ALSTON & BIRD

CLASS ACTION & MDL roundup

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CLASS ACTION & MDL **roundup**

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Where the (Class) Action Is

Welcome back to the ***Class Action & MDL Roundup***! This edition covers notable class actions from the third quarter of 2022. Retirement and 401(k) plans were a hot topic this quarter, with significant cases across the Labor & Employment, ERISA, and Banking & Insurance areas with matters related to fiduciary duties, stock prices, and excessive fees. We also saw more noteworthy price-fixing cases in the Antitrust area in the third quarter.

What does "All Natural" mean? It seems to be the buzz word on every item at the grocery store, but is anyone able to define it? That's the question of quarter in this Consumer Protection case in the Southern District of New York, addressing claims that a popular health-food brand's "All Natural/Non GMO" labels were misleading. Data breaches and cyberattacks continue to be an issue for a wide variety of industries, including retail, automotive, and pharmaceutical. We also cover Delaware's amendments to its General Corporation Law which address significant aspects of Delaware law impacting securities class actions.

We wrap up the Roundup with a summary of class action settlements finalized in the third quarter. We hope you enjoy this installment and, as always, welcome your feedback on this issue.

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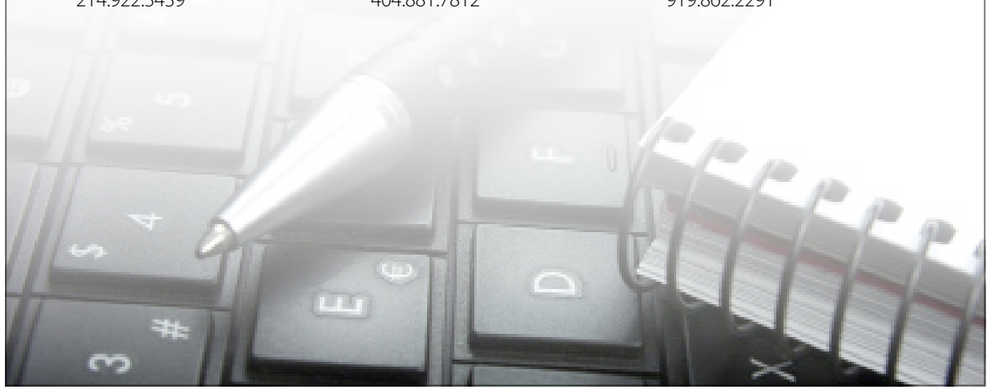

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Antitrust/RICO

- **Adequacy Challenge Based on Disparate Purchasing Practices Found to Be Inadequate**

  In re Cathode Ray Tube (CRT) Antitrust Litigation, No. 4:07-cv-05944 (N.D. Cal.) (Aug. 1, 2022). Judge Tigar. Granting class certification.

  Direct purchaser plaintiffs successfully moved to certify a class against a seller of cathode ray tubes in a price-fixing case, overcoming the seller's typicality and adequacy arguments. The seller asserted that the class representatives purchased only small quantities at standardized prices, while absent class members purchased large quantities under individually negotiated prices. Judge Jon S. Tigar acknowledged that overwhelming disparities in purchasing practices between class representatives and absent class members could defeat typicality or adequacy. But he ultimately found that this case did not present the type of overwhelming disparities that could defeat class certification, in part because customization was fairly limited, there were relatively few types of cathode ray tube products at issue, and wholesale prices were rarely negotiated individually.

- **Aggregate Damages Challenge Does Not Present Much of a Challenge to Court**

  In re Namenda Indirect Purchaser Antitrust Litigation, No. 1:15-cv-06549 (S.D.N.Y.) (Sept. 19, 2022). Judge McMahon. Denying motion to decertify class.

  Judge Colleen McMahon denied the defendant drug manufacturers' motion to decertify the class in an alleged pay-for-delay scheme. The drug manufacturers argued that the plaintiffs' classwide damages model violated due process because it did not account for "staggering" variation among the class—with thousands of insurers reducing out-of-pocket costs by transacting in different ways, at different times, and to varying degrees with different stakeholders (government payors, PBMs, consumers), in multiple jurisdictions. Judge McMahon was unpersuaded, finding that aggregate damages are appropriate so long as common proof can be used to estimate classwide damages and those damages are tied to only a single theory of liability. Further, class members would not need to present proof of individual overcharges at trial; rather, they must present proof of injury during a post-verdict claims process, and Judge McMahon noted that the parties could structure this process so as to permit the defendant drug manufacturers to cross-examine every person making a claim and to challenge the right of any class member to obtain a specific sum.

  Apparently, this order motivated the parties to settle their dispute—the court preliminarily approved a classwide settlement two months later, on November 14, 2022. ■

Alston & Bird earned 117 Tier 1 rankings in the edition of "Best Law Firms" – 27 national, 90 metropolitan – across all U.S. offices.

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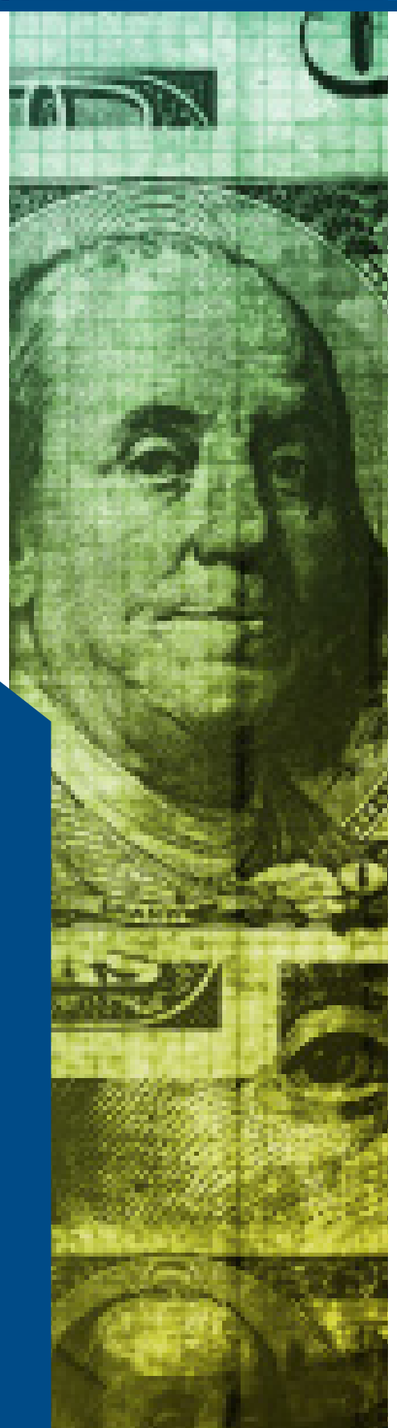


