ALSTON & BIRD

CLASS ACTION & MDL roundup

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CLASS ACTION & MDL **roundup**

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Where the (Class) Action Is

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

If the fourth quarter of 2023 was a peek at what's to come, 2024 is going to be an exciting year in the world of class actions. We will be here to summarize all the new developments, but before we look ahead, we must look back. We tip off with a landmark ruling in an antitrust case that could change the landscape of college athletics. We are also seeing a rise in PFAS litigation, which will likely continue throughout 2024. In this products liability case, a Sixth Circuit judge vacated a ruling that certified a class of nearly 12 million people.

Don't forget to read your labels! The conscious consumer is in. We cover several false labeling and false advertising cases in the consumer protection section of the Roundup. In the technological age, privacy class actions are more prevalent than ever and span every industry from hospitality to automotive, just to name a couple. In the fourth quarter of 2023, the courts answer the age-old question: can your car read your text messages?

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.

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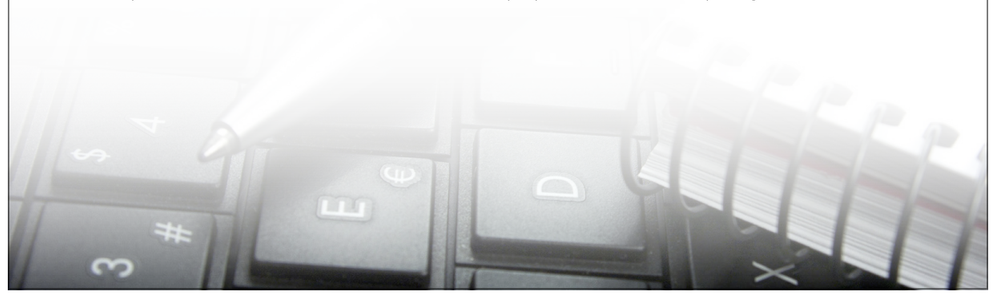

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Antitrust/RICO

Student-Athletes Score Win in Battle for Certification of NIL Class

In re College Athlete NIL Litigation, No. 4:20-cv-03919 (N.D. Cal.) (Nov. 3, 2023). Judge Wilken. Granting class certification.

In a landmark ruling that could further change the face of college athletics, student-athletes challenging NCAA restrictions on their NIL (name, image, and likeness) rights prevailed on a motion to certify three Rule 23(b)(3) damages classes: broadcast NIL rights, video game injury and damages, and third-party NIL injury and damages.

The court rejected the NCAA's argument that the plaintiffs could not satisfy the predominance requirement in showing classwide antitrust impact and damages. The NCAA contended the student-athletes could not establish a value to NIL in broadcasts given that no payments had ever been made to student-athletes, or even professional athletes, to compensate them specifically for their broadcast NIL. The court ruled, however, that value could be inferred from the fact that broadcasts require the use of student-athletes' NIL and that media companies require contractual assurances that the right to use athlete NILs are being conveyed or that the media partners are indemnified for their use. The court credited the testimony of the student-athletes' expert's opinion that the broadcast NIL was at least 10% of the revenues of the NCAA's broadcast contracts.

Banks Emerge Victorious from Battle of the Experts, Vanquish Class Certification

In re Interest Rate Swaps Antitrust Litigation, No. 1:16-md-02704 (S.D.N.Y.) (Dec. 15, 2023). Judge Oetken. Denying class certification.

A New York federal court denied a motion for class certification brought by various investment entities that entered interest rate swaps (IRSs) with large investment bank dealers. The investors alleged that the banks conspired to boycott trading platforms that would permit anonymous, "all-to-all" trading of IRSs. The banks' alleged conspiracy prevented the growth of all-to-all trading platforms that would have provided price benefits to investors unavailable in the current over-the-counter model, where investors trade IRSs directly with dealers. In other words, investors were precluded from engaging in transactions with other investors without the direct involvement of a dealer, which resulted in inflated spreads on IRSs.

The court denied the investors' motion for class certification for failure to satisfy the predominance requirement of Rule 23(b)(3) based on the banks' evidence that many trades were not affected by the alleged conspiracy because they were executed at spreads that were less than or equal to zero. The court resolved a battle of the experts, finding that the investors' expert, in claiming that no below-zero swaps occurred, made a crucial assumption that smoothed out what was otherwise considerable variation in the model and masked what should have been below-zero swaps. The court accepted the banks' expert's testimony that this led to a false positive rate of 23–29%.

Court Pulls the Cord on Catheter Class Action

North Brevard County Hospital District v. C.R. Bard Inc., No. 2:22-cv-00144 (D. Utah) (Dec. 27, 2023). Judge Shelby. Denying class certification.

