ALSTON & BIRD

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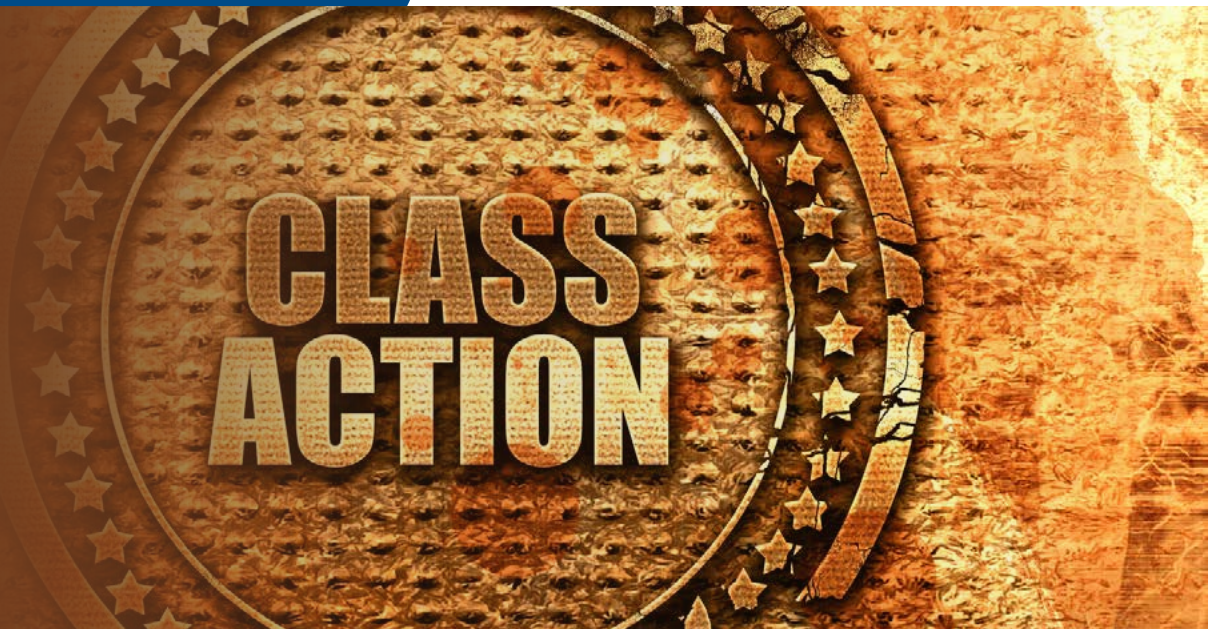

Class Action Roundup

Summer 2018

Where the (Class) Action Is

Welcome to the latest edition of the *Class Action Roundup*, covering significant decisions and settlements from the second quarter of 2018. Arbitration was a hot topic this quarter with the Supreme Court's decision in *Epic Systems*, which is now rippling down to lower court decisions. We continue to see significant action in the Banking, Financial Services & Insurance area with cases covering California's state escrow law, retirement plan investments, and residential mortgage-backed securities (RMBS).

Consumer Protection decisions covered a wide range of products and services, from parking receipts and food products to department store pricing and pesticides. Cases related to the Flint water crisis continue to work their way through the court system. Employers defended themselves against wage-and-hour claims and issues related to worker classifications, two areas that have seen a lot of attention over the last year. Data breaches continue to plague consumers and corporations alike with several decisions stemming from breaches. Automakers were hit with a slew of product liability cases alleging faulty wiring, clutch system defects, vehicles that stall or shut off without warning, and faulty engines.

We wrap up the *Roundup* with a summary of class action settlements finalized in the 2nd quarter. We hope you enjoyed this installment and, as always, welcome any feedback you have on this or any other publication from the Class Action team.

Authors & Editors

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

Kyle G.A. Wallace
kyle.wallace@alston.com
404.881.7808

David R. Venderbush
david.venderbush@alston.com
212.210.9532

Charles W. Cox
charles.cox@alston.com
213.576.1048

Alexander Akerman
alex.akerman@alston.com
213.576.1149

Christina Bortz
christina.bortz@alston.com
404.881.4686

Sam Bragg
sam.bragg@alston.com
214.922.3437

David B. Carpenter
david.carpenter@alston.com
404.881.7881

Caitlin Counts
caitlin.counts@alston.com
919.862.2252

A. Nicole DeMoss
nicole.demoss@alston.com
404.881.4945

Matthew A. Durfee
matt.durfee@alston.com
214.922.3428

Mia Falzarano
mia.falzarano@alston.com
214.922.3439

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

Anthony T. Greene
tony.greene@alston.com
404.881.7887

Bradley Harder
bradley.harder@alston.com
404.881.7829

Kandis Wood Jackson
kandis.jackson@alston.com
404.881.7969

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

Jahnisa Tate Loadholt
jahnisa.loaadholt@alston.com
202.239.3670

Austin L. Lomax
austin.lomax@alston.com
404.881.7840

Rachael A. Naor
rachael.naor@alston.com
415.243.1013

Christiane Nolton
christiane.nolton@alston.com
404.881.7165

Sarah N. O'Donohue
sarah.odonohue@alston.com
404.881.4734

Kristi Ramsay
kristi.ramsay@alston.com
404.881.4755

Geoff C. Rathgeber
geoff.rathgeber@alston.com
404.881.4974

Jay Repko
jay.repko@alston.com
404.881.7683

Jason Rottner
jason.rottner@alston.com
404.881.4527

Marcus Sandifer
marcus.sandifer@alston.com
212.210.9551

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

Amanda M. Waide
amanda.waide@alston.com
404.881.4409

Jacob M. Ware
jake.ware@alston.com
404.881.7693

Derek Zotto
derek.zotto@alston.com
202.239.3017

Supreme Court

- **Class Action Waivers in Employment Arbitration Agreements Are Valid**

  Epic Systems Corp. v. Lewis, No. 16-285 (U.S.) (May 21, 2018). Reversed and remanded to Seventh Circuit.

  The U.S. Supreme Court recently resolved a circuit split over the validity of class action waivers in arbitration agreements between employees and employers. Arbitration agreements that require employees to pursue employment-related claims in arbitration, rather than in court, have long been enforced pursuant to the Federal Arbitration Act. In recent years, however, the National Labor Relations Board (NLRB), as well as the Seventh Circuit and Ninth Circuit, took the view that agreements requiring employees to submit their work-related claims to individual rather than class arbitration violated Section 7 of the National Labor Relations Act (NLRA).

