ALSTON & BIRD

CLASS ACTION & MDL roundup

FALL 2021

In this issue

ALSTON & BIRD

overview

CLASS ACTION & MDL **roundup**

FALL 2021

Where the (Class) Action Is

Welcome back to the ***Class Action & MDL Roundup***! Our fall edition covers notable class actions from the third quarter of 2021.

Click here to watch the latest installment of our video highlight. This quarter, our partner from the Securities Litigation Group, Andy Sumner, discusses SPAC-related class actions.

It was another active quarter with significant activity across all areas we monitor in the ***Roundup***. COVID-19 continues to impact a variety of industries across these areas, keeping the courts particularly busy. Insurance companies saw the bulk of this activity with cases ranging from breach of contract to coverage claims involving losses due to stay-at-home orders. On the consumer protection front, a district judge denied class certification in a case involving claims that ticket refunds were not received after event cancellations or delays due to COVID-19.

Other notable decisions covered include the Sixth Circuit reversing the dismissal of a Telephone Consumer Protection Act (TCPA) class action involving prerecorded calls and the Fourth Circuit reversing a class certification decision on numerosity grounds in an antitrust case. Additionally, the Second Circuit held that once an ERISA plaintiff demonstrates a loss to an ERISA plan, the burden shifts to the defendant to disprove damages. This ruling aligns itself with other circuit courts approving of this burden-shift approach, furthering the current circuit split.

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

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Antitrust/RICO

When the Numbers Don't Add Up: District Court's Numerosity Analysis Falls Short

In re Zetia Antitrust Litigation, No. 20-2184 (4th Cir.) (Aug. 4, 2021). Vacating class certification order and remanding.

In a rare move, the Fourth Circuit reversed a class certification decision on numerosity grounds. The plaintiff pharmaceutical buyers had sought to certify a class of 35 putative members, which fell within a "gray area" of the law: more than a presumptively uncertifiable class of 19 members but less than a presumptively certifiable class of 41 members. The district court found that judicial economy favored certifying the class because multiple individual trials would involve the same theories of liability and evidence, so a class action would conserve judicial resources. According to the Fourth Circuit, because Rule 23(a) speaks to the impracticability of joinder, the district court should have focused on whether judicial economy favored a class action or favored *joinder*, rather than focusing on individual trials. Indeed, under the district court's contrary analysis, judicial economy would always favor class certification, which is simpler to manage than individual lawsuits.

Whose Law Is It Anyway? Ninth Circuit Vacates Massive Class Cert Decision on Faulty Choice-of-Law Analysis

Stromberg v. Qualcomm Inc., No. 19-15159 (9th Cir.) (Sept. 29, 2021). Vacating class certification order and remanding.

The Ninth Circuit vacated the district court's decision to certify a nationwide class of up to 250 million indirect cellphone purchasers based on an erroneous choice-of-law analysis. Applying California's "governmental interest" test, the district court concluded that California had an interest in applying its Cartwright Act—which permits indirect purchasers to bring antitrust claims, effectively repealing *Illinois Brick*—whereas states that did not repeal *Illinois Brick* had no interest in applying their laws to the current dispute. That conclusion ignored that non-repealer states had made a policy decision regarding how to effectively enforce antitrust laws and promote business within their borders. Thus, those states had an interest in applying their laws to bar antitrust claims brought by indirect purchasers. Because California law did not apply uniformly to the class, the class could not show that common issues of law predominated.

Ascertainability Still Alive and Well in the Third Circuit

In re Niaspan Antitrust Litigation, No. 2:13-md-02460 (E.D. Pa.) (Aug. 17, 2021). Judge DuBois. Denying class certification.

Judge DuBois denied a renewed motion for class certification brought by end-payor plaintiffs in a pay-for-delay dispute, ruling that the plaintiffs failed to satisfy the ascertainability requirement of Rule 23(b)(3). Judge DuBois recognized that in addition to the other requirements for class actions in the Federal Rules of Civil Procedure, the Third Circuit requires that a Rule 23(b)(3) class be currently and readily ascertainable. To satisfy this ascertainability requirement, plaintiffs must show that the class is defined with reference to objective criteria and there is an administratively feasible mechanism for determining whether putative class members fall within the class definition. Here, the plaintiffs had not shown that they could distinguish between class members and intermediaries—excluded from the class definition—without review of the individual contractual relationships underlying each transaction. ■

Impress your friends with the ABA's *A Practitioner's Guide to Class Actions* on your bookshelf. Ten Alston & Bird attorneys contributed to this third edition of the comprehensive guide.

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Banking & Insurance

Appeals Court Affirms: COVID-19 Does Not Cause Physical Property Loss or Damage

Gilreath Family & Cosmetic Dentistry Inc. v. Cincinnati Insurance Co., No. 21-11046 (11th Cir.) (Aug. 31, 2021). Affirming dismissal.

The Eleventh Circuit affirmed dismissal of Gilreath Family & Cosmetic Dentistry's claim for breach of contract against its insurer, Cincinnati Insurance. Gilreath alleged that Cincinnati breached the terms of its policy by denying a claim for business-interruption coverage based on financial losses suffered during the COVID-19 pandemic. A district court dismissed Gilreath's complaint, ruling that it failed to state that any direct physical loss or damage to property had occurred. The appellate court agreed, reasoning that "direct physical loss or damage," as required by the contract, meant "an actual change in insured property" that renders it "unsatisfactory for future use" or requires repairs. Accordingly, Gilreath's allegations that "viral particles" postponed routine and elective procedures (while Gilreath still conducted emergency procedures) failed to state a claim for breach of contract.

Clearing (Marital) Conflicts to Certify Class

Bartle v. TD Ameritrade Holdings Corp., et al., No. 4:20-cv-00166 (W.D. Mo.) (Sept. 15, 2021). Judge Phillips. Granting motion for class certification.

Judge Phillips certified a class of TD Ameritrade's customers who alleged that it breached its contract for brokerage services and unjustly enriched itself by issuing substitute payments in lieu of qualified dividends without providing compensation for the different tax rates. TD Ameritrade contested class certification on several grounds, including whether the named plaintiff, Annette Bartle, could be an adequate class representative given that her husband's two-person firm, Bartle & Marcus, represented the putative class when the case began and had previously litigated other cases with Annette Bartle's other counsel, Jared Rose.

Several months earlier, the court had denied a motion for class certification filed by the other member of Bartle & Marcus, and Annette Bartle addressed the court's concerns before moving to certify the class again by taking several corrective actions: Bartle & Marcus withdrew from the case, Annette Bartle entered a new representation agreement solely with Jared Rose, Jared Rose filed a sworn declaration indicating that he does not have a close personal relationship with Annette Bartle or her husband, and Annette Bartle's husband filed a sworn declaration indicating that he will receive no money from any outcome of the case. These measures, in addition to a few others, satisfied the court, and it certified the class with some modifications, ruling in part that Annette Bartle is an adequate "class representative whose lawyer is a business acquaintance of her husband."

