ALSTON & BIRD

CLASS ACTION & MDL roundup

QTR 4 | 2022

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overview

CLASS ACTION & MDL **roundup**

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video highlight

click here

DREW PHILLIPS

Counsel, Litigation & Trial Practice Group

Drew discusses the FDA's new definition of "healthy" and the potential impacts on class action litigation.

Where the (Class) Action Is

Welcome back to the ***Class Action & MDL Roundup***! This edition covers notable class actions from the fourth quarter of 2022.

What's new across the pond? In this edition of the *Roundup*, we cover the EU's Directive on Representative Actions, which remains the most significant development on the horizon in the class actions arena, particularly for multinational businesses. Check out our new "International" section to learn more about the key details.

But in the meantime, on this side of the Atlantic a company challenges the constitutionality of a $925 million jury verdict for alleged violations of the TCPA in an ongoing consumer protection case. The circuits all agree, with the Eighth Circuit following in the Sixth and Seventh Circuits' footsteps, holding that ERISA plaintiffs asserting an excessive-recordkeeping-fee claim must identify "similar plans offering the same services for less" in order to allege a "meaningful benchmark." Meanwhile, the automotive industry was a target this quarter for products liability cases related to faulty water pumps and defective fuel pumps.

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.

authors & editors

Cari K. Dawson
cari.dawson@alston.com
404.881.7766

David Venderbush
david.venderbush@alston.com
212.210.9532

Ryan P. Ethridge
ryan.ethridge@alston.com
919.862.2283

Miriam Archibong
miriam.archibong@alston.com
404 881 7776

Charlotte M. Bohn
charlotte.bohn@alston.com
404.881.4471

Sean R. Crain
sean@crain@alston.com
214.922.3435

Blake Crohan
blake.crohan@alston.com
404.881.4625

Mia Falzarano
mia.falzarano@alston.com
214.922.3439

Irene Fraile
irene.fraile@alston.com
+44.20.8161.2225

Jamie S. George
jamie.george@alston.com
404.881.4951

Bradley Harder
bradley.harder@alston.com
404.881.7829

Michelle Jackson
michelle.jackson@alston.com
404.881.7870

Jyoti Kottamasu
jyoti.kottamasu@alston.com
404.881.7835

Kara F. Kennedy
kara.kennedy@alston.com
404.881.4944

Laura A. Komarek
laura.komarek@alston.com
404.881.7880

Matthew D. Lawson
matt.lawson@alston.com
404.881.4650

Andrew J. Liebler
andrew.liebler@alston.com
404.881.4712

Dominic Olins
dominic.olins@alston.com
+44.20.8161.4348

Gavin Reinke
gavin.reinke@alston.com
404.881.4828

Jay Repko
jay.repko@alston.com
404.881.7683

Noelle Elaine Reyes
noelle.reyes@alston.com
212.210.9478

Jason Rottner
jason.rottner@alston.com
404.881.4527

Joanna H. Schorr
joanna.schorr@alston.com
212 210 9421

Alex Shattock
alex.shattock@alston.com
+44.20.8161.4379

Troy A. Stram
troy.stram@alston.com
404.881.7256

Ellie Studdard
ellie.studdard@alston.com
404.881.7291

Andrew T. Sumner
andy.sumner@alston.com
404.881.7414

Nick A. Young
nick.young@alston.com
919.862.2291

International

EU Representative Action Directives

Multinational businesses sued in class actions in the United States regularly face parallel class actions in other jurisdictions with established mass, class, and collective action procedures. It therefore remains important for corporates in the United States with international businesses to keep updated on international developments in class actions.

In the European Union, the EU Directive on Representative Actions for the Protection of Collective Interests of Consumers remains the most significant development on the horizon in the class actions arena. EU Member States were required to transpose the Directive into their national legal systems by 25 December 2022. While it appears that most EU Member States have not met this deadline, the Directive will still need to be implemented. By 25 June 2023, EU Member States are required to have started applying at least one procedural mechanism meeting EU standards for consumer collective redress. This will represent a further step towards facilitating class actions in the EU, and we can expect enhanced coordination and alliances across the plaintiffs' bar in the EU and U.S. in order to maximize pressure on defendants. Some key aspects of the Directive to be aware of include:

1. **Minimum EU-wide Standards.** As explained in our advisory 'Across the Horizon: Growing Class Action Risks in the UK and EU', the purpose of the Directive is to provide minimum EU-wide standards for representative actions brought on behalf of EU consumers in certain categories of EU law (including financial services, data privacy, and energy sectors). For example, redress (and not just injunctive) remedies such as compensatory damages should be available throughout the EU, and the 'loser pays' principle and the ability of courts to summarily dismiss unfounded cases should form part of the collective redress systems of all Member States to avoid vexatious litigation.
2. **Forum Shopping.** Notwithstanding these minimum EU-wide standards, the Directive gives wide discretion to Member States to determine the procedural rules that are to regulate representative actions. For example, Member States are free to decide on key elements, such as whether domestic representative actions are to be governed by an 'opt-in' or 'opt-out' regime, certification procedures, scope of discovery, and the availability and regulation of third-party litigation funding. The likely variance between domestic regimes in these and other key aspects of class action litigation means that forum shopping will increase – at least where the Brussels Regulation allocating jurisdiction between EU domestic courts allows it.

A further development in the EU class action sphere concerns third-party litigation funding. Towards the end of 2022, the EU Parliament adopted a resolution on 'Responsible private funding of litigation'. The resolution made several recommendations concerning the involvement and regulation of third-party litigation funding (TPLF), primarily to boost transparency for both parties and courts and increase the safeguards that should be in place to protect the interests of claimants. In the context of representative actions, the resolution explicitly calls on the EU Commission to 'closely monitor and analyse' the development of TPLF within the EU, with particular attention to be given to the implementation of the Directive and its impact on a variety of access to justice issues. We will continue to monitor developments in this area. ■

