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Class Action Roundup

Fall 2016

Where the (Class) Action Is

In this edition of *Class Action Roundup*, we feature decisions from the third quarter of 2016, covering everything from pizza delivery and Uber drivers to payday lenders, canned tuna manufacturers, and even flushable toilet wipes. The courts continue to take a close look at class certification and how plaintiffs are defining the class as well as the analysis of numerosity and predominance. The courts have also weighed in on issues of class action waivers and arbitration agreements, deciding on the timing of agreements and whether the class of plaintiffs is covered by a waiver or not.

The employment arena continues to be fraught with class action cases covering overtime rules, pay for meal breaks, and definitions of contractor or employee status. Court cases already filed over the DOL's new overtime rule likely means we'll witness more litigation on that topic into 2017. Matters involving data breaches and other privacy issues are again featured in this issue, with cases dealing with how much private information is "private" to warrant harm and the nuances of TCPA rules in play for health care providers.

This issue wraps up with a standard summary of settlements, including cases dealing with settlement funds and coupons. We hope you have enjoyed this issue and invite you to send any feedback on this or other publications from our Class Action team.

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Antitrust

- **Clean Up on Aisle 23: Grocers Tidy Up Plaintiffs' Class Definition**

  In re Wholesale Grocery Products Antitrust Litigation, No. 09-md-2090 (D. Minn.) (Sept. 7, 2016). Judge Montgomery. Denying in part motion for class certification.

  A Minnesota district court judge has limited a class of grocery shoppers to the class defined in their complaint. Wholesale grocers claimed that the plaintiffs had impermissibly expanded their class definition by revising that definition to include customers located in a "relevant geographic market," which the plaintiffs' expert contended included parts of Missouri. The plaintiffs' complaint had used a list of states that omitted Missouri. Judge Montgomery held plaintiffs to that class definition and confirmed her authority to insist that the plaintiffs put their class definitions on the table "at an early practicable time."

- **Seventh Circuit: Individualized Proof of Injury Can Wait**

  Kleen Products LLC v. International Paper Co., No. 15-2386 (7th Cir.) (Aug. 4, 2016). Affirming class certification.

  Containerboard producers argued that the putative class of purchasers was unable to use common evidence to show the fact of injury on a classwide basis. The containerboard producers argued that it was not enough for the purchasers to prove aggregate injury and damages without then allocating damages to each individual class member. The Seventh Circuit rejected the producers' position, finding that individualized proof of injury was not required at the class certification stage.

CLASS-IFIED INFORMATION

Kim Peretti

Are you "Dealing with Multiple Enforcement and Investigative Techniques"? Join Kim Peretti February 2 in Atlanta at the ABA Consumer Protection Conference to learn how.

- **Third Circuit Announces Six-Factor Test for "Impracticability" Analysis**

  In re Modafinil Antitrust Litigation, No. 15-3475 (3rd Cir.) (Sept. 13, 2016). Denying certification.

  The Third Circuit denied certification of a class of 22 direct purchasers alleging Cephalon and four generic drug manufacturers engaged in a global antitrust conspiracy. The appellate court held that the lower court erred in both its numerosity and predominance analysis. But the Third Circuit also listed six "nonexhaustive" factors that district courts should consider in the "impracticability of joinder" analysis: (1) judicial economy; (2) the claimants' ability and motivation to litigate as joined plaintiffs; (3) the financial resources of class members; (4) the geographic dispersion of class members; (5) the ability to identify future claimants; and (6) whether the claims are for injunctive relief or for damages. ■

Banking & Financial Services

- **No Illusion: Payday Lender Cannot Compel Claims into "Illusory and Unavailable Arbitral Forum"**

  Parm v. National Bank of California, No. 15-12509 (11th Cir.) (Aug. 29, 2016). Affirming denial of arbitration.

