ALSTON & BIRD

CLASS ACTION & MDL roundup

QTR 4 | 2021

In this issue

- Where the (Class) Action Is
- Antitrust/RICO
- Banking & Insurance
- Consumer Protection
- Labor & Employment/ERISA
- Privacy & Data Security
- Products Liability
- Securities
- Settlements

video highlight

KRISTI RAMSAY

Senior Associate, Litigation & Trial Practice Group

Kristi provides an overview of the TCPA's Do Not Call provisions and a summary of the approach and ultimate ruling in *Johansen v. eFinancial LLC*.

click here

Where the (Class) Action Is

Welcome back to the ***Class Action & MDL Roundup***! This edition covers notable class actions from the fourth quarter of 2021.

The circuits never sleep. In the fourth quarter, the Seventh Circuit gutted a putative class action alleging violations of the FCRA but ultimately determined that the plaintiff still lacked evidence that proved actual damages. In other news, the Ninth Circuit and Northern District of California teamed up, holding that plaintiffs failed to adequately allege their claims in a wage-and-hour class action.

At the district level, a New Jersey judge granted a motion to dismiss in a putative class action brought by one of the company's customers based on denial of insurance coverage for business interruptions arising during the COVID-19 pandemic. On the other coast, a California judge denied a motion to dismiss in a products liability case involving vanilla flavoring, giving plaintiffs a chance to amend their request for certification.

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

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

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

Alexander Akerman
alex.akerman@alston.com
213.576.1149

Nnola Amuzie
nnola.amuzie@alston.com
213.576.1190

Gina Angiolillo
gina.angiolillo@alston.com
213.576.2606

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

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

F. Nicholas Chandler
nick.chandler@alston.com
404.881.7679

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

R. Blake Crohan
blake.crohan@alston.com
404.881.4625

Ashley De Vance
ashley.devance@alston.com
213.576.1072

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

Bradley Harder
bradley.harder@alston.com
404.881.7829

Alexander A. Ingoglia
alex.ingoglia@alston.com
404.881.7863

Jyoti Jindal
jyoti.jindal@alston.com
404.881.7835

Kathryn Klorfein
kathryn.klorfein@alston.com
404.881.7415

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

Katie Jo Luningham
katiejo.luningham@alston.com
404.881.7812

Michelle C. Prendergast
michelle.prendergast@alston.com
919.862.2287

Melissa Quintana
melissa@quintana@alston.com
404.881.7548

Kristi Ramsay
kristi.ramsay@alston.com
404.881.4755

Jay Repko
jay.repko@alston.com
404.881.7683

Noelle Elaine Reyes
noelle.reyes@alston.com
212.210.9478

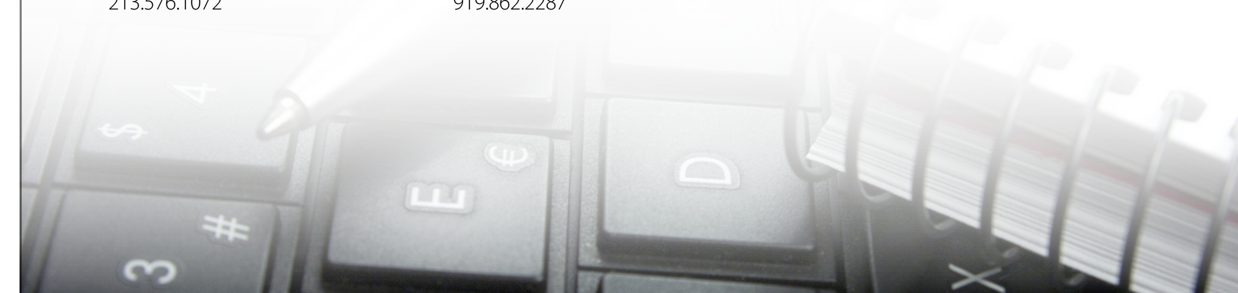
Jason Rottner
jason.rottner@alston.com
404.881.4527

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

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



Antitrust/RICO

Propane Tank Purchasers' Motion for Class Certification Blows Up

In re Pre-filled Propane Tank Antitrust Litigation, No. 4:14-md-02567 (W.D. Mo.) (Nov. 9, 2021). Judge Fenner. Denying motion for class certification.

