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CLASS ACTION & MDL roundup

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BLAKE SIMON

Senior Associate, Litigation & Trial Practice Group

Blake Simon provides an update on total-loss class actions and discusses recent court decisions on this evolving area of the law.

Where the (Class) Action Is

Welcome back to the ***Class Action &MDL Roundup***! This edition covers notable class actions from the third quarter of 2023.

The much-anticipated third quarter Roundup has arrived and there is no shortage of interesting cases to report from across the country. Over on the West Coast, courts are continuing to see insurance cases related to premium refunds due to loss of business from COVD-19. One case in particular cites alleged violations of the California Unfair Competition Law (UCL) and Business and Professions Code Section 17200. UCL and false advertising claims were also called into question in a consumer protection matter involving wood pellets. Over on the East Coast, products liability cases were all the rage.

The circuit courts also saw a lot of action in the third quarter, resulting in several decision reversals, dismissals, and motions for class certification. Of note, the Second Circuit upheld a $17 million overtime verdict in a labor & employment class action. Meanwhile, the Eleventh Circuit reversed a district court's dismissal of a privacy class action involving unwanted text messages for lack of standing, holding that class members have standing regardless of how many text messages they receive.

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

The Class Action & MDL Roundup is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

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Antitrust/RICO

Class Certification Turns on Failed Daubert Motions

City of Philadelphia v. Bank of America Corp., No. 1:19-cv-01608 (S.D.N.Y.) (Sept. 21, 2023). Judge Furman. Granting class certification.

Judge Jesse M. Furman denied a *Daubert* motion filed by the defendants, which in part informed his decision to grant class certification to the plaintiffs, in consolidated class actions brought by three municipalities against eight banks. The plaintiffs asserted antitrust and contract claims, alleging that the defendants conspired to fix the interest rates for bonds issued by municipalities and other public entities between 2008 and 2016. The plaintiffs' class certification motion relied heavily on the testimony (and regression models) of their two experts, and the defendants' class certification opposition relied heavily on its attempts to preclude some or all of that testimony. In particular, the defendants focused on the predominance element and argued the plaintiffs could not prove, through common evidence (their experts' models), that all the class members were injured by the conspiracy. However, Judge Furman denied the *Daubert* motions, determining that reasonable economists could disagree about whether the models adequately accounted for lawful factors that influenced the bond rates (like the financial crisis). This "weigh[ed] heavily in favor of granting Plaintiffs' class certification motion," which Judge Furman ultimately did.

Nominated by one of our clients, **Adam Biegel** has been recognized by the ABA Antitrust Section with its "Outstanding Performance Award."

Adam Biegel

Banking & Insurance

No Class Action for Investors on Financial Crisis Claims

Arkansas Teacher Retirement System v. Goldman Sachs Group Inc., No. 22-00484 (2nd Cir.) (Aug. 10, 2023). Reversing class certification order and remanding with instructions to decertify the class.

The Second Circuit reversed the district court's order certifying a class action against Goldman Sachs, holding that the plaintiffs failed to establish price impact and presumption of reliance for class certification. The plaintiffs, shareholders who purchased Goldman Sachs stock between 2007 and 2010, alleged that Goldman misled investors about its business practices and ability to manage conflicts of interest ahead of the 2008 financial crisis through allegedly false statements about integrity, client interests, and extensive procedures to address conflicts that artificially inflated its stock price.

Goldman's stock price dropped after the SEC fined it in 2010 for failing to disclose conflicts in marketing collateralized debt obligations, and the plaintiffs argued this revealed the falsity of Goldman's earlier statements using the presumption provided by *Basic Inc. v. Levinson*. But the Second Circuit disagreed, holding that Goldman had successfully rebutted the presumption by showing that the generic, aspirational statements at issue did not actually impact the stock price and highlighting the tenuous link between the alleged misstatements and the later, more specific, corrective disclosures. Courts should be careful when using a stock drop following specific negative news as evidence that earlier broad statements inflated the price.

Mistake of Law Can Qualify for "Bona Fide Error" Exception to FDCPA

Sprayberry v. Portfolio Recovery Associates LLC, Nos. 21-36000, 21-36001 (9th Cir.) (Aug. 28, 2023). Affirming summary judgment and dismissal of putative class actions.