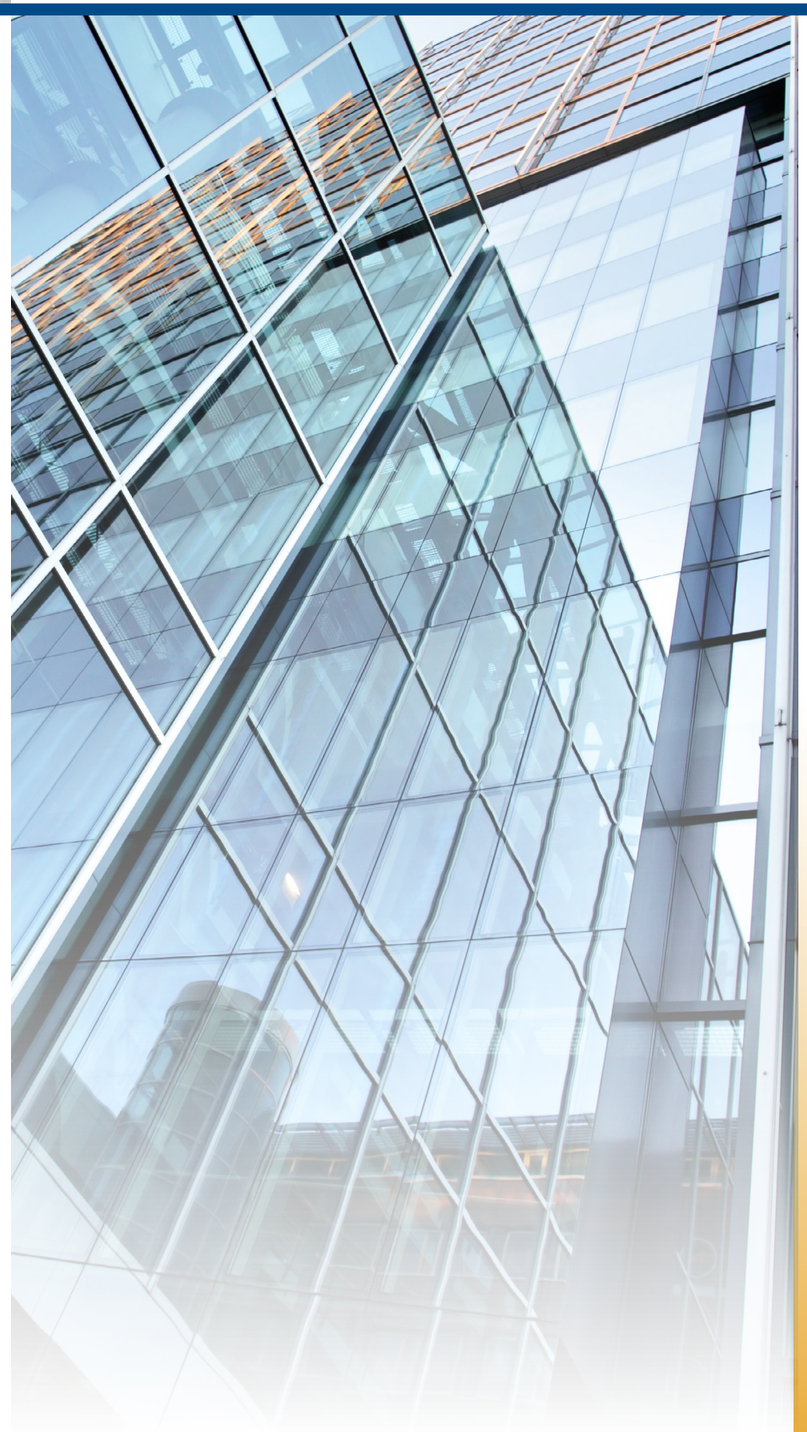
Banking & Insurance

- **Court Finds Management of 401(k) Is A-OK**

  Falberg v. The Goldman Sachs Group Inc., No. 1:19-cv-09910 (S.D.N.Y.) (Sept. 14, 2022). Judge Ramos. Granting motion for summary judgment.

  A federal judge granted summary judgment in Goldman Sachs' favor on putative class claims alleging that the firm breached its fiduciary duties under ERISA to its employees invested in a defined-contribution 401(k) retirement plan maintained by the firm. A former employee filed suit in October 2019, asserting that Goldman Sachs had breached its duties of prudence and loyalty by maintaining (and delaying removal of) five proprietary Goldman Sachs–managed mutual funds among a larger menu of 35 investment options available to plan participants. The former employee alleged the proprietary funds underperformed and charged higher fees than alternative investments and that the company only maintained them on its menu because it would benefit from having its employees choose to invest in funds that it managed.

  Judge Ramos rejected all the former employee's claims, finding that the unrebutted evidence showed that none of the retirement committee members had any incentive to favor Goldman Sachs–managed funds and that the committee members did not apply any different standard for those funds than for any other investment option. The mere possibility that committee members may have been influenced by a desire to benefit the company was not enough to show a fiduciary breach. ■