When Saving 15% Costs Your Chiropractor 20%

Rosenberg v. Geico General Insurance Co., No. 0:19-cv-61422 (S.D. Fla.) (Sept. 22, 2021). Judge Cannon. Granting motion for class certification.

A provider of chiropractic services won her bid for class certification in a case alleging that GEICO engages in a widespread practice of underpaying personal injury protection claims. The plaintiff provided chiropractic services to a GEICO-insured patient after she was injured in an automobile accident, and GEICIO only reimbursed a portion of the submitted claims. The amount GEICO reimbursed was in line with Florida's personal injury protection (PIP) statute but allegedly in violation of a GEICO policy, which states that "A charge submitted by a provider for an amount less than the amount allowed … shall be paid in the amount of the charge submitted."

After surviving a motion to dismiss, the plaintiff moved for class certification. To establish that the class she sought to represent was ascertainable, the plaintiff pointed to GEICO's searchable electronic records that track relevant data, including the identities and locations of the providers making claims, the charges billed, and whether GEICO reimbursed those amounts at 80% or 100%. GEICO argued that a "claim-by-claim 'paper' review of each claim file" would be required because 15 different scenarios could trigger a code resulting in a claim being paid out as 80% as opposed to 100%. Judge Cannon ruled that the plaintiff met her burden on ascertainability because her expert found that she could identify with certainty a subset of 6,045 providers meeting the definitional criteria using GEICO's own electronic records. The court also ruled that the plaintiff satisfied the commonality and predominance requirements because the proposed class members were are all medical providers who seek a similar resolution about whether GEICO underpaid them for services rendered to GEICO insureds, raising a single legal issue regarding whether GEICO's uniform policy of allegedly reducing payments was lawful.

"Charge! **Jim McCabe** and **Nanci Weissgold** take stock of why the Eleventh Circuit's decision in the *Hunstein* case – no, not that one, the *other Hunstein* decision – has left the debt collection industry and hundreds of FDCPA cases (including class actions) in such turmoil: "*Hunstein*: The Eleventh Circuit Cavalry Arrives."

Jim McCabe

Nanci Weissgold

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Judge Grants Motion to Dismiss Restaurant's COVID-Related Insurance Claims

Protégé Restaurant Partners v. Sentinel Insurance Co., No. 5:20-cv-03674 (N.D. Cal.) (Sept. 28, 2021). Judge Freeman. Granting motion to dismiss.

Protégé brought claims arising from Sentinel's alleged failure to provide business insurance coverage for COVID-related losses due to county and state stay-at-home orders that disrupted the restaurant business. The case ultimately turned on the "Virus Exclusion" provision in the parties' insurance policy that stated, "We will not pay for loss or damage caused directly or indirectly by any of the following …: (1) Presence, growth, proliferation, spread or any activity of … virus." Protégé argued that the definition of "loss or damage" applied not only to physical loss or direct physical damage, but also to non-physical loss like business losses. Judge Freeman disagreed—ultimately ruling that the virus exclusion provision of the parties' insurance policy unambiguously barred coverage for COVID-related losses.

Motion to Dismiss Granted in Gym's COVID-Related Insurance Case

Byberry Services & Solutions v. Mt. Hawley Insurance Co., No. 1:20-cv-03379 (N.D. Ill.) (July 19, 2021). Judge Rowland. Granting motion to dismiss.

Judge Rowland granted a motion to dismiss in an action brought by franchisees of Snap Fitness Center against Mt. Hawley Insurance Company for failing to compensate the Snap franchises for losses incurred during the COVID-19 pandemic. At issue in the case was the business income section of Snap's insurance policy, which stated that Mt. Hawley would pay for "the actual loss of 'earnings' you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.' The suspension must be caused by direct physical loss of or damage to property." The policy also covered certain losses that could occur as a result of a government decree.

The franchisees closed their gyms in March 2020 in response to the growing COVID-19 pandemic and state-issued stay-at-home orders. Although the plaintiff argued that repairs and adjustments to the gym upon reopening after the state shutdown orders satisfied the business income section of the policy, Judge Rowland disagreed, ruling that those measures did not qualify as physical loss. Additionally, the plaintiffs argued that their loss of income resulted from the contamination of the COVID-19 virus infesting their property. Still, Judge Rowland was not persuaded, ruling that the plaintiffs' allegations under the contamination theory were insufficient to state a claim.

Court (Re)considers Barbershop's COVID-19 Modifications as Improvements, Not Losses

Legacy Sports Barbershop LLC, et al. v. Continental Casualty Company, No. 1:20-cv-04149 (N.D. Ill.) (Aug. 13, 2021). Judge Kocoras. Granting motion to reconsider and dismissing complaint.

Judge Kocoras granted Continental Casualty Company's motion to reconsider a previous order that had allowed Legacy Sports Barbershop's COVID-19 insurance claim to continue. The barbershop, on behalf of a putative class, had sought declaratory judgment that losses suffered because of the COVID-19 pandemic were covered by Continental's insurance policy. The court had previously denied Continental's motion to dismiss the suit, but upon reconsideration it ruled that the barbershop's alterations to its property—installing plexiglass and a new outdoor patio, for example—were "neither physical *losses* nor *physical damage*," but instead more properly classified as improvements. Because the insurance policy required "direct physical loss of or damage to" the property, the court ruled that the barbershop's claim failed, and the complaint was dismissed with prejudice.

Policy Interpretations Limit Claims from Suspended Business Operations

Elegant Massage LLC v. State Farm Mutual Automobile Insurance Co., No. 2:20-cv-00265 (E.D. Va.) (Aug. 19, 2021). Judge Jackson. Granting in part motion for class certification.

The plaintiff operated the Light Stream Spa in Virginia Beach and was a party to an "all risk" commercial property insurance policy that covered loss of business income resulting from suspended business operations, such as via action by civil authority that prohibit access to the plaintiff's business property, but which explicitly excluded loss or damage caused by "Fungi, Virus or Bacteria," "Ordinance or Law," "Acts or Decisions," or "Consequential Loss." The plaintiff submitted a claim under its policy for loss of busines income and extra expenses incurred while it was voluntarily closed for several weeks after the stay-at-home orders were lifted because it was unable to comply with return-to-work requirements imposed by state executive orders. State Farm denied the claim because the closure was voluntary, there was no known damage to the business property, and the coverage excludes loss caused by a virus; the plaintiff filed a class action complaint. Judge Jackson declined to certify a "declaratory judgment"

"D&I takes center stage at the Alston & Bird Annual Conference on Diversity & Inclusion in the Design and Construction Industry. **Anna Saraie** and **Kerri Griggs** focused on the federal agencies and international workers most affected by "Diversity & Inclusion Practices and Policies for Construction Industry Employers."