The Ninth Circuit affirmed a district court's dismissal of two putative class actions under the Fair Debt Collections Practices Act (FDCPA). In two separate actions, the plaintiff alleged that the defendant, a collection agency, violated the FDCPA by sending her collections letters for outstanding debts that were time-barred by Oregon's four-year statute of limitations. The Ninth Circuit found the district court properly granted summary judgment to the defendant because it met the "bona fide error" exception to FDCPA liability. Applying the recent precedent in *Kaiser v. Cascade Capital LLC*, the Ninth Circuit held that the defendant's error was bona fide because the evidence showed that the defendant's counsel was unaware that a four-year statute of limitations could apply and maintained procedures reasonably adopted to avoid a statute of limitations error.

California Federal Court Narrows, But Does Not Dismiss, Premium Refund Class Action

Echo & Rig Sacramento LLC v. AmGuard Insurance Co., No. 2:23-cv-00197 (E.D. Cal.) (Oct. 17, 2023). Judge Calabretta. Dismissing in part and allowing in part class action.

A California federal court trimmed, but did not dismiss, a putative class action alleging AmGuard Insurance Company failed to refund the premiums of businesses affected by the COVID-19 pandemic. More specifically, according to Echo & Rig Sacramento LLC, the California insurance commissioner requested that insurers issue refunds to businesses that were charged premiums based on the risks of pre-pandemic operations but were closed or operated with a limited capacity due to the pandemic. Despite this request, AmGuard allegedly failed to provide Echo & Rig a premium refund or an opportunity to request a premium refund, which resulted in AmGuard's unjust enrichment and violated the California Unfair Competition Law (UCL) and Business and Professions Code Section 17200. The court dismissed Echo & Rig's UCL claim to the extent it alleged AmGuard failed to provide refunds or sufficient refunds because the California insurance commissioner does not have the authority to order insurance companies to issue retroactive refunds, while allowing its claims that AmGuard violated the UCL and was unjustly enriched by failing to reduce Echo & Rig's premium rate or provide an opportunity to request a reduced premium to proceed. ■

Our London team just keeps growing as we welcome International Arbitration Partner **Will Hooker**.

Will Hooker

Consumer Protection

Fax On, Fax Off: Seventh Circuit Reverses Dismissal of Claim That Faxes Violated TCPA

Smith v. First Hospital Laboratories Inc., No. 22-01540 (7th Cir.) (Aug. 9, 2023). Reversing dismissal of TCPA claim.

An "aggravated" medical provider filed a putative class action days after receiving a second fax requesting that he join the defendant's medical provider network, contending these faxes were prohibited under the TCPA as "unsolicited advertisements." The two faxes explained that, in exchange for joining, the plaintiff would be listed on the defendant's network and would be sent clients if he used the defendant's recommended pricing. The district court determined the faxes were not advertisements, reasoning that the defendant had offered to purchase the plaintiff's services, not the other way around, but the Ninth Circuit sided with the plaintiff and reversed.

Both courts agreed that faxes "must directly or indirectly encourage recipients to buy goods, services, or property to qualify as an unsolicited advertisement." The Ninth Circuit, however, concluded that the faxes qualified because the defendant had essentially promoted its services as a broker or lead-generator in asking the plaintiff to join its network, and it would receive a cut of the cost for any services provided. The court concluded with a warning to members of the plaintiffs' bar who "view the TCPA opportunistically": its holding only applies to a "slice of fax messaging."

Ninth Circuit Wipes Away Dismissal of False Labeling Claims

Souter v. Edgewell Personal Care Co., No. 22-55898 (9th Cir.) (Aug. 7, 2023). Reversing dismissal of complaint alleging false labeling claims.

After losing three consecutive motions to dismiss in district court, plaintiffs challenging Wet Wipes labeling finally prevailed on appeal at the Ninth Circuit. The plaintiffs claimed that the defendant's use of "hypoallergenic" and "Kill 99.99% of Germs" on its Wet Wipes labels was false and misleading. The Ninth Circuit held that the plaintiffs had plausibly alleged those claims, noting that the terms "hypoallergenic" and "99.99% of germs" were ambiguous. According to the court, there are several plausible interpretations of "hypoallergenic," and the district court's selection of one interpretation was "improper." "99.99% of germs" fared no better, with the court finding this term could be misleading because it included "no qualifier or limitation." Is it 99.99% of all germ species? Or 99.99% of individual germs on the hand when the wipe is used? Not finding an answer to these questions on the product's label, the Ninth Circuit allowed these claims of unsanitary advertising to proceed.

Ninth Circuit Squashes Protein Mislabeling Suit

Brown, et al. v. Kellogg Company, No. 22-15658 (9th Cir.) (Aug. 14, 2023). Affirming order granting motion to dismiss.

The Ninth Circuit affirmed the dismissal of a consolidated action alleging the defendants' products were mislabeled because they overstate the quantity of protein in the product and "implicitly exaggerate" its quality. The district court dismissed the lawsuit on preemption grounds, finding that the products could not be mislabeled because the defendants measured protein quantity using a method approved by the Food and Drug Administration (and any state labeling requirements that differ from federal standards are preempted).

