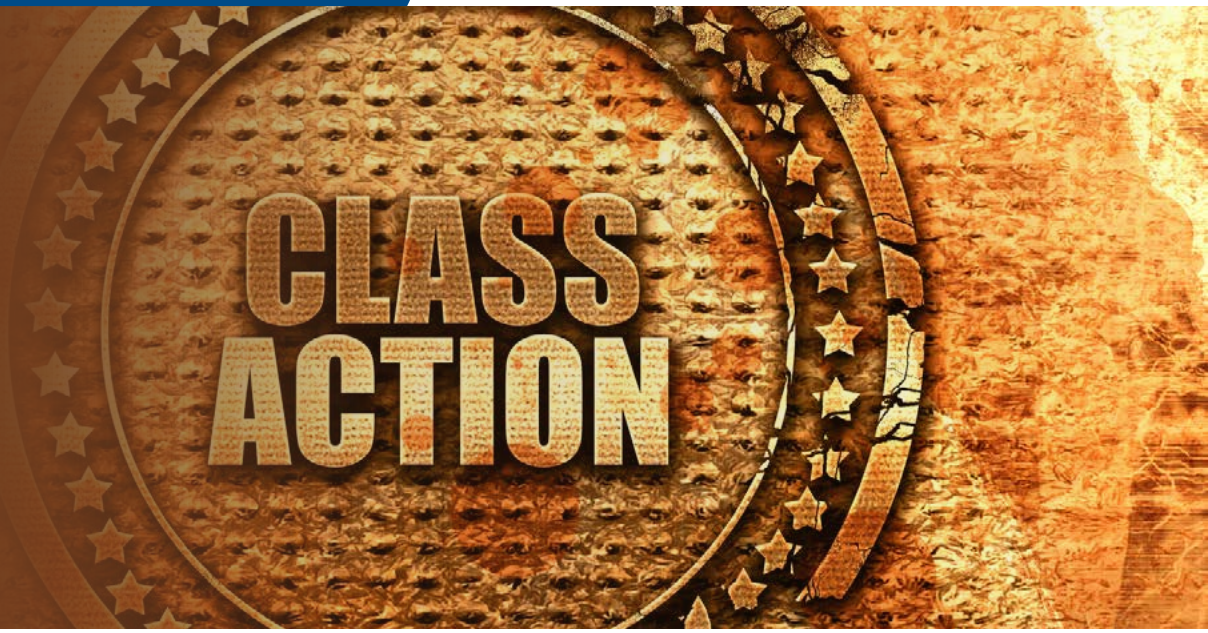
ALSTON & BIRD

- WHERE THE (CLASS) ACTION IS
- ANTITRUST/RICO
- BANKING, FINANCIAL SERVICES & INSURANCE
- CONSUMER PROTECTION
- ENVIRONMENTAL
- LABOR & EMPLOYMENT
- PRIVACY & DATA SECURITY
- PRODUCTS LIABILITY
- SECURITIES
- SETTLEMENTS



Class Action Roundup

Summer 2017

Where the (Class) Action Is

Welcome to our second *Roundup* of 2017, where we feature the cases litigated and settlements finalized during the second calendar quarter of the year. It was a very active quarter in almost all of the categories we monitor, with significant increased activity particularly in financial services and insurance, environmental, and securities. Topics addressed in these areas include policy limits, TCPA, standing under *Spokeo*, and exclusion clauses. *Spokeo* comes into play in the environmental category as well, along with claims concerning contaminated land from manufacturing facilities.

We continue to witness a wide variety of claims under consumer protection laws, covering products as varied as baby food, applesauce, and satellite television, and even lost luggage and discount retail stores. Labor and employment cases this quarter feature disputes over unpaid "work" time as well as hiring practices such as criminal background checks. Privacy and security cases see a number of issues still being litigated in the aftermath of data breaches and security lapses.

We wrap up the *Roundup* with a summary of class action settlements finalized this quarter. Be on the lookout for a number of settlements to be featured next quarter as several are in preliminary stages this summer. We welcome your feedback on this issue or other publications from the firm.

As you plan for your professional development through the end of this year and into 2018, we invite you to take advantage of the many CLEs offered by our Class Action Team. These courses are provided at no charge to you and can be delivered at your office or in one of our offices around the country. Click here for a description of some of the CLEs we have prepared, and note that we will tailor our CLE offerings for your legal department and focus specifically on your industry or particular issues of interest. Feel free to reach out to Cari Dawson, chair of the Class Action Team, or your Alston & Bird attorney for additional information.

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Antitrust/RICO

- **Plaintiffs Get Egg on Their Face**

  In re Processed Egg Products Antitrust Litigation, No. 08-md-02002 (E.D. Pa.) (June 27, 2017). Judge Pratter. Denying certification of Rule 23(b)(2) class.

  A Pennsylvania federal judge denied a motion to certify a class seeking injunctive relief, under Rule 23(b)(2), against defendant egg producers. The proposed class of individual-purchaser plaintiffs claimed that the egg producers took a variety of steps to limit their hens' egg production and drive up the price of eggs. After failing to obtain certification of a class seeking monetary damages, the plaintiffs sought to certify a nationwide Rule 23(b)(2) class to enjoin the defendants' allegedly anticompetitive activity. Judge Pratter declined to certify the class because of difficulties in proving future harm through common proof, particularly in light of recent regulations in certain states mandating egg producers to act consistent with the very conduct the plaintiffs alleged was anticompetitive in the lawsuit. ■

CLASS-IFIED INFORMATION

Chapters by the well-versed: Alston & Bird class action lawyers pen four chapters of *A Practitioner's Guide to Class Actions, Second Edition*.

Banking, Financial Services & Insurance

- **Fax Fails to Revoke Consent Under TCPA**

  Martinez v. TD Bank USA N.A., No. 15-cv-07712 (D.N.J.) (June 30, 2017). Judge Simandle. Denying certification.

