ALSTON & BIRD

CLASS ACTION & MDL roundup

FALL 2020

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ALSTON & BIRD

overview

Where the (Class) Action Is

Welcome back to the ***Class Action & MDL Roundup***! Our fall edition covers notable class actions from the third quarter of 2020.

Click here to watch the latest installment of our video highlight featuring our senior associate, Cassie Johnson. This quarter we explore removal updates since *Dart v. Cherokee Basin* and general practice tips on removal.

The circuit courts were busy with class actions in the third quarter. The Fourth Circuit and Ninth Circuit went head to head in a TCPA case involving network providers. The Ninth Circuit, however, affirmed a California district court's ruling twice over, writing two opinions affirming the $142 million settlement approval. In environmental news, the Third Circuit affirmed landowners had successfully stated a public nuisance claim against a landfill releasing foul odors that allegedly affected a putative class of 20,000 nearby residents. The Tenth Circuit made history, becoming the first federal appellate court to find that employees can bring "sex-plus-age" claims against their employer under Title VII of the Civil Rights Act of 1964 in a labor & employment case.

At the district level, 2,537 municipal employees won big in a $6 million settlement approved by the Southern District of California in a Fair Labor Standards Act (FLSA) case claiming compensation for overtime. The 16 customers that filed a consumer class action against a large cosmetic retailer alleging the resale of used products were not as lucky. The judge ruled to deny class certification due to the absence of proof of a systemic practice.

We wrap up the ***Roundup*** with a summary of class action settlements finalized in the second quarter. We welcome your feedback on this issue, as always, and let us know what you think of our new video highlight feature.

CLASS ACTION & MDL roundup

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Antitrust/RICO

Third Circuit: Allocation of Damages Issues Do Not Preclude Certification

In re Suboxone Antitrust Litigation, No. 19-640 (3rd Cir.) (July 28, 2020). Affirming class certification.

The Third Circuit affirmed class certification for direct purchasers of a prescription drug used to treat opioid addiction. The direct purchasers had alleged that the defendant drug manufacturer developed a new under-the-tongue film version of the drug as the exclusivity period for its tablet version of the drug neared an end, and then set out to suppress the market for the tablet version of the drug as generic versions of the tablet became available. On appeal, the drug manufacturer argued that the plaintiff purchasers had not satisfied the predominance requirement because their damages model calculated only aggregate damages, and the eventual need for individualized damages inquiries defeated predominance. The Third Circuit disagreed. The court found that antitrust plaintiffs may satisfy the predominance requirement by using a model that estimates the damages attributable to the antitrust injury, even if more individualized determinations are needed later to allocate damages among class members.

Death of Pet Doesn't Survive Challenge at Eleventh Circuit

Cisneros v. Petland Inc., et al., No. 18-12064 (11th Cir.) (Aug. 25, 2020). Affirming district court's dismissal of plaintiff's federal RICO claim and remanding for dismissal of the Georgia RICO claim.

Rosalba Cisneros alleged both federal and Georgia RICO violations after her puppy died less than a week after purchase from one of Petland's franchise stores. Cisneros had received a "Certificate of Veterinary Inspection" certifying that the puppy was healthy, fit for adoption, and free of parvovirus, a deadly disease found in puppies. Within days of bringing the dog home, it was diagnosed with parvovirus and died. She responded by claiming that the puppy's death was part of a nationwide racketeering conspiracy. Expressing

sympathy, the Eleventh Circuit affirmed the district court's dismissal of the federal RICO claim, holding, among other deficiencies, that Cisneros failed to allege the qualifying features of a RICO enterprise: either an association-in-fact enterprise or a pattern of racketeering activity. The Georgia RICO claim failed on similar grounds. The district court had declined to exercise supplementary jurisdiction to address the Georgia RICO claim, so the appellate court remanded with orders to dismiss that claim as well.

