ALSTON & BIRD

CLASS ACTION & MDL roundup

QTR 1 | 2023

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FIONA O'CARROLL

Senior Associate, Litigation & Trial Practice Group

Fiona discusses timely PFAS litigation and what, if any, class actions we can look forward to.

Where the (Class) Action Is

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

We're ringing in the first *Roundup* of the year with another slate of interesting cases spanning industries and subject matter. Football fans celebrated a win after they were granted class certification in an antitrust case involving claims related to anticompetitive pooled-rights agreements. The banking industry was also rattled by antitrust litigation resulting in the approval of a multibillion-dollar settlement by the Second Circuit. On the other end, insurers celebrated the Third Circuit's decision in a consolidated appeal of 14 COVID-19 cases, ruling the loss of use of a property's intended business purpose is not a physical loss of property that would give rise to coverage under the policies at issue.

Moving to consumer protection, courts continued to see deceptive labeling cases involving food products. There were a number of decisions to watch out for in labor & employment involving leave laws, especially issues pertaining to compensation for time taken off and rights for military members. TCPA cases remained on the docket this quarter, with multiple instances of unwanted faxes, with one court affirming summary judgment and another vacating summary judgment.

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.

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

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Antitrust/RICO

Purchaser Class Survives Challenge Flag

In re National Football League's Sunday Ticket Antitrust Litigation, No. 2:15-md-02668 (C.D. Cal.) (Feb. 7, 2023). Judge Gutierrez. Granting class certification.

A California federal judge certified classes of residential and commercial purchasers of the NFL's all-inclusive DirecTV "Sunday Ticket" package. The purchasers alleged the NFL entered into anticompetitive pooled-rights agreements on behalf of the 32 individual NFL teams, which forced fans to choose between viewing a limited number of local games offered for free on network television or subscribing to the NFL Sunday Ticket package and receiving all local and out-of-market games—without any option to purchase out-of-market games individually or by team, for example.

The NFL argued, among other things, that antitrust impact and damages could not be proven through classwide evidence because numerous individual class members would be worse off in the plaintiffs' but-for worlds and damages inquiries would necessarily be individualized, given that some class members negotiated prices and/or received promotional discounts when considering how some class members would face different effects. The court rejected these arguments because the plaintiffs' damages model showed that all class members suffered at least some injury, while also applying a uniform reduction to the prices that class members paid.

This Little Piggy Went to the Courthouse

In re Pork Antitrust Litigation, No. 0:21-md-02998 (D. Minn.) (Mar. 29, 2023). Judge Tunheim. Granting class certification.

The district court certified direct and indirect purchaser classes in a multidistrict litigation alleging price-fixing in the pork industry. The defendant pork producers argued that the purchasers could not prove classwide impact with common evidence and that the purchaser plaintiffs' use of an averaging methodology masked individualized differences between class members. But the court rejected this position because there was extensive evidence that market prices generally set the individual producers' prices, and individual differences between negotiations and transactions did not change the fact that the alleged conspiracy, if true, would cause all prices to increase. The court also disagreed with the defendants' argument that the class impermissibly contained uninjured class members, given that the producers' own expert analysis showed 96.2% of direct purchasers yielded overcharges—such that the number of uninjured purchasers did not cross the de minimis threshold of approximately 5–10%.

Brokers Beware: Home Sellers Win Class Certification Bid

Moehrl v. National Association of Realtors, No. 1:19-cv-01610 (N.D. Ill.) (Mar. 29, 2023). Judge Wood. Granting class certification.

A group of individual home sellers successfully moved for class certification on their claims against the National Association of Realtors and several other real estate brokerage firms. The home sellers challenged the requirement that they must include a set offer of compensation to any broker who finds a buyer for their home in order to list their homes for sale in the Multiple Listing Services (MLS) database, arguing this requirement is anticompetitive and caused them to pay artificially inflated commission rates. The sellers and their experts asserted that, in the but-for world, if buyers were forced to internalize the cost of buyer-broker services, buyers would question the value of those services and opt against using a buyer-broker. The defendants countered that with evidence from other MLS markets that recently stopped requiring listings to include an offer of compensation to buyer-brokers where 99.75% of sellers continued to make such an offer. The court reasoned that this evidence reflects "not the existence of individual questions as to impact," but rather "the lack of impact" at all. And a question that is subject to common *disproof* is itself a common question under Rule 23. ■

Getting better all the time:
Four Partners Named to *Daily Report*'s "On the Rise" Class of 2023.

Meredith Jones Kingsley

Emily McGowan

Jonathan Parente

Alexandra Peurach

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Banking & Insurance

Good News for Insurers in 14 Appeals

Wilson, et al. v. USI Insurance Service LLC, et al., No. 20-03124 (3rd Cir.) (Jan. 6, 2023). Affirming dispositive motion rulings in 14 cases.

The Third Circuit affirmed dispositive motion rulings in favor of the insurer-defendants in a consolidated appeal of 14 cases involving claims by business owners that they were entitled to commercial property insurance coverage because COVID-19 closed or significantly limited their business operations. In reaching its decision, the Third Circuit was forced to predict how the supreme courts of Pennsylvania and New Jersey would decide the underlying issues and ultimately concluded that those courts would hold that the loss of use of a property's intended business purpose is not a physical loss of property that would give rise to coverage under the policies at issue. While several of the Pennsylvania businesses had requested that the Third Circuit certify the dispositive coverage question to the Supreme Court of Pennsylvania, the Third Circuit declined to do so, simply stating that the requests did not satisfy the circuit's certification factors.

Fourth Circuit Affirms "Rent-a-Tribe" Class

Williams v. Martorello, No. 21-2116 (4th Cir.) (Jan. 24, 2023). Affirming class certification.

The Fourth Circuit affirmed the certification of a class of borrowers who accused a payday lender of charging excessive interest rates on their consumer loans in circumvention of state usury laws. The plaintiffs allege the existence of a "Rent-a-Tribe" scheme in which Martorello and other named entities partnered with the Lac Vieux Desert Band of Chippewa Indians to cloak the payday lender in the tribe's sovereign immunity protections, precluding enforcement of otherwise applicable usury laws that cap interest rates.

The district court had granted class certification of a class of Virginia citizens who took out loans from "Rent-a-Tribe" lenders. On appeal, Martorello argued that the district court violated the mandate rule by making factual findings related to the misrepresentations that contradicted the Fourth Circuit's holding in a prior appeal and then relied on those factual findings in granting class certification.

