefore lacked standing to bring claims under laws of the other states. The court also found that the named plaintiffs never presented their vehicles to Ford to have the defective lug nuts replaced within the warranty period. Further, the complaint did not present any legally viable state-law fraud or consumer protection claims because it contained no allegations that Ford made any misrepresentations related to the lug nuts. The plaintiffs argued that Ford knew of the defect before the sale of the vehicles because there were negative reviews on third-party forum websites and complaints filed with the National Highway Traffic Safety Administration (NHTSA). The court held that "[a]lthough 'knowledge' need be alleged only 'generally' under … Rule 9(b), Plaintiffs' general assertions of Defendant's knowledge without any alleged facts that Defendant was even aware of the complaints do not rise above mere speculation." Finally, the plaintiffs' unjust enrichment claims also failed because they did not allege any facts to establish that Ford used cheaper lug nuts or obtained any benefit from refusing to replace them.

Court Gives Green Light to Proposed Class Action

Costa v. Nissan North America Inc., No. 1:18-cv-11523 (D. Mass.) (Jan. 18, 2019). Judge Sorokin. Denying motion to dismiss.

A Massachusetts federal judge denied Nissan's motion to dismiss a proposed class action alleging that certain Altima models contain dangerously defective transmissions. Nissan moved to dismiss the suit, arguing that the allegations in the complaint were impermissibly vague and did not adequately identify the defects in the car's design. However, the court held that the plaintiff stated viable claims under the Massachusetts Consumer Protection Act and state and federal warranty laws. The complaint included information about how the defect manifested in the named plaintiff's car and resulted in total transmission failure while she was driving, which required a costly replacement. Likewise, the plaintiff's state and federal warranty claims survived because the court found that she described the safety-related consequences of a faulty transmission, such as sudden loss of momentum, unexpected surges of power, and inoperable brake lights, and did not merely state that it wore out sooner than expected. The court found that, because the complaint provided fair notice to Nissan and contained ample facts that, if true, would entitle the plaintiff to relief, the motion to dismiss was denied.

Watch This Motion to Dismiss

Sciacca v. Apple Inc., No. 5:18-cv-03312 (N.D. Cal.) (Jan. 25, 2019). Judge Koh. Granting motion to dismiss.

A putative class action alleging that Apple misrepresented the quality of the screens on its watches was dismissed because the plaintiff failed to identify the particular defect that causes the screens to detach, crack, or shatter. The court found that the vague allegations in the complaint did not satisfy Rule 9(b)'s heightened pleading standard for claims sounding in fraud and noted that an unspecified potential to fail in no way equates to a material product defect. The court also held that the plaintiff failed to provide any support for the allegation that Apple's website contained statements that misled him about the durability of the watch. The plaintiff merely pled that he reviewed advertisements that described the Apple Watch as a good complement to sporting activities such as

You can find **Cari Dawson** wearing two hats—conference chair and panelist—at the 12th National Forum on Defending and Managing Automotive Product Liability Litigation in Chicago, July 18–19.

Cari Dawson

swimming, running, and biking, but he did not indicate what was false or misleading about those statements or how they relate to the alleged defect in the screens. In addition, Judge Koh found that the plaintiff could not bring any breach of warranty claims because his watch broke three months after its express warranty had expired and Apple had disclaimed all statutory and implied warranties. Similarly, the plaintiff's unjust enrichment claim was dismissed with prejudice because Apple's limited warranty clearly prohibits direct, special, incidental, or consequential damages under "any other legal theory." Finally, Judge Koh held that the plaintiff did not have standing to seek injunctive relief under Rule 12(b)(1) because the possibility that he might be injured in the future by the alleged defect if he potentially repairs his watch is an insufficient allegation of future harm.

Defendants Win Summary Judgment in Alleged Tire Defect Case

Hamilton v. TBC Corp., No. 2:17-cv-01060 (C.D. Cal.) (Jan. 29, 2019). Judge Gee. Granting motion for summary judgment.