  A New Jersey district court held that a class representative who consented to receive calls could not represent a proposed class of consumers bringing claims against Target and TD Bank under the Telephone Consumer Protection Act (TCPA). The class representative argued that although she consented to the calls when she signed up for a Target credit card, she subsequently revoked her consent by sending faxes to TD Bank, which had purchased Target's consumer credit card portfolio. The court found that faxing a letter to the number associated with a party connected to the credit card account at issue was insufficient to revoke consent. Consequently, the class representative could not bring a TCPA claim and could not represent the proposed class.

- **Making Progress? Class Certified to Challenge Progressive's Policy Limits Rule**

  AA Suncoast Chiropractic Clinic PA, et al. v. Progressive American Insurance Co., et al., No. 15-cv-02543 (M.D. Fla.) (May 16, 2017). Judge Lazzara. Granting motion for class certification.

  The Middle District of Florida granted class certification to a group of health care providers and claimants in a lawsuit against Progressive Insurance. Judge Lazzara wrote that certification was warranted because the case centers around one issue—whether a 2013 revision to Florida's personal injury protection (PIP) law permits Progressive to significantly lower its policy limits by obtaining a nontreating physician's opinion (rendered after the medical event) that the individual did not experience an "emergency medical condition." The court found that this inquiry does not require "a highly individualized assessment" by the claimant because the pertinent information (i.e., whether an after-the-fact opinion was rendered and the claimant's benefits were dropped from $10,000 to $2,500) is easily obtainable from the claimant's files. Making a List, (and Should Be)

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CLASS-IFIED INFORMATION

Elizabeth Sperling

Alex Pacheco

Elizabeth Sperling and Alex Pacheco hit the bullseye with their article "Another Arrow in the Quiver: Defending Against Homeowners' Challenges to Residential Foreclosures" in *Consumer Financial Services Law Report*.

Checking It Twice

Ramirez v. Trans Union LLC, No. 12-cv-00632 (N.D. Cal.) (June 20, 2017). Jury verdict in favor of the plaintiffs.

A San Francisco jury awarded a record-breaking $60 million to a class of consumers claiming that Trans Union falsely flagged their credit reports with Office of Foreign Assets Control (OFAC) alerts, failed to tell them this information was in their consumer reports, and did not follow procedures that would have prevented it from happening—even after the company was previously found liable for similar conduct. The verdict—the highest-ever award under the Fair Credit Reporting Act (FCRA)—amounted to $7,337 per person, including statutory and punitive damages, for the 8,185-member class.

Insurance Policies' Exclusion Clauses of No Avail

Netherlands Insurance Co. v. Butler Area School District, No. 17-cv-00341 (W.D. Pa.) (June 9, 2017). Judge Schwab. Granting a motion for judgment on the pleadings.

A Pennsylvania district court held that Netherlands Insurance Company had a duty to defend in a toxic tort class action against a school district for conduct that allegedly caused dangerous levels of lead and copper to enter an elementary school's drinking water. The company argued that the insurance policies did not cover the conduct because they contained pollution and lead exclusion clauses. The court disagreed. According to the court, the pollution exclusion was ambiguous and the lead exclusion did not apply broadly enough to preclude coverage of injury claims due to copper. As a result, the court found that the insurer was obligated to defend.

Court Appreciates That a Policy of Depreciation Is Appropriate for Class Treatment

Johnson v. Hartford Casualty Insurance Co., No. 15-cv-04138 (N.D. Cal.) (May 22, 2017). Judge Orrick. Denying summary judgment and granting class certification.

Judge Orrick certified a class of Hartford policyholders who accused the insurer of underpaying them by unlawfully depreciating the value of certain "permanent" items on their property and failing to calculate sufficient sales tax in violation of California Insurance Code Section 2051. Hartford argued that the plaintiff could not demonstrate predominance because damages presented individual questions that would require the court to consider how much money each policyholder spent on repairs. The court disagreed and found that certification was proper because the question of whether Hartford's practices violated Section 2051 was common to the class. The court also held, contrary to Hartford's contentions, that the amount of money each policyholder spent on repairs was irrelevant to damages. Rather, the proper measure of damages was the difference between what Hartford paid out and what it should have paid out if not for its purportedly unlawful practice of depreciation. ■

Consumer Protection

- **California Plaintiff Gets Another Bite at Her Baby Food Case**

  Bruton v. Gerber Products Company, No. 15-15174 (9th Cir.) (April 19, 2017). Reversing and remanding trial court class certification denial and summary judgment for defendant.

  Natalia Bruton claimed that Gerber violated U.S. Food and Drug Administration rules and state consumer protections through improper claims about the nutrient and sugar content of its baby food. The district court dismissed the state law claims, denied class certification, and granted Gerber summary judgment based on its determination that there was insufficient evidence that the nutrient content and sugar-related claims on the challenged Gerber products were likely to mislead reasonable consumers.

  The Ninth Circuit, however, reinstated Bruton's claims. The court of appeals found that dismissal of her unjust enrichment/quasi-contract claims was improper in light of new California law possibly recognizing each as an appropriate cause of action. The court also rejected the district court's denial of class certification on ascertainability grounds, affirming new Ninth Circuit law that there is no separate "administrative feasibility" requirement for class certification. And the Ninth Circuit found that the district court erred in granting Gerber summary judgment on Bruton's claims that the labels were deceptive. By claiming that its product "Supports Healthy Growth & Development," Gerber arguably violated the state's "attractive label" ban, potentially confusing customers about the relative benefits of Gerber's products compared to those of its competitors.

CLASS-IFIED INFORMATION

The needs of the many outweigh the needs of the few. Or the one. Or do they? Todd Benoff ponders "Why We Must Teach Self-Driving Cars How to Crash" in *Law360*.