But the Fourth Circuit disagreed, finding that the district court permissibly reconsidered its previous factual findings because the "new evidence and serious injustice exceptions to the mandate rule" applied. The circuit court also agreed with the district court that the borrowers did not waive their right to bring class claims because the waivers in the loan agreements were unenforceable under the prospective waiver doctrine. Finally, the Fourth Circuit found that the district court did not abuse its discretion in granting class certification because common issues predominated, in part because the borrowers' claims were based on standardized loan contracts. The court also pointed to uniform conduct by Martorello, such as his substantive involvement in the lending operations, noting the borrowers can rely on common proof to show that Martorello participated in and controlled the direction of the lending operations to establish RICO liability. The court also noted that the individualized damage calculations for each class member could likely be calculated from loan records rather than requiring extensive individualized evidence.

Rule That Allows for Deadline Extensions Does Not Also Allow for Merits Dismissals

Rodriguez v. Hirshberg Acceptance Corp., Nos. 20-2184, 2247, 2253 (6th Cir.) (Mar. 14, 2023). Reversing denial of motion to reopen and vacating order based on res judicata.

The Sixth Circuit revived a proposed class action accusing debt collectors of miscalculating class members' debt in violation of the Fair Debt Collection Practices Act. The district court administratively closed the plaintiff's case in 2018 to await a decision in a related pending case, and its order allowed the parties to re-open the case within two weeks after that related decision. When the plaintiff moved to re-open the case approximately four months after the related decision was announced, the district court refused, finding the plaintiff's justifications for the late filing did not amount to "excusable neglect," as required to extend the original deadline under Rule 6(b)(1)(B). The court later clarified that this ruling served as a final disposition, and when the plaintiff then filed another identical case, a separate district court dismissed the second case based on res judicata. On appeal, after determining that there was appellate jurisdiction, the Sixth Circuit held that the first district court abused its discretion by relying exclusively on Rule 6(b)(1)(B)—which simply grants the authority to extend deadlines—and "elevating" that rule "to serve as a means for terminating a case." From there, the Sixth Circuit easily vacated the subsequent order based on res judicata because the preclusive effect of the earlier order had vanished.

"**Andy Tuck** will show you the way through recent trends at the webinar "Class Certification and Classwide Damages Models: Navigating Increased Scrutiny of Expert Methodologies" on August 10."

Andy Tuck

ERISA Plaintiffs Fail to Withstand Standing Challenge

Windsor v. Sequoia Benefits & Insurance Services, No. 21-16992 (9th Cir.) (Mar. 8, 2023). Affirming dismissal for lack of Article III standing.

The Ninth Circuit affirmed the district court's dismissal of ERISA plan participants' putative class action alleging breach of fiduciary duty. The plaintiffs, current and former employees of RingCentral who participated in an employee welfare benefits plan administered by Sequoia, alleged that Sequoia violated its fiduciary duties by receiving commission payments from insurers, which the plaintiffs characterized as kickbacks.

The court held that the plaintiffs failed to establish Article III standing under either of their theories of injury. First, the plaintiffs failed to establish that Sequoia's alleged conduct caused them to incur an injury-in-fact because it was RingCentral, not Sequoia, that set the plaintiffs' contribution amounts and decided which coverage options to make available, and the plaintiffs did not allege that RingCentral's contribution-amount and/or coverage-option choices were impacted by Sequoia's alleged breaches of fiduciary duties. Second, the plaintiffs could not establish that they had some equitable interest in the plan funds because they received a fixed set of benefits, the underlying assets were not divided into individual accounts, and the plaintiffs did not own beneficial interests that increased or decreased depending on the management of those assets.

Court Has Independent Obligation to Assess Rule 23 Class Certification Requirements

In re Synchrony Financial Securities Litigation, No. 3:18-cv-01818 (D. Conn.) (Feb. 3, 2023). Judge Bolden. Granting class certification.

Judge Bolden granted class certification for a class of individuals and entities that purchased or otherwise acquired common stock of Synchrony Financial in an action asserting securities claims against Synchrony Financial and other defendants. Although the defendants did not file an opposition to the plaintiffs' motion for class certification, Judge Bolden noted his "independent obligation" to ensure that the proposed class satisfied Rule 23 and dutifully analyzed the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements of Rules 23(a) and 23(b). In his thorough predominance analysis, Judge Bolden concluded that common questions predominated over individual questions of reliance and damages because the plaintiffs were ultimately entitled to a presumption of reliance and proposed a classwide damages methodology. The parties agreed to resolve these claims shortly after this order was entered, and Judge Bolden preliminarily approved the $34 million class settlement in April. ■

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Consumer Protection

- **Ninth Circuit Pokes Hole in Clothing Sales Tax Lawsuit**

  Van v. LLR Inc., et al., No. 21-36020 (9th Cir.) (Mar. 13, 2023). Vacating order granting class certification and remanding for further proceedings.

  The Ninth Circuit vacated the district court's certification of a class action alleging that a multilevel-marketer defendant overcharged sales tax to Alaskan purchasers of clothing products and remanded the case for further proceedings. The circuit court rejected the defendant's arguments based on standing and the voluntary payment doctrine, but it agreed that class certification was improper because some fashion retailers offset the erroneous sales tax charged to customers through individual discounts, and it remanded with instructions that the district court weight these individualized issues in determining whether class issues otherwise predominate.

- **Class Certified for Checking Credit Scores Before Purchase**

  Bultemeyer v. CenturyLink Incorporated, No. 2:14-cv-02530 (D. Ariz.) (Feb. 2, 2023). Judge Logan. Granting renewed motion for class certification.

  The plaintiff filed suit against CenturyLink in 2014 after she visited the company's website and began an online order for residential high-speed internet services. As part of the ordering process, CenturyLink ran her credit report after she keyed in her personal information and address, selected the service she wanted to buy, and clicked on a box indicating she accepted the company's terms of services. The plaintiff ultimately never placed an order and filed a putative class action alleging that CenturyLink violated the Fair Credit Reporting Act by obtaining her credit score without a permissible purpose. The Arizona district judge granted class certification, finding that commonality, typicality, numerosity, adequacy of representation, predominance, and superiority had been met and rejecting CenturyLink's claim that common questions did not predominate because individual inquiries would be necessary to exclude anyone who signed a class action waiver or arbitration agreement.

- **The Pressure Rises as Plaintiffs Succeed in Certifying Four Classes**

  In re Valsartan, Losartan, and Irbesartan Products Liability Litigation, No. 1:19-md-02875 (D.N.J.) (Feb. 8, 2023). Judge Kugler. Granting motion for class certification.