Purchaser Plaintiffs' Certification Bid Foiled in Aluminum Antitrust Litigation

In re Aluminum Warehousing Antitrust Litigation, No. 1:13-md-02481 (S.D.N.Y.) (July 23, 2020). Judge Engelmayer. Denying class certification.

Judge Engelmayer denied the first-level purchaser plaintiffs' motion for class certification in a case alleging that financial institutions and metal warehouses conspired to drive up the price for primary physical aluminum. Judge Engelmayer ruled that the plaintiffs' expert's model of classwide injury and causation could not survive a "rigorous" review at the class certification stage and thus the predominance requirement was not satisfied. He also suggested that plaintiffs could not "comfortably clear the Rule 23(a)(4) hurdle" because there were certain absent class members who may have received a net economic benefit from the alleged anticompetitive scheme. The court would need to determine whether the conflict between class members was sufficiently fundamental to bar class certification. Judge Engelmayer left that question for another day should his holding regarding Rule 23(b)(3) be reversed on appeal.

Second Time's a Charm for Certifying Class of Health Plan Purchasers

Sidibe v. Sutter Health, No. 3:12-cv-04854 (N.D. Cal.) (July 30, 2020). Judge Beeler. Granting class certification.

Magistrate Judge Beeler certified a class of indirect purchasers who alleged that Sutter Health used its market power in seven Northern California markets (the tying markets) to force health plans in other geographic markets (the tied markets) to accept Sutter's hospitals

Our own **Deona Kalala** was recognized for her leadership with the inaugural "Outstanding Performance Award" from ABA Antitrust Section.

Deona Kalala

in the tied markets at Sutter's dictated supracompetitive prices, which were then passed through to the indirect-purchaser plaintiff consumers. Judge Beeler had previously rejected the plaintiffs' damages methodology because the plaintiffs' expert assumed a 100% pass-through rate without proving that rate. The plaintiffs submitted a revised damages methodology based on a regression analysis of the relationship between premium prices and medical costs, which yielded a pass-through rate of 97.16%. Judge Beeler ruled the revised methodology passed muster because the plaintiffs' expert sufficiently controlled for competitive conditions and the effect of the regulatory environment.

Gloomy Outlook for Drug Manufacturer

In re Glumetza Antitrust Litigation, No. 3:19-cv-05822 (N.D. Cal.) (Aug. 15, 2020). Judge Alsup. Granting class certification.

Judge Alsup certified a class of direct purchasers of the diabetes drug Glumetza in an alleged "pay for delay" scheme. Judge Alsup rejected the drug manufacturers' argument that the plaintiff purchasers had to prove by a preponderance of the evidence at the class certification stage that a generic drug manufacturer would have entered the market early and successfully but for the alleged anticompetitive scheme. Instead, that was the merits question on which the class's claims would rise or fall. If the class cannot prove that common question, "[t]he class doesn't just break down—the entire class loses." ■

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Banking, Financial Services & Insurance

No Taxes Needed in Total Settlements for Totaled Cars

Sigler v. Geico Casualty Co., No. 19-2272 (7th Cir.) (July 24, 2020). Affirming judgment of dismissal.

The Seventh Circuit affirmed a district court's dismissal of a policyholder's proposed class action against GEICO that sought taxes for a replacement vehicle in a total-loss insurance claim. Policyholder Nathan Sigler argued that his settlement from GEICO should have included not only the base value of his totaled vehicle, but also sales taxes and transfer fees for a replacement vehicle, regardless of whether he incurred those costs because they are always required to replace a vehicle. The three-judge panel rejected Sigler's argument as misreading the GEICO insurance policy and the relevant Illinois insurance regulation. Instead, the appellate court found that GEICO's policy does not promise to pay sales taxes or transfer fees and that the Illinois Administrative Code requires an auto insurer to pay such costs only if the insured in fact incurs them and substantiates them with appropriate documentation, which Sigler did not do. ■

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An exceptional group of lawyers: Alston & Bird elects 20 new partners for 2021.