Todd Benoff

- **Ninth Circuit Lowers Evidentiary Bar for California Consumer Claims**

  Murphy v. Best Buy Stores L.P., No. 15-55047 (9th Cir.) (May 5, 2017). Reversing and remanding the district court's grant of summary judgment.

  Best Buy customers claim that the big box store misrepresented key facts about DirecTV receivers, and that confusion apparently carried over into their depositions. At least one plaintiff provided testimony that both supported and discredited her claim that she would not have paid for a television receiver but for the alleged misrepresentations of Best Buy. At one point, she stated that she would not have paid money for a DirecTV receiver had Best Buy not misrepresented the true nature of the transaction. Later on, she gave testimony that she may still have leased the device from another supplier and never argued that she paid a premium for the receiver as a result of any misrepresentations.

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But the Ninth Circuit still allowed her unfair competition law (UCL) and California Consumers Legal Remedies Act (CLRA) claims to proceed. Her contradictory testimony notwithstanding, the plaintiff's claim that she would not have paid for the receiver but for the alleged misrepresentations of Best Buy was, alone, sufficient to create a triable issue of material fact under the California consumer protection statutes.

Lost Luggage Leaves Airline in Lurch

Hickcox-Huffman v. US Airways Inc., No. 11-16305 (9th Cir.) (May 3, 2017). Reversing and remanding dismissal of case.

Haley Hickcox-Huffman took a US Airways flight from Colorado Springs to San Luis Obispo, California. While Hickcox-Huffman arrived on time, her baggage did not show up until a day later. After the airline refused to refund the $15 she paid to check her bag, she sued US Airways for breach of contract. The district court judge dismissed the suit, ruling that the federal Airline Deregulation Act preempted her claims.

The Ninth Circuit reversed the lower court's ruling, holding that Hickcox-Huffman had sufficiently pled a breach by US Airways. Unlike state impositions, private contract claims are based on voluntarily assumed obligations. Because US Airways voluntarily entered into the contract containing the provision at issue, the state law breach of contract claim was not preempted.

"Compared To" Prices with No Comparisons a Problem for Retailer

Rubenstein v. The Neiman Marcus Group LLC, No. 15-55890 (9th Cir.) (April 8, 2017). Reversing dismissal of consumer protection claims.

The Ninth Circuit reversed the dismissal of Linda Rubenstein's California state law claims that Neiman Marcus labeled its merchandise with deceptive "Compared To" prices. The circuit court held that the deceptiveness of a business practice is usually a question of fact and that Rubenstein sufficiently alleged deception by stating that neither Neiman Marcus nor other merchants in the vicinity sold comparable products at the "Compared To" prices at the time of her purchase. The Ninth Circuit also found that Rubenstein had satisfied Rule 9(b)'s particularity requirements because she could not be expected to have "detailed personal knowledge" of Neiman Marcus's internal pricing policies.

"Life's Good" for LG in Arbitration World

Chamberlain v. LG Electronics U.S.A. Inc., No. 17-cv-02046 (C.D. Cal.) (June 29, 2017). Judge Fitzgerald. Granting motion to compel arbitration.

The district court granted LG's motion to compel arbitration of three claims that its phones contained a defect that caused them to reboot on an infinite loop. Three plaintiffs' phones came in a box that contained LG's Limited Warranty Statement, which included a binding arbitration notice. The complainants contended that they were handed their phones directly during their in-store purchase and did not see the documentation containing the arbitration clause, which remained in the phone's box. They then argued that the outside of the phone's box made no reference to the arbitration clause.

The trial court rejected each of these arguments. According to the court, purchasers of a product with an arbitration clause found in the product box are put on notice by opening the boxes. Here, they had the opportunity to review the materials and take action within 30 days by returning their phone or opting out of the arbitration clause, but chose not to do so.

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- **Citi Can't Bank on Arbitration Provision That Precludes Injunctive Relief**

  McGill v. Citibank N.A., No. S224086 (Cal.) (Apr. 6, 2017). Reversing judgment compelling arbitration.

  Sharon McGill opened a credit card account with Citibank and purchased a "credit protector" plan. Under the plan, Citibank agreed to defer or to credit certain amounts on McGill's credit card account when a qualifying event occurred, such as long-term disability, unemployment, divorce, military service, or hospitalization. McGill filed this class action based on Citibank's marketing of the plan and the handling of a claim she made under it when she lost her job in 2008. The trial court denied Citibank's motion to compel arbitration, and the court of appeal reversed.

  The California Supreme Court then reversed the court of appeal, holding that arbitration provisions that purport to waive a consumer's right to seek "public injunctive relief" are unenforceable under California law. The claims at issue in the McGill case were, specifically, claims for injunctive relief under the California CLRA, UCL, and FAL; injunctive relief under those statutes "has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public."

  "Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief." Citibank's arbitration agreement provides that the "arbitrator will not award relief for or against anyone who is not a party." Because the injunctive relief available under the UCL, CLRA, and FAL "is a substantive statutory remedy," Citibank could not effectuate its release through its arbitration provision. Had Citibank simply required that the plaintiff arbitrate her public injunctive relief claim, the result likely would have been different. ■

Environmental

- **Can't Paper Over Local Exceptions to Evade State Court**

  Adams v. International Paper Co., No. 17-cv-00105 (S.D. Ala.) (May 5, 2017). Judge Steele. Remanding case to state court.

  Hundreds of landowners accused International Paper of contaminating land around its Mobile, Alabama, manufacturing plant with dioxins and other pollutants. Challenging International Paper's removal to federal court, the landowners convinced Judge Steele that their claims were distinctively "local," and remand to state court was proper under two Class Action Fairness Act (CAFA) exceptions. First, the environmental contamination constituted a single course of conduct, placing it squarely within the "local event or occurrence" exception. Second, more than two-thirds of landowners were plainly Alabama residents and International Paper's and its co-defendant's relevant operations were exclusively in Alabama, making the case subject to federal law's "local controversy" exception. CAFA's exceptions continue to be a hurdle to successful removal of mass environmental actions.

