ALSTON & BIRD

CLASS ACTION & MDL roundup

WINTER 2019

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overview

CLASS ACTION & MDL roundup

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Where the (Class) Action Is

Welcome back to the *Class Action & MDL Roundup*! This year has begun with cases all over the map, from California to Florida to Massachusetts.

The West Coast features overbearing manufacturers, allegedly underpaid lenders, and anonymous social media users who were all left wanting by the courts. Plaintiffs had better luck with a food labeling claim that left 0g to the imagination, a noble crusade against hidden surcharges, and the idea that measuring stock twice is better than cutting it once.

The Midwest was the venue for privacy issues for Google's face recognition system and for a health system's data breach. Both companies looked to *Spokeo* for their defense. Federal courts in Florida decided cases in antitrust, banking, and securities, including cases involving undisclosed commissions and unauthorized processing fees.

There was no bias among the East Coast courts as they doled out victories to both plaintiffs and defendants. Cases included a question of FDCPA validation notices, a plaintiff whose research contradicted his own claims, and violations of the Securities Act.

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 any feedback you have on this or any other publication from the Class Action & Multidistrict Litigation Team.

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

Uninjured Class Members Doom Indirect Drug Purchaser Class Action

In re Asacol Antitrust Litigation, No. 18-01065 (1st Cir.) (Oct. 15, 2018). Reversing class certification and remanding.

The district court certified a class of indirect purchasers on state antitrust claims against a drug manufacturer alleging that the manufacturer withdrew the drug from the market months before its patent expired and introduced a similar, substitute drug to preclude generic manufacturers from entering the market. The First Circuit reversed, holding that the district court abused its discretion in finding the predominance requirement was met, because approximately 10 percent of the class was uninjured—a deficiency that could not be overcome by the plaintiff's suggested process through which a claims administrator would assist in removing uninjured class members.

Seeing the Predominance Requirement of Class Certification More Clearly

In re: Disposable Contact Lens Antitrust Litigation, No. 3:15-md-02626 (M.D. Fla.) (Dec. 4, 2018). Judge Schlesinger. Granting class certification.

Judge Schlesinger certified numerous classes of retail purchasers in an antitrust case arising out of unilateral pricing policies (UPPs) adopted by contact lens manufacturers. In doing so, he rejected the defendant contact lens manufacturers' predominance arguments, concluding that the defendants' classwide practice of allegedly conspiring to adopt UPPs to artificially constrain prices was a common question of fact that predominated over individualized issues. Judge Schlesinger further found that the defendants had failed to show that discounts, rebates, and insurance payments would have been any different in a "but for" world absent the defendants' conduct.

Court to Capacitor Manufacturers: Methinks Thou Doth Protest Too Much

In re Capacitors Antitrust Litigation (No. III), No. 3:17-md-02801 (N.D. Cal.) (Nov. 14, 2018). Judge Donato. Granting class certification.

In certifying a class of direct purchasers, Judge Donato concluded that the defendants "demand[ed] too much" by arguing that the direct purchaser plaintiffs had to prove at the class-certification stage that each and every putative class member was harmed. "Rule 23 does not require proof of impact on each purchaser before a class can be certified," and to hold otherwise would "almost certainly kill off most antitrust class actions well before an adjudication of the merits of the case." ■

Take the straight course to "[Classwide Damage Models in Misleading and False Advertising Consumer Class Actions](#)," a webinar featuring **Bo Phillips** on May 23.

Bo Phillips

Banking, Financial Services & Insurance

Putative Class Action Runs Aground

Carretta v. Royal Caribbean Cruises Ltd., No. 1:18-cv-23917 (S.D. Fla.) (Nov. 27, 2018). Judge Ungaro. Granting motion to dismiss.

Judge Ungaro dismissed putative class claims alleging that Royal Caribbean violated the Florida Deceptive and Unfair Trade Practices Act by receiving undisclosed commissions for the sale of travel insurance issued by a third party and bundled as part of Royal Caribbean's "Travel Protection Program." Judge Ungaro found that Royal Caribbean's ticket contract barred the suit because it included a class action waiver and also required claims against the cruise line to be brought within six months after the conclusion of a plaintiff's cruise.

Court Authorizes Class in Unauthorized Processing Fees Case

Brink v. Raymond James & Associates Inc., No. 0:15-cv-60334 (S.D. Fla.) (Oct. 22, 2018). Judge Dimitrouleas. Granting class certification.