The plaintiffs sought to certify a class of indirect purchasers of spare propane tanks and exchange propane tanks based on the theory that two of the nation's leading propane tank suppliers had conspired to reduce the fill level of tanks without a corresponding reduction in wholesale price. Judge Fenner ruled that the plaintiffs could not satisfy the predominance requirement by demonstrating a common impact—in the form of an overcharge—incurred by all or nearly all retailers and passed through to end users.

The court found that there were numerous flaws in the economic models the plaintiffs relied on to show a common overcharge and pass-through. Most notably, the economic expert's use of averaging and aggregated data masked unequivocal record evidence that wholesale prices were regularly negotiated, individually set, and highly dispersed among individual retail customers. Similarly, the use of averaging and aggregated data covered up the existence of numerous uninjured class members.

Standing Issues Don't Stand in the Way as EpiPen Decertification Bid Falls Short

In re EpiPen Marketing, Sales Practices, and Antitrust Litigation, No. 2:17-md-02785 (D. Kan.) (Dec. 15, 2021). Judge Crabtree. Denying, in relevant part, motion for decertification.

The Mylan defendants—marketers and sellers of the well-known EpiPen used to treat anaphylaxis—moved to decertify a state-law antitrust class. The class plaintiffs had alleged that the Mylan defendants violated certain state antitrust laws by entering an unlawful reverse payment settlement that delayed generic entry of a competing product. The Mylan defendants argued that the Supreme Court's recent *TransUnion LLC v. Ramirez* decision required every class member to have Article III standing to recover individual damages and that brand loyalists who would have purchased the EpiPen even if a generic was available sustained no injuries from alleged generic delay.

Judge Crabtree rejected this argument, finding that the plaintiffs had come forward with a method of proving classwide injury for all EpiPen purchasers—brand loyal or not. Specifically, the plaintiffs' expert analyzed real-world data showing a precipitous drop in EpiPen prescriptions after the eventual entry of generics to the market, indicating that the EpiPen price would have decreased for all purchasers and that all class members suffered a quantifiable overcharge but for the delay scheme. ■

LEADERSHIP IN ACTION:

Adam Biegel, **Andy Tuck**, and **Deona Kalala** will moderate sessions at the 2022 American Bar Association Antitrust Law Spring Meeting, the world's largest antitrust and consumer protection law conference, April 5–8 in Washington, DC.

Adam Biegel

Andy Tuck

Deona Kalala

Banking & Insurance

No Picnic in the Park Primarily Due to COVID-19, Not Government Closure Orders

Caterer's in the Park LLC v. Ohio Security Insurance Co., No. 2:20-cv-06867 (D.N.J.) (Oct. 26, 2021). Judge Arleo. Granting motion to dismiss.

Judge Arleo granted Ohio Security Insurance Company's motion to dismiss a putative class action brought by one of the company's customers based on denial of insurance coverage for business interruptions arising during the COVID-19 pandemic. Before the pandemic, the customer had obtained an "all-risk" commercial property insurance policy from Ohio Security, which excluded coverage "for loss or damage caused by or resulting from any virus." Caterer's in the Park alleged that New Jersey's stay-at-home and closure orders were the predominant cause of its business interruption, while Ohio Security argued in its motion to dismiss that other federal district courts in New Jersey "have universally determined that the Closure Orders are 'inextricably tied' to COVID-19," such that the predominant cause of loss is the COVID-19 virus—not the closure orders issued in response. Following this precedent, Judge Arleo dismissed the putative class action.

California Insurance Regulator Has Exclusive Original Jurisdiction over Rates, but Not Their Misapplication

Boobuli's LLC v. State Farm Fire and Casualty Co., et al., No. 3:20-cv-07074 (N.D. Cal.) (Oct. 5, 2021). Judge Orrick. Denying in part and granting in part motion to dismiss.