  Northern Bank of California must defend RICO claims by a putative class in the Northern District of Georgia. The Eleventh Circuit rejected the bank's arguments seeking to compel arbitration of the named plaintiff's claims challenging its online payday lending practices. The named plaintiff's arbitration agreement contained a forum-selection clause mandating arbitration before a representative of the Cheyenne River Sioux Tribe under its rules. The court found that, because the forum and its rules did not exist when the agreement was executed in 2013, the agreement required use of "an illusory and unavailable arbitral forum." Concluding the clause was "an integral aspect of the parties' agreement," the court refused to substitute an arbitrator and affirmed the lower court's denial of arbitration.

- **Post-Verdict Decertification: The Jury Giveth and the Court Taketh Away**

  Mazzei v. Money Store, No. 15-2054 (2nd Cir.) (July 15, 2016). Affirming decertification.

  A jury awarded $32 million to a class of borrowers challenging the late fees charged by The Money Store and other loan services after they accelerated their mortgages. But the trial court granted the defendants' motion for decertification following the verdict. The Second Circuit held that neither the Seventh Amendment nor Rule 23 prevent a trial court from decertifying a class after a jury verdict and before entry of a final judgment. Finding the named plaintiff did not satisfy the typicality and predominance requirements through trial because he failed to prove "class-wide privity of contract between The Money Store and those borrowers whose loans it only serviced, and did not own," the Second Circuit affirmed the decertification order and vacated the jury award, leaving the named plaintiff with $134.00 for his individual claim.

CLASS-IFIED INFORMATION

Adam Kaiser

John Aerni

Alston & Bird welcomes two high-profile litigation partners to our New York office.

- **Emotionally Distressed Consumers Have a Leg to Stand On Under *Spokeo***

  Larson v. Trans Union LLC, No. 12-cv-05726 (N.D. Cal.) (Aug. 11, 2016). Judge Orrick. Granting certification.

  Judge Orrick certified a class of consumers challenging the "uncertainty" surrounding Trans Union's Office of Foreign Asset Control (OFAC) disclosure and dispute process, finding that the named plaintiff satisfied both the Rule 23 prerequisites and the standing requirement, as clarified by *Spokeo*. According to the plaintiffs, Trans Union's disclosure included a blank space in the "Possible OFAC Match" section, leaving consumers unsure of whether they matched a name on a government watch list. Distinguishing the named plaintiff's "informational injury"

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from a "bare procedural violation" of the Fair Credit Reporting Act, which "may result in no harm" under *Spokeo*, the court held that the plaintiff satisfied the concreteness requirement. Judge Orrick concluded that the dissemination of the OFAC disclosure could harm consumers through emotional stress brought about by uncertainty over whether Trans Union was reporting him as a match to a name on the watch list and the perceived inability to dispute the disclosure because it was included "as a courtesy" and not as part of the credit report. ■

Consumer Protection

Warranty Claims Float, but Other Claims Go Down the Drain in Flushable Wipes Class Action

Meta v. Target Corp., No. 14-cv-00832 (N.D. Ohio) (Aug. 29, 2016). Judge Nugent. Granting in part and denying in part class certification.

An Ohio federal judge certified a class of consumers alleging that Target's Up & Up flushable wipes cause plumbing problems, but only for warranty claims. Because Target had already taken the wipes off the market, Judge Nugent denied injunctive relief but granted class certification on the plaintiffs' warranty claims, holding that under a breach-of-warranty theory, all purchasers are affected when a product does not live up to the statements on the packaging. Fraud claims, on the other hand, must proceed individually because consumers chose to purchase the wipes for different reasons. In addition, because the lead plaintiff did not present evidence of a harm separate from his decision to buy the wipes or a loss beyond the product price, allegations of fraud and unjust enrichment merely duplicated the warranty claim.

Ninth Circuit Rejects Class's Request for Damages but Allows Individual to Proceed

Brazil v. Dole Packaged Foods LLC, No. 12-cv-01831 (9th Cir.) (Sept. 30, 2016). Affirming in part and reversing in part motions to dismiss, summary judgment, and class certification.