  In a highly anticipated decision, the Supreme Court held that employment agreements that require employees to sign away their rights to pursue *class action claims* in court are enforceable under the FAA. The Court analyzed the text of the NLRA using the traditional tools of statutory construction to conclude that the protections in Section 7 do not extend to an employee's right to participate in a class or collective action. The Court noted that the detailed list of protected activities in the statutory language of Section 7 demonstrates an intent to protect activities related to free association in the workplace rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." Employers can now be certain that courts will enforce arbitration agreements that both require employees to bring any claims related to their employment relationship in arbitration alone and require employees to waive their ability to bring a class or collective action on behalf of other employees.

CLASS-IFIED INFORMATION

Kyle Wallace

In "Supreme Court Says Plaintiffs Can't Stack Class Actions," Kyle Wallace explains to *SHRM* why the U.S. Supreme Court's *China Agritech* ruling is good news for companies routinely facing class action litigation.

- **Supreme Court Tempers *American Pipe***

  China Agritech Inc. v. Resh, et al., No. 17-432 (U.S.) (June 11, 2018). Reversing and remanding.

  This unanimous decision by the Supreme Court reversed the Ninth Circuit for applying the tolling doctrine set forth in *American Pipe & Construction Co. v. Utah*, which provides that the timely filing of a class action tolls the applicable federal statute of limitations for all persons encompassed by the class complaint during the pendency of the class certification decision. The Court held that when a court denies class certification of a putative class action, the *American Pipe* tolling rule does *not* permit a putative class member to bring a class action anew if the applicable statute of limitations has run. The Court held that *American Pipe* tolling applies only to *individual* claims that might be brought by putative class members. This decision resolves a long-standing circuit split on the application of *American Pipe* to subsequent class litigation—and even though *China Agritech* involved class claims under the 1934 Act that are subject to the PSLRA, the Court's ruling was not limited to PSLRA claims, but written broadly so that *American Pipe* tolling is unavailable to all follow-on or successive class actions after the expiration of a statute of limitations. ■

Banking, Financial Services & Insurance

- **Second Circuit Revives Putative Class Action Against Insurance Companies**

  DuBuisson v. Stonebridge Life Insurance Co., No. 16-03526 (2nd Cir.) (Apr. 12, 2018). Vacating order granting defendants' motion to dismiss and remanding to district court.

  The Second Circuit vacated a dismissal after it found that a district court overstepped the bounds of a proper standing analysis. The plaintiffs had alleged that Stonebridge targeted credit card holders with fraudulent solicitations for illegal accidental disability and medical expense insurance policies that were void ab initio under applicable New York insurance law. The district court had found no injury-in-fact because the policies were not void ab initio and also that the plaintiffs had no injury because they never submitted claims under the relevant insurance policies. The Second Circuit ruled that the lower court had improperly reached the merits of the plaintiffs' claims. The Second Circuit reiterated that "an Article III court must resolve the threshold jurisdictional standing inquiry before it addresses the merits of a claim."

- **National Banking Act Preemption Inapplicable to California Escrow Interest Law**

  Lusnak v. Bank of America N.A., No. 14-56755 (9th Cir.) (Mar. 2, 2018). Reversing dismissal of class action and remanding.

  A putative class action against Bank of America for breach of contract and violation of California's Unfair Competition Law can continue after the Ninth Circuit reversed a district court ruling that national-bank regulations preempted California's state escrow interest law. The circuit court held that the state escrow-interest law did not prevent or significantly interfere with Bank of America's exercise of powers as a national bank and that an Office of the Comptroller of the Currency regulation addressing state escrow laws was entitled only to *Skidmore* (rather than *Chevron*) deference.

- **One Claim, Three Defendants Timed Out and Dismissed from ERISA Suit**

  Barbara J. Fuller, et al. v. SunTrust Banks Inc., et al., No. 1:11-cv-00784 (N.D. Ga.) (May 3, 2018). Judge Evans. Dismissing five plaintiffs from suit.

  A Georgia federal judge dismissed one claim and three defendants from a proposed class action ERISA lawsuit. The plaintiffs alleged that SunTrust breached its fiduciary duties related to the selection of retirement plan investments. But the court held that the section of ERISA under which the

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CLASS-IFIED INFORMATION


Patrick Gennardo


Kathy Huang


Jonathan Kim


Rachel Naor

Find out why "NY Reg 187 Amendment May Not Be in Anyone's Best Interest" in this article from *Law360*.

plaintiffs brought suit has a six-year statute of repose—not a six-year statute of limitations. Because one of the plaintiffs' claims accrued more than six years before the date they filed suit, it was time-barred. The court rejected the plaintiffs' argument that the time spent in an administrative process should not cut off the right to bring a claim, noting that the plaintiffs waited two years to file suit after the administrative process ended.

Class Waivers and Binding Arbitration Allowed Under FINRA Rule 13204

Laver v. Credit Suisse Securities (USA) LLC, No. 3:18-cv-00828 (N.D. Cal.) (June 21, 2018). Judge Orrick. Granting defendant's motion to dismiss.

Judge Orrick dismissed a putative class action under an employee dispute-resolution program (EDRP) that both parties agreed to before the dispute arose. The court rejected the plaintiffs' argument that the Financial Industry Regulatory Authority (FINRA) prohibited the EDRP's class waiver and arbitration clauses. Judge Orrick ordered the dispute to proceed in arbitration.

Class Actions Serve as Poor Vehicle for Breach Claims in RMBS Litigation

Royal Park Investments SA/NV v. Wells Fargo Bank N.A., No. 1:14-cv-09764 (S.D.N.Y.) (Apr. 17, 2018). Judge Failla. Denying motion for class certification.

In line with a number of previous S.D.N.Y. decisions, Judge Failla ruled that a class action is not the appropriate vehicle for bringing breach claims against the trustee of a residential mortgage-backed security (RMBS) trust. Judge Failla held that in an RMBS litigation, a class action is not superior to other available methods of adjudication because many of the proposed class members are sophisticated institutions or investors with a strong interest in individually litigating their claims.

Insurer Can't Crack Chiropractors' Suit

Coastal Wellness Centers Inc., et al. v. Progressive American Insurance Co., No. 0:17-cv-61951 (S.D. Fla.) (Apr. 3, 2018). Judge Dimitrouleas. Denying motion to dismiss.