Judge Orrick largely denied State Farm's motion to dismiss a putative class action alleging that State Farm collected or failed to return excess insurance premiums during the COVID-19 pandemic. The California Department of Insurance (DOI) ordered insurers to refund and reduce premiums to account for new levels of risk during the pandemic, and State Farm reported to the DOI that it had done so. However, plaintiff Boobuli's alleged that it received no refund or premium reduction while its business was adversely affected by mandatory closures during the pandemic, and it brought claims on behalf of all other State Farm customers that paid premiums for property and casualty insurance from March 2020 through the present, including claims for breach of the covenant of good faith and fair dealing, unjust enrichment, and violation of California's unfair competition law. In seeking dismissal, State Farm argued that all of Boobuli's claims were barred because the DOI and its insurance commissioner have exclusive original jurisdiction over insurance rates, but the court disagreed, finding that theory did not bar Boobuli's claims, which challenged misapplication of the approved rates rather than the rates themselves.

Claims for Pandemic Losses Dismissed

Fountain Enterprises LLC, et al. v. Markel Insurance Co., No. 2:21-cv-00027 (E.D. Va.) (Oct. 26, 2021). Judge Wright Allen. Dismissing case.

A Virginia district judge dismissed claims by a group of Anytime Fitness franchise owners alleging that they were entitled to insurance coverage for pandemic-related losses. In doing so, the district judge concluded that the franchise owners—who were seeking to represent a proposed class of 4,500 franchisees—failed to allege facts demonstrating that their properties had been damaged or that they had been permanently disposed of their properties. The district judge also noted that a virus exclusion within the policies barred coverage.

"The California Supreme Court Limits Tort Liability of Lenders and Servicers," but in *The Recorder*, **Elizabeth Sperling**, **Daniel Dubin**, and **Daniel Seabolt** warn that they should continue to tread lightly in the loss mitigation process.

Elizabeth Sperling

Daniel Dubin

Daniel Seabolt

Consumer Protection

Plaintiffs' Mortgage Recordation Suit Doesn't Have Legs to Stand On

Maddox v. Bank of N.Y. Mellon Trust Co., N.A., No. 19-1774 (2nd Cir.) (Nov. 17, 2021). Vacating order denying motion for judgment on the pleadings.

The Second Circuit vacated an order denying BNY Mellon's motion for judgment on the pleadings in a suit alleging violations of the timely recordation requirements under New York's mortgage satisfaction recording statutes. Instructing the district court to dismiss the suit on remand, the Second Circuit determined that the plaintiff homeowners' allegations were entirely predicated on a statutory violation or risk of future harm—as opposed to harm to their credit or reputation, for example—and were therefore insufficient to confer Article III standing in federal court.

FCRA Lawsuit Grounded by Seventh Circuit

Persinger v. Southwest Credit Systems L.P., No. 21-1037 (7th Cir.) (Dec. 22, 2021). Affirming order granting summary judgment.

The Seventh Circuit gutted a putative class action against Southwest alleging violations of the Fair Credit Reporting Act (FCRA). Although the plaintiff had standing to sue based on allegations that Southwest invaded her privacy when it reviewed her credit information following the plaintiff's bankruptcy discharge order, the court determined that the plaintiff failed to adduce evidence demonstrating that accessing her "propensity-to-pay score" resulted in actual damages. The court similarly held that there was no willful violation of the FCRA because Southwest lacked actual knowledge of the plaintiff's bankruptcy and reasonably relied on its own collection procedures.

Seventh Circuit Impounds Less-Than-Rigorous Class Cert Order

Santiago v. City of Chicago, No. 20-3522 (7th Cir.) (Dec. 13, 2021). Vacating class certification.

Andrea Santiago sued the City of Chicago after the city towed and impounded her vehicle, and the district court certified two classes: a tow class, comprising individuals who did not receive a pre-tow notice from the city, and a vehicle disposal class, made up of individuals who did not receive the statutorily required notice from the city before their vehicles were disposed of. The Seventh Circuit quickly vacated class certification, finding that the district court failed to engage in a rigorous analysis of the individual elements of Santiago's claims in making its commonality, predominance, and adequacy of representation determinations.

