ALSTON & BIRD

CLASS ACTION & MDL roundup

WINTER 2020

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overview

Where the (Class) Action Is

Welcome to the latest edition of the ***Class Action & MDL Roundup***. This edition covers notable class actions from the fourth quarter of 2019. Recognizing the current environment with the COVID-19 pandemic, we have added a new section to this Roundup highlighting class action filings since the beginning of 2020 that are directly related to the coronavirus pandemic. As we're sure all our readers are aware, the pandemic has had far-reaching implications on our legal system that are likely to lead to significant class action issues for some time to come. We'll be updating this section quarterly for each edition of the Roundup and keeping tabs on the trends we're identifying.

The final quarter of 2019 witnessed its fair share of decisions and settlements. In the employment world, cases continue to revolve around the classification of workers, and consumer protection matters address questions of how consumers interpret labels and notices on the products and services they willingly purchase. A few privacy cases and several securities cases addressed issues of class certification on commonly argued grounds such as the value of actual damages, whether a plaintiff had demonstrated that members of the proposed class were indeed ascertainable, and issues of first impression, regardless of how persistent a class's argument may be. One notable settlement to highlight is the approval of the $250 million settlement of the securities class action in the Alibaba Holdings deal, of which plaintiffs' counsel will rake in $62.4 million in fees.

We'll continue to track decisions and filings in 2020 with our upcoming *Roundup* editions, recognizing that as the pandemic spread in the first quarter and courts began to close their doors, there may be less news to share than in the past. We are monitoring active and new cases closely and will keep you informed of all that is newsworthy in the realm of class actions and MDLs. As always, we welcome your feedback and don't hesitate to contact us if we can be of assistance.

CLASS ACTION & MDL roundup

WINTER 2020

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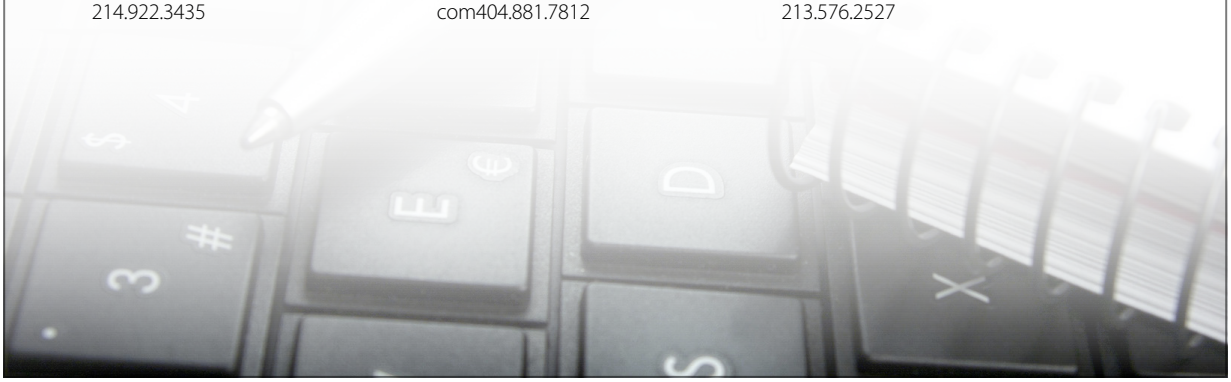

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COVID-19 Litigation

As the coronavirus (COVID-19) pandemic affects nearly every aspect of daily life, we are seeing the first wave of putative class actions related to the coronavirus and its impact. Many of the cases seek refunds for services that were canceled or rendered impossible due to COVID-19. Others stem from alleged failures to warn or negligent exposure to the coronavirus. And still others relate to contractual provisions regarding cancellations or coverage for business interruption. In this section of the ***Class Action & MDL Roundup***, we provide an overview of the earliest COVID-19-related class actions. In future installments, we will summarize new COVID-19-related class actions and provide updates on key rulings in these cases.

Flight Credits Not Flying for Customers

Some of the earliest COVID-19 class actions have arisen from airlines canceling flights and passengers canceling tickets because of travel restrictions, financial difficulties, and other issues stemming from COVID-19. We will likely continue to see a surge in litigation against airlines over cancellation and refund policies.

Rudolph v. United Airlines Holdings Inc., et al., No. 1:20-cv-02142 (N.D. Ill.).

The plaintiff, Jacob Rudolph, booked a flight that was ultimately canceled by United Airlines. Rudolph alleges that United refused to issue a monetary refund and instead only offered the option to rebook or receive a ticket credit, despite receiving a federal "bailout." Rudolph purports to represent a nationwide class asserting claims for violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, unjust enrichment, conversion, and fraudulent misrepresentation.

Similar cases: *Compo v. United Airlines Inc., et al.*, No. 1:20-cv-02166 (N.D. Ill); ***Utley, et al. v. United Airlines Inc., et al.***, No. 1:20-cv-00756 (N.D. Ohio); ***Levey v. Concesionaria Vuela Compania de Aviacion***, No. 1:20-cv-02215 (N.D. Ill).

Gym Memberships Not Working Out

Several class actions seeking a refund of membership fees have been filed against gyms and workout studios that have been forced to temporarily close. Similar suits have also been filed against amusement parks with monthly membership fees. Again, many similar suits are likely against entities with recurring membership fees.

Labib v. 24 Hour Fitness USA Inc., No. 3:20-cv-02134 (N.D. Cal.).

The complaint alleges that 24 Hour Fitness USA closed its gyms due to the COVID-19 pandemic but continued charging its customers monthly membership fees. The plaintiff, Brenda Labib, filed suit on behalf of herself and other customers "that have paid or were charged for fees while Defendant's gyms were closed" alleging claims for violations of the California Consumer Legal Remedies Act, Unfair Competition Law, False Advertising Law, and Health Studio Services Contract Law, breach of express warranties, negligent misrepresentation, fraud, unjust enrichment, money had and received, conversion, and breach of contract.

See also: ***Radford, et al. v. Town Sports International Holdings Inc., et al.***, No. 1:20-cv-02938 (S.D.N.Y.); ***Jampol v. Blink Holdings Inc.***, No. 1:20-cv-02760 (S.D.N.Y); ***Carisi v. Events and Adventures California, et al.***, No. 3:20-cv-02260 (N.D. Cal.); ***Rezai-Hariri v. Magic Mountain LLC***, No. 8:20-cv-00716 (C.D. Cal.); ***Hunt v. Fitness Evolution Inc.***, No. 4:20-cv-02461 (N.D. Cal.).

Students Face Eviction

As colleges throughout the U.S. have transitioned to remote learning, class actions have popped up seeking refunds for room and board and other fees. We expect to see similar lawsuits brought against other colleges and universities that have not provided (or agreed to provide) their students with refunds. Similar lawsuits may also arise against private primary and secondary schools, daycares, and camps.

Alston & Bird was among the first law firms to create a task force to prepare our clients for the coronavirus (COVID-19) pandemic. Stay on top of the latest regulations and get meaningful advice for nearly every industry.

Corinti v. Asset Plus Corp., No. 4:20-cv-00173 (N.D Fla.).