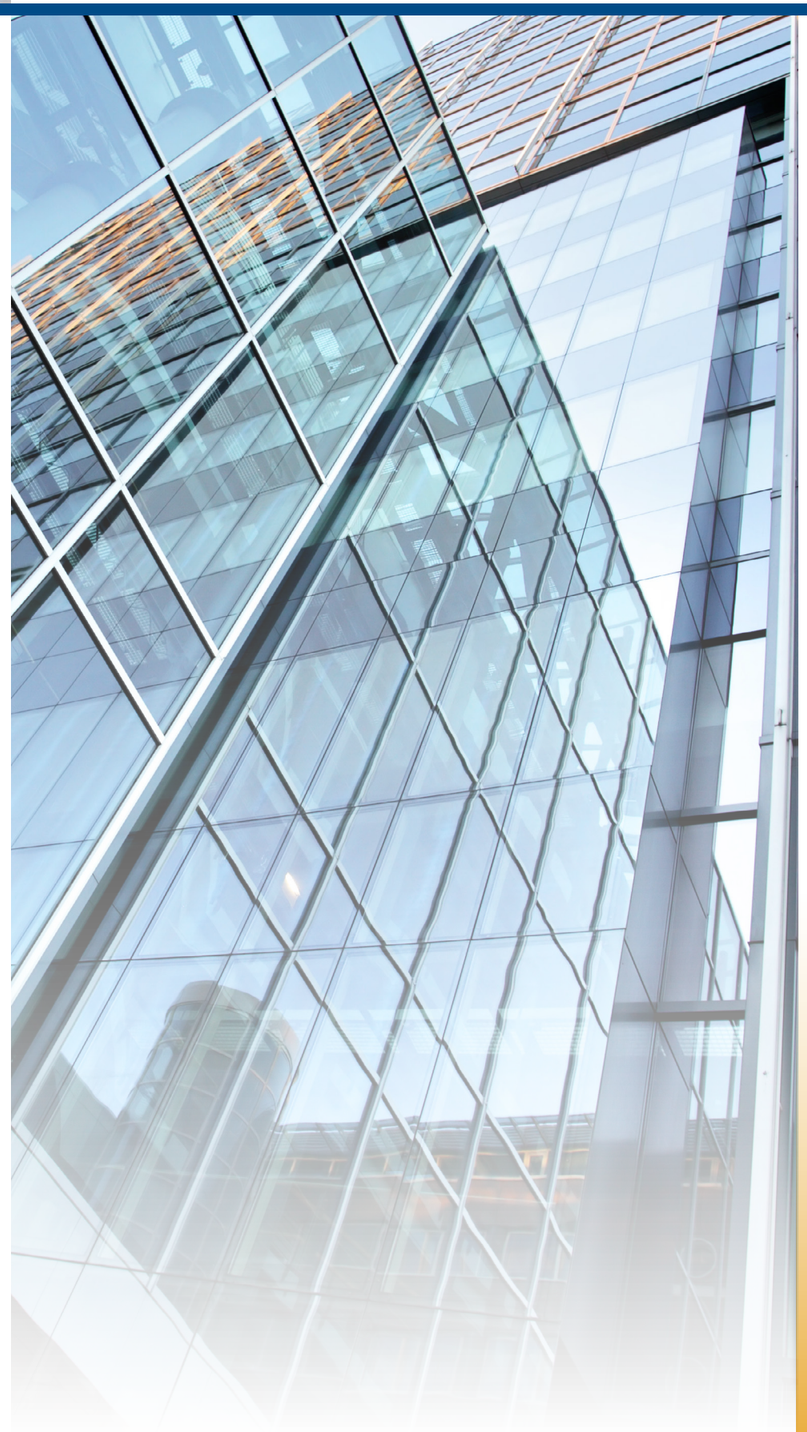
A plaintiff hospital district failed to make it past the Rule 23(a) requirements in its bid for class certification against medical device manufacturer Bard. The hospital district alleged that Bard unlawfully monopolized the market for peripherally inserted central catheters (PICCs) by tying the sale of its tip-location system (TIL) to its sale of PICCs. Bard's TLS allowed more precise navigation of the PICC through a patient's body and confirmation of its proper placement, preventing serious health risks. But a stylet is required to operate a TLS while placing a PICC, and only Bard-produced PICCs come with the proprietary stylet necessary to operate Bard's industry-leading TLS. So if a PICC purchaser wanted to use Bard's TLS, the only economically viable option was to purchase a Bard PICC pre-loaded with the necessary stylet—even if they already had (or preferred) a competitor PICC, the purchaser would have to buy the Bard PICC to get the required stylet. Because of Bard's commanding position in the TLS market, the combination allowed Bard to capture over 70% of the market for the sale of PICCs.

The court found that the hospital district could not satisfy Rule 23(a)(3)'s typicality requirement. Although the hospital district suffered the same alleged antitrust price injury as other purchasers of Bard's PICCs, the district was subject to unique defenses. The hospital district was distinct from the majority of the proposed class because it did not use Bard's TLS and purchased only Bard's stand-alone PICCs, which it preferred because the PICCs offered features and services competitors did not. In other words, while most proposed class members had to buy Bard's PICCs to use Bard's TLS, the hospital district could have purchased PICCs elsewhere, but had a non-price preference for Bard's PICCs.

"**Kathleen Benway** helps explain why "Senator's Hold on FTC Nominee Robs Agency of Political Diversity, Regulatory Attorneys Say" to the *National Law Journal*."

Kathleen Benway

In addition, the hospital district failed to establish adequacy because it, along with some other class members, likely benefited from the alleged tie. Without the tie, demand for Bard's competitors' PICCs would increase as some consumers chose to combine Bard's TLS with another company's PICC. Rather than increased competition in the PICC market driving prices down, Bard's expert explained that economic theory predicted that the competitors would be incentivized to raise their prices for stand-alone PICCs and Bard would follow suit. Additionally, for customers that continued to purchase the bundled TLS-PICC, Bard would know the consumer had a non-price-based preference and would likely raise prices. ■



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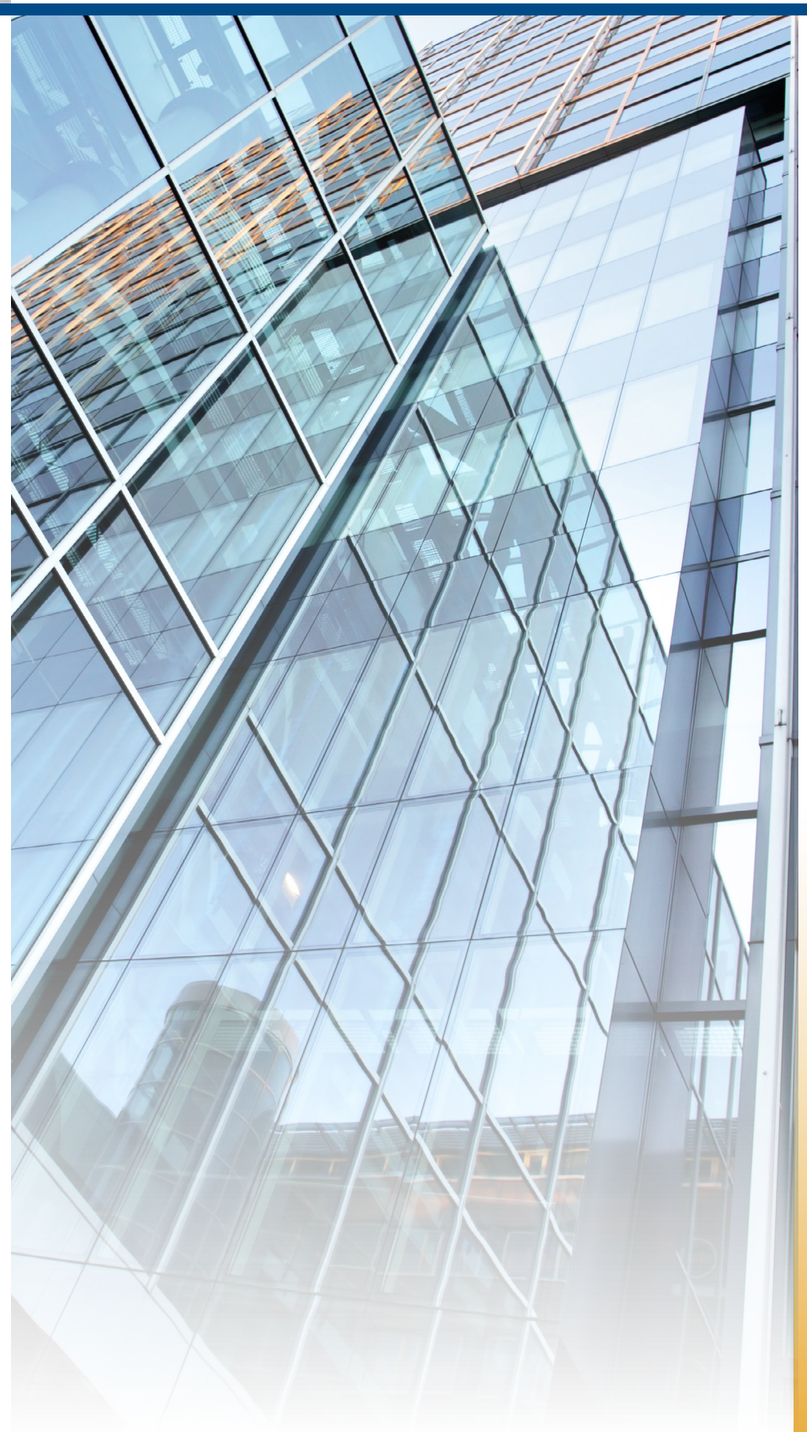
Banking & Insurance