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Consumer Protection

- **Health Food Class Can't Define "All Natural"**

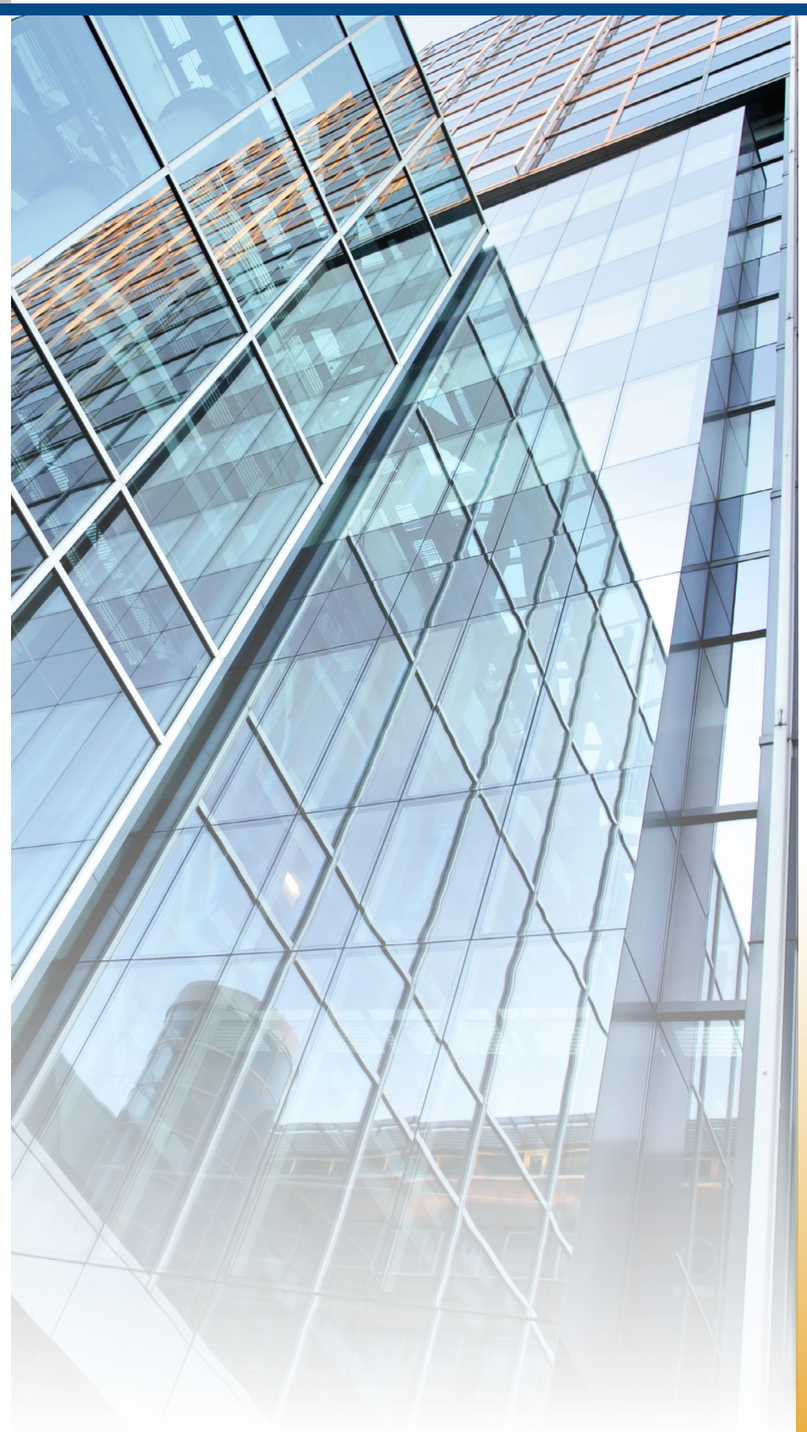
  In re Kind LLC "Healthy and All Natural" Litigation, No. 1:15-md-02645 (S.D.N.Y.) (Sept. 9, 2022). Judge Buchwald. Granting motion for summary judgment and motion to decertify class.

  Purchasers of Kind food products originally filed a class action claiming that Kind products labeled "All Natural/Non GMO" were misleading. After the customers dropped the non-GMO claims, Kind moved for summary judgment, arguing that no objective definition of "All Natural" exists, so that claim cannot be deceptive or misleading. The court agreed and found that there is no reasonable consumer standard for a product being all natural, that the Food and Drug Administration itself has not defined the term, and that, because the class had dropped its non-GMO claims, it did not have evidence that Kind's products contained GMOs and, therefore, were not "All Natural." This last finding also led the court to decertify the class—ruling that while "All Natural" and "Non GMO" claims were subject to common proof (specifically that if a product contained a GMO it was not "All Natural"), the decision to drop its non-GMO claims eliminated that theory of common proof.

- **4G Wireless Service Class Loses Coverage**

  Freitas v. Cricket Wireless LLC, No. 3:19-cv-07270 (N.D. Cal.) (July 29, 2022). Judge Alsup. Granting motion to decertify class.

  After previously certifying a class of consumers who alleged Cricket Wireless failed to provide them 4G wireless service as advertised, the court granted Cricket's motion to decertify based on the class's faulty damages model. The expert witness attempted to estimate restitution by isolating the price premium paid by consumers who paid for 4G wireless service and 4G-capable phones but received only 3G. Cricket successfully argued that the model failed under *Comcast* because while it did compare the prices of allegedly comparable 3G- and 4G-capable phones and wireless plans, it did not control for significant phone features (e.g., battery size) and wireless service features (e.g., international text messaging), which impacted their prices significantly. ■



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Labor & Employment / ERISA

Dudenhoeffer Keeps Door Closed on Renewed ESOP Class Actions

Perrone v. Johnson & Johnson, No. 21-1885 (3rd Cir.) (Sept. 7, 2022). Affirming dismissal for failure to state a claim.

The Third Circuit declined to revive a class action alleging that Johnson & Johnson had harmed former employees' retirement savings by concealing information about the presence of asbestos in its products. Although the Second Circuit's *Jander v. Retirement Plans Committee of IBM* raised hopes of reanimating employee stock ownership plan (ESOP) class actions, the *Dudenhoeffer* test continues to keep the door closed.

In this case, participants in the Johnson & Johnson ESOP argued that the plan administrators failed to protect them from the drop in stock prices when news became public about asbestos contamination. *Dudenhoeffer* requires participants with these claims to plausibly allege an alternative action the defendants could have taken that (1) would be consistent with the securities laws; and (2) would be so clearly beneficial that a fiduciary *could not conclude* it would be likely to do more harm than good.

Here, participants' allegations relied on general economic theory, arguing that a corrective public disclosure could have avoided artificial stock inflation and that the prolonged concealment caused greater reputational damage. These general allegations were insufficient under *Dudenhoeffer* and *Jander*, the only circuit court decision post-*Dudenhoeffer* to find plausible allegations. In *Jander*, IBM was in the process of selling its microelectronics business, and the undisclosed financial problems would inevitably be revealed in the sale.

Because a reasonably prudent fiduciary could determine that an early corrective disclosure of asbestos contamination would do more harm than good, the participants in *Johnson & Johnson* failed to state a claim for breach of fiduciary duty.

Seventh Circuit Clarifies Pleading Standard for 401(k) Excessive-Fee Class Actions

Albert v. Oshkosh Corp., No. 21-2789 (7th Cir.) (Aug. 29, 2022). Affirming dismissal for failure to state a claim.

The Seventh Circuit clarified the pleading standard for excessive fee class actions in the wake of the Supreme Court's opinion in *Hughes v. Northwestern University*. Relying heavily on the Sixth Circuit's *Smith v. CommonSpirit Health*, the Seventh Circuit's opinion finds that *Hughes* did not introduce a radically new approach to claims alleging excessive investment fees.

This case involved similar claims by 401(k) participants for breaches of the duty of prudence for excessive fees.