Because of COVID-19, most colleges and universities were forced to move classes online for the remainder of the spring 2020 semester. Additionally, students were told ("or strongly encouraged") to move out of their dormitories. The plaintiff brought this class action "on behalf of all people who paid the costs of room and board and/or attendant service fees for the Spring 2020 academic semester at private dormitories throughout the state of Florida." Corinti alleges that the defendant refused to provide refunds to students and is essentially profiting from the pandemic. Causes of action include violation of the Florida Consumer Collection Practices Act, breach of implied covenant of good faith and fair dealing, unjust enrichment, conversion, and money had and received.

See also: ***Church v. Purdue University, et al.***, No. 4:20-cv-00025 (N.D. Ind.); ***Dixon v. University of Miami***, No. 2:20-cv-01348 (D.S.C).

COVID-19 Sinks Trust in Cruises

Even before state and local lockdown orders, the airwaves were filled with numerous news reports of cruise ships stuck at sea with confirmed or suspected COVID-19 cases aboard. Plaintiffs' attorneys have already initiated several class actions against cruise lines alleging negligence in allowing these ships to set sail and the ways the outbreaks were handled on the ships. We anticipate additional lawsuits will be brought.

Turner v. Costa Crociere S.P.A., et al., No. 1:20-cv-21481 (S.D. Fla.).

The plaintiff was a passenger aboard the defendants' 20-day transatlantic cruise sailing on March 5, 2020. He alleges that the defendants knowingly and intentionally proceeded with the cruise (1) despite knowing that at least one passenger from the prior voyage had symptoms of COVID-19; (2) concealed from passengers that another passenger had symptoms of COVID-19; and (3) waited two days to order passengers to isolate in their rooms after being informed that the passenger who disembarked tested positive for the coronavirus. The plaintiff brought this class action on behalf of all passengers aboard the February 24, 2020 and March 5, 2020 cruises, asserting claims for negligence, infliction of emotional distress, negligent misrepresentation, and false advertising.

See also: *Archer, et al. v. Carnival Corporation & PLC, et al.*, No. 3:20-cv-02381 (N.D. Cal.).

Money-Back NO Guarantee

As entertainment events continue to be canceled due to COVID-19, we anticipate a proliferation of class actions seeking refunds or alleging fraudulent advertising of cancellation policies and money-back guarantees.

McMillan v. StubHub Inc., et al., No. 3:20-cv-00319 (W.D. Wis.).

The plaintiff brought this class action behalf of "individuals who were deprived of the benefit of Defendants' longstanding 'FanProtect' guarantee." He alleges that the FanProtect guarantee promised that if a user purchased tickets to any event through Stubhub, and the event was canceled, the user would receive a full, money-back refund for their purchase. The plaintiff further alleges that in response to COVID-19, Stubhub changed its policy on March 25, 2020 without notifying customers. The plaintiff asserts claims for breach of contract, conversion, negligent misrepresentation, and violations of California's Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law.

Not Business as Usual

Several individual suits and at least one class action have been filed against insurers over business interruption coverage related to COVID-19. As mitigation efforts continue, we expect to see additional lawsuits brought by struggling businesses.

El Novillo Restaurant, et al. v. Certain Underwriters at Lloyd's London, et al., No. 1:20-cv-21525 (S.D. Fla.).

The plaintiffs, which operate restaurants that have been forced to close or substantially curtail their operations, have commercial property insurance policies that allegedly provide business interruption insurance. They, on behalf of themselves and a nationwide class of entities with similar policies, seek a declaratory judgment that their policies provide for business income losses and extra expense losses incurred due to the measures taken by civil authorities to prevent the spread of COVID-19 and also assert a claim for anticipatory breach of contract. ■

"Be aware of federal and state price-gouging laws during the current pandemic. **Jason Levine**, **Kathleen Benway**, and **Valarie Williams** lead our webinar "COVID-19 and Price Gouging – Guidance and Risk Avoidance" on April 29."

Jason Levine

Kathleen Benway

Valarie Williams

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Antitrust

Insurer's RICO Suit in Testosterone MDL Fades Away

Medical Mutual of Ohio v. AbbVie Inc., et al., No. 19-1500 (7th Cir.) (Nov. 12, 2019). Affirming summary judgment.

The Seventh Circuit refused to give insurer Medical Mutual another shot at its RICO claims that pharmaceutical companies wrongly caused it to pay for prescriptions by misrepresenting the safety of testosterone-replacement drugs. Medical Mutual argued that it had to pay for thousands of prescriptions after pharmaceutical companies had improperly marketed their testosterone drugs as a "fountain of youth" for older men while downplaying the accompanying side effects. The Seventh Circuit held that the possibility that Medical Mutual was derivatively affected by false or misleading statements the pharmaceutical companies made to third-party physicians or patients (which allegedly induced prescriptions) does not support the pharmaceutical companies' liability to Medical Mutual under RICO.

I Beg Your Pardon, I Never Promised You a Damages Model

Ward v. Apple Inc., No. 18-16016 (9th Cir.) (Nov. 13, 2019). Affirming denial of class certification.

The Ninth Circuit held that in an antitrust putative class action it is not enough under *Comcast* for the plaintiffs' expert economist to merely describe the but-for world and then conclude that he did not expect to encounter insurmountable difficulty in applying standard economic techniques to estimate harm to consumers. The plaintiffs' expert needed to provide a workable method for classwide determination of the impact of the antitrust violation—not promise to develop a model in the future. ■

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"The ABA Antitrust Section's Spring Meeting is going virtual! Join meeting co-chair **Adam Biegel**, panelists **Peter Swire** and **Matt Kent**, and diversity reception host **Deona Kalala** for actual knowledge via livestream and podcast, April 17 – May 1."

Adam Biegel

Peter Swire

Matt Kent

Deona Kalala

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Banking, Financial Services & Insurance

- **Trust Beneficiaries Cannot Bring Class Action Against Trustee**

  Banks v. Northern Trust Corp., No. 2:16-cv-09141 (C.D. Cal.) (Dec. 6, 2016). Judge Walter. Denying motion for class certification.

  The plaintiffs, who were beneficiaries of trusts for which Northern Trust served as trustee, filed a putative class action lawsuit against Northern Trust alleging that it violated the terms of the trusts by taking impermissible or inflated fees in violation of the trusts' "fixed fee" provisions. Judge Walter denied the plaintiffs' motion for class certification because the plaintiffs failed to meet their burden to show commonality. Determining the amount of a reasonable fee would differ for each trust, and the portfolio managers assigned by Northern Trust had complete discretion to invest in any funds. In addition, the plaintiffs were not typical class representatives because Northern Trust waived its fees for their trusts.

- **MSJ on MSPs—Court Grants Bid to Escape Claims Under Medicare Secondary Payer Provisions**

  MAO-MSO Recover II LLC, et al. v. State Farm Mutual Automobile Insurance Co., No. 1:17-cv-01537 (C.D. Ill.) (Nov. 25, 2019). Granting summary judgment and denying motion for leave to amend.

