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CLASS ACTION & MDL roundup

SUMMER 2020

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overview

Where the (Class) Action Is

Welcome back to the ***Class Action & MDL Roundup***! Our summer edition covers notable class actions from the second quarter of 2020.

Click here to watch the second installment of our video highlight featuring our partner, Derin Dickerson. This quarter's video takes a deep dive into the Supreme Court's decision in *Barr v. AAPC*.

As COVID-19 continues to impact many aspects of everyday life and business functions, we look at the rulings from the Judicial Panel on Multidistrict Litigation (JPML) hearing held on July 30, 2020 that addressed several MDL requests involving COVID-19-related litigation.

The courts saw no shortage of action this summer, dismissing multiple class certifications due to lack of substantiated claims from plaintiffs. In a key glyphosate case, both the appellate panel and lower court agreed that the plaintiff lacked standing in their claim alleging that Cheerios cereal contains the weed-killing chemical. The panel stressed that for an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." A consumer protection class action resulted in a significant decision by the Second Circuit, holding that registering to do business as a foreign corporation in New York is insufficient to subject a defendant to general personal jurisdiction in the state. In a turn of events during an investment action, a federal judge approved class certification but required the plaintiff's law firm to identify the individual attorneys responsible for leading the suit. The judge explained that in order to oversee counsel and perform her "supervisory obligations to the class," she needed to know the identities of the individual attorneys, rather than the firm in general.

We wrap up the ***Roundup*** with a summary of class action settlements finalized in the second quarter. We welcome your feedback on this issue, as always, and let us know what you think of our new video highlight feature.

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COVID-19 Litigation

As class actions and individual lawsuits proliferate in the wake of the COVID-19 pandemic, parties have sought to have these cases consolidated into multidistrict litigation proceedings (MDLs).

On July 30, 2020, the Judicial Panel on Multidistrict Litigation (JPML) held oral argument—virtually—to decide several MDL requests involving COVID-19-related litigation. The JPML later repeatedly rejected attempts to consolidate similar cases industry-wide against multiple defendants. In this section, we highlight the JPML's rulings.

PPP Actions Proceed Separately

In re JPMorgan Chase Paycheck Protection Program Litigation, MDL No. 2944 (J.P.M.L.) (Aug. 5, 2020); ***In re Paycheck Protection Program (PPP) Agent Fees Litigation***, MDL No. 2950 (J.P.M.L.) (Aug. 5, 2020); ***In re Bank of America Paycheck Protection Program Litigation***, MDL No. 2952 (J.P.M.L.) (Aug. 5, 2020); ***In re Wells Fargo Paycheck Protection Program Litigation***, MDL No. 2954 (J.P.M.L.) (Aug. 5, 2020).

The JPML declined to centralize various actions stemming from the Paycheck Protection Program (PPP).

In MDL No. 2950, the JPML considered the consolidation of various actions alleging that lenders across the banking industry failed to pay mandatory fees to agents who assisted small businesses in applying for PPP loans. The JPML held that "centralization will not serve the convenience of the parties and witnesses or further the just and efficient conduct of the litigation." The JPML reasoned that an industry-wide MDL would involve numerous different lenders with practices unique to each lender and that common factual questions are lacking because the policies and practices for paying agent fees are unique to each lender. The JPML also rejected the creation of separate MDLs by lender, explaining that because there were numerous multilender cases, it would require "extensive separation and remand of claims to ensure that (1) the claims against the various lenders are transferred to the correct MDL, and (2) the claims against unrelated lenders are simultaneously separated and remanded to their transferor courts."

In MDL Nos. 2944, 2952, and 2954, the JPML was asked to create lender-specific MDLs for the lenders' alleged failure to properly process applications for loans under the PPP. In denying the motions, the JPML found that although a defendant's practices may be common, the cases nonetheless involved individualized loan-documentation issues. Consequently, "centralization will not serve the convenience of the parties and witnesses or further the just and efficient conduct of the litigation." The JPML ruled that "voluntary coordination among the parties and the involved judges is preferable to centralization."

No Big Ticket in Push for Industry-wide MDL

In re Secondary Ticket Market Refund Litigation, MDL No. 2951 (J.P.M.L.) (Aug. 6, 2020).

Following oral argument, the JPML rejected the plaintiffs' request to create an industry-wide MDL that combined cases against VividSeats, SeatGeek, and StubHub that allege that the defendants refused to offer required refunds for events disrupted by the COVID-19 pandemic. The JPML was unmoved by the plaintiffs' argument that an industry-wide MDL was necessary because of the "common need … to determine which events were canceled or rescheduled on a nationwide basis." Instead, they found that the defendants were separate businesses with different terms of use, arbitration agreements, marketing, and choice of law provisions. Further, considering there were no allegations of conspiracy, creating an industry-wide MDL would "complicate pretrial proceedings more than it would streamline them."

The JPML did, however, find it appropriate to consolidate the cases against StubHub in the Northern District of California and renamed the MDL "In re: StubHub Refund Litigation." The JPML found that those cases involve "common factual issues arising from similar putative nationwide class actions" and that "[c]entralization will eliminate duplicative discovery; avoid inconsistent pretrial rulings, particularly on class certification; and conserve the resources of the parties, their counsel and the judiciary."

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Visit our Alston & Bird Pro Bono Coronavirus Resources website to help nonprofits, community service advocates, and other public interest organizations manage their response to the COVID-19 pandemic.

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JPML Leaves Insurers and Insured Businesses Unsure

In re COVID-19 Business Interruption Protection Insurance Litigation, MDL No. 2942 (J.P.M.L.) (Aug. 12, 2020).

The JPML ruled against two motions brought by two groups of plaintiffs seeking an industry-wide MDL for cases claiming commercial property insurance coverage for business interruption losses caused by the COVID-19 pandemic and the related government orders suspending or curtailing nonessential businesses. The JPML concluded that industry-wide centralization would not "serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation." Considering the lack of common defendants to the action or multidefendant cases, the JPML found that there was little potential for common discovery. The JPML also pointed out that the cases involved different insurance policies with different coverages, conditions, exclusions, and policy language, purchased by different businesses in different industries, which would overwhelm any common factual questions.

During briefing and oral argument, some plaintiffs requested regional or insurer-specific MDLs in lieu of an industry-wide MDL. The JPML ruled that regional or statewide MDLs would "suffer from many of the same problems as the industry-wide motions." They found the arguments for insurer-specific MDLs "more persuasive," but held that the record was insufficient to support such a proposal. The JPML therefore directed the parties to show cause why actions against certain insurers should not be centralized on an expedited briefing schedule so that these matters can be considered at the next JPML hearing session on September 24, 2020. ■

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People who need people are the luckiest people. Alston & Bird is the #1 law firm in ***People*** magazine's "50 Companies That Care," "demonstrating outstanding respect, care, and concern for their employees, their communities, and the environment during the COVID-19 pandemic."

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Antitrust/RICO

Generic Drug Purchasers Can't Rely on Generic Predominance Analysis

In re Lamictal Direct Purchaser Antitrust Litigation, No. 19-1655 (3rd Cir.) (Apr. 22, 2020). Vacating certification of class and remanding.

