ALSTON & BIRD

CLASS ACTION & MDL roundup

WINTER 2020

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ALSTON & BIRD

overview

Where the (Class) Action Is

Welcome back to the ***Class Action & MDL Roundup***! Our winter edition covers notable class actions from the fourth quarter of 2020.

As COVID-19 continues to affect many aspects of everyday life and business, our team follows significant cases making their way through the courts and looks at decisions impacting the higher-education, travel, and hospitality industries.

Price fixing was a hot topic this quarter, with a California judge's decision to deny class certification in a case involving indirect purchaser plaintiffs seeking damages under California's Cartwright Act. On the Banking, Financial Services & Insurance front, the Second Circuit affirmed a district court's dismissal of a bank's alleged involvement in a $100 million Ponzi scheme.

Consumer Protection decisions covered a wide range of products and services, from sports equipment and automotive parts to music festivals and cruises. Employers defended themselves against several wage-and-hour collective actions. A preliminary settlement proposal was rejected in one collective action on the ground that it unduly rewarded the attorneys, serving as a reminder that judges will evaluate settlements and strike down agreements that reward attorneys at the expense of the class. In Securities news, the U.S. Supreme Court will weigh in on a years-long class certification that will have wide-reaching implications for future securities class actions.

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

CLASS ACTION & MDL roundup

WINTER 2020

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COVID-19 Litigation

Numerous class actions have been filed in the wake of the COVID-19 pandemic, and many are now working their way through the courts. In this section, we highlight some of these recent decisions and the trends that have been developing as more courts grapple with the issues raised in these lawsuits.

Collegiate Confusion: Comparing the Mixed Results in Higher Education Tuition Refund Decisions

Brandmeyer v. Regents of the University of California, Nos. 4:20-cv-02886, 3:20-cv-02925 (N.D. Cal.) (Nov. 10, 2020); ***Gibson v. Lynn University Inc.***, No. 9:20-cv-81173 (S.D. Fla.) (Nov. 29, 2020).

Divergent trends are emerging as courts across the country grapple with dozens of tuition refund class actions filed against colleges and universities in the wake of their move to online education. In early November 2020, the Northern District of California dismissed a pair of class actions filed against the Regents of the University of California alleging breach of contract for the institution's response to COVID-19. Later that month, the Southern District of Florida allowed a similar class action to survive Lynn University's motion to dismiss. The key distinction—at least at this stage of the proceedings—appears to be the identity of the defendant-institution: a public university entitled to qualified immunity or a private school with no such immunity.

In *Brandmeyer v. Regents of the University of California*, Judge Sallie Kim granted the defendants' motion to dismiss claims brought by University of California (UC) students, alleging that UC withheld campus fee refunds and that UC should have issued prorated refunds to reimburse the students for campus services that they could no longer access due to the pandemic. Judge Kim held that the UC regents and former UC president Janet Napolitano were entitled to qualified immunity under the Eleventh Amendment and dismissed both suits with prejudice, rejecting the plaintiffs' attempt to "disguise their breach of contract claim as a constitutional takings claim." Because the students sought "a remedy for asserted violations of their rights in the form of financial compensation," Judge Kim determined that the State of California was the "substantial party in interest in

these cases and is entitled to invoke its sovereign immunity from suit, as Defendants have done on behalf of the State here."

By contrast, Judge Rodolfo A. Ruiz II denied the defendant's motion to dismiss in *Gibson v. Lynn University Inc.*, involving claims that Lynn University should have issued partial tuition and fee refunds after classes were moved online due to the COVID-19 pandemic. In denying Lynn's motion to dismiss, Judge Ruiz noted that he was not opining on the merits of the students' claims. Rather, he determined that the complaint's factual allegations were "sufficient to plead the existence of a valid contract for in-person education" at this stage of litigation, explaining that "Florida law recognizes an implied contractual relationship between a university and its students derived from the university's publications" and citing two Florida decisions denying universities' motions to dismiss. In addition to denying Lynn's motion to dismiss, Judge Ruiz also lifted the stay of discovery.

Membership Fees and Canceled Tickets: No Refunds Allowed

Barnett v. Fitness International LLC, d/b/a LA Fitness, No. 0:20-cv-60658 (S.D. Fla.) (Sept. 17, 2020); ***Kouball v. Seaworld Parks & Entertainment Inc.***, No. 3:20-cv-00870 (S.D. Cal.) (Sept. 9, 2020); ***Daversa-Evdyriadis v. Norwegian Air Shuttle ASA***, No. 5:20-cv-00767 (C.D. Cal.) (Sept. 17, 2020); ***Maree v. Deutsche Lufthansa AG***, No. 8:20-cv-00885 (C.D. Cal.) (Oct. 7, 2020).

Numerous class actions have been filed seeking ticket refunds for events that were canceled due to COVID-19 or membership fee refunds when the plaintiff was unable to make full use of his membership due to COVID-19. To date, defendants have largely been successful in dismissing these claims early in the proceedings, often based on lack of injury, lack of reliance, and, in the context of airline ticket refunds, rejection of arguments that airlines incorporated Department of Transportation (DOT) regulations into their general conditions of carriage. As these cases continue to work their way through the courts, we anticipate that defendants will continue to obtain dismissals based on similar arguments.

"Wonders will never cease at the ABA's 2021 Virtual Litigation Section Annual Conference, featuring **Kristy Brown**, **Jeff Rosenfeld**, and **Yuri Mikulka**, May 5-7."

Kristy Brown

Jeff Rosenfeld

Yuri Mikulka

Some courts have dismissed these claims based on lack of injury if the plaintiff has already received a refund for his ticket or unused membership. In *Barnett v. Fitness International LLC, d/b/a LA Fitness*, the court ruled that the plaintiff suffered no injury and dismissed his claims alleging he was injured by his gym's failure to refund his March 2020 membership fees but also alleged that the fees were refunded before filing suit.