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Antitrust/RICO

Play Ball! Court Certifies Class

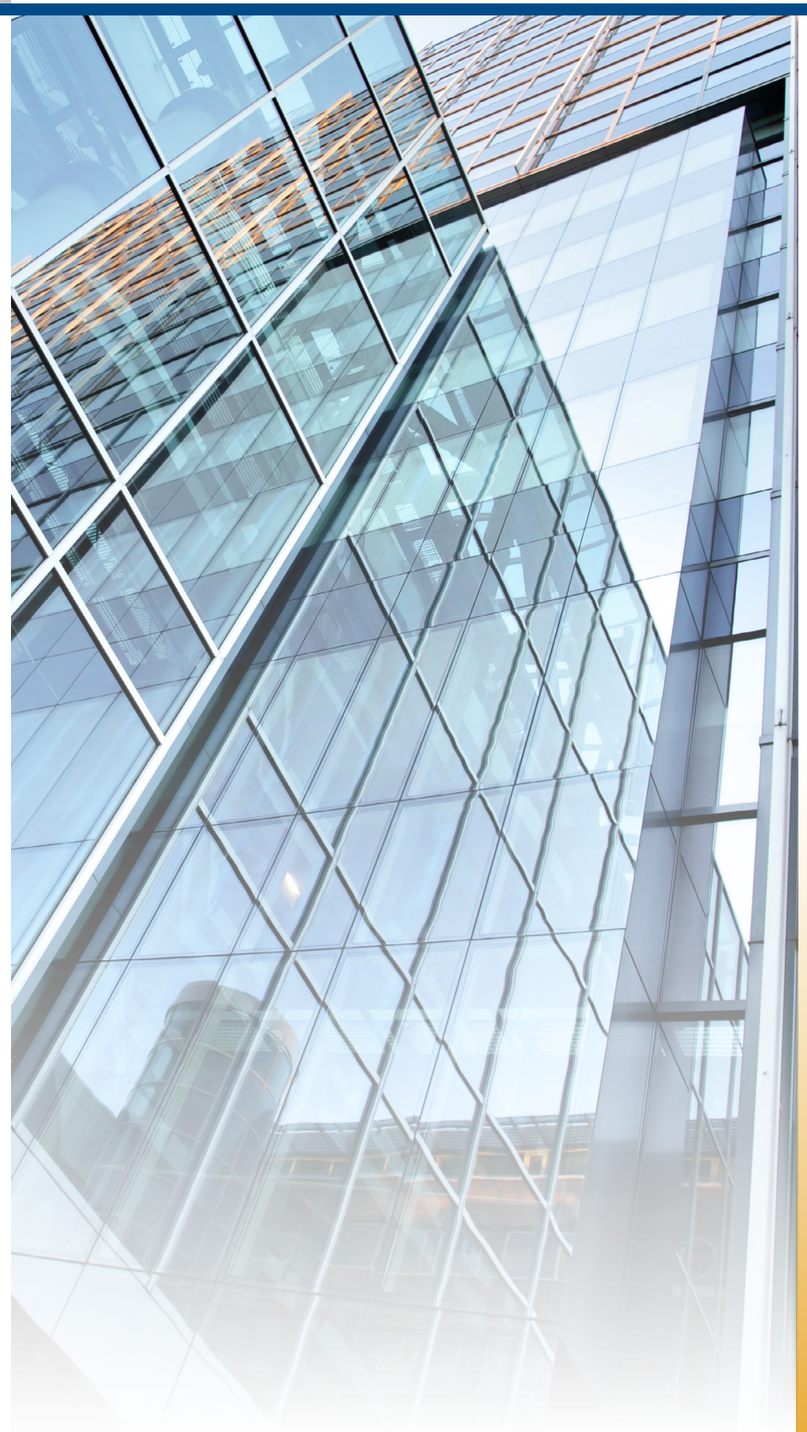
In re Google Play Store Antitrust Litigation, No. 3:21-md-02981 (N.D. Cal.) (Nov. 28, 2022). Judge Donato. Granting class certification.

In a case alleging Google monopolized the Android app distribution market, the plaintiffs successfully moved to certify a multistate class of 21 million consumer purchasers who paid for an app through the Google Play Store or paid for in-app content. Google challenged whether the plaintiffs could establish, predominantly with generalized evidence, that all or nearly all members of the class had suffered antitrust injury. Judge Donato accepted that the formula at the heart of the plaintiffs' economic expert's opinions was suitable as an element of classwide proof. Further, although Google identified other idiosyncratic factors that the expert may not have accounted for, at most that meant that the expert's methods did not totally eliminate the possibility of some individualized issues for certain class members. That was not enough to bar class certification because the plaintiffs' burden is to show only that the common, aggregation-enabling issues are *more prevalent or important than* individual issues.

Predominance Requires Plausibility and Proof, Not Presumptions

Value Drug Co. v. Takeda Pharmaceuticals, U.S.A. Inc., No. 2:21-cv-03500 (E.D. Pa.) (Nov. 23, 2022). Judge Kearney. Denying class certification.

A drug-store-chain purchaser of gout medication moved for certification of a class of similarly situated purchasers after alleging that the brand-name manufacturer and three generic manufacturers conspired to maintain higher prices through agreements to settle pending patent litigations shortly before trial. Judge Kearney denied the motion because the purchaser had not shown a plausible basis to find that common issues predominated. The purchaser's theory of antitrust liability and impact was based on a but-for scenario where the brand-name manufacturer lost the patent litigation to the generic manufacturer, instead of settling. But the purchaser did not offer proof that the brand-name manufacturer would have lost the litigation—that was a counsel-supplied assumption. Without evidence showing the assumption was plausible, this theory could not survive the "rigorous" analysis required by Rule 23. ■



"You too can be at the 2023 American Bar Association Antitrust Law Section's Spring Meeting and see **Kathleen Benway** on the panel "Privacy Enforcement: With or Without You" and **Valarie Williams** on the panel "E-commerce Platforms After *Apple v. Pepper*," March 29–31 in Washington, DC."

Kathleen Benway

Valarie Williams

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Banking & Insurance

Pandemic Policy and COVID Cancellations

Oglevee v. Generali United States Branch, No. 22-00336 (2nd Cir.) (Nov. 2, 2022). Affirming judgment granting motion to dismiss.

In a consolidated class action against Generali U.S. Branch and Customized Services Administrators, the plaintiffs claimed they incurred losses by paying for travel insurance policies on trips that were canceled because of the COVID-19 pandemic. They alleged these losses were covered under the policies' "quarantine" and "natural disaster" provisions. The district court rejected these arguments on the defendant's motion to dismiss, finding that the plaintiffs' losses, if any, were caused by the governmental stay-at-home orders and, therefore, their claims were barred by the policies' general exclusion for losses caused by "travel restrictions imposed … by governmental authority." The district court further found that the plaintiffs had not established that the policy provisions for quarantine or natural disaster applied and were not entitled to premium refunds, based on the policy's plain language making premiums nonrefundable after 10 days. On appeal, the Second Circuit affirmed for "substantially the same reasons," supporting the district court's judgment.

Insurance Company Wins and Loses Appeal

Safety Specialty Insurance Company v. Genesee County Board of Commissioners, Nos. 22-1189/1196 (6th Cir.) (Nov. 21, 2022). Affirming order holding no duty to defend or indemnify insured on class claims but dismissing insurer's declaratory judgment claims against class representatives for lack of standing.

The Sixth Circuit affirmed the lower court's order in this insurance-coverage dispute involving two class actions alleging that several Michigan counties (including Genesee County) wrongfully retained surplus proceeds from tax-foreclosure sales of private property to satisfy tax delinquencies. The three-judge panel affirmed that Safety National Casualty Company and Safety Specialty Insurance Company did not owe a duty to defend or indemnify Genesee County from the lawsuits because the policy expressly excludes claims "arising out of … tax collection, or the improper administration of taxes or loss that reflects any tax obligation."

The circuit court also affirmed that Safety lacked Article III standing for its declaratory judgment claims against the class representatives. First, it agreed that Safety could not sue them over its duty to defend because this right affects only the obligations of the insurer vis-à-vis the insured. Second, it held that Safety's "claim for the duty to indemnify lacks ripeness," noting that "several events must occur" for Safety to indemnify the class representatives, and that the insured (Genesee County) is not the alleged tortfeasor that supposedly injured the class representatives—a distinction belonging to two nonparties (the counties where the representatives live). Ultimately, the court determined that it "require[s] more certainty of the necessity of indemnification before allowing Safety to hale [the class representatives] into federal court."

Do Not Ski Pass Go

In re United Specialty Insurance Company Ski Pass Insurance Litigation, No. 21-16986 (9th Cir.) (Nov. 22, 2022). Affirming dismissal.

The Ninth Circuit affirmed a district court order dismissing the claims of a certified class of individuals who purchased ski-pass insurance from United Specialty Insurance Company for their 2019–2020 season ski passes, seeking to recover for lost ski days after resorts were shut down for the season on March 15, 2020 due to the COVID-19 pandemic. The district court dismissed the action, finding that the class members' "allegations did not support that they had been 'quarantined' within the meaning of the insurance policy." The circuit court affirmed on alternative grounds, holding that the class members could not recover for lost ski days after March 15, 2020 because their insurance coverage terminated on that date pursuant to the "effective date of coverage" provision, which states that coverage terminates on "the date upon which ski operations are ceased due to an unforeseen event" even if that date is before the end of the scheduled ski season.