The Third Circuit upended class certification for wholesalers pursuing pay-for-delay claims against GlaxoSmithKline and Teva Pharmaceuticals over a generic version of the anti-epilepsy drug Lamictal. The court first rejected the class's argument that the predominance inquiry was governed by the "no reasonable juror" standard, instead holding that settled precedent required class members to show their claims were capable of common proof by a preponderance of the evidence. Next, the Third Circuit faulted the district court for assuming that the class could rely on average price increases to show common proof of injury, without conducting a "rigorous analysis."

No Injury? No Problem for Drug Purchasers

In re Restasis (Cyclosporine Ophthalmic Emulsion) Antitrust Litigation, No. 1:18-md-02819 (E.D.N.Y.) (May 5, 2020). Judge Gershon. Granting class certification.

Wading into the recent debate of whether and when a class containing uninjured consumers can be certified, Judge Gershon certified a class of end-payors of the dry-eye drug Restasis that purportedly contained 5.7% uninjured consumers. Judge Gershon rejected defendant Allergan's argument that the 5.7% rate was "unreasonably low"—finding the end-payors' expert analysis persuasive—and then held that 5.7% was a de minimis number of uninjured class members, in line with other recent decisions.

Ascertainability Requirement Still Well and Alive in Third Circuit Antitrust Suits

In re Niaspan Antitrust Litigation, No. 2:13-md-02460 (E.D. Pa.) (June 3, 2020). Judge DuBois. Denying class certification.

Although other circuits have rejected an ascertainability requirement for class certification, Judge DuBois sitting in the Third Circuit cited that factor and a slew of other reasons that end-payor plaintiffs had not met the standards for class certification in a pay-for-delay case. On ascertainability, Judge DuBois concluded that records of drug purchases could be obtained through court-issued subpoenas, but he rejected the plaintiffs' six-step methodology for identifying class members. The plaintiffs' expert would have to merge data sources, eliminate errors, standardize fields, eliminate duplicates, compile a list of class members, and apply a number of exclusions. Worse still, the plaintiffs' expert did not provide sufficient detail about each step to allow the defendants to test the reliability of that process. ■

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Banking, Financial Services & Insurance

Decoupled Debit Card Claims Dismissed and Absent Class Members Ignored

Sharp v. Bank of America N.A., et al., No. 1:19-cv-05223 (N.D. Ill.) (Mar. 31, 2020). Judge Kocoras. Granting motion to dismiss.

Judge Kocoras dismissed five claims, but denied the bank's motion to strike nationwide class allegations. Building on a precedential decision by the Seventh Circuit, Judge Kocoras held that absent class members are not full parties to the case for purposes of analyzing personal jurisdiction and that the Supreme Court's decision in *Bristol-Myers Squibb* does not apply to class actions. This preserved Sharp's bid to represent a proposed nationwide class based on allegations that the bank improperly charged overdraft fees when he overdrew funds using "decoupled" debit cards from other sources that were linked to his personal account at the bank. Although the court found that decoupled debit cards were not covered by Sharp's contract with the bank and that the contract was not unconscionable, the court nonetheless gave him leave to file an amended complaint for claims of breach and unconscionability. All remaining claims were dismissed with prejudice, including claims against the parent company that employed improper group pleading. ■

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Consumer Protection

"Flushable Wipe" Injunctive Relief Class Goes Down the Drain

Kurtz v. Costco Wholesale Corp., et al., No. 17-1856 (2nd Cir.) (June 26, 2020). Affirming in part and reversing in part certification of damages and injunctive relief classes.

A certified class of consumers claimed that the defendants falsely represented their wipes as "flushable." On appeal, the Second Circuit affirmed the lower court's determination that the plaintiff had sufficiently demonstrated that he was an adequate and typical representative of the damages class, despite the defendants' argument that the plaintiff's strategic decision to forgo higher-value plumbing damages in favor of more easily certifiable statutory damages created a conflict of interest. Additionally, the Second Circuit affirmed the lower court's acceptance of the plaintiff expert's "price premium" regression model, rejecting the defendants' argument that the model failed to account for significant factors that drive consumers' purchase decisions. However, the Second Circuit overturned the lower court's certification of an injunctive relief class, finding that the plaintiff had not shown a likelihood of future injury because the plaintiff had not stated an intent to buy the flushable wipes in the future.

Arbitration Clause Gains Win at Second Circuit

Nicosia v. Amazon.com Inc., No 19-1833 (2nd Cir.) (June 4, 2020). Affirming order compelling arbitration.

Dean Nicosia sued Amazon for violating Washington state and consumer protection laws based on purchases of a weight-loss product that contained a controlled substance the Food and Drug Administration requested be removed from the market in 2010. A Washington district court rejected Nicosia's argument that he never received notice of an arbitration clause or manifested his assent to it. Under Washington law, even when there is no actual notice of contract terms, a party is still bound by the provision if he is on inquiry notice of the term and assents to it through conduct that a reasonable person would understand to constitute assent.

The district court found that Nicosia received notice of the arbitration clause no later than September 2014, when Amazon filed a letter motion raising the arbitration clause. Nicosia admitted making at least 27 purchases through Amazon.com since that date, conduct that "a reasonable person would understand to constitute assent." The Second Circuit agreed, holding that the plaintiff was bound by the agreement to arbitrate and that Amazon's participation in the litigation did not mean Amazon waived its right to arbitrate.

Consumers Have No Actionable Beef

Chen v. Dunkin' Brands Inc., No. 18-3807 (2nd. Cir.) (Mar. 31, 2020). Affirming dismissal for failure to state a claim and lack of personal jurisdiction.

In a significant decision, the Second Circuit held that registering to do business as a foreign corporation in New York is insufficient to subject a defendant to general personal jurisdiction in the state. Customers alleged that Dunkin' Donuts deceptively marketed two of its breakfast sandwich products to consumers by tricking consumers into believing that the products contained an "intact" piece of meat through advertisements and labeling using the words "Angus" and "steak." In reality, the products contained a ground beef patty with multiple additives. The district court dismissed the claims of four of the five plaintiffs on the grounds that the defendant was not subject to general personal jurisdiction in New York and their allegations stemmed from conduct that occurred outside the state. The district court dismissed the complaint as to the remaining plaintiff on the ground that she failed to state a claim because the advertising in question was not actionable as a warranty and was not deceptive or misleading to a reasonable consumer. The Second Circuit affirmed the district court's judgment, holding that long-standing New York law subjecting registered foreign corporations to general jurisdiction was incompatible with recent U.S. Supreme Court jurisdiction law and with recent New York state intermediate appellate court decisions. The court also held that the plaintiffs had not otherwise alleged facts sufficient to confer general jurisdiction on Dunkin' Donuts there, and the complaint failed to allege a plausible violation of New York's statutory consumer protection laws.

"**Sam Jockel** will serve up what's "On the Horizon: Near-Future Legal Challenges for Food and Dietary Supplement Labeling and Advertising" at the virtual Food Advertising, Labeling, and Litigation Conference, September 22–24."