Recordkeeping fees: Participants submitted data showing that other plans paid cheaper recordkeeping fees and alleged that the plan failed to solicit competitive bids. These allegations, however, did not include any information about the quality or type of recordkeeping services. *Hughes* did not hold that fiduciaries are required to regularly solicit bids from service providers. Thus, the Seventh Circuit affirmed dismissal of the recordkeeping claim for failure to state a claim.

Investment Manager Fees: Participants argued that the key indication of whether investment fees are prudent is the "net investment expense to retirement plans," which is the share class that gives participants access to portfolio managers at the lowest net fee for services. The Form 5500 the participants relied on, however, did not disclose details about where money from revenue sharing goes. This was insufficient to state a claim because fiduciaries are not required to choose the cheapest possible fund, and no court has adopted the participants' novel net investment expense theory.

Imprudent Investments: Participants alleged that the plan's actively managed funds charged more than passively managed funds. The Seventh Circuit held that without more details providing a basis to compare the prudence of investments, these allegations were insufficient to state a claim.

Claim Waiver Issue Does Not Preclude Certification

Butch, et al. v. Alcoa USA Corp., et al., No. 3:19-cv-00258 (S.D. Ind.) (Sept. 28, 2022). Judge Young. Granting class certification.

A California district judge granted class certification to a group of approximately 6,000 Alcoa retirees claiming that Alcoa violated the Employee Retirement Income Security Act and the Labor Management Relations Act by terminating their life insurance benefits. The court rejected Alcoa's argument that class certification was improper because the overwhelming majority of the proposed class had signed waivers forfeiting their right to sue in court. According to the court, the presence of a possible waiver issue did not preclude class certification because "it is a regular feature for courts to certify a class even though the defendants may have affirmative defenses against the class." ■

"Making friends in all the right places. **Emily Costin** tells ***Pensions & Investments*** about the "Rare Legal Strategy Used to Encourage ERISA Dismissals" after SCOTUS didn't give district courts guidance on when to dismiss complaints."

Emily Costin

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Privacy & Data Security

- **Allegations of Cyberattack Vulnerability Insufficient to Establish Standing**

Flynn, et al. v. FCA US LLC & Harman International Industries Inc., No. 20-1698 (7th Cir.) (July 14, 2022). Affirming motion to dismiss for lack of standing.

The Seventh Circuit affirmed the dismissal of an automobile cybersecurity case for lack of evidence of injury to establish federal Article III standing. The case arose from a 2015 *Wired* article reporting cybersecurity researchers discovering a vulnerability in a Jeep's "Uconnect" infotainment system. Although the car company offered a free software update to fix the problem, a group of plaintiffs sued on behalf of every consumer who had purchased or leased a 2013–15 Chrysler vehicle with the Uconnect system, asserting federal and state claims based on allegations that the vehicles were vulnerable to cyber-attacks, not that any cyber-attacks had actually occurred.

The district court rejected facial standing challenges at the pleading stage, but dismissed the case after discovery concluded because the plaintiffs failed to produce sufficient evidence to support their theory that they suffered an "overpayment" injury because they would not have paid as much as they did if they had known about the cybersecurity vulnerability. The Seventh Circuit grounded its affirmance in the Supreme Court's instruction that "the proof required to establish standing increases as the suit proceeds."

- **No Action, No Liability: BIPA Action Dismissed**

Stauffer v. Innovative Heights Fairview Heights, et al., No. 3:20-cv-00046 (S.D. Ill.) (Aug. 5, 2022). Judge Beatty. Dismissing defendant from suit.

After discovering that her employer had collected and stored her fingerprint data for timekeeping purposes, the plaintiff sued her employer, the company that operated the fingerprint database, and the facility where she worked for violation of the Illinois Biometric Information Privacy Act (BIPA).

The district court dismissed the claims against the facility because the plaintiff failed to allege that the facility ever "took an active step to collect or obtain her data." The court based its conclusion on BIPA Section 15(b), which provides that a private entity may not "collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or information." The court ruled that the key words of the statute, "collecting, capturing, purchasing, or obtaining," all require an "active step," which the plaintiff failed to show.

- **Pet Stair Search Results in Communications Interception**

Popa v. Harriet Carter Gifts Inc., No. 21-2203 (3rd Cir.) (Aug. 16, 2022). Vacating grant of summary judgment.

After browsing the Harriet Carter Gifts website in search of pet stairs, Ashley Popa learned that Harriet and a third-party marketing service, NaviStone, had tracked her activity while using the site. She sued for violations of Pennsylvania's Wiretapping and Electronic Surveillance Control Act (WESCA) and invasion of privacy. The district court granted summary judgment for the defendants on the WESCA claim because there was no interception if communications are received by a "direct party," and even if they did intercept Popa's communications, that interception did not occur in Pennsylvania and thus WESCA does not apply.

The court of appeals rejected that result, holding that no "direct-party exception" applied because when the Pennsylvania legislature amended the statute's definition of "intercept," it included a narrow exclusion that only protected direct communications to law enforcement. Also, applying the common definition of "intercept" and analogizing with wiretapping, the court concluded that, in the case of electronic communications, the interception occurred where the communications were "rerouted" and that the rerouting occurred at Popa's browser in Pennsylvania.

- **Third Circuit Resets Data Breach Standing Test**

Clemens v. ExecuPharm Inc., No. 21-1506 (3rd Cir.) (Sept. 2, 2022). Reversing dismissal for lack of standing.

Jennifer Clemens alleged she provided her personal and financial data to her employer in exchange for her employer's agreement to keep that data safe. After a known hacker group infiltrated her employer's systems, encrypted its data, and demanded ransom, Clemens filed suit alleging breach of contract and tort claims against her employer. The district court dismissed the case for lack of standing, determining that the Third Circuit had set forth a "bright line" rule precluding standing based on a future risk of identity theft.

The Third Circuit reversed and announced a nonexhaustive multifactor test for determining whether a future risk of identity theft is sufficiently imminent and substantial to qualify as an

"Chief information security officers are becoming targets of civil and criminal cases. **Kim Peretti**, **Cara Peterman**, **Sierra Shear**, and **Lance Taubin** share how companies are "Mitigating the Risks in Era of Heightened Liability for CISOs" in this article for Bloomberg Law."