An importer and distributor of RV trailer tires won summary judgment in a certified class action brought by Florida consumers who claim that design and/or manufacturing defects made the tires they purchased prone to tread separations and failure under normal operating conditions. The suit alleged causes of action for fraud, unjust enrichment, breach of warranty, negligence, and violations of Florida's consumer protection statute. The plaintiffs' expert relied on a report from the NHTSA analyzing warranty return rates for Firestone passenger tires, but did not include any analysis comparing those tires to the RV trailer tires at issue in this case. The court found that "[t]his error is material, given that the NHTSA has concluded that performance trends for one population of tires may not apply to another tire population that differs in design or application." The plaintiffs' expert also did not establish that a "significant" warranty return rate means that there was a tire defect. Consequently, the court held that on the current evidentiary record, no reasonable factfinder could conclude that the tires were defective, and the defendants were entitled to judgment as a matter of law on all claims.

Plaintiff Sees the Light in Defective Sunroof Suit

Enea v. Mercedes-Benz USA LLC, No. 4:18-cv-02792 (N.D. Cal.) (Jan. 31, 2019). Judge Gilliam. Granting in part and denying in part motion to dismiss.

A California consumer filed a putative class action alleging that some Mercedes vehicles have defective sunroofs that are prone to spontaneously explode, shatter, or crack. The court dismissed the claims brought under the state's Unfair Competition Law and Consumer Legal Remedies Act because the plaintiff failed to plausibly allege that the defendants affirmatively misrepresented the sunroofs or actively omitted any material facts. The court also found that allegations regarding safety recalls issued by other car manufacturers, a change in the provider of sunroof glass for Mercedes vehicles, and undated customer complaints did not show that the defendants had knowledge of the defect during the relevant time periods. However, the court allowed the plaintiff's defect and breach of warranty claims to proceed. Although the plaintiff alleges that his sunroof shattered after the one-year implied warranty period had expired, he stated a plausible claim that a latent defect existed at the time of sale. Moreover, because the plaintiff claims that the sunroofs (a single component of Mercedes vehicles) are prone to explode while the cars are in motion, "[t]he alleged defect poses a risk for any driver on the road, and is more than sufficient to survive at the pleading stage." The plaintiff likewise alleged sufficient facts to support a plausible claim under the express limited warranty because the spontaneous shattering of the sunroofs may be attributable to material or workmanship defects.

Court Partially Dismantles Suit Against Carmakers

Mandani v. Volkswagen Group of America Inc., No. 4:17-cv-07287 (N.D. Cal.) (Feb. 15, 2019). Judge Gilliam. Granting in part and denying in part motion to dismiss.

A California federal judge granted most of the defendants' motion to dismiss a proposed consumer class action alleging that certain Audi vehicles contain defective direct-shift gearbox transmissions that cause "sudden, rough, unexpected shaking and violent jerking"

when drivers accelerate, shift gears, and decelerate. Judge Gilliam allowed only the express warranty claims of one plaintiff to proceed because he experienced transmission problems during the warranty period. He held that the other three named plaintiffs could not bring express warranty claims based on a latent defect discovered outside the limits of the new-vehicle limited warranty, even if they could prove the warrantor knew of the defect at the time of the sale. Judge Gilliam also found that the express warranty claims should go forward only against the Volkswagen entity that actually issued the warranty in question. In addition to their other causes of action, the court rejected the plaintiffs' claims under California's Consumer Legal Remedies Act and Unfair Competition Law because they did not present evidence that the defendants had pre-sale knowledge of the specific transmission defect. The fact that the plaintiff purchased his vehicle in California in April 2013 was "fatal" to his claims because at that point the defendants had only issued one technical service bulletin regarding transmission-noise issues and the one relevant complaint to the NHTSA involved a different model vehicle.

Court Throws Shade on Leaky Sunroof Class Action

Gaines v. General Motors Co., No. 3:17-cv-01351 (S.D. Cal.) (Feb. 25, 2019). Judge Burns. Granting motion to dismiss.

A California federal judge dismissed a proposed class action alleging that General Motors violated its warranty agreements by forcing customers to pay for repairs to leaky sunroofs because the named plaintiff did not experience the defect until three years after the warranty had expired on her 2010 Cadillac SRX. The court found no legal support for the plaintiff's arguments that her repair costs should have been covered because General Motors allegedly knew about the leaking sunroof defect during her warranty period. "[P]roblems that 'manifest' during the warranty period, and only those problems, are covered," and the relevant case law makes clear that "manifest" refers to "a defect in the plaintiff's own product becoming apparent, not anything involving other owners' products, or a seller's knowledge about products in general." If a product performs as warranted within the warranty period, there can be no claim for breach of express warranty. However, Judge Burns granted leave to amend the complaint because he could not be certain on the current record that the plaintiff could not cure her unfair business practices and false advertising claims.