Sam Jockel

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Seventh Circuit Ices Passenger's De-Icing Suit

Hughes v. Southwest Airlines Co., No. 19-3001 (7th Cir.) (June 10, 2020). Affirming dismissal for failure to state a claim.

An airline passenger alleged that Southwest Airlines breached its contract after it canceled the plaintiff's flight to Chicago because Southwest supposedly lacked sufficient de-icing solution at the Chicago airport. Considering Southwest fulfilled its duties under its contract with the passenger by offering him a later fight or a refund, however, the district court held that the complaint failed to state a claim as a matter of law. The Seventh Circuit affirmed, agreeing with the district court that the contract "did not require, explicitly or implicitly, Southwest to maintain sufficient reserves of de-icer," and that reading such a requirement into the contract would constitute an "impermissible implied term."

Temporary Loss of Money Hurts Just Enough to Confer Article III Standing

Van v. LLR Inc., et al., No. 19-35242 (9th Cir.) (June 24, 2020). Reversing dismissal for lack of Article III standing and remanding for further proceedings.

The Ninth Circuit held that a very small amount of improperly charged sales taxes is enough to confer Article III standing. The lower court had dismissed for lack of standing because the defendant had fully refunded the tax charges, ruling that the claim for interest alone was insufficient. The Ninth Circuit reversed, holding that the small interest charge ($3.76) was sufficient to support Article III standing.

Poor Memory Sinks Memory Supplement Class Action

Racies v. Quincy Bioscience LLC, No. 4:15-cv-00292 (N.D. Cal.) (May 4, 2020). Judge Gilliam. Granting motion to decertify the class.

Phillip Racies filed a class action against Quincy Bioscience after purchasing Quincy's Prevagen brain health supplement. Racies claimed he purchased Prevagen because the product was advertised as improving memory and supporting healthy brain function. In 2017, the court certified a class of California consumers.

The case proceeded to trial, but Racies could not recall whether the Prevagen bottle he purchased included statements about improved memory and brain function. After Racies presented his case, the jury deliberated for several days but was unable to come to a unanimous decision, and the court declared a mistrial.

The court subsequently granted Quincy's motion to decertify the class, explaining that Racies could no longer meet the typicality, adequacy, and predominance requirements because was unable to recall the statements on the Prevagen he purchased. Because Prevagen is not marketed for purposes other than improving brain function and memory, these representations about Prevagen's benefits were a substantial factor in the typicality and predominance analysis. ■

"**Cari Dawson** will be on the virtual panel "Consumer Class Actions: Effective Defense Strategies for Litigation and Reputational Defense" at the Corporate Counsel Women of Color Career Strategies Conference on September 30."

Cari Dawson

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Environmental

Negligence Claims Don't Hold Water Against Hydroelectric Generators

Bonin v. Sabine River Authority of Louisiana, No. 19-40299 (5th Cir.) (June 4, 2020). Affirming class dismissal.

The Fifth Circuit affirmed the dismissal of a putative class of homeowners who failed to state a negligence claim. The 300+ homeowners initially filed takings claims against the Sabine River authorities of Texas and Louisiana in Texas state court after the 2016 flooding around the Sabine River, allegedly caused by high water levels in the Toledo Bend Reservoir. The homeowners added a negligence claim against hydroelectric power generators that operated turbines in the reservoir. The case was eventually removed to federal court—on appeal, the circuit court held that because the case was properly under federal jurisdiction at the time it was removed (because the case qualified as a "mass action" under the Class Action Fairness Act), the district court's dismissal of the homeowners' claims was valid. The circuit court also affirmed the ruling that the putative class had not shown that the utilities had violated their Federal Energy Regulatory Commission licenses by allowing the reservoir to fill, potentially contributing to the flooding.

Part of an Allegedly Harm-Less Breakfast

Doss v. General Mills Inc., No. 19-12714 (11th Cir.) (May 20, 2020). Affirming dismissal.

The Eleventh Circuit affirmed the dismissal of a consumer's proposed class action alleging that General Mills failed to reveal that its Cheerios cereal contains a weed-killing chemical called glyphosate. The plaintiffs alleged that by withholding information about the presence of glyphosate, General Mills deceived its customers into thinking the cereal was safe. But the appellate panel agreed with the lower court that the plaintiff lacked standing—she failed to allege she was harmed by purchasing

the allegedly unsafe product or that the boxes of Cheerios were "presumptively unsafe" and "therefore worthless." The panel stressed that for an injury to be "particularized," it "must affect the plaintiff in a personal and individual way," and the plaintiff failed to allege that glyphosate was dangerous to consume. ■

Learn why the "EPA's Pass on Perchlorate Regulation Reduces Lawsuit Risk" from **Jeffrey Dintzer** and **Clynton Namuo** in *Law360*.

Jeffrey Dintzer

Clynton Namuo

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ERISA

Same Difference Means No Standing

Thole v. U.S. Bank N.A., No. 17-1712 (U.S.) (June 1, 2020). Affirming lack of Article III standing.

The plaintiffs, retired participants in U.S. Bank's retirement plan, alleged the bank (and others) mismanaged their pension fund to the tune of $750 million in losses. The Supreme Court held that the plaintiffs lacked Article III standing because, whether the plaintiffs won or lost the lawsuit, they would receive the exact same monthly benefits, "not a penny more." Therefore, the plaintiffs had no concrete stake in the lawsuit and lacked Article III standing. *Thole* may result in fewer class actions related to the alleged mismanagement of defined-benefit plans.

Not an Employment Security? Not a Problem

Schweitzer, et al. v. Investment Committee, et al., No. 18-20379 (5th Cir.) (May 22, 2020). Affirming motion to dismiss.

The Fifth Circuit affirmed a decision from the Southern District of Texas dismissing a putative Employee Retirement Income Security Act (ERISA) class action filed against a company that continued to allow plan participants to invest in its former parent company's stock after the subsidiary was spun off. The district court dismissed the complaint, ruling that even though the stock at issue ceased to be an employer security after the spinoff, the fiduciaries did not violate their duty to diversify or duty of prudence by allowing the stock to remain in the plan. Reviewing the issue de novo on appeal, a three-judge panel explained that the stock was no longer an employer security but upheld dismissal for failure to state a claim. The court reasoned that the duty-to-diversify claim failed because the plaintiffs did not allege that the fiduciaries failed to offer sufficient investment options or failed to issue a warning about a concentrated portfolio, and the duty of prudence claim failed because, even if the investment became imprudent, the fiduciaries were not obligated to force divestment and took other steps to comply with ERISA. ■

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> "Reading **Emily Costin** and **Ashley Gillihan**'s "The Road to Hell Is Paved with Good Intentions: COBRA Compliance in the Wake of COVID-19 Downsizing" in ***Benefits Law Journal*** could be good for your litigation health."