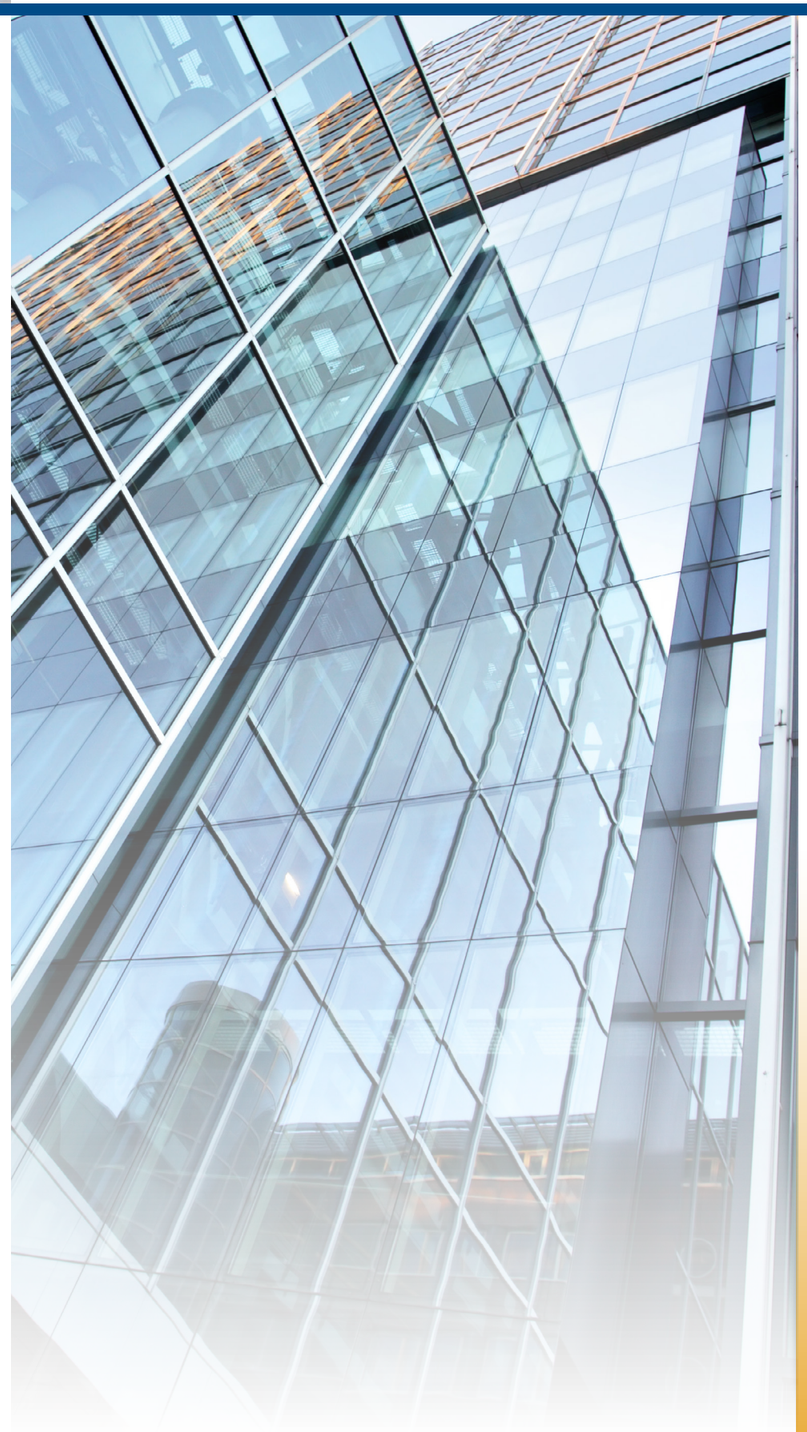
Kim Peretti

Cara Peterman

Sierra Shear

Lance Taubin

Article III injury. In resolving the particular issues before it, the court determined that Clemens's allegations regarding the known identity of the hacker, its publication of data on the dark web, and the type of data at issue (personal and financial) were sufficient to demonstrate that her asserted injury was actual and imminent. Following the Supreme Court's *TransUnion* ruling, the Third Circuit also held that the harm was concrete because the "unauthorized exposure of personally identifying information that results in an increased risk of identity theft or fraud" is closely related to the harms contemplated by traditional privacy torts. Further, the court held that while Clemens's future injury was sufficient to confer standing only for injunctive relief under *TransUnion*, her alleged emotional distress and expenditures on mitigation measures relating to the data breach were sufficient to confer standing for damages. ■



Products Liability

- **Standards Matter: District Judge Applied Wrong Legal Standard to Approve $500 Million Settlement**

  Best Companies Inc. v. Apple, No. 21-15762 (9th Cir.) (Sept. 28, 2022). Vacating final settlement approval.

  The Ninth Circuit vacated an order approving a final class settlement involving Apple because the district court applied the wrong legal standard. The litigation stemmed from an update to Apple iPhones' system software, iOS, that slowed the performance of certain phones. Consumers around the country filed federal and state class actions, which were consolidated respectively in a federal MDL and a California state Judicial Council coordination proceedings (JCCP). The parties reached a settlement that resolved the MDL and JCCP proceedings, which the district court finally approved.

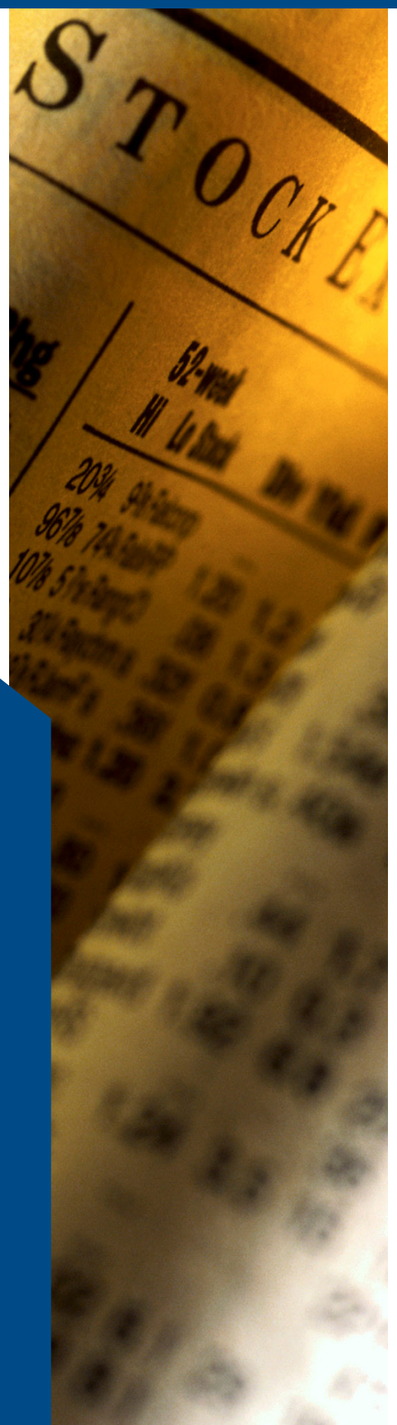
  On appeal, the Ninth Circuit rejected objectors' arguments about the sufficiency of class notice, standing, and incentive payments, but reversed the settlement because the district court applied a presumption of reasonableness and fairness. The appellate court explained that "[a]s we have repeatedly admonished, settlement prior to class certification requires extra scrutiny." Although "the district court's probing analysis suggests that it may have applied heightened scrutiny, its written order relied on a flawed legal standard" and thus was an abuse of discretion. The panel remanded to permit reevaluation under the correct standard.