- **Second Circuit: No Antitrust Standing in Class Action over Aluminum Pricing Conspiracy**

  In re Aluminum Warehousing Antitrust Litigation (Fujifilm Manufacturing USA Inc. v. Goldman Sachs & Co. LLC), Nos. 21-643, 21-651, 21-660, 21-663, 21-954 (2nd Cir.) (Nov. 1, 2023). Affirming grant of summary judgment and dismissing appeal of denial of class certification.

  The Second Circuit affirmed the district court's grant of summary judgment to the defendants in a proposed class action and, as a result, dismissed the plaintiffs' appeal of the district court's denial of class certification as moot. The plaintiffs claimed that the defendants conspired to artificially limit the supply of aluminum in North America, which resulted in increased prices and excess profits on aluminum sales for the defendants. While the plaintiffs were purchasers of aluminum, none of them purchased aluminum from the defendants. The district court denied class certification for lack of predominance under Rule 23(b)(3) and subsequently denied summary judgment for lack of antitrust standing.

  On appeal, the Second Circuit held that the plaintiffs were not "efficient enforcers of the antitrust laws," and so lacked standing to assert their claims because their injuries were indirect and there were more direct victims. As a result, the Second Circuit dismissed the plaintiffs' appeal of the district court's denial of class certification as moot. Because no named plaintiffs could maintain the action on their own behalf, they could not seek relief on behalf of the class. ■



"Item 303 is on the block. **Elizabeth Clark** and **Madeleine Davidson** break down the Macquarie oral arguments before the Supreme Court for ***Law360*** in "What to Expect from High Court in Corp. Disclosure Case."

Elizabeth Clark

Madeleine Davidson

Consumer Protection

- **The Second Circuit Takes a Not-So-Friendly Stance on "Reef Friendly" Label Claims**

  Richardson v. Edgewell Personal Care LLC, No. 23-128 (2nd Cir.) (Oct. 30, 2023). Reversing dismissal of complaint alleging false labeling claims.

  The Second Circuit vacated the dismissal of a complaint challenging the labeling of Hawaiian Tropic sunscreen products. The plaintiff alleged that the front label claim "Reef Friendly*" was misleading because the products contained ingredients harmful to reefs. The district court ruled that "Reef Friendly*" was ambiguous, not misleading, and that the back-label disclaimer "*No Oxybenzone or Octinoxate" or "*Hawaii Compliant: No Oxybenzone or Octinoxate" clarified any ambiguity.

  But the Second Circuit disagreed, determining that (1) a reasonable consumer could plausibly believe that "Reef Friendly*" indicates that the products do not contain any reef-harming ingredients; and (2) the back-label disclaimers were incomplete because other reef-harming ingredients, which consumers may not recognize due to their unfamiliarity with "the universe of chemicals harmful to coral reefs," were present in the products. Furthermore, citing its prior decision in *Mantikas v. Kellogg*, the court held that the plaintiff was not expected to look beyond the allegedly misleading front-label representations to discover that the products contained reef-harming ingredients. The court noted that whether a reasonable consumer could be misled by these representations was a question to be addressed on summary judgment or at trial.

- **Eighth Circuit Rejects Challenge of Deceptive Discount Ads**

  Hennessey v. The Gap Inc., No. 22-3187 (8th Cir.) (Nov. 14, 2023). Affirming dismissal with prejudice.

  The Eighth Circuit has rejected the revival of a proposed class action against The Gap for alleged deceptive advertising of discounted clothes. The plaintiff asserted that former prices on clothing items were not genuine recent prices but instead were used to mislead the customer into believing that the "sale" products were discounted. The panel held that the plaintiff failed to demonstrate an "ascertainable loss" under the Missouri Merchandising Practices Act because she did not prove that the purchased clothes were of lower quality or worth less than the price she paid. Likewise, the panel affirmed the dismissal of the plaintiff's unjust enrichment claim. Lastly, the court rejected the plaintiff's challenge to the court's order of dismissal with prejudice because she failed to request leave to amend.

- **Game Over: Ninth Circuit Affirms Dismissal of Minor's Contract Claims**

  V.R. v. Roblox Corp., No. 23-15216 (9th Cir.) (Dec. 21, 2023). Affirming dismissal with prejudice.

  The Ninth Circuit upheld the dismissal of a proposed class action against Roblox, a gaming company, where the plaintiff alleged that Roblox engaged in illegal contracts with minors. In an unpublished opinion, the Ninth Circuit rejected the argument that California minors cannot enter contracts for in-game purchases because, the court held, that would overly restrict minors from buying any software licenses. The court also held that the plaintiff lacked standing for injunctive relief and declaratory relief because he did not show imminent risk and had not requested a refund. The panel concluded that the plaintiff failed to plausibly allege his purchases were void and dismissed claims based on unjust enrichment and California's Unfair Competition Law. The court also rejected claims of fraudulent misrepresentation, stating that the plaintiff did not show reliance on any misrepresentation by Roblox.

- **Requiring Actual Damages Under the Fair Credit Reporting Act Is Not Fair**

  Santos v. Healthcare Revenue Recovery Group LLC, No. 22-11187 (11th Cir.) (Nov. 6, 2023). Vacating order denying class certification and remanding for further proceedings.