Crypto-Contest's Dilemma

Suski v. Coinbase Inc., No. 22-15209 (9th Cir.) (Dec. 16, 2022). Affirming denial of motion to compel arbitration.

The plaintiffs filed a class action on behalf of those Coinbase customers who opted into a sweepstakes for trading the cryptocurrency Dogecoin. Coinbase moved to compel arbitration, relying on the arbitration provision contained in the user agreements the plaintiffs agreed to when creating their Coinbase accounts. The district court denied the motion, ruling that the user agreement's arbitration clause was superseded by the forum selection clause contained within the

class-ified

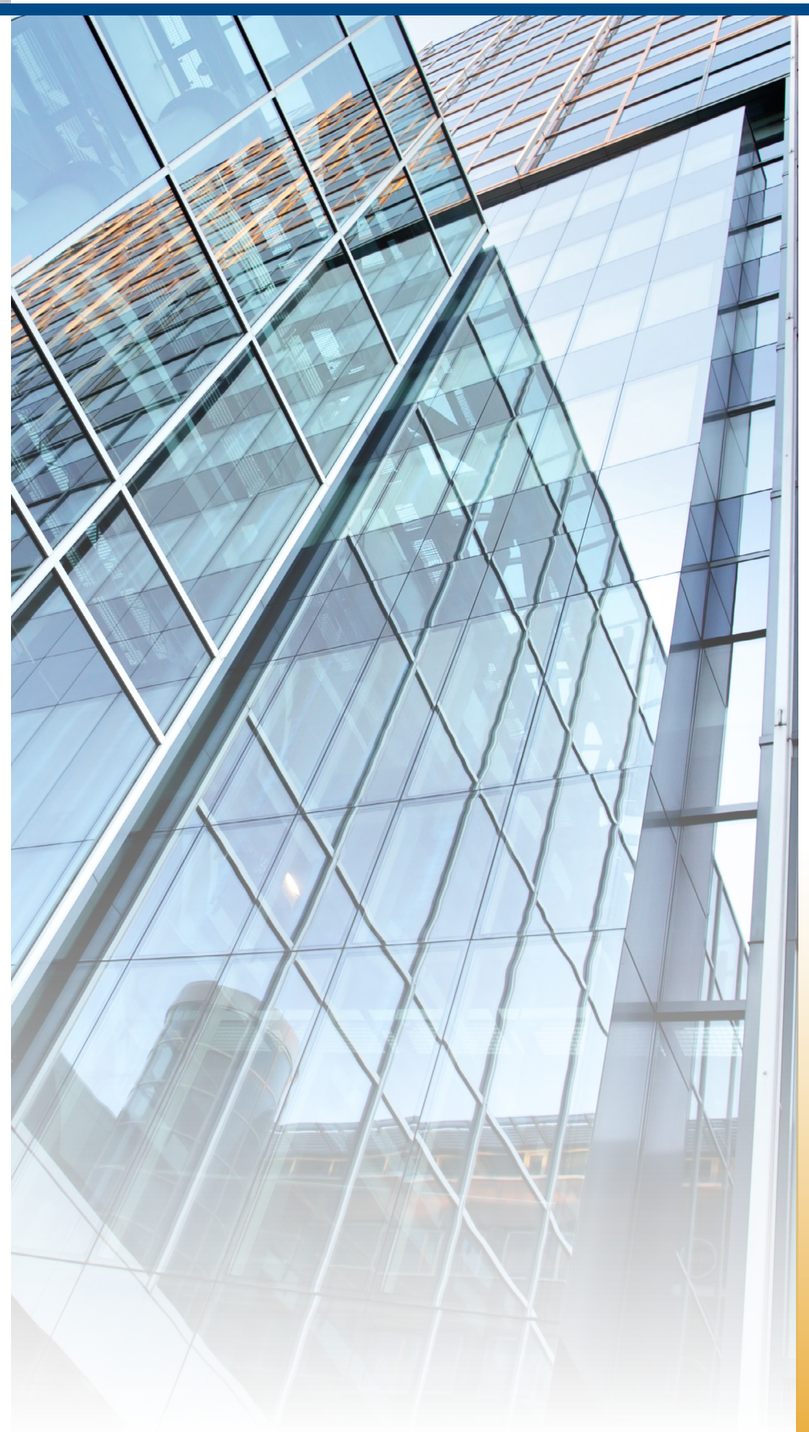
We invest in our relationships with our clients: U.S. Bank Honors Alston & Bird with 2022 "Invested in Diversity" Award.

sweepstakes' official rules that the plaintiffs subsequently agreed to—which named California as the exclusive jurisdiction for controversies regarding the sweepstakes. On appeal, Coinbase argued the user agreement could not have been superseded because it contained an "integration clause" and included procedures for amending itself. But the Ninth Circuit affirmed, noting that the official rules applied to all sweepstakes entrants, including those not subject to the user agreement, and holding that the district court's ruling was proper.

- **Eleventh Circuit Allows Second Bite at Jurisdiction, Ultimately Tosses Suit**

  15 oz Fresh & Healthy Foods LLC v. Underwriters at Lloyd's London, No. 21-10949 (11th Cir.) (Oct. 11, 2022). Granting leave to amend, finding subject matter exists based on additional citizenship allegations, and affirming dismissal with prejudice.

  The Eleventh Circuit granted the plaintiff's motion to amend its putative class action complaint to include additional allegations of the parties' citizenship for purposes of diversity jurisdiction and found that diversity subject-matter jurisdiction existed. Following this winning appetizer for the plaintiffs, the court ultimately affirmed the lower court's dismissal of the plaintiffs' claims concerning insurance coverage under Florida law for losses incurred by businesses as a result of the COVID-19 pandemic. Citing the court's decision in *SA Palm Beach LLC v. Certain Underwrites at Lloyd's London*, which issued while this case was pending, the court held that Eleventh Circuit precedent "squarely" establishes that Florida law does not extend insurance coverage to business losses and expenses related to the COVID-19 pandemic and "forecloses further consideration of this issue." ■



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Consumer Protection

Second Circuit Ices Charcoal Toothpaste Lawsuit

Housey v. Procter & Gamble Company, No. 22-00888 (2nd Cir.) (Dec. 22, 2022). Affirming order granting motion to dismiss.

The Second Circuit affirmed a New York federal court's dismissal of a putative class action alleging the defendant misrepresented the benefits of its toothpastes containing charcoal. The court found the district court properly focused on the product the defendant allegedly purchased, and because the plaintiff represented she did not view the defendant's website before buying the product, the court also properly limited its analysis to whether the "enamel safe whitening" claim appearing on the product's packaging was misleading. The complaint relied primarily on several articles to suggest charcoal may be harmful to tooth enamel, but the Second Circuit agreed with the lower court that the plaintiff failed to plausibly allege the toothpaste she used contained enough charcoal "so as to render the toothpaste harmful and incapable of 'enamel safe whitening.'"

Seventh Circuit Green-Lights Denial of Arbitration Bid in Biometric Information Privacy Suit

Johnson v. Mitek Systems Inc., No. 22-01820 (7th Cir) (Dec. 21, 2022). Affirming order denying motion to compel arbitration.

The Seventh Circuit affirmed a trial court's order denying the defendant's motion to compel arbitration in a putative class action alleging violations of the Illinois Biometric Information Privacy Act (BIPA). The complaint alleged the defendant identification-verification company violated BIPA by unlawfully collecting and storing rideshare drivers' biometric data without their notice or consent, and the defendant moved to compel arbitration based on an arbitration agreement entered into between the drivers and the third-party car-rental platform. The circuit court affirmed the lower court's order, holding that the defendant could not force arbitration because it is not a beneficiary under the contract, noting that, although the class representatives "agreed to arbitrate with a long list of entities," including subsidiaries of the car-rental platform and "users or beneficiaries of services or goods provided under the Agreement," suppliers such as the defendant "are not on the list."