Jyll Brink filed a class action accusing Raymond James of charging unauthorized "processing fees" on trades executed by customers in its "Passport Investment Account Programs." Brink contended that the processing fee operated as a direct (and highly profitable) commission in violation of the services agreement for the program, which provided that no commission fees would be charged.

Judge Dimitrouleas first excluded from the class any customers whose processing fees were paid by their financial advisors—as proposed in the plaintiff's reply brief—and found the as-modified class was ascertainable using Raymond James's own records. He further held that the need to calculate the amount of each class member's processing fees was not fatal to class certification because the plaintiff proposed a viable methodology for calculating each class member's damages using Raymond James's own Excel spreadsheets of customer transactions.

Not So Fast, Class

Fernandez, et al. v. Bank of America NA, No. 2:17-cv-06104 (C.D. Cal.) (Nov. 27, 2018). Judge Fitzgerald. Denying class certification.

A California federal judge denied class certification to a group of mortgage lenders in consolidated suits who contended that Bank of America's sales-based compensation did not compensate them for overtime. Judge Fitzgerald denied the motion because the mortgage lenders had failed to show that they were "similarly situated" under the Fair Labor Standards Act, and because evaluating the employees' claims—under either the incentive plan or based on their "similar" job responsibilities—was not possible on a case-wide basis. ■

Proud to be home to two of the *Los Angeles Business Journal*'s "2019 Most Influential Minority Attorneys in Los Angeles": **Elizabeth Sperling** and **Sam Park**.

Elizabeth Sperling

Sam Park

Consumer Protection

Tech Company Doesn't Get a Second Bite of the Apple

Forby v. One Technologies LP, et al., No. 17-10883 (5th Cir.) (Nov. 28, 2018). Vacating order granting motion to compel arbitration.

The Fifth Circuit has held that a defendant may not attempt to "check[ ] the district court's temperature" on the merits with a motion to dismiss and then later move for arbitration. That is what One Technologies did after it convinced a federal court in Illinois to transfer the case to Texas to permit arbitration. After transfer, One Tech filed a Rule 12(b)(6) motion to dismiss with prejudice. The motion to dismiss did not invoke the mandatory arbitration contractual provision or mention arbitration in any way. After a partial win, One Tech moved to compel arbitration on the remaining issues. The district court granted the motion to compel, finding that the plaintiff had not suffered prejudice as a result of One Tech's delay. The Fifth Circuit reversed, holding that One Tech substantially invoked the judicial process and that the plaintiff was prejudiced because she would need to re-litigate in the arbitration forum an issue already decided in her favor by the district court.

No Matter How You Slice It, Bread Crumb Claims Were Misleading

Hawkins v. The Kroger Co., No. 16-55532 (9th Cir.) (Oct. 4, 2018). Reversing Rule 12(b)(6) dismissal.

Shavonda Hawkins asserted that Kroger falsely advertised that its Kroger brand bread crumbs contain "0g Trans Fat per serving." The district court granted Kroger's Rule 12(b)(6) motion to dismiss, holding that the labeling claims were preempted by the Nutrition Labeling and Education Act, which establishes uniform food labeling and nutrition facts panel requirements. Relevant here, a Food and Drug Administration (FDA) regulation provides that within the nutrition facts panel, "[i]f the serving contains less than 0.5 gram, the content shall be expressed as zero."

But the Ninth Circuit held that the FDA's "rounding" rules do not give Kroger license to claim 0g Trans Fat elsewhere on the product. The rules regarding "nutrition content claims" prohibit any content that is "false or misleading in any way." Just because information is permitted to be in the nutrition facts panel does not mean the same statements can be located elsewhere on the product. Because the FDA regulations did not authorize Kroger's representations, Hawkins's labeling claims were not preempted.

New Jersey Court Hangs Up on Attempt to Discuss Debt Collection Via Phone

Kassin v. AR Resources Inc., No. 3:16-cv-04171 (D.N.J.) (Dec. 13, 2018). Judge Wolfson. Granting summary judgment and class certification.