  A group of corporations with aggregated rights of recovery under the Medicare Secondary Payer (MSP) provisions obtained through assignments from numerous Medicare Advantage organizations (MAOs) alleged that State Farm failed to pay for medical services or reimburse the assignor-MAOs for conditional payments issued to State Farm insureds. Calling this area of the law "among the most completely impenetrable texts within human experience," an Illinois federal court granted State Farm's motion for summary judgment,

ending the plaintiffs' years-long bid to advance their claims under the MSP provisions of the Medicare Act. The court ruled that the plaintiffs did not suffer an injury-in-fact giving rise to standing based on their payment claims. The plaintiffs' exemplar sought treatment for an injury for which the plaintiffs had no right to seek reimbursement, and the plaintiffs failed to demonstrate that any disputed payment was a "conditional payment" under the MSP provisions, as required under the Medicare Act. The court also denied the plaintiffs' motion to file a third amended complaint, castigating the plaintiffs'"apparent litigation strategy [of throwing] their allegations into as many federal courts as possible [to] see what sticks." ■

Congratulations to **Kathy Huang** and **Pam Privett**, named 2020 "Top Minority Attorneys" by the ***Los Angeles Business Journal.***

Kathy Huang

Pam Privett

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Consumer Protection

- **Smartphone Casino Operator Gambled That Users Would Notice Terms … and Lost**

  Wilson v. Huuuge Inc., No. 18-36017 (9th Cir.) (Dec. 20, 2019). Affirming denial of motion to compel arbitration.

  This case presented an issue of first impression—"under what circumstances does the download or use of a mobile app … establish constructive notice of the app's terms and conditions?" The Ninth Circuit held that a casino app company could not compel arbitration consistent with its terms of use because the app did "not require users to affirmatively acknowledge or agree to the Terms before downloading or while using the app." Even if the user happened to look at the page with the Terms, the page did not "inform the user that he will be bound by those terms." The court quipped that the defendant "chose to gamble on whether its users would have notice of its Terms. The odds are not in its favor."

- **The Ninth Circuit Does Not Pull Any Punches in Dismissing Spectator Lawsuit**

  In re Pacquiao-Mayweather Boxing Match Pay-per-View Litigation, No. 17-56366 (9th Cir.) (Nov. 21, 2019). Affirming dismissal of putative class actions.

  Spectators brought multiple class actions against boxers and promoters of a 2015 Floyd Mayweather–Manny Pacquiao fight on the belief that the defendant concealed a preexisting injury to Pacquiao. They claimed, "they would not have purchased tickets had they known of the injury." The plaintiffs analogized their claims to consumer-protection claims where customers allege that they were fraudulently induced to buy a good or service. Neither the district court nor the Ninth Circuit was convinced. According to the Ninth Circuit, spectators who are disappointed by a sporting event do not suffer a legally cognizable injury. The panel further held that the plaintiffs "essentially got what they paid for—a full-length regulation between two boxing legends." According to the court, "a sports match or game, unlike a consumer good or service, is defined only by a set

of rules that are well-known to fans; the rest is determined by how the match is fought or the game is played," and fan expectations are not "uniform." Therefore, "the 'human drama of athletic competition' distinguishes this case from the garden-variety consumer protection cases." The court of appeals affirmed the district court's decision "to knock out Plaintiffs' complaints."

- **Fair Credit Reporting Act Complaint Was Unfairly Dismissed**

  Nayab v. Capital One Bank (USA) N.A., No. 17-55944 (9th Cir.) (Oct. 31, 2019). Reversing order granting motion to dismiss.

  A district court ruled that a plaintiff had no standing under allegations that Capital One obtained her credit report for an unauthorized purpose under the Fair Credit Reporting Act (FCRA). But the Ninth Circuit reversed, holding that the allegations conferred "Article III standing because a consumer suffers a concrete injury in fact when a third party obtains [a] credit report for an unauthorized purpose, regardless of whether the credit report is published or otherwise used by that third party."

- **"DuraBlend" Leather Claims Are Not Durable**

  Razo v. Ashley Furniture Industries, No. 17-56770 (9th Cir.) (Oct. 24, 2019). Affirming summary judgment.

  The Ninth Circuit affirmed summary judgment of a plaintiff's action based on his disappointment that his Ashley's DuraBlend leather furniture was not 100% leather. The Ninth Circuit held that any reasonable consumer reading the clear disclosures on the front and back of the DuraBlend hangtag would determine the material was not made of 100% genuine leather. Ashley's statement that DuraBlend "contains … leather" does not deceptively suggest otherwise. The Ninth Circuit also held that Ashley was not legally responsible for representations made by a retail salesperson because claims under California's consumer protection laws cannot be based on vicarious liability.

"Don't be led astray. Follow **Bo Phillips** on the "Classwide Damage Models in Misleading and False Advertising Consumer Class Actions 2020" webinar on May 27."

Bo Phillips

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Court Does Not Heed Call Against Certifying Class

MacDonald v. CashCall Inc., No. 2:16-cv-02781 (D.N.J.) (Oct. 31, 2019). Judge Arleo. Granting plaintiff's motion for class certification.

A New Jersey district court certified a class of New Jersey residents who made payments to CashCall on loans originated by a nonparty. The class claimed that CashCall lent money at "exorbitant" interest rates in violation of state and federal law. The defendant focused on superiority, claiming that the class action was inferior to two simultaneous actions brought by the federal Consumer Financial Protection Bureau and the New Jersey Department of Banking. But the court ruled that the class action could obtain some measure of relief for the class of New Jersey borrowers, making the class treatment superior to the two government actions.

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Environmental

- **Fifth Circuit Confirms Landfill Odor Claims Time-Barred**

  Gao, et al. v. Blue Ridge Landfill TX L.P., No. 19-40062 (5th Cir.) (Oct. 30, 2019). Affirming dismissal of nuisance claim.

  Landfills' pungent odors make them prime targets for nuisance-based class actions. It can be hard to win dismissal of such cases as a matter of law because of elastic nuisance standards. But one potent defense is the statute of limitations as shown by a recent Fifth Circuit affirmance that the statute of limitations barred the nuisance claims of a proposed class of Pearland, Texas, residents living near a landfill. A unanimous panel held that the landfill odors constituted a permanent nuisance, and therefore the residents' claims accrued upon first injury or discovery of injury (rather than renewing upon each odor). The panel found the neighborhood had been experiencing foul odors for over a decade and, critically, the recent uptick in complaints about worsening smells did not restart or renew the clock on the statute of limitations.

  Blue Ridge Landfill is a reminder that: (1) proper classification of a nuisance as permanent or temporary is critical to developing statute of limitations defenses; and (2) relative changes in the degree of harm caused by a permanent nuisance do not reset otherwise time-barred claims.

- **"Physical" Harm Required Under Pennsylvania Law**

  Diehl v. CSX Transportation Inc., No. 3:18-cv-00122 (W.D. Pa.) (Dec. 9, 2019). Judge Gibson. Granting summary judgment.

  Residents of Hyndman, Pennsylvania, filed a class action after a train derailment in 2017 resulted in a fire that required the evacuation of approximately 1,000 people for varying periods of time.

  The plaintiffs alleged injuries resulting from the evacuation, including unattended pets, expired food, fumes, inconvenience, fear, mental anguish, and the loss of use and enjoyment of their property.

Judge Gibson granted summary judgment to the railway company after determining that the proposed class action was barred by Pennsylvania's economic-loss doctrine, which prevents recovery of purely "economic" damages.