One Step Closer to Slashing $925 Million Verdict

Wakefield v. ViSalus Inc., No, 21-35201 (9th Cir.) (Oct. 20, 2022). Affirming in part and vacating in part the district court's judgment following a jury verdict in favor of the plaintiffs.

In this appeal, ViSalus sought to undo a $925 million jury verdict against it for violations of the Telephone Consumer Protection Act (TCPA). While ViSalus had previously received consent from the recipients of its prerecorded calls, during the timeframe relevant here, the FCC had amended its regulations to define "prior express consent" as necessitating a written disclosure indicating the recipient's request. ViSalus had no such disclosures. ViSalus sought a waiver from the FCC for its noncompliance but failed to plead prior express consent. Its request was denied once before trial but granted two months after trial. In light of this retroactive waiver, ViSalus filed post-trial motions to decertify the class or grant a new trial or, alternatively, find the damages award to be unconstitutionally excessive. These motions were denied.

On appeal, the Ninth Circuit affirmed the lower court's determination that the plaintiff class had standing and that ViSalus had waived a consent defense by not pleading prior express consent. However, the panel vacated the lower court's denial of ViSalus's motion challenging the award, noting that the district court should apply the *Williams* due process standard and *Six Mexican Workers* factors to determine the constitutionality of the award.

Plaintiff Puts Stranglehold on Organics False Ad Lawsuit

McMonigle v. BlackOxygen Organics USA Inc., No. 1:21-cv-04790 (N.D. Ga.) (Oct. 17, 2022). Granting motion for class certification.

A Georgia federal court granted certification of a nationwide class action filed against the company and its owner alleging their nutritional supplements contained toxic heavy metals. Relying on tests performed by independent laboratories confirmed by the Food and Drug Administration, the complaint alleged the products contained unsafe levels of arsenic, lead, and cadmium and made unsubstantiated medical claims. After the defendants failed to respond to the complaint, the court certified a nationwide class against the defendants of all U.S. residents who purchased the products during the applicable statutes of limitations.

"How do you build a monitoring program? Let **Tery Gonsalves** explain on the panel "Investigations vs Monitoring: Strengthening Your Monitoring Program in the Pursuit of Less Investigations" at ALM's LegalWeek, March 20–23 in New York City."

Tery Gonsalves

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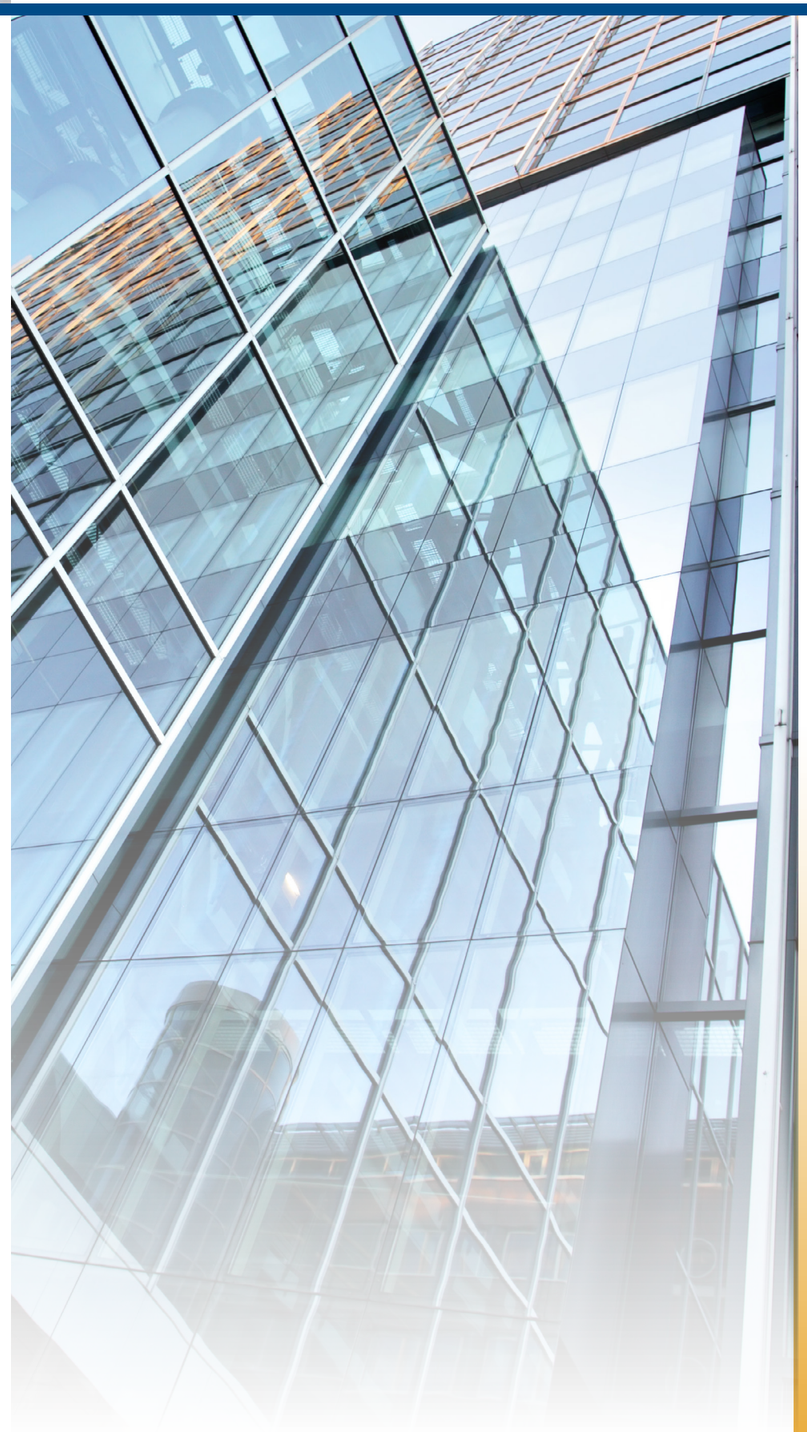
A Successf-OIL Motion for Class Certification

Noohi v. Johnson & Johnson Consumer Inc., No. 2:20-cv-03575 (C.D. Cal.) (Nov. 30, 2022). Judge Hatter. Granting motion for class certification.

In this false advertising case, the plaintiff sought to certify a class of individuals who bought an "oil-free" face wash that contained ethylhexyl palmitate and soybean sterols, which the plaintiff alleged are oils or byproducts of oils. Though the court excluded the plaintiff's expert seeking to opine on the substances that could qualify as "oil" at the class certification stage, the court found that the expert could likely present his conclusions in an admissible manner at subsequent stages of the litigation. Further, the court allowed the plaintiff to proceed on her damages model because the proposed methodology was capable of showing class members were harmed. With these issues settled, the court had little trouble finding that the plaintiff had satisfied the remaining requirements of Rule 23 and certified the class. ■