Other courts have dismissed fraud-based statutory claims due to lack of reliance. For example, in *Kouball v. Seaworld Parks & Entertainment Inc.*, the court held that the plaintiff failed to sufficiently allege reliance because she could not point to any statement made by SeaWorld that the plaintiff would have unlimited access with her annual pass and instead simply alleged that she relied on her subjective believe that she would have this access.

In *Daversa-Evdyriadis v. Norwegian Air Shuttle ASA*, the court dismissed the plaintiff's claim alleging that Norwegian breached the General Conditions of Carriage by taking several weeks to refund her airline ticket for a flight that was canceled due to a COVID-19 travel ban. The plaintiff contended that the airlines' conditions of carriage incorporated particular DOT regulations that require a refund within seven days of a flight cancellation. The court rejected this theory because the General Conditions of Carriage simply stated that Norwegian complies with all applicable laws, which was too general to incorporate the specific DOT regulations. The court in *Maree v. Deutsche Lufthansa AG* relied on the *Norwegian Air* decision to reach the same result.

Despite COVID-19, Contractual Provisions Continue to Apply

Archer v. Carnival Corporation, No. 2:20-cv-04203 (C.D. Cal.) (Oct. 20, 2020); ***Ward v. American Airlines***, No. 4:20-cv-00371 (N.D. Tex.) (Nov. 2, 2020); ***McDonnell v. Maplebear Inc.***, No. CGC-20-585037 (Cal. Sup. Ct.) (Oct. 22, 2020).

Several courts have ruled that class action waivers and mandatory arbitration clauses prevent plaintiffs from bringing class actions, even in cases stemming from COVID-19. Given these decisions, a defendant facing a COVID-19-related class action—or any

class action for that matter—should consider whether there are arbitration defenses that could be asserted.

In *Archer v. Carnival Corporation*, the plaintiff moved to certify a class of passengers who were on the *Grand Princess* cruise ship during a COVID-19 outbreak in February and March 2020. He admitted that he assented to the terms of a "Passage Contract," which contained a class-action waiver, but argued that the waiver was unenforceable because it was not conspicuously visible on the face of the cruise ticket and was not available for review before purchasing a ticket. The district court rejected those arguments, finding that the waiver terms were prominently featured in emails and links provided to Archer and the class and that they had multiple opportunities to review the waiver during the booking process. Holding the waiver to be enforceable, the court denied the motion and declined to address whether the class met any Rule 23 requirements.

In *Ward v. American Airlines Inc.*, the plaintiffs purchased flights through third-party online travel agencies that were later canceled due to COVID-19. American Airlines moved to compel arbitration based on the arbitration clause contained within the agencies' terms of use. Applying Texas law, the court ruled that American was entitled to enforce the arbitration agreement as a third-party beneficiary even though it was not itself a party to the agreements.

And in *McDonnell v. Maplebear*, the plaintiff, a courier for Instacart, alleged that Instacart had failed to provide him with PPE or hand sanitizer. The plaintiff's independent contractor agreement with Instacart contained an arbitration clause, and the court ruled that the arbitration clause was enforceable and that Instacart couriers are not "workers engaged in foreign or interstate commerce."

Alston & Bird's Women in Cyber™ Presents Post SolarWinds: The Role of Government in Cybersecurity, moderated by **Kim Peretti**, April 22.

Kimberly Peretti

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Courts Continue to Deny COVID-19 Coverage Suits Absent "Direct" or "Physical" Damage

Promotional Headwear International v. The Cincinnati Insurance Co., No. 2:20-cv-02211 (D. Kan.) (Dec. 3, 2020); ***El Novillo Restaurant, et al. v. Certain Underwriters at Lloyd's, London, et al.***, No. 1:20-cv-21525 (S.D. Fla.) (Dec. 7, 2020).

In *Promotional Headwear International v. The Cincinnati Insurance Co.*, Judge Julie A. Robinson dismissed a breach of contract suit against a property insurer stemming from losses sustained due to COVID-19-related business interruptions. The plaintiff, a wholesale distributor of headwear, bags, and other custom promotional products, argued that it lost nearly 95% of its projected $100 million in sales for 2020 as a result of state and local stay-at-home orders that prevented its employees from being able to come to work. In support of its claim, the plaintiff pointed to policy language providing coverage for direct losses to covered property where "loss" was defined as "accidental physical loss or accidental physical damage."

The court denied the plaintiff's claim, explaining that the complaint failed to allege any material change or intrusion on the property itself, as required by the policy. The plaintiff's reading of the policy, the court explained, would write out the modifiers "direct" and "physical" in describing the types of covered loss and damages recoverable. Relying on similar precedent from other district courts as well as the Tenth and Eleventh Circuits, Judge Robinson observed that the majority of cases to consider similar policy language held "that 'direct physical loss or damage' to property requires some showing of actual or tangible harm to or intrusion on the property itself.'" Judge Robinson also denied the plaintiff's claims of physical damage resulting from the likelihood that someone infected with COVID-19 had been present on the covered property, explaining that absent specific allegations about an employee's infection, there was a similar risk of exposure to the virus in any public setting.

In *El Novillo Restaurant, et al. v. Certain Underwriters at Lloyd's, London, et al.*, Judge Ursula Ungaro granted the insurance underwriters' motion to dismiss the restaurants' proposed class action, which sought coverage for claims of lost business income and other expenses arising from restrictions related to the COVID-19 pandemic.

In April 2020, two plaintiffs operating El Novillo Restaurants in Florida filed claims under "all-risk" commercial property insurance policies provided by certain underwriters at Lloyd's London based on "direct physical losses and damage to the properties" they suffered as a result of the pandemic and local governmental orders that restricted restaurant operations to control the spread of COVID-19. Judge Ungaro rejected the plaintiffs' interpretations of "direct physical loss" and "damage to property," relying instead on recent orders by other courts that denied coverage for claims based on closure of indoor dining. Judge Ungaro held that the plaintiffs failed to allege any physical damage to property and failed to allege that access to their restaurants was completely prohibited by order of a civil authority, particularly because the restaurants remained open for delivery and takeout. She further held that, because the plaintiffs had already been given an opportunity to amend their complaint, any further amendment would be futile, and she dismissed the complaint with prejudice. ■

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Antitrust/RICO

Nuts! Peanut Shellers Unable to Defeat Class Certification Bid

D&M Farms v. Birdsong Corp., No. 2:19-cv-00463 (E.D. Va.) (Dec. 2, 2020). Judge Jackson. Granting class certification.