  The Eleventh Circuit reversed the district court's order denying class certification of a Fair Credit Reporting Act lawsuit. Joining every other circuit court to address the issue, the Eleventh Circuit determined that proof of actual damages is not a prerequisite to recovering statutory damages under the Act. Willful violations of the Act instead entitle aggrieved consumers to recover *either* actual damages or statutory damages of $100–$1,000. Because the district court incorrectly found that actual damages were required and denied class certification as a result, the Eleventh Circuit vacated the class certification order and remanded for further proceedings.

"Verdicts costing $10 million or more are now commonplace. **Jenny Hergenrother** and **Mia Falzarano** help you keep the jury's finger off the button with "3 Principles for Minimizing the Risk of a Nuclear Verdict" in *Law360*."

Jenny Hergenrother

Mia Falzarano

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Court Certifies Two Nationwide Classes Who Received Calls

Samson v. United HealthCare Services Inc., No. 2:19-cv-00175 (W.D. Wash.) (Oct. 13, 2023). Judge Pechman. Granting class certification.

A Washington federal court certified two classes of nationwide consumers in an action against United HealthCare alleging that United violated the Telephone Consumer Protection Act (TCPA) by placing non-emergency calls using an artificial prerecorded voice to call cellular telephone numbers without the prior express consent of the party being called. The court certified two classes—a wrong-number class and a do-not call class. The wrong-number class comprises individuals who received a call from United but according to United's records were not UnitedHealthcare members at the time of the call. The do-not-call class comprises individuals who received a call from United but, according to United's records, were flagged as "do not call."

In granting class certification, the court rejected United's arguments that the proposed classes did not meet the predominance requirement for certification because common questions did not predominate over individual questions. The court ruled that United failed to demonstrate that individual questions—such as whether United's internal "do not call" and "wrong number" notations were reliable—were prevalent enough to defeat class certification.

Lack of Standing Sinks Tuna Plaintiff's Motion to Certify Class

Craig v. American Tuna Inc., No. 3:22-cv-00473 (S.D. Cal.) (Dec. 21, 2023). Judge Huie. Denying motion for class certification.

A New York tuna consumer's class certification motion is dead in the water due to lack of standing. The plaintiff sought to certify claims alleging violations of New York's consumer protection laws on behalf of a putative class of New York consumers. The plaintiff alleged that the defendant marketed its various tuna products as "American Made" or "Caught and Canned in the USA" even though the tuna was caught outside U.S. waters. But the court found that the plaintiff failed to offer any evidence that he was a victim of this "alleged mischaracterization," such as that he saw the allegedly misleading labels or that he purchased one of the products at issue. Instead, The plaintiff offered a "general opinion" of a statement that was not even on the labels at the time the products were purchased. The court determined that, with no "evidence or testimony … as to what misleading statements appeared on the cans he purchased," the plaintiff did not have standing to represent the putative class. The motion for class certification was denied, and the court ordered the plaintiff to show cause why the case should not be dismissed for lack of Article III standing. ■

Congratulations to **Cari Dawson** for being selected for the 2024 National Bar Association Commercial Law Section Cora T. Walker Award for promoting diversity, equity, and inclusion within the legal profession.

Cari Dawson

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Labor & Employment / ERISA

- **Drivers Lose Class Cert. Bid in Misclassification Suit**

  Martinez v. FedEx Ground Package System Inc., No. 1:20-cv-01052 (D.N.M.) (Oct. 27, 2023). Judge Yarbrough. Denying class certification.

  Former employees alleged that FedEx violated the New Mexico Minimum Wage Act by misclassifying them as independent contractors and paying them a flat daily rate that did not take into consideration their actual number of hours worked. A central issue was whether FedEx "employed" drivers like the plaintiffs, jointly and in addition to the plaintiffs' undisputed employers (companies contracting with FedEx referred to as "independent service providers"). The court denied certification, finding that resolving that central issue in individual trials would not sufficiently advance the litigation. The court noted that in the class-action format, it is impossible to determine whether FedEx is a joint employer without engaging in individual fact-finding for each independent service provider (there are over 100), which is not an efficient use of the court's time. The court also found that regardless of whether FedEx was each driver's joint employer, the plaintiffs failed to offer any common evidence necessary to establish that drivers worked more than 40 hours per week, how many hours of overtime drivers worked, or how they were paid. The court denied class certification, noting the evidence in the case showed it was necessary to interview each driver and examine payroll records for each driver.

- **Class Wins Pre-Trial Liability Judgment in BIPA Fingerprint Scan Case**

  Thompson v. Matcor Metal Fabrication (Illinois) Inc., No. 2020-CH-00132 (Ill. Cir. Ct. 10th Dist.) (Dec. 7, 2023). Granting pre-trial liability judgment.

  A class of current and former employees prevailed on a motion for summary judgment against their employer in what is believed to be the first summary judgment ruling for a certified class under the Illinois Biometric Information Privacy Act (BIPA). In September 2019, the defendant employer began using a new timekeeping policy to collect its employees' fingerprints using "biometric scanners" to determine when employees clocked in and out of work. The scanners were connected to the employer's timekeeping vendor (ADP), and the company sent finger-scan data to ADP every time an employee scanned his or her fingertips.

  The Illinois state court, determining there was no dispute of material fact, entered a pre-trial liability judgment against the employer for collecting employee biometric data through its timekeeping system in violation of BIPA. The court dismissed a series of defenses, including that an employer must "collect" and store its employees' fingerprints for BIPA to apply and that fingertip scans are different from fingerprint scans. Because the record established that the employer failed to obtain its employees' consent before collecting their fingerprints and there was no governing retention policy, the court granted the plaintiffs' motion for summary judgment. ■

"Tired of hiring over and over? Looking for someone who can walk, talk, and smile? In *Bloomberg Law*, **Anna Saraie** and **Martha Doty** remind you not to be a fool –"Pre-Hire Personality Tests Set Legal Challenges for Employers."

Anna Saraie

Martha Doty

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Privacy & Data Security

- **Invasion of Privacy Requires Harm in Washington State**

  Jones v. Ford Motor Co., No. 22-35447 (9th Cir.) (Oct. 27, 2023). Affirming district court's dismissal for failure to state a claim.