Court Puts the Brakes on Class Action

Haag v. Hyundai Motor America, No. 6:12-cv-06521 (W.D.N.Y.) (Mar. 5, 2019). Judge Larimer. Denying motion for class certification and remanding to state court.

A New York federal judge held that a lawsuit regarding a brake defect in Hyundai Santa Fe SUVs cannot be certified as a class action because the plaintiff did not demonstrate that common issues would predominate over individual ones. The plaintiff contends that Hyundai Motor America violated New York's consumer protection statute by misrepresenting or omitting material facts about the alleged brake defect at the time she purchased her vehicle. The court found that the plaintiff satisfied the threshold requirements for class certification under Rule 23(a). However, when analyzing the more stringent requirements of Rule 23(b), the court held that there was no evidence of an injury common to the class under the plaintiff's diminution in value or overpayment damages theory. Given the inherently individualized nature of a purchase decision, it is impossible to conclude on a global basis that knowledge of the alleged defect would have affected the proposed class members' decisions to buy their vehicles or raised their purchase prices by a common amount. Moreover, the plaintiff did not show that the class vehicles' market value was in fact diminished by the possibility that their brake pads would corrode prematurely. Because the lack of certification deprived the court of jurisdiction under the Class Action Fairness Act, the case was remanded to New York state court for the plaintiff to pursue her individual claims. ■

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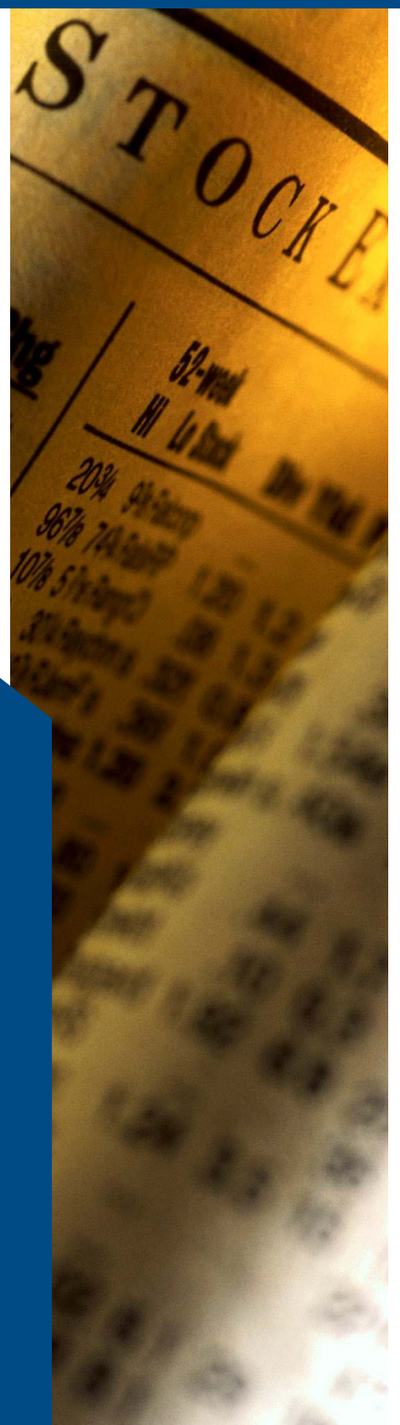

Securities

S.D.N.Y. Denies Second Attempt at Class Certification in Investor Suit

Royal Park Investments SA/NV v. The Bank of New York Mellon, No. 1:14-cv-06502 (S.D.N.Y.) (Feb. 15, 2019). Judge Woods. Denying class certification.

Judge Woods denied an investor's renewed motion for class certification in a suit against The Bank of New York Mellon. The plaintiffs alleged that BNY Mellon failed to protect the interests of investors who held certificates or notes entitling them to revenue from mortgage-backed securities during the financial crisis. The court had previously denied class certification in August 2017. In denying the renewed motion, the court found that the plaintiffs had failed to establish common questions of law, and fact predominated over individualized issues. The court found that the potential efficiencies gained from addressing the common issues of the plaintiffs' claims in a classwide adjudication was outweighed by the individualized issues and the potential burden of forcing class members to litigate factual issues, including those related to breach, discovery, and even standing, that were wholly unrelated to their claims.