- **Residents' Property Claims as Common as Corn**

  Freeman v. Grain Processing Corp., No. 15-1942 (Iowa) (May 12, 2017). Affirming class certification.

  Grain Processing Corp.'s milling plant converts corn kernels to commercial and industrial use and—according to nearly 4,000 residents—also blows hazardous chemicals onto nearby properties. Grain Processing contested class certification, arguing that the residents' claims were inherently individualized. Disagreeing, the Iowa Supreme Court affirmed the commonality of the residents' property claims, noting that the absence of personal injury claims eliminates many potential individual issues. Grain Processing's conduct, knowledge, and emissions levels are, according to the court, common questions of liability.

  The court did acknowledge that if individual issues become unmanageable, the district court can always bifurcate trial, create subclasses, or even decertify the class. The decision serves as a reminder of courts' willingness to treat property-only environmental claims as largely "common."

- **Arcane Statutory Violations Not Enough**

  South Carolina Clean Air Initiative LLC v. Harbor Freight Tools, No. 16-cv-01631 (D.S.C.) (May 16, 2017). Judge Cain. Dismissing action based on mere "statutory violations."

  Judge Cain threw out an advocacy group's proposed class action based on alleged violations of the Clean Air Act. Brought as a citizen suit, the group alleged a discount hardware retailer sold engines without the

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CLASS-IFIED INFORMATION

If you build, you should come to our CLE event "Nuts & Bolts of Litigation in the Manufacturing Industry: Practical Advice for Managing Legal Disputes.

required emissions warranty language. But, the court—seizing on the U.S. Supreme Court's 2016 decision *Spokeo*—held that the group had merely alleged statutory violations, not a concrete injury, and therefore lacked standing. *Harbor Freight* extends consumer protection jurisprudence to environmental law; it also highlights standing as a potent defense for actions based solely on arcane reporting and labeling requirements in environmental statutes. ■

Labor & Employment

- **Sour Decision for Citrus Grower on Joint Employer Liability for Subcontracted Workers**

  Garcia-Celestino, et al. v. Consolidated Citrus LP, No. 10-cv-00542 (M.D. Fla.) (May 11, 2017). Judge Aspen. Holding defendant jointly liable.

  A Florida federal court ruled that a citrus fruit grower was a joint employer of a class of more than 150 guest harvesting laborers provided by a subcontractor. The guest laborers were recruited by the subcontractor under the H-2A visa program and paid piece-rate wages. H-2A regulations required that the "employer" pay workers the higher of the adverse effect wage rate (AEWR) or the federal hourly wage rate. When the subcontractor failed to do so, the guest laborers brought a class action alleging breach of contract claims under the H-2A program against the subcontractor and the citrus company.

  Although the subcontractor controlled certain aspects of the laborers' payment, and provided the laborers with housing, transportation, and tools, the court found that the citrus grower extensively supervised the laborers' work conditions and the manner in which they accomplished their work. Factors demonstrating the citrus company's control included dictating working hours, providing timekeeping equipment, directing which grove areas were harvested, managing rigorous citrus-protection procedures, and auditing the subcontractor's payroll procedures. As a result, the court held that the citrus grower was a joint employer of the subcontractor's laborers under common law principles of agency for the breach of contract claims.

CLASS-IFIED INFORMATION

A different perspective from Frank Sheeder's "Compliance Professionals Are Like Helicopter Pilots" in *Becker's Hospital Review*.

Frank Sheeder

- **Transit Authority's Criminal Screening Policy May Go Off the Rails**

  Little, et al. v. Washington Metropolitan Area Transit Authority, et al., No. 14-cv-01289 (D.D.C.) (Apr. 18, 2017). Judge Collyer. Granting in part motion for class certification.

  A Washington, D.C. district court certified three classes of approximately 1,000 African Americans who claim they were wrongfully disqualified or removed from employment with the WMATA. The named plaintiffs allege that the WMATA's implementation of a criminal screening policy disparately impacted them by improperly disqualifying them from employment based on criminal history that was not related or relevant to their job. The court refused to certify a proposed class that would have included all African American individuals who were terminated, suspended, or denied employment since the policy was implemented. Instead, the court certified three separate classes, respectively defined to include persons who were disqualified, suspended, or terminated based on a specific appendix in the challenged policy.

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Former Lehman Brothers Employees Take Another Financial Hit

In re Lehman Brothers Holdings Inc., No. 16-1296 (2nd Cir.) (May 4, 2017). Affirming subordination of claims.

The restricted stock units (RSUs) of approximately 100 former Lehman Brothers Holdings Inc. employees were found to be "securities," not salary, such that the workers had no preferred claim to the $200 million they claimed they are owed by their bankrupt former employer.

The Second Circuit upheld a bankruptcy court finding that the former employees' RSUs met the legal definition of "securities," meaning that the employees' claims to the RSUs must be subordinated to the claims of general creditors pursuant to the Bankruptcy Code. In 2008, Lehman Brothers filed for Chapter 11 bankruptcy. At the time, thousands of its employees held RSUs—compensatory awards that gave employees a contingent right to own Lehman Brothers common stock at the conclusion of a five-year holding period. Because the RSUs had been awarded between 2003 and 2008, the employees holding them at the time Lehman Brothers filed for bankruptcy did not receive common stock. Moreover, the Chapter 11 filing effectively rendered the RSUs worthless. After the bankruptcy filing, many of the employees holding RSUs filed proofs of claim in the Chapter 11 proceeding seeking cash payments in the amounts of and as substitutes for compensation they had been paid in RSUs.