A Florida federal court denied Progressive's motion to dismiss a proposed class action brought by a group of Florida chiropractors. The chiropractors alleged that they were consistently underpaid by the insurer, which applied a 2 percent reduction for all claims submitted for chiropractic services performed under no-fault personal injury protection (PIP) car insurance policies. The court rejected Progressive's argument that it was authorized to use a 2 percent reduction under current federal Centers for Medicare and Medicaid Services (CMS) guidelines.

PSLRA Claims Fail for Lack of Scienter

Gamboa v. Citizens Inc., et al., No. 1:17-cv-00241 (W.D. Tex.) (May 29, 2018). Judge Pitman. Granting defendant's motion to dismiss.

Judge Pitman adopted a magistrate's recommendation to dismiss a Private Securities Litigation Reform Act (PSLRA) claim for failure to sufficiently plead scienter. Magistrate Judge Austin had ruled that the plaintiff failed to meet the pleading standards of "a very high level of pleading detail and enough facts to result in a strong inference of scienter" because an outside auditor's review indicated a lack of suspicious trading on the part of Citizens. The pleading standard was not satisfied even though it was alleged that Citizens' previous outside auditors resigned, its CFO was fired after refusing to sign off on the company's financial disclosures, and a former vice president had made statements hinting at past fraud before the time in question. ■

Consumer Protection

- **Uber Unable to Force Customers to Come Along for Arbitration Ride**

  Rachel Cullinane, et al. v. Uber Technologies Inc., No. 16-02023 (1st Cir.) (June 25, 2018). Reversing grant of motion to compel arbitration.

  Various ride sharers alleged that Uber violated a Massachusetts consumer-protection statute by knowingly imposing fictitious or inflated fees, such as an $8.75 "Massport Surcharge" and sometimes a $5.25 charge for the East Boston toll. The district court granted Uber's motion to compel arbitration and dismissed the complaint based on the Uber app's terms and conditions, which included an arbitration provision and class-action waiver. The First Circuit reversed the district court's decision, finding that the Uber app registration process did not reasonably notify the plaintiffs of Uber's terms and conditions. Uber had not required users to click a box stating that they agreed to a set of terms provided by hyperlink but relied on displaying a notice of acquiescence and a link to the terms, which the court of appeals found insufficient.

- **California Consumer Protection Does Not Extend to Child Labor Disclosure**

  Hodsdon v. Mars Inc., No. 16-15444 (9th Cir.) (June 4, 2018). Affirming grant of motion to dismiss.

  Robert Hodsdon accused Mars of failing to label its products as possibly being produced by child or slave labor. The appellate court agreed with the district court that California's Unfair Competition Law (UCL), Consumers Legal Remedies Act, and False Advertising Law do not obligate Mars to disclose the types of labor practices that Hodsdon alleged, that no affirmative misrepresentations were included on Mars's products, and that the alleged labor practices did not affect the product's central function. The Ninth Circuit also held that Mars's alleged omission could not be held to be "unfair" under any operative test for the UCL: there is not a significant nexus between legislative polices against child labor and a duty to disclose child labor practices on products, and the failure to disclose child labor practices on a product is not, by itself, immoral – even if those practices are "clearly immoral."

- **Price Is Right for Retailer's Sale**

  Chowning v. Kohl's Department Stores Inc., No. 16-56272 (9th Cir.) (May 17, 2018). Affirming grant of summary judgment.

  Wendy Chowning accused Kohl's of violating California consumer protection laws by displaying two price tags: (1) a "sale" price tag; and (2) a significantly higher "original" price tag even though the items were never actually sold at the higher "original" price. The Ninth Circuit affirmed the district court ruling that that the plaintiff failed to prove she was entitled to restitution or disgorgement because she had not offered evidence of the difference between the price she paid for clothing and its actual value. The Ninth Circuit also found that transaction percentage or "actual discount"

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CLASS-IFIED INFORMATION

Angela Spivey

We've expanded our Food & Beverage team with partner Angela Spivey, co-author of the definitive *Food Safety Law*.

(calculated by applying the advertised discount percentage to the actual market price of an item) is not available to UCL claimants because such relief is only available as contract damages. Similarly, the Ninth Circuit affirmed the lower court's finding that rescission was not available to the plaintiff because she had admitted to receiving some value from her clothing and rescission is available only when a claimant receives no value and is entitled to a "full refund."

Parking Company Unable to Drive Standing Argument

Kathryn G. Collier, et al. v. SP Plus Corp., No. 17-02431 (7th Cir.) (May 14, 2018). Remanding with instructions to return the case to state court.

The Seventh Circuit has ruled that a defendant may not remove a case from state to federal court and then move to dismiss for lack of Article III standing. Kathryn Collier and Benjamin Seitz claimed that a public parking facilities operator at the Dayton International Airport violated the Fair and Accurate Credit Transactions Act (FACTA) by printing the expiration dates of credit and debit cards on their parking receipts. The complaint contained no allegations of concrete harm, such as credit-card fraud or identity theft; however, the plaintiffs requested actual damages of more than $25,000. SP Plus removed the action to federal court and days later moved to dismiss the complaint on standing grounds. The district court agreed, finding that Collier and Seitz could not establish Article III standing because they had only alleged that SP Plus violated statutory requirements.

The Seventh Circuit vacated and remanded the district court's decision, noting that SP Plus, the removing defendant, had to establish Article III standing at the time of removal. SP Plus argued that, post-removal, the slate is wiped clean and the defendant can challenge jurisdiction. But the Seventh Circuit still found that Collier and Seitz's complaint did not allege an actual injury—a mere reference to "actual damages" does not establish Article III standing. But the right result was not dismissal but remand back to state court.

Apparently Too Many "Opinions" Isn't a Good Thing

D'Apuzzo v. United States, No. 0:16-cv-62769 (S.D. Fla.) (Apr. 13, 2018). Judge Scola. Denying motion for class certification.

The Public Access to Court Electronic Records System (PACER) is a system that lawyers know all too well. PACER routinely charges for court documents constituting judicial opinions. But Theodore D'Apuzzo contended that access to judicial opinions is supposed to be provided free of charge under the E-Government Act's mandate and the guidance provided for what constitutes a "written opinion." Judge Scola found that D'Apuzzo's class certification motion failed to satisfy Rule 23's predominance and superiority requirements. Because the definition of "written opinion" is "inherently subjective," D'Apuzzo's claims could not be resolved using generalized proof. Individualized inquiries would be required to identify "opinions," and the case would be unmanageable as a class action.