  An invasion of privacy without injury does not satisfy the Washington Privacy Act (WPA), according to the Ninth Circuit. The plaintiffs claimed a statutory violation because their vehicles' infotainment systems allegedly download all text messages and call logs from their cellphones as soon as they are connected to the vehicle and permanently store those communications without the plaintiffs' knowledge or consent. The Ninth Circuit affirmed the dismissal because an invasion of privacy, without more, does not satisfy the statutory requirement of an injury to the claimant's business, person, or reputation.

- **Can't Buy Me Personal Jurisdiction: Ninth Circuit Requires Causal or Direct Relationship**

  Briskin v. Shopify Inc., No. 22-15815 (9th Cir.) (Nov. 28, 2023). Affirming dismissal for lack of personal jurisdiction.

  California shopper Brandon Briskin sued Shopify, a Canadian company that operates an e-commerce payment platform throughout the United States, alleging Shopify violated various California privacy and unfair competition laws through its extraction and retention of customer data and by concealing its involvement in consumer transactions. The district court dismissed the action for lack of personal jurisdiction, and the Ninth Circuit affirmed on appeal.

  The Ninth Circuit held that Briskin could not rely on Shopify's general contacts with California—such as its brick-and-mortar stores or contracts with California merchants—to establish specific jurisdiction. Although those contacts were intentional, Briskin's claims did not "arise out of" or "relate to" those contacts such that it could be said that Shopify expressly aimed its conduct toward California. The court held that Briskin's presence in California, making his purchase there, and suffering his privacy-based injuries there also did not demonstrate that Shopify expressly aimed its conduct toward California because the inquiry is focused on the defendant's contacts with the forum state, not the plaintiff's.

  The court also articulated a framework from its "interactive website" caselaw to assess whether Shopify's e-commerce platform was specifically directed to California shoppers—that is, whether it had a "forum-specific focus." The court answered no because Shopify's platform is available throughout the United States, is indifferent to the location of the merchant or consumer, and did not prioritize customers in California or specifically cultivate them. The fact that California is a large market for Shopify is not enough, on its own, to demonstrate express aiming.

- **Waiving the Waiver: District Court Finds Class Action Waiver Inapplicable in MDL**

  In re Marriott International Customer Data Security Breach Litigation, No. 8:19-md-02879 (D. Md.) (Nov. 29, 2023). Judge Bailey. Granting class certification.

  Marriott suffered a data breach that gave hackers access to the information of Marriott guests and members of Starwood's Preferred Guest Program (SPG). The parties identified 10 bellwether claims, each keyed to the laws of a different state, and the bellwether plaintiffs moved for class certification. Marriott argued, among other things, that the class action waiver in the SPG terms and conditions precluded a finding of typicality because the class representatives were SPG members who had agreed to that waiver, while many class members were not. The court certified the class and avoided the typicality question by limiting it to only SPG members. On appeal, the Fourth Circuit held that the district court erred in failing to address whether the class waiver barred certification and remanded for consideration of that issue. On remand, the court once again granted class certification and held that the waiver did not apply for two reasons. First, Marriot had waived the class action waiver by requesting that the cases be consolidated in an MDL in Maryland. And second, even if Marriot did not waive the class waiver, it was unenforceable because as written it impermissibly limited the court's authority, contrary to federal rules. ■

"It's not a matter of if, but when. Be ready by learning "Ransomware Attack Best Practices" with **Kate Hanniford** at the Incident Response Forum Masterclass 2024 webinar, hosted by Cybersecurity Docket, on April 18."

Kate Hanniford

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Products Liability

- **Court Orders PFAS Class to Stand Down Given the Named Plaintiff's Lack of Standing**

  Hardwick v. 3M Co., No. 22-3765 (6th Cir.) (Nov. 27, 2023). Vacating class certification and remanding with direction to dismiss due to lack of standing.

  The Southern District of Ohio certified a class of nearly 12 million Ohio residents, each of whom had at least small amounts of certain per- and polyfluoroalkyl substances (PFAS) in their blood. On appeal, the Sixth Circuit determined the named plaintiff lacked standing to sue, vacating the class certification decision and directing the lower court, on remand, to dismiss the case.

  The Sixth Circuit focused its standing inquiry on the traceability requirement, holding that the plaintiff failed to connect the alleged harm to each defendant. First, the plaintiff failed to differentiate between the 10 defendants. Citing Supreme Court precedent, the Sixth Circuit explained "standing is not dispensed in gross"; a plaintiff must show how each defendant probably caused his injury. Second, the plaintiff failed to explain how these defendants were liable for his specific injury. There are thousands of PFAS variations, but the plaintiff's alleged injury stems from the five distinct PFAS variations that were found in his blood. Therefore, despite the plaintiff's argument that the group of "defendants manufactured or otherwise distributed 'PFAS,'" he still did not trace his injury to the defendants because he never explained whether these defendants contributed to any of these five PFAS variations ending up in his blood. Given this lack of traceability, the court vacated class certification, commenting, "[s]eldom is so ambitious a case filed on so slight a basis."

- **Material Isn't the Same as Central: Plaintiffs Omitted a Valid Explanation of the Defect's Centrality**

  Gomez v. Intel Corp., No. 22-35652 (9th Cir.) (Nov. 2, 2023). Affirming dismissal of fraudulent omissions claims.

  The plaintiffs brought a class action against Intel Corporation, alleging fraudulent omission and unfair conduct. In making these claims, the plaintiffs pointed to Intel's processors, claiming they were defective due to increased security threats. The district court dismissed these claims, and the Ninth Circuit affirmed.

  California-based fraudulent omission claims require a defendant to have had "a duty to disclose the omitted fact." Such a duty arises only when, among other requirements, the omitted fact is "material," and "the defect was central" to the functionality of the item. The district court and Ninth Circuit agreed that the plaintiffs failed to demonstrate the centrality prong. Though data security could be important to purchasers of the processor, the alleged defect—namely, the decreased security—did not impact the "central function" of the processor, which was to act as "the brains" of the computer. Because the alleged defect was not central to the processor's function, Intel did not have a duty to disclose the claimed defect and the claim for fraudulent omission failed. Moreover, in affirming the dismissal of the unfair conduct claims, the Ninth Circuit agreed that some of these claims largely mirrored the fraudulent omission claims, meaning they too must be dismissed. ■

"*Law360* checked in with **Todd Benoff** to see where your autonomous vehicle is taking you in "Transportation Regulation & Legislation to Watch in 2024."