A class of New Jersey consumers who alleged violation of the Fair Debt Collection Practices Act (FDCPA) related to AR Resources' use of language in a debt collection letter asking debtors to directly contact AR Resources *by phone* if the debt in question was covered by the debtor's insurance. The plaintiffs argued, and the court agreed, that this language "overshadowed and contradicted" the FDCPA-required "validation notice," which requires debt collectors to notify debtors that they must dispute the debt in question *in writing* within 30 days and then will receive a verification of the debt from the collector. The court reasoned that a debtor could mistakenly attempt to dispute their debt over the phone, rather than in writing, because of these two statements in AR Resources' letter. Accordingly, Section 1692g of the FDCPA was violated as a matter of law. AR Resources did not oppose the plaintiffs' motion for class certification, and the district court found that the plaintiffs had satisfied all class certification factors.

Angela Spivey helps *Food Navigator* map out "Sprouted Grain Claims in the Spotlight as Ezekiel 4:9 Brand Is Targeted in a Lawsuit."

Angela Spivey

Diet Coke Secures Win in Weight-Loss Dispute

Evan Geffner, et al. v. The Coca-Cola Company, No. 1:17-cv-07952 (S.D.N.Y.) (Oct. 31, 2018). Judge Stanton. Granting motion to dismiss.

Evan Geffner accused Coca-Cola of misleading consumers that drinking Diet Coke would assist in weight loss based on his own consumer survey and Diet Coke commercials dating back to the 1980s. Geffner's conclusions, however, were belied by his own survey, which showed that the majority of consumers do not expect diet soft drinks to affect their weight. According to the court, the brand name "Diet Coke" conveys to reasonable consumers that the soft drink contains fewer calories than non-diet soft drinks—not that it will, on its own, lead to weight loss or healthy weight management. The court's conclusions were also supported by the results of various studies that the plaintiff included in his complaint, which failed to show a causal link between the aspartame in Diet Coke and risk of weight gain or health problems.

Restaurant-Goers Can Proceed as Class Against Resort Chain

Holt v. Noble House Hotels & Resort Ltd., No. 3:17-cv-02246 (S.D. Cal.) (Oct. 16, 2018). Judge Anello. Granting class certification.

Kathleen Holt filed a class action challenging Noble House's practice of adding a 3.5% surcharge to all guest checks at its restaurants that is not reflected in prices on its menus. The district court certified a class of customers asserting California Unfair Competition Law (UCL) and Consumers Legal Remedy Act (CLRA) claims, concluding that the class claims do pose a common question: whether Noble House's practice of listing menu prices without including the cost of the surcharge was unfair, deceptive, and/or misleading under California consumer protection laws. The district court also concluded that it did not matter, for typicality purposes, whether class members saw the surcharge disclosure because injury under the UCL and CLRA need only be shown by establishing that a consumer has purchased a product that is marketed with a material misrepresentation that is likely to deceive.

Environmental

PFAS Get Their First MDL

In re Aqueous Film-Forming Foams Products Liability Litigation, MDL No. 2873. Judicial Panel on Multidistrict Litigation. Transferring cases for consolidated pretrial proceedings.

PFAS (per- and polyfluoroalkyl substances) dominate headlines about environmental health and safety these days, in large part because of their ubiquity. PFAS touch almost every aspect of the economy: food, personal hygiene products, household and consumer goods, industrial operations, and drinking water. Although the jury is still out on PFAS's health effects, a tsunami of suits appears on the horizon.

In December, the Judicial Panel on Multidistrict Litigation sent 75 foam cases (including several class actions), from eight district courts, to Judge Gregel in South Carolina—even though no PFAS cases were filed there originally. The order also refused 3M's (a PFAS manufacturer) request to include non-foam cases in the MDL.

ENVIRONMENTAL & LAND USE BRIEFING

Take some time and peruse our newest publication, the *Environmental & Land Use Briefing*. The inaugural issue includes a note on why SCOTUS might take up the ***Martin v. Behr*** case about the scope of class certification in toxic tort cases.

Labor & Employment

ERISA Class Action Must Stay in Federal Court for Now

Jander v. International Business Machines, No. 17-03518 (2nd Cir.) (Dec. 10, 2018). Reversing and remanding district court order dismissing putative class action.

The Second Circuit reversed a district court decision dismissing a proposed class action alleging that IBM breached its fiduciary duty under ERISA. The panel held that the putative class of workers provided adequate support for their claim that IBM breached its fiduciary duty by overly investing savings into company stock despite knowing the value would likely decline due to an overvaluation. The Second Circuit disagreed with the district judge's conclusion that a prudent fiduciary might have concluded that notifying workers of IBM's losses would hurt, not aid, the retirement fund. The panel also acknowledged, but did not rule on, the plaintiffs' argument that subsequent case law had misinterpreted the 2014 Supreme Court *Dudenhoeffer* decision and thus made it "functionally impossible to plead a duty-of-prudence violation." On that issue, the panel merely opined that the plaintiffs' case was strong enough to meet the "more harm than good" standard set forth in *Dudenhoeffer*.