Judge Raymond Jackson certified a class of peanut farmers asserting a Section 1 Sherman Act claim against peanut processors for facilitating a price-fixing conspiracy, overcoming the processors' objection that the farmers' damages model could not measure individualized antitrust impact. Judge Jackson determined it was sufficient at the class certification stage if a damages model imputes a single average percentage rate for underpayment to all class members, even if the ultimate damages calculation would require a more individualized inquiry. He reasoned that a potential need to inquire into individual damages did not preclude class certification and noted that the court could certify Rule 23(c)(4) classes on the issue of liability if an alternative damages calculation was needed.

No Capacity for Capacitor Indirect Purchasers to Certify Multistate Class

In re Capacitors Antitrust Litigation (No. III), No. 3:17-md-02801 (N.D. Cal.) (Nov. 3, 2020). Judge Donato. Denying class certification.

Indirect purchaser plaintiffs sought to certify a damages class under California's Cartwright Act and Rule 23(b)(3) made up of purchasers from the 31 states that permit recovery by indirect purchaser plaintiffs in price-fixing cases. Judge Donato denied class certification, finding "problems abound." First, the plaintiffs did not satisfy their initial burden to show that the application of California law to the entire class was constitutional because the plaintiffs' complaint alleged hardly any contacts at all with California and the defendants' principal places of business were in Japan. Second, choice-of-law rules posed another insurmountable bar because the 31 state laws at issue apply different statutes of limitations, and some states require indirect purchaser plaintiffs to prove that a portion of the overcharge was "passed on" from direct

purchasers, while others do not. Each of these differences could spell the difference between the success and failure of a plaintiff's claim, making class treatment inappropriate.

Inescapable Emissions

Gamboa v. Ford Motor Co., No. 2:18-cv-10106 (E.D. Mich.) (Nov. 30, 2020). Judge Hood. Denying motion to dismiss.

Judge Denise Page Hood denied the motion to dismiss of auto parts maker Robet Bosch GmgH, in a Racketeer Influenced and Corrupt Organizations Act (RICO) class action alleging that Bosch conspired with Ford Motor Co. to rig 500,000 heavy-duty trucks to bypass emission tests. Vehicle owners and lessees of Ford's vehicles argued that, because Bosch made the electronic diesel control units that could allegedly be rigged with emissions-cheating software, and because Bosch played a prominent role in the distribution chain, they could directly trace their alleged RICO injuries to Bosch's role as a co-conspirator. Bosch relied on the indirect purchaser rule from *Illinois Brick* to argue the consumers' claims should be dismissed because Bosch did not make, sell, or advertise the cars to consumers, who purchased from dealerships. Judge Hood disagreed, finding that Bosch's "analysis of the distribution chain and Plaintiffs' relationship to it is overly simplified" and concluding that the plaintiffs "are direct purchasers for purposes of their RICO claim." In doing so, Judge Hood noted that the Supreme Court did not intend to "restrict the sole non-conspirators in a multi-level distribution chain—usually consumers—from bringing a private antitrust claim." She also rejected Bosch's other contentions and ultimately held the RICO claim was sufficiently pleaded because the case involved active concealment or half-truths as opposed to pure omissions. *Gamboa* underscores the hurdles faced by manufacturers in sprawling class actions attempting to defeat RICO and antitrust claims at the motion to dismiss stage. ■

"This year's ABA Antitrust Law Spring Meeting will be virtual, so be sure to join us for panels on hot topics, ***Schrems II***, and antiracism March 23–26 in the comfort of your (home) office."

Adam Biegel

Peter Swire

Deona Kalala

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Banking, Financial Services & Insurance

Banks Steer Clear of Ponzi Scheme Liability

Heinert, et al. v. Bank of America N.A., et al., No. 20-00691 (2nd Cir.) (Nov. 13, 2020). Affirming dismissal.

The Second Circuit affirmed a New York district court's order dismissing claims that Bank of America and Citizens Bank should be liable for a $100 million Ponzi scheme perpetrated by five individuals. Agreeing with the district court, the Second Circuit concluded that the plaintiffs—a putative class of nearly 640 investors—failed to adequately plead that the banks had actual knowledge of the underlying scheme. As a result, the plaintiffs' claims of breach of fiduciary duty, conspiracy, and aiding and abetting fraud could not withstand the heightened pleading requirements of Rule 9(b). ■

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"Were you there? Three of our partners were featured moderators at the National Bar Association Commercial Law Section's 34th Annual Corporate Counsel Conference. Catch up with our fireside chats and peeks behind the corporate veil."

Liz Broadway Brown

Derin Dickerson

Cari Dawson

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Consumer Protection

Class Allegations Get Another At Bat

Wisdom v. Easton Diamond Sports LLC, No. 19-55742 (9th Cir.) (Oct. 5, 2020). Reversing order striking class allegations.

Ricky Wisdom claimed that his Easton baseball bat weighed more than the weight represented on its label, and he filed suit seeking to represent a class of all individuals who "purchased any model(s) of Easton baseball bat(s) from Easton or a retailer, where such bats were purchased in new condition and were labeled as being a lighter weight than they actually were." The district court struck Wisdom's class allegations under Rule 12(f), finding that common questions did not exist, and the Ninth Circuit reversed. It held that Wisdom's allegations that the mislabeled bat models were mislabeled in similar ways, causing similar injury to every member of the class, and were sufficient at the pleading stage to warrant more discovery on whether class treatment was appropriate.

District Court Douses Festival Attendee's Class Certification

In re Fyre Festival Litigation, No. 1:17-cv-03296 (S.D.N.Y.) (Dec. 1, 2020). Judge Castel. Denying motion for class certification and default judgment.