Ninth Circuit Signals Arbitration

Cottrell v. AT&T Inc., et al., No. 20-16162 (9th Cir.) (Oct. 26, 2021). Reversing denial of motion to compel arbitration.

The Ninth Circuit reversed a lower court's denial of AT&T's motion to compel arbitration in a case alleging that it improperly charged customers for DIRECTV Now accounts without permission. Because the plaintiff sought injunctive relief, the district court determined that contractual provisions waving the right to seek public injunctive relief in any forum are unenforceable under California law. To qualify as public injunctive relief, however, the injunction must be for the benefit of the general public as a whole, rather than a particular class of persons. Here, the requested relief would only affect AT&T customers rather than the public as a whole, and the arbitration agreement was, thus, valid. Therefore, the trial court's decision was reversed and remanded.

Class Action Waivers in Loan Agreements Do Not Pay Off

Gibbs, et al. v. Stinson, et al., No. 3:18-cv-00676 (E.D. Va.) (Oct. 14, 2021). Judge Lauck. Granting motion for class certification.

The district court granted Darlene Gibbs's motion for certification of a Virginia class of individuals who obtained loans from a lending operation at allegedly "exorbitant interest rates." Gibbs alleged that the lenders created an unlawful lending scheme by distributing loans through tribal entities and charged interest rates as much as double the statutory limit in Virginia. Before concluding that the class met the requirements of Rule 23, the court ruled that the class action waivers in the loan agreements are unenforceable, citing to the "prospective waiver" doctrine that holds arbitration agreements that entirely prevent litigants from making future federal statutory claims unenforceable. The court ruled that the waiver, which waived the right to participate in class actions, the right to a jury trial, and the right to have access to discovery available in a lawsuit (among other waivers), "clearly amounted to a substantive waiver of federally protected rights."

Alston & Bird is committed to creating a more diverse and inclusive legal profession. The Leadership Council on Legal Diversity named **Jordan Webber Edwards** and **Courtney Quirós** to its 2022 class of Pathfinders and **Alex Barnett** to its 2022 class of Fellows.

Jordan Webber Edwards

Courtney Quirós

Alex Barnett

Labor & Employment / ERISA

U-Turn Ordered for Drivers Seeking to Avoid Arbitration

Cunningham, et al. v. Lyft Inc., et al., No. 20-1373, -1567 (1st Cir.) (Nov. 5, 2021). Reversing denial of motion to compel arbitration.

The First Circuit reversed a District of Massachusetts order that denied rideshare company Lyft's motion to compel a class of Lyft drivers into arbitration. The drivers sued Lyft to challenge their classification as independent contractors, seeking relief on a classwide basis, and Lyft moved to compel the plaintiffs into individual arbitration based on the terms of service. In arguing that they were exempt from arbitration because they worked in interstate commerce, the plaintiffs noted that some drivers took customers across state lines or to Logan Airport in Boston, but they did not challenge Lyft's contention that only approximately 2% of rides were interstate. The First Circuit cited that data and rejected the plaintiffs' exemption arguments, holding that the small percentage of interstate trips for certain drivers was insufficient to exempt the drivers from arbitration. In doing so, the First Circuit aligned itself with a similar Ninth Circuit opinion that recently ordered Uber drivers into arbitration. This case illustrates the continued effectiveness of arbitration provisions for gig economy companies.

Ninth Circuit Affirms Dismissal of Car Salesperson Class Wage Claims

In re Robert Saavedra, et al. v. Volkswagen Group of America, I, et al., No. 20-17327 (9th Cir.) (Dec. 6, 2021). Affirming motion to dismiss.