Anna Saraie

Kerri Griggs

class, which included policyholders that did not have denied claims and that were not otherwise impacted by the COVID-19 closures, but he certified a subclass of Virginia policyholders whose claims were denied, ruling that it met Rule 23's numerosity, commonality, and typicality requirements. ■

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Consumer Protection

Third Circuit Takes Issue with "Issue Class"

Russell et al. v. Educational Commission for Foreign Medical Graduates, No. 20-2128 (3rd Cir.) (Sept. 24, 2021). Reversing class certification.

A class of hospital patients filed suit against the Educational Commission for Foreign Medical Graduates, claiming they were treated by a doctor allegedly practicing medicine under a false identity. The district court certified a class under Rule 23(c)(4) concerning the specific issues of duty and breach. In reversing, the Third Circuit held that district courts tasked with resolving motions to certify issue classes must make three determinations: (1) whether the proposed issue class satisfies Rule 23(a)'s requirements; (2) whether the proposed issue class fits within one of Rule 23(b)'s categories; and, if so, (3) whether it is "appropriate" to certify these issues as a class. The Third Circuit reversed, holding that the trial court erred by failing to determine whether the proposed issues satisfied a subsection of Rule 23(b).

Consumers Lack Real Standing in Artificial Flavors Suit

Engurasoff, et al. v. Coca-Cola Refreshments USA Inc., et al., No. 20-15742 (9th Cir.) (Aug. 31, 2021). Reversing class certification.

A class of Coca-Cola drinkers claimed to be misled by the advertising slogan "no artificial flavors. no preservatives added. since 1886" because the products contain phosphoric acid. The court determined the plaintiffs had not demonstrated a threat of any real, future harm sufficient to support their claim for injunctive relief, finding the plaintiffs' declaration that they "would consider purchasing" the product insufficient to confer Article III standing. The plaintiffs fell short by failing to allege a desire to purchase Coca-Cola "as advertised, that is, free from what they believe to be artificial flavors or preservatives."

No Ticket to Class Certification

Shiflett v. Viagogo Entertainment Inc., No. 8:20-cv-1880 (M.D. Fla.) (July 16, 2021). Judge Moody. Denying class certification.

Lauren Shiflett sued StubHub's parent company, claiming that ticketholders did not receive refunds after events were canceled or delayed due to COVID-19. For canceled events, StubHub offered ticketholders a voucher for 125% of the purchase value of the ticket or a cash refund to be received months later; Shiflett argued this was inadequate. The court denied class certification, ruling that significant individual questions predominate, particularly related to the ticketholders' purported damages—namely, it was not clear whether ticketholders who accepted a voucher actually suffered damages, given the economic value of the voucher (at 125% of the original ticket price) and the fact that 30–40% of the putative class redeemed a voucher, suggesting they preferred it over a refund. The court also ruled that the plaintiffs' proposed classes were not ascertainable because the proposed class definitions included arbitrary criteria.

Stoking the (Discovery) Embers

Waters v. Kohl's Department Stores Inc., No. B300638 (Cal. Ct. App.) (July 7, 2021). Reversing dismissal.

Crystal Waters claimed that Kohl's was misleading customers by offering "Kohl's Cash" certificates for every $50 spent. According to Waters, the certificates were applied to purchases and returns in a manner that caused consumers to overpay for goods. Kohl's argued the certificates were processed according to their terms and conditions and that Waters's Consumers Legal Remedies Act (CLRA) cause of action was without merit because no reasonable consumer would believe the certificates were treated like actual cash. The trial court denied Waters's motion for discovery and granted Kohl's no-merit motion as to the CLRA claim. On appeal, the California appeal court reversed, holding that Waters had been diligent in seeking discovery to oppose the no-merit motion and was entitled to take discovery on the likelihood of consumer deception. ■

"Get the proof you need from "Recent Alcoholic Beverage Labeling Suits Offer Best Practices," a high-gravity article in *Law360* by **Angela Spivey**, **Andrew Phillips**, **Sam Jockel**, and **Alan Pryor**."

Angela Spivey

Drew Phillips

Sam Jockel

Alan Pryor

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Labor & Employment / ERISA

The Burden of Proof

Sacerdote v. New York University, No. 18-2707 (Aug. 16, 2021) (2nd Cir.). Affirming in part, vacating in part, and remanding on appeal from entry of judgment and denial of post-trial motions.

The Second Circuit vacated the trial court's dismissal of the plaintiff's "share class" claim for breach of the fiduciary duty of prudence because it was adequately pleaded and it could not conclude that the dismissal was harmless. In its ruling, it held that once an ERISA plaintiff demonstrates a loss to an ERISA plan, the burden shifts to the defendant to disprove damages. The court explained that "plaintiffs bear the burden of proving a loss," but "the burden under ERISA shifts to the defendants to disprove any portion of potential damages by showing that the loss was not caused by the breach of fiduciary duty."

The court clarified that loss and damages are distinct, where loss is measured by "a comparison of what the plan actually earned on the investment with what the plan would have earned had the funds been available for other plan purposes," Whereas damages are the monetary amount that should be awarded if the defendant is liable for the claimed loss. The Second Circuit provided a simple example: "If a plaintiff proved that it was imprudent to pay $100 for something but that it would have been prudent to pay $10, it is not the plaintiff's burden to prove that it would also have been imprudent to pay every price between $11 and $99. It is on the defendant to prove that there is some price higher than $10 that it would have been prudent to pay."

With *Sacerdote*, the Second Circuit appears to align itself with other circuit courts approving of this burden-shifting approach, although some other circuits have not adopted this approach. It will be interesting to monitor whether the U.S. Supreme Court addresses this issue in the near future, in light of the current circuit split.

Delivery Driver Defeats Push for Arbitration

Jackson v. Amazon.com Inc., No. 3:20-cv-02365 (S.D. Cal.) (Sept. 16, 2021). Judge Hayes. Denying motion to compel arbitration.

A federal judge has denied Amazon's bid to force a driver's privacy claims into arbitration. The plaintiff, an Amazon Flex driver, filed a lawsuit against Amazon alleging that the e-commerce giant was tracking drivers' social media activity. Amazon moved to compel arbitration. The federal court, however, ruled that because Amazon's alleged wrongdoing—tracking the driver's private social media—does not arise out of or relate to the plaintiff's terms of service from when he started with the company, the claims fall outside the arbitration provision. Accordingly, the case will proceed in federal court.

North Carolina Federal Court Refuses Employer's Decertification Bid

Jared Mode v. S-L Distribution Company LLC, et al., No. 2:18-cv-00150 (W.D.N.C.) (Aug. 31, 2021). Judge Bell. Denying motion to decertify class.