A New York district court declined to certify a class of ticket holders and attendees of the infamous Fyre Festival. The various plaintiffs alleged that Fyre Media and its founder Billy McFarland oversaw and directed marketing of the Fyre Festival as a luxurious event with top-of-the-line accommodations, meals, amenities, and performances. In denying Daniel Jung's motion for class certification, the court noted that he had not shown that his claims were typical of those of the putative class because Jung failed to articulate which advertisements he saw or heard and which of those advertisements he relied upon when purchasing Fyre tickets or booking travel. Judge Farlan also highlighted that Jung, as a foreign national residing abroad, would not adequately represent the class on state-law claims. ■

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Discover new ways opposing counsel and regulators can access your company's secrets. Better yet, learn to protect them by reading *Bloomberg Law*'s "Protecting Data Breach Investigations from Disclosure" by **Gavin Reinke** and **Ashley Miller**.

Gavin Reinke

Ashley Miller

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ERISA

Insurer's Bad Behavior Leads to Multiple Remedies for Class

Wit v. United Behavioral Health, No. 3:14-cv-02346 (N.D. Cal.) (Nov. 3, 2020). Judge Spero. Ordering defendant to reprocess claims.

In this action, plaintiffs alleged that United Behavioral Health (UBH) wrongfully denied mental health and substance abuse disorder treatment coverage to tens of thousands of class members using internal guidelines that were inconsistent with the terms of the class members' health insurance plans. In March 2019, following a bench trial, Judge Joseph Spero concluded UBH was liable for breach-of-fiduciary-duty and denial-of-benefits claims under ERISA.

In two more-recent orders, filed the same day, Judge Spero imposed a myriad of relief terms UBH must satisfy, including requiring UBH to reprocess approximately 67,000 claims using proper criteria. The court also ruled that class members are permitted to submit additional information in support of their claim for benefits, while the plan administrator is not permitted to invoke plan exclusions not in the original denial letter. Further, for class members whose denials are reversed during reprocessing, UBH is required to pay interest on the benefits awarded as a result of reprocessing from the date the bill for services came due. Although *Wit* involved extreme facts—including findings that UBH "lied to state regulators" and "deliberately attempted to mislead the Court at trial"—it is a good reminder that plan administrators should include every basis for a denial in their denial letters and ensure that their internal guidelines for processing claims are consistent with their members' plans. ■

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For up-to-the-minute news on legal hot topics and trends, check out our annual **Alumni & Client Checkup CLE**, coming virtually March 16 & March 23.

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Labor & Employment

D.C. Circuit Affirms Dismissal of Pilots' Pension Claims

Lewis, et al. v. PBGC, No. 19-5261 (D.C. Cir.) (Dec. 7, 2020). Affirming district court order dismissing the case.

The D.C. Circuit affirmed dismissal of a putative class action brought by Delta Air Lines pilots against their retirement plan manager Pension Benefit Guaranty Corp. (PBGC), a federally chartered corporation created as part of the Employee Retirement Income Security Act (ERISA). The pilots brought ERISA claims alleging that PBGC misallocated assets after it began managing their retirement plan following Delta's 2005 bankruptcy. The district court held that *Chevron* deference applied to PBGC's interpretation of ERISA's ambiguous provisions and sided with PBGC in dismissing nearly all the pilots' claims. On appeal, the pilots argued that *Chevron* deference did not apply and that the district court relied on a nonbinding appellate decision involving PBGC in making its ruling. The D.C. Circuit disagreed and affirmed dismissal, reasoning that the agency is not a private trustee but a federal agency administering pension benefits under ERISA.

Collective Action Filed Against Most Populous County in the U.S. Dismissed

Ray v. California Department of Social Services, et al., No. 2:17-cv-04239 (C.D. Cal.) (Oct. 27, 2020). Judge Anderson. Granting summary judgment dismissal.

The Central District of California granted summary judgment in favor of Los Angeles County in a Fair Labor Standards Act (FLSA) wage-and-hour case. The putative class action was brought by home health care providers that provided services under California's In-Home Supportive Services (IHSS) plan. Because the IHSS providers are paid directly by the state pursuant to the county's plan, the workers argued that the county was their employer for purposes of the FLSA. The court rejected the plaintiffs' argument, relying in part on a 30-year-old state court decision holding that the county did not employ or hold supervisory control over the IHSS providers.

The court further rejected the plaintiffs' argument that the county should be considered a joint employer, relying on Ninth Circuit precedent for an "economic reality" test that focuses on whether the alleged employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records. The court ruled that none of those factors weighed in favor of joint employment status and concluded as a matter of law that the county could not be considered an employer of the home health care providers. ■

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17@100 – Alston & Bird rated again as a best place to work for LGBTQ+ equality, earning a 100% rating by the Human Rights Campaign for the 17th consecutive year.

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Privacy & Data Security

Former Lawyer Did Not Drop the Ball in TCPA Case

Medical & Chiropractic Clinic Inc. v. Oppenheim, No. 18-13714 (11th Cir.) (Dec. 1, 2020). Affirming summary judgment.

The Tampa Bay Buccaneers were sued in at least five class actions alleging the Buccaneers sent telefax advertisements in violation of the Telephone Consumer Protection Act (TCPA). After an unsuccessful mediation in one of those cases, the lawyer (David Oppenheim) representing the named plaintiff Medical & Chiropractic Clinic Inc. (M&C) joined a new firm, the Bock Law Firm LLC. Shortly thereafter, the Bock Firm filed a separate class action against the Buccaneers arising from the same TCPA claims and successfully settled the case. M&C sued Oppenheim and the Bock Firm, alleging that they had breached fiduciary duties by using confidential information about previous settlement negotiations with the Buccaneers to settle their class action quickly and to the detriment of the class.