Judge Weeds Out Herbicide Plaintiff's Claims

Arthur v. United Industries Corp., No. 2:17-cv-06983 (C.D. Cal.) (May 17, 2018). Judge Snyder. Denying class certification.

Gregory Arthur asserted that United Industries Corporation falsely advertised its herbicide concentrates because the concentrates were capable of making only a fraction of the number of gallons represented when diluted according to the defendant's own instructions. Arthur sought class damages for violations of various California consumer-protection statutes.

The district court ruled that Arthur failed to meet the commonality, typicality, and adequacy requirements of Rule 23 because he suffered a different alleged injury than the remainder of the class. Arthur's complaint was not that he did not receive the expected volume of concentrate advertised on the package; rather, he complained that the product was not as effective as expected. He also failed to read the instructions on the label, distinguishing him from the putative class he sought to represent—individuals who mixed according to the instructions on the herbicide label. ■

Environmental

- **Sixth Circuit Strikes Blow to "Federal-Officer" Removal**

  Nappier v. Snyder, No. 17-1401 (6th Cir.) (Apr. 16, 2018). Holding removal was improper.

  Tamara Nappier, on behalf of minor residents in Flint, Michigan, sued Michigan's environmental agency's employees for allegedly breaching various duties relating to the Flint water crisis. The agency removed to federal court, but the district court remanded, determining that it lacked subject-matter jurisdiction. The Sixth Circuit agreed—holding that even though Michigan's employees were administering the federal Safe Drinking Water Act, they could not be considered "federal officers" for the purposes of removal.

  Nappier likely forecloses "federal-officer" removal for programs when state officers are implementing a federal environmental statute modeled on cooperative federalism—i.e., if they are merely authorized by the Environmental Protection Agency (EPA) to administer and enforce a federal statute within their borders.

- **$1 Billion Class Certification Blasted Away**

  Cotromano v. United Technologies Corp., No. 9:13-cv-80928 (S.D. Fla.) (May 2, 2018); *Adinolfe v. United Technologies Corp.*, No. 9:10-cv-80840 (S.D. Fla.) (May 2, 2018). Judge Marra. Denying class certification.

  Pratt & Whitney defeated a bid to certify a $1 billion class of property owners alleging a rocket engine facility contaminated a 60-square-mile area in Palm Beach County, Florida. Multiple deficiencies proved fatal to the owners' claims: their experts failed to connect the metes and bounds of the proposed class area to danger posed by soil and water contamination, fear or risk of contamination was not an "objective criteria" for the ascertainability of the class, and claims were too individualized for class treatment.

  Judge Marra's opinion offers a blueprint for mounting defenses to environmental class actions at the class certification stage. It highlights, in particular, expert testimony's crucial role in groundwater contamination class actions and underscores the high bar plaintiffs must clear to establish Rule 23 prerequisites across a large geographical area. ■

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Jeffrey Dintzer

Nathaniel Johnson

The EPA may bar the press from spreading the word, but you can learn more about "PFAS: Not Your Typical Emerging Contaminants" in this two-part series in *Law360* by Jeffrey Dintzer and Nate Johnson. Part 1. Part 2.

Labor & Employment

- **Pizza Drivers Are Delivered to Arbitration**

  Ralph v. Haj Inc., et al., No. 3:17-cv-01332 (S.D. Cal.) (May 31, 2018). Judge Miller. Granting motion to compel arbitration.

  Delivery drivers filed a class action alleging that the defendants, who operate 74 Domino's Pizza stores in Southern California, utilized reimbursement policies that resulted in drivers making less than minimum wage. The defendants moved to compel arbitration under the Federal Arbitration Act (FAA) based on an arbitration agreement that contained a class and collective action waiver. Judge Miller initially deferred ruling on the motion for the plaintiffs' Fair Labor Standards Act claim pending the appeal of the Ninth Circuit opinion in *Morris v. Ernst & Young* that held collective action waivers in arbitration provisions are unenforceable. After the U.S. Supreme Court reversed that decision in *Epic Systems Corp. v. Lewis*, Judge Miller compelled arbitration of all the plaintiffs' claims and stayed the case pending arbitration.

- **Franchisor Shakes Off Gas Station Manager's Overtime Suit**

  Curry v. Equilon Enterprises LLC, No. E065764 (Cal. Ct. App.) (Apr. 26, 2018). Affirming grant of summary judgment.

  California's Fourth Appellate District has upheld the dismissal of a proposed wage-and-hour class action against Equilon Enterprises LLC, doing business as Shell Oil. The court affirmed dismissal of a former gas station manager's class action claims that included failure to pay overtime compensation, failure to pay for missed break periods, and unfair business practices. Shell Oil maintained a contract with American Retail Services (ARS) under which Shell supplied equipment and set terms for gas prices but left all employment decisions to ARS. The plaintiff argued that under those terms, Shell was a joint employer and therefore responsible for ARS's failure to pay its workers for overtime and missed breaks. However, the court rejected that argument and found that Shell did not meet any of California's three definitions of an employer. The court reasoned that the plaintiff had failed to show that Shell exercised control over her wages, hours, or working conditions or that Shell was "suffering or permitting [her] to work." Because Shell could not hire the plaintiff or terminate her employment nor direct her employment, the court concluded that ARS, not Shell Oil, was solely responsible for her employment.

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Steve Ensor

Alex Barnett

Don't leave time on the table. Join Steve Ensor and Alex Barnett for the Alston & Bird Labor & Employment Executive Breakfast: The Intersections of Employee Leave Laws on August 22 at our Atlanta office.

California Defines a New Standard for Independent Contractors

Dynamex Operations West Inc. v. The Superior Court of Los Angeles County, No. S222732 (Cal. Sup. Ct.) (Apr. 30, 2018). Affirming class certification.