- **Lacking an Expert Witness Can Cost You Your Case**

  In re Onglyza and Kombiglyze XR Products Liability Litigation, No. 5:18-md-02809 (E.D. Ky.) (Aug. 2, 2022). Judge Caldwell. Granting summary judgment.

  In multidistrict litigation, Judge Caldwell granted the defendants' motion for summary judgment because the plaintiffs failed to present evidence of general causation. The litigation involved claims that certain type 2 diabetes drugs containing saxagliptin could cause heart failure. Having previously excluded the plaintiffs' general causation expert, the court ruled the defendants were entitled to summary judgment because all U.S. jurisdictions require expert testimony to establish general causation in complex medical products liability cases. The court further ruled that, even if expert testimony were not required, evidence that use of saxagliptin was associated with an increased risk of heart failure established only correlation, not causation.

  The court also rejected the plaintiffs' request to reopen expert discovery to allow them to find a new general causation expert, explaining that the plaintiffs' surprise at the *Daubert* ruling did not constitute good cause and the defendants would be prejudiced if the plaintiffs were permitted to start expert discovery anew. The court further rejected the plaintiffs' arguments that the defendants, who had agreed to modify the drugs' labels to reference a potential increased risk of heart failure, were judicially estopped from arguing that saxagliptin did not cause heart failure because the defendants' prior statements to the FDA were not made in a judicial or quasi-judicial proceeding and, in any event, were not inconsistent with the positions taken in this litigation. ■



Securities

Toothless Securities Claims Dismissed

Macomb County Employees' Retirement System, et al. v. Align Technology Inc., et al., No. 21-15823 (9th Cir.) (July 7, 2022). Affirming dismissal.

The Ninth Circuit affirmed the dismissal of a securities fraud class action against the maker of Invisalign braces. The Ninth Circuit agreed with the district court that the plaintiff failed to allege actionable statements concerning the company's prospects in China. Of the 12 purportedly fraudulent statements made by Align's senior executives, the court held that six were non-actionable puffery since they used "vague, generically positive terms, describing China as 'a great growth market,' 'a huge market opportunity,' 'a market that's growing significantly for us,' and possessing 'really good' 'dynamics,' and describing Align's performance there as 'tremendous' and 'great.'" The court then held that the remaining six statements "did not create a false impression of Align's growth in China and so were not actionable," including because (1) the complaint failed to contradict three of the statements and the plaintiff waived its arguments related to another statement on appeal; (2) one statement was accurate "when considered in context"; and (3) one statement was an "optimistic prediction" and not "false when made."

Rideshare Investors Given Green Light

Boston Retirement System, et al. v. Uber Technologies Inc., et al., No. 3:19-cv-06361 (N.D. Cal.) (July 26, 2022). Judge Seeborg. Granting class certification.

The Northern District of California certified a class of Uber investors alleging the company misled them about its business prospects, among other things, and that it downplayed risk ahead of its May 2019 initial public offering. In its opposition to class certification, Uber argued that the proposed class of investors failed to meet the adequacy and typicality requirements of Rule 23(a) and the predominance and superiority requirements of Rule 23(b)(3). In particular, Uber argued that issues concerning each plaintiff's actual knowledge precluded a finding of predominance and superiority.

The court disagreed, finding that although Uber had "presented evidence in the form of deposition testimony from various employees of [the named plaintiff's] investment manager, ZCI, showing that some employees had knowledge of pieces of information related to the alleged omissions," this "awareness of snippets of information" could "not defeat predominance." The court also ruled that Uber failed to show that issues associated with actual knowledge would predominate over common issues of the class and create conflicts. The court similarly swept aside Uber's adequacy and typicality arguments, holding that the class representatives had demonstrated they would adequately serve the class. The class, defined as "all persons and entities that purchased or otherwise acquired Uber's publicly traded common stock pursuant and/or traceable to the offering documents for Uber's IPO, and who were damaged thereby," likely numbers in the thousands.

DGCL Amendments Have Potential to Impact Delaware Stockholder Class Actions

Delaware's amendments to its General Corporation Law (DGCL) took effect on August 1, 2022. Those amendments address several significant aspects of Delaware law, including the authority to issue stock and options, the expansion of appraisal rights to beneficial owners, and new provisions intended to streamline the process for non-U.S. entities to domesticate into Delaware. In particular, Delaware corporations are now permitted to exculpate certain specified officers from personal liability for monetary damages arising out of breaches of the fiduciary duty of care. Delaware law previously limited that category of exculpation to directors. The new exculpation provision for officers will impact future Delaware stockholder class actions, especially those involving duty of care claims. ■

"Where's the line between "covering up" and just "failing to report"? Listen to "*The Lawfare Podcast*: **Kellen Dwyer** on the Fallout from the Conviction of Uber's Former Chief Security Officer" to find out more."

Kellen Dwyer

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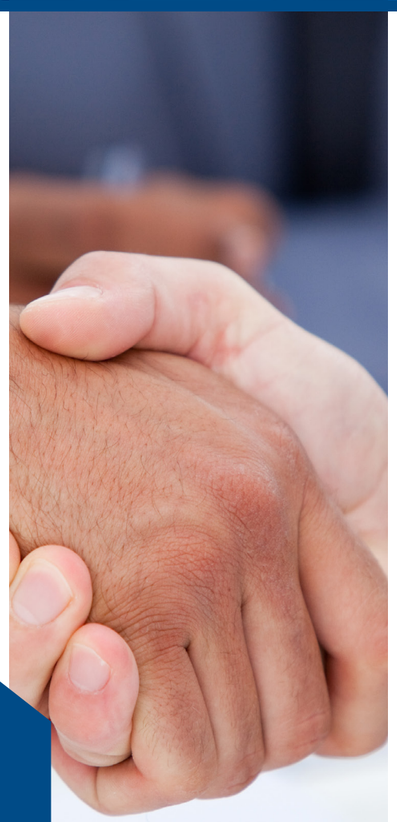

Settlements

- **Farm-Raised Salmon Consumers Awarded $85 Million in Antitrust Settlement**

  In re Farm-Raised Salmon and Salmon Products Antitrust Litigation, No. 1:19-cv-21551 (S.D. Fla.) (Sept. 8, 2022). Judge Altonaga. Approving final $85 million settlement.