The district court granted summary judgment in favor of the defendants, holding that Oppenheim and the Bock Firm did not violate any fiduciary duties. The Eleventh Circuit agreed, concluding that class counsel does not owe a fiduciary duty to class representatives that is heightened or distinct from the fiduciary duty owed to the class. If courts required class counsel to give special ethical considerations to class representatives or any other subset of the class, the remaining class members would "necessarily receive reduced ethical considerations in comparison."

No Harm No Foul Following Hack

Hartigan v. Macy's Inc., No. 1:20-cv-10551 (D. Mass.) (Nov. 5, 2020). Judge Saris. Granting motion to dismiss.

Robert Hartigan sued Macy's after a criminal cyber-attack on Macy's online database—the second hacking of the retail giant in less than a year and a half. Hackers installed malware on Macy's website to access the payment information of customers who completed online purchases between October 7 and 15, 2019. The court granted

Macy's motion to dismiss, finding the plaintiff did not adequately allege resulting injuries. Specifically, Judge Saris found that Hartigan did not allege substantial risk of future harm (via identity theft) because there were no allegations of any fraudulent use or even attempted use of the personal information to commit identity theft against any Macy's customer whose credit card information was stolen. Moreover, the court concluded that the information stolen was not highly sensitive or immutable like social security numbers and that immediate cancellation of a credit card can effectively eliminate the risk of credit card fraud in the future. The court also noted that, because the plaintiff alleged no misuse of his or any class member's data, his purchase of a credit monitoring service was not based on a reasonably impending threat and therefore did not constitute injury in fact. ■

"**Kimberly Peretti** and **Emily Poole** offer a path following a cyber-attack in *Bloomberg Law*'s "The SolarWinds Hack: How Companies Should Assess the Damage."

Kimberly Peretti

Emily Poole

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Products Liability

Affirmative Statements or Omissions: Distinction Without a Difference

Reitman v. Champion Petfoods USA Inc., No. 19-56467 (9th Cir.) (Dec. 9, 2020). Affirming denial of class certification.

The Ninth Circuit rejected the plaintiff's bid to revive her class claims based on the distinction between affirmative statements and omissions in product labeling. The plaintiff brought claims alleging that a pet food manufacturer misled consumers about the presence of contaminants in its products. The district court ruled that the putative class failed Rule 23's predominance requirement because resolution of the class claims required individual determinations of the specific information on each product package. On appeal, the court rejected the plaintiff's argument that the district court failed to adequately consider the manufacturer's uniform omissions regarding the presence of contaminants, concluding that the claims require individualized determinations regardless of whether they are based on affirmative statements or omissions.

Plaintiffs Have Free Rein to Narrow Class Definitions

Hawkins v. Kroger Co., No. 3:15-cv-02320 (S.D. Cal.) (Nov. 9, 2020). Judge Miller. Granting certification of late-narrowed class.

The Southern District of California ruled that plaintiffs may narrow their class definitions at the class certification stage without amending their complaints. The court noted that it lacked guidance on the issue from the Ninth Circuit. The court saw no problem with allowing the plaintiff to adopt a more restrictive definition given that courts routinely narrow class definitions sua sponte at the certification stage. But plaintiffs cannot advance a broader class definition without amending their pleadings. Without a showing of real prejudice to the defendant, Ninth Circuit district courts are likely to allow similar narrowed definitions without requiring an amended complaint.

Fail-Safe Argument Not a Safe Bet for Dismissal

Grundy v. FCA US LLC, No. 2:20-cv-11231 (E.D. Mich.) (Dec. 15, 2020). Judge Murphy. Denying motion to strike class allegations.

A federal judge clarified the meaning of "fail-safe" classes and ultimately refused to find one based on the pleadings alone. In a case alleging breach of warranties against an auto manufacturer, the defendant asked the court to strike the class allegations because they represented an impermissible fail-safe class. The court clarified that a fail-safe class arises only when the class "cannot be defined until the case has been resolved on its merits." Although it acknowledged that such classes are impermissible because they allow putative class members to seek a remedy without being bound by the judgment, the court concluded that it could not determine from the pleadings alone that the plaintiff's proposed class violated the rule against fail-safe classes. ■

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Daniella Main

Mia Falzarano

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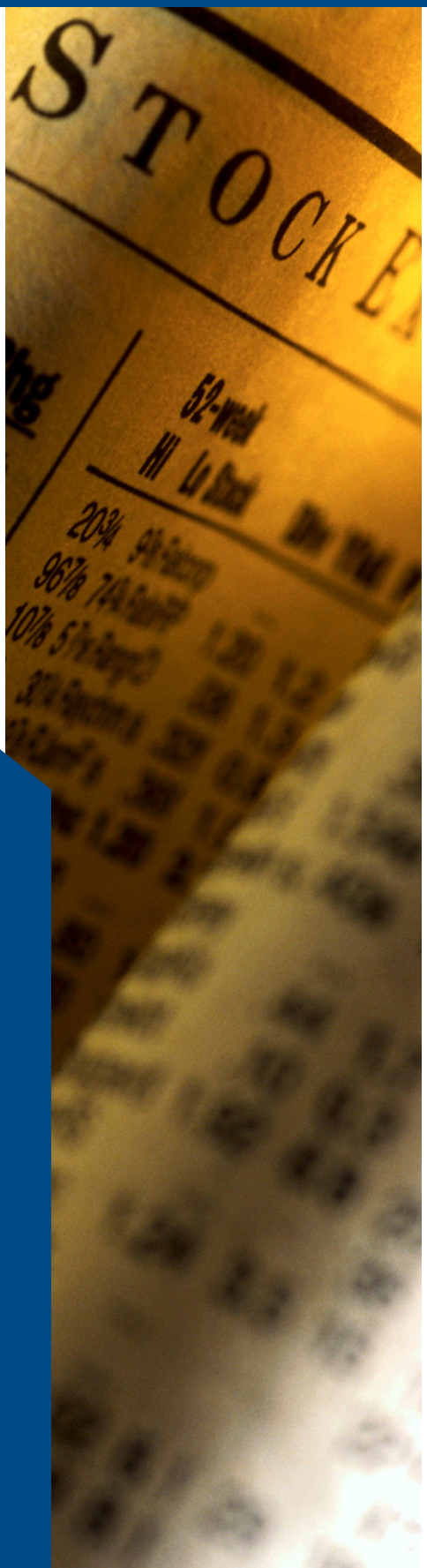

Securities

Supreme Court Agrees to Hear Class Certification Fight

Goldman Sachs Group Inc., et al., Petitioners v. Arkansas Teacher Retirement System, et al., No. 20-222 (U.S.) (Dec. 11, 2020). Granting certiorari.