  A district court granted certification for four classes of consumers and insurers stemming from a 2018 Food and Drug Administration recall of generic hypertensive, prescription drugs. In the court's 97-page order—which addressed 19 different motions related to the plaintiffs' claims for economic loss and medical monitoring—the judge found it "incontrovertible" that the "defendants' conduct in making contaminated [drugs] and in putting these into the U.S. drug supply chain … grounds all of plaintiffs' claims."

  The court carefully considered each of the parties' arguments regarding class certification, including those related to variations in state laws and class definition considerations. Ultimately, the court certified two economic-loss classes—one for consumers and one for third-party payors—and two classes of medical-monitoring plaintiffs. The plaintiffs' request to certify a third medical-monitoring class was denied without prejudice, with the court granting the plaintiffs "the option to re-seek class certification of this class by briefing" the court on certain issues pertaining to how this class, if certified, would impact the two now-certified medical-monitoring classes.

- **Make It a Double Scoop—Court Grants Revised Bid for Class Certification**

  Vizcarra v. Unilever United States Inc., No. 4:20-cv-02777 (N.D. Cal.) (Feb. 24, 2023). Judge Gonzalez Rogers. Granting motion for class certification.

  A California district court granted a revised class certification bid for ice cream purchasers who claim they were deceived by the "Natural Vanilla" labeling on the defendant's ice cream product. The suit claims that the product's packaging—which depicts a scoop of ice cream with vanilla bean specks alongside two vanilla beans and vanilla flowers—misleads consumers to believe that the ice cream's vanilla flavor is derived exclusively from the vanilla plant.

  In denying the plaintiff's initial motion for class certification in October 2021, the court ruled that the plaintiff's expert survey lacked a control variable and failed to isolate the statements about the natural vanilla claims. This time around, the court found that the revised expert survey adequately measured the effect of the vanilla representations on consumers' perceptions and concluded that the survey results could support the plaintiff's claim that a reasonable consumer was likely to be deceived by the defendant's vanilla representations on its ice cream. ■

Introducing the
PFAS Primer Quarterly Update
– rounding up regulatory, litigation, and scientific actions involving PFAS, known as "forever chemicals."

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Labor & Employment / ERISA

Third Circuit Holds PTO Is Not Pay

Higgins v. Bayada Home Health Care Inc., No. 21-03286 (3rd Cir.) (Mar. 15, 2023). Affirming partial summary judgment order.

In a case of first impression, the Third Circuit has held that an employer's policy of docking employees' paid time off (PTO) for failing to meet their productivity goals is not an impermissible deduction under the Fair Labor Standards Act (FLSA). The plaintiff, a registered nurse, filed a collective action and putative class action against her former employer, arguing that its policy violated the salary-basis test for overtime pay exemption under the FLSA and entitled her and similarly situated employees to time-and-a-half overtime pay and liquidated damages.

The defendant paid its employees a salary, set certain productivity goals, rewarded especially productive employees with additional compensation, and deducted PTO from those who failed to meet productivity minimums. But the employer did not reduce employees' base salary for failure to meet their productivity goals. The district court granted summary judgment to the employer, and the court of appeals affirmed, holding that PTO is a "fringe benefit," as opposed to a facet of an employee's salary, and that the defendant's reduction of employee's PTO did not result in an improper deduction from the employee's salary.

The Third Circuit reiterated that an exempt employer under the FLSA must pay its employees their full predetermined "base" salary and held that an employer that "does not dock that pre-determined part of the employee's compensation … has satisfied the salary-basis test." The defendant did not lose the FLSA exemption and was not required to pay time-and-a-half overtime to its employees.

This decision highlights the importance of employers periodically reviewing their pay policies to ensure they do not result in improper deductions from an exempt employee's base salary. Although this decision suggests employers have the green light to implement a practice of deducting from exempt employees' accumulated fringe benefits, employers should discuss incentive compensation policies with experienced employment counsel before making any changes to their pay and benefit practices.

Ninth Circuit Revives Paid Military Leave Suit

Clarkson v. Alaska Airlines Inc., No. 21-35473 (9th Cir.) (Feb. 1, 2023). Reversing grant of summary judgment and remanding.

The Ninth Circuit revived a class action alleging that Alaska Airlines and subsidiary Horizon Air owed pay to the plaintiff and other servicemember pilots for the time they took off work for military service duties. The Uniformed Services Employment and Reemployment Rights Act (USERRA) requires employers to treat military leave in the same way they treat similar absences, but the plaintiff said pilots who took short-term military leave were not compensated, whereas the airlines did compensate those who took comparable non-military leave, such as jury duty and sick leave.

The district court granted summary judgment in favor of Alaska Airlines and Horizon Air, but the Ninth Circuit reversed, finding a jury trial was appropriate. The Ninth Circuit disagreed with the trial court's focus on military leave and sick leave in general and held the relevant question was whether military short-term leaves were comparable to the other paid leaves offered by the airlines, which was a jury question. The opinion focuses on the purpose of USERRA to support, rather than penalize, service members.

The Ninth Circuit is the third federal appellate court in the last two years to determine that pay is a right and benefit under USERRA, after the Third and Seventh Circuits recently held that paid leave falls within the rights and benefits of the statute. However, each court refused to determine whether the various types of leave offered were comparable, holding this was a question of fact for a jury to decide. Employers that offer paid forms of leave, such as sick, bereavement, or jury-duty leave, should consider whether to also pay employees for requested military leave of similar duration.

Young Company Beats Age Bias Suit

Obrien v. Amazon.Com Inc., No. 4:22-cv-00348 (N.D. Cal.) (Jan. 27, 2023). Judge Westmore. Granting motion to dismiss.

Amazon defeated a terminated warehouse worker's putative class action accusing it of forcing arduous quotas that discriminate against employees older than 40, after a California magistrate judge ruled that the plaintiff still did not allege any disparity in injuries of that age group compared to warehouse workers as a whole, despite multiple opportunities to amend. According to the plaintiff, Amazon's California warehouse workers must meet an hourly quota of items moved and