The Ninth Circuit reached the same result as the district court but for different reasons. The Ninth Circuit determined that even if protein quantity is calculated using a federally approved method, as the defendant's was here, advertising a product's protein quantity outside the label's Nutrition Facts Panel could still be misleading if the panel fails to disclose the percent daily value of protein adjusted for quality. The Ninth Circuit still affirmed the dismissal, however, because the plaintiffs did not allege that the Nutrition Facts Panels on the product labels omitted the required protein quality-adjusted percent daily value information.

California Court Certifies a Tea Party

Banks v. R.C. Bigelow Inc., No. 2:20-cv-06208 (C.D. Cal.) (July 31, 2023). Judge Pregerson. Granting motion for class certification and denying motion to strike export reports.

A California district court certified a class of Bigelow tea consumers who alleged that Bigelow misled consumers by marketing its various tea varieties as "Manufactured in the USA 100% Family Owned" even though the teas were processed abroad. The defendant used a multipronged approach to challenge the motion for certification, including moving to strike the expert reports the plaintiffs used to support their Rule 23(b)(3) arguments. These efforts failed, however, and this action will continue to brew as the newly certified class moves forward with its claims. The court found that common questions predominated, dismissing the defendant's arguments that the plaintiffs' false-labeling claims presented individual questions of exposure, reliance, materiality, and damages. Even the plaintiffs'

"**Jeffrey Dintzer** and **Samantha Van Winter** remind you to not be blinded by "Science on Human Health Effects of PFAS Is Still Inconsistent" in *Law360*."

Jeffrey Dintzer

Samantha Van Winter

counsel's method of finding named plaintiffs—through solicitation via a website—was not enough to defeat a finding of adequacy. In a small victory for the defendant, the court amended the class definition to better reflect the active shipping period of the products at issue.

- **Handgun Class Certified in Age-Limit Challenge**

Fraser v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, No. 3:22-cv-00410 (E.D. Va.) (Aug. 30, 2023). Judge Payne. Granting motion for class certification.

A Virginia federal court certified a national class of individuals aged 18 to 21 in an action brought against the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives, challenging federal laws barring that age group from buying handguns from federal firearms dealers. The plaintiffs argued, and the district court agreed, that the government's argument that not all of them may be opposed to the law is irrelevant as to whether the class meets the requirements under the Federal Rules for Civil Procedure, since the challenged rules apply to all members. The court found that the plaintiffs also met the ascertainability and numerosity requirement since bartenders and store clerks check IDs thousands of times a day and there are approximately 10 million Americans between the ages of 18 and 21.

- **Court Ignites Wood Pellet Class**

Yates v. Traeger Pellet Grills, No. 2:19-cv-00723 (D. Utah) (Sept. 7, 2023). Judge Jenkins. Granting motion for class certification.

A Utah federal court certified classes of Utah and California consumers in an action against Traeger Pellet Grills alleging that Traeger misled buyers about the content of bags of wood pellets it sold for lighting and flavoring grills. The plaintiffs allege that they purchased bags of Traeger's pellets, which were advertised as containing "100%" hickory or mesquite. The plaintiffs allege they later learned that the pellets were mostly composed of alder or oak wood that had merely been flavored with hickory or mesquite oil. In granting class certification, the court rejected Trager's argument that individual questions of law and fact predominate over questions common to the classes for both the Utah Consumer Sales Practices Act and California Unfair Competition Law and False Advertising Law claims. The court also found that damages can be calculated on a classwide basis, pointing to the differences in price between Traeger's and competitor products. ■

"You'll want to subscribe to "Promoting Cancel Culture: Best Practices for Compliance With California's Automatic Renewal Law" by **David Carpenter**, **Gillian Clow**, and **Brooke Bolender** for *The Recorder*."

David Carpenter

Gillian Clow

Brooke Bolender

Labor & Employment / ERISA

Second Circuit Upholds $17 Million Overtime Verdict

Perry v. City of New York, No. 21-02095 (2nd Cir.) (Aug. 25, 2023). Affirming in toto.