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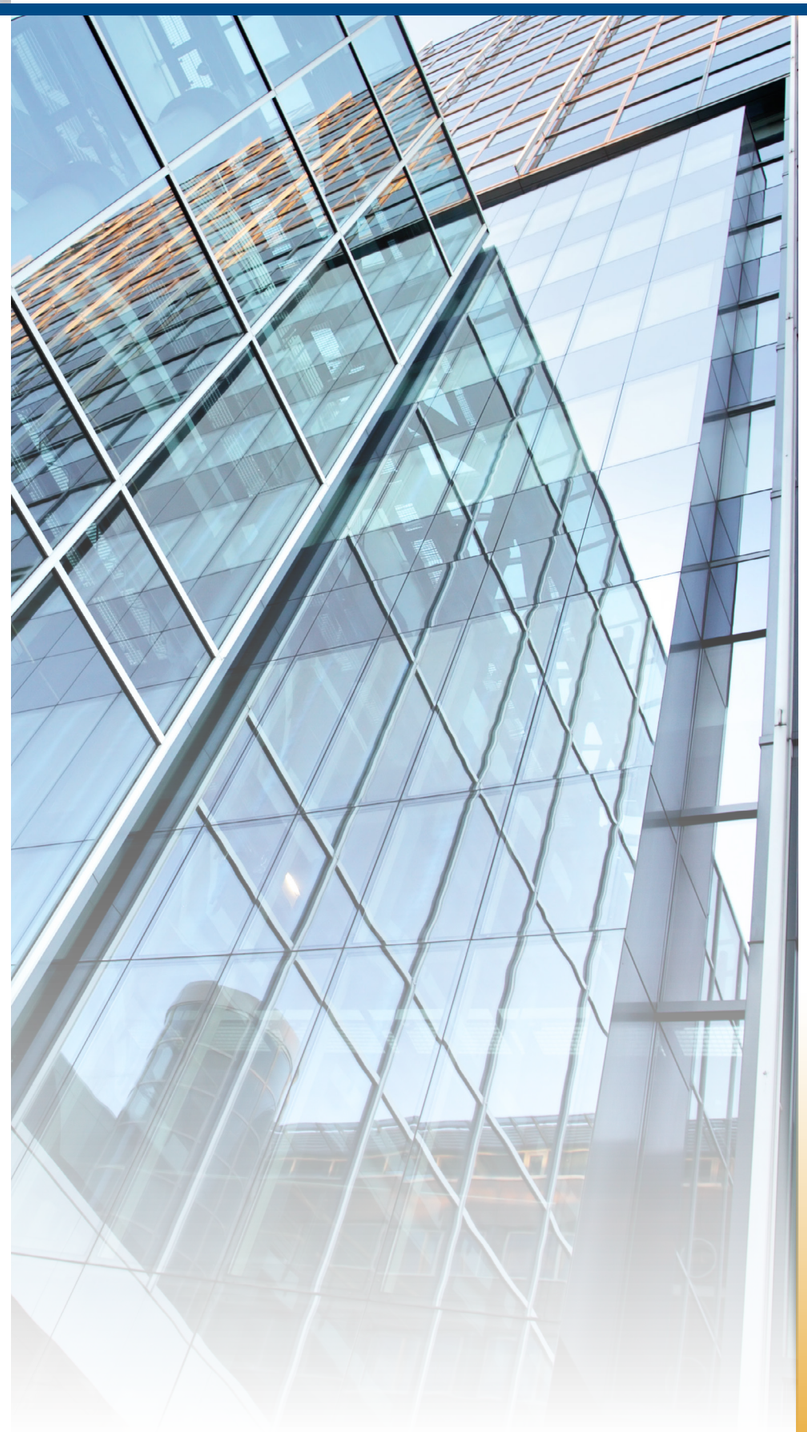
Labor & Employment / ERISA

- **ERISA Plaintiffs Must Allege a "Meaningful Benchmark"**

  Matousek v. MidAmerican Energy Co., No. 21-02749 (8th Cir.) (Oct. 12, 2022).

  The Eighth Circuit held that ERISA plaintiffs asserting an excessive-recordkeeping-fee claim must identify "similar plans offering the same services for less" in order to allege a "meaningful benchmark," aligning the Eighth Circuit with the Third, Sixth, and Seventh Circuits, which have a similar requirement to plausibly allege such a claim. The court also held that ERISA plaintiffs cannot rely on broad peer-group data or large universes of funds to challenge specific plan investments without demonstrating that the "risk profiles, return objectives, and management approaches" of the challenged and comparator funds are similar.

  This decision, and recent Sixth and Seventh Circuit decisions, provide defendants additional support to challenge the sufficiency of an ERISA plaintiff's allegations. ■



"On the 30th anniversary of the Family and Medical Leave Act, *HR Dive* asked **Ashley Brightwell** "Pregnant Workers Fairness Act vs. FMLA: Where Do They Intersect?"

Ashley Brightwell

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Privacy & Data Security

- **Not All Subclasses Are Created Equal: If One Has More Valuable Claims, It May Require Separate Counsel**

  Murray v. Grocery Delivery E-Services USA Inc., No. 21-01931 (1st Cir.) (Dec. 16, 2022). Vacating approval of class action settlement.

  Sarah McDonald objected to a proposed TCPA class action settlement with the defendant, arguing that the claims of the subclass she sought to represent were substantially more valuable than the claims of the rest of the class because her claims allowed recovery of certain statutory damages that other class members' claims did not. McDonald argued that class counsel's decision to settle all claims for $14 million—with equal payouts to each member of each subclass—demonstrated that class counsel could not fairly represent all three subclasses.

  The district approved the settlement, but the First Circuit reversed. It recognized that "significant differences in contested claims or defenses have the potential to cause significant differences in claim value" and that there are circumstances when one lawyer cannot "properly advocate for each such group because giving one group a larger piece of the pie necessarily reduces the amount available to a different group." Because there were significant differences in the claims and defenses of the putative subclasses that the district court had not adequately addressed, the First Circuit held that it was erroneous to conclude that the proposed settlement was fair, reasonable, and adequate.

- **Where Are Your Workers? Remote Employees May Be Sufficient Contacts for Personal Jurisdiction**

  Baton v. Ledger SAS, No. 21-17036 (9th Cir.) (Dec. 1, 2022). Reversing in part dismissal for lack of personal jurisdiction and remanding for jurisdictional discovery.

  After a data breach exposed the putative class members' personal data through the "hardware wallets" they purchased to store cryptocurrency, the plaintiffs filed class claims against the company that manufactured and sold the wallets, a Canadian vendor of that company, and the vendor's U.S. subsidiary. The Northern District of California dismissed the action for lack personal jurisdiction and denied the plaintiffs' requests for jurisdictional discovery.

  On appeal, the Ninth Circuit concluded the California district court had specific jurisdiction over the plaintiffs' claims against the manufacturer of the hardware wallet because it generated significant revenue from the sale of 70,000 wallets directly to Californians and collected California taxes. On the other hand, the circuit court held that the plaintiffs had not established personal jurisdiction over the vendor or its subsidiary, but it found the district court abused its discretion in refusing the plaintiffs' request for jurisdictional discovery because over 200 of the vendor's remote workers—including the vendor's "Data Protection Officer," who oversaw "the relevant privacy policies" and "may have played a role related to the data breach"—worked remotely from California and there was a "reasonable probability" his presence in California could support the exercise of personal jurisdiction. The district court was directed to allow the requested jurisdictional discovery on remand.

- **Friendly Reminder: It's Your Mother's Birthday … and Equipment That Randomly Generates the Order Phone Numbers Are Called Does Not Violate the TCPA**

  Brickman v. Meta Platforms Inc., No. 21-16785 (9th Cir.) (Dec. 21, 2022). Affirming dismissal.

  Colin Brickman sued Meta, Facebook's parent company, alleging that Facebook's birthday announcement text messages violated the TCPA because they were sent with equipment that randomly generated the order telephone numbers were texted. In granting the motion to dismiss, the district court agreed with Meta that equipment that randomly generates the order numbers are texted—but does not randomly generate the numbers themselves—does not qualify as an autodialer under the TCPA. Brickman appealed, and the Ninth Circuit affirmed the dismissal, holding that under the plain language of the TCPA, "an [autodialer] must generate and dial random or sequential telephone numbers" and that Meta's system did not violate the TCPA because it merely chose the order phone numbers entered by Facebook users would be contacted.