Chad Brazil sued Dole Packaged Foods, alleging that the food distributor deceptively labeled as "All Natural Fruit" products that contained synthetic ascorbic acid. The Ninth Circuit held that the district court incorrectly granted summary judgment to Dole under the California Unfair Competition Law (UCL) because the trier of fact could find that Dole's description of its products was misleading. But the Ninth Circuit affirmed the district court's decision to decertify an unjust enrichment class because the plaintiff could not prove damages on a classwide basis.

All-Natural Labeling Requires More Than One All-Natural Ingredient

Goldemberg v. Johnson & Johnson Consumer Companies Inc., No. 13-cv-03073 (S.D.N.Y.) (Oct. 4, 2016). Granting class certification and denying *Daubert* motion.

Consumers alleged that Johnson & Johnson misled consumers and commanded a premium price by labeling Aveeno products that contain unnatural and synthetic ingredients as "Active Naturals." The court denied J&J's Rule 702 motion to exclude the plaintiffs' expert on

CLASS-IFIED INFORMATION

Frank Hirsch

Michael Barry

Ride along with Frank Hirsch and Michael Barry in "The *Spokeo* Result: Who's Peddling Uphill and Who's Just Coasting Down" in the *Consumer Financial Services Law Report*.

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a classwide damages model. The court also held that the proposed damages model and price-premium theory were consistent, noting that the expert testimony went beyond what is required by *Comcast v. Behrend* by proposing to more accurately calculate the portion of the product's value associated with the deceptive claim. The court granted the plaintiffs' motion for class certification, rejecting J&J's argument that one natural ingredient was enough to make the "natural" label not misleading as a matter of law. ■

Employment

- **Making Employee–Independent Contractor Distinctions on a Classwide Basis**

  Williams v. Jani-King International Inc., No. 15-2049 (3rd Cir.) (Sept. 21, 2016). Affirming class certification.

  The Third Circuit affirmed the grant of class certification against commercial cleaning franchisor Jani-King in a lawsuit alleging that its franchisees were misclassified as independent contractors. The court rejected Jani-King's primary argument that the question of employee status could not be resolved through classwide evidence. The Third Circuit held that franchisee classification issues were susceptible to classwide determination by looking to common documentary evidence: the franchise agreement, policy manuals, training manuals, and testimony about those documents.

- **Truck Driver Subclasses Lose Class Status**

  Dilts v. Penske Logistics LLC, No. 08-cv-00318 (S.D. Cal.) (July 20, 2016). Judge Bencivengo. Decertifying subclasses.

  A California district court decertified three of five subclasses of Penske employees alleging that the trucking company failed to provide meal breaks, but still deducted pay for those breaks. The court found no proof that Penske had an across-the-board policy of denying meal breaks. According to the court, "[t]hat defendants did not schedule the employees' meal breaks … does not establish that defendants did not provide the opportunity to take a timely meal break. Leaving the decision of when to break to the employee in the field is not the same as prohibiting or discouraging timely meal breaks." The court concluded that there was sufficient evidence for the two subclasses left intact to show a uniform policy that Penske failed to provide a second meal break at the end of the tenth hour of a shift.

CLASS-IFIED INFORMATION

Jim Evans

The Society for Human Resource Management talked to Jim Evans about "New Labor Code Section Helps Ensure California Workers Are Governed by California Law."

- **Blow to Big Bank as Employees Win Class Certification**

  In Re: SunTrust Banks Inc. ERISA Litigation, No. 08-cv-03384 (N.D. Ga.) (Aug. 17, 2016). Judge Story. Certifying class.

  In a class action dating back to 2008, a Georgia district court granted class certification to thousands of SunTrust employees who alleged that the bank mishandled their retirement funds under ERISA. The class includes employees who participated in the bank's 401(k) plan from mid-2007 through mid-2011 and lost money because SunTrust invested funds in its own common stock. The plaintiffs claim that SunTrust knew its stock was declining from its business activity in the subprime housing market and failed to disclose the nonpublic information to plan participants. The class certification ruling comes after the class definition was amended to include only those employees who sustained an economic loss as a result of the investment after SunTrust argued that some employees benefited from the practice.