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Consumer Protection

Payday Loan Agreements' Arbitration Clause Does Not Pay Off

Williams v. Medley Opportunity Fund II LP, et al., No. 19-2058 (3rd Cir.) (July 14, 2020). Affirming denial of motion to compel arbitration.

Payday loan customers filed a federal action over allegedly unlawful interest rates charged for loans from AWL Inc.—an entity owned by the Otoe-Missouria Tribe of Indians. The defendants moved to compel arbitration, but the district court ruled that the clause was unenforceable because the arbitration clause required application of tribal law in any subsequent arbitration. The Third Circuit agreed, holding that the arbitration clause constituted a prospective waiver of all statutory rights for the borrower and, therefore, violated public policy.

Delegation Provision Cannot Borrow Time for Arbitration Clause

Gibbs v. Haynes Investments LLC, et al., No. 19-1434 (4th Cir.) (July 21, 2020). Affirming denial of motion to compel arbitration.

In another suit stemming from payday loan agreements with arbitration clauses exclusively applying tribal law, the defendants argued the agreements' delegation clause prevented the district court from deciding the enforceability of the agreement before the issue was first decided by an arbitrator. The Fourth Circuit disagreed—affirming the district court's denial of the defendants' motion to compel arbitration and finding that the plaintiffs' challenge to the delegation clause was sufficiently specific, as required under the U.S. Supreme Court's 2010 *Rent-A-Center* decision. The Fourth Circuit held that the plaintiffs' argument that the arbitration clause amounted to a prospective waiver of all statutory rights was a sufficiently specific and related attack on the delegation clause that permitted analysis by the district court. The Fourth Circuit reasoned that if the arbitration clause *did* waive all a borrower's statutory rights, then it would be impossible for an arbitrator to assess the enforceability of the agreement without ability to apply any federal or state law.

See No Fraud; There Is No Fraud

Bahamas Surgery Center LLC v. Kimberly-Clark Corporation, No. 18-55478 (9th Cir.) (July 23, 2020). Vacating judgment and remanding.

Kimberly-Clark appealed from a jury verdict in a class action concerning surgical gowns labeled as compliant with the Association for the Advancement of Medical Instrumentation (AAMI) Liquid Barrier Level 4 standard. The Ninth Circuit held that the district court abused its discretion by failing to decertify the class because evidence of testing failures related to only a subset of class purchasers who had seen representations about the gowns' AAMI rating. The appellate court also relied on the lack of evidence that a reasonable person would attach importance to the AAMI test failures in a transaction for purchase of a package of surgical goods if the AAMI rating was not noted on the package.

A Searching Motion Is Revived by Engine of the Ninth Circuit

Singh v. Google LLC, No. 18-17035 (9th Cir.) (Sept. 1, 2020). Reversing order granting motion to dismiss.

The Ninth Circuit reversed a lower court dismissal, holding that statutory standing under California law is equivalent to Article III standing. Plaintiff Singh's allegations that Google's AdWords service caught fewer fraudulent clicks than advertised were sufficient to adequately allege economic injury and causation. The Ninth Circuit rejected Google's arguments that the district court's holding could be upheld on alternate grounds that its AdWords agreement and a 2007 blog post precluded the alleged deception as a matter of law.

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Eleventh Circuit Gives Wake-Up Call to Lawsuit Against Hotelier

Fox v. The Ritz-Carlton Hotel Co. L.L.C., No. 19-10361 (11th Cir.) (Sept. 29, 2020). Reversing, in part, order granting motion to dismiss.

The Eleventh Circuit has awoken a class action alleging that Ritz-Carlton deceptively adds automatic gratuities to patrons' dining bills in violation of Florida's consumer protection laws and tax regulations. The district court initially dismissed the complaint on the grounds that the plaintiff: (1) lacked standing to sue on behalf of the customers paying automatic gratuities at restaurant locations that he did not visit; (2) failed to satisfy the Class Action Fairness Act's (CAFA) $5 million amount in controversy requirement; and (3) did not exhaust the requisite administrative remedies for his tax refund claim. The appellate court affirmed the dismissal of the tax refund claim, but held that the plaintiff adequately alleged injury-in-fact "traceable to Ritz-Carlton's allegedly deceptive practices" sufficient to confer Article III standing. The panel also determined that the plaintiff satisfied CAFA's amount-in-controversy requirement based on the alleged number of Florida consumers who paid an automatic gratuity within the class period.