International Company Puts Up Its *Dukes* to Defeat Class Certification

Kassman, et al. v. KPMG LLP, No. 1:11-cv-03743 (S.D.N.Y.) (Nov. 30, 2018). Judge Schofield. Denying motion for class certification.

Three weeks before the U.S. Supreme Court decided *Wal-Mart Stores Inc. v. Dukes*, plaintiffs filed this case on behalf of a nationwide class of more than 10,000 female KPMG employees alleging that KPMG discriminates against women in their pay and promotions. Judge Schofield noted that *Dukes* makes class certification extremely difficult when the alleged discriminatory treatment was the product of local supervisors exercising their discretion in awarding pay and promotions. Ultimately, she held that the proposed class could not be certified under *Dukes*, in large part because KPMG followed *Dukes*'s roadmap by utilizing a decentralized system for determining pay and promotion—a system that precludes class certification under *Dukes* regardless of whether a pay disparity exists at KPMG between men and women.

In a footnote, Judge Schofield questioned the *Dukes* decision, based on her view that studies on implicit bias have contradicted a key assumption underlying the majority opinion: that most managers make unbiased decisions if left to their own devices.

District Court Sides with Insurer for Portion of ERISA Settlement

Axis Reinsurance Co. v. Northrop Grumman Corp., No. 2:17-cv-08660 (C.D. Cal.) (Nov. 21, 2018). Judge Birotte. Granting motion for summary judgment.

A California district judge granted summary judgment in favor of Axis Reinsurance, ruling that it could recoup some portion of a $9.7 million settlement paid to resolve a lawsuit against Northrup Grumman. Judge Birotte held that Axis's excess policy was triggered too soon because Northrop's two lower-level insurers needlessly exhausted their coverage to pay to settle a Department of Labor (DOL) investigation into alleged ERISA violations. Judge Birotte held that this was not warranted because the DOL settlement involved a disgorgement, and California law prohibits companies from purchasing insurance to protect against losses associated with returning wrongfully obtained money. Although the DOL settlement did not use the term "disgorgement," he found that its intent was obviously to disgorge ill-gotten gains. Thus, Judge Birotte determined that Axis should not face a penalty for the other insurers' choice to improperly fund a settlement outside policy coverage.

The exact amount Northrup must repay to Axis was redacted in the order. ■

"You need to be aware of "Key ERISA Litigation Trends to Monitor in 2019" by **Emily Costin** in BenefitsPro."

Emily Costin

"SHRM looked to **Brett Coburn** to explain why companies need to exercise caution with travel time in "DOL: Designated Regular Rate for Overtime May Violate FLSA.""

Brett Coburn

Privacy & Data Security

Feeling Under the Weather? Doctor Zuckerberg Will See You Now

Smith, et al. v. Facebook Inc., et al., No. 17-16206 (9th Cir.) (Dec. 6, 2018). Affirming dismissal.

Three users alleged that Facebook illegally collected and used their browsing data from health-care-related websites. The court of appeals affirmed the trial court's dismissal, finding that the named plaintiffs consented to Facebook's data tracking and collection procedures by accepting its Terms and Policies, which contain numerous disclosures related to information collected from third-party websites. Because the collected data revealed nothing about the individual plaintiffs' health or medical history, it was neither excluded from Facebook's Terms and Polices nor protected under HIPAA.

Google Prevails in Face-Off with Google Photo Users

Rivera v. Google Inc., No. 1:16-cv-02714 (N.D. Ill.) (Dec. 29, 2018). Judge Chang. Granting motion for summary judgment.

Plaintiffs in Illinois federal court argued that Google violated the Illinois Biometric Information Privacy Act when it created biometric scans of faces appearing in photos users uploaded to the platform Google Photos. The scans provided data for use in sorting the photos within the confines of the platform.