The court held that the denial of access to property was merely an economic loss and did not satisfy the "actual physical harm" requirement for recovery. Furthermore, the plaintiffs' allegations of fear and anxiety had not manifested into physical injury sufficient to be actionable. Judge Gibson held that "[f]ear and anxiety without physical manifestation are economic losses that are not recoverable under Pennsylvania law."

The plaintiffs' claims of negligence and private nuisance were thus barred; the plaintiffs' motion for class certification was then denied as moot. ■

DCA Live has named **Elise Paeffgen** to its 2020 "Emerging Women Leaders in Private Practice."

Elise Paeffgen

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Labor & Employment

- **Ninth Circuit Hands Franchisor a Large Win in Wage-and-Hour Litigation**

  Salazar v. McDonald's Corp., No. 17-15673 (9th Cir.) (Oct. 1, 2019). Affirming grant of summary judgment.

  The Ninth Circuit affirmed summary judgment in favor of McDonald's Corp. in a wage-and-hour class action, holding that the company did not exercise enough control over workers employed by a franchisee. Workers sued McDonald's and one of its franchisees on behalf of a class of approximately 1,400 employees in the San Francisco Bay Area, alleging denial of overtime, meal and rest breaks, and other benefits under the California Labor Code. After settling with the franchisee, the workers pursued claims against McDonald's, arguing that it was their joint employer. Agreeing with the district court, the Ninth Circuit held that McDonald's was not an employer under any of the three definitions of joint employment outlined by the California Supreme Court: "control," "suffer or permit," and "common law." The court reasoned that McDonald's retained control over certain matters relating to brand standards, but not "day-to-day aspects" of its franchisee's business.

- **Appeals Court Rejects Privity Between Employer and Its Adviser in ERISA Lawsuit**

  Sacerdote v. Cammack Larhette Advisors LLC, No. 18-1558 (2nd Cir.) (Oct. 1, 2019). Vacating and remanding district court order.

  After six New York University (NYU) professors lost an ERISA case against NYU, they sued NYU's investment adviser. The district court dismissed the second case as duplicative, ruling that NYU and its investment adviser were in privity because the adviser was alleged to have a long-standing relationship with NYU and enabled NYU to commit the same breaches of duty alleged in the first suit. The Second Circuit rejected that analysis, concluding that NYU and its adviser were not in privity because the relationship did not fit into any of the privity categories set forth in the governing U.S. Supreme Court precedent of *Taylor v. Sturgell*.

U.S. Women's Soccer Scores Goal with Class Certification

Morgan, et al. v. U.S. Soccer Federation Inc., No. 2:19-cv-01717 (C.D. Cal.) (Nov. 8, 2019). Judge Klausner. Granting motion for class certification.

The World Cup champion U.S. Women's National Soccer Team won class certification in their lawsuit against the U.S. Soccer Federation alleging discriminatory employment practices, specifically asserting lower pay and less favorable working conditions than the men's national team. The district court certified two classes: one for those players seeking equal pay and equal working conditions, and another for those players seeking back pay and punitive damages. The court also certified a collective action (a lawsuit requiring potential members to opt in) that seeks relief under the Equal Pay Act.

Federal Judge Pours Out Café Managers' Overtime Suit

Brown v. Barnes & Noble Inc., No. 1:16-cv-07333 (S.D.N.Y.) (Oct. 15, 2019). Judge Abrams. Affirming denial of conditional certification.

Café managers at Barnes & Noble stores lost their challenge to a magistrate judge's denial of a renewed conditional certification motion. The district court ratified the magistrate's decision to apply a "modest plus" certification standard from *Korenblum v. Citigroup Inc.*, ruling that it made "eminent sense in the instant case" due to six months of discovery and the prior conditional certification motion. The court explained that the Second Circuit has ruled that two-step certification was not always necessary or required by the Fair Labor Standards Act. Under the "modest plus" standard, the magistrate judge evaluated evidence submitted by both parties to determine whether "it is more likely than not that a group of similarly situated individuals may be uncovered by soliciting opt-in plaintiffs."

Alston & Bird welcomes back **Angela Payne James** as our partner in charge of Diversity & Inclusion.

Angela Payne James

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PBGC Perseveres in ERISA Suit

Pension Benefit Guaranty Corp. v. 20 SE 3rd St LLC, et al., No. 9:18-cv-81009 (S.D. Fla.) (Nov. 22, 2019). Judge Rosenberg. Granting plaintiffs' motion for partial summary judgment.

Judge Rosenberg granted the Pension Benefit Guaranty Corporation's (PBGC) motion for partial summary judgment in an ERISA suit involving Liberty Lighting's 21-year delay in terminating its pension-plan liability after the company's bankruptcy and dissolution in the early 1990s. The PBGC filed suit against Liberty's sole owner, Joseph Wortley (who had declared personal bankruptcy following Liberty's demise), and Wortley's current business interests in 2018, arguing that ERISA imposed pension-plan-termination liability on Wortley and his current companies as of Liberty's plan termination date in 2012. Acknowledging the difficulty of the case, Judge Rosenberg found that Liberty was the sole contributing sponsor to the pension plan on the plan-termination date. Liberty's state-law-based dissolution did not terminate its ERISA liability because contributing sponsors of a pension plan are not allowed to dissolve under state law, never notify the PBGC of the dissolution, and then evade ERISA liability. In short, "ERISA does not allow pension plans to exist in a state of limbo, devoid of any caretaker."

Uber Driver's Public Injunction Stalls Out, but Court Gives Green Light to Class Claims

Colopy v. Uber Technologies Inc., No. 3:19-cv-06462 (N.D. Cal.) (Dec. 16, 2019). Judge Chen. Denying plaintiff's motion for classwide preliminary injunction and denying in part defendant's motion to dismiss.

Judge Chen denied the plaintiff's pre-certification request for a public injunction that would have forced Uber to reclassify its drivers as employees. The court rejected the plaintiff's characterization of the injunction as public, ruling that Colopy was seeking private injunctive relief. The request for broad relief was also premature given Uber's enforceable arbitration agreement and the likelihood that

only a small subset of drivers would be entitled to injunctive relief. The court then denied most of Uber's motion to dismiss, applying "the presumption of employee-status" arising from *Dynamex* and ruling that the plaintiff alleged sufficient facts to support a plausible claim that Uber has misclassified him and other drivers as independent contractors. ■

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Privacy & Data Security

- **"Meowchristine" Loses Class Cert Bid in Groupon Username Suit**

  Dancel v. Groupon Inc., No. 19-1831 (7th Cir.) (Dec. 18, 2019). Affirming denial of class certification.

  The Seventh Circuit affirmed the denial of class certification to a group of Instagram users who sued Groupon for sharing pictures and usernames of Instagram users at participating businesses as violating the Illinois Right of Publicity Act. The court of appeals agreed with the district court that each class username would have to be examined to determine whether it sufficiently resembled an "identity" under the state law, which made the case unfit for class treatment. The court of appeals rejected the argument that the common question of whether usernames, categorically, constituted "identities" under the state law was sufficient to establish predominance.

- **Proposed Class Members Must Stand Up to Telemarketers**

  Cordoba v. DIRECTV LLC and John Doe 1, No. 18-12077 (11th Cir.) (Nov. 15, 2019). Vacating class certification and remanding.