Todd Benoff

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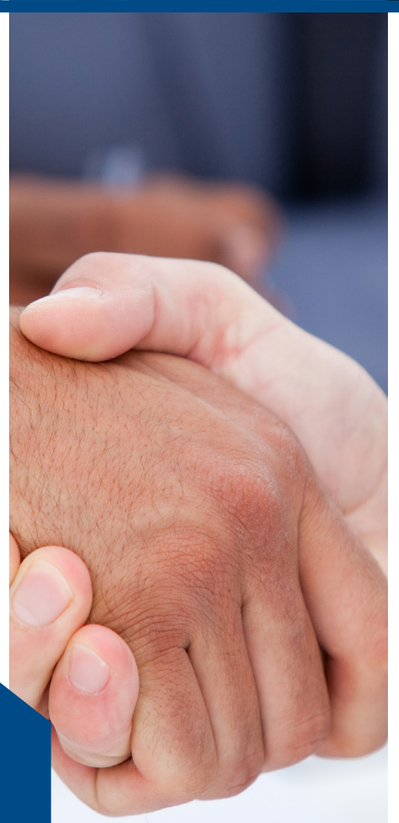

Settlements

More Friends ≠ More Settlement Money

In re Facebook Inc. Consumer Privacy User Profile Litigation, No. 3:18-md-02843 (N.D. Cal.) (Oct. 10, 2023). Judge Chhabria. Approving $725 million settlement.

Judge Vince Chhabria approved a class action settlement involving Meta Platforms Inc. (f/k/a Facebook Inc.), which arose out of the alleged unlawful sharing of Facebook users' private content with thousands of third parties. The settlement class is massive and includes all Facebook users in the United States between May 24, 2007, and December 22, 2022. The settlement itself—$725 million—is also sizeable, and is in addition to the $5 billion Meta paid to the FTC for the conduct alleged in this case. Judge Chhabria adopted the parties' proposed plan of allocation (for use in divvying up the settlement pot), which assigns "allocation points" to each class member based on how many months they had an activated account on Facebook. Judge Chhabria noted that Meta confirmed that there was a "positive correlation" between the length of time and the degree to which third parties had access to a user's information, rejecting the class objectors' proposals that the allocation should be based on the number of each class member's Facebook friends.

Class Sucks In Liposuction Coverage Settlement

Akhlaghi v. Cigna Corporation, No. 4:19-cv-03754 (N.D. Cal.) (Oct. 10, 2023). Judge Tigar. Approving settlement.

A California federal judge granted final approval to a settlement resolving the claims of a class of patients who argued that an insurance company wrongly denied coverage for liposuction procedures to address medical issues. The settlement provides for injunctive and declaratory relief only—the insurer changed its coverage policy and agreed that policy members who paid out of pocket before the change could file a claim for reimbursement. In addition, class members who had not yet undergone the procedure but were previously denied coverage could file a claim to have their request re-reviewed. In awarding $542,000 in attorneys' fees, the court acknowledged that it is difficult to put a dollar figure on injunctive relief. But here, the relief obtained had meaningful value now that the insurer changed its policy and agreed to reprocess claims. The court was also satisfied that a lodestar crosscheck justified the fees sought.

Not So Fast: Payments Platform Settles with States

In the Matter of ACI Payments Inc. (Oct. 17, 2023). Agreeing to $10 million settlement and consent order.

ACI Worldwide Corp., which owns ACI Payments, reached a settlement agreement with the state money transmission regulatory agencies in more than 40 U.S. states. The settlement was a resolution with regulators following suit over issues with ACI Worldwide's recent merger of ACI Payments with an electronic bill payment platform formerly known as Speedpay. The state regulators contended that at the time of the merger, legacy vendors that previously had a relationship with Speedpay were not properly integrated into ACI Payments, causing incorrect monetary debits and credits affecting many consumers. As part of the settlement, ACI Corp. agreed to institute and maintain an internal enterprise risk management program, to be externally monitored by regulators, and to pay a total of $9,509,999.84 in administrative penalties and $490,000.16 in administrative costs to the participating states.

Copy That: Former Employees Ink Settlement

Vollmer v. Xerox Corp., No. 6:20-cv-06979 (W.D.N.Y.) (Oct. 19, 2023). Judge Siragusa. Approving $7.2 million settlement and granting attorneys' fees.

A federal district judge signed off on a class settlement for hundreds of former Xerox employees who sued the company and its various retirement plans in November 2020. The underlying complaint alleged the company violated federal benefits law by requiring the early retirees to pay increased health care premiums after being promised the company would cover medical and dental premiums for the rest of their lives. In addition to the $7.2 million settlement fund, the company also agreed to provide medical coverage for no premium payments and dental coverage for reduced premiums. The court also approved $1.3 million in attorneys' fees for class counsel and $25,000 case contribution awards for the two named plaintiffs.

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CLASS ACTION & MDL roundup

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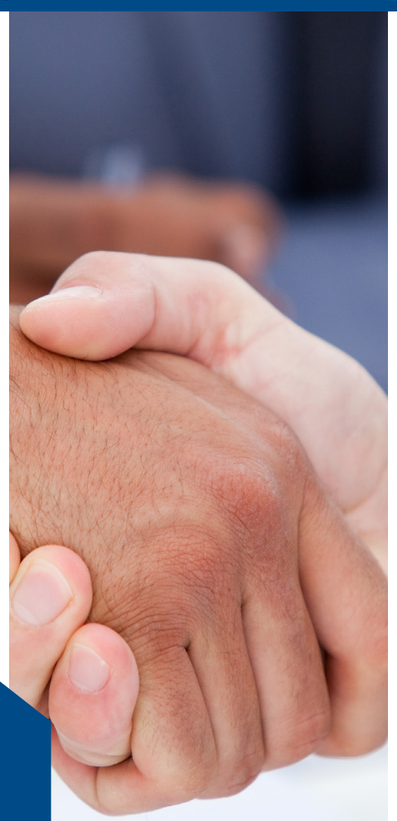

Landmark Settlement Reached in Bronx Civil Rights Protest Suit

Sierra v. City of New York, No. 1:20-cv-10291 (S.D.N.Y.) (Oct. 25, 2023). Judge McMahon. Granting final approval of settlement.

A New York federal judge granted final approval of a class settlement to Bronx protestors who accused police officers of violating their constitutional rights by assaulting and arresting them en masse during a peaceful protest following the 2020 killing of George Floyd. Judge Colleen McMahon hailed the settlement as providing the highest-known per-person payments ever agreed upon in a mass arrest class action: $21,500 to each person who was seized, detained, or subject to force by NYPD officers and an additional payment of $2,500 to each class member who was given a desk appearance ticket. The five class representatives also received $21,500 incentive awards, and the settlement provided for payment of class counsel fees and costs separate from the class awards. Judge McMahon also emphasized the overwhelmingly positive reaction to the settlement: not a single opt-out or objection was received, and of the 256 potential eligible class members, 251 submitted claims.