The court awarded summary judgment after finding that the users did not suffer a sufficiently concrete injury to confer standing. Google's retention of the biometric facial recognition data posed no concrete injury to users if there was no accompanying disclosure or risk of disclosure to any third party. Simply harboring privacy-driven concerns over Google's retention of the biometric data was insufficient evidence of injury to confer standing. Additionally, Google's collection and retention of users' biometric data without their knowledge and consent—a violation of the statute at issue—similarly did not amount to a sufficiently concrete injury to confer standing because the plaintiffs were unable to cite evidence of any cognizable risk of identity theft, the key concern the Illinois legislature had identified in drafting the law. And Google's collection and retention of the facial recognition data failed to satisfy the elements of any of the common-law privacy torts that Spokeo instructs courts to examine.

Impatient Patient's Data Unexposed

Williams-Diggins v. Mercy Health, No. 3:16-cv-01938 (N.D. Ohio) (Dec. 6, 2018). Judge Helmick. Granting motion to dismiss.

A patient at Mercy Health filed a class action after vulnerabilities in the company's patient web portal exposed protected health information to the risk of potential access by third parties. Mercy Health moved to dismiss under *Spokeo*, arguing that the plaintiff was unable to show a concrete and particularized injury. The most the plaintiff could show was that the alleged vulnerabilities placed his protected health information at risk of being improperly accessed, not that it actually *was* improperly accessed. Because the risk of exposing protected health information remained strictly theoretical, the defendant's data security measures, while ineffective, caused no harm. ■

"*Corporate Counsel* turned to **Kim Peretti** to learn more about why the "FINRA Report on Best Cybersecurity Practices Is Must-Read, Alston & Bird Lawyer Says.""

Kim Peretti

Products Liability

Ninth Circuit Keeps Transmission Defect Case Parked in Federal Court

Schneider v. Ford Motor Co., No. 18-56347 (9th Cir.) (Dec. 12, 2018). Reversing order that remanded the case to state court.

The Ninth Circuit reversed a California district court's order remanding a proposed class action to state court. The appellate court held that Ford proved the amount in controversy exceeded the Class Action Fairness Act's (CAFA) $5 million jurisdictional threshold. The plaintiff alleged that all California consumers who purchased or leased a Ford F-150 truck after December 14, 2012, are entitled to damages or a restitution award because the vehicles had faulty transmission systems. In a declaration attached to its notice of removal, Ford indicated that more than 68,000 new F-150s with the alleged defect were sold in California during the class period, with an average list price of approximately $45,000—totaling more than $3 billion in controversy.

The Ninth Circuit agreed with the district court that Ford overestimated the potential restitution award in its notice of removal by using the list price instead of the actual purchase price and failing to account for depreciation in value before the defect was discovered. Nevertheless, it held that Ford made a "plausible allegation" that the amount in controversy exceeds the threshold for federal jurisdiction, concluding that it was reasonable for Ford to assume the actual purchase price did not differ significantly from the list price and that the trucks did not lose most of their value after only a few years of use. Thus, while Ford overstated the amount in controversy, it still far exceeds the $5 million threshold—especially when considering that the putative class members could receive an award of attorneys' fees. Therefore, the case was properly removed to federal court.

BMW Must Litigate Engine Defect Class Action

Gelis v. Bayerische Motoren Werke Aktiengesellschaft, No. 2:17-cv-07386 (D.N.J.) (Oct. 30, 2018). Judge Walls. Granting in part and denying in part motion to dismiss.

Plaintiffs from 14 different states sought a nationwide class with state-specific subclasses against BMW alleging that BMW knowingly sold vehicles with defective chain assemblies that caused premature engine failures. The decision provides an excellent example of the kind of state-specific choice-of-law and substantive-law analysis in which a district court should engage on a motion to dismiss a multistate consumer fraud case. The judge dismissed some state-specific claims, but allowed most claims to advance, finding that there was enough detail in the plaintiffs' allegations that a four-year/50,000 mile warranty may be unconscionable if BMW set the terms "with specific knowledge that class engines would fail after the warranty period but before the vehicle's expected useful life" in order to avoid paying repair costs.

Glass Found in Prescription Drugs Leads to Sharp Ruling

Fenwick v. Ranbaxy Pharmaceuticals Inc., No. 3:12-cv-07354 (D.N.J.) (Nov. 13, 2018). Judge Sheridan. Denying motion for class certification.