A certified collective of over 2,500 EMTs and paramedics working for the New York City Fire Department argued that they were not compensated for certain activities before and after their official shift, even though those activities were essential to their roles. The Second Circuit affirmed a jury verdict awarding nearly $18 million to the workers, reiterating that the Fair Labor Standards Act (FLSA) obligates employers to pay for all work it suffers or permits to be done on its behalf, not just the work employees record on time sheets. The Second Circuit emphasized that work qualifying for compensation under the FLSA includes work employers demand, are aware of, or reasonably should have known about, regardless of whether the employer knows the employee is not being paid. The Second Circuit recognized that unreported work may not always make employers liable, but in this case, the City of New York was deemed liable because the workers could not have executed their duties without these pre- and post-shift activities and they had expressed concerns about not being compensated for them.

Ninth Circuit Sends Wage Suit to Arbitrator

Holley-Gallegly v. TA Operating LLC, No. 22-55950 (9th Cir.) (July 21, 2023). Vacating denial of motion to compel and remanding.

The Ninth Circuit held that the trial court wrongly deemed a key arbitration agreement clause to be unenforceable. Specifically, the trial court denied the defendant's motion to compel arbitration, finding the agreement's delegation clause procedurally unconscionable because it appears to limit a plaintiff's rights to a jury trial even if the agreement is deemed unenforceable.

The Ninth Circuit, however, held that the district court erred in its unconscionability analysis because the agreement's jury waiver provision applies only if the agreement is determined to be unenforceable and, thus, cannot support the conclusion that the delegation clause is unenforceable. It illustrated with two examples—both of which assume the delegation clause is enforceable. On one hand, if the arbitrator finds the arbitration agreement unenforceable, the plaintiff may pursue his claims in court, where the parties will have an opportunity to argue about the jury waiver provision (assuming the defendant attempts to enforce it). On the other hand, if the arbitrator determines the arbitration agreement is enforceable, the jury waiver provision becomes irrelevant because the plaintiff would be required to pursue his claims in arbitration.

The Ninth Circuit held that neither of these outcomes has any bearing on whether the delegation of arbitrability to the arbitrator would be unconscionable, and its decision makes clear that those seeking to invalidate a delegation clause must focus specifically on why an arbitrator should not be allowed to decide whether the underlying dispute is subject to arbitration.

"**Conrad Hester** and **Emily Fitzgerald** make the case for "What Texas Business Court Could Mean for Oil, Gas Cases" in *Law360*."

Conrad Hester Emily Fitzgerald

Privacy & Data Security

"Waiving" Goodbye to Class Certification: Court Must Consider Class Action Waivers

In re Marriott International Inc. Customer Data Security Breach Litigation, No. 22-01744 (4th Cir.) (Aug. 18, 2023). Vacating and remanding order granting class certification.

The Fourth Circuit vacated certification of a class of hotel guests arising out of a 2018 breach of Marriott's guest database. The class representatives—and all the class members—were members of the Starwood Preferred Guest Program, which required assent to terms & conditions that included a class action waiver. The Fourth Circuit held that the district court erred by certifying multiple classes without first addressing the validity and impact of that waiver. The case was returned to the district court to consider the impact of the class action waiver.

No Such Thing as a Free Fax: Unsolicited Fax Offering Product for Free Violates the TCPA

Carlton & Harris Chiropractic Inc. v. PDR Network LLC, No. 22-01279 (4th Cir.) (Sept. 6, 2023). Reversing dismissal under Rule 12(b)(6).,

This lawsuit arose out of a chiropractic office's receipt of an unsolicited fax offering a free eBook with information about prescription drugs. The district court dismissed the complaint, ruling that allegations of a free eBook offer would not qualify as an unsolicited advertisement because the fax did not attempt to sell anything. The Fourth Circuit disagreed, holding that the plaintiff sufficiently alleged a "commercial character" under the TCPA because the fax promoted a product (the eBook) on which the defendant earned a commission. Moreover, the fax itself touted the virtues and qualities of the eBook—it did not provide merely neutral information.

No Harm, No Foul: No Standing to Challenge Disclosure of Drivers' License Numbers

Baysal v. Midvale Indemnity Company, No. 22-01892 (7th Cir.) (Aug. 22, 2023). Affirming dismissal for lack of standing.

In an effort to streamline the process of receiving auto insurance quotes, Midvale Indemnity and American Family Mutual created an "instant quote" feature on their website that automatically filled in the applicant's driver's license number based on the name and address the person provided. Midvale discontinued the feature after noticing unusual activity that suggested misuse and then notified the people whose information may have been improperly disclosed. Three of those individuals sued Midvale, alleging that the autofill feature violated the federal Driver's Privacy Protection Act and state negligence law. The district court, however, never reached the merits of the plaintiffs' claims, instead dismissing the action for lack of standing, finding that the plaintiffs had failed to show concrete injury. The plaintiffs disagreed and argued that they had suffered harm because a fraudulent brokerage account was opened in one plaintiff's name and another plaintiff paid for a credit-monitoring service.