The U.S. Supreme Court will weigh in on a years-long class certification fight between Goldman Sachs and a class of its investors. The Court will consider whether a defendant in a securities class action may rebut the presumption of classwide reliance that exists in federal securities class actions by pointing to the generic nature of the underlying alleged misrepresentations, thereby showing that the statements at issue had no ability to impact the trading price of the security. Goldman's challenge has broad industry support, and the Supreme Court's decision in this case will have wide-reaching implications for securities class actions.

Second Circuit Casts Doubt on Investor Access to Foreign-Language Public Records

Lea v. TAL Education Group, No. 19-3549 (2nd Cir.) (Nov. 25, 2020). Reversing dismissal.

The Second Circuit reversed the Southern District of New York's dismissal of a shareholder suit alleging that TAL Education Group, a Chinese education-services tech company with American depositary shares, engaged in sham transactions with related parties to improperly recognize over $75 million in pre-tax income and accounting profits. The Second Circuit corrected the district court for considering the plaintiffs' allegations "one by one" and emphasized that the allegations should have instead been "taken collectively" to find that they give rise to a strong inference of scienter. The appellate court also rejected TAL's argument that the investors failed to point to any "previously concealed facts subsequently disclosed to the market that could have caused the stock drop" because their complaint relied exclusively on a report stating that "all information contained herein … has been obtained from public sources." The Second Circuit noted that, in addition to containing

some nonpublic information, the report also contained information "not readily accessible to investors," such as Chinese regulatory filings and court judgments. Therefore, the stock loss following the report's disclosure of such information was sufficient to plead loss causation as to the stock-drop claims.

Postage Company Investors Get Stamp of Approval

Karinski, et al. v. Stamps.com Inc., et al., No. 2:19-cv-01828 (C.D. Cal.) (Nov. 9, 2020). Judge Fitzgerald. Granting class certification.

The court granted certification of a class of investors alleging Stamps.com artificially inflated its stock value by engaging in undisclosed, improper, and unsustainable business practices. The Stamps.com investors alleged that the company's misrepresentations about its relationship with the USPS kept its stock prices high. In granting certification, Judge Fitzgerald was persuaded by the investors' expert, who conducted a study showing statistically significant share price declines following the alleged corrective disclosures.

Insurance Company Investors in Good Hands at Class Certification Stage

In re the Allstate Corporation Securities Litigation, No. 1:16-cv-10510 (N.D. Ill.) (Dec. 21, 2020). Judge Gettleman. Granting class certification.

An Illinois federal judge certified a class of investors alleging that Allstate secretly lowered its underwriting standards in order to boost business. The class certification grant comes after the Seventh Circuit vacated the court's initial certification, directing the judge to consider evidence of market price impact in its certification analysis. On remand, Judge Gettleman found "several deficiencies" in an expert report Allstate submitted, ultimately concluding that Allstate's expert report was "not responsive" to the investors' allegations.

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Retired partner **Bernard Taylor** was honored by Georgia State College of Law with its 2021 "Ben F. Johnson Jr. Public Service Award" for his professional excellence and philanthropic leadership.

Bernard Taylor

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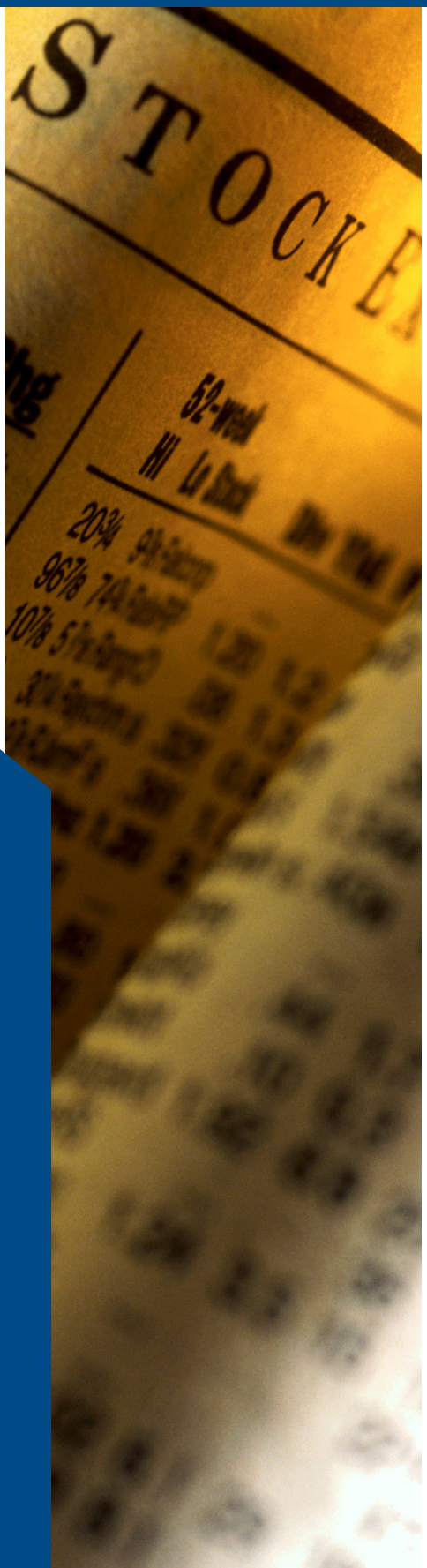

Certification Granted to Investors Alleging UnderZestimated Regulatory Woes

Shotwell v. Zillow Group Inc., et al., No. 2:17-cv-01387 (W.D. Wash.) (Oct. 28, 2020). Judge Coughenour. Granting class certification.