The Supreme Court of California defined the proper standard under California law to determine whether workers should be classified as employees or as independent contractors for purposes of California's wage orders, which impose obligations on minimum wages, maximum hours, and a limited number of very basic working conditions of California employees. In the underlying lawsuit, two individual delivery drivers filed a class-action complaint against Dynamex, a nationwide package and document delivery company, alleging that it had misclassified its delivery drivers as independent contractors. In affirming class certification, the court essentially replaced its long-standing *Borello* test with the simplified "ABC test" applied in various other jurisdictions. This decision broadens the definition of "employee" and places the burden on the hiring entity to establish that a worker is an independent contractor who was not intended to be included within the applicable wage order's coverage. ■

Privacy & Data Security

- **Don't Be a Schnuck: Seventh Circuit Rejects Tort Liability in Data Breach**

  Community Bank of Trenton, et al. v. Schnuck Markets Inc., No. 17-02146 (7th Cir.) (Apr. 11, 2018). Affirming district court's dismissal.

  In 2012, hackers stole data of about 2.4 million credit and debit cards after infiltrating the computer networks of Schnuck Markets. By the time the data breach was announced in March 2013, the financial losses that resulted from the breach had reached into the millions of dollars. The plaintiffs in this case were not the consumers but the financial institutions that bore the costs of reissuing cards and indemnifying customers for the fraud. Based on the network of contracts linking merchants, card-processors, banks, and card brands to enable electronic payments, the court determined that the economic-loss rule precluded the plaintiffs from pursuing tort claims.

- **Don't Judge a Book by Its Cover: Seventh Circuit Decision May Not Be as Plaintiff-Friendly as It Seems**

  Heather Dieffenbach and Susan Winstead v. Barnes & Noble Inc., No. 12-08617 (7th Cir.) (Apr. 11, 2018). Vacating and remanding to district court.

  The Seventh Circuit revived a putative class action that resulted from a 2012 breach of the retailer's payment systems in which hackers acquired customers' personal and financial information. The district court held that the plaintiffs had alleged an injury as a result of the breach, but still dismissed the case on the ground that the complaint did not adequately plead damages. The Seventh Circuit held that plaintiff Dieffenbach's injuries could support a claim for money damages just as they had supported standing. The federal rules merely require that Dieffenbach allege a general injury—a standard that she had met in her complaint. The Seventh Circuit nevertheless expressed reservations about Dieffenbach's ability to collect damages from Barnes & Noble, which the court described as a "fellow victim of the data thieves," as well as whether the case could ever be certified as a class action.

- **Experian Plenty Experienced, Ninth Circuit Finds**

  Shaw v. Experian Information Solutions Inc., No. 16-56587 (9th Cir.) (May 29, 2018). Affirming summary judgment.

  John Shaw claimed that Experian violated the Fair Credit Reporting Act by failing to distinguish between short sales and foreclosures on consumer credit reports. Foreclosures carry more significant consequences. The court held that it need not address the reasonableness of Experian's reporting

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Jim Harvey


David Keating


Peter Swire

Will Navigating the California Consumer Privacy Act of 2018 mean you'll have to comply with the GDPR? Find out during this webinar on September 12.

procedures because Shaw could not make the prima-facie showing that the Experian reports were inaccurate or misleading in a manner expected to lead to adverse credit decisions. Rather, Experian's subscriber Fannie Mae mistreated Experian's credit coding classifications, an error 14,999 other subscribers managed to avoid. Additionally, Experian did not violate consumer disclosure requirements merely because the consumer version of its credit report used alternative language and not the technical codes provided to subscribers like Fannie Mae.

Message Delivered: Email SMS Service Not a TCPA Violation

Dominguez v. Yahoo Inc., No. 17-01243 (3rd Cir.) (June 26, 2018). Affirming summary judgment.

The Third Circuit affirmed a grant of summary judgment in favor of Yahoo, whose email SMS service was challenged for being an "automatic telephone dialing system" in violation of the Telephone Consumer Protection Act. Following the D.C. Circuit's opinion in *ACA International v. FCC*, plaintiffs must show that Yahoo's email SMS service had the *present capacity*, not the *latent or potential capacity*, to function as an autodialer. Because the plaintiff's expert reports focused on *l*atent or potential capacity, and because Yahoo's email SMS messages were sent because the prior owner of the plaintiff's telephone number had opted to receive them, the plaintiff could put forth no evidence showing that Yahoo's service had the present capacity to function as an autodialer.

Plaintiff's New Idea Goes Flat

Enslin v. Coca-Cola Co., et al., Nos. 17-3153, -3256 (3rd Cir.) (June 20, 2018). Affirming summary judgment and denial of class certification.

In a unanimous decision, the Third Circuit denied the plaintiff's appeal in a case involving a former employee of a Coca-Cola bottler who had stolen older laptops containing other former employees' personal information. As part of his appeal, the plaintiff claimed the district court erred in denying his request to certify a class based on a new theory of liability. After the district court granted summary judgment for Coca-Cola and denied the plaintiff's class certification as moot, the plaintiff tried to resuscitate class certification by arguing that Coca-Cola could still be held liable under a respondeat superior theory for the wrongdoing of one of the named individual defendants. The Third Circuit held that the district court did not abuse its discretion by refusing to consider the plaintiff's request because this was the first time the plaintiff had raised the theory of vicarious liability in almost three years of litigation.

CLASS-IFIED INFORMATION

Grant Alexander

Sean Crain

Sometimes the court of public opinion fumbles the facts. Get the score from Grant Alexander and Sean Crain's "The NFL's New Anthem Policy and Free Speech in the Workplace" from *The National Law Journal*.

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Court Sees Standing in Optometrists' Data Breach Suit

Hutton v. National Board of Examiners in Optometry Inc., No. 17-01506; *Mizrahi v. National Board of Examiners in Optometry Inc.*, No. 17-01508 (4th Cir.) (June 12, 2018). Vacating and remanding.

A group of optometrists alleged that the National Board of Examiners in Optometry (NBEO) was liable for the plaintiffs' injuries resulting from a data breach. The lower court dismissed the complaints for lack of Article III standing, but the Fourth Circuit disagreed, reasoning that the plaintiffs had sufficiently alleged injury-in-fact because the fraudsters used, and attempted to use, the plaintiffs' personal information to open credit card accounts, and traceability because NBEO was the only common source that collected and continued to store personal information of all plaintiffs.

Ninth Circuit Drops the Other Shoe on Zappos with Standing Decision

In re Zappos.com Inc. Customer Data Security Breach Litigation; *Stevens, et al. v. Zappos.com Inc.*, No. 16-16860 (9th Cir.) (Mar. 8, 2018; amended Apr. 20, 2018). Denying petitions for rehearing and rehearing en banc.