- **Boeing Employee Makes Second Pass at Class Certification**

  Mann v. The Boeing Co., No. 15-cv-01507 (W.D. Wash.) (Aug. 23, 2016). Judge Lasnik. Denying class certification.

  A Washington district court denied a Boeing employee's bid to certify a class of employees allegedly classified improperly by the aerospace company as exempt from overtime premiums. The court determined

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that the proposed class was too broad because it included managers in multiple operations teams with differing job duties. Following that ruling, the plaintiff renewed his motion by narrowing the class to cover a smaller group of managers supervising the assembly of the Boeing 777 aircraft.

▪ Domino's Drivers Seeking Slice of Delivery Charges Win Certification

Mooney v. Domino's Pizza Inc., No. 14-cv-13723 (D. Mass.) (Sept. 1, 2016). Judge Talwani. Granting certification for two classes of plaintiffs.

Domino's delivery drivers were granted class certification in a suit alleging that the company violated Massachusetts law by keeping delivery charges for itself instead of handing them over to the drivers. The court concluded that the case dealt with common questions of fact—whether Domino's adequately informed customers that the delivery charge was not a tip. The evidence necessary to resolve that question was common to all class members and therefore did not present a barrier to certification. The court also rejected Domino's attempt to rely on a recent Eighth Circuit case that vacated certification to a group of its drivers based on an interpretation of Minnesota law. Due to the differences between the Massachusetts and Minnesota tip statutes, the Massachusetts drivers were permitted to pursue their claims on a classwide basis.

▪ Tech Firm Kicks Class Claims in Overtime Litigation

Payala v. Wipro Technologies Inc., No. 15-cv-04063 (C.D. Cal.) (Aug. 23, 2016). Judge Kronstadt. Denying class certification.

Wipro Technologies—an information technology firm based in India—will not face class claims that it withheld overtime pay. The court held that the proposed class of workers had job duties too disparate for class certification. Wipro successfully argued that although the workers had the same titles, they performed different tasks for different companies. It would take numerous individual inquiries to determine which class members should not receive an administrative exemption for overtime pay. That was enough to defeat class certification.

▪ Just Certify It

Rodriguez v. Nike Retail Services Inc., No. 14-cv-01508 (N.D. Cal.) (Aug. 19, 2016). Judge Freeman. Granting class certification.

A California district court granted class certification to a group of Nike retail store employees who claimed failure to pay wages for end-of-shift security checks. Nike argued that the employees were inspected for different amounts of time and under different circumstances. The court disagreed. Because Nike applied the bag-check policy universally to all employees, no individual inquiries were required and certification was permissible.

▪ Setback for Airline in Wage Suit

Vidrio v. United Airlines Inc., No. 15-cv-07985 (C.D. Cal.) (Aug. 23, 2016). Judge Gutierrez. Granting class certification.

A California district court certified a class of flight attendants alleging violations of wage statement labor laws that required United Airlines to provide statements showing employees' hourly rates for different pay based on different activities, or the hours worked. It was undisputed that United had failed to provide the statements.

The airline argued against certification because the putative class members had other resolution methods available. But the court held that the fact "[t]hat individual class members have alternative means of pursuing their claims does nothing to address the fact that a class action is the superior method for adjudicating the class members' claims, since a class action alone has the potential to knock out the majority of the class members' claims in one fell swoop." Because the numerosity, commonality, typicality, and adequacy requirements were satisfied, class certification was granted. ■

Environmental

District Court Holds Firm Pleading Line

Cole v. Marathon Oil Corp., No. 16-cv-10642 (E.D. Mich.) (Oct. 25, 2016). Judge Cox. Dismissing class action for pleading deficiency.