"Last call: **Alexander Brown**, **Kathleen Benway**, and **Ashley Miller** wrote "Federal Trade Commission Settles with Drizly for Alleged Security Failures," for *Pratt's Privacy & Cybersecurity Law Report.*"

Alexander Brown

Kathleen Benway

Ashley Miller

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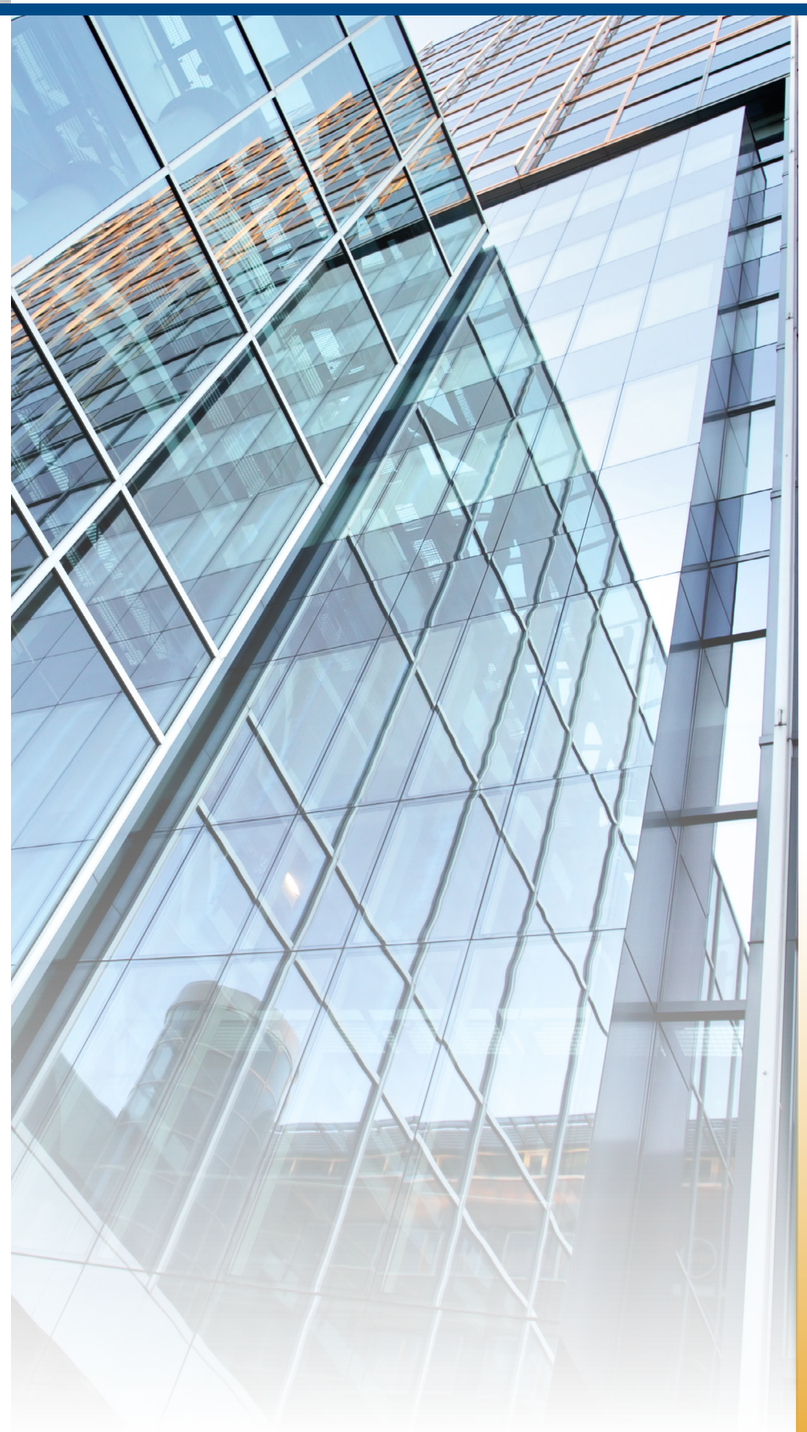
In-COPPA-ceivable! COPPA Preempts Only *In*consistent State Laws, Not Consistent Ones

Jones v. Google LLC, No. 21-16281 (9th Cir.) (Dec. 28, 2022). Vacating dismissal of class action complaint.

The plaintiffs, all children under 13, allege that the defendants violated various state laws by using "persistent identifiers" to collect their data and track their online behavior, without obtaining parental consent, in violation of the Children's Online Privacy Protection Act (COPPA). The plaintiffs brought only claims pursuant to the constitutional, statutory, and common law of several states, and the district court twice dismissed their claims because the "core allegations" were "squarely covered, and preempted," by COPPA. On appeal, the Ninth Circuit reversed, holding that COPPA's express preemption clause applies only to "contradictory state law requirements" or "requirements that stand as obstacles to federal objectives" and that the plaintiffs' state-law claims were not preempted because they were "parallel to, or proscribe the same conduct forbidden by, COPPA." ■



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Products Liability

Oh Baby! Baby Food Buyers Got the Benefit of Their Bargain

In re Gerber Products Company Heavy Metals Baby Food Litigation, No. 1:21-cv-00269 (E.D. Va.) (Oct. 17, 2022). Judge Nachmanoff. Dismissing class action for lack of standing.

Judge Michael S. Nachmanoff dismissed the consolidated class actions seeking monetary damages and injunctive relief, finding that the plaintiffs lacked standing on their claims for false advertising and other alleged wrongdoings, which were based largely on a report released by the House Committee on Oversight and Reform that showed heavy metals were found in baby food products sold by various companies.

The plaintiffs made clear they did not seek standing based on "personal injury, i.e., an increased risk of adverse health effects," but the court found the plaintiffs' economic harm theory for injury in fact "runs afoul of logic" because the basis for their diminished-value claim was that the baby food products posed a threat of future harm—an allegation the plaintiffs "explicitly disavow[ed]."

Analyzing the plaintiffs' alleged economic injuries under both benefit-of-the-bargain and price-premium theories, the court ruled that they lacked Article III standing because they paid for safe and healthy baby food and apparently received just that. The court went on to find that, even if there were standing, the FDA—not the court—has primary jurisdiction to determine the harmful levels of heavy metals in baby food, a finding that would be necessary to adjudicate any of their claims.

Class Certification Arguments Successful for Some but Not All

Sonneveldt, et al. v. Mazda Motor of America Inc, d/b/a/ Mazda North American Operations, No. 8:19-cv-01298 (C.D. Cal.) (Oct. 21, 2022). Judge Staton. Granting in part and denying in part motion for class certification.

In this products liability class action alleging Mazda sold cars with faulty water pumps that cause engine failure, the court denied the defendants' motion to exclude the plaintiffs' expert testimony, certified seven putative classes of vehicle purchasers from seven states (California, Massachusetts, Michigan, Missouri, Ohio, Texas, and Virginia), and declined to certify two other putative classes of purchasers in two other states (North Carolina and Louisiana). For the buyers in the seven certified states, the court found that the alleged defect's effect on the class vehicles' safety and value is susceptible to common proof and, therefore, common issues predominate over individualized issues involving the materiality of Mazda's omission.

The court denied certification for the North Carolina class because the proposed class included all persons who purchased class vehicles in North Carolina, regardless of seller, and the court found that Mazda did not owe a duty to disclose to buyers like the named plaintiff who bought their cars from non-Mazda-authorized dealers or from private sellers. The court also declined to certify the Louisiana class, ruling that the plaintiffs failed to offer a theory of damages that is redressable under the Louisiana Products Liability Act because purely economic damages—such as the overpayments and costs of repair sought by the class representatives—cannot be recovered under the law.