The Western District of North Carolina denied a motion by Snyder's Lance snack food companies to decertify a collective action brought by more than 300 delivery drivers under the Fair Labor Standards Act (FLSA). In the lawsuit, the plaintiffs allege they signed contracts with the defendants to buy and deliver snack foods to retailers along designated routes, that they were misclassified as independent contractors, and that the defendants, as their employers, owed them minimum wage and overtime payments. The court ruled that decertification was not warranted because of the drivers' similar circumstances and because the motor carrier exemption to the FLSA did not apply—relying in large part on the testimony of the opt-in plaintiffs and other post-conditional-certification discovery, which showed the contracts with the delivery drivers were for indefinite terms, the drivers did not hire employees, and there were similar levels of control over both the prices that drivers paid for snacks and the retailers that they engaged.

This decision highlights the plaintiffs' bar's continued focus on independent contractor misclassification in FLSA cases and the importance of carefully documenting independent contractor relationships.

Cannabis Company Can't Harsh Class's Buzz

Lyttle v. Trulieve Inc., et al., No. 8:19-cv-02313 (M.D. Fla.) (Aug. 13, 2021). Judge Edwards Honeywell. Granting motion for class certification.

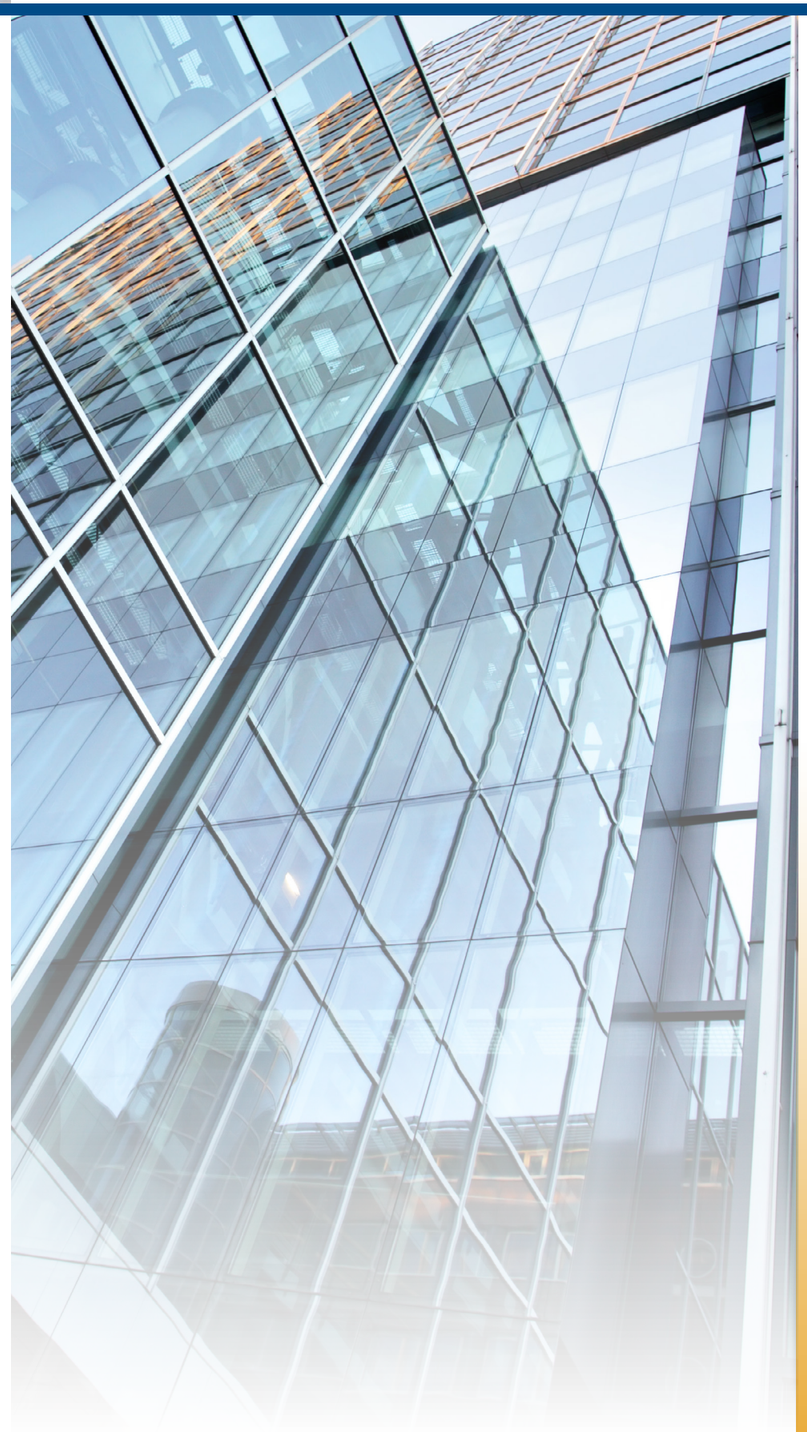
A Florida federal court granted class certification in a Rule 23 class action brought on behalf of applicants and employees at Trulieve, a cannabis company, asserting violations of the Fair Credit Reporting Act (FCRA). The plaintiffs claimed that Trulieve and its background check vendor violated the FCRA by failing to provide adverse action notices (along with claims for other alleged violations that have been dismissed). Much of the court's order focused on arguments surrounding the named plaintiff's adequacy as a class representative.

"Which direction will the Supreme Court go? Navigate the Court's oral arguments from *Hughes v. Northwestern University* with **Emily Costin** at the ABA webinar "Update on Current Supreme Court ERISA Developments and Fallout from Recent Decisions" on January 13. For a primer, check out our advisory, "Supreme Court Offers Mixed Guidance on Future of Lawsuits Challenging Investments and Fees in 401(k) and 403(b) Plans."

Emily Costin

Ultimately, the court ruled that named plaintiff Logan Lyttle established that he would fairly and adequately protect the interests of the class, rejecting Trulieve's arguments that Lyttle's allegedly false deposition testimony raised credibility concerns, that he failed to actively participate in the litigation, that his settlement with a defendant that was previously named in the case created a conflict of interest, and that the amount of damages he suffered rendered him inadequate. The court certified a class but limited it to a two-year statutory period instead of the five-year period sought by the plaintiff.

This case illustrates the large scope of liability resulting from FCRA cases and the importance of carefully vetting background-check procedures and any vendors used to administer the process. ■



"Choose your preferred way for **Ashley Brightwell** to discuss OSHA's emergency temporary standard (ETS): audio – "Everything You Need to Know About OSHA's COVID-19 Emergency Temporary Standard" from *OH&S Magazine*; or visual – "Vaccine Mandate: New Details Answer Lingering Questions About Long-awaited Rule" from *Yahoo! Finance*."