Tennessee Federal Judge Partially Certifies Class of Investors

Rao v. Quorum Health Corporation, et al., 3:16-cv-02475 (M.D. Tenn.) (Mar. 29, 2019). Judge Crenshaw.

Judge Crenshaw in the Middle District of Tennessee granted in part a group of investors' motion for class certification. The plaintiffs, a class of Quorum Health Corp. investors, alleged that Quorum withheld information from them about its spinoff from Community Health Systems Inc. Specifically, the investors alleged that Quorum failed to disclose that its goodwill was impaired before the spinoff, and because of that failure, they bought stock in Quorum at inflated prices. The court found that the defendants had not rebutted the presumption of fraud on the market but rather had merely created a complex fact issue better left for trial. The court found that the plaintiffs had established the superiority of a class action over pursuing individual claims and met the requirements of Rule 23(a), including numerosity and commonality, for which the court noted that if the defendants had violated federal law as to one plaintiff, then they had violated it as to all. The court also found that the proposed class representative was adequate and typical of the class. The court, however, dismissed some of the plaintiffs' claims that they were misled and so only partially granted the motion for class certification. ■

Congratulations to **Tod Sawicki** and **Christina Bortz** and the many readers who gave them a JD Supra 2019 Readers' Choice Award for their advisory "Cryptocurrency Securities Class Action Suits: Paving the Path for U.S. Jurisdiction."

Tod Sawicki

Christina Bortz

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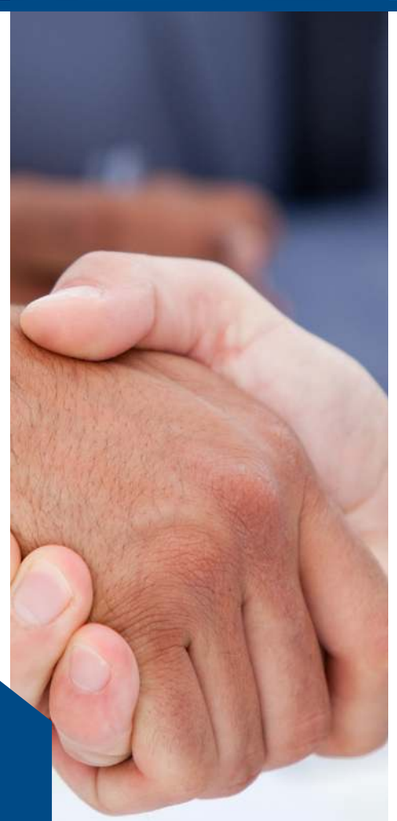

Settlements

Fair Shakes for All-in $9 Million Settlement of Claims for Overstated Protein Content

Gregorio v. Premier Nutrition Corp., No. 1:17-cv-05987 (S.D.N.Y.) (Jan. 17, 2019). Judge Torres. Approving settlement.

Judge Torres granted final approval of a $9 million settlement in a class action alleging that Premier Nutrition Corp. violated state and federal consumer protection laws by misrepresenting the amount of protein contained in its "Premier Protein" shakes. The class included people in the U.S. who had purchased the shakes between 2011 and 2018, and class members with proof of purchase were entitled to submit claims for $1 per purchased shake, up to $40 in cash.

To cover the claims, Premier Nutrition paid $9 million into a settlement fund that also covered administrative costs, $5,000 for the lead plaintiff, and $3 million for attorneys' fees. Any payments made to class members who fail to cash their claims are donated to a national food bank, and Premier Nutrition agreed to review and refresh its manufacturing process to minimize variability in the shakes' protein content. In return, class members released the company from all claims based on the nutrient content or labeling of Premier Protein shakes. Seven people objected to the settlement and 135 opted out, but Judge Torres overruled the objections and approved the settlement agreement in all respects.

Nonparty Release a Nonissue in Overdraft Fee Settlement

Pantelyat v. Bank of America N.A., No. 1:16-cv-08964 (S.D.N.Y.) (Jan. 31, 2019). Judge Nathan. Approving settlement.