Prompt Recall Moots Truck Buyers' Claims

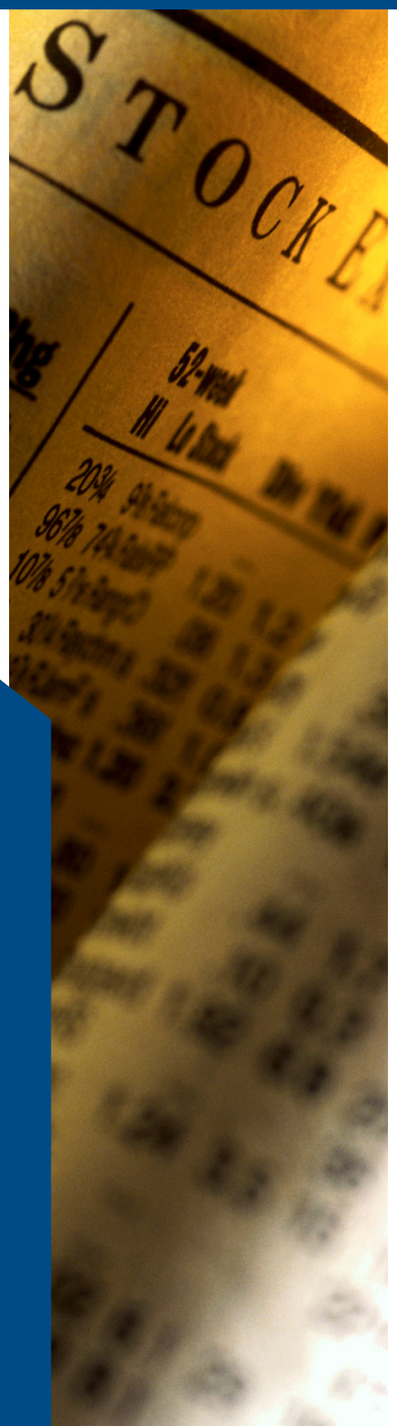
Sharp v. FCA US LLC, No. 2:21-cv-12497 (E.D. Mich.) (Oct. 25, 2022). Judge Parker. Dismissing class action.

Judge Linda Parker dismissed class claims against engine manufacturer Cummins and Fiat Chrysler Automobiles (FCA) alleging that the defendants installed defective fuel pumps in their heavy-duty trucks, finding the claims were mooted by the voluntary recall FCA announced less than two weeks after the suit was filed. Applying the doctrine of prudential mootness, the court dismissed the case because FCA had agreed, under the continuing investigation and oversight by the National Highway Traffic Safety Administration (NHTSA), to replace the defective fuel pumps and to reimburse the plaintiffs for costs incurred in repairing their vehicles.

The court stated it "can offer little by way of an injunction or declaratory relief that will not already be provided through the recall." The court rejected the plaintiffs' argument that prudential mootness applies only when the plaintiffs seek equitable relief, not when damages are sought, explaining that the repairs offered through the recall remove the defect the plaintiffs' diminished-value or benefit-of-the-bargain injury is based on. The court also rejected the plaintiffs' argument that their claims were not mooted because the recall is ineffective, concluding that the plaintiffs alleged insufficient facts to show the recall remedy would not be effective, and the mere possibility of an ineffective remedy is insufficient. ■

"**Mia Falzarano** judges the answer to a question about "Juror Questions in Civil Cases: Opening Pandora's Box or Newest Tool for Juror Engagement?" in American Psychology-Law Society's newsletter."

Mia Falzarano



Securities

- **Something Stinks: Investor Suit over Omissions of the Impact of Sulfur-Restriction Regulation Revived**

  City of Riviera Beach General v. Macquarie Infrastructure Corp., No. 21-02524 (2nd Cir.) (Dec. 20, 2022). Vacating judgment.

  The Second Circuit breathed new life into investors' claims, which the lower court had dismissed, alleging that a company's executive team failed to warn shareholders about the financial impact of a new environmental regulation. The appellate court agreed with the district court that the majority of the alleged misstatements were not actionable, but it held that the lead plaintiff met its burden by pleading actionable omissions—specifically, that the defendants allegedly withheld information about a fuel restriction regulation known as IMO 2020, which placed a global limit on sulfur content in marine fuel, and that the company's stock price declined sharply when it eventually announced that its most profitable subsidiary could lose a significant amount of fuel storage business a result of the regulation. The court also held that the plaintiff satisfied the scienter requirement by pleading "strong circumstantial evidence of conscious recklessness 'at least as strong as any opposing inference.'"

- **Online Education Platform Schools Plaintiffs, Wins Appeal**

  Boykin v. K12 Inc., No. 21-02351 (4th Cir.) (Nov. 22, 2022). Affirming dismissal.

  The Fourth Circuit affirmed the dismissal of a securities fraud class action against online education platform K12, agreeing with the lower court that the plaintiffs failed to state viable claims as to statements K12 made about its prospects and performance in the early months of the COVID-19 pandemic. Although the complaint enumerated 23 purportedly fraudulent statements made by K12's senior executives, the court cautioned that "quantity is not the same as quality" and held the vast majority of the identified statements were non-actionable as puffery, opinions, and forward-looking statements. The court further held that the plaintiffs did not demonstrate falsity as to the remaining statements, by which the defendant allegedly reported a deal between K12 and Miami-Dade County Public Schools that ultimately fell through, in part because there was "an extensive working relationship between K12 and Miami-Dade" and because K12's executives never "unambiguously" stated that it had a signed agreement with Miami-Dade. The court also held that the plaintiffs failed to plead scienter because they did not allege a personal benefit that would have motivated K12's executives to commit securities fraud, such as suspicious insider sales or special bonuses. ■

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CLASS ACTION & MDL roundup

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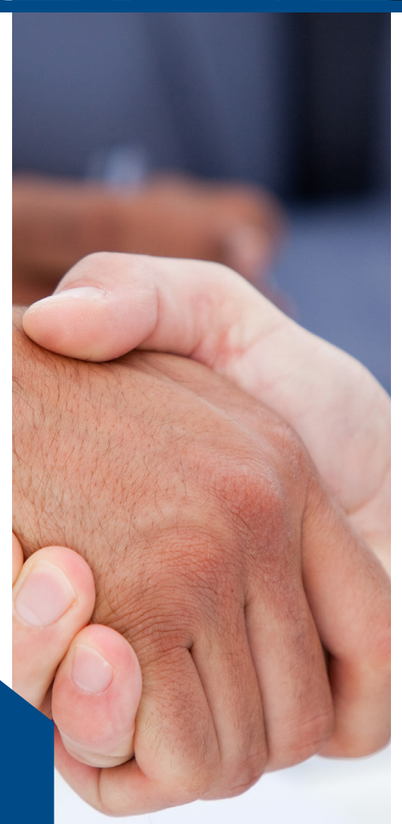


Settlements

(Timely) Objection, Not Intervention, Is the Better Course

Fyson, et al. v. Wells Fargo Bank, No. 22-15694 (9th Cir.) (Oct. 12, 2022). Affirming settlement approval.

The Ninth Circuit affirmed a California district court's approval of a $95 million settlement resolving multiple class actions stemming from claims that Wells Fargo improperly clawed back wages and vacation time from mortgage consultants' earned commissions. The circuit court rejected the objecting class member's argument that the district court erred by "disregarding the allegedly collusive and unfair nature of the settlement," finding that the lower court carefully scrutinized the fee amount and provided class members with a reasonable opportunity to opt out of a class settlement, and noting that no class members had chosen to opt out and that the petitioning class member "instead made only an untimely objection to the settlement." The Ninth Circuit also affirmed the district court's denial of the petitioner's motion to intervene, concluding the motion was untimely and further noting that the "better course for class members who oppose a settlement" is to file (timely) objections, rather than seeking to intervene.