The Ninth Circuit agreed with the Northern District of California's dismissal of a putative wage-and-hour class action brought by Volkswagen salespersons. The district court decision granted dismissal for failure to state a claim and found that the named plaintiffs and putative class members were employed by independent franchised dealerships and that Volkswagen was not a joint employer. On appeal, the Ninth Circuit agreed and held that the plaintiffs failed to adequately allege that Volkswagen exerted control over the salespersons' wages, hours, and working conditions and failed to adequately allege that Volkswagen suffers or permits the salespersons to work. The court reasoned that allegations about Volkswagen paying salespersons "incentive compensation" for selling vehicles, disseminating consumer surveys to determine the compensation, and mandating certifications and training were insufficient to establish a joint employer relationship for wage-and-hour claims. The decision helps to define the contours of joint employment class actions brought in California. ■

"Take a deeper dive into "How the Supreme Court Ruling on Northwestern's 403(b) Plan Could Affect 401(k) Fiduciaries" with **Emily Costin** and **Ellie Studdard** for BenefitsPro."

Emily Costin

Ellie Studdard

Privacy & Data Security

Dishonesty/Deception Dooms TCPA Class

Johansen v. Bluegreen Vacations Unlimited Inc., No. 9:20-cv-81076 (S.D. Fla.) (Sept. 30, 2021). Judge Smith. Denying motion for class certification.

Kenneth Johansen sued Bluegreen Vacations for allegedly making telemarketing calls to residential telephone numbers on the Do Not Call Registry. Discovery revealed that Johansen was a serial (and profitable) Telephone Consumer Protection Act litigant who voluntarily engaged in and prolonged calls with telemarketing representatives and who admitted to posing as an interested customer and verifying false contact information. The district court denied Johansen's motion for class certification after finding that his "deceptive and dishonest tactics" raised additional questions of standing, consent, and damages that were not typical of other class members' claims. The court also ruled that the deceptive conduct rendered Johansen an inadequate class representative because it raised "serious concerns" about his "credibility, honesty, trustworthiness, and motives" in bringing the suit.

Class "Gave Up" on Discovery; Court Gives Up on Class

Sapan v. Yelp Inc., No. 3:17-cv-03240 (N.D. Cal.) (Nov. 15, 2021). Judge Donato. Denying motion for class certification.

Jonathan Sapan brought suit against Yelp for allegedly making telemarketing calls to phone numbers on the Do Not Call Registry. Sapan tried and could not fashion reasonable discovery requests to get Yelp's call data—so he "gave up." The district court thus ruled that Sapan could not demonstrate numerosity, even if he had an expert who could purportedly parse through the call data to identify all the putative class members, because there was no call data to analyze. The district court also ruled that individual issues predominated because Yelp argued its consent defense required an inquiry into each putative class member's contacts with the company, down to the content of any reviews or comments left on the social media platform. Sapan's failure to identify a better method for identifying class members left the court with no choice but to deny class certification.

"**David Keating** can help make sure you have your loyalty card ducks in a row because "State AGs Now Targeting Customer Loyalty Plans of Retailers." Learn more at the 2022 National Retail Federation Spring Privacy Meeting on April 13."

David Keating

Products Liability

Class Certification for Vanilla Flavoring Suit Is Artificial

Vizcarra v. Unilever United States Inc., No. 4:20-cv-02777 (N.D. Cal.) (Oct. 27, 2021). Judge Gonzalez Rogers. Denying motion to dismiss and granting motion to file a statement of recent decision.

A California judge denied certification to a proposed class of Breyer's Natural Vanilla ice cream buyers who alleged they were misled into believing the ice cream contained only natural vanilla.

The judge rejected Vizcarra's argument that whether Unilever's label is misleading and material to class consumers would be determined by the "reasonable consumer" standard, and thus established by common proof. Instead, the judge found that the suit's central questions of whether customers understood Unilever's labeling to indicate that the ice cream flavor was derived solely from the vanilla plant had not been shown to be "susceptible to resolution with common proof." The only common evidence Vizcarra pointed to as "being capable of answering these questions [was] the expert report." Further, Vizcarra failed to point to any other evidence, other than the expert report, to establish deception across the class. The judge concluded that Rule 23 predominance requirements also had not been met, stating: "Vizcarra's argument that Unilever's challenges to the validity of [the expert's] opinions cannot defeat predominance because plaintiff is not required to prove likelihood of deception or materiality at the class certification stage misses the point." Vizcarra failed to present common proof capable of answering the likelihood and materiality questions on a classwide basis.