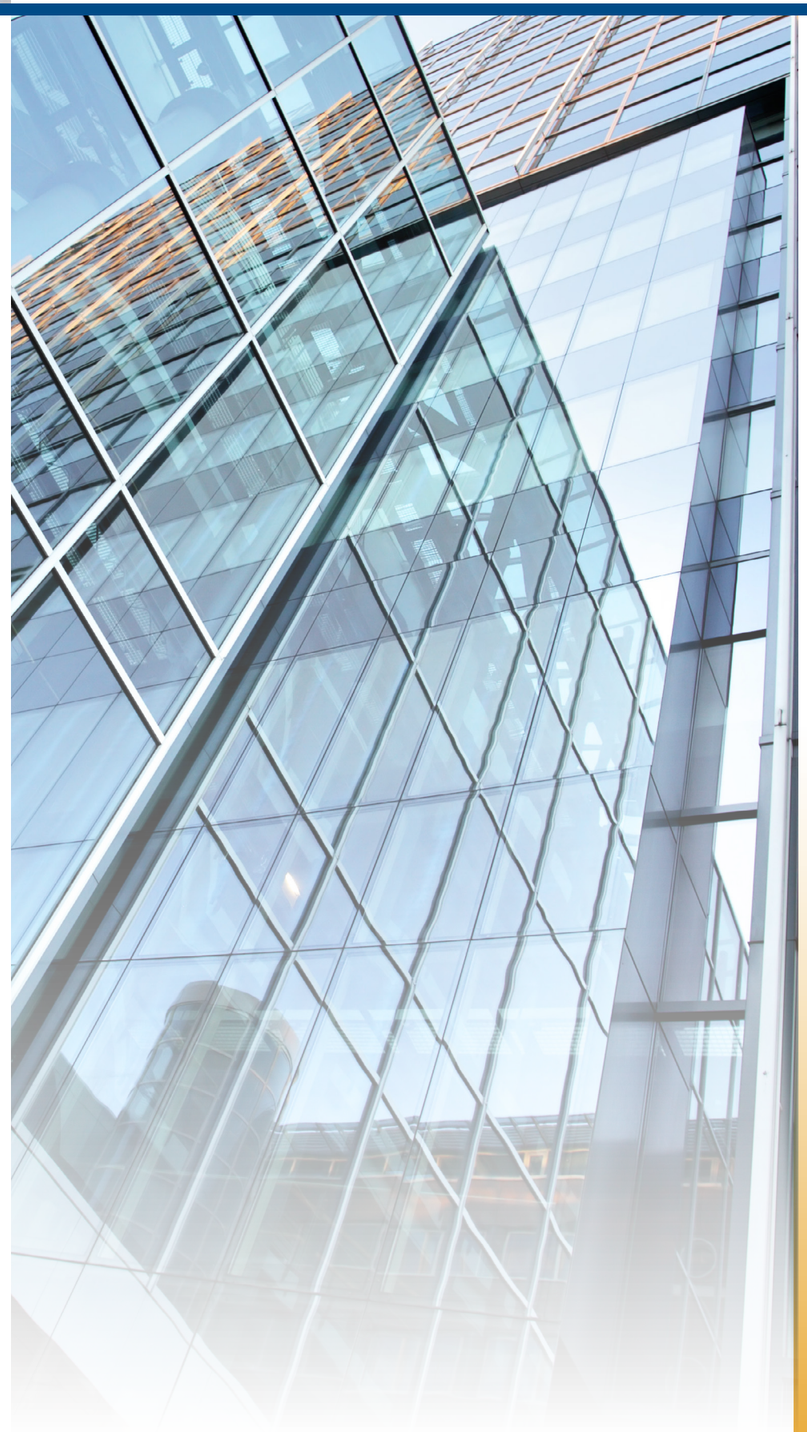
"Join **Alex Barnett** and **Ian Wright** for an in-depth look at confidentiality agreements and protections for pregnant and nursing employees at our Labor & Employment Executive Webinar on June 27."

Alex Barnett

Ian Wright

processed during their shifts. After suffering a back injury, the 49-year-old plaintiff alleged that she requested time off but was advised that she would be fired for not meeting her assigned quota of sorting 150 to 250 items per hour. Upon termination, she sued.

The court found that the plaintiff did not identify a specific employment practice that is discriminatory, but instead relied on every quota for every position, as well as every mechanism for enforcing those quotas. The court ruled that the plaintiff failed to sufficiently allege disparate impact bias, and her repeated pleading failures made further leave to amend unwarranted. The court's ruling highlights the specificity with which disparate impact discrimination must be alleged—while proof of intentional bias is not required, insufficient detail about the specific employment practice or policy at issue may result in dismissal. ■



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Privacy & Data Security

- **Is Promoting a Free Seminar an Unsolicited Advertisement?**

  Mauthe v. Millennium Health LLC, No. 20-2265 (3rd Cir.) (Jan. 19, 2023). Affirming summary judgment.

  A doctor's office brought a putative class action under the Telephone Consumer Protection Act (TCPA) after it received a fax from a laboratory promoting a free educational seminar on "national trends in opioid misuse and abuse." Neither the fax nor the seminar promoted the sale of any goods, services, or property. But the doctor's office, which had filed more than 10 TCPA lawsuits since 2015, alleged that the fax constituted an unsolicited advertisement in violation of the TCPA.

  The district court granted summary judgment to the laboratory, and the Third Circuit affirmed. The court found that whether a fax constitutes an unsolicited advertisement is governed by an objective standard and that, to constitute an unsolicited advertisement under the TCPA, the fax must promote goods, services, or property to be bought or sold. The fax at issue did not do so because it did not reference any goods, services, or property and discussed only a free event. The Third Circuit also rejected the plaintiff's argument that the educational seminar was a pretext for later solicitation, reasoning that even if this was a viable theory, there was no evidence in the record to suggest that the fax in question was a pretext for later advertisements.

- **There and Back Again: A Tale of Three Unwanted Faxes, Two Litigious Hardware Stores, and a Court That Has Seen It All Too Many Times**

  Craftwood II Inc. v. Generac Power Systems Inc., Nos. 21-2858, 21-3393 (7th Cir.) (Mar. 30, 2023). Vacating summary judgment.

  Making a repeat appearance before the Seventh Circuit, two hardware stores contended that they received a total of three fax advertisements from the defendant supplier in 2016 and 2017 without their express permission, in violation of the TCPA. In the previous round, the district court dismissed the suit for lack of standing, and the Seventh Circuit reversed. This time around, the plaintiff stores appealed from a grant of summary judgment to the defendant after the district court found that the plaintiffs had provided express permission to receive the faxes.

  The Seventh Circuit again reversed, ruling that the contractual language relied on by the defendant and the district court did not demonstrate prior express consent because it was a contract between the stores and a hardware-store cooperative, to which the defendant was not a party. This reinforces the court's prior decision in *Physicians Healthsource Inc. v. A-S Medication Solutions LLC*, which held that express permission under the TCPA is not transferable and that the sender itself must procure permission. The Seventh Circuit also held that reversal was proper because conflicting testimony created a material factual dispute over whether the plaintiff-stores' owners or managers had provided express consent to receive fax advertisements in a phone call in 2012.