Judge Cox threw out a proposed class action accusing Marathon Oil Corp. of exposing Detroit residents to toxic chemicals. Residents had alleged the company's nearby refinery caused "ongoing" contamination, resulting in personal injuries and property damage. But the residents' claims were subject to a three-year statute of limitations, and their failure to allege a specific date their injuries began proved fatal. The court declined to speculate about when the limitations period began to run. In similar cases, plaintiffs are often permitted to assert general allegations without identifying a precise date of first injury—but Judge Cox has raised that bar, at least for claims in Michigan. The decision serves as a reminder of the specificity that may be required in pleading environmental damage claims.

Eighth Circuit Applies Strict Reading to CAFA Removal

Gibson v. Clean Harbors Environmental Services Inc., No. 16-8012 (8th Cir.) (Oct. 24, 2016). Reversing remand.

In 2013, residents asserted state tort claims against a hazardous waste storage and treatment facility related to a chemical release at the facility. In 2016, the residents offered to settle for $6.5 million (above the Class Action Fairness Act's (CAFA) $5 million threshold for federal jurisdiction). The defendant removed the case more than 30 days after receiving that settlement offer. The district court held that that removal was untimely and sent the case back to state court. A divided Eighth Circuit panel disagreed, holding that the residents' settlement letter did not qualify as a paper from which the defendant could "*unambiguously* ascertain" that the CAFA jurisdictional requirements had been satisfied. The Eighth Circuit joins a chorus of circuits taking the same bright-line approach to the removal rules. ■

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"We have a deep and enduring commitment to diversity and inclusion." *Fortune* Names Alston & Bird a Top Workplace for Diversity.

Privacy & Data Security

Stolen Electronic Data Not Enough to Create Standing

Attias v. CareFirst Inc., No. 15-cv-00882 (D.D.C.) (Aug. 10, 2016). Judge Cooper. Granting motion to dismiss.

Judge Cooper dismissed a putative class action stemming from a data breach for approximately 1.1 million policyholders. The plaintiffs failed to demonstrate "a substantial risk that stolen data has been or will be misused in a harmful manner." The information stolen included policyholders' names, birth dates, email addresses, and subscriber identification numbers. The plaintiffs argued that the data breach exposed them to an increased risk of identity theft, but Judge Cooper concluded that the plaintiffs never demonstrated "how the CareFirst hackers could steal their identities without access to their social security or credit card numbers," which were not stolen.

Two of the plaintiffs also alleged that they had already suffered an injury from the data breach because they had not received their expected tax refunds due to fraud made possible by the breach. Judge Cooper rejected that claim and held that any alleged tax return fraud was not "fairly traceable to the data breach." Judge Cooper also dismissed claims alleging economic harm through overpayment and credit-monitoring services, loss of intrinsic value of the plaintiffs' personal information, and violation of the plaintiffs' statutory rights under consumer protection laws.

GameStop Scores Big Win for Privacy Policies, but Standing Questions Loom

Carlsen v. GameStop Inc., No. 15-2453 (8th Cir.) (Aug. 16, 2016). Affirming dismissal.

The Eighth Circuit affirmed a Minnesota district court's dismissal of contract and consumer claims based on GameStop's alleged breach of its privacy policy by sharing the Facebook IDs and browsing information of subscribers to its online magazine. The plaintiff alleged that the magazine website collected personally identifiable information through Facebook's web plug-in, which GameStop disclosed to third parties. The Eighth Circuit affirmed dismissal because the personal information at issue was not within the scope of information covered by GameStop's privacy policy. The privacy policy's terms did not include Facebook IDs or browsing information as "personal information," instead limiting protection to information specifically solicited by GameStop or voluntarily submitted in response to a solicitation. The policy also warned users that it did not extend to other companies' websites and did not specifically promise to prevent web plug-ins from third parties such as Facebook from collecting user information. On these grounds, the information was unprotected by the policy.