The judge granted the ice cream buyers a chance to amend their request for certification.

Class Discovery Halted on the Runway During Fifth Circuit Appeal

Earl, et al. v. The Boeing Co., et al., No. 4:19-cv-00507 (E.D. Tex.) (Nov. 19, 2021). Judge Mazzant. Granting a limited stay of discovery.

U.S. District Judge Amos L. Mazzant granted Boeing and Southwest a limited stay of discovery while they seek an immediate appeal of the judge's class certification order. The plaintiffs alleged that Boeing and Southwest colluded to mislead regulators and the public into believing that Boeing's 737 Max 8 jets were safe following crashes in 2018 and 2019 that killed more than 245 people. The plaintiffs alleged that had they known the extent of the Max 8 jet's actual design flaws, they would have either paid less for their plane tickets or not purchased tickets at all.

In September, Judge Amos granted the plaintiffs' request to certify two classes: (1) customers who purchased tickets from Southwest Airlines; and (2) customers who purchased American Airlines tickets, which also operated Boeing 737 Max 8 jets but is not named as a party. However, Judge Amos also divided each of those classes into two, according to whether the customers purchased the plane tickets or were later reimbursed by someone else (e.g., an employer). Judge Mazzant explained that the identity of the person who purchased the ticket was necessary to determine who incurred the economic burden and suffered a RICO injury.

Although Boeing and Southwest opposed class certification based on the class plaintiffs' "nebulous theory of recovery," Judge Amos found that substantial evidence from the plaintiffs' expert indicated that the airlines enjoyed a price premium on tickets for flights on Max 8 jets and that the market price would have been lower if the truth about the safety of the Max 8 had been known during the class period.

Nonetheless, Judge Amos ruled that a limited stay was appropriate pending the defendants' appeal of the certification order, agreeing "that the certification order involves presently unsettled questions of law and thus raises significant legal issues." While Boeing and Southwest argued that legal questions regarding class standing necessitated halting discovery and other proceedings pending appeal, Judge Amos stayed discovery on class membership only and ordered that the case proceed in all other respects, including merits discovery. ■

"Connect with higher education leaders and delve into overcoming obstacles facing the industry, from insurance to cybersecurity to strategic initiatives, at Making the Grade: Strategies for Success in Higher Education Conference, hosted by TCS Education System and Alston & Bird on April 26."

Derin Dickerson

Terance Gonsalves

Scott Kitchens

John Latham

Kim Peretti

Securities

Clients Fail to Satisfy Commonality Requirement for Class Certification

Crago, et al. v. Charles Schwab & Co. Inc., et al., No. 3:16-cv-03938 (N.D. Cal.) (Oct. 27, 2021). Judge Seeborg. Denying class certification.

A group of Charles Schwab clients lost their bid for class certification because they could not satisfy the commonality requirement of Rule 23(a). Judge Seeborg ruled that no presumption of reliance applied in the case under applicable Ninth Circuit precedent because, although the plaintiff investors alleged both affirmative misrepresentations and an omission, they did not "primarily allege" omissions that were entitled to the presumption of reliance. Judge Seeborg ruled that the individualized reliance inquiry, which would have required "analyz[ing] individualized proof of reliance as to each proposed class member" for the "millions of trades" at issue in the class, meant that the plaintiff could not show the case was capable of classwide resolution.

Jury Holds Crypto-Mining-Linked Products Are Not Securities

Audet, et al. v. Fraser, No. 3:16-cv-00940 (D. Conn.) (Nov. 1, 2021). Judge Shea. Jury verdict.