A New Jersey federal judge denied class certification in a lawsuit filed by consumers seeking a refund of the money they paid for a prescription cholesterol drug that may have contained glass. The manufacturer identified 41 lots of potentially contaminated pills and issued a recall, but its retailers did not keep a record of the lot numbers that were sold to customers. Therefore, Judge Sheridan held that the putative class members were not ascertainable because there is no way to determine who received pills from the recalled lots without extensive and individualized fact-finding or mini-trials. Although the plaintiffs proposed a method of ascertaining a class, they did not provide any evidentiary support that the method would be successful, and even their expert agreed that there is "likely no feasible way to accurately identify" potential class members. The court also found that common legal issues do not predominate because the laws of each individual class member's home state would apply for the breach of express and implied warranty claims. ■

class-ified

information

Head to the Motor City to see **Todd Benoff** discuss "Legal Issues and Risks for Highly Autonomous and Connected Vehicles" at the 2019 WCX World Congress Experience, April 9–11.

Todd Benoff

Securities

Court Puts Futures Investors' Class Action on Hold

Krukever v. TD Ameritrade, Futures & Forex LLC, No. 1:18-cv-21399 (S.D. Fla.) (Dec. 17, 2018). Judge Goodman. Denying class certification.

A group of 231 investors with put-option futures accounts at T.D. Ameritrade sought certification on claims alleging that the brokerage firm fraudulently and unreasonably liquidated their accounts in the afterhours market during a 17-hour period beginning on February 5, 2018. The plaintiffs contended that T.D. Ameritrade was not authorized to expose the investors to greater risk by liquidating their accounts in the "illiquid and dysfunctional" afterhours market, even though their agreement with the brokerage firm permitted it to liquidate "under-margined" or "unsecured" accounts without prior notice. In denying the motion for class certification, the court held that individual issues predominated over common ones, largely because it concluded that the damages calculations would be too complex, fact-specific, and difficult for class action treatment to be practicable.

Investors Granted Certification Despite Spoliation Claims

In re Deutsche Bank AG Securities Litigation, No. 1:09-cv-01714 (S.D.N.Y.) (Oct. 2, 2018). Judge Batts. Granting motion for class certification.

Judge Batts certified a class of investors on claims against Deutsche Bank AG and other related entities and individuals alleging violations of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933. The court rejected the defendants' primary arguments, which centered on their contentions that the proposed class representatives had allegedly profited from the transactions at issue and that they had willfully destroyed evidence. Judge Batts concluded that the class representatives had met the "minimal loss" requirement, and he did not credit the defendants' contention that the class representatives had made a profit. Moreover, the court held that any individualized damages issues did not destroy the typicality, adequacy of representation, or predominance requirements under Rule 23 because the damages for the class as a whole could be mechanically determined on an individualized basis by statutory formula. Finally, Judge Batts found that the alleged spoliation did not threaten to become the focus of the litigation or predominate over the issues subject to generalized proof.

Common Ground Gives Investors Class Certification

City of Miami General Employees' & Sanitation Employees' Retirement Trust v. RH Inc., No. 4:17-cv-00554 (N.D. Cal.) (Oct. 11, 2018). Judge Gonzalez Rogers. Granting motion for class certification.

The Northern District of California certified a class of investors who purchased defendant Restoration Hardware's stock and claimed that Restoration Hardware and the other named defendants made misleading statements in violation of Section 10(b) of the Securities and Exchange Act of 1934, causing the company's stock prices to fall. In granting certification, the court found that the plaintiffs had established a common methodology for measuring the damages applicable to the entire class: (1) the plaintiffs' proposed method of measuring damages would limit damages to those attributable to their fraud-on-the-market theory of liability; (2) the plaintiffs' proposed methodology was sufficiently specific to their claims under Section 10(b); and (3) despite the defendants' argument that the plaintiffs failed to provide a measure of inflation, the plaintiffs were not required to prove damages with "exact proof" at the certification stage. The court also held that the named plaintiff was an adequate class member, even though it was approached by class counsel at a time when it was already overseeing 11 securities class actions.

Gidon Caine, **Chuck Cox**, and **David Gouzoules** explain why, one way or another, the Supreme Court's ruling on "*Emulex* Will Likely Dictate Venue for Merger Shareholder Suits" in *Law360*.

Gidon Caine

Chuck Cox

David Gouzoules

Settlements

Class Counsel Paid for Climbing Hurdles

Muransky, et al. v. Godiva Chocolatier Inc., No. 16-16486 (11th Cir.) (Oct. 3, 2018). Approving settlement.