Emily Seymour Costin

Ashley Gillihan

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Labor & Employment

Ninth Circuit Denies Coverage of Wage-and-Hour Class Action

U.S. Telepacific Corp. d/b/a TPx Communications v. U.S. Specialty Insurance Co., No. 19-55828 (9th Cir.) (June 1, 2020). Affirming order granting motion for judgment on the pleadings.

The Ninth Circuit affirmed the dismissal of Telepacific's breach of contract and related claims against Specialty relating to its refusal to defend Telepacific in a proposed wage-and-hour putative class action because the suit is barred by policy exclusions. The three-judge panel agreed with the district court that an exclusion in the policy for alleged violations of the Fair Labor Standards Act or other similar federal, state, or local provisions included alleged violations of the California Labor Code. The court further held that Specialty's duty to advance defense costs under the policy extended only to actually covered claims, not potentially covered claims for which the parties dispute whether coverage exists.

Sick Leave Claims Dropped from Driver Class Action

Colopy v. Uber Technologies Inc., No. 3:19-cv-06462 (N.D. Cal.) (June 30, 2020). Judge Chen. Granting, in part, defendant's motion to dismiss.

California-resident Uber drivers asserted claims that Uber misclassified them as independent contractors and denied them certain employee benefits, including failure to reimburse business expenses, failure to pay minimum wage, and overtime. Judge Chen dismissed without prejudice one claim related to paid sick leave entitlement and denied Uber's legal challenges to the other claims.

Judge Chen ruled that the plaintiffs did not adequately plead "that they would have qualified for paid sick leave and/or that they would have utilized it (and if so, how much) during the relevant period, had it been available to them."

Inadequacy of Class Reps Sinks Class Certification

Pruitt, et al. v. Personnel Staffing Group LLC, et al., No. 1:16-cv-05079 (N.D. Ill.) (June 8, 2020). Judge Dow. Granting motion to deny class certification.

The Northern District of Illinois rejected class certification in a Title VII race discrimination putative class action brought against a staffing company by two of its temporary workers. Following substantial discovery and a "robust record," including depositions, the defendants filed a motion to deny class certification asserting, among other arguments, that the named plaintiffs were inadequate class representatives under Federal Rule of Civil Procedure 23(a). The court granted the motion, closely analyzing the deposition transcripts and ruling that the workers failed to meet the bar for knowledge of and involvement in the case because their testimony indicated that they did not know who the defendants were, why many of them were sued, or whether EEOC charges were filed. The decision demonstrates the importance of effective discovery early in the case to probe for weaknesses in the plaintiffs' attempt to pursue the case as a class action. ■

"Start your day (from your office or your home office) with our Labor & Employment Group's executive breakfast "Remote Work and Return to In-Person Work: Challenges and Solutions" on October 15."

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Privacy/Data Security

Fingerprint Vending Machines

Bryant v. Compass Group USA Inc., No. 20-1443 (7th Cir.) (May 5, 2020). Reversing and remanding.

Christine Bryant worked for a call center whose vending machines required users to establish an account and use their fingerprint for payment instead of cash. She alleged that Compass Group violated the Illinois Biometric Information Privacy Act by failing to make available a retention schedule and guidelines for permanently destroying the biometric identifiers and other information it was collecting and storing. She also based claims on the defendant's failure to (1) inform her in writing that her fingerprint was being collected and stored; (2) inform her in writing of why and how long her fingerprint would be collected and stored; and (3) obtain her written release to collect, store, and use her fingerprint.

The trial court dismissed for a lack of standing, but the Seventh Circuit largely disagreed. The appellate court did agree that the duty to disclose is owed to the public generally, not to persons whose biometric information is collected, and thus the plaintiff did not suffer a concrete and particularized injury on that claim. However, the court held that the deprivation of information was a concrete injury in fact that was particularized to Bryant. Had the plaintiff been equipped with the missing information, she may have chosen not to use the vending machines.

Standing Up to Facebook

Davis v. Facebook Inc., No. 17-17486 (9th Cir.) (Apr. 9, 2020). Affirming in part and reversing in part.

A number of Facebook users alleged that the social media giant violated their common-law and statutory right to privacy by tracking their browsing histories after they logged out of Facebook. The district court dismissed the plaintiffs' claims, which included economic damages as an element for lack of standing. The remaining claims were dismissed for failure to state a claim.

The Ninth Circuit largely disagreed. The court held that the plaintiffs had standing because California law recognizes a legal interest in unjustly earned profits, and they presented evidence that Facebook profited from their browsing history. The court also held that the plaintiffs adequately stated claims for intrusion upon seclusion and invasion of privacy, reasoning that "[t]he ultimate question of whether Facebook's tracking and collection practices could highly offend a reasonable individual is an issue that cannot be resolved at the pleading stage." The court also held that the plaintiffs adequately stated claims under the Wiretap Act and the California Invasion of Privacy Act because Facebook was a "party to the communication."

Automatic Invite Leaves Nightclub Holding the Tab

Duran v. La Boom Disco Inc., No. 19-600 (2nd Cir.) (Apr. 7, 2020). Vacating district court's judgment and remanding.

Radames Duran sued La Boom Disco after allegedly receiving hundreds of unsolicited text messages in violation of the Telephone Consumer Protection Act. La Boom acknowledged sending the messages but argued that its actions were not illegal because the texting platforms used to send the messages were not automatic telephone dialing systems. To qualify as an autodialer, according to the Second Circuit, a dialing system must have the capacity to: (1) "store or produce telephone numbers to be called, using a random or sequential number generator"; and (2) "dial such numbers." The court held that La Boom's system met both requirements. On the first requirement, the court concluded that "the clause requiring the use of 'a random or sequential number generator' modifies only the verb 'produce' in the statute, but not the word 'store.'" For the second requirement, the court concluded that the human intervention analysis should focus on the system's ability to dial or input the number, not simply the requirement of a human to press send.

"Add it up at the Privacy + Security Forum Virtual Fall Academy 2020, October 21–23, and learn more about "***Schrems II***: Practical Approaches to Manage Cross Border Data Flow Risks" from **David Keating** and "Ransomware – Changes in Attacks and Changes in Legal Exposure" from **Kim Peretti**."

David Keating

Kim Peretti

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Products Liability

Lack of Expert Testimony Closes the Window for Class Certification

Grodzitsky v. American Honda Motor Co., No. 18-55417 (9th Cir.) (Apr. 29, 2020). Affirming order denying class certification.

The Ninth Circuit affirmed an order denying class certification to plaintiffs who alleged that they purchased Honda Pilots with faulty window regulators. The appellate court affirmed the district court's decision to exclude the testimony of the plaintiffs' engineering expert as unreliable by applying Rule 702 at class certification. In the absence of expert testimony establishing a common cause of the window failures, the plaintiffs' class failed Rule 23's commonality requirement because it relied on nothing more than a series of consumer complaints about windows that failed for unknown reasons. This decision underscores the importance of focusing on causation experts when trying to defeat class certification.

Defendants Pump the Brakes on Broad Class Definition

Sloan v. GM LLC, No. 3:16-cv-07244 (N.D. Cal.) (Apr. 23, 2020). Judge Chen. Granting class certification in part.