- **Be Careful When Drafting—and Updating—Arbitration Agreements: Ninth Circuit Finds Employee Must Litigate Privacy Claims**

  Jackson v. Amazon.com Inc., No. 21-56107 (9th Cir.) (Apr. 19, 2023). Affirming denial of motion to compel arbitration.

  Drickey Jackson began delivering packages for Amazon as a Flex driver in 2016, after agreeing to Amazon's 2016 terms of service, which included an arbitration clause in which the question of arbitrability was decided by the court. Amazon amended its terms in 2019 to make the question of arbitrability one for the arbitrator, and it notified all Flex drivers of the updated terms by email.

  During his employment with Amazon, Jackson communicated with other Flex drivers in closed Facebook groups during their off-hours. When he later discovered that Amazon monitored those groups, he filed a putative class action against the company, alleging violations of federal and state privacy laws. Amazon moved to compel arbitration, citing the 2019 terms, and the district court denied the motion, finding that the 2016 terms controlled and that the dispute did not fall within the scope of the 2016 arbitration agreement.

  Amazon appealed, and the Ninth Circuit affirmed. The court concluded the 2016 terms applied because the email Amazon sent to notify its Flex drivers of the 2019 terms was not individualized enough to provide adequate notice to change the terms governing Jackson's relationship with Amazon. The court then held that Jackson's federal and state privacy-law claims fell outside the arbitration agreement's scope. Finding that the 2016 arbitration agreement was limited to disputes that related to the terms, the court concluded that the protections provided by the federal and state privacy statutes, and in turn Amazon's alleged misconduct, existed independently of Jackson's employment and the contract. ■

class-ified

Congratulations to **Kim Peretti** and the Privacy, Cyber & Data Strategy Team on their ranking in the 2023 Legal 500 US guide for Cyber Law.

Kim Peretti

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Products Liability

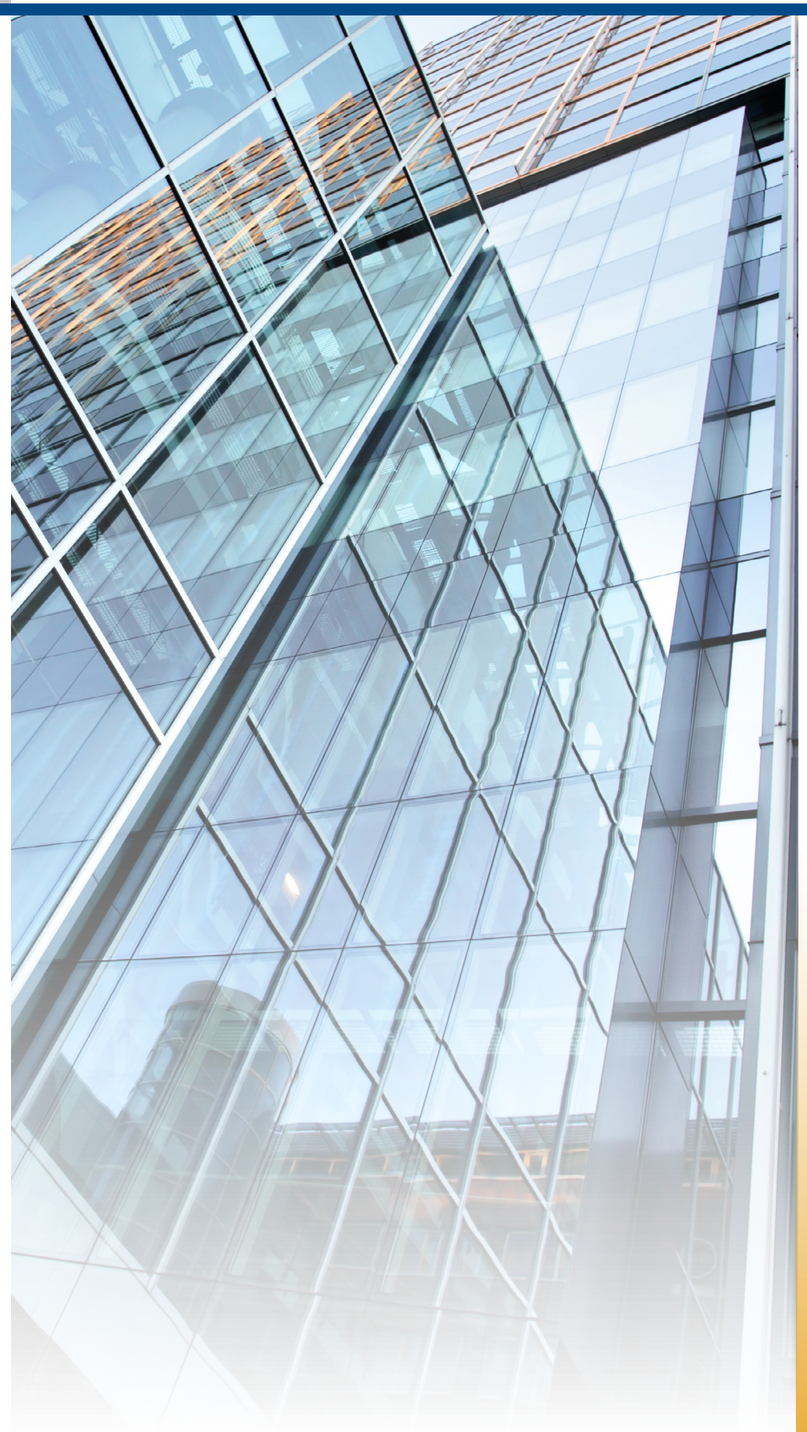
- **Low Failure Rates in Allegedly Faulty Pumps Lead to Decertification of Classes**

  Sonneveldt v. Mazda Motor of America Inc., No. 8:19-cv-01298 (C.D. Cal.) (Jan. 25, 2021). Judge Staton. Decertifying classes.

  Judge Staton decertified a Texas class and a California Song-Beverly class in a suit alleging Mazda sold vehicles with faulty water pumps. The plaintiffs contended that failure rates were irrelevant to their claims because the vehicles had an inherent design defect. At the class certification stage, the court agreed, finding the lack of evidence of failure rates was not a sufficient basis to deny class certification. But at the merits stage—with undisputed evidence showing that manifestation of the alleged defect was rare—the court took a different view.

  The court ruled that the Texas plaintiffs could not establish that manifestation of the defect was more than a remote chance for most class members, meaning that most class members cannot claim an actionable injury under the Texas Deceptive Trade Practices Act. Because "[n]o authority permits certification of a class where members without claims outnumber members with claims," the court decertified the Texas class.