Lehman Brothers objected, and the Second Circuit agreed, that pursuant to federal bankruptcy law, and particularly the subordination statute (11 U.S.C. § 510(b)), the employees' claims must be subordinated to the claims of general creditors because the RSUs are "securities" for purposes of the statute. Construing § 510(b) broadly, the Second Circuit held that the category of RSU at issue constituted a "security" as defined by the Bankruptcy Code and, therefore, the employees' claims based on the RSUs must be subordinated to those of Lehman Brothers' general creditors.

Dick's Sporting Goods' Employees Permitted to Play Ball as a 8,500-Plus Member Class

Greer v. Dick's Sporting Goods Inc., No. 15-cv-01063 (E.D. Cal.) (Apr. 13, 2017). Judge Mueller.

A federal court in California certified a class of more than 8,500 Dick's Sporting Goods employees who claim they were unlawfully required to wait off-the-clock for inspections of their belongings, among other claims.

In 2015, lead plaintiff Jimmy Greer filed suit against the company, asserting that it unlawfully required employees to wait on their own time for an inspection of their bags and other personal belongings as part of the store's loss-prevention practice and required workers to purchase apparel appropriate to their department without providing reimbursement for the expenses. After the named plaintiff moved to certify a class, Dick's filed a motion in opposition to class certification. In its opposition, Dick's argued that the case was similar to a California federal case in which class certification was denied, *Ogiamien v. Nordstrom Inc.*

But the court disagreed, saying that the Dick's case was distinguishable from *Ogiamien* in part because Nordstrom's inspection policy only applied to bags and therefore did not apply to a substantial portion of the putative class that did not bring bags to work. Dick's security check procedure, on the other hand, pertained to jackets, bags, and other personal belongings, "and therefore applied to a greater proportion, if not the entire, putative class." The court also certified the plaintiff's proposed business reimbursement subclass based on the claims that Dick's required workers to purchase apparel appropriate to their department without providing reimbursement for the expenses. ■

Privacy & Data Security

- **Time Ran Out on Plaintiff's Privacy Suit Against Periodical**

  Coulter-Owens v. Time Inc., Nos. 16-1321 & 16-1380 (6th Cir.) (June 26, 2017). Affirming summary judgment.

  Rose Coulter-Owens purchased some of Time's magazines through an online subscription agent. Time then allegedly shared her "order information"—including her name, address, and magazine choice—with third-party marketing database operators, without her permission, in purported violation of Michigan privacy laws. The trial court dismissed the case after determining there was no retailer-customer relationship between the magazine publisher and Coulter-Owens given that she had purchased her subscription through an intermediary agent. The Sixth Circuit affirmed, ruling that the privacy statute specifically includes the phrase "at retail," which, at a minimum, means that some types of sales must be "nonretail," which are consequently excluded from the statute's jurisdiction.

- **You Get What You Bargain For: Contractual Consent Irrevocable Under TCPA**

  Reyes v. Lincoln Automotive Financial Services, No. 16-2104 (2nd Cir.) (June 22, 2017). Affirming summary judgment order.

  Alberto Reyes owed money on his car lease, and he was hearing about it in the form of debt collection calls. Reyes demanded that the calls stop and figured he had himself a TCPA claim when the calls did not stop. But the Second Circuit pivoted from prior case law and ruled that consumers do not have the ability to revoke consent to be called when that consent is part of a bargained-for exchange, giving businesses helpful precedent to thwart rising TCPA litigation. The court emphasized that Reyes did not provide his consent gratuitously since it was included as an express provision of a contract to lease an automobile. Therefore, it could not be revoked unilaterally. Reading the TCPA to permit unilateral revocation of consent at any time would not only undermine black letter contract law, it would also contravene Congress's intent.

CLASS-IFIED INFORMATION

San Francisco partner Jeff Tsai has been named to the Commission on Judicial Nominees Evaluation by the State Bar of California.

Jeff Tsai

- **USPS Can't Deliver Dismissal of FCRA Claim**

  Rondo Tyus v. U.S. Postal Service, No. 15-cv-01467 (E.D. Wis.) (June 20, 2017). Judge Duffin. Denying motion to dismiss.

  Rondo Tyus alleged that the U.S. Postal Service (USPS) violated the Fair Credit Reporting Act (FCRA) by not giving him sufficient time to correct his background check before rendering its final employment decision. Analyzing the case under the U.S. Supreme Court's *Spokeo* rubric, the

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district court concluded that the alleged violation amounted to more than a mere procedural violation. The USPS told Rondo it would give him five days to contest his background check but denied him a security clearance after only three. Factual issues, such as whether Tyus actually suffered his alleged injuries of emotional distress and financial harm, were not before the court on this motion to dismiss, and the court found that Tyus's case plausibly stated a concrete injury fairly traceable to the USPS's conduct.

Barnes & Noble Closes Book on Pin Pad Litigation

In re Barnes & Noble Pin Pad Litigation, No. 12-cv-08617 (N.D. Ill.) (June 13, 2017). Judge Wood. Granting motion to dismiss.

Although Barnes & Noble customers had their credit card information compromised during a criminal data breach of the retail giant, they were unable to show they suffered redressable injuries in the form of economic or out-of-pocket injuries. Alleged injuries to the value of the plaintiffs' personal identifiable information, loss of time and cell phone minutes, emotional distress, renewal of credit monitoring *in part* due to the breach, and temporary inability to use a bank account were all insufficient to state a claim for relief.

Second Circuit Rejects Crafty Appeal in Michaels Data Breach Case

Whalen v. Michaels Stores Inc., No. 16-260 (2nd Cir.) (May 2, 2017). Affirming dismissal.