In a case brought against General Motors (GM) in the Northern District of California, the court granted the plaintiffs' motion for class certification but significantly trimmed the scope of the class. The plaintiffs alleged that their GM vehicles consumed too much oil because of an engine defect and sought to represent a class of all current and former owners and lessees of vehicles containing the allegedly defective engine. But GM redesigned the engine in 2011, which meant that members of the proposed class could not rely on common evidence. In addition, because of differences in damages calculations, the class could not include all former owners and lessees. The court thus limited the class to current owners and lessees of GM vehicles that contained the redesigned engine. Defendants should keep in mind that, even if they cannot defeat class certification altogether, they may at least be able to limit the scope of an overly broad class.

CLASS ACTION & MDL roundup

SUMMER 2020

Plaintiffs Can't Wash Away Causation Issues

Elward v. Electrolux Home Products, No. 1:15-cv-09882 (N.D. Ill.) (June 1, 2020). Judge Pacold. Denying motion for class certification.

A federal judge denied the plaintiffs' motion to certify a proposed class of individuals who purchased Electrolux dishwashers and, in doing so, highlighted the precision required to craft a successful class definition. The plaintiffs alleged that the dishwashers' heating elements were dangerously defective, leading to fires and flooding. Among other reasons, the court determined that the proposed class failed for lack of ascertainability. Because the plaintiffs defined the class to include all consumers who suffered property damage from a fire or flood caused by the alleged defect, determining which consumers fell within the class would have required individual factual causation findings.

Superiority Trumps Privacy Concerns in Complex Product Litigation

I*n re Pacific Fertility Center Litigation*, No. 3:18-cv-01586 (N.D. Cal.) (June 23, 2020). Judge Corley. Denying motion for class certification.

The Northern District of California applied the superiority prong of the Rule 23(b)(3) analysis to deny class certification to plaintiffs alleging that their eggs and embryos were damaged or destroyed by a defective cryopreservation tank. First, the court found that class treatment was not the superior method of adjudicating these claims because evidence produced to show general causation at the class level would have to be re-introduced in individual trials to show specific causation and damages. In addition, the court noted that many of the people affected by the defect were pursuing separate individual claims, so there was a serious risk of inconsistent rulings even if the court certified the class. Finally, the court rejected the plaintiffs' argument that the privacy concerns raised by the case were sufficient to make class litigation superior. Although the court recognized that some absent class members would prefer class treatment because it would allow them to potentially recover without revealing their sensitive medical concerns during discovery, the court noted that there were sufficient means of addressing these privacy concerns outside the class context. ■

TOP INFLUENCERS.

Congratulations to **Kerri-Ann Griggs** and **Aimee Pickett Sanders**, named to the National Black Lawyers – Top 100 in Georgia; **Ellen Goodwin**, recognized as a "Woman of Influence" in commercial real estate by *GlobeSt. Real Estate Forum*; and **Teresa Bonder**, honored as one of California's "Top Antitrust Lawyers" by the *Daily Journal*.

Kerri-Ann Griggs

Aimee Pickett Sanders

Ellen Goodwin

Teresa Bonder

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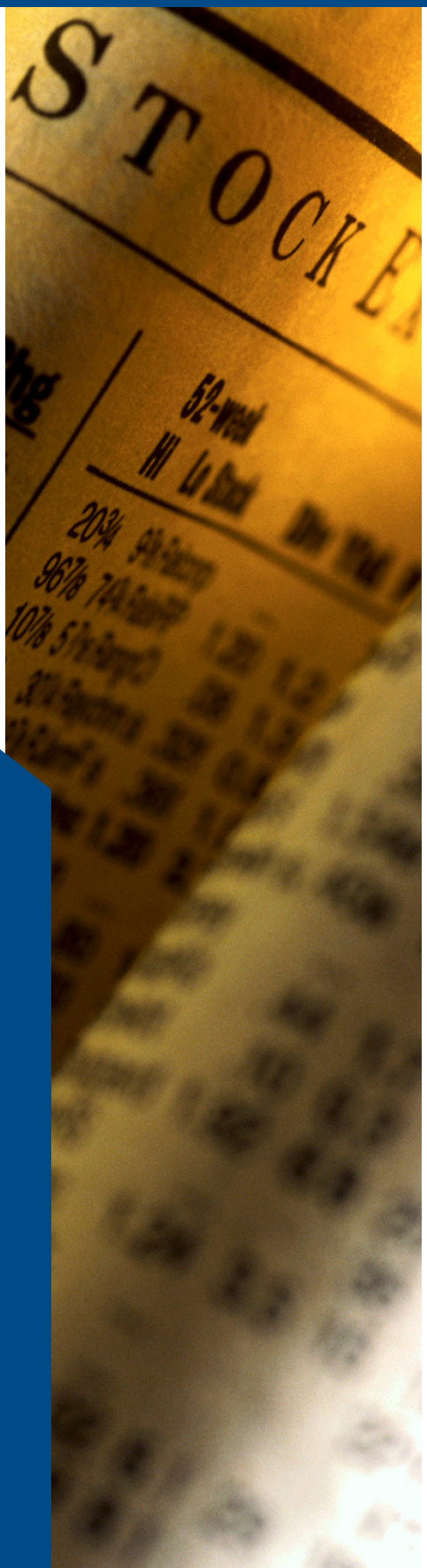


Securities

Second Circuit Rejects Second Attempt to Ditch Class

Arkansas Teacher Retirement System, et al. v. Goldman Sachs Group Inc., et al., No. 18-3667 (2nd Cir.) (Apr. 7, 2020). Affirming certification.

The Second Circuit denied Goldman Sachs's appeal of a Southern District of New York order that granted certification to investors alleging that the bank failed to disclose conflicts of interest in underwriting collateralized debt obligation transactions involving subprime mortgages. The thrust of Goldman's appeal was that the price-maintenance theory of liability—which allows shareholders to bring securities-fraud claims when misstatements maintain inflated stock prices without causing them—required fraud-induced inflation and could not be satisfied with general statements. The Second Circuit was unpersuaded, refusing to "narrow" the scope and applicability of the price-maintenance doctrine. Accordingly, the Second Circuit found that the district court had applied the correct standard and affirmed its order granting class certification to the investors.

Energy Company Shareholder Suit Proceeds Full Steam Ahead

Cosby v. Miller, et al., No. 3:16-cv-00121 (E.D. Tenn.) (June 29, 2020). Judge Varlan. Granting class certification.

A Tennessee federal magistrate judge recommended certification of two classes bringing securities claims against KPMG. Former shareholders of Miller Energy Resources Inc. allege KPMG helped the now-defunct oil and natural gas company falsify financials about its assets. The court found that bringing claims under the same legal theories as other shareholders, despite variations in the timing of stock purchases, was sufficient to satisfy Rule 23's typicality requirement. The suit follows the SEC's imposition of a $6.2 million fine against KPMG for its Miller Energy audit failures.

CLASS ACTION & MDL roundup

SUMMER 2020

Firm Must Identify Attorneys to Be Lead Counsel

Dahhan v. OvaScience Inc., et al., No. 1:17-cv-10511 (D. Mass.) (May 8, 2020). Judge Talwani. Granting class certification.