  For similar reasons, California's Song-Beverly class was decertified. Although federal courts postpone to the merits stage the evidentiary showing that California courts require for implied warranty claims under the Song-Beverly Act, decertification was now required because the California class failed to produce evidence at summary judgment that would allow a jury to conclude the alleged defect is "substantially certain" to cause the class vehicles to malfunction. ■



"Sit pretty with "An Ounce of Prevention: Strategies for Anticipating and Readying for FDA's Expanded Regulation of Cosmetics and Personal Care Products" at our Washington, D.C. office on July 18."

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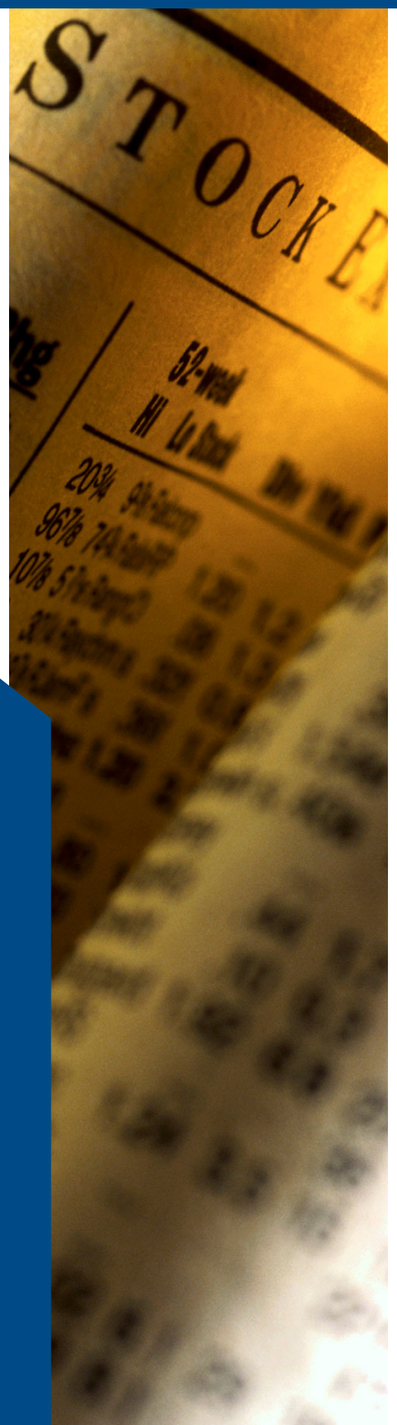


Securities

- **Fifth Circuit Reverses Dismissal Based on Confidential Witness Testimony**

  Oklahoma Firefighters Pension and Retirement System v. Six Flags Entertainment Corporation, et al., No. 21-10865 (5th Cir.) (Jan. 18, 2023). Reversing district court dismissal.

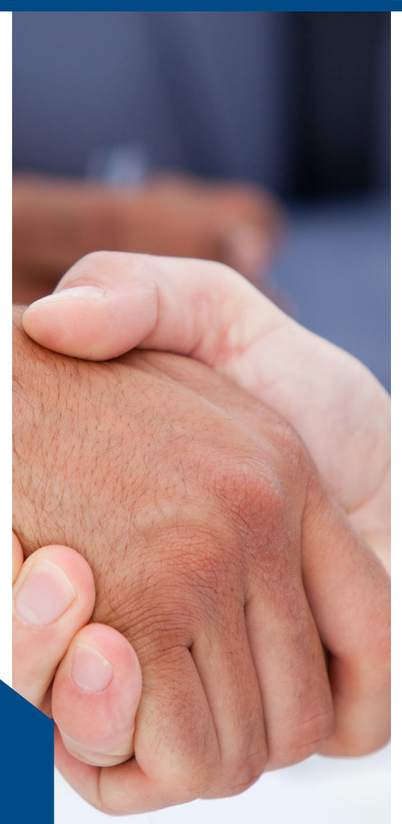
  The Fifth Circuit reversed the dismissal of a shareholder suit claiming that Six Flags Entertainment Corporation violated the Exchange Act by falsely claiming that construction on its Chinese parks was progressing and that the parks would be able to open on the timeline promised. The plaintiff appealed the dismissal on the grounds that the district court discounted too heavily the plaintiff's anonymous witness, and the Fifth Circuit agreed, concluding that the discount should have been minimal because the confidential witness's work responsibilities would have placed him "in a position to know at first hand the facts" relevant to the case. The circuit court remanded the case to the district court.

- **Delaware Chancery Court Clarifies Law on Oversight Duties**

  Delaware's Court of Chancery issued two important decisions clarifying the law on derivative claims in Delaware. In the first ruling, the court held, for the first time, that corporate oversight duties under *In re Caremark International Inc. Derivative Litigation* apply to not just directors but also officers. In reaching this holding, the court noted that the scope of oversight duties owed by officers is more context-specific—and potentially more focused—than those owed by directors. In the second ruling, the court clarified the *Caremark* analysis by explaining that claims based on alleged ignorance of "red flags" do not need to involve "mission critical" risks, as prior case law had suggested. The court concluded that officers and directors in Delaware have an obligation to respond to any evidence indicating the corporation is or will suffer harm, not just mission-critical risks.

Susan Hurd has you covered with everything you need to know about the U.S. Supreme Court's *Slack* case in Law360 and Bloomberg Law.

Susan Hurd



Settlements

$5.6 Billion Settlement Affirmed for Claims on Interchange Fees

In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, No. 20-00339 (2nd Cir.) (Mar. 14, 2023). Affirming class action settlement approval.

The Second Circuit affirmed a district court order approving a class action settlement of roughly $5.6 billion, including $900,000 in service awards and roughly $523 million in attorneys' fees. The class action involved antitrust claims originally filed in 2005, alleging that Visa and Mastercard adopted rules and practices that allowed them to charge merchants interchange fees on each payment card transaction. The appellants, representatives of the service stations that objected to the settlement, raised many challenges to the settlement, including ascertainability; the class definition, which allegedly gave rise to an intraclass conflict; the district court's plan to refer the dispute over class membership to a special master; lack of authority to release certain claims; the release conflicted with federal law; and the attorneys' fee award was excessive. The circuit court found that none of these challenges had merit, but it did direct the district court to reduce the service award to the class representatives to the extent that its size was increased by time spent on lobbying efforts that would not increase the recovery of damages.

Overtime Pay Class Action Settles for $1.3 Million

Sykes v. Legacy Healthcare Financial Services LLC, et al., No. 1:21-cv-03190 (N.D. Ill.) (Jan. 24, 2023). Judge Guzman. Approving $1.3 million settlement.