Settlement Stops the Bleeding in Hemophilia Therapy Securities Class Action

In re BioMarin Pharmaceutical Inc. Securities Litigation, No. 3:20-cv-06719 (N.D. Cal.) (Nov. 14, 2023). Judge Orrick. Granting final approval of $39 million settlement.

A California federal judge granted final approval to a $39 million securities class action settlement, resolving claims that a pharmaceutical company allegedly misled investors about the progress of a new hemophilia therapy it was developing. The $39 million settlement fund was established on a claims-made, non-reversionary basis. The settlement also provided that 19% of the settlement fund would be allocated to lead counsel's attorneys' fees and $127,400 would be reimbursed from that fund for the lead plaintiff's costs and expenses. Lead counsel's fees were based on 12,500 hours of work, with a lodestar value of approximately $6.7 million.

Eleventh Circuit Allows Settlement in Peeling Paint Class Action to Stick

Ponzio v. Pinon, No. 21-14503 (11th Cir.) (Nov. 27, 2023). Affirming district court's approval of class action settlement.

The Eleventh Circuit upheld a Georgia federal judge's approval of a settlement in a class action brought by owners and lessees of certain Mercedes-Benz vehicles with an alleged latent defect that caused the exterior surface to peel or bubble, rejecting the objectors' argument that the settlement agreement left 80% of the class members without any benefits.

The Eleventh Circuit concluded that the objections to the settlement were meritless and held that the district court did not abuse its discretion in approving the settlement, which provided reimbursement for past repairs and coverage for future repairs based on a vehicle's age and mileage. The panel determined that the six *Bennett* factors, which district courts should consider when determining whether a class action settlement is "fair, reasonable, and adequate," remain relevant after the 2018 amendment to Rule 23(e)(2). Applying these factors, the panel concluded that the objectors' contention that the "vast majority" of the class members will receive no benefits under the settlement was "significantly flawed."

Although some class members will not be able to recover under the settlement, the objectors did not account for the class members who satisfy the requirements for reimbursement but choose not to file a claim and ignored that the agreement entitles class members with older or high-mileage vehicles to a future repair if they previously had warranty or goodwill coverage denied. The panel also disagreed that this amounted to a coupon settlement that required heightened scrutiny because portions of the class (perhaps the majority) who previously paid for repairs were entitled to direct cash payments.

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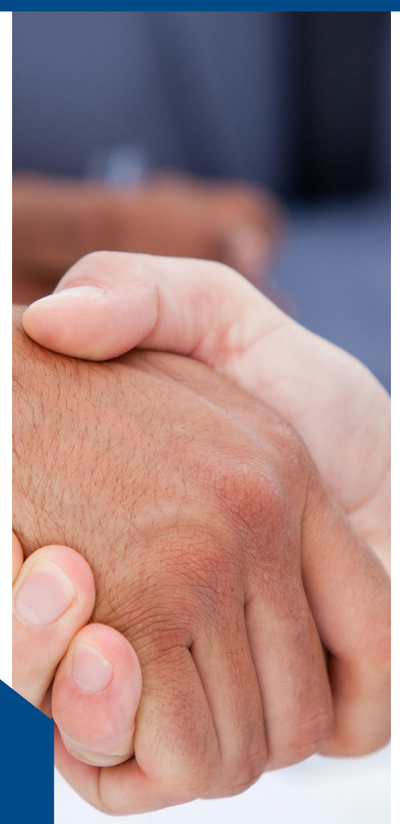
Dave Brown

Elise Paeffgen



Real Estate Brokerage Closes Deal with Agents

Bell v. Redfin Corporation, No. 3:20-cv-02264 (S.D. Cal.) (Nov. 28, 2023). Judge Battaglia. Grating final approval of $3 million settlement.

A California federal judge granted final approval to a $3 million class settlement, ending a three-year-long dispute between real estate broker Redfin and the agents who claimed the company misclassified them as independent contractors. The settlement provided that the $3 million gross settlement amount would first be used to pay $20,000 in class representative enhancement payments, $1 million in class counsel fees, approximately $19,000 in class counsel costs, and a Private Attorneys General Act award of $100,000. The remaining $1.8 million would then be distributed to the 2,754 participating class members. The court incorporated its prior finding that the agreed settlement amount was reasonable from its order conditionally certifying the class—reasoning that although the maximum recoverable damages for the class were allegedly as high as $25 million, the time, expense, and risk of an adverse verdict rendered $3 million a fair settlement.

Court Brews Another Settlement in Kona Coffee Suit

Corker v. Costco Wholesale Corp., No. 2:19-cv-00290 (W.D. Wash.) (Nov. 30, 2023). Judge Lasnik. Approving $7.775 million settlement and granting attorneys' fees.

A federal district judge approved yet another settlement in a class action Lanham Act suit that challenged the alleged misleading labeling and selling of coffee not from Hawaii's Kona region as "Kona" coffee. The most recent settlement was affirmed between the class and defendant Mulvadi Corporation for $7.775 million, bringing the total settlements reached in the coffee case to over $41 million. The settlement also includes injunctive provisions relating to the labeling of the Kona coffee products at issue that an expert economist for the plaintiffs valued at more than $81.2 million over the next five years.

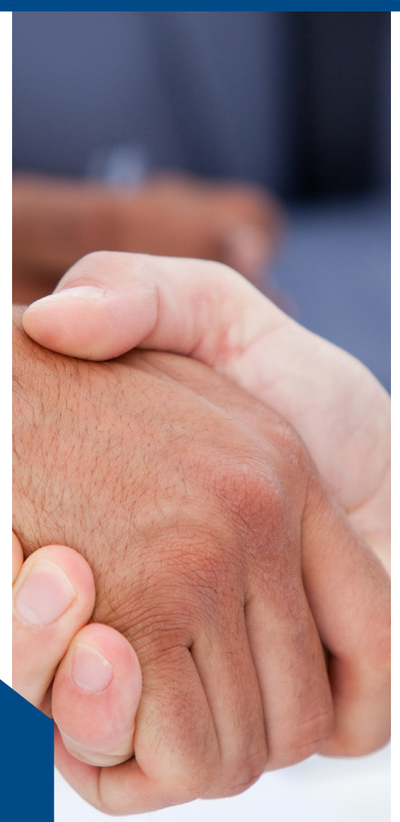
The settlement will be paid out to all persons who farmed Kona coffee in the Kona District and sold their Kona coffee between February 2015 and July 2023. The court also granted class counsel's request for $3.7 million in attorneys' fees, a little over 14% of the total economic value of the settlements reached to date, which the court found to be fair and reasonable under the circumstances and below the Ninth Circuit benchmark for successful cases. The court explained that the award of attorneys' fees was particularly warranted given the case's complexities and unusual risks. The court credited class counsel for conducting "an exceptionally extensive prefiling investigation, including the identification and retention of scientific experts who could test hundreds of coffee samples to support the allegations in the complaint." The court also approved the request for $2,500 service awards for each farm whose owners served as class representatives in the litigation.