In an investor action, a Massachusetts federal judge approved class certification but required the plaintiff's law firm to identify the individual attorneys responsible for leading the suit. Judge Talwani explained that she needed to know the identities of the individual attorneys, rather than the firm generally, in order to oversee counsel and perform her "supervisory obligations to the class." The firm will file a supplemental brief indicating which lawyers will be handling the matter, and OvaScience will have an opportunity to object.

Lead Plaintiff Nutmegged in Soccer Suit

In re Grupo Televisa Securities Litigation, No. 1:18-cv-01979 (S.D.N.Y.) (June 8, 2020). Judge Stanton. Denying class certification.

Judge Stanton denied certification for a class of investors who contend that Televisa paid a FIFA executive $15 million through its Swiss subsidiary in exchange for FIFA World Cup broadcasting rights and that they bought Televisa stock at an inflated price because the company hid its involvement. In his order denying class certification, Judge Stanton wrote that the lead plaintiff could not represent the proposed class because it held both short and long positions on Televisa's shares.

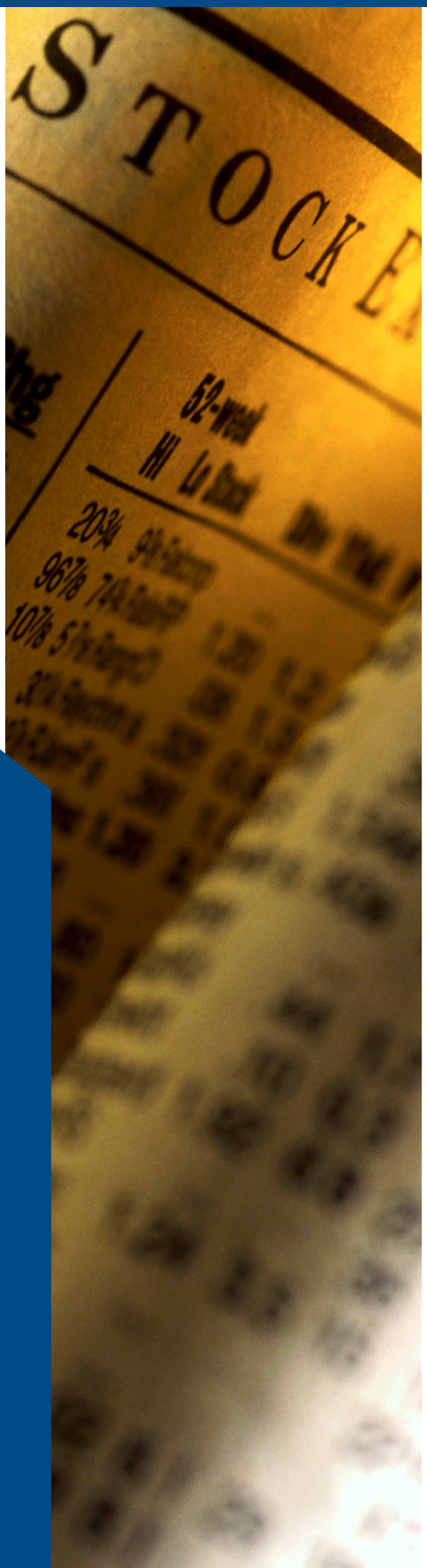
No California Love for Out-of-State Class Members in Cannabis Crypto Suit

Davy, et al. v. Paragon Coin Inc., No. 4:18-cv-00671 (N.D. Cal.) (June 24, 2020). Judge White. Granting certification in part.

The district court granted partial certification to investors of a marijuanaindustry cryptocurrency startup for federal claims but denied certification on claims based on state law because at least some of the class members were not located in California. In addition to alleging that Paragon Coin Inc. violated federal securities laws because its initial coin offering (ICO) was not registered with the U.S. Securities and Exchange Commission, the class members also brought a state unjust enrichment claim

219 Best Lawyers. 69 Ones to Watch.

Alston & Bird is well represented in the 2021 editions of ***The Best Lawyers in America*** and the inaugural ***Best Lawyers: Ones to Watch***.



and claims under the California Corporations Code and California Business and Professions Code. Although the court found that it would be constitutional to apply California law because Paragon Coin was headquartered in California at the time of its ICO, it refused to do so after engaging in a conflictoflaw analysis centered on the "governmental interest" of the states involved and the "place of the wrong," which the court defined as "the state where the last event necessary to make the actor liable occurred."

EpiPen Claims Stick, but Generic Claims Won't Do in Price-Fixing Shareholder Suit

In re Mylan N.V. Securities Litigation, No. 1:16-cv-07926 (S.D.N.Y.) (Apr. 6, 2020). Judge Oetken. Granting certification and denying motion to dismiss in part.

Investors will live to see another day in a class action against the EpiPen manufacturer, but their claims alleging price-fixing of "virtually all" of its generic drugs will not. The court rejected the manufacturer's attempt to dismiss claims based on its alleged misclassification of EpiPen as a generic drug under a Medicaid program and claims based on alleged engagement in a noncompetitive rebate scheme for that same drug. The court likewise found its argument that it could not have made any misleading statements with requisite scienter because of an ambiguity in Right Rebate Act to be unavailing because the Centers for Medicare & Medicaid Services had "indeed directly and repeatedly inform[ed the manufacturer] that the EpiPen was misclassified."

The manufacturer also moved to dismiss class claims based on the investors' EpiPen price-fixing allegations, but the court held that the investors' causation allegations—that the high price of EpiPens caused the company's stock to drop after the FTC announced an investigation—were not too attenuated, even if a competing product was pulled from the market for reasons unrelated to anticompetitive behavior. That said, the court did dismiss the investors' claims based on allegations that "virtually all" of the company's generic drugs were affected by anticompetitive activity because the investors failed to allege specific anticompetitive activity for each of the generic drugs enumerated in their complaint. The court also granted certification, which was unopposed.

Court Finds Plaintiff Lacks Sufficient Facts in the Bank

Karp v. SI Financial Group Inc., et al., No. 3:19-cv-00199 (D. Conn.) (Apr. 16, 2020). Judge Shea. Granting motion to dismiss.

Judge Shea dismissed a proposed class action against two banks and individual defendants, finding that the plaintiff failed to plead sufficient facts to support a claim under Section 14(a) of the Exchange Act. The plaintiff's claims related to allegations that the banks had misled investors before a vote on a proposed merger. The plaintiff alleged that the defendants omitted material financial data in a proxy statement encouraging shareholders to approve the merger. Judge Shea ruled that the plaintiff had not plausibly alleged that any omissions by the defendants caused the proxy statement to be misleading, therefore failing to state a necessary element of a Rule 14a-9 claim. The court focused on the plaintiff's reliance on omissions without pointing to misleading statements in the proxy statement as being insufficient to render the proxy statement misleading. Judge Shea also noted that the plaintiff's pleading failed to meet the specificity-in-pleading standards under the Private Securities Litigation Reform Act.