On appeal, the Seventh Circuit affirmed, holding that the harms the plaintiffs relied on were not traceable to the disclosure of their drivers' license numbers because drivers' license numbers cannot be used to open brokerage accounts and cannot be used to facilitate credit-related frauds. The court also rejected the argument that the fact that the statute provided for liquidated damages established standing because the disclosure of drivers' license numbers has not historically been recognized as harmful and, in fact, people regularly disclosed their drivers' license numbers to third parties such as hotels, car rental companies, and airports.

Don't Forget About Standing: Eleventh Circuit Clarifies Predominance Inquiry in Data Breach Class Action Cases

Green-Cooper v. Brinker International Inc., No. 21-13146 (11th Cir.) (July 11, 2023). Vacating and remanding order granting class certification.

The Eleventh Circuit reversed certification of a class of guests of a restaurant chain that was subject to a data breach of customers' credit and debit card information. The court held that two of the named plaintiffs lacked Article III standing because they visited the restaurants outside the "at-risk" time period when their information could have been involved in the cyber-attack. The Eleventh Circuit also held that the class could potentially "include uninjured individuals" whose information was accessed by cyber-criminals but who had not suffered misuse of that information, and remanded to the district court to give it "the opportunity to clarify its predominance finding" to "either refine the class definitions to include only" individuals whose information was misused or to "conduct a more thorough predominance analysis" to explain how it could "ultimately weed out plaintiffs who do not have Article III standing before damages are awarded to a class."

We're celebrating our own **Daniella Main**, named to *Texas Lawyer's* "Rising Stars" class of 2023.

Daniella Main

A Harm Is a Harm, No Matter How Small: Standing Based on a Single Unwanted Text

Drazen v. Pinto, No. 21-10199 (11th Cir.) (July 24, 2023). Reversing dismissal for lack of standing.

GoDaddy.com sent unwanted text messages and prerecorded calls to approximately 1.26 million people. After three of those individuals filed putative class actions, the lawsuits were consolidated and resolved through a $35 million settlement. When reviewing the proposed settlement class, the district court determined that 7% of the class only received a single text message and concluded that those class members lacked standing. The district court then approved a settlement excluding those class members. An objector who had challenged the settlement then appealed its approval.

On appeal, the Eleventh Circuit dismissed the case for lack of jurisdiction, holding that every class member must have Article III standing to recover individual damages. The court then agreed to rehear the appeal en banc. On rehearing, the court determined that receiving a single unwanted text message was a sufficiently concrete injury to establish standing. The court focused on the "kind" of harm, as opposed to "degree" of harm suffered. Because the kind of harm suffered by the class members who received a single text message "share[d] a close relationship" with the kind of harm traditionally recognized under the privacy tort of intrusion upon seclusion, the court held that the class members had standing, regardless of how many text messages they received.

Products Liability

Defendant Strikes Out on Motion to Strike Class Allegations

Faulkner v. Acella Pharmaceuticals, No. 2:22-cv-00092 (N.D. Ga.) (July 10, 2023). Judge Story. Denying motion to strike class allegations and to stay class discovery.

A Northern District of Georgia case involving allegedly defective thyroid medication highlights the risks of moving to strike class allegations. The court noted that motions to strike are a "generally disfavored" "extreme remedy" in the Eleventh Circuit and that many courts deny such motions as premature at the pleadings stage. The court nevertheless addressed the merits of the motion, substantively rejecting the defendant's arguments and ruling that commonality, typicality, and predominance were satisfied (though the court noted that the defendant could re-raise those arguments in opposition to a future class certification motion). The court also found that the proposed class—which consisted of purchasers of medication not in compliance with regulatory requirements—was not a fail-safe class. The court's order potentially opened the door to asserting personal injury claims on a classwide basis. Although the plaintiffs did not seek classwide personal injury damages, the court opined that had they done so, typicality would likely still exist given that the injuries arose "from the same practice."

Court Allows Plaintiffs to Hold Their Ground by Certifying Issue Classes

In re FieldTurf Artificial Turf Marketing & Sales Practices Litigation, No. 3:17-md-02779 (D.N.J.) (July 13, 2023). Judge Shipp. Granting renewed motion for class certification.

School districts and local governments that purchased Duraspine fields sought to certify their claims against FieldTurf for fraudulent concealment, statutory consumer fraud, implied warranty, and unjust enrichment. The court initially denied class certification, ruling that individual issues predominated for causation and damages but noting that two issues were susceptible to common, classwide proof: (1) whether the products share a common design defect; and (2) whether the defendant knowingly omitted the facts of this common defect in its marketing and sales presentations. The plaintiffs then sought to certify those two issues for class treatment pursuant to Rule 23(c)(4).