But a panel majority disagreed with the district court's dismissal for lack of standing. Without reference to the U.S. Supreme Court's recent *Spokeo* decision, the majority reasoned that the plaintiff had sufficiently alleged that he was a party to a contract that GameStop breached by disclosing his personal information to third parties, causing him to suffer damages in the form of devaluation of his magazine subscription based on what he would have paid for lesser privacy protection.

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Michael Zweiback

Michael Zweiback explains to *Fortune* why "Device Makers Face Legal Trouble over Internet of Things Attack."

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▪ Individualized Aches and Pains Doom Chiropractor Junk-Fax Class Certification

True Health Chiropractic Inc. v. McKesson Corp., No. 13-cv-02219 (N.D. Cal.) (Aug. 22, 2016). Judge Gilliam. Denying motion for class certification.

A Northern District of California judge denied class certification to a class of chiropractic clinics that alleged that McKesson had sent them unsolicited faxes in violation of the Telephone Consumer Protection Act (TCPA). The court denied class certification under Rule 23(b)(2) because each plaintiff sought individual monetary relief they would be entitled to under the TCPA. The court denied certification under Rule 23(b)(3) after discovery showed predominant individual issues regarding the clinics' express permission to receive faxes.

▪ Sixth Circuit Rejects Waiting Period for *Spokeo* Standing

Galaria v. Nationwide Mutual Insurance Co., No. 15-3387 (6th Cir.) (Sept. 12, 2016). Reversing dismissal.

A split Sixth Circuit panel reversed the Western District of Ohio's dismissal of the plaintiffs' Fair Credit Report Act (FCRA), negligence, and bailment claims against Nationwide, holding that the plaintiffs sufficiently alleged a substantial risk of harm, coupled with reasonably incurred mitigation costs, to establish a cognizable Article III injury at the pleading stage. The plaintiffs' action arises from a 2012 data breach. The majority reasoned that when the plaintiffs allege that their data has already been stolen, the plaintiffs need not wait for actual misuse before taking steps to ensure their own personal and financial security. Making the plaintiffs wait until they were actually injured, according to the majority opinion, would be "unreasonable" because there is a "sufficiently substantial risk of harm" that the plaintiffs will incur through mitigation costs. In so holding, the majority cited the defendant's offer of free credit monitoring as purported evidence that the company knew and understood the severity of this risk. The majority also noted that its decision was consistent with the Seventh Circuit's decisions in *Neiman Marcus* and *P.F. Chang's China Bistro* in finding that the assertion of fraud-prevention expenses is sufficient to confer standing. ■

Products Liability

Class Certification Decision Offers Silver Lining for Roof Tile Manufacturer

Wilson v. Metals USA Inc., No. 12-cv-00568 (E.D. Cal.) (July 1, 2016). Judge Mueller. Granting motion for class certification.

A California federal judge certified a class of property owners alleging that their roof tiles faded after exposure to sunlight despite a 25-year ultraviolet protection warranty. But the judge also upheld the company's warranty requirement that owners notify the manufacturer within 30 days of discovering a defect and file a lawsuit within one year of corrective action or denial of a claim. Under California law, manufacturers are free to offer an express, limited warranty with notice requirements that are more stringent than the state's default rules. The warranty ruling complicates the case for potential class members (like the named plaintiffs) who did not comply with the warranty's conditions.

Class Certification Denied in A/C Defect Case

Kotsur v. Goodman Global Inc., No. 14-cv-01147 (E.D. Pa.) (Aug. 22, 2016). Judge Beetlestone. Denying motion for class certification.

A Pennsylvania federal judge found that the lead plaintiff in a proposed product defect class action could not adequately represent class members because his claims were "susceptible to unique defenses" from the manufacturer. The plaintiff alleged that the evaporator coils in Goodman's air conditioning units are defective, but his own HVAC servicer made different diagnoses of the problem, and the coil in his unit was discarded rather than returned under warranty. Although the class members' claims depended on a common contention, the judge denied the motion for class certification because key factual questions, including whether an individual's unit has the alleged defect, must be decided individually.