The Eleventh Circuit affirmed a $6.3 million settlement resolving claims that Godiva violated the Fair and Accurate Credit Transactions Act by printing too many payment card digits on receipts. Two objectors appealed the settlement on the grounds that class counsel had exerted "remarkably minimal effort" and were not deserving of a $2.1 million attorneys' fee award. Citing the "significant legal hurdles" that class counsel faced, the Eleventh Circuit held that the district court did not abuse its discretion in approving this above-benchmark award.

Relief for Pregnant Moms

U.S. Equal Employment Opportunity Commission v. Family HealthCare Network, et al., No. 1:18-cv-00893 (E.D. Cal.) (Dec. 5, 2018). Judge Drozd. Approving consent decree.

A California district court recently approved a $1.75 million consent decree resolving claims that Family HealthCare Network violated the Pregnancy Discrimination Act and the Americans with Disabilities Act by, among other things, firing pregnant employees. The consent decree—which was submitted less than 40 days after the suit was filed—also included provisions requiring Family HealthCare Network to modify its antidiscrimination policies and implement a detailed system for accommodating pregnant employees. The court ultimately found that the monetary and injunctive relief within the consent decree was fundamentally fair and would provide substantial relief to a potential class of more than 250 claimants.

Final Settlement Closes Class Action Claiming Covert Credit Checks

Feist, et al. v. Petco Animal Supplies Inc., No. 3:16-cv-01369 (S.D. Cal.) (Nov. 16, 2018). Judge Huff. Approving settlement.

Judge Huff granted final approval of a $1.2 million settlement in this class action alleging that Petco violated the Fair Credit Reporting Act by conducting credit checks on job applicants without notifying them. The settlement allocates $10,000 in incentive awards to lead plaintiffs and $300,000 in attorneys' fees, leaving approximately $20 for each class member whose credit check was pulled without notice and $150 for each class member who was subject to adverse action as a result of the credit check. Any unclaimed funds will be donated to the National Consumer Law Center. Judge Huff found that "the strength of the parties' positions as well as the risk of further litigation weigh in favor of approving the settlement," and there were no objections to the settlement.

Energy Employer Extinguishes Overtime Class Claims in $2.9 Million Settlement

Williford, et al. v. Rice Energy Inc., No. 2:17-cv-00945 (W.D. Pa.) (Dec. 19, 2018). Judge Cercone. Approving settlement.

Judge Cercone granted final approval of a $2.9 million settlement to resolve claims that Rice Energy, an oil and natural gas company, failed to pay overtime wages in compliance with the Fair Labor Standards Act and state labor laws. The plaintiff and other workers in the class alleged that they often worked more than 40 hours per week between 2014 and 2018, but that Rice Energy improperly classified them as independent contractors and paid them a daily rate with no overtime compensation. Drawing no objections and only one exclusion, the approved settlement allocates one-third of the settlement fund to attorneys' fees, $15,000 to the lead plaintiff, and up to $40,000 in costs and administration, leaving nearly $1.9 million for workers in the class. The court concluded that the attorneys' fees were consistent with others in the Third Circuit and that the settlement's terms were fair, reasonable, and adequate for the class.

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information

The American Bar Association and **Clay Massey** will help you keep your pencils sharp when you're "Taking Effective Expert Depositions in Toxic Tort Cases."

Clay Massey

Attorneys Get $503 Million in GMO Corn Settlement

In re Syngenta AG Mir 162 Corn Litigation, No. 2:14-md-02591 (D. Kan.) (Dec. 7, 2018). Judge Lungstrum. Approving settlement.

Judge Lungstrum approved a $1.5 billion deal resolving claims filed on behalf of 650,000 corn producers regarding Syngenta's genetically modified corn seed. The plaintiffs alleged that Syngenta's commercialization of its products caused genetically modified corn to become commingled with the corn supply in the U.S.—an act that caused China to reject all corn imports from the U.S., which harmed corn famers by reducing corn prices. In approving the settlement, Judge Lungstrum noted that the case was "hotly contested" and "not a situation in which the parties proceeded quickly to settlement."

Big Banks' LIBOR Settlements Make Judge Smile

In re LIBOR-Based Financial Instruments Antitrust Litigation, No. 1:11-md-02262 (S.D.N.Y.) (Oct. 24, 2018). Judge Buchwald. Approving settlement.