The district court approved a $1.3 million class action settlement resolving claims alleging violations of the Fair Labor Standards Act and Illinois minimum wage law based on Legacy Healthcare Financial Services' and Elmbrook Skilled Nursing Facility's incorrect computations of the regular rate of pay for overtime purposes. Of the $1.3 million settlement fund, one-third was to be paid to class counsel for attorneys' fees. The district judge recognized that the settlement was fair, reasonable, and adequate considering the complexity, expense, and duration of the litigation and the risks involved in establishing liability and damages.

Retirement Benefits Suit Retired Through $7 Million Settlement

Moon v. E.I. du Pont de Nemours and Co., No. 1:19-cv-01856 (D. Del.) (Feb. 3, 2023). Judge Bibas. Granting final approval of $7 million settlement.

The district court approved a $7 million settlement, resolving allegations that DuPont failed to inform its employees that they were eligible for certain retirement benefits in breach of its fiduciary obligations under ERISA. The settlement requires DuPont to pay $7 million, which includes $2.3 million in class counsel fees, $40,000 in expenses, and $25,000 as a service award to the class representative. The remaining amount will be distributed pro rata to the 359 class members, and the settlement also requires DuPont to provide additional notice to retirees. The court noted that "class-action settlements sometimes present thorny questions," but found "this one is straight down the middle," given that the monetary and nonmonetary relief "are substantial" and class counsel's fee request was "ordinary."

Dispute over Coffee Beans Settles

Corker, et al. v. Costco Wholesale Corp., et al., No. 2:19-cv-00290 (W.D. Wash.) (Feb. 16, 2023). Judge Lasnik. Approving final $6.15 million settlement.

A Washington district judge approved a $6.15 million class settlement resolving Lanham Act claims asserted by Hawaiian coffee farmers against L&K Coffee Co. LLC for selling coffee marked as "Kona" coffee that was not from the Kona region. The court concluded that the results obtained by class counsel were "excellent" and warranted a payment of approximately $2 million—one-third of the settlement fund—for their fees. The district court also approved an injunctive provision of the settlement agreement that requires L&K Coffee to "accurately and unambiguously" label the "minimum percentage of authentic Kona coffee beans" included in its products. Following this settlement, only one non-bankruptcy defendant remains in the farmers' suit, which at one point included as many as 20 defendants, including Costco.

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CLASS ACTION & MDL roundup

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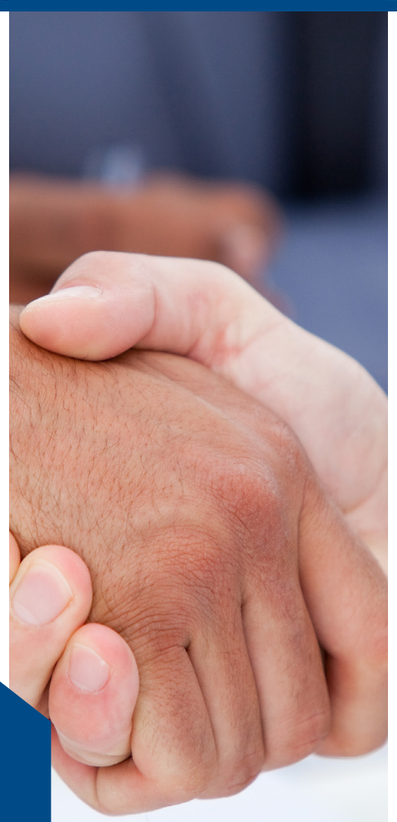


Settlement Approved, but Attorneys' Fees Not Iron-Clad

In re All-Clad Metalcrafters LLC Cookware Marketing and Sales Practices Litigation, No. 2:21-mc-00491 (W.D. Pa.) (Feb. 17, 2023). Judge Ranjan. Approving $6.5 million settlement, granting in part attorneys' fees.

The district court approved a class settlement valued at $6.5 million in a suit against All-Clad involving cookware marketed as "dishwasher safe" but that allegedly deteriorated after dishwashing. Most notable in this decision was the court's treatment of attorneys' fees and service awards. The court found that a lodestar award—rather than percentage of fund—was the appropriate measure because the complaints included statutory claims that allow for fee-shifting and because, as the claims-made settlement, it was not a true common fund. Although the court allowed a lodestar multiplier of 1.35, the court withheld that multiplier (approximately $500,000) until the claims process concluded to encourage class counsel to remain engaged throughout the claims process. The court rejected the requested service award of $2,500 for each class representative, finding that the named plaintiffs, "at most," gathered some documents, reviewed pleadings, and stayed in contact with counsel about the status of the case; because "they did not assume significant risk in bringing these lawsuits" or "materially participate in investigation or discovery," the court found that any additional individualized compensation was not merited.

Preliminary Settlement Approvals Aren't Always Just Preliminary

Gupta v. Aeries Software Inc., No. 8:20-cv-00995 (C.D. Cal.) (Mar. 3, 2023). Judge Olguin. Approving final $1.75 million settlement.

The district court approved a class action settlement involving a class of students and their parents in California whose personal information was subjected to unauthorized access due to a data breach at two school districts that used the defendant's information system. When assessing whether the settlement was fair, reasonable, and adequate under the factors set out in Rule 23(e)(2)—whether there was adequate representation, the proposal was negotiated at arm's length, the relief to the class was adequate, and the proposal treated class members equitably—Judge Olguin based his decisions almost entirely on the earlier rulings he made when granting preliminary approval to the settlement. Judge Olguin also made quick work of finding that the notice requirements in Rule 23(c) were met and awarding attorneys' fees, costs, and service awards. This may be due, in part, to the fact that not a single member of the 98,199-person class filed an objection.

Antitrust Class Action over Canned Tuna Products Settles for $13 Million

In re Packaged Seafood Products Antitrust Litigation, No. 3:15-md-02670 (S.D. Cal.) (Mar. 7, 2023). Judge Sabraw. Approving $13 million settlement.

The district court approved an approximately $13 million class action settlement resolving antitrust and unfair competition claims relating to the alleged conspiracy to fix the price of packaged tuna products at an artificially high price. The court recognized that the settlement was the result of arm's-length negotiations in good faith between experienced antitrust class action attorneys with the assistance of an experienced and well-regarded mediator of complex cases—a former federal judge. The court awarded $5.95 million in attorneys' fees and costs in a separate motion.