  The Eleventh Circuit has provided additional guidance on standing issues in cases involving do-not-call lists. Sebastian Cordoba alleged that DIRECTV failed to maintain an internal do-not-call list and continued to call individuals who asked not to be contacted. The trial court granted certification for two classes: (1) all individuals who received telemarketing calls during the time when there was no internal do-not-call list; and (2) all individuals whose numbers were listed on the National Do Not Call registry but still received calls.

  The circuit court vacated class certification because the district court erred by failing to address the "fairly traceable" requirement of Article III standing. The appellate court held that "recipients of such calls who never asked the telemarketer to stop calling them do not have standing to sue over violations of the internal do-not-call list regulations because their injuries are not fairly traceable to the telemarketer's failure to maintain an internal do-not-call list."

Court Ices Class Cert Bid by Rewards Customers

San Pedro-Salcedo v. The Häagen-Dazs Shoppe Company Inc., No. 5:17-cv-03504 (N.D. Cal.) (Dec. 3, 2019). Judge Davila. Denying motion for class certification.

A nationwide class of individuals purported to have received text messages from Häagen-Dazs's customer-rewards program without their prior express written consent. The cashier who took the plaintiff's phone number did not inform her that she would receive a text message from the company if she signed up for the rewards program, despite Häagen-Dazs training its cashiers to do exactly that. Because the class representative did not receive that information, the district court found her experience to be atypical and insufficient to meet Rule 23(a)(3)'s typicality requirement. The plaintiff failed to show she was an adequate representative because she had a personal friendship with her lawyer and showed a lack of familiarity with her own factual allegations during her deposition (e.g., she claimed that she was suing about 12 unsolicited phone calls from Häagen-Dazs when her complaint alleged only one unsolicited text).

Injunctive Class Certified, but Damages Class Gets Blocked in Hacking Lawsuit

Adkins v. Facebook Inc., No. 3:18-cv-05982 (N.D. Cal.) (Nov. 26, 2019). Judge Alsup. Granting motion for class certification in part.

A district court certified a class of Facebook users seeking injunctive relief against Facebook following a 2018 hack of the social media giant. The court held that an injunctive class seeking Facebook's implementation of reasonable security measures and engagement of third-party security auditors and personnel was appropriate for class treatment based on Facebook's repetitive losses of user privacy. The court denied certification of two nationwide classes seeking damages based on the diminished value of impacted personal information, future credit monitoring, and individual damages for time spent and costs incurred by members in response to the breach. The court ruled that the speculative nature of the loss would not sustain a negligence claim.

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Class Cert a Pain for Unintended Recipient

Sandoe v. Boston Scientific Corporation, No. 1:18-cv-11826 (D. Mass.) (Oct. 23, 2019). Judge Gorton. Denying motion for class certification.

Steven Sandoe alleged that he received two prerecorded calls from Boston Scientific inviting him to pain-management seminars. The calls were intended for a patient of a partnering clinic whose phone number had been reassigned to Sandoe, who sought to certify two classes for his TCPA claim: a prerecorded no-consent class and a do-not-call registry class.

The court denied class certification because Sandoe "failed to demonstrate that the members of the proposed classes are ascertainable and that common issues predominate." The court reasoned that the expert's methodology for identifying the class was unreliable because it did not identify even Sandoe as a class member and inconsistently applied a "fuzzy period." The court also found that Boston Scientific may have a separate consent defense against each class member.

CLASS ACTION & MDL roundup

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Products Liability

- **Narrowed Class Action Suit Gets a Green Light**

  Victorino v. FCA US LLC, No. 3:16-cv-01617 (S.D. Cal.) (Oct. 17, 2019). Judge Curiel. Granting renewed motion for class certification.

  After the Ninth Circuit ruled in *Nguyen v. Nissan* that a benefit of the bargain damages model is cognizable under the Song–Beverly Act, a California federal judge certified a class of drivers in the state who purchased or leased new 2013 to 2015 Dodge Dart vehicles from an authorized dealership. Plaintiff Carlos Victorino alleges that every class vehicle is equipped with a defective Fiat C635 manual transmission that causes the clutch pedal to lose pressure, stick to the floor, and prevent the gears from engaging and disengaging. Defendant FCA US LLC contended that a joint investigation with its supplier of reservoir hoses found that only 16 percent of the class vehicles could be defective based on the variations in the manufacturing of component parts. In his renewed motion, the plaintiff moved for class certification solely on the Song–Beverly Consumer Warranty Act claim because his vehicle has not yet experienced the clutch defect, and manifestation of malfunction is not required to establish breach of implied warranty under California law. The court held that the plaintiff satisfied the predominance requirement because if he "fails to demonstrate a defect in all vehicles at the time of sale, all class claims will fail in one fell swoop." The court also found that the plaintiff's damages model based on payment of the cost to repair the clutch defect comports with the benefit-of-the-bargain theory and can be applied across the entire class.

Court Dismisses Opioid Suit for Increased Health Care Costs

Enriqguez v. Johnson & Johnson, No. CAM-L-4677-18 (N.J. Super. Ct.) (Oct. 10, 2019). Judge Polansky. Granting motion to dismiss.

A New Jersey superior court judge dismissed a putative class action alleging that the fraudulent marketing of opioids by pharmaceutical companies caused health insurers in the state to increase premiums to offset the higher costs that they paid for prescriptions and addiction treatment. The court rejected the plaintiff's claims as "speculative and attenuated" and found that there are at least five links in the chain of causation that separate the plaintiff's higher insurance premiums from the companies' alleged misrepresentations and omissions to doctors and health insurers. In addition, because statistical data and a fraud on the market theory cannot be used to prove damages under New Jersey law, the factfinder would be required to use individualized proof to calculate how much of the increase in insurance premiums was due to the opioid crisis, as opposed to other factors. Although there were sufficient allegations to state a claim that the companies were complicit in creating and perpetuating the opioid crisis, the court concluded that the complaint must be dismissed with prejudice because "this particular Plaintiff and this particular proposed class are simply not the appropriate vehicle to vindicate the rights of those who have been impacted by the alleged conduct of Defendants." ■

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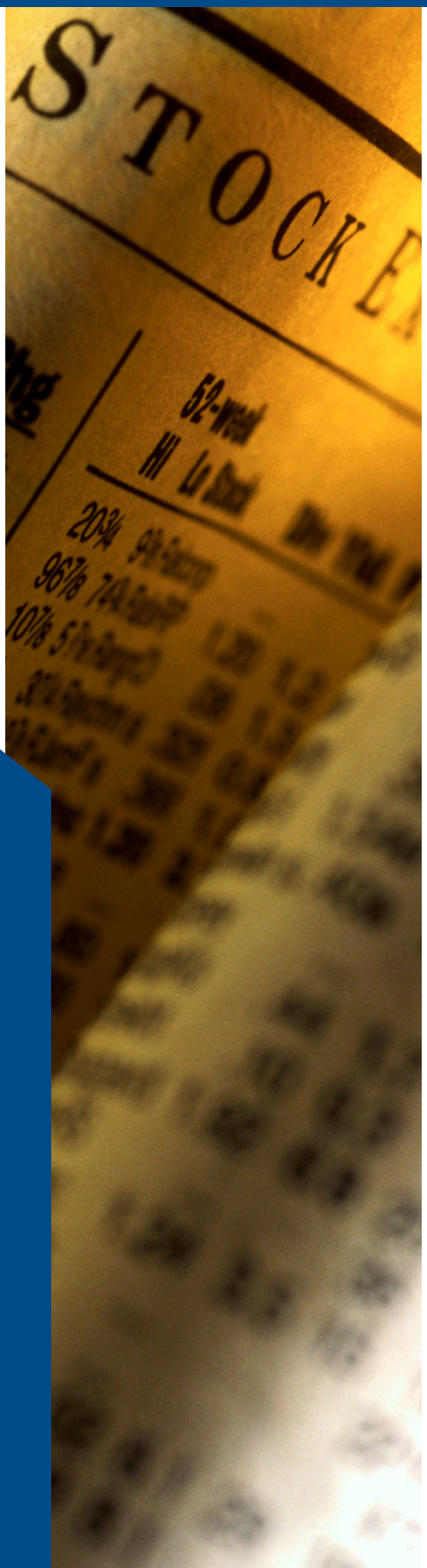