The court granted the renewed motion because the defect and deception issues could be resolved classwide using common evidence. The court ruled that superiority was satisfied because it would be difficult for any individual to gather the requisite resources to resolve these issues and their answers will streamline the case even if other aspects of liability and damages are left to individual adjudication. The court then examined the ***Gates*** factors—a nonexclusive list of factors for evaluating the propriety of issue certification—and ruled certification would efficiently determine significant liability issues while protecting the defendant's due process rights to challenge each class member's claim to recovery during the causation and damages phase.

Court Signs Off on Nonsignatory Retailer's Ability to Compel Arbitration

Shepherd v. Belkin International Inc., No. 1:21-cv-05862 (E.D.N.Y.) (July 24, 2023). Judge Cogan. Granting defendants' motion to compel arbitration.

The Eastern District of New York ruled that a nonsignatory to an arbitration agreement between the plaintiff and the manufacturer-defendant could compel arbitration.

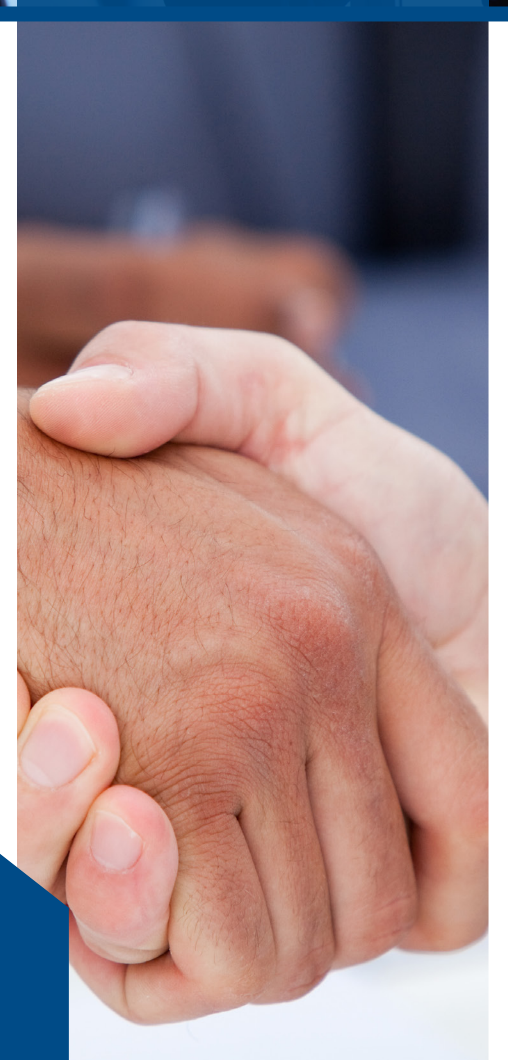
The plaintiff purchased a Belkin router and brought a class action alleging the router did not work as advertised. When setting up the device, the plaintiff accepted an agreement with Belkin containing an arbitration clause. Both defendants moved to compel arbitration. The court had little trouble granting Belkin's motion. In granting the retailer's motion, the court explained that whether a retailer can invoke a manufacturer's arbitration clause is a "fact-sensitive" question. On the facts of this case, the court found that the retailer was a "middleman" that could enforce the arbitration agreement. The court emphasized that the plaintiff's complaint asserted identical claims against both defendants without differentiating between them in any way. Moreover, even though the agreement did not mention any retailers, the plaintiff knew of the defendants' manufacturer-retailer relationship when he accepted the agreement. Having treated the defendants as relatively "interchangeable," and having agreed to arbitrate with the manufacturer, the court charged the plaintiff with knowledge that he had also agreed to arbitrate with the retailer for "committing exactly the same conduct for precisely the same product." ■

"**Elise Paeffgen**, **Greg Berlin**, and **Sam Burdick** cut through the weeds in "Pesticide Labeling Bill, 9th Circ. Case Could Cut Prop 65 Suits" for *Law360*."

Elise Paeffgen

Greg Berlin

Sam Burdick



Settlements

Investors Settle Opioid Addiction Drug Safety Allegations

City of Sterling Heights Police & Fire Retirement System v. Reckitt Benckiser Group PLC, No. 1:20-cv-10041 (S.D.N.Y.) (July 10, 2023). Judge Castel. Granting final approval of $19.6 million settlement with award for fees and costs.