The Ninth Circuit denied Zappos's petition for rehearing on the issue of when a trial court is supposed to assess standing. In its initial appeal, Zappos contended that the relevant time to assess standing is the present. After the Ninth Circuit's March ruling, Zappos sought a rehearing, arguing that two prior opinions (one U.S. Supreme Court and one Ninth Circuit) required the court to assess standing at the time the plaintiffs filed their third amended complaint, rather than their original complaints. The court noted that the allegations in the original and third amended complaints were largely the same and rejected Zappos's argument that the plaintiffs' allegations were implausible because Zappos relied on facts outside of the complaints. For this reason, the argument was inappropriate for a facial challenge to standing at the motion to dismiss stage.

No Class Certification for Former Inmates

Romero, et al. v. Securus Technologies Inc., No. 3:16-cv-01283 (C.D. Cal.) (Apr. 12, 2018). Judge Miller. Denying motion for class certification.

Two former inmates and a criminal defense attorney sought a class action against a company that provides inmate communication services and investigative technologies, alleging that the company secretly recorded privileged attorney-client telephone communications. The district court concluded that there was insufficient evidence of a feasible manner to determine class members based on the plaintiffs' broad class definition. The evidence showed that there could be between 22 and 123 class members in San Diego County alone, and given the plaintiffs' representation that Securus operates in 20 California counties, potentially thousands more statewide. While acknowledging that ascertainability does not require a precise number, the court refused to accept a proposed class that could range anywhere from 22 to a few thousand members. ■

Products Liability

- **Car Company Continues Down Bumpy Road**

Malizia v. FCA US LLC, No. 1:17-cv-07039 (S.D.N.Y.) (Apr. 19, 2018). Judge Hellerstein. Granting in part and denying in part motion to dismiss.

A New York federal judge granted in part and denied in part Fiat Chrysler's motion to dismiss a proposed class action alleging that certain model years of the automaker's Jeep Wranglers have faulty engines that prevent the heating and cooling systems from working properly. Specifically, the plaintiffs contend that Fiat Chrysler's failure to properly clean the engine and its component parts during the finishing process created a manufacturing defect that cannot be remedied without replacing certain parts. The plaintiffs failed to oppose Fiat Chrysler's motion to dismiss their implied warranty claim and therefore abandoned that cause of action. Judge Hellerstein dismissed the claims for unfair and deceptive trade practices and false advertising because they were barred by the applicable statute of limitations. In addition, the amended complaint did not present any basis for equitable tolling because the plaintiffs did not allege any "act of deception, separate from the ones for which they sue." The court allowed claims for breach of express warranty and violations of the Magnuson–Moss Warranty Act to move forward, finding that the powertrain limited warranty covers the alleged defect in the vehicles.

- **No Class for Apple Touchscreen Users**

Davidson v. Apple Inc., No. 5:16-cv-04942 (N.D. Cal.) (May 8, 2018). Judge Koh. Denying motion for class certification.

A California federal judge declined to certify five classes of consumers who claim that Apple failed to disclose a defect in the iPhone 6 and iPhone 6 Plus that caused the touchscreens to stop responding. The proposed classes consisted of residents of Colorado, Florida, Illinois, Texas, and Washington who purchased iPhone 6 or iPhone 6 Plus cellphones that were manufactured without a certain resin in the circuit chip. In denying the plaintiffs' motion for class certification, Judge Koh found that the state classes did not satisfy Rule 23's predominance requirement. As an initial matter, the Colorado Consumer Protection Act bars class claims for money damages, and Texas courts require individualized proof of reliance on a defendant's alleged omissions or misrepresentations. For claims arising under the laws of Florida, Illinois, and Washington, Judge Koh held that the damages model proposed by the plaintiffs' expert was inadequate. The damages model assumed that the touchscreen defect would manifest in all iPhones, when only about 5 percent of iPhone 6 and iPhone 6 Plus models were actually affected. Therefore, the plaintiffs "failed to provide a damages model that is 'consistent with [their] liability case' and that measures 'only those damages attributable' to [their] theory of liability" as required by the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*.

CLASS-IFIED INFORMATION

Jenifer Keenan

Get a snapshot of "Best Practices for Reporting Consumer Product Hazards to the U.S. Consumer Product Safety Commission" from the editor of the *CPSC Recall Snapshot*, Jenifer Keenan. (video)

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Rat-Infested Vehicle Owners' Class Action Caught in Dismissal Trap

Heber v. Toyota Motor Sales U.S.A. Inc., No. 8:16-cv-01525 (C.D. Cal.) (June 11, 2018). Judge Guilford. Granting motion to dismiss.

A California federal judge dismissed Toyota owners' class claims that the automaker sold them vehicles that were defectively designed to contain soybean-coated wiring. The soybean coating allegedly attracts rats who chew on the wires and inflict damage that can debilitate the vehicles. The court rejected the plaintiffs' express warranty claim because Toyota's warranty clearly states that it only covers "defects in materials"—not design defects. Moreover, the implied warranty of merchantability does not cover damage caused by a third party, or in this case "those pesky rats." The fraud and consumer protection claims failed to meet the heightened pleading standards because they did not "provide a sufficiently specific picture of what Toyota could have done to meet its disclosure requirements." Judge Guilford dismissed all of these causes of action without leave to amend because the plaintiffs could not state a viable claim for relief after amending their complaint five times, and the warranty claims were "incurably defective."

Plaintiffs' Proposed Class Certification for Clutch Claims Stalls Out

Victorino v. FCA US LLC, No. 3:16-cv-01617 (S.D. Cal.) (June 13, 2018). Judge Curiel. Denying motion for class certification.

A California federal judge rejected proposals for three classes of drivers who purchased Dodge Dart vehicles that allegedly have design defects in their hydraulic clutch systems. Although the plaintiff satisfied the Rule 23 requirements for numerosity, commonality, typicality, and adequacy, the implied warranty claims lacked predominance. The plaintiff sought to apply California's Song–Beverly Consumer Warranty Act to a nationwide class, but the court held that because the plaintiff "has not met the initial burden of demonstrating that due process is satisfied for purposes of a nationwide class, he cannot demonstrate that common issues predominate over the different questions posed by each state's law." The definition for the proposed California class was overbroad because the plaintiff failed to demonstrate that the Song–Beverly Act imposes liability on a car manufacturer for used vehicles that were purchased from authorized dealerships.