Securities

- **Judge Relies on Ability to Modify Class in Granting Certification**

  Rougier v. Applied Optoelectronics Inc., et al., No. 4:17-cv-02399 (S.D. Tex.) (Nov. 13, 2019). Judge Bryan. Granting class certification.

  A magistrate judge certified a class of investor who claimed that that a fiber-optics manufacturer misled investors. The court rejected the defendant's argument that the class could not be certified because the current class definition included investors who sold their stock before the relevant disclosures. The court ruled that, regardless of whether the current class definition included plaintiffs who could not prove loss causation, it could be modified later. The court also rejected the defendants' argument that the proposed damages methodology would overcompensate the plaintiffs.

- **Pharmaceutical Giant's Efforts Fail to Cure Class Suit**

  Roofer's Pension Fund v. Papa, et al., No. 2:16-cv-02805 (D.N.J.) (Nov. 14, 2019). Judge Arleo. Granting class certification.

  A district court granted certification to three classes of investors in Perrigo, a manufacturer of over-the-counter health care products. The plaintiffs alleged that the defendant misled investors, resulting in the investors voting down a takeover offer by a competitor. The defendants' opposition to the class certification centered largely on the plaintiffs' alleged reliance on private meetings between the lead plaintiffs and executives of the competitor that sought to take over the company. The defendants alleged that the lead plaintiffs, in determining whether to accept the competitor's tender offer, relied on nonpublic information unavailable to other plaintiffs. The court, however, rejected that allegation, ruling the defendants had not presented nonpublic information that the lead plaintiffs had relied on.

CLASS ACTION & MDL roundup

WINTER 2020

Shareholders Prevail Because You Can't Ignore the Whale in the Room

Baker, et al. v. SeaWorld Entertainment Inc., et al., No. 3:14-cv-02129 (S.D. Cal.) (Nov. 6, 2019). Judge Anello. Denying defendants' motion for summary judgment.

A federal judge in the Southern District of California denied summary judgment to SeaWorld in a shareholder class action arising from SeaWorld's allegedly wrongful denial of the impact that the documentary *Blackfish* had on its business. After the documentary's release, SeaWorld's executives denied *Blackfish*'s impact on park attendance and attributed subsequent quarterly losses to issues like weather and yield-management strategies. A year later, however, the company admitted that issues related to *Blackfish* had caused a decline in attendance, an admission that caused shares to drop 33%. The court held that, although SeaWorld contends it "had no knowledge of an actual material *Blackfish* impact" at the time the complained-of disclosures were made, the plaintiffs would survive summary judgment because they had raised "genuine issues of material fact as to whether Defendants made false or misleading statements" about the film's impact "intentionally or with deliberate recklessness."

Persistent Plaintiffs Denied Certification Again

Goldberg v. Gray, et al., No. 5:15-cv-00538 (N.D.N.Y.) (Oct. 21, 2019). Judge Hurd. Denying reconsideration.

A federal judge once again denied certification to two investors seeking to become lead plaintiffs in a class action against a convicted fraudster and his companies. The court criticized the investors for "persist[ing] in their doomed arguments" and "misunderstand[ing] the allocation of burdens," under which the investors had to establish that their claims would be best served by the class action format. Refusing to consider evidence that was not included in their original certification bid, the court held that the investors' allegations were too individualized to qualify for a class action.

> When the stock market goes down, litigation goes up. Members of our Securities Litigation Group explored how "Early Securities Class Actions Highlight COVID Litigation Risk" for ***Law360***.

Robert Long

Elizabeth Clark

Tim Fitzmaurice

Charlotte Bohn

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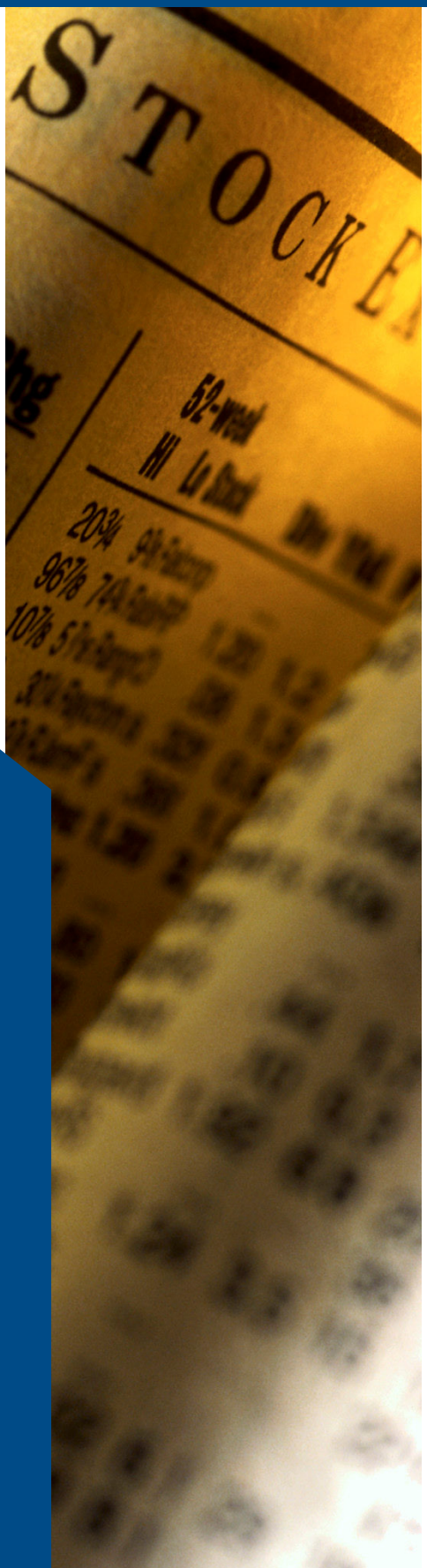

Class Certification Granted in a Snap

In re Snap Inc. Securities Litigation., No. 2:17-cv-03679 (C.D. Cal.) (Nov. 20, 2019). Judge Wilson. Granting class certification.