The plaintiffs brought suit against Reckitt Benckiser Group alleging that its executives made false and misleading statements about the safety of Suboxone Film, a treatment for opioid addiction, in order to increase sales and profits. Specifically, the suit alleged the defendants falsely claimed Suboxone Film was safer and less prone to accidental pediatric exposure compared with its tablet form, despite contrary findings by the Food and Drug Administration. The plaintiffs alleged that the scheme generated over $3 billion in proceeds for Reckitt before the Department of Justice brought criminal charges in 2019. The court approved a $19.6 million settlement with Reckitt to resolve the claims that investors were misled in violation of federal securities laws.

Online Service Outages Cost Brokerage $9.9 Million

In re Robinhood Outage Litigation, No. 3:20-cv-01626 (N.D. Cal.) (July 18, 2023; July 28, 2023). Judge Donato. Approving $9.9 million settlement.

The district court approved a $9.9 million class action settlement resolving claims of negligence, gross negligence, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, violation of California's Unfair Competition Law, and unjust enrichment based on the online brokerage firm's repeated services outages preventing customers from trading. The settlement was negotiated over the course of a year with the assistance of a mediator. The court entertained attorneys' fees in a separate order, and ultimately awarded class counsel a fee of 30% of the settlement amount plus approximately $1.1 million in expenses. The court, however, expressed skepticism at the amount sought in service awards to the various named plaintiffs, declining to award $2,500 per named plaintiff, and instead awarding each named plaintiff $1,500.

World Cup Bribery Class Action Scores $95 Million Settlement

In re Grupo Televisa Securities Litigation, No. 1:18-cv-01979 (S.D.N.Y.) (Aug. 8, 2023). Judge Stanton. Granting $95 million settlement and awarding attorneys' fees.

Judge Louis L. Stanton approved a settlement of $95 million involving a class of individuals and entities who purchased or acquired Televisa American depositary receipts from 2013 to 2017. Judge Stanton found that the settlement was fair, reasonable, and adequate and that the requirements of Rule 23 were satisfied. In addition, Judge Stanton awarded attorneys' fees of 30% of the settlement amount, as well as expenses of over $1.1 million. Only two individuals requested to be excluded from the settlement.

Banks Resolve Ponzi Scheme Claims

Securities and Exchange Commission v. Stanford International Bank LTD, No. 3:09-md-02099 (N.D. Tex.) (Aug. 8, 2023). Judge Godbey. Approving $1.34 billion in settlements.

A Texas district judge approved three settlements resolving claims against three banks that arose out of the alleged Ponzi scheme by Robert Allen Stanford. Under those settlements—which the court found to be the result of "extensive, good-faith, and arm's length negotiations"—HSBC agreed to pay $40 million, Independent Bank agreed to pay $100 million, and TD Bank agreed to pay $1.2 billion. In approving the settlements, the district court noted that the settlement agreements reflected "the best option for maximizing the net amount recoverable" from these defendants.

Shareholder Derivative Action Catalyzes Change

In re Zillow Group Inc. Shareholder Derivative Litigation, No. 2:17-cv-01568 (W.D. Wash.) (Aug. 8, 2023). Judge Coughenour. Approving $15 million settlement.

A shareholder derivative action alleged Zillow's directors breached their fiduciary duties, claiming unjust enrichment, abuse of control, corporate waste, and violations of Section 14(a) of the Securities Exchange Act of 1934. After extensive litigation and mediation, the parties reached a proposed settlement requiring Zillow to adopt corporate governance reforms like creating a Risk Committee charter, appointing a new independent director, and enhancing compliance policies. Ultimately, the court gave final approval of the settlement terms after a fairness hearing, awarded attorneys' fees for

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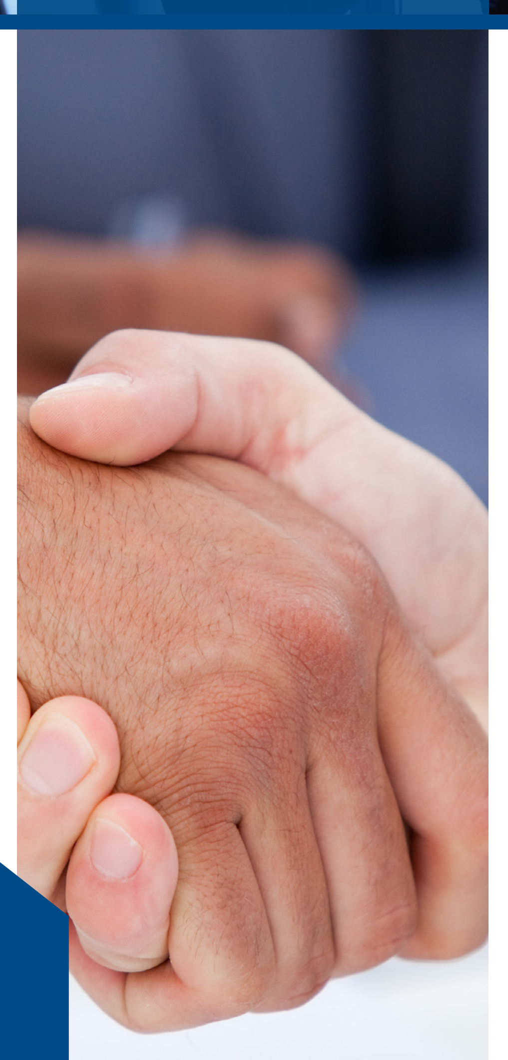