  A Florida district judge approved an $85 million common fund settlement resolving antitrust litigation. The settlement class included consumers who purchased farm-raised Atlantic salmon or farm-raised salmon products from the defendants. The district judge also approved class counsel's request of attorneys' fees of 25% of the common fund, totaling $25.5 million, and reimbursement of litigation expenses of about $2.6 million.

- **Settlement Presents Path to Citizenship**

  Calixto v. United States Department of the Army, No. 1:18-cv-01551 (D.D.C.) (Sep. 22, 2022). Judge Friedman. Certifying class and proposed settlement.

  The district court approved a settlement of a class of plaintiffs who are current and former enlisted soldiers in the U.S. Army and who participated in the Military Accessions Vital to the National Interest (MAVNI) program before September 2016. The program enables non-U.S. citizens with skills "vital to the national interest" to enlist and serve in the military. But in late 2016, the Army began involuntarily discharging MAVNI soldiers who were still at entry-level status. The plaintiffs assert that they were discharged without notice or process, contravening the Army and Department of Defense regulations and violating due process. They alleged the actions were unconstitutionally discriminatory based on their national origin. The court noted that the class members were provided "exceptional and equitable" relief, enabling "their ability to become citizens of the United States."

- **Settlement Creates Coordinated Community Response**

  Graham v. University of Michigan, No. 2:21-cv-11168 (E.D. Mich.) (Aug. 3, 2022). Judge Roberts. Granting final approval of settlement and awarding fees.

  The district court approved the settlement of a suit against the University of Michigan, claiming that the university failed to maintain or properly enforce sufficient practices for preventing and responding to sexual misconduct on campus. Rather than seeking monetary relief, the class sought major institutional reforms. The settlement created a representative Coordinated Community Response Team, chaired by external advisers and experts, to advise on developing campus police, procedure, and prevention efforts related to sexual misconduct and gender-based violence.

  The settlement releases only certain non-economic claims, while enhancing meaningful best-practice reforms of the campus's comprehensive policies.

- **Drug Maker Settles Securities Claim**

  Fleming, et al. v. Impax Laboratories Inc., et al., No. 4:16-cv-06557 (N.D. Cal.) (July 15, 2022). Judge Gilliam. Approving $33 million settlement.

  A California district judge approved a $33 million settlement resolving securities claims arising from Impax Laboratories' alleged failure to disclose a price-fixing investigation by federal authorities. In approving the settlement, the judge noted that $33 million represented approximately 12.5% of the estimated damages potentially recoverable at trial—a percentage that is consistent with other securities class action settlements. The judge also granted class counsel's request for $9.9 million in attorneys' fees after concluding that class counsel had litigated the case skillfully and professionally and had achieved significant results for the class.

- **Cow Treatment MDL Put to Pasture with $21 Million Settlement**

  In re Fairlife Milk Products Marketing & Sales Practices Litigation, No. 1:19-cv-03924 (N.D. Ill.) (Sept. 28, 2022). Judge Dow. Approving $21 million settlement and stipulated injunction.

  The district court approved a $21 million settlement and a stipulated injunction related to the monitoring of cows, ending several lawsuits against milk companies alleging that they falsely marketed their milk as coming from humanely treated cows. The court awarded class counsel $7 million in attorneys' fees from the settlement fund, finding that a one-third fees-to-settlement-fund ratio was in line with circuit precedent, to go along with service awards of $3,500 to each class representative. The remainder of the approved settlement fund is non-reversionary, with eligible claimants able to receive up to $20 for claims without valid proof of purchase and up to $80 for claims with valid proof of purchase, for a total of $100 in total possible relief, subject to pro rata adjustments depending on the number of claims filed. The settlement also included meaningful

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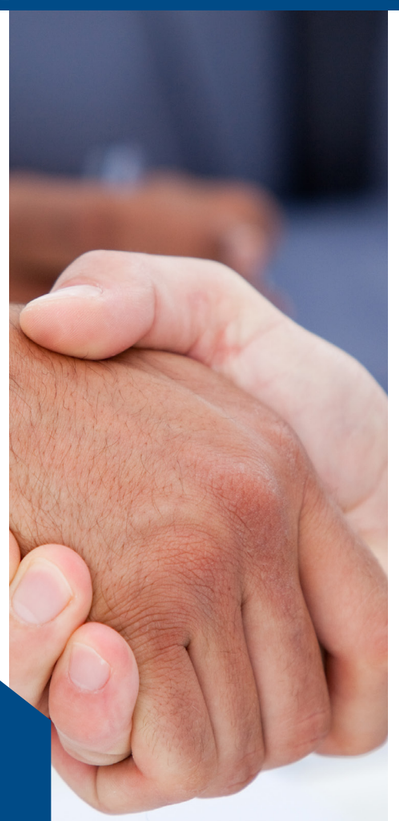


injunctive relief, including the right to conduct third-party audits of suppliers' farms to ensure they are complying with agreed-upon animal welfare obligations and the appointment of an independent monitor.

Securities Fraud Case Ripe for Settlement with $165 Million Deal

Pearlstein v. BlackBerry Ltd., No. 1:13-cv-07060 (S.D.N.Y.) (Sept. 29, 2022). Judge McMahon. Approving $165 million settlement.

The district court approved a $165 million settlement, ending a long-running securities fraud case against smartphone manufacturer BlackBerry. The initial 2013 complaint alleged that BlackBerry had made materially false and misleading statements and omissions concerning the purported success of BlackBerry's new line of BlackBerry 10 smartphones. After an initial dismissal and appellate reversal, the plaintiffs' claims survived a motion to dismiss, motion for summary judgment, motion to strike, and motion for judgment on the pleadings. The parties finally reached a settlement on the eve of trial. A third of the total settlement is set aside for attorneys' fees and case contribution awards of $100,000 were awarded to each of the named plaintiffs. In determining that the settlement was fair, even in light of the plaintiffs' expert's aggregate damages calculation of up to $1.2 billion, Judge McMahon noted that it was not certain that BlackBerry could withstand a judgment much larger than the $165 million settlement. Moreover, at 13.75% of the estimated maximum recoverable damages, the settlement amount was considerably above the high-end of historical average percentages.