Shareholders in Snapchat parent Snap Inc. won certification in a California federal action despite arguments that their class definition was overbroad. The proposed class's original lead plaintiffs withdrew for health reasons, and the lead plaintiff process was reopened in August 2018. Judge Wilson found the new lead plaintiffs could be trusted to properly represent the interests of Snap Inc. investors, referencing their incentives to maximize recovery given the merits of both claims.

No Second Chance at a First Impression in Class Certification Bid

Rensel, et al. v. Centra Technology Inc., et al., No. 1:17-cv-24500 (S.D. Fla.) (Nov. 20, 2019). Judge Scola. Denying class certification.

Centra Technology investors attempting a second-bite-at-the-apple approach were denied certification in a Florida federal securities fraud action. Although the investors addressed some of the problems with their initial certification bid, they failed to give any justification for their decision to wait until a year and a half after filing suit to move for class certification. Judge Scola noted that even if the motion had been timely, he was skeptical of the investors' ability to identify all the members of the potential class using records that are currently being held by the government in its criminal case against the company's founders. ■

CLASS ACTION & MDL roundup

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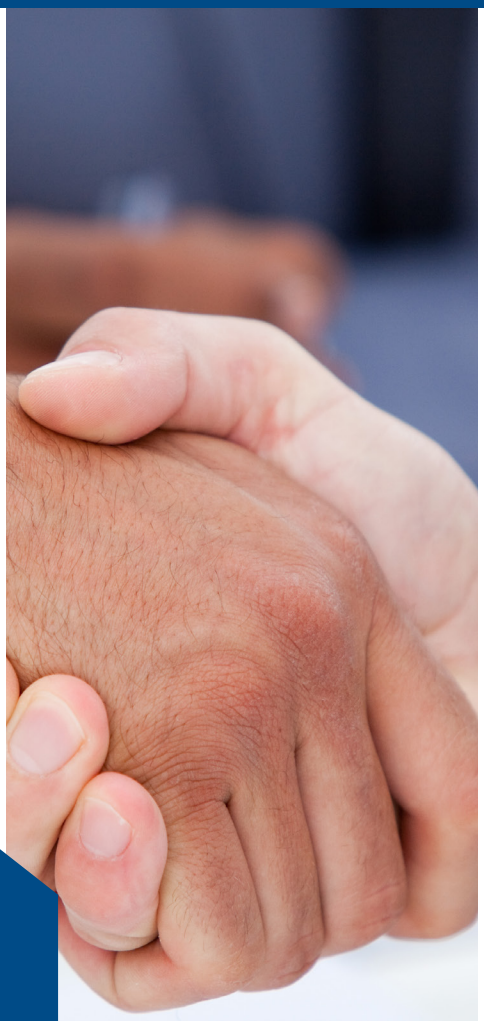

Settlements

- **Final Settlement of Claims That Education Provider's Inflated Employment Metrics Deflated Stock Prices**

  Pension Trust Fund for Operating Engineers v. DeVry Education Group Inc., et al., No. 1:16-cv-05198 (N.D. Ill.) (Dec. 6, 2019). Judge Rowland. Approving $27.5 million settlement.

  Judge Rowland granted final approval of a $27.5 million settlement in this class action alleging that DeVry violated the Securities Exchange Act in a manner that harmed a class of investors who purchased DeVry stock from August 2011 through January 2016. The plaintiffs alleged that, during that time, DeVry's stock prices rose based on false claims that 90% of its students obtained jobs within six months of graduation and earned salaries of $40,000, but DeVry's stock price fell when it emerged that these figures were misleading. There were no requests for exclusion from the settlement class. The settlement fund will be distributed to authorized claimants for six months, at which point the remaining balance will be equitably redistributed to those authorized claimants who have cashed their checks and the remainder donated to the nonprofit Council of Institutional Investors. Class counsel received 27% of the settlement fund ($7,425,000) in attorneys' fees, and there were no objections.

- **Manufacturer of Opioid Medication Pays $82.5 Million to Settle Investors' Claims**

  SEB Investment Management AB v. Endo International PLC, et al., No. 2:17-cv-03711 (E.D. Pa.) (Dec. 13, 2019). Judge Savage. Approving $82.5 million settlement.

  Judge Savage granted final approval of an $82.5 million settlement in this class action alleging that pharmaceutical manufacturer Endo International and other defendants violated federal securities laws when they misrepresented and omitted facts about the safety and abuse-deterrent properties of Endo's opioid medication, Opana ER. The class consisted of investors who bought Endo shares between November 2012 and June 2017 while the stock price allegedly was inflated based on Endo's misstatements. The stock price

then declined when several corrective disclosures revealed new information about the medication's properties and Endo withdrew it from the market. Under the terms of the settlement, Endo must pay $82.5 million in cash to a settlement fund, most of which will go to authorized claimants on a pro rata basis, with no right for Endo to claim any remaining funds. Twenty percent of the settlement fund, or $16.5 million, will be awarded as attorneys' fees; approximately $900,000 will be paid in costs and expenses; and approximately $32,000 will be paid to the lead plaintiff. No class members objected to the proposed settlement or the award of attorneys' fees and expenses.

$250 Million Settlement Approved in Alibaba Holdings Deal

Ziolkowski, et al. v. Alibaba Group Holding Ltd., No. 1:15-cv-01405 (S.D.N.Y.) (Oct. 16, 2019). Approving $250 million settlement.

A securities class action claiming that Alibaba Group Holding concealed a backroom meeting with China's commerce regulator in July 2014 recently received final settlement approval. The investor-plaintiffs alleged that Alibaba met with China's State Administration of Industry and Commerce (SAIC) in a closed-door meeting in which the agency ordered the company to stop illegal business practices, including the sale of counterfeit goods. The securities claims lodged against Alibaba alleged that despite receiving threats of significant penalties from the SAIC were it to fail to address its alleged misconduct, Alibaba concealed the meeting ahead of its record $25 billion IPO in September 2014.

Once news of the meeting became public, the price of Alibaba's American depositary shares plummeted, ultimately erasing nearly $33 billion in shareholder value, according to investors. A case that was previously dismissed by the Southern District of New York now has final approval for a mammoth $250 million settlement. Of that, the plaintiffs' counsel will rake in $62.4 million in fees, approximately 25% of the settlement total.

"We're proud to announce that **Derin Dickerson** has been named to the 2020 class of Leadership Council on Legal Diversity Fellows."