CLASS-IFIED INFORMATION

Todd Benoff

Cars are talking to each other, but who's talking to the cars? Todd Benoff downloads to *Corporate Counsel* in "Putting the Brakes on Hackers."

U Can't Touch This: Nine Classes Certified in Ford Touchscreen Defect Lawsuit

In re MyFord Touch Consumer Litigation, No. 13-cv-03072 (N.D. Cal.) (Sept. 23, 2016). Judge Chen. Granting motion for class certification.

A federal judge in California certified nine classes of Ford owners asserting claims for breach of warranty, unfair trade practices, and fraudulent concealment due to a faulty touchscreen system in their vehicles. Claims that Ford misrepresented the capabilities of the touchscreen system and attempted to conceal defects could be extrapolated to all buyers in nine different states. But the judge found that laws and policies in Arizona, Iowa, and New York prevent the claims by consumers in those states from being decided on a classwide basis. ■

RICO

Pyramid Schemes Are Per Se Mail Fraud

Torres v. S.G.E. Management, No. 14-20128 (5th Cir.) (Sept. 30, 2106). Affirming class certification.

A district court certified a class of participants in a multilevel energy marketing program who alleged that the program was actually a fraudulent pyramid scheme that violated RICO. The Fifth Circuit affirmed and rejected the program operator's attempt to leverage individual reasons that putative class members may have had for joining the scheme. The Fifth Circuit held that those individual issues do not predominate over common issues because fraudulent pyramid schemes are structured to defraud their victims.

RICO Claims Based on a Fraudulent Misrepresentation Theory Trigger Individualized Reliance Inquiries

Coleman v. Commonwealth Land Title Insurance Co., No. 09-cv-00679 (E.D. Pa.) (Aug. 16, 2016). Judge Slomsky. Denying class certification.

Homeowners brought a putative class action against title insurers, alleging that they did not receive discounts on homeowners' title insurance policies they were entitled to. Judge Slomsky denied class certification and held that because the homeowners brought their RICO claims under a fraudulent misrepresentation theory, individual inquiries into the issue of homeowners' reliance predominated. ■

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Get the most from your law firm. Bloomberg Law includes Alston & Bird in "These Top Law Firms Got the Most ERISA Class Action Biz."

Securities

That's the Spirit: Tenth Circuit Finds Spirit Aero Was Optimistic, Not Malevolent

Anderson v. Spirit AeroSystems Holdings Inc., No. 15-3142 (10th Cir.) (July 5, 2016). Affirming dismissal.

The Tenth Circuit affirmed dismissal of claims brought by a group of Spirit investors alleging that the company downplayed the impact of cost overruns resulting from widespread production problems in aircraft programs. The 2013 lawsuit arose from a nearly $600 million forward-loss charge in late 2012 on manufacturing contracts for multiple airline companies.

The court agreed that the massive losses were significant, but found that there was not sufficient evidence that Spirit's executives were lying when they indicated that the programs would meet deadlines and budgets, explaining that the "plaintiffs supply little reason to suspect malevolence over benign optimism." In August 2016, the Tenth Circuit declined to reconsider its ruling.

Money Shop Comes Up Empty

West Palm Beach Police Pension Fund v. DFC Global Corp., No. 13-cv-06731 (E.D. Pa.) (Aug. 4, 2016). Judge Schiller. Granting class certification.

A Pennsylvania district court certified a class of investors claiming that DFC Global Corporation violated Rule 10b-5 by falsely portraying itself as a conservative manager of risk. The securities class comprises investors who bought shares of DFC Global between January 2011 and February 3, 2014, the day DFC Global's president and chief operating officer resigned and a day before the price of DFC Global's stock fell from $7.09 to $6.76.