A federal judge certified a class of investors in a stock-drop suit alleging that Zillow misrepresented its compliance with the Real Estate Settlement Procedures Act (RESPA), failed to disclose the existence of the Consumer Financial Protection Bureau's (CFPB) investigation, and downplayed the seriousness of the situation upon disclosure. The certification period spans nearly three years, beginning when Zillow filed its initial registration statement (before the CFPB probe began) and ending when Zillow made a "final corrective disclosure" acknowledging the CFPB's intent to charge Zillow with RESPA violations (after Zillow publicly acknowledged the probe). Zillow argued that the class was too broad because the stock's average trading price in the three months following the final corrective disclosure was higher than it was at any point before Zillow initially disclosed the probe—when 90% of the class purchased its shares. In rejecting Zillow's arguments, the court held that limiting the class period on such a basis "would be a premature inquiry into the merits of the suit."

Natural Gas Investors Can Keep Drilling into Merger Announcements

In re EQT Corporation Securities Litigation, No. 2:19-cv-00754 (W.D. Penn.) (Dec. 2, 2020). Judge Colville. Denying motion to dismiss.

A federal court denied natural gas company EQT Corporation's motion to dismiss claims brought by shareholders alleging that EQT exaggerated the synergies that would flow from its $6.7 billion merger with Rice Energy. The court refused to accept the representations EQT made in connection with the merger as unactionable forward-looking statements because they contained assertions of material fact, such as the total undrilled acreage and drilling capacity that would result from the merger.

Delaware Supreme Court Clarifies Scope of Stockholders' Rights in 220 Demands

AmerisourceBergen Corp. v. Lebanon County Employees' Retirement Fund, No. 60, 2020 (Del.) (Dec. 10, 2020). Affirming interlocutory judgment.

Before this Delaware Supreme Court ruling, the Delaware Court of Chancery split on whether the court should consider merits-based defenses, as opposed to purely procedural defenses, when considering Delaware Section 220 demands for corporate books and records. The Delaware Supreme Court stepped in to resolve the tension, confirming that shareholders need only show a "proper purpose"—which the court defined as a "purpose reasonably related to such person's interest as a stockholder"—to justify a books and records request. The court held that stockholders are not required to identify the objective for their investigation or to "demonstrate that the wrongdoing or mismanagement [they seek] is actionable" to satisfy the proper purpose rule. The court determined, however, that a mere disagreement with a business decision does not qualify as a proper purpose. ■

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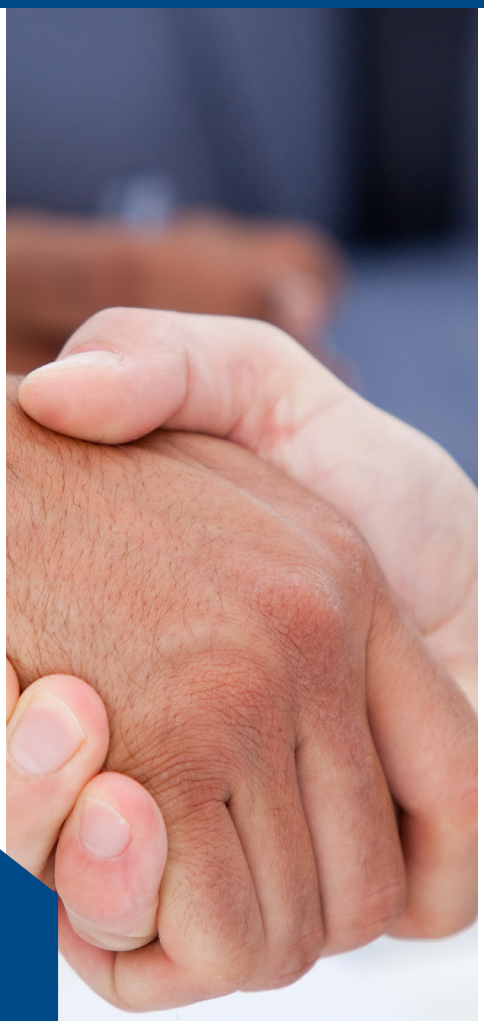

Settlements

Judge Not Sweet on Attorneys' "Sweetheart Deal"

Monplaisir, et al. v. Integrated Tech Group LLC, et al., No. 3:19-cv-01484 (N.D. Cal.) (Nov. 7, 2020). Judge Alsup. Denying approval of settlement.

The Northern District of California rejected a preliminary settlement proposal in a wage-and-hour collective action on the grounds that the proposal unduly rewarded the attorneys. The court ruled that the settlement, which provided over $1.5 million for plaintiffs' counsel, was a "steal." The award was between 28% and 45% of the gross payment that could be expected—far above the Ninth Circuit's benchmark of 25%. The order serves as a reminder that judges evaluate proposed settlements and that many will not hesitate to strike down agreements that appear to reward attorneys at the expense of the class.

$17 Million Settlement for Overdraft Fees Includes $4.6 Million for Attorneys' Fees

Roberts v. Capital One N.A., No. 1:16-cv-04841 (S.D.N.Y.) (Dec. 2, 2020). Judge Schofield. Approving $17 million settlement.

Judge Schofield approved a $17 million settlement between Capital One and a class of its customers who alleged that the bank improperly charged them overdraft fees on debit card transactions when there were sufficient funds available in their accounts at the time the transactions were approved. The settlement provides that Capital One will pay approximately $12 million in settlement benefits to approximately 340,000 current and former Capital One accounts, which averages to $36 per account. No class members objected to the settlement. The lead plaintiff requested an incentive award of $15,000, but Judge Schofield awarded her $10,000. Class counsel's request for attorneys' fees totaling 30% of the settlement fund also was reduced as Judge Schofield awarded 27% of the fund in attorneys' fees for a total of approximately $4.6 million plus $185,647 in litigation costs.