The Second Circuit affirmed a district court's dismissal of a putative class action against Michaels following a data breach suffered by the company. The suit was originally dismissed for lack of standing under *Clapper*, and the Second Circuit agreed. The Second Circuit rejected the plaintiff's argument that the use of her card in two attempted fraudulent purchases was enough, holding that "she never was either asked to pay, nor did pay, any fraudulent charge," her card was promptly canceled after the breach, and she had not alleged any time and effort spent monitoring her credit.

Dillard's Insurer's Data Breach Class Action Gets Bagged at Certification Stage

Dolmage v. Combined Insurance Company of America, No. 14-cv-03809 (N.D. Ill.) (May 18, 2017). Judge Castillo. Denying motion for class certification.

A putative class of Dillard's employees whose personal information was made public lost their bid for class certification in the Northern District of Illinois. The putative class of more than 4,000 employees in more than 25 states sued Dillard's insurer, Combined Insurance Co. of America, who provided the employees with supplemental insurance, pledged to protect the privacy of insureds, and later suffered a data breach. Judge Castillo denied certification of the nationwide class on commonality grounds because the litigation would invoke numerous states' contract laws to settle key issues for the class. In addition, Judge Castillo held that the class plaintiff's claim did not meet typicality requirements, nor did the class meet predominance and superiority requirements.

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- **Not So Fast: Eighth Circuit Tells District Court to Show Its Work in Target Settlement**

  In re Target Corp. Customer Data Security Breach Litigation, No. 15-3909 (8th Cir.) (May 2, 2017). Reversing in part and remanding.

  The Eighth Circuit reversed the District of Minnesota's approval of a $10 million MDL settlement of claims arising from Target's 2013 data breach and remanded it, citing concerns over the district court's thin legal analysis of key issues. The proposed settlement permitted consumers to obtain up to $10,000 for documented losses or an equal share of the remaining settlement fund after class plaintiffs and supported loss claims were paid. But the Eighth Circuit found that the district court failed to rigorously analyze the propriety of certification and adequacy of class representation, which was particularly important given the possibility of interclass conflicts in a large, single settlement class. ■

Products Liability

- **Court Extinguishes Whirlpool Oven Putative Class Action**

  Kljajic v. Whirlpool Corp., No. 15-cv-05980 (N.D. Ill.) (May 9, 2017). Judge St. Eve. Denying motion for class certification.

  An Illinois federal judge denied a motion for class certification in a case alleging that Whirlpool's ovens overheat when the self-cleaning setting is on, causing damage to the controls and requiring repairs or replacement. The plaintiffs sought certification of six classes that were defined based on where the oven was purchased and the purchaser resides, among other criteria. The plaintiffs relied on expert testimony to prove a common defect in all ovens, but the testimony was excluded under a *Daubert* challenge. Without that testimony, the court reasoned that the differences in the ovens' design and the lack of a common cause made the claims unfit for class resolution.

- **Eighth Circuit Buries Pegasus Pipeline Lawsuit**

  Webb v. ExxonMobil Corp., No. 15-2879 (8th Cir.) (May 11, 2017). Affirming district court's order granting motion for class decertification.

  The Eighth Circuit affirmed a decision by the Eastern District of Arkansas to decertify a class of homeowners seeking recovery for property damage resulting from the 2013 rupture of the Pegasus Pipeline in Mayflower, Arkansas. The Eighth Circuit agreed that a breach of contract claim demanding repair, replacement, or removal of the Pegasus Pipeline by landowners with easements along the pipeline's route could not be pursued classwide because the pipeline's characteristics varied widely from place to place. Further, even if the pipeline was maintained in the same manner in each location, the effect on the landowners was not the same. Accordingly, "[t]oo many individual issues predominate[d] over common ones."

CLASS-IFIED INFORMATION

Cathy Burgess

Dan Jarcho

It's good to stay current. Keep your manufacturing practices up to date with Cathy Burgess and Dan Jarcho's *How to Comply with Drug CGMPs, second Edition*.

- **U.S. Supreme Court Rejects Plaintiff's Attempt to Game the Class Action System**

  Microsoft Corp. v. Baker, No. 15-457 (U.S.) (June 12, 2017). Reversing the Ninth Circuit's ruling that the district court abused its discretion in striking class allegations.

  In an 8–0 decision, the U.S. Supreme Court held that the Ninth Circuit did not have jurisdiction to review an order denying class certification after the named plaintiff voluntarily dismissed his individual claims with prejudice. The plaintiff alleged that Microsoft's Xbox 360 units have defects that make game discs spin out of control and become scratched. Microsoft denied the defect claims and argued that any damage to game discs is caused by consumer misuse. A judge in the

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Western District of Washington denied class certification, finding that individual issues predominated. The Ninth Circuit revived the lawsuit, holding that although individual factors may damage game discs, they have no impact on whether the Xbox 360 units were sold with a defect.

Writing for the majority, Justice Ruth Bader Ginsburg noted that a voluntary dismissal is not a final decision that can be automatically appealed under 28 U.S.C. § 1291, and plaintiffs cannot sidestep the interlocutory appeals process that is required for class certification orders by Federal Rule of Civil Procedure 23(f). Justices Clarence Thomas, John Roberts, and Samuel Alito wrote separately to opine that the Ninth Circuit lacked jurisdiction under Article III of the U.S. Constitution; the plaintiff did not have standing to bring the appeal because there was no "case" or "controversy" once he dismissed his claims with prejudice.

▪ Judge Does Not Crack Under Pressure to Decertify Consumer Class Action

Chapman v. Tristar Products Inc., No. 16-cv-01114 (N.D. Ohio) (June 20, 2017). Judge Gwin. Denying motion for class decertification.