In opposing class certification, DFC Global—also known as The Money Shop—argued primarily that the investors failed to properly allege reliance. But the court concluded that the investors adequately alleged reliance based on a showing that the alleged misrepresentations were publicly known and material and that DFC Global's stock was traded in an efficient market—Nasdaq. ■

CLASS-IFIED INFORMATION

Kevin Miller

Charles Cox

Join chairperson Kevin Miller and presenter Charles Cox at Mergers & Acquisitions 2017: Advanced Trends and Developments, hosted by PLI January 12–13 in New York.

Settlements

District Court Won't Can StarKist Tuna Settlement

Hendricks v. StarKist Co., No. 13-cv-00729 (N.D. Cal.) (Sept. 29, 2016). Judge Haywood. Approving $12 million settlement.

StarKist customers alleged the company underfilled its tuna cans, amounting to false advertising, unfair competition, and breach of express warranty. The district court approved the $12 million settlement agreement resolving all claims. The court questioned whether the settlement's second amended release required that additional notice be given to all class members. But the court ultimately concluded that no additional notice was needed because the amended release narrowed the scope of claims discharged by the settlement, rather than broadened them.

Uber Not Safe to Proceed with Its Safe Rides Fee Settlement

Philliben v. Uber Technologies Inc., No. 14-cv-05615 (N.D. Cal.) (Aug. 30, 2016). Judge Tigar. Denying preliminary approval of settlement.

Judge Tigar rejected Uber's $28.5 million preliminary settlement proposal as unreasonable given Uber's total revenues stemming from the Safe Rides Fee program. Uber cannot claim that its insurance expenses support its Safe Rides Fee to customers since the primary purpose behind Uber's insurance policies is to protect Uber, not its customers. The Safe Rides Fee generated revenues far exceeding the $28.5 million settlement proposal, and Judge Tigar held that class members should be able to recover a greater portion of that gross revenue.

Small Class Response for Big Settlement Fund

In re Carrier IQ Inc., No. 12-md-02330 (N.D. Cal.) (Aug. 25, 2016). Judge Chen. Granting final approval of $9 million settlement.

Judge Chen approved software developer Carrier IQ's $9 million fund to settle a privacy lawsuit related to its logging cellular messaging content. The fund was set to cover more than 79 million affected devices from 30 million unique users. But a class response rate of only 0.14% translated to relatively large payouts for the participating class members. Judge Chen deferred to the settlement administrator's judgment that the seemingly low response rate was consistent with other settlement administrations that had similar class characteristics.

Settlement Coupons Cannot Replace Settlement Payouts

Hoffman v. Dutch, No. 14-cv-02418 (S.D. Cal.) (Aug. 16, 2016). Judge Curiel. Denying second motion for preliminary approval of settlement.

Customers of Current/Elliott brand jeans brought suit alleging Dutch inaccurately labeled the jeans as "Made in the USA." Initially, Dutch tried to settle claims by offering each class member a $20 e-gift certificate. The district court rejected that preliminary settlement since no item on the Current/Elliott website retailed for less than $20 and class members would be required to pay out of pocket to redeem the e-gift certificate. Dutch then returned with a second offer of a $20 e-gift certification *and* a denim tote bag ($128 value). Judge Curiel rejected that offer because the addition of a tote bag to the settlement package did not resolve the first issue.

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▪ Uber Driver Class Action Settlement Proposal Unreasonably Favors Uber

O'Connor v. Uber Technologies Inc., No. 15-cv-00262 (N.D. Cal.) (Aug. 18, 2016). Judge Chen. Denying preliminary settlement approval.

Uber drivers filed a class action against Uber alleging that drivers were employees rather than independent contractors and eligible for expense reimbursement and converted tips. Despite a substantial risk that the Ninth Circuit may enforce Uber's arbitration provision, the district court held that the proposed settlement unreasonably favored Uber.

The plaintiffs proposed to settle their California Private Attorneys General Act claim for $1 million. But the potential penalty exposure under the Act was more than $1 billion. Judge Chen held that the meager settlement offer did not justify approving the settlement proposal when potential exposure was so high. ■