Ashley Brightwell

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Privacy & Data Security

- **Sixth Circuit Hangs Up on Defendants' TCPA Hopes**

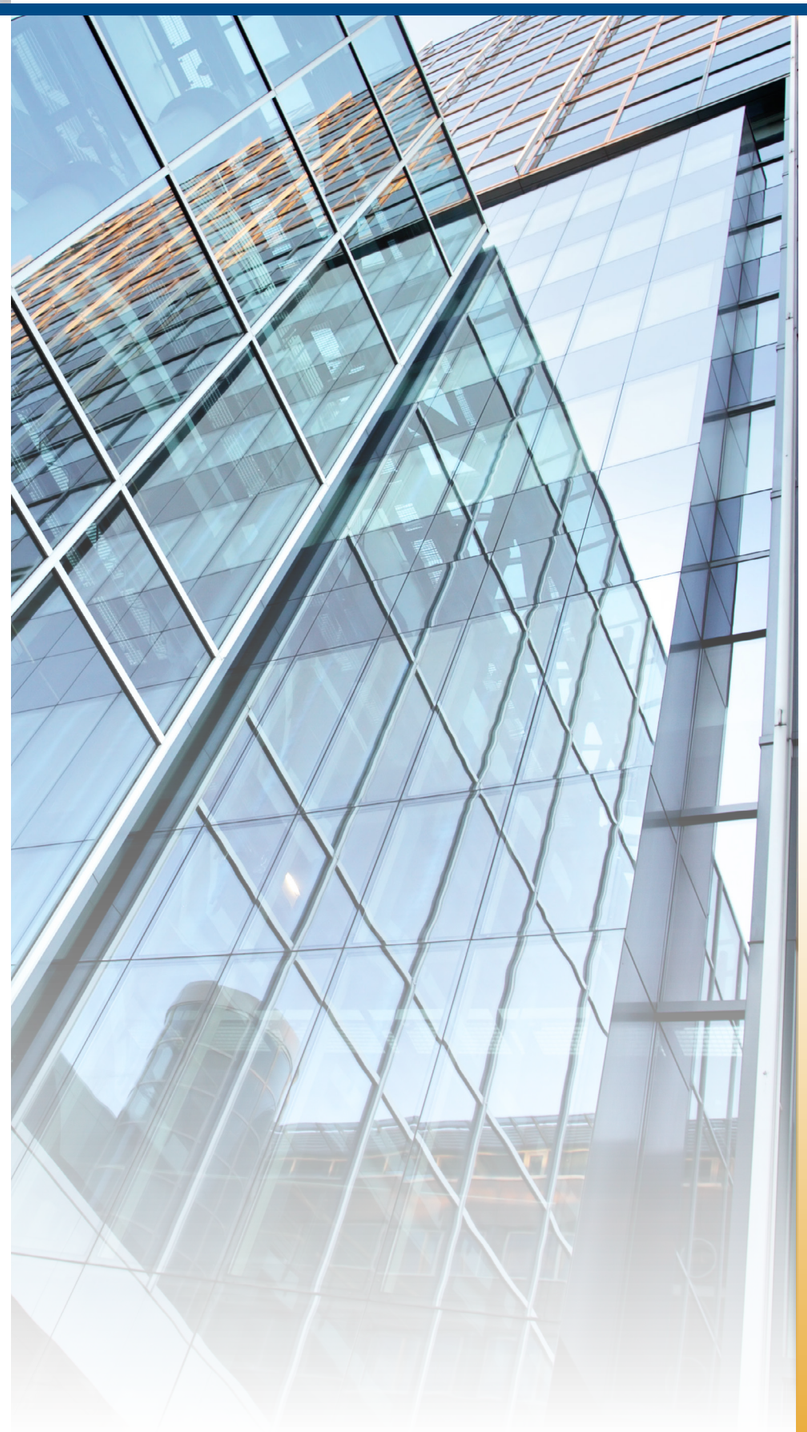
  Lindenbaum v. Realgy LLC, No. 20-4252 (6th Cir.) (Sept. 9, 2021). Reversing grant of motion to dismiss.

  In a much-anticipated ruling, the Sixth Circuit reversed the dismissal of a Telephone Consumer Protection Act (TCPA) class action involving prerecorded calls. The district court was one of a number that had ruled that the TCPA was unconstitutional to all calls made between November 2015 and July 2020, when a provision was included in the statute that exempted calls concerning debts owed to the government. In a 2020 decision, the U.S. Supreme Court severed the government-debt exception as violating the First Amendment. The Sixth Circuit sided with the plaintiff, finding that the Supreme Court's decision was limited to the specific severance of the government-debt exception. The remaining portions of the TCPA, according to the court of appeals, remain intact.

- **No Harm No Foul in Data Breach Lawsuit**

  Gardiner v. Walmart Inc., et al., No. 4:20-cv-04618 (N.D. Cal.) (July 28, 2021). Judge White. Granting motion to dismiss.

  Lavarious Gardiner, a Walmart customer, brought claims against the retail giant stemming from a data breach that resulted in hackers gaining access to customers' personally identifiable information (PII). The court dismissed the bulk of the customer's claims because the damages allegations, including loss of value of PII, were insufficient. The court also gave short shrift to Gardiner's claims of risk of future harm, out-of-pocket expenses and lost time, and benefit of the bargain. The plaintiff's California Consumer Privacy Act (CCPA) claim failed because, as the court recognized, that statute does not apply retroactively. Because the plaintiff became aware of his privacy exposure in 2019, the court concluded that the data breach likely occurred before the statute's enactment in January 2020. ■



"It's not you, it's me … or the market. Find out more from this recording of our "2021 Cyber Insurance Updates Webinar – Coverage Shock: Is It Me or Is It the Market?" hosted by **Amy Mushahwar**."

Amy Mushahwar

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Products Liability

Common Problems Do Not Mean Common Questions

Adams Pointe I LP v. Tru-Flex Metal Hose Corp., No. 20-3528 (3rd Cir.) (Aug. 16, 2021). Affirming denial of class certification.

The Third Circuit signaled that class actions involving a common product do not always mean that common questions of fact or law exist. The circuit court upheld a trial court's denial of class certification to property owners suing for an allegedly defective piping system, holding the plaintiffs failed to show "how the design issues will rely on common evidence that will resolve any of the essential elements of their claims."

The appeal stemmed from a 2016 lawsuit brought on behalf of Philadelphia condominium owners who alleged that a faulty piece of "corrugated stainless-steel tubing" caused a natural gas leak, which led to a fire from a lightning strike. The plaintiffs' argument that the case involved a common product and common problems involving the pipes' installation was not enough to persuade the court that certification was appropriate. Although the plaintiffs all alleged that faulty piping led to property damage and costs for inspection and repair, the nature and extent of potential damages greatly varied among the putative class. Some plaintiffs had physical damage, others claimed economic injury from diminution in the value of their homes, while other plaintiffs had little to no injury at all. According to the court, "each claim will require individualized property assessments and will raise different causation issues."

Ninth Circuit Swipes Left on Precertification Class Settlement

Kim v. Tinder, No. 19-55807 (9th Cir.) (Aug. 17, 2021). Reversing approval of precertification.