Court Gives Green Light to Investor Suit

In re GreenSky Securities Litigation, No. 1:18-cv-11071 (S.D.N.Y.) (June 1, 2020). Judge Hellerstein. Granting class certification.

Judge Hellerstein certified a class against financial technology startup GreenSky Inc. The class is composed of purchasers of GreenSky Class A common stock traceable to the registration statement and prospectus issued with GreenSky's May 25, 2018 public offering. The plaintiffs allege that GreenSky, as well as a group of individual defendants and underwriters, were deceptive in failing to state the company's planned foray into the elective health care field, which led to a stark drop in the company's stock prices. GreenSky had previously sought to dismiss the claims, but the court ultimately permitted the claims to continue, stating the alleged insufficient disclosure "cries out for an explanation," and ultimately granted the plaintiffs' motion to certify the class. ■

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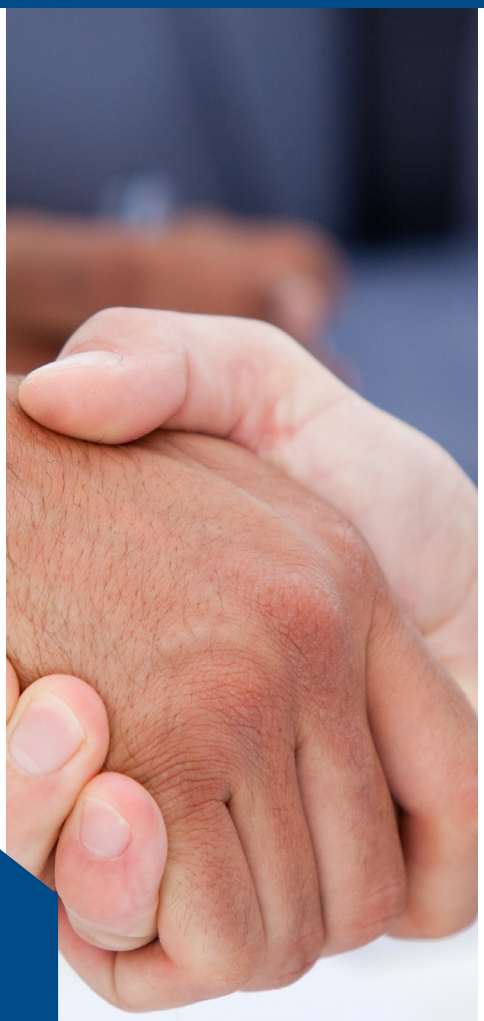

Settlements

Court Approves One of the Largest Antitrust Settlements in History

In re Namenda Direct Purchaser Antitrust Litigation, No. 1:15-cv-10083 (S.D.N.Y.) (May 27, 2015). Judge McMahon. Approving $750 million settlement.

Judge McMahon approved what she referred to as the largest-ever settlement ($750 million) of an antitrust case alleging suppressed generic drug competition against a single defendant under Section 4 of the Clayton Act. There were no objections to the settlement, and the court found the amount to be reasonable, fair, and adequate. Class counsel prosecuted the complicated antitrust case for over four and a half years after first attempting to resolve the case in March 2017. The parties finally reached a settlement the night before the first day of trial on October 27, 2019, which was a culmination of years of negotiations.

Insureds Appreciate Court's Approval of Depreciating Labor Settlement

Stuart v. State Farm Fire & Casualty Co., No. 4:14-cv-04001 (W.D. Ark.) (June 2, 2020). Judge Hickey. Approving $10 million settlement.

Judge Hickey granted final approval of a class settlement between an insurer and a class of insureds who alleged the insurance company breached its contracts with them by depreciating labor when calculating actual cash value payments for structural damage claims. The settlement proceeds will benefit individuals who submitted claims for loss or damage that occurred between May 2010 and December 2013 to structures in Arkansas. Relief will vary from 10% to 100% reimbursement for unpaid labor depreciation. No objections to the settlement were filed, and the court found that the settlement was fair, reasonable, and adequate, including the $2.8 million awarded in attorneys' fees and $9,500 for representative plaintiffs' service awards.

- **Nearly $80 Million Attorneys' Fee Award in Mortgage Lending Bond Price-Fixing Suits**

  In re GSE Bonds Antitrust Litigation, No. 1:19-cv-01704 (S.D.N.Y.) (June 16, 2020). Judge Rakoff. Approving $337 million settlement.

  Judge Rakoff granted final approval of five separate settlements between more than a dozen banks and the investor-plaintiffs that claimed the financial institutions rigged the prices of bonds issued by mortgage lending giants Fannie Mae and Freddie Mac. The five settlements totaled $337 million and will be distributed among the investor-plaintiffs, which include large pension funds for cities, states, and unions. The final settlement approval ends the sprawling litigation in which plaintiffs had claimed that the banks used their position as bond sellers for the government-sponsored entities (GSEs) to unlawfully raise the price of bonds, harming investors.

  In addition to granting final approval of the five separate settlements, Judge Rakoff approved a request for $77.3 million in attorneys' fees for co-lead counsel. The award represented 20% of the settlement total, an amount the court found reasonable in light of co-lead counsel's work in the case, which totaled close to 30,000 hours. In approving the attorneys' fee request, the court lauded co-lead counsel's work "both in briefs and oral argument" and praised the outcome they were able to achieve in light of facing the combined resources of sophisticated defendants who were "represented by top counsel from many of the nation's most prominent law firms." The court also approved a $1.7 million award for litigation expenses and class representative service awards ranging from $50,000 to $400,000, an amount justified by the "great risk" the named plaintiffs took in suing the defendants because the GSE bonds are among the plaintiffs' core investment vehicles, and there was no guarantee that the defendants—some of the largest dealers of GSE bonds in the secondary market—would continue to do business with the plaintiffs.

Texas FTW! Alston & Bird opens our lucky 13th office in Fort Worth with 6 new attorneys focusing on our oil & gas industry clients.

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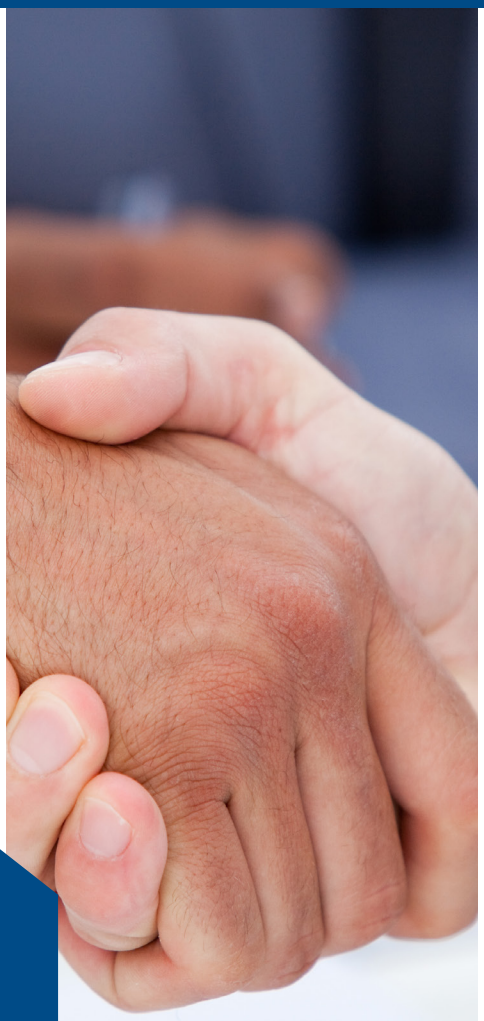

Hepatitis C Patients Get Drug Coverage

M.D., et al. v. Centene Corporation, et al., No. 1:18-cv-22372 (S.D. Fla.) (June 12, 2020). Judge Becerra. Approving settlement.