In a first-of-its-kind case, a District of Connecticut jury found that a series of digital-asset products linked to a cryptocurrency mining operation do not count as securities. GAW Miners LLC and ZenMiner LLC sold, among other things "Hashpoints," which the plaintiffs claimed were similar to promissory notes that could be converted into the companies' virtual currency. The plaintiffs claimed that the companies' products, including the Hashpoints, were unregistered securities and sought to hold individuals associated with the company liable for their sale. After applying the Supreme Court's *Howey* test to analyze whether the products were investment contracts, the jury disagreed, resulting in a complete victory for the remaining defendant in the case.

Stock-Drop Suit Heads to Trial

Washtenaw County Employees' Retirement System v. Walgreen Co., et al., No. 1:15-cv-03187 (N.D. Ill.) (Nov. 2, 2021). Judge Coleman. Granting and denying summary judgment.

A class of Walgreens investors will get their day in court. The investors had alleged that Walgreens and its former executives made a series of fraudulent statements to hit an earnings target in 2016. At the end of fact discovery, Judge Coleman agreed that some—but not all—of the statements at issue should go before a jury.

In one example, the CFO made an allegedly fraudulent statement in the present tense, but the court tossed it as a forward-looking statement because the truth or falsity of the statement could not be discerned until a later time, it was couched in cautionary language, and the company's SEC filings had previously disclosed specific risks related to the statement. Other statements will go to the jury because it was not clear if the company knew its earnings goal was unattainable when they were made.

A related issue the jury will decide is whether, for loss causation purposes, the relevant truth was fully disclosed in a June 2014 earnings call when the company revealed that its earnings goal was unattainable or an August 2014 investor call when the extent of the shortfall was disclosed.

"There's always more than meets the eye when the SEC Proposes Sweeping New Cybersecurity Disclosure Rules for Public Companies subject to the Exchange Act, including a four-day reporting timeframe."

Dave Brown

Kate Hanniford

Kim Peretti

Cara Peterman

Rebecca Valentino

Alysa Austin

Sierra Shear

Kezia Osunsade

ALSTON & BIRD

Settlements

"Mineral-Based" Sunscreen Labels Will Cost More Than $2.50

Prescott, et al. v. Bayer Healthcare LLC, et al., No. 5:20-cv-00102 (N.D. Cal.) (Dec. 15, 2021). Judge Cousins. Approving $2.25 million settlement.

Judge Cousins approved a $2.25 million settlement for a class of retail consumers who purchased certain Coppertone sunscreen products with "mineral-based" labels that the plaintiffs allege were misleading and caused people to purchase the products who would not otherwise have done so for the same price. The defendants, which make and sell the sunscreen products, denied these allegations and defended their labeling before agreeing to a settlement.

Under the settlement agreement, class members may submit an unlimited number of claims for $2.50 per product with proof of purchase and up to four claims with no proof of purchase. The defendants no longer use the term "mineral-based" on their products, but the settlement includes injunctive relief requiring that if they do use that term again, they will note that the product contains "other sunscreen active ingredients" through December 31, 2023. In paying $2.25 million into the settlement fund, the defendants disclaimed any right to reversion and instead the parties agreed that any remaining amount will be disbursed to a charity that seeks to prevent cancer through sunscreens. The court also approved attorneys' fees and expenses of approximately $681,000 to class counsel and $5,000 to each of the two lead plaintiffs.

Mismatched Marketing of Minor Differences Between Infant and Children's Medicine

Levy v. Dolgencorp LLC, et al., No. 3:20-cv-01037 (M.D. Fla.) (Dec. 2, 2021). Judge Corrigan. Approving $1.8 million settlement.

Judge Corrigan approved a $1.8 million settlement between a set of Dollar General Corporation defendants and a class of consumers who alleged that Dollar General charged three times more for "infant" acetaminophen-based medication than for "children's" medication and that Dollar General improperly labeled the infant medication to imply that it was specifically formulated for infants. Under the settlement agreement, class members who purchased the infant medication for personal or household use from September 2016 to June 2021 may submit an unlimited number of claims for $1.70 per product with proof of purchase and up to three claims with no proof of purchase, although the rate of claims suggested that the amount per product would increase.