ERISA Litigation Settles on Eve of Trial

In re Omnicom Group Inc. ERISA Litigation, No. 1:20-cv-04141 (S.D.N.Y.) (Dec. 12, 2023). Judge McMahon. Approving $2.45 million settlement and granting attorneys' fees.

Participants and beneficiaries of the Omnicom Group Retirement Savings Plan settled ERISA claims just days before they were set to begin a week-long bench trial in February 2023. A federal district judge approved the final proposed settlement, establishing a settlement fund of $2.45 million and granting the request for $816,666.67 for attorneys' fees, expenses, and case contribution awards, which paid out $7,500 to each named plaintiff. In approving the final settlement, the judge lauded the efforts of counsel to resolve the "thoroughly contested ERISA action" that was litigated through multiple motions to dismiss, two amended complaints, and summary judgment and class certification.

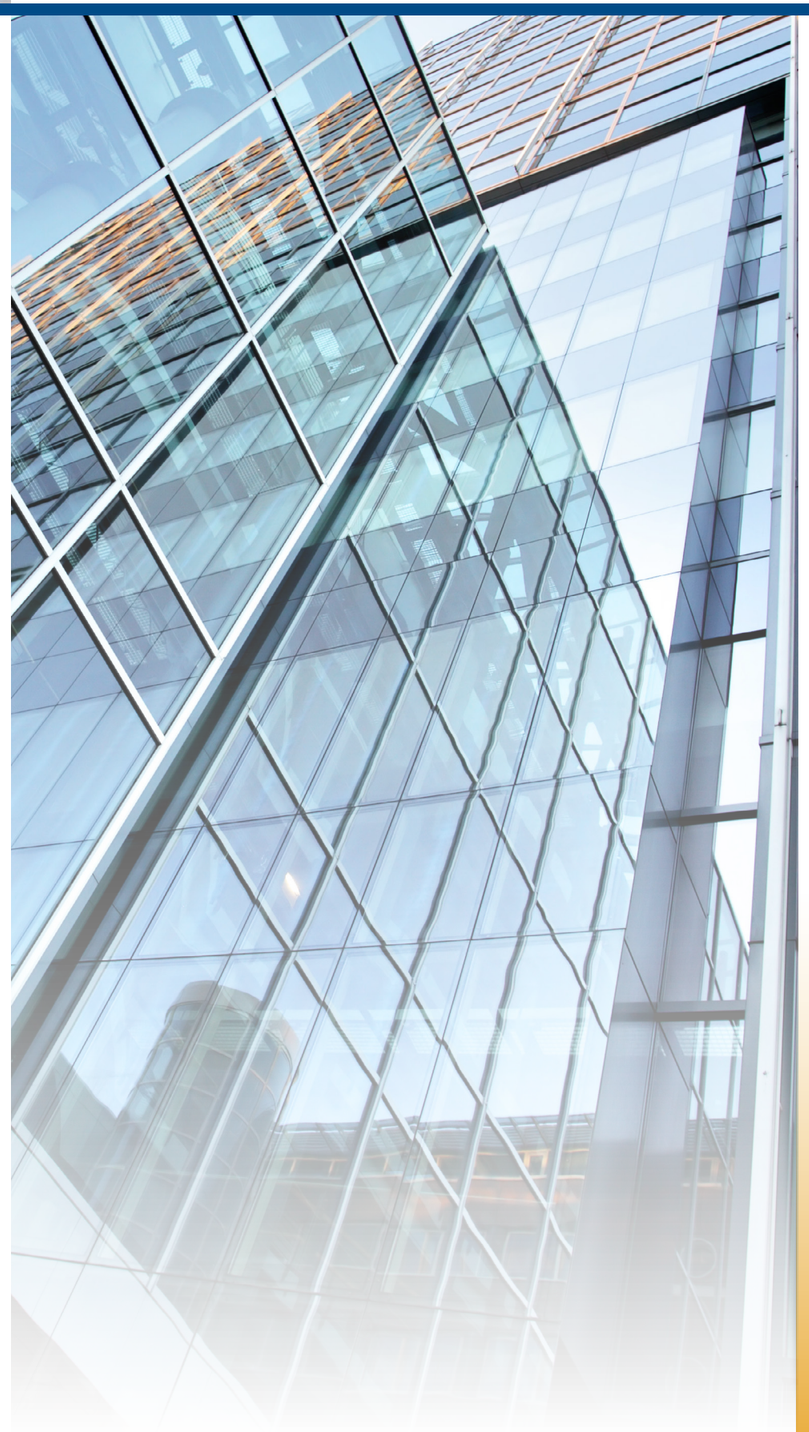
The underlying litigation was initially filed in early 2020, and through various iterations of the initial complaint alleged that the defendants failed to appropriately monitor and retain the Fidelity Freedom Funds as the plan's target-date fund option and caused plan participants to pay excessive fees to the plan's recordkeeper. The settlement funds are to be allocated to participants, former participants, beneficiaries, and alternate payees of the plan, with more than 40,000 members of the settlement class set to automatically receive allocation of settlement payments. The judge also praised the requested amount of attorneys' fees and expenses as "modest" and reflecting counsel's "efforts to return the greatest amount possible to the Plan" given that class counsel incurred more than half a million dollars in expenses alone, more than half the total award for the years-long litigation.



Closure for Cosmetologists

Eberline v. Douglas J. Holdings Inc., No. 5:14-cv-10887 (E.D. Mich.) (Dec. 21, 2023). Judge Levy. Approving $2.8 million settlement.

A Michigan district judge approved a $2.8 million class settlement resolving federal and state minimum wage violation claims asserted by former cosmetology students. After noting that the class representatives had actively pursued the interests of the class for more than nine years, the court found the settlement to be "fundamentally fair, reasonable, adequate, and in the best interest" of the class. The court also awarded class counsel attorneys' fees of $779,978, which equates to approximately 28% of the settlement fund.



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