A Florida district court approved a class settlement resolving claims that health insurer Centene improperly denied coverage of hepatitis C drugs. Under the terms of the agreement, Centene agreed to abandon the coverage restrictions at issue, notify class members who were previously denied coverage of their new eligibility, and pay $350,000 in attorneys' fees and costs. The district court concluded that approving the settlement agreement—which was the result of six months of arm's-length settlement negotiations—was in the best interest of the class.

Data Breach Claims Resolved

Carroll v. Macy's Inc., et al., No. 2:18-cv-01060 (N.D. Ala.) (June 5, 2020). Judge Proctor. Approving settlement.

An Alabama district court recently approved a $192,500 settlement resolving claims that a department store failed to adequately protect customer data from attacks by cybercriminals. In doing so, the district court also approved an attorneys' fee award of $60,000, which represented roughly 24% of the total class settlement fund. According to the district court, this fee award was appropriate because it fell within the 25% benchmark range that has been approved by the Eleventh Circuit.

Conversion Consequences Action Settles

Clapp, et al. v. Accordia Life and Annuity Co. and Alliance-One Services Inc., No. 2:17-cv-02087 (C.D. Ill.) (June 23, 2020) Judge Bruce. Approving settlement.

Judge Bruce approved a monetary and non-monetary class action settlement, including $2.2 million in attorneys' fees. In a lawsuit filed in April 2017, the plaintiffs alleged that after Athene Annuity sold most of its insurance business to Accordia in 2013, they were assured that their insurance coverage and no-lapse guarantees would remain effective during the conversion process. However, the plaintiffs claimed that, after the policies were converted to Alliance One's administrative systems, Accordia stopped auto-debiting policy

premiums from their accounts, resulting in missed and increased premium payments, and in effect canceling the no-lapse guarantees in their life insurance policies.

The settlement included injunctive and monetary relief, including automatic corrections, adjustments, backdating of policy payments, and claim review relief. It also provided for partial or total waiver of past-due premium payments and refunds. The defendants also agreed to implement a "testing plan" to identify and correct conversion-related issues. Judge Bruce also approved the $2.2 million attorneys' fees award, determining that it amounted to 2,261 hours of work at $495 per hour, which was a "reasonable blended rate."

One Small Step for Anti-Age Bias: NASA Jet Propulsion Lab Settles EEOC Suit

U.S. Equal Employment Opportunity Commission v. Jet Propulsion Laboratory, No. 2:20-cv-03131 (C.D. Cal.) (June 9, 2020). Judge Marshall. Approving settlement.

The EEOC settled an age discrimination lawsuit against the Pasadena Jet Propulsion Laboratory (JPL), a federally funded research and development center and NASA field center in Pasadena, California. The JPL has agreed to pay $10 million, along with injunctive relief.

The EEOC filed a complaint against the JPL alleging that the lab violated the Age Discrimination in Employment Act of 1976 (ADEA) by systematically laying off employees who were over 40 years old. The complaint also alleged that older employees were passed over for rehire in favor of employees aged 39 and younger who were less qualified.

The settlement provides monetary relief to older employees and a three-year consent decree with injunctive relief intended to prevent further discrimination. The JPL will also retain an EEOC monitor, a diversity director to help the lab retain and recruit individuals of all ages, and a layoff coordinator to monitor compliance. The settlement also requires the JPL to review and revise policies and procedures related to ADEA discrimination; provide training to all employees on age discrimination; and report the JPL's recruitment, hiring, layoffs, terminations, complaints, and complaint monitoring about age discrimination to the EEOC.

Picking up a 7–10 will be easy after you attend "Circuit Splits and How to Handle Them" with **Cari Dawson** at the Class Actions Virtual 2020 National Institute, Oct 13–14.

Cari Dawson

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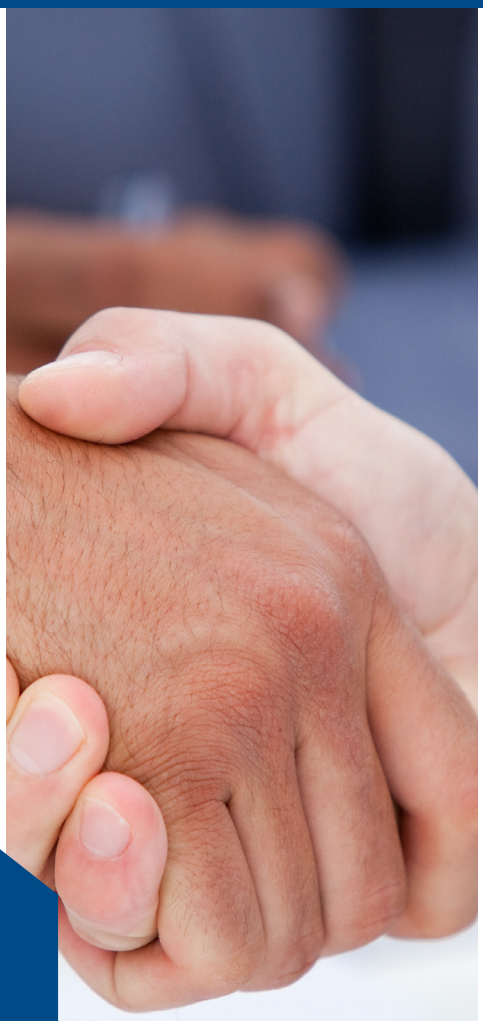

Pharmaceutical Company Treats Investor Suit Settlement

In re Dr. Reddy's Laboratories Limited Securities Litigation, No. 3:17-cv-06436 (D.N.J.) (May 18, 2020). Judge Arpert. Approving $9 million settlement.

Dr. Reddy's settled a proposed class action alleging quality control issues. The plaintiffs, a group of investors led by a Mississippi pension fund, alleged that the pharmaceutical company misrepresented the scope and severity of the Food and Drug Administration's observance of noncompliance with regulations at three of its facilities in India. Judge Arpert approved a proposed settlement for $9 million. The settlement class includes persons or entities that bought or otherwise acquired Dr. Reddy's American depository shares on the New York Stock Exchange between November 27, 2014 and September 15, 2017. Each class member is to receive a pro rata share of the settlement based on an evaluation of the party's recognized claim compared to the aggregate of the proposed class. ■

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