As injunctive relief, Dollar General has agreed not to sell the infant medication unless the label specifically says that it contains the same concentration of acetaminophen as the children's medication. No class member objected to the settlement and only one member opted out. Although class counsel requested $600,000 in attorneys' fees, Judge Corrigan awarded $540,000, reasoning that it adhered to the high end of the Eleventh Circuit's benchmark range of 20%–30%. Lastly, Judge Corrigan denied the request for a $5,000 service award to the named plaintiff, citing a recent decision by the Eleventh Circuit that prohibited such awards.

Union Medical Plan Resolves Claims

D.T., et al. v. NECA/IBEW Family Medical Care Plan, et al., No. 2:17-cv-00004 (W.D. Wash.) (Oct. 8, 2021). Judge Robart. Approving $1.7 million settlement.

A Washington district judge approved a $1.7 million class settlement resolving claims that a union medical plan unlawfully refused to cover autism treatments and other developmental conditions. As part of the settlement, the defendants were also required to pay class counsel their lodestar (total hours multiplied by rate) attorneys' fees and costs up to $850,000. Noting that no class members objected to the settlement, the district judge concluded that it was fair, reasonable, and adequate and should be approved.

Big Settlements in Chicken Case

In re Broiler Chicken Antitrust Litigation, No. 1:16-cv-08637 (N.D. Ill.) (Dec. 20, 2021). Judge Durkin. Approving $181 million settlement.

An Illinois district judge approved six settlements worth a total of $181 million that resolve claims that six chicken producers conspired to fix the price of broiler chicken. Because of pending objections, the district court took class counsel's request for $68 million in fees and costs under advisement, but highlighted that class counsel had spent more than 67,000 hours on the case.

"We're here for you – Eight Alston & Bird attorneys named BTI "Client Service All-Stars."

Kristy Brown

Steve Collins

David Godofsky

Jim Harvey

Wim Nauwelaerts

Scott Ortwein

Kim Peretti

Angela Spivey

E-grocer Pays for Calls

Murray, et al. v. Grocery Delivery E-Services USA Inc., No. 1:19-cv-12608 (D. Mass.) (Oct. 15, 2021). Judge Young. Approving $14 million settlement.

A Massachusetts district judge approved a $14 million class settlement resolving claims that HelloFresh made telemarketing calls to individuals on the National Do Not Call Registry in violation of the Telephone Consumer Protection Act. Of the $14 million, the district court approved $3.4 million to be awarded to class counsel for costs and fees. The district court ultimately concluded that the settlement was "fair, adequate, and reasonable" and that the low number of objectors demonstrated a "positive reaction" to the agreement.

Settlement Compensation and New Military Leave Policies Greet Employees

Tsui v. Walmart Inc., No. 1:20-cv-12309 (D. Mass.) (Oct. 15, 2021). Judge Kelley. Approving $10 million settlement.

The court approved a $10 million settlement agreement after a class of employees alleged that Walmart did not offer any compensation to uniformed service members who took time off for military leave. That failure was apparent because Walmart paid civilian employees their full salary when taking short periods of time off for jury duty or bereavement. The court awarded approximately one-third of the fund for attorneys' fees and costs of litigation expenses.

Recorded Phone Calls Prompt Record Settlement Under California Privacy Law

Wang v. Wells Fargo Bank, No. 1:16-cv-11223 (N.D. Ill.) (Dec. 6, 2021). Judge Pallmeyer. Approving $28 million settlement.

In the largest settlement to date under the California Invasion of Privacy Act (CIPA), Judge Pallmeyer approved a $28 million settlement in a suit brought by businesses physically in California that received a telephone call from the International Payment Services (IPS) call center and had not signed a contract for merchant processing services. The suit alleged that IPS, an independent sales organization, made calls to California businesses without disclosing the fact that the calls were being recorded. The suit further alleged that the calls were made for the purpose of selling credit processing equipment and services on behalf of co-defendant Wells Fargo Bank. The plaintiffs argued that the nonconsensual recording was an invasion of privacy under the CIPA.

ALSTON
& BIRD

www.alston.com

© ALSTON & BIRD LLP 2022