The Ninth Circuit reversed a California district court's approval of a precertification settlement, concluding that the district court "shirked its independent duty" in evaluating the value of the settlement. The putative class brought claims under California civil rights and consumer protection laws against Tinder, a developer of a dating app, for charging older members higher fees than younger subscribers. The court held that district court's review failed to meet the "high procedural standard" that applies to precertification settlements. The court also held that the district court failed to apply the specific settlement criteria added to Rule 23(e) in 2018, which created a heightened scrutiny standard for all class action settlements that requires district courts "to go beyond [the circuit court's] precedent."

The circuit court concluded that, although the district court recited Rule 23's fairness factors, it failed to subject the agreement to "a higher standard of fairness and a more probing inquiry than may normally be required under Rule 23(e)." The Ninth Circuit held that the district court abused its discretion by "underrating the strength of the plaintiff's case, overstating the settlement value, and overlooking the suggestions of collusion present." ■

"At Alston & Bird, helping our community is standard practice. Reuters highlighted **Daniella Main**, **Nathan Lee**, and **Laura Hunt** as "Pro Bono Heroes: Alston Team Wins Freedom for Man Convicted Under Jim Crow Law."

Daniella Main

Nathan Lee

Laura Hunt

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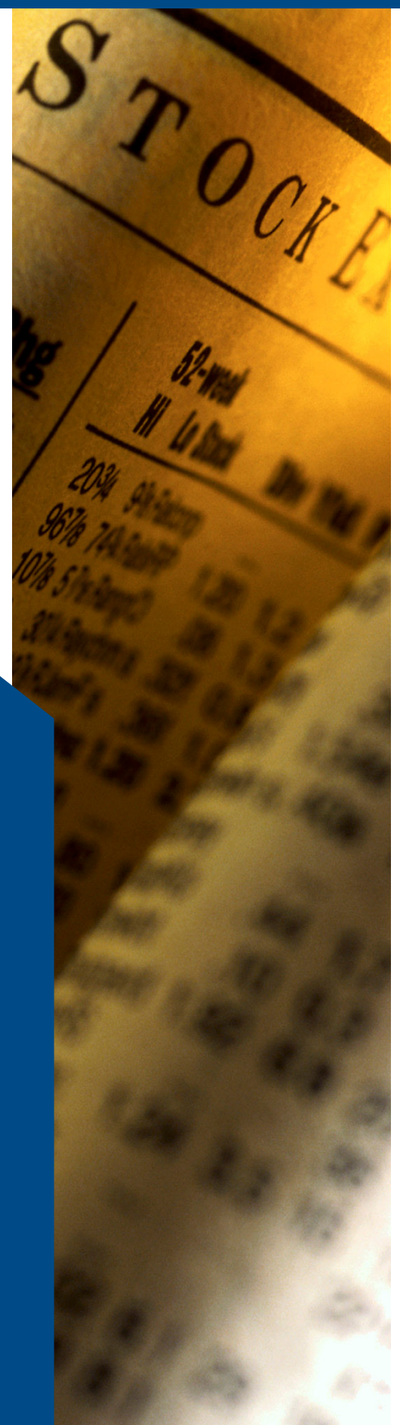
CLASS ACTION & MDL roundup

FALL 2021



Securities

SDNY Denies Section 13(e) Preliminary Injunction Regarding Appraisal Rights in Short-Form Merger

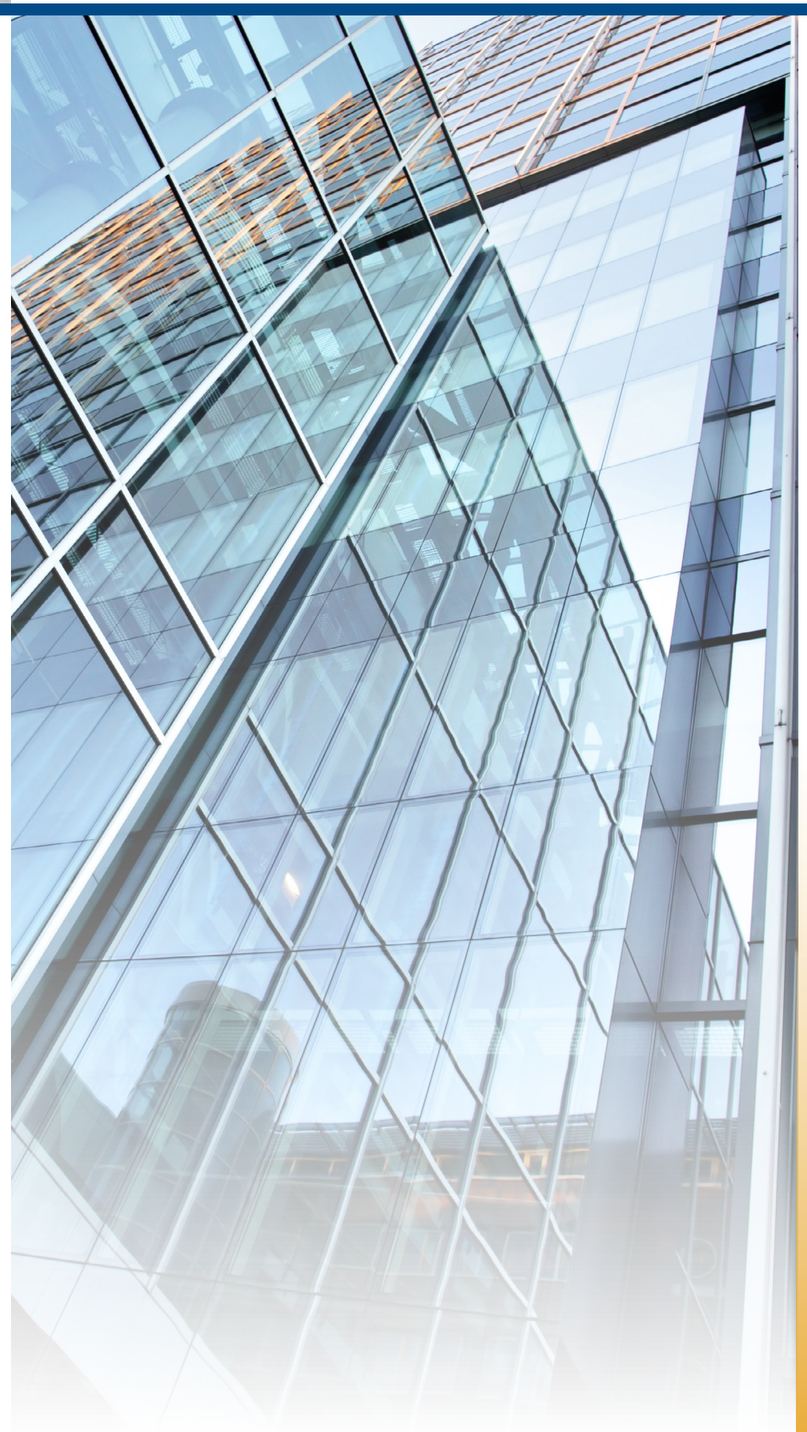
Boylan v. Sogou Inc., No. 1:21-cv-02041 (S.D.N.Y.) (Sept. 13, 2021). Judge Gardephe. Denying preliminary injunction.