Security Snafu

In re Sonic Corp. Customer Data Security Breach Litigation, No. 1:17-md-02807 (N.D. Ohio) (Oct. 17, 2022). Judge Gwin. Approving class settlement, grawnting attorneys' fees and expenses, and reducing incentive awards for named class members.

Sonic Corporation's customer information was exposed by a data breach in 2017, resulting in several related multidistrict litigations that were ultimately consolidated and settled. In this case, the court granted final settlement approval, resolving negligence claims brought by a certified class of over 5,000 financial institutions that reissued payment cards or reimbursed a compromised account associated with the data breach. After extensive discovery and pretrial motions practice over the course of three years, Sonic agreed to pay up to $5.73 million to resolve class members' claims. The court approved the proposed settlement agreement, certified the nationwide class, and granted $2.2 million for attorneys' fees and costs, along with payment of incentive awards.

COVID-19 Flight Cancellation Class Action Settled

Ide v. British Airways PLC (UK), No. 1:20-cv-03542 (S.D.N.Y.) (Nov. 14, 2022). Judge Furman. Approving settlement.

A federal judge approved a settlement resolving claims over British Airways' handling of flight cancellations during the COVID-19 pandemic and its alleged decision to offer vouchers for partial payments on future travel instead of cash refunds. Judge Jesse M. Furman noted the complexity, expense, and likely duration of the litigation in approving the settlement, which (1) provides all 26,000+ class members with canceled flights between March 1, 2020 and December 31, 2021 an opportunity to receive a 100% refund; (2) allows those with canceled flights between March 1, 2020 and November 19, 2020 a chance to claim an additional cash payment; and (3) awards $1.26 million in attorneys' fees to class counsel.

Student Borrowers Settle for $6 Billion of Forgiveness

Sweet, et al. v. Cardona, et al., No. 3:19-cv-03674 (N.D. Cal.) (Nov. 16, 2022). Judge Alsup. Approving settlement.

A California district judge approved a class action settlement resolving approximately 264,000 college students' claims that the U.S. Department of Education failed to timely process their debt cancellation applications under a federal program intended for students who believe their schools misled them about the value of taking on student loans. In doing so, the judge approved the department's plan to forgive more than $6 billion in student debt—over the objection of several education institutions—citing the plenary discretion of the Attorney General and the department to settle litigation to which the federal government is a party. The court also specifically noted that the debt forgiveness contemplated by the settlement agreement is separate and apart from President Biden's broader program to forgive $430 billion in student debt.

Cleanup Costs

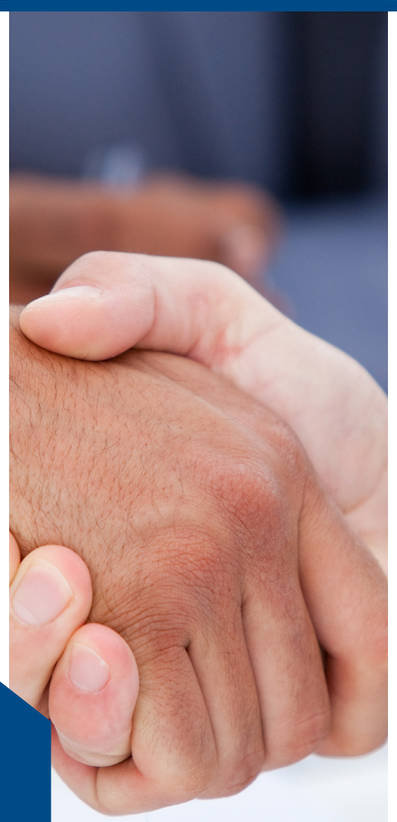
City of Long Beach v. Monsanto Co., No. 2:16-cv-03493 (C.D. Cal.) (Nov. 19, 2022). Judge Olguin. Approving $537.5 million settlement and awarding $91.7 million in attorneys' fees and costs.

The City of Long Beach, California, and more than 10 other localities filed similar but separate lawsuits alleging that Monsanto's design, manufacture, sale, promotion, and supply of PCBs (polychlorinated biphenyls) contaminated public waterways, exposed the public to increased health risks, and resulted in additional cleanup and

"Don't be late: **Jeffrey Dintzer** and **Greg Berlin** remind you that "Preparation for EPA Regulation of PFAS Starts Now," in *Law360*."

Jeffrey Dintzer

Greg Berlin



compliance costs for the municipalities. After litigating these separate actions for years, the plaintiffs and Monsanto reached a settlement to resolve all pending actions and potential claims nationwide.

Judge Fernando M. Olguin approved the proposed settlement, consisting of a monetary award of $537.5 million, plus $91.67 million in attorneys' fees. The majority of the monetary award was paid into three settlement funds to compensate the three main identified harms—the need to monitor PCBs in stormwater, the need to comply with regulatory maximums for PCBs, and sediment remediation—with the remainder going to a fourth fund to compensate those localities that bore the highest costs or made the settlement possible. The court found that the $91.67 million in fees requested by counsel was reasonable, given that it amounted to 14.6% of the total class benefit, which was "well below the 25% benchmark."

Security Fraud Action Settles for $13 Million

Nieves v. Davis, No. 1:16-cv-03591 (S.D.N.Y.) (Nov. 21, 2022). Judge Woods. Approving $13 million settlement and awarding attorneys' fees.

A federal judge approved a $13 million class action settlement resolving securities fraud claims against the former executives of the bankrupt Performance Sports Group Ltd. after more than six years of litigation. In a separate order, the judge awarded class counsel a total of $4.8 million in attorneys' fees—consisting of 28% of the settlement fund and 28% of a $1.15 million bankruptcy fund set aside for the class members' benefit—finding this award was reasonable in light of the amount of time expended and the absence of objections to the fee application.

Pay-for-Delay Deal Ends with Payout to End-Payors

In re Opana ER Antitrust Litigation, No. 1:14-cv-10150 (N.D. Ill.) (Dec. 15, 2022). Judge Leinenweber. Approving $15 million settlement.

An Illinois federal judge approved the proposed settlement of an end-payor class action and entered final judgment, ending nearly a decade of litigation over claims against Impax Laboratories that an alleged pay-for-delay deal with Endo Pharmaceuticals had caused purchasers to pay more for the brand name drug when a cheaper, generic version could have been available to them years earlier. The approved settlement provided $15 million for payouts to the two certified end-payor classes (an antitrust/consumer protection class and unjust enrichment subclass), as well as service awards for each of the six class representatives, and it awarded co-lead class counsel attorneys' fees of $5 million, along with an additional $4 million in costs and expenses.

Class Counsel Rewarded for Obtaining Large Portion of D&O Insurance

Gruber, et al. v. Gilbertson, et al., No. 1:16-cv-09727 (S.D.N.Y.) (Dec. 21, 2022). Judge Rakoff. Approving $14 million settlement.

A New York district judge approved a $14 million class settlement resolving securities claims asserted by shareholders of Dakota Plans Holdings Inc. against the company's directors and officers. He also approved a $4.6 million attorneys' fee award, concluding that this award was appropriate given the quality of class counsel, who were able to obtain a settlement that represented 93% of the directors and officers' remaining insurance. As part of the order, the court also ruled that the prior judgment entered against one of the company's co-founders, who was previously found liable for securities fraud, should be reduced by the amount of the class settlement.

Join **Bhanu Mathur** on the Associate panel at the 18th Annual Leadership Institute for Women of Color Attorneys Conference, March 22–24 in Washington, DC.

Bhanu Mathur

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