Judge Nathan granted final approval of a class settlement between Bank of America and customers who were charged overdraft fees on nonrecurring debit card transactions for Uber rides. Nearly a dozen state attorneys general had objected to the settlement because it provided a full release for Uber—a third-party to the litigation—without any consideration. But Judge Nathan found that the third-party release did not raise significant fairness concerns: Bank of America would only agree to the settlement in the first place if it was assured it would face no future liability, either from class members or through litigation from Uber. And the plaintiffs' counsel had diligently investigated claims against Uber and concluded any recovery would be risky.

$111 Million Settlement Approved in Insurance Rate Deal

Feller, et al. v. Transamerica Life Insurance Company, No. 2:16-cv-01378 (C.D. Cal.) (Feb. 6, 2019). Judge Snyder. Approving settlement.

Judge Snyder approved a $111 million settlement and awarded nearly $28 million in attorneys' fees for attorneys representing a class of about 69,000 Transamerica policyholders. The dispute revolved around Transamerica's alleged breach of its agreements with the plaintiffs by increasing their monthly costs. The policyholders had the option of paying a minimum premium to cover the costs of the insurance or a higher premium, in which case the excess funds were put into a cash value accumulation account. Once a month, Transamerica withdrew a monthly deduction from that accumulation account, which is calculated by multiplying a monthly deduction rate by the difference between the death benefits and the value of the account, plus a policy fee. The plaintiffs argued that raising the monthly deduction rate directly led to a higher monthly rate or a risk of the policy lapsing. Although Transamerica agreed to settle the dispute last year for $195 million, a handful of large institutional investor groups holding more than 500 in-force policies opted out of the settlement, which reduced the total settlement amount. Both sides were pleased that the settlement had been approved by the court.

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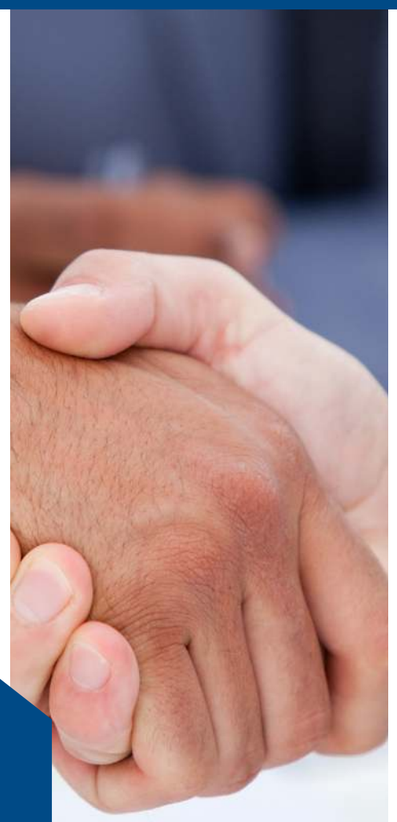

Bribery Doesn't Pay

In re Cobalt International Energy Inc. Securities Litigation, No. 4:14-cv-03428 (S.D. Tex.) (Feb. 13, 2019). Judge Atlas. Approving settlement.

A Texas district court approved a $173.8 million settlement resolving claims by shareholders of Cobalt International Energy that the now-bankrupt company violated the Foreign Corrupt Practices Act and federal securities laws by allegedly bribing Angolan officials to gain access to certain oil wells. As part of the settlement—which also resolved the shareholders' claims against Goldman Sachs (which owned a significant stake in Cobalt) and a number of investment banks that underwrote stock and note offerings for Cobalt—the court also approved a $43.45 million attorneys' fee award and roughly $2 million in litigation expenses. The court concluded that the fee award—which represented 25 percent of the settlement fund—was reasonable given the amount of work associated with the case and the outcome achieved.

Parking-Lot Guards Granted Free Parking – Pass Go and Collect $10 Million

Hines, et al. v. CBS Corporation, et al., No. 1:15-cv-07882 (S.D.N.Y.) (Feb. 5, 2019). Magistrate Judge Lehrburger. Approving settlement.

A magistrate judge in Manhattan granted final approval to a settlement between television production assistants who guarded parking spots and the television companies that employed them. The production assistants alleged that they worked an average of 50 to 100 hours per week securing sets, lots, and streets on television production sites in New York City. The plaintiffs alleged that the defendants failed to pay overtime in violation of the Fair Labor Standards Act. Magistrate Judge Lehrburger praised class counsel's "commitment to the class and to representing the class's interest" as he approved the $9.98 million settlement, $3.3 million of which was attorneys' fees.

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