The Southern District of New York denied a shareholder's request to issue a preliminary injunction against a foreign corporation, ruling that Section 13(e) of the Securities Exchange Act did not create a private right of action. The shareholder requested the injunction against the short-form, take-private merger of a Cayman Islands corporation, asserting that the transaction statement filed under SEC Rule 13e-3 was false and misleading because it did not properly alert the shareholders of their dissenters' rights under Cayman Islands law. Shareholders typically bring disclosure claims under Section 14(a); but because foreign companies are not required to file proxies, shareholders cannot bring Section 14(a) claims against foreign corporations but must resort to Section 13(e) for their disclosure claims related to short-form mergers. The court here ruled that the plaintiff could identify no language in the statute or its legislative history "that evinces an affirmative intent on Congress's part to provide a private right of action under Section 13." The court's decision cuts against the Sixth Circuit's holding in *Howing Co. v. Nationwide Corp*. and exhibits the unsettled nature of private rights of action under Section 13.

Class Certified After Reversal on Appeal

In re Bofl Holdings Inc., No. 3:15-cv-02324 (S.D. Cal.) (Aug. 23, 2021). Judge Curiel. Granting class certification.

A California district court certified a class of investors claiming that Bofl Federal Bank made misleading statements abouts its underwriting standards, internal controls, and compliance infrastructure, leading to a 47% decline in stock price. This certification ruling was only possible, however, because of a prior successful appeal. In March 2018, the district court dismissed the class complaint, concluding that the complaint failed to allege a corrective disclosure that could establish loss causation under the Securities Exchange Act. On appeal, the Ninth Circuit reversed the district court, concluding that the class could rely upon allegations in a separate lawsuit by a former Bofl auditor to establish the corrective disclosure necessary to avoid dismissal.



"Discovery costs time, and time is money. Get guidance from **Alan Pryor** on how to leverage motions to stay, bifurcation motions, and cost-shifting motions to rein in discovery expenses at "Strategically Limiting Discovery in Class Litigation: Tactics for Defense Counsel," hosted by Strafford."

Alan Pryor

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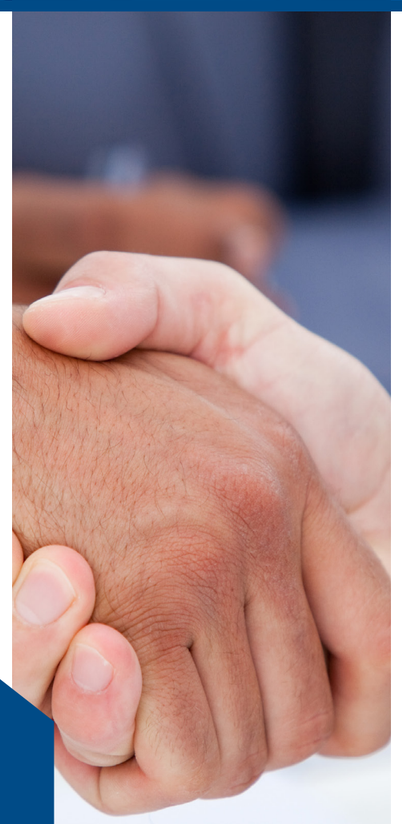

Settlements

First Settlement Reached in COVID-Related Tuition Suits Against University

Rosado v. Barry University Inc., No. 1:20-cv-21813 (S.D. Fla.) (Sept. 7, 2021). Judge Martinez. Approving $2.4 million settlement.

Judge Martinez granted final approval of a settlement for a class of Barry University students who filed suit after the school transitioned its spring 2020 students from in-person to remote learning because of the COVID-19 pandemic.

The settlement agreement provides a $2.4 million common fund for students who were enrolled during the class period and others who paid or were charged tuition, room and board, or other associated fees. Settlement class members are entitled to receive a cash payment, tuition credits for future classes, or a credit for unpaid balances due to Barry. The court determined that the settlement was fair, reasonable, and adequate, and the class counsel's request for $800,000 (roughly 33% of the settlement fund) in attorneys' fees and litigation expenses was reasonable. The court denied the service award of $5,000 to the class representative, citing recent Eleventh Circuit precedent in *Johnson v. NPAS Solution LLC*: "[a] plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses" and the "modern-day incentive award for a class representative is roughly analogous to a salary."

Oil Giants Ordered to Pay Millions in Puerto Rico Contamination Case

Puerto Rico v. Shell Oil Co., No. 3:07-cv-01505 (D.P.R.) (July 21, 2021). Judge Carreno-Coll. Approving $25 million settlement.

Judge Carreno-Coll granted final approval of a settlement as to Exxon Mobil and Esso Standard Oil Company in a long-standing lawsuit with Puerto Rico and dozens of energy giants over the release of a gasoline additive causing contamination in its waters. According to the judicial consent order, Exxon and Esso agreed to pay Puerto Rico $25 million, as well as attorneys' fees. Exxon and Esso also agreed to participate in a risk-based corrective action (RBCA) sites pilot program for investigation and remediation of all RBCA sites.

Independent Delivery Drivers Settle Overtime Class Action

Davis v. Omnicare Inc., et al., No. 5:18-cv-00142 (E.D. Ky.) (Sept. 14, 2021). Judge Weir. Approving $1 million settlement.

Judge Weir granted final approval of a settlement in a class action brought against Omnicare Inc. and three of its subsidiary pharmacies. The parties jointly submitted a motion for settlement approval of $1 million to serve as a common settlement fund to resolve both federal and state claims. Additionally, Judge Weir granted final certification of the Rule 23 class and the FLSA collective. The court also approved over $300,000 in attorneys' fees, costs, and expenses.

Settlement Clarifies Staffing Considerations for Senior Communities

Troy, et al. v. Aegis Senior Communities LLC, No. 4:16-cv-03991 (N.D. Cal.) (Aug. 23, 2021). Judge White. Approving $16.25 million settlement.

Judge White approved a $16.25 million settlement between Aegis Senior Communities LLC and two classes of plaintiffs in Washington and California who alleged that Aegis misled its residents and their family members about how it determined staffing at Aegis's facilities in those states. The settlement fund will be used to pay class members, service awards, $6.35 million in attorneys' fees, and $1.17 million in expenses and costs. Washington class members expect to receive average settlement payments of $1,550, and California class members expect to receive average payments of $950. The settlement also includes an injunction that requires Aegis to set staffing levels based in part on resident assessments and to clearly disclose that other factors may be considered.