Judge Buchwald granted final approval to two settlements totaling $340 million in the long-running LIBOR MDL. The suit stemmed from claims against Deutsche Bank AG and HSBC Inc. brought by a class of over-the-counter investors who were subject to LIBOR outside of a stock exchange. The settlements come after the Second Circuit's reversal of Judge Buchwald's earlier decision finding that the banks did not inflict antitrust injury on the plaintiffs because the banks' actions setting the LIBOR rates were not intended to injure competition. Following a few clarifying questions at the final approval hearing, Judge Buchwald humorously acknowledged the length and complexity of the LIBOR MDL by telling the attorneys involved, with a smile, that "You keep me from getting Alzheimer's, you keep me alive, you keep me working. No other judge has had such a positive view of MDL, I suspect."

Mushroom Company Cleared from Price-Fixing MDL Despite MFN

In re Mushroom Direct Purchaser Antitrust Litigation, No. 2:06-cv-00620 (E.D. Pa.) (Dec. 17, 2018). Judge Schiller. Approving settlement.

Judge Schiller approved an $11.5 million settlement against a mushroom company despite objections from some of the defendants regarding the existence of a most-favored nation (MFN) provision in the settlement agreement. The provision apparently would allow a company to adjust their settlement payment downward if another defendant reached a future settlement covering a smaller percentage. Judge Schiller noted that although "[t]he terms of the Giorgi Agreement may work a hardship upon the [objecting] defendants' ability to negotiate their own settlements with the class … this strategic disadvantage does not give the [objecting] Defendants standing to challenge the Giorgi settlement." The litigation began after the Department of Justice (DOJ) reached a settlement in 2005 with a group of mushroom growers and sellers in which the group agreed to nullify restrictions they had placed on farms that led to reductions in production.

HIV Disclosure Settlement Yields Significant Individual Relief

Beckett v. Aetna Inc., No. 2:17-cv-03864 (E.D. Pa.) (Oct. 16, 2018). Judge Sanchez. Approving settlement.

Judge Sanchez granted final approval to a $17.1 million nonreversionary class settlement in a case brought against insurer Aetna by patients taking HIV medications. The patients alleged that Aetna failed to protect their privacy rights by improperly transmitting their names to Aetna's legal counsel and claims administrator in a prior lawsuit and also by mailing notices from that lawsuit in envelopes with large transparent windows revealing the patients' personally identifiable information and instructions related to their HIV medication. Notably, in addition to automatic base payments of either $75 or $500, the settlement allows plaintiffs to submit claims for additional monetary relief of up to $20,000 for documented financial or nonfinancial harm.

Dial in to **Derin Dickerson** and the ABA's webinar TCPA Compliance on April 30.

Derin Dickerson

Automotive Parts Manufacturers Agree to Pay—and Cooperate

In re Automotive Parts Antitrust Litigation, No. 2:12-md-02311 (E.D. Mich.) (Nov. 8, 2018). Judge Battani. Approving settlement.

Judge Battani approved a sweeping class settlement of over $432 million, resolving lawsuits against 33 automotive parts manufacturers. The suits arose from alleged conspiracies among the automotive industry's largest manufacturers and sellers of automotive component parts to fix prices, rig bids, and allocate markets and customers. In addition to monetary relief, the settling defendants agreed to provide cooperation to the end-payor plaintiffs. Specifically, the defendants agreed to produce documents and data relevant to ongoing claims against non-settling defendants; make witnesses available for interviews, depositions, and trial; provide assistance in understanding certain data; and facilitate the use of data at trial.

Big Payday for Class Counsel, Class Representative in Annuities Suit

Griffiths v. Aviva London Assignment Corp., No. 1:15-cv-13022 (D. Mass.) (Oct. 23, 2018). Judge Gorton. Approving settlement.

Judge Gorton granted final approval in a case involving guaranteed annuities. The plaintiff annuity purchasers alleged that they bought guaranteed annuities, which were sold with a written promise that Aviva's parent corporation would ensure that all payments were timely made. However, after the guaranteed annuities were sold to the plaintiff purchasers, Aviva sold the annuities to a new entity, who claimed that the guaranty was no longer in force. Under the terms of the settlement, the defendants agreed to reinstate the guaranty backing the annuities—valued at $27 million to $41 million—as well as to make additional payments up to $3 million. Judge Gorton also approved attorneys' fees of more than $4 million, despite indicating that they were at the "high end" of the reasonable range, and a service award of $25,000 to the class representative. The large service award recognized the representative's role in investigating and uncovering the facts that gave rise to the case.

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