Settlement Approved in Bitcoin Mining Class Action

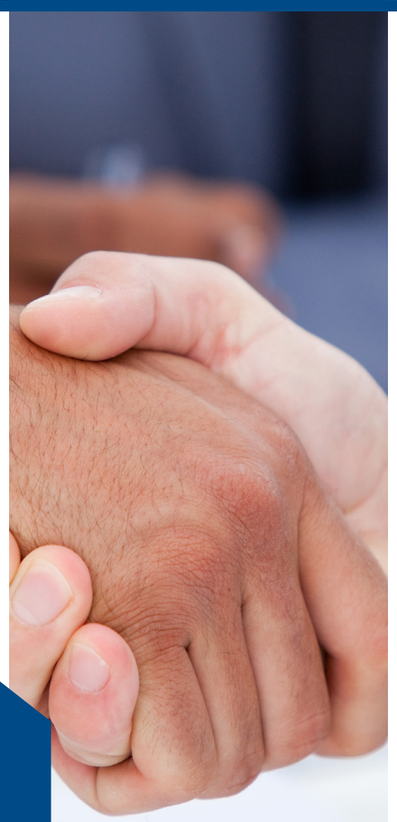
In re Bit Digital Inc. Securities Litigation, No. 1:21-cv-00515 (S.D.N.Y.) (Mar. 7, 2023). Judge Carter. Approving $2.1 million settlement.

The Southern District of New York approved a $2.1 million settlement resolving claims that Bit Digital misled investors about its operations. Investors suffered a 25% drop in Bit Digital's price after an analyst report revealed that Bit Digital did not have sufficient permits to legally conduct bitcoin mining operations in China. Investors previously urged the district court to approve the settlement based on substantial challenges with collecting any potential judgment since Bit Digital had no applicable director and officer liability insurance.

Court Approves Direct Purchaser Plaintiffs' Settlement with Generic Drug Makers

In re Generic Pharmaceuticals Pricing Antitrust Litigation, No. 2:16-md-02724 (E.D. Pa.) (Mar. 9, 2023). Judge Rufe. Approving $75 million settlement.

A Pennsylvania federal judge overseeing the expansive generic pharmaceutical price-fixing litigation approved a $75 million settlement to resolve direct purchaser class plaintiffs' claims against Sun Pharmaceutical Industries Inc. and Taro Pharmaceuticals USA Inc. The settlement class includes all direct purchasers of the named generic drugs from the defendants from May 1, 2009 until December 31, 2019. The four named plaintiffs will each receive a $20,000 service award under the settlement as a result of their active involvement in prosecuting the case, including through depositions



and extensive document production. While the plaintiffs' attorneys are not presently seeking an award, they did seek reimbursement for $6.3 million in expenses and are looking to place one-third of the net settlement fund into escrow to pay attorneys' fees at a later time. In its order, the court noted that some plaintiffs are choosing to proceed in the MDL individually but observed that "given the complexity of the litigation, 700 individual actions are not likely to be a more desirable way of proceeding, and '[a] class action is therefore superior to other methods of adjudication' in the context of the settlements."

Cryptic Future of Unsettled Cryptocurrency Regulation

Hunichen v. Atonomi LLC, No. 2:19-cv-00615 (W.D. Wash.) (Mar. 22, 2023). Judge Jones. Approving final settlement.

Plaintiff Matthew Hunichen brought suit against Atonomi LLC, alleging that Atonomi sold him and class members unregistered securities in the form of Atonomi tokens purchased in a 2018 initial coin offering (ICO). He claimed that the offering failed to comply with registration requirements under state securities law and that class members were entitled to a refund of their investment plus interest, or damages if they had sold at a loss. This settlement resolves the plaintiff's claims against a portion of the defendants, which agreed to a settlement fund of $6,037,500, which includes $1,961,173.02 in attorneys' fees and litigation costs of $31,201.98. The suit against the remaining defendants will proceed separately.

Truck Drivers Collect

Salter, et al. v. Quality Carriers Inc., et al., No. 2:20-cv-00479 (C.D. Cal.) (Mar. 27, 2023). Judge Walter. Approving final $3 million settlement.

A California district court approved a $3 million class settlement resolving a group of truck drivers' claims that they were misclassified as independent contactors and denied wages and reimbursements in violation of California labor laws. As part of its approval order, the court also noted that, of the $3 million settlement, class counsel was entitled to $1 million for fees and approximately $35,000 for costs. The court concluded that the $1 million fee award was appropriate given, among other things, the fact that a lodestar cross-check demonstrated that the fee amount being awarded was less than class counsel's actual lodestar in the matter.

Forever Chemicals Suit Is No More with $54 Million Settlement

Zimmerman v. The 3M Company, No. 1:17-cv-01062 (W.D. Mich.) (Mar. 29, 2023). Judge Jarbou. Granting final approval of settlement

A Michigan district court approved a $54 million settlement among shoe company Wolverine, industrial manufacturer 3M, and Michigan property owners resolving a class action involving drinking water contaminated by PFAS "forever chemicals" from Scotchgard, a product made by 3M and used by Wolverine to waterproof its products. Class counsel received attorneys' fees of $17.4 million—one-third of the settlement fund—and class representatives received service awards between $15,000 and $25,000, for a total of $235,000. Allocation of the non-reversionary settlement fund is based, among other things, on the levels of PFAS found in each property owner's well, and the administrator received 1,195 claim forms by the claim deadline.

Weedkiller Settlement Receives Final Approval

Gilmore v. Monsanto Co., No. 3:21-cv-08159 (N.D. Cal.) (Mar. 31, 2023). Judge Chhabria. Approving final $45 million settlement.

The California federal court overseeing the massive Roundup weedkiller MDL approved a $45 million settlement that resolves false advertising and failure to warn claims against Monsanto and its owner, Bayer AG. The settlement is distinct from the cancer multidistrict litigation and resolves claims by plaintiffs that Monsanto failed to warn consumers about the potential health risks associated with use of its products as a result of their inclusion of the chemical glyphosate. The court found that the amount to be paid to claimants is fair, reasonable, and adequate in light of the potential value of the claims. All claimants will receive more than 20% of the average retail price of the products they purchased, which the court noted was "more than two-thirds of Plaintiffs' expert's estimate of best-case damages were this case to proceed to trial." The court's order also noted that the reaction of the class members to the settlement was favorable, with approximately 230,000 claims being made to only seven opt-outs and one objection to final approval. In granting final approval, the court explained that the lone objector's argument that the nationwide settlement was unfair to the class members residing in Missouri was "unwarranted" and that the settlement "treats all Class Members fairly, including those residing in Missouri." Through the settlement, class counsel received $5.75 million in attorneys' fees—about half of the $11.25 million initially requested, which means class members will receive more than the predetermined amount for their claims. ■

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