An Ohio federal judge denied Tristar's motion for decertification of three classes of consumers in Ohio, Pennsylvania, and Colorado who are seeking refunds for the defective pressure cookers that they purchased. Tristar argued that the classes should be decertified due to the fluctuating price of the pressure cookers and the unknown number of products sold by third-party retailers. The court reasoned that the class action device does not require every member of the class to have identical damages, but decided to bifurcate the trial into liability and damages phases to address Tristar's concerns. If the jury agrees with the plaintiffs that the cookers have a defect that allows them to be opened while still pressurized and eject scalding food, then the parties will determine the appropriate amount of damages. ■

Securities

- **Oily Dealings**

  In re Cobalt International Energy Inc. Securities Litigation, No. 14-cv-03428 (S.D. Tex.) (June 15, 2017). Judge Atlas. Granting class certification.

  A Texas district court certified a class of investors alleging that Cobalt International Energy Inc., an exploration and production company, violated sections of the Securities Exchange Act of 1934 and the Securities Act of 1933 by bribing Angolan government officials in its pursuit of oil-drilling permits and making misrepresentations to stock and bond investors about the value of its wells. In opposition to class certification, Cobalt argued certain individualized issues predominated over the common issues of law and fact, specifically issues relating to whether the plaintiffs had actual knowledge that the information on which they based their claim was materially false or misleading (specifically whether it was public knowledge that Angolan officials owned one of the shell companies Cobalt partnered with) and whether each individual plaintiff purchased his shares in a domestic transaction. Further, Cobalt raised issues relating to tracing the purchase of securities to the registration statements and whether each plaintiff could prove reliance on the allegedly false statements. Ultimately, the court found Cobalt's arguments unpersuasive. The district court rejected all of Cobalt's arguments, noting that their speculation that any class member had knowledge of the shell company's ownership did not support a finding of actual knowledge.

- **Pension Fund Fit to Stand as Class Representative**

  Burges, et al. v. BancorpSouth Inc., et al., No. 14-cv-01564 (M.D. Tenn.) (June 26, 2017). Judge Crenshaw. Granting class certification.

CLASS-IFIED INFORMATION

Jessica Corley follows the "Latest Developments in Securities and Derivative Class Action Litigation" at the ABA's Women in Litigation Joint Conference in Philadelphia.

Jessica Corley

After the Sixth Circuit voided a previous grant of class certification, a Tennessee district court certified a class of shareholders alleging that BancorpSouth Inc. violated the Securities Exchange Act of 1934 and Rule 10b-5 by making false and materially misleading statements about its compliance with anti-money laundering and Bank Secrecy Act regulations, fair lending practices, and the closing of two pending mergers and acquisitions. BancorpSouth set forth many arguments challenging the fitness of the lead plaintiff, Palm Beach Gardens Firefighters Pension Fund, including calling out the "portfolio monitoring agreement" it had in place as well as problems arising from the lead plaintiff having its own counsel in addition to class counsel. However, Judge Crenshaw rejected the argument that the monitoring agreement rendered the fund inadequate to be the class representative, noting it did not create a conflict of interest, impair the fund's independent judgment, or render the fund substantially different from the other members of the class. The judge also rejected BancorpSouth's attempt to rebut the fraud on the market presumption.

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A Race for Certification

Elizabeth Morrison, et al. v. Ray Berry, et al., No. 12808 (Del. Ch.) (June 21, 2017). Vice Chancellor Glasscock. Granting class certification.

The Court of Chancery of the State of Delaware certified a class of The Fresh Market Inc. shareholders over alleged breaches of fiduciary duty by Ray Berry, the company's founder and chairman, and his son, former executive Brett Berry, relating to the company's $1.4 billion acquisition by Apollo Global Management LLC. The shareholders pushed for a prompt decision on class status, alerting the court that another group of shareholders bringing a federal securities suit in North Carolina was also pursuing class status after allegedly copying Morrison's complaint. Morrison argued the North Carolina action could prejudice her efforts to gain a recovery for the alleged breaches of fiduciary action in the Delaware case. Accordingly, Vice Chancellor Glasscock granted Morrison's motion for prompt class certification.

California Court Puts Heat on Canadian Company

Masillionis v. Silver Wheaton Corp., No. 15-cv-05146 (C.D. Cal.) (May 11, 2017). Judge Snyder. Granting class certification.

A California federal district court granted class certification to a group of investors in Silver Wheaton, a Canadian silver company. The class of investors alleges that the company knew that $500 million in profits that it hid in a Cayman Islands subsidiary would expose the company to $215 million in Canadian tax liability, which it purposefully concealed from investors. In certifying the class, the court rejected the defendant's arguments that the named plaintiffs were not knowledgeable enough about the class, but also rejected the plaintiffs' argument that they could use the U.S. Supreme Court's *Affiliated Ute* decision to establish the presumption that they relied on certain omissions.

Windstream Stockholders May Proceed as Class in REIT Row

Doppelt v. Windstream Holdings Inc., No. 10629 (Del. Ch.) (Apr. 17, 2017). Vice Chancellor Slights. Granting class certification.

Investors who sued Windstream over disclosures related to a 2015 real estate investment trust spinoff have won class certification in a decision from the bench. Alleging that the company's proxy statement failed to specify that a REIT spinoff and charter change would diminish periodic dividends considerably, the plaintiffs argued that the purported class should include stockholders to whom shares had been transferred after the date of the shareholder vote. The court agreed but cautioned that the class must still demonstrate common damage from the alleged disclosure inadequacies in order to recover on their claims.

Court Allows Indirect Purchasers to Join Theranos Suit

Colman v. Theranos Inc., No. 16-cv-06822 (N.D. Cal.) (Apr. 18, 2017). Judge Cousins. Ordering investors can proceed as a class.