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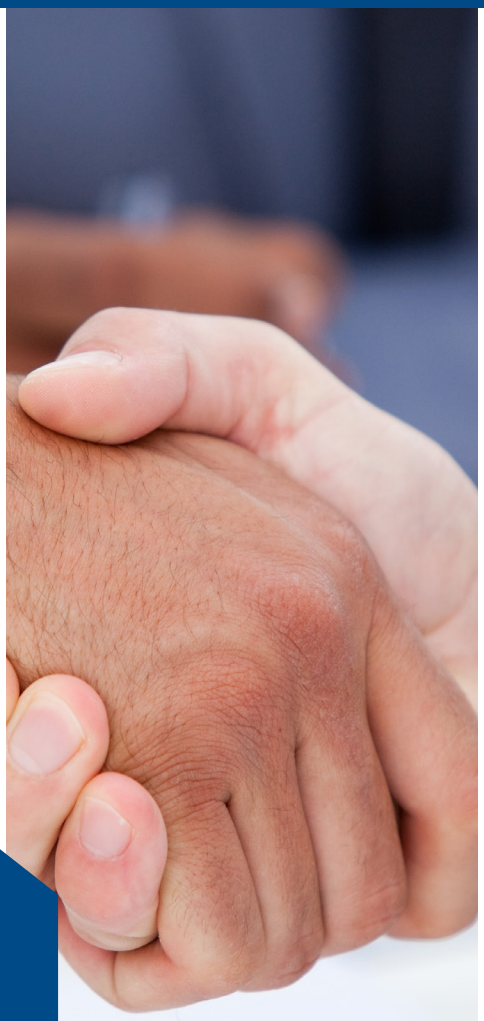

Court Approves Healthy Settlement for Unpaid Wages Class Action

Martinez v. John Muir Health, No. 4:17-cv-05779 (N.D. Cal.) (Nov. 20, 2019). Judge Wilken. Approving $9.5 million settlement.

The plaintiff sued John Muir Health for unearned wages on behalf of a class of individuals employed by the health company or its affiliate in California who worked as non-exempt employees and entered their time into the companies' electronic systems during the designated class period. The court approved a $9.5 million class settlement, concluding that the notice to the settlement class members conformed with the preliminary settlement approval order and provided adequate notice. Finally, the court awarded class counsel's request for attorneys' fees and litigation costs.

ERISA Claims Settle Despite Open Legal Questions

Del Sesto, et al. v. Prospect CharterCARE LLC, et al., No. 1:18-cv-00328 (D.R.I.) (Sept. 30, 2019). Judge Smith. Approving $4.5 million settlement.

A Rhode Island district court recently approved a $4.5 million settlement resolving claims that a number of entities, including the CharterCARE Foundation, violated ERISA by underfunding a retirement plan for nurses and other hospital workers. While one of the more than 2,700 class members objected to the settlement amount, the district court held that the amount was sufficient given the complexity of the case and the difficulty the class might face in proving liability. The nonsettling defendants also objected to the settlement, citing the open question of whether ERISA applied to the claims at issue. Ultimately, however, the Rhode Island district court overruled the objection, concluding that it need not answer this question to approve a final settlement.

Gas Tax Refund for Los Angeles Residents

Lavinsky, et al. v. City of Los Angeles, No. BC542245 (Cal. Super. Ct.) (Oct. 9, 2019). Judge Jones. Approving $32.5 million settlement.

A California court approved a $32.5 million settlement resolving claims that the city of Los Angeles overtaxed 1.3 million residents by including certain state fees in their natural gas tax calculations. In doing so, the California court approved, over objections, a $400,000 cy pres award and a three-year timetable for the city to make its required payments. The California court also awarded $8.1 million in attorneys' fees and expenses, finding that the litigation was particularly complex and expensive.

$10 Threshold for Claims Approved as Part of $11.7 Million Settlement

In re McAfee Inc. Shareholder Litigation, No. 2010-1-CV-180413 (Cal. Sup. Ct.) (Oct. 4, 2019). Judge Kuhnle. Approving $11.7 million settlement.

Judge Kuhnle granted final approval of a $11.7 million settlement in this class action arising out of Intel Corporation's acquisition of McAfee Inc. for $7.68 billion. The class consisting of McAfee stockholders who exchanged their shares for consideration as part of the sale alleged that former McAfee board members breached their fiduciary duties by failing to ensure a fair process for the sale and by depriving the stockholders of the true value of their stock. Class members are expected to receive approximately $0.05 per share from the settlement fund. Despite a lodestar of more than $6.65 million in attorneys' fees, the plaintiff's counsel received $3.51 million in fees, which represented 30% of the total settlement amount. The sole objector took issue with the requirement that class members be entitled to a minimum payment of $10 to receive a settlement distribution, but Judge Kuhnle overruled the objection and found the minimum threshold reasonable because issuing such small checks to class members could cause a disproportionate administrative expense.

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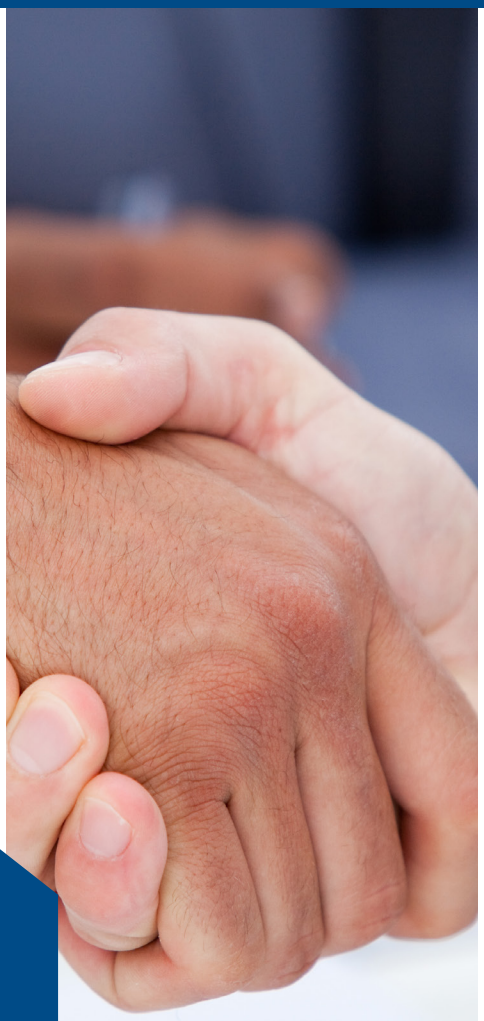

Settlement Approved for Grocery Store Violations

Sharp, et al. v. Safeway Inc., et al., No. 2011-1-cv-202901 (Cal. Sup. Ct.) (Oct. 18, 2019). Judge Kuhnle. Approving $12 million settlement.

Judge Kuhnle approved a $12 million settlement over Safeway's alleged violations of California's Private Attorneys General Act by failing to provide seats to 30,182 cashiers. The court awarded a higher than normal incentive award of $14,000 given the length of the litigation and the amount recovered. Indeed, the settlement ended an eight-year-old litigation revolving around Safeway's alleged failure to provide its cashiers with seats and its policy requiring its cashiers to stand while working.

iSettlement Approved—Apple to Pay 4S Purchasers for Alleged Connectivity Failures

Butler v. Apple Inc., et al., No. 2014-1-CV-262989 (Cal. Sup. Ct.) (Oct. 18, 2019) Approving $6.6 million settlement.

A California superior court judge granted final approval for a class of iPhone 4S purchasers who sued Apple back in 2014, alleging that the iPhone 4S failed to connect to either Wi-Fi or Bluetooth. Consumers complained that they were forced to either pay a small fee for a replacement phone under warranty or to pay up to $200 for an out-of-warranty replacement. Other consumers had filed complaints about the connectivity issues but never paid for a replacement phone. The net settlement fund is nearly $5 million and will be divided among participating class members based on the amount the groups of consumers actually spent on a replacement device. Those consumers who never paid for any replacement but did file a complaint are eligible to receive $23. After noting that there were no objectors and that a substantial portion of the settlement funds would ultimately reach the class, the court granted final approval of the settlement. ■

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