Attorneys' Fees Award of 25% Denied

Cottle v. Plaid Inc., No. 3:20-cv-03056 (N.D. Cal.) (July 20, 2022). Judge Ryu. Approving $58 million settlement.

A California district judge approved a $58 million class settlement resolving claims against Plaid Inc., a financial technology startup that provides linking and verification services for apps consumers use to send and receive money from financial accounts, alleging that it misled consumers and violated their privacy rights by collecting their financial account login information without authorization, using it to collect their banking data, and selling the consumer banking data to third parties.

Although Judge Donna Ryu approved the total settlement figure, she denied class counsel's request for an attorneys' fee award of 25% (or $14.5 million). Judge Ryu determined this requested fee was not justified in light of the class counsel fee awards in other cases, even though she did find that the achieved results, the risk of litigation, the skill and the quality of class counsel's work, and class counsel's acceptance of the financial risks by undertaking the matter on a contingent basis supported the requested award. Judge Ryu ultimately awarded 19% of the settlement fund ($11 million) in attorneys' fees, and she also approved the request for $5,000 for each of the 11 class representatives.

Security Fraud Class Action Settles for $45 million

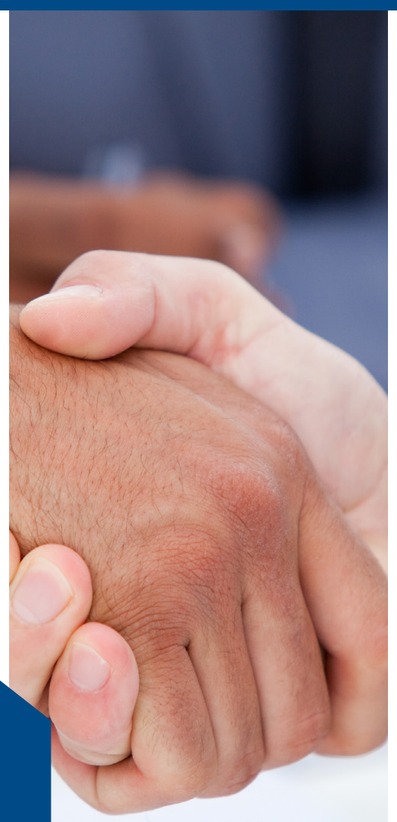
Strathclyde Pension Fund v. Bank OZK, No. 4:18-cv-00793 (E.D. Ark.) (Sept. 23, 2022). Judge Marshall. Approving $45 million settlement.

An Arkansas district judge approved a $45 million class settlement resolving security fraud claims. The judge noted the difficult nature of the claims, the bank's nuanced points against the merits of the claims, the uncertainty of how it would have resolved the issues in the case, and that the case involved the particularly complex question of loss causation in approving the settlement. The judge also approved as reasonable class counsel's request for attorneys' fees of 25% of the settlement fund ($11.25 million) and a $30,000 incentive award to the class representative.

Attorneys Settle Their ATM fees

Mackmin v. Visa, No. 1:11-cv-01831 (D.D.C.) (Aug. 8, 2022). Judge Leon. Granting motion for final approval of settlements and awarding attorneys' fees and class representative service rewards.

A federal judge approved a $66.7 million settlement over claims by credit card holders alleging that Visa and Mastercard violated the Sherman Antitrust Act by setting ATM access fee pricing requirements for banks and other ATM operators. The court certified a settlement-only class, consisting of all individuals and entities that paid unreimbursed ATM access fees directly to the bank defendants or foreign ATM transactions from ATMs in the United States during the class period, and it also awarded over $20 million in attorneys' fees (30% of settlement fund), plus $10 million for litigation expenses, to three law firms, as well as a $10,000 payment to the class representative.



Banks Settle a Golden Egg

In re Commodity Exchange Inc., No. 1:14-cv-01459 (S.D.N.Y.) (Aug. 8, 2022). Judge Caproni. Certifying the class and approving the settlement and awarding attorneys' fees.

The court granted the plaintiffs' application for final settlement approval of claims alleging the bank defendants conspired to illegally fix prices on the gold market. The court certified a settlement-only class of all persons or entities that sold any physical or financial derivative of gold as the underlying asset during the class period. The final, approved settlement involves a $50 million cash settlement fund, reduced by an attorneys' fee award of over $16 million, resulting in $152 million in total settlements related to this action to date.

Bank Resolves Spoofing Claims

In re JPMorgan Precious Metals Spoofing Litigation, No. 1:18-cv-10356 (S.D.N.Y.) (July 7, 2022). Judge Woods. Approving $60 million settlement.

A New York district judge approved a $60 million settlement resolving claims that JPMorgan and some of its former traders illegally manipulated metals futures through a technique known as spoofing. The court emphasized that, had a settlement not been reached, there would have been a significant risk that the class could have received less or nothing. The judge also approved $20 million—one-third of the settlement amount—as an appropriate attorneys' fee award for class counsel.

Banks Settle Largest CIPA Deal in History

Narayan v. Fifth Third Bank, No. 1:16-cv-11223 (N.D. Ill.) (Aug. 4, 2022). Judge Pallmeyer. Granting final approval of $50 million settlement.

An Illinois federal judge granted final approval of a $50 million class action settlement in a case against a trio of banks. The underlying complaint, filed by a group of business owners, alleged that the bank defendants hired telemarketers to sell credit card and debit card payment processing services to businesses across the country and then recorded the calls without disclosing that they were doing so. According to the final settlement approval, the bank defendants claimed they had no principal-agent relationship with the telemarketers, and even if there were such a relationship, the telemarketers acted outside the scope of their authority when they recorded the phone calls. The settlement is the largest in history for a class action brought under the California Invasion of Privacy Act and included nearly $16.4 million in attorneys' fees to be paid from the settlement fund (approximately 33%).

Data Breach Victims Cash In on Settlement

In re Morgan Stanley Data Security Litigation, No. 1:20-cv-05914 (S.D.N.Y.) (Aug. 5, 2022). Judge Englemayer. Granting final approval of $60 million settlement.

A New York federal judge blessed a $60 million class action settlement, ending litigation against Morgan Stanley that began back in 2020 after Morgan Stanley began notifying customers and regulators about data security incidents stemming from actions taken to dispose of computer hardware in 2016 and 2019. The settlement fund includes $13.6 million in attorneys' fees, reduced from the requested $20 million. The terms of the settlement provide that Morgan Stanley will pay to provide 15 million class members with two years of fraud insurance and prevention services and will reimburse claims up to $10,000 for financial losses traceable to the data security incidents. The settlement also paid $5,000 service awards to the 11 named plaintiffs for their services as class representatives. ■

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