Judge Curiel also found that predominance was not met on the issue of damages because the plaintiff's damages model did not align with its stated "benefit of the bargain" theory and would result in overcompensation. Finally, the plaintiff failed to demonstrate that a Rule 23(b)(2) class for injunctive relief could be certified. The alleged common injury is that the drivers overpaid for their vehicles and therefore only money damages are appropriate. In addition, the injunction that the plaintiff sought would not apply to the entire class because the class definition included individuals who had sold or repaired their vehicles.

CLASS-IFIED INFORMATION

Bo Phillips

Build your network and cover the latest developments with Bo Phillips at the 2018 Class Action Litigation Conference in San Francisco on September 14.

(continued on next page)

- **Vehicle Owners Move Forward in Engine Stall Class Action**

  Wildin v. FCA US LLC, No. 3:17-cv-02594 (S.D. Cal.) (June 19, 2018). Judge Curiel. Denying motion to dismiss.

  A California federal judge denied Fiat Chrysler's motion to dismiss a putative class action, finding that the plaintiffs raised a reasonable inference that Fiat Chrysler did not inform consumers that a defect could cause its Pacifica minivans to stall or shut off without warning. The court held that the plaintiffs adequately pled claims for violations of California's consumer protection and unfair competition laws and unjust enrichment. The first amended complaint alleged that there were numerous online customer complaints about the stalling defect, and Fiat Chrysler issued several technical service bulletins and software updates for the engine and powertrain control module. Judge Curiel noted that "courts have expressed doubt that customer complaints in and of themselves adequately support an inference that a manufacturer was aware of a defect [because] complaints posted on a manufacturer's webpage 'merely establish the fact that some consumers were complaining.'" The court went further and stated that even if "consumer complaints could on their own create a plausible claim of pre-purchase knowledge, it surely would take more than one consumer complaint to support such an assertion."

  In contrast, allegations of technical service bulletins and updates issued after the sale of a vehicle are sufficient to allege pre-sale knowledge because even if the manufacturer's conduct occurred after the relevant sale, presumably it was preceded by an "accretion of knowledge over time." Judge Curiel adopted the position of other courts that the plaintiffs' unfair competition and unjust enrichment claims "may survive the pleading stage when pled as an alternative avenue for relief, though the claims, as alternatives, may not afford relief if other claims do." ■

Securities

- **Investors May Proceed in Emissions Fraud Suit**

Pirnik v. Fiat Chrysler Automobiles NV, No. 1:15-cv-07199 (S.D.N.Y.) (June 26, 2018). Judge Furman. Granting class certification.

A New York federal district court granted class certification to a group of Fiat Chrysler investors. The class alleges that Fiat hid the fact that it had installed "defeat devices" to avoid emissions standards in 104,000 Ram and Jeep Grand Cherokee automobiles. The investors argued that they were injured by a common course of misconduct: Fiat Chrysler's CEO stated in a 2016 earnings call that the company used no such defeat devices, but in May 2017 the Department of Justice filed a complaint against Fiat for violations of the Clean Air Act and sent the company's stock price plunging. The court agreed and granted class certification, rejecting the carmaker's arguments that the alleged misrepresentations did not affect the company's stock price when made.

- **Named Plaintiff's Testimony Precludes Class Certification in Bitcoin Exchange Lawsuit**

Greene v. Mt. Gox Inc., No. 1:14-cv-01437 (N.D. Ill.) (June 7, 2018). Judge Feinerman. Denying class certification.

Judge Feinerman of the Northern District of Illinois declined to grant certification to a putative class of banking customers who deposited money in the Bitcoin exchange Mt. Gox through the Japanese bank Mizuho. The court had originally refused to dismiss most of the proposed class's claims against Mizuho, which allege that the bank knew of Mt. Gox's improprieties and refused to comply with withdrawal requests for accounts associated with the exchange (yet still accepted deposits). The court had further instructed that the plaintiffs should find an Illinois citizen to represent the class. But the plaintiff's new representative testified that he would have still deposited U.S. dollars at Mizuho even if he had known the bank would not allow him to withdraw it, saying he would have withdrawn it in Bitcoin instead. The court ruled that this plaintiff faced unique defenses and may not even be injured, and thus he could not represent the class.

CLASS-IFIED INFORMATION

Derin Dickerson

Congress is working on legislation that could dramatically change the class action landscape. Derin Dickerson explains why in "Fairness in Class Action Litigation: Changes on the Horizon?" (video)

- **Lack of Scienter Motivates Court to Dismiss**

Jackson v. Halyard Health Inc., et al., 1:16-cv-05093 (S.D.N.Y.) (Mar. 30, 2018). Judge Swain. Granting motion to dismiss.

The Southern District of New York dismissed a securities class action against Halyard Health Inc. and its former parent company Kimberly-Clark Corporation and the companies' executives, alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 by making various statements and failing to state material facts relating to MicroCool gowns, a product intended to protect health care providers from contact with highly infectious diseases such as Ebola. The court dismissed the action because the plaintiff failed to adequately plead facts sufficient to give rise to a strong inference of scienter, a prerequisite under the PSLRA. The court said the

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plaintiff did not allege facts showing that the defendants had "the motive and opportunity to commit fraud" because the stock sales at issue were not unusual and the alleged motives of the executives were common among all executives, i.e., a desire for profitability and to keep the stock price high.

The plaintiffs also failed to plead a strong inference of scienter because they failed to show facts demonstrating or supporting a plausible inference that any of the defendants were personally informed about any of the alleged issues with the MicroCool gowns, including failure to show that the defendants received specific reports about failed testing of the gowns. The court also rejected allegations involving confidential witnesses because they referred only to what "senior management" or "senior executives" knew or learned and were conclusory, like the other scienter allegations.

Investors Granted Class Certification in Stock-Drop Suit

Bradley Cooper, et al. v. Thoratec Corp., et al., No. 4:14-cv-00360 (N.D. Cal.) (May 8, 2018). Judge Wilken. Granting class certification.