"The past couple of years have been a circus. *The American Lawyer* asked **Angela Spivey** about it in its article "The Great Juggling Act: How Working Parents Have Kept Law Firms–and Kids–Thriving Through It All."

Angela Spivey

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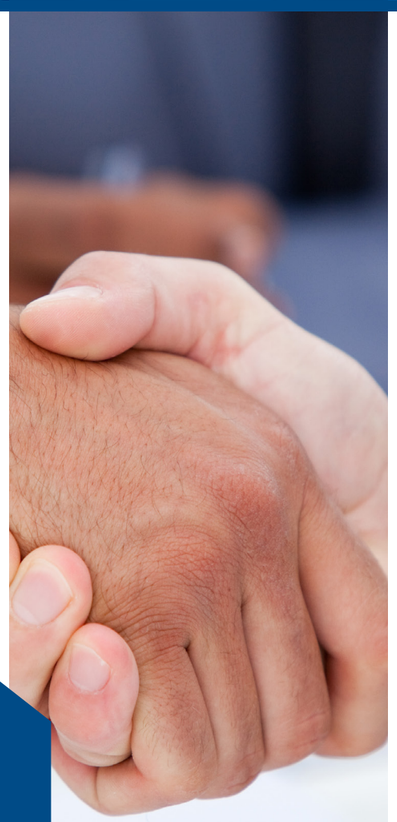


Settlement Cheques for Uncompensated Security Checks

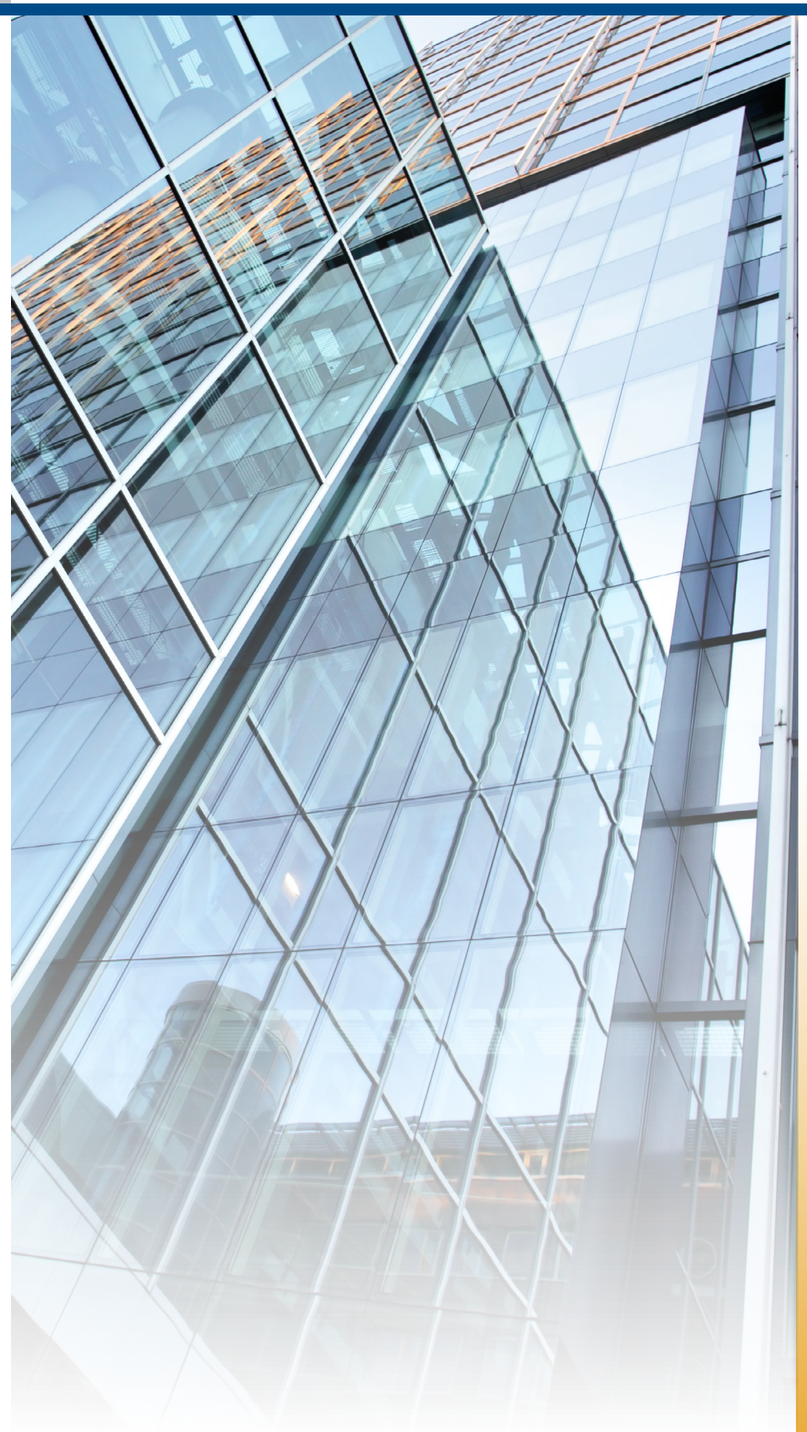
In re Amazon.com Inc., Fulfillment Center Fair Labor Standards Act and Wage and Hour Litigation, No. 3:14-md-02504 (W.D. Ky.) (July 22, 2021). Judge Hale. Approving $13.5 million settlement.

Judge Hale approved a $13.5 million settlement resolving a 10-year multidistrict litigation involving claims that employees of Amazon and staffing agencies used by Amazon were not compensated for required security checks. The agreement provides for attorneys' fees up to $4.5 million, costs up to $150,000, and service awards to the named plaintiffs. The class encompasses anyone that Amazon employed directly as hourly paid warehouse employees in its warehouses at any time from October 2007 to April 2020. At the time of conditional certification, the claims administrator had already received claims from more than 4,000 class members. The court noted no objections to the settlement and very few opt-outs.

Settlement Approved Despite Numerous Objections to Opt-Out Procedures

In re Chesapeake Energy Corporation, No. 4:21-cv-01215 (S.D. Tex.) (Aug. 23, 2021). Judge Rosenthal. Approving $6.25 million settlement.

A Texas district court approved a $6.25 million class settlement resolving claims that Chesapeake Energy underpaid oil and gas royalties due under lease agreements. In doing so, the district court also approved a fee award of approximately $2.4 million for the nearly eight years of representation by class counsel. Ultimately, the district court issued its ruling over the objection of 58 class members, many of whom claimed that the class opt-out procedures were unduly burdensome. ■



"Is your firm's door revolving too quickly? **Brett Coburn** offers 3 steps you can take to navigate the '"The Great Resignation': Employment Lawyers Advise How to Avoid Losing Talent During Pandemic" in the *Daily Report*."

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