California Retail Workers Strike Big

Ser Lao, et al. v. H&M Hennes & Mauritz L.P., No. 5:16-cv-00333 (N.D. Cal.) (Dec. 1, 2020). Judge Davila. Approving $3.8 million settlement.

Judge Davila granted final approval of a $3.8 million settlement to resolve a class action against the retail giant H&M for allegedly violating California labor laws by failing to pay proper wages and provide meal and rest breaks to its workers. The settlement class consisted of all non-exempt employees who were employed by H&M in California from January 8, 2013 through October 31, 2019. The approved deal provides for roughly $2.5 million to be divided among the class members. Class counsel will receive nearly $1.5 million in attorneys' fees and costs, while the class representative is set to receive a $15,000 service award.

Settlement Succeeds in Big Bank LIBOR Manipulation Suit

In re LIBOR-Based Financial Instruments Antitrust Litigation, No. 1:11-md-02262 (S.D.N.Y.) (Oct. 5, 2020). Judge Buchwald. Approving $22 million settlement.

Judge Buchwald approved a $22 million settlement between a class of indirect investors and five major Wall Street banks. The settlement resolves one of many in a flurry of lawsuits against the financial institutions for allegedly manipulating the London Interbank Offered Rate (LIBOR) in violation of the Sherman Act. According to the class members, the defendant banks orchestrated lower LIBOR submissions to avoid the appearance that the banks were facing financial trouble. Judge Buchwald approved the settlement class, consisting of over-the-counter investors who indirectly transacted with the defendant banks from August 1, 2007 to May 31, 2010. The court granted final approval of the settlement amount and the plan of allocation.

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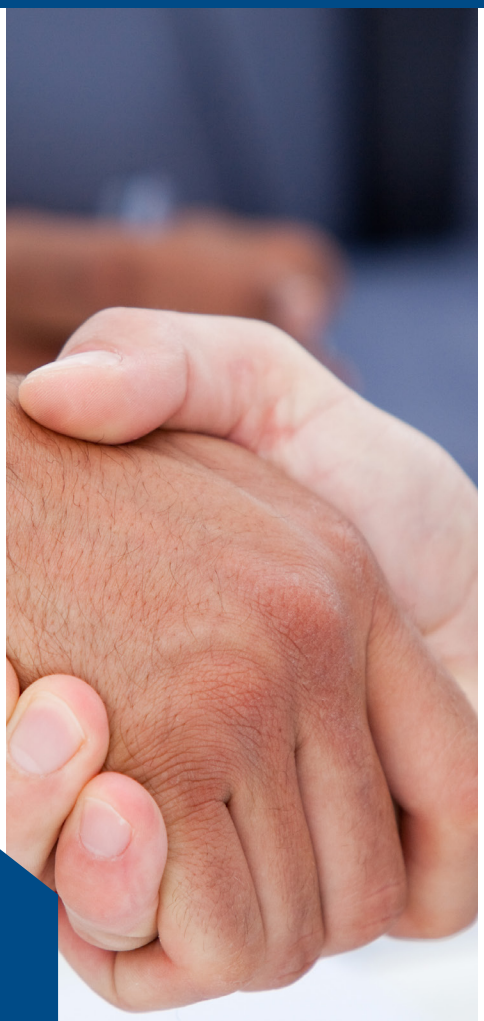

Judge Finalizes Settlement in Brain Health Class Action

Collins v. Quincy Bioscience LLC, No. 1:19-cv-22864 (S.D. Fla.) (Nov. 18, 2020). Judge Goodman. Approving settlement.

Judge Goodman granted final approval to a class action settlement arising from allegations that Quincy Bioscience LLC misled consumers about the effects of its memory supplement, Prevagen. The settlement resolves a string of lawsuits filed by consumers across the country and will include all individuals who purchased one or more Prevagen products from Quincy or from an authorized reseller within the United States from January 1, 2007 though the date of the settlement's preliminary approval—July 21, 2020. Eligible claimants may receive partial refunds of up to $70 with proof of purchase. Judge Goodman also approved about $4.2 million in attorneys' fees and expenses to class counsel. Notably, the court denied the request to award contribution awards of $10,000 each to the class representatives and $2,000 each to eight other plaintiffs, citing the Eleventh Circuit's recent ruling in *Johnson v. NPAS Solutions LLC*. However, Judge Goodman notes that the denial is made without prejudice in case the *Johnson* decision is reversed or overruled.

Court Settles It: Captive Audience Calls Out Telecom Company

*James, et al. v. Global Tel*Link Corp., et al.*, No. 2:13-cv-04989 (D.N.J.) (Oct. 20, 2020). Judge Martini. Approving $25 million settlement.

Judge Martini approved a $25 million settlement on the eve of a class action trial, to be awarded to inmates of New Jersey correctional institutions who made phone calls using Global Tel*Link (GTL) services and individuals who established payment accounts to receive inmate phone calls. The plaintiffs claimed that GTL engaged in unconscionable business practices under the New Jersey Consumer Fraud Act by establishing pricing models that were irrationally expensive and shifted the financial burden to a captive audience. The court determined that $25 million would grant immediate relief to the approximately 55,000 currently incarcerated GTL users as well as several hundred other class members who submitted a valid claim.

This limited jurisdictional outcome leaves room for future classes to bring overlapping claims against the telecommunications provider.

Contact Lens Providers Pay

Thompson, et al. v. 1-800 Contacts Inc., et al., No. 2:16-cv-01183 (D. Utah) (Oct. 20, 2020). Judge Campbell. Approving $40 million settlement.

A Utah district court approved a $40 million class settlement resolving antitrust claims that retailers worked together to prevent consumers from finding cheaper contact lenses. In resolving this litigation—which arose out of a Federal Trade Commission enforcement action—the alleged instigator, 1-800 Contacts, agreed to pay $15.1 million, the most of any defendant. The district court did not address class counsel's fee award because the deadline for fee objections had not yet run. ■

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