A California federal court certified a class of investors bringing a stock-drop suit alleging that medical device company Thoratec concealed risks linked to its heart devices. This case was initially filed in January 2014, dismissed in November 2015, and revived in October 2017 by the Ninth Circuit, which found that the investors' allegations were sufficient to survive the motion to dismiss. In January 2018, the plaintiffs filed the motion to certify a class. They argued that statements made by a Thoratec officer about rates of fatal pump thrombosis in patients using the company's HeartMate II left ventricular assist device led shareholders to believe that the device was maintaining low rates of thrombosis when in reality, rates were increasing. Thoratec claimed that the shareholders could not claim that an entire class of shareholders relied on those statements because those statements did not cause Thoratec's stock to rise. In granting the motion to certify the class, Judge Wilken rejected this theory, finding that the plaintiffs were not arguing that the statements caused stock prices to rise. Instead, they were arguing that the statements led investors to believe that the risk around the Heartmate II was not as high as it was. Upholding this argument, Judge Wilken stated, "Had Thoratec admitted that thrombosis rates were actually higher, HeartMate II would not have been able to maintain its competitive position, … and Thoratec's stock price would not have remained afloat."

Investors Denied Tolling in RMBS Suits

BlackRock Balanced Capital Portfolio FI, et al. v. HSBC Bank USA NA, No. 1:14-cv-09366 (S.D.N.Y.); *Royal Park Investments SA/NA v. HSBC Bank USA NA*, No. 1:14-cv-08175 (S.D.N.Y.) (Apr. 19, 2018). Judge Netburn. Denying tolling of statute of limitations.

A New York federal court denied BlackRock and Royal Park Investments' request to toll the statute of limitations on claims against HSBC Bank for failing to properly oversee hundreds of residential mortgage-backed securities (RMBS) trusts. The plaintiff investors' motion for class certification was denied earlier this year, and they asked that the statute of limitations on their individual claims against HSBC Bank be tolled while they awaited a decision from the Second Circuit on their appeal of that denial. HSBC argued, however, that the request "contradicts the Second Circuit's bright line rule that [tolling] ends (and statutes of limitations for potential individual claims begin to run) when a district court denies the named plaintiffs' request for class certification." Judge Netburn agreed with HSBC, endorsing the bank's arguments in denying the plaintiffs' request. ■

Settlements

10 Defendants Down, 5 to Go

Alaska Electrical Pension Fund, et al. v. Bank of America N.A., et al., No. 1:14-cv-07126 (S.D.N.Y.) (June 1 & 26, 2018). Judge Furman. Granting final approval of settlement for 10 defendants; granting preliminary approval of settlement for five defendants.

Judge Furman issued two settlement orders in this antitrust class action against 15 financial firms. The plaintiffs, including an Alaskan pension fund and two Pennsylvania counties, alleged that the defendants conspired to rig ISDAfix (now called the ICE Swap Rate), which is the global benchmark reference rate used in interest rate derivatives and swaps.

The court granted final approval of a $409 million settlement with 10 defendants on June 1 and granted preliminary approval of a $96 million settlement with the remaining five defendants on June 26. Both settlement agreements resolve alleged misconduct from 2006 through 2014, and they are "non-recapture" in the sense that the defendants have no right to return of the settlement funds. The agreements provide for monetary payments based on formulas that reflect the economic sensitivity of an affected transaction to ISDAfix rates and the degree of risk that claims arising out of the transaction may have faced at trial. If the second settlement is approved at the court's fairness hearing in November, the plaintiffs project that this case would be one of only about 12 antitrust class actions ever to exceed $500 million in settlements.

Mortgage Banker Class Takes Settlement to the Bank

Montero v. JPMorgan Chase & Co., et al., No. 1:14-cv-09053 (N.D. Ill.) (Apr. 25, 2018). Judge Cox. Approving settlement.

Judge Cox granted final approval to a $3 million settlement between the company and 2,000 mortgage bankers that it employed from April 2014 to November 2017. The deal settles claims by the bankers that the company violated state and federal laws when it failed to pay them overtime for work beyond the standard 40 hours per week. Judge Cox noted that there were no objections lodged against the settlement agreement, which included attorneys' fees totaling $1 million. The settlement fully resolves the bankers' claims and terminates the three-year litigation.

Settlement Approved in Antitrust Suit

Sullivan, et al. v. Barclays PLC, et al., No. 1:13-cv-02811 (S.D.N.Y.) (May 18, 2018). Judge Castel. Approving settlement.

A New York district court approved a $309 million settlement resolving claims by investors alleging that Deutsche Bank, Barclays, and HSBC conspired to manipulate the Euro Interbank Offered Rate—the interest rate charged on short-term euro loans between big banks. As part of its approval order, the court also held that the shareholders' request for

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CLASS-IFIED INFORMATION

Cari Dawson

Our attorneys are leaders: Cari Dawson is named one of the "Top 250 Women in Litigation" by *Benchmark Litigation*.

$68.7 million in attorneys' fees was fair and reasonable. In asking for this award—which constituted more than 22 percent of the total settlement fund—class counsel highlighted that they had already spent more than 100,000 hours on the case. The investors' claims against JPMorgan Chase and Citigroup Inc. remain pending.

▪ Health Workers' Payday Capped at $900K

Brown v. Health Resource Solutions Inc., No. 1:16-cv-10667 (N.D. Ill.) (Apr. 20, 2018) Judge Valdez. Granting final approval.

Magistrate Judge Maria Valdez approved a $900,000 settlement in a class action alleging that Health Resource Solutions wrongly exempted a group of registered nurses and clinicians from overtime pay. The $900,000 settlement represented the all-in "Maximum Settlement Amount." From that award, Health Resource Solutions was ordered to pay $300,000 in attorneys' fees and costs, $7,878 in settlement administration expenses, and a service payment of $7,500 to named plaintiff Monique Brown.

▪ $425 Million Not Enough for Shareholders

I*n re Good Technology Corp. Stockholder Litigation*, No. 11580 (Del. Ch. Ct.) (Apr. 5, 2018). Vice Chancellor Laster. Approving settlement.

The Delaware Chancery Court recently approved a $35 million settlement resolving claims by Good Technology Corp. shareholders alleging that the defendant aided and abetted Good Technology's directors in breaching their fiduciary duties by not seriously pursuing sale offers higher than the $425 million for which Blackberry Ltd. acquired Good Technology in 2015. In signing off on the settlement, the court also approved the shareholders' requests for $8.3 million in attorneys' fees and $1.7 million in legal expenses. While the case settled at a relatively early stage in the litigation, the court found that the fee request was fair and reasonable at least in part because class counsel had already deposed more than 20 fact witnesses and received more than 1 million pages in document discovery. ■