$1.3 million, and reasoned that the corporate governance changes yielded meaningful improvements for Zillow.

Securities Class Action Fire Is Put Out

Howard v. Arconic Inc., No. 2:17-cv-01057 (W.D. Pa.) (Aug. 9, 2023). Judge Hornak. Approving $74 million settlement.

The district court approved a $74 million settlement resolving claims that the defendants violated various securities laws by misrepresenting the safety and compliance of their products. The class members claimed they were damaged when it was revealed that the products were installed in the Grenfell Tower in London, which caught fire and burned in June 2017, killing over 70 people and injuring over 70 more. The district court also awarded class counsel attorneys' fees of 33.5% of the settlement amount (approximately $24.7 million).

Bank Settles Data Breach Litigation

In re Overby-Seawell Company, No. 1:23-md-03056 (N.D. Ga.) (Sept. 11, 2023). Judge Grimberg. Approving $750,000 settlement with award for fees and costs.

The plaintiffs in a consolidated class action alleged that Fulton Bank and Overby-Seawell Company (OSC)—a third-party service provider that provided compliance, insurance, and outsourcing services to Fulton and other financial institutions—failed to adequately secure and safeguard the personally identifiable information of over 111,000 individuals and that unauthorized individuals accessed OSC's systems and acquired customers' personal and financial information between May and July 2022.

After litigation and negotiation, Fulton agreed to a claims-made settlement whereby those impacted by the breach would be compensated in varying amounts for losses like lost time, monitoring services, and unreimbursed losses. The court approved the settlement as fair, reasonable, and adequate and approved $187,500 in attorneys' fees (roughly 25% of the settlement fund).

Oil Spill Class Action Cleaned Up in Settlement

Gutierrez v. Amplify Energy Corp., No. 8:21-cv-01628 (C.D. Cal.) (Sept. 14, 2023) Judge Carter. Approving $45 million settlement.

The district court approved a $45 million settlement resolving claims that the defendants caused an oil spill when two container ships struck and dragged their anchors over a pipeline in the San Pedro Bay during a heavy storm, resulting in damage to commercial fishers and processors, property owners, and businesses. The court considered the significant relief provided to the class, the risks of ongoing litigation, the risk of maintaining class action status through trial and appeal, the extensive discovery, and the class members' positive reaction. The court also recognized that the settlement was negotiated with the involvement of highly qualified mediators, including two former federal judges. The court also granted class counsel an award of $11.25 million.

Manipulation of Swiss Franc LIBOR-Based Derivative Suit Settles

Fund Liquidation Holdings LLC v. Credit Suisse Group AG, No. 1:15-cv-00871 (S.D.N.Y.) (Sept. 27, 2023). Judge Stein. Approving $52 million settlement.

After about eight years of litigation, Judge Sidney H. Stein approved a class action settlement involving a class of individuals and entities who alleged that the defendants had manipulated Swiss franc LIBOR-based derivatives. Judge Stein found that the settlement class met the requirements of Rule 23 and that the settlement was fair, reasonable, and adequate. Notably, not a single class member requested to be excluded from the settlement class.

Fingerprinting Claims Resolved

Haywood, et al. v. Flex-N-Gate LLC, et al., No. 19CH09767 (Cook Cnty. Cir. Ct.) (Sept. 12, 2023). Judge Gamrath. Approving $3.6 million settlement.

An Illinois circuit judge approved a $3.6 million class settlement resolving Illinois Biometric Information Privacy Act claims asserted by current and former employees of manufacturer Flex-N-Gate who claim that the company unlawfully required them to use a fingerprinting timekeeping system without first obtaining their consent. The court awarded class counsel attorneys' fees of one-third of the settlement fund (approximately $1.2 million). The court concluded that this award was appropriate given the "substantial work" of class counsel and the benefit they had obtained for Flex-N-Gate employees. ■

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