A federal judge allowed indirect stock purchasers to join a class in a large securities fraud suit against Theranos and its officers alleging fraudulent representations about the efficacy of cutting-edge blood testing technology. The investors purchased shares in funds that were specifically created to only invest in Theranos. Judge Cousins determined that Section 25400(d) of the California Code does not require a showing of reliance on misrepresentations nor does it require a direct relationship between buyer and seller, so the indirect plaintiffs may proceed against both Theranos and its officers individually under common law fraud claims. ■

Settlements

Second Circuit Allows Defendants to Milk Their Influence over Class Members

Allen v. Dairy Farmers of America Inc., No. 16-1944 (2nd Cir.) (April 18, 2017). Affirming approval of settlement.

A subclass of dairy farmers appealed the district court's order approving settlement, arguing that the representatives of the defendant milk purchasers coerced class members into supporting the settlement. The Second Circuit rejected the subclass's argument. Although the milk purchasers' practice of soliciting letters of support for the settlement from the dairy farmers may have been a "questionable tactic," there was still clear evidence of substantial support for the settlement. And in any event, class members' support is only one factor bearing on the terms of the settlement.

Federal Court OK's $35.5 Million Race-Bias Settlement

Lance Slaughter, et al. v. Wells Fargo Advisors LLC, et al., No. 13-cv-06368 (N.D. Ill.) (May 4, 2017). Judge Leinenweber. Granting final approval of settlement.

Banking giant Wells Fargo Advisors LLC received preliminary approval of a $35.5 million settlement earlier this year in a case involving race-bias claims by a putative class of the bank's employees. The suit alleged that Wells Fargo had implemented policies and procedures that systematically discriminated against black employees and prevented those employees from moving up the ladder at the company. Aside from the monetary relief that the settlement gives to each of the class's approximately 360 employees, the settlement provides a half-million-dollar business development fund for the bank's black financial advisers. The settlement also requires Wells Fargo to add internal structures to prevent discriminatory practices and policies from taking a grip in the future.

Wells Fargo to Pay $14.8 Million for Robocalls

Luster v. Wells Fargo Dealer Services Inc., No. 15-cv-01058 (N.D. Ga.) (June 19, 2017). Judge Thrash. Granting revised class notice reflecting final settlement amount.

A Wells Fargo consumer filed suit under the TCPA alleging the company made autodialed calls to his cell phone in an attempt to collect debts owed by individuals that the consumer did not know. Wells Fargo maintained that it had prior express consent to make calls—a complete defense under the TCPA. But the consumers disagreed. Discovery revealed that roughly 3.2 million cell phone numbers were affected.

CLASS-IFIED INFORMATION

Hitting the mark: Cari Dawson named one of the country's top female litigators by *Benchmark Litigation*.

Cari Dawson

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Judge Thrash granted preliminary approval for an almost $16 million settlement, but Wells Fargo was able to knock the settlement value down by almost $1 million after discovery revealed that the settlement class was smaller than estimated. The company asked the court to approve a revised class notice that reflects the final settlement amount and to extend case deadlines in light of this new information. A final settlement approval hearing is slated for early November.

▪ Sephora Forced to Make Up for Deleting Customer Accounts

Lee, et al. v. Sephora USA Inc., et al., No. 14-cv-05237 (N.D. Cal.) (May 25, 2017). Judge Chen. Granting final settlement approval.

Shortly before Sephora's 2014 "Very Important Beauty Insider" sale was scheduled to begin, the makeup retailer deactivated customer accounts associated with three Chinese service providers, thinking that the accounts were created by bots. Customers owning those accounts filed suit, alleging breach of contract and racial discrimination.

Judge Chen approved a settlement offering the 13,879 class members the choice of either $124 in cash or a $245 gift card to Sephora, which—according to Sephora's counsel—is "as good as cash" for Sephora loyalists. However, the judge voiced concern when he saw that the attorneys' costs and fees totaled more than half of the settlement fund. Class counsel responded that they achieved strong results for class members and that reducing the attorneys' fees award could discourage firms from taking on these lawsuits.

CLASS-IFIED INFORMATION

Join Cari Dawson for a "Privacy Law Mini Boot Camp" at the 13th Annual Career Strategies Conference of the Corporate Counsel Women of Color in New Orleans.

▪ Game Over for Suit Against Activision

Lee, et al. v. Activision Blizzard Inc., et al., No. BC 575665 (Cal.) (June 16, 2017). Judge Nelson. Granting final settlement approval.

Judge Nelson approved a $1.5 million settlement between videogame developer Activision Blizzard and its senior developers who claimed that they were wrongfully denied overtime compensation by being misclassified as exempt employees. Although the plaintiffs calculated damages exposure of approximately $6.5 million, the court considered the defendant's potential defenses, including a declaration that could defeat class certification and the fact that 80% of the 128 class members still worked for the defendant and would potentially testify that they are correctly classified. The court also approved an attorneys' fees award for 1/3 of the $1.5 million settlement value and awarded costs of $21,475.

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- **Phone Bankers Avoid Getting Hung Up on Potential De Minimis Exception.**

  Santini, et al. v. Wells Fargo Bank, No. 16-cv-01992 (N.D. Cal.) (Mar. 31, 2017). Judge Rogers. Approving pre-certification settlement.

  A California federal court approved a pre-certification settlement of $685,000 for the federal wage and hour claims of more than 2,000 phone bankers who alleged that they were not paid for three to 10 minutes each day spent "booting up" computer applications needed for them to start fielding customer calls. At the time of the decision, California's de minimis standard was under review, with California state law cases holding that even up to 10 minutes of work can be de minimis. Rather than getting hung up on whether the de minimis exception would preclude recovery, the court approved the settlement, observing that the proposed settlement for the proposed class was "exceptional because there was a significant risk class members would ultimately recover nothing. [Wells Fargo's] information showing it took less than three minutes for class members to load software before being able to take a call could result with a ruling that the off-the-clock time is not compensable under the de minimis doctrine." ■