Court Steers Driver's Privacy Protection Act Case Off Course

Garey v. Farrin, No. 1:16-cv-00542 (M.D.N.C.) (July 23, 2020). Judge Biggs. Denying motion for class certification.

In North Carolina, an officer investigating a traffic accident is required to make an official written report of the accident to be furnished to the state's Division of Motor Vehicles. The division then makes a standard crash report form—the DMV-349. Six individuals involved in car accidents brought a class action, alleging that they began receiving unsolicited marketing materials from North Carolina attorneys and law firms that had obtained their names and addresses from their DMV-349 forms. The court ruled that the question of whether each class member's information was obtained from a "motor vehicle record," required for liability under North Carolina's Driver's Privacy Protection Act, was not susceptible to classwide proof. Instead, information included in DMV-349s can come from a variety of sources, such as from the driver directly.

Beauty Is in the Eye of the Beholder—as Are a Class's Disparate Claims

Smith-Brown v. Ulta Beauty Inc., No. 1:18-cv-00610 (N.D. Ill.) (Aug. 6, 2020). Judge Alonso. Denying motion for class certification.

Sixteen Ulta customers filed a consumer class action, alleging that the company restored used beauty products and reshelved them to be resold as new after Ulta customers returned them. But the court denied class certification for several reasons. First, although evidence showed that Ulta had a policy of pressuring managers and employees to reduce the amount of damaged product in their stores, the plaintiffs failed to show an express policy directing managers to put used product back on the shelves. Thus, the plaintiffs had a *Wal-Mart* problem—the absence of proof of a systemic practice. The court also ruled that it would have to make individualized inquiry into questions of merchantability and Ulta's pre-sale knowledge to decide "core liability issues." Common evidence suggesting at most that Ulta "sometimes" sold used products was not enough to predominate over the individual questions of whether Ulta actually *did* sell used products. ■

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Environmental

Common-Law Odor Suits Withstand Legal Challenges

Baptiste v. Bethlehem Landfill Co., No. 19-1962 (3rd. Cir.) (July 13, 2020). Reversing dismissal.

Sines v. Darling Ingredients Inc., No. 2:19-cv-19121 (D.N.J.) (Aug. 25, 2020). Judge Cecchi. Declining dismissal.

William Prosser once called nuisance a "legal garbage can" full of vagueness and uncertainty.

Garbage is the subject of two recent public nuisance cases in which courts held landowners had successfully stated a public nuisance claim against nearby operators. In *Baptiste*, the Third Circuit revived a suit against a landfill over foul odors allegedly affecting a putative class of 20,000 nearby residents. Similarly, in *Sines*, Judge Cecchi denied a local animal food processing plant's motion to dismiss the local residents' action complaining of noxious odors emanating from the plant's wastewater and sludge.

The defendants in both cases argued that the plaintiffs could not state a claim for public nuisance because they had no special injury—an injury different than the general public. That argument succeeded with the lower court in *Baptiste*, but both the Third Circuit and Judge Cecchi were unpersuaded. The Third Circuit juxtaposed the landowners' inability to "use and enjoy their swimming pools, porches, and yards" with the general public's "discomfort of having to breathe polluted air in public spaces." Judge Cecchi distinguished the Sines' desire to "vindicate their right to use and enjoy their home" from the larger community's "general, non-possessory right to clean air."

The cases explore the tension between public nuisance (which requires a private litigant to have a special injury) and numerosity (which requires a class to be so numerous that joinder is impracticable). In other words, what's the Venn diagram for the putative class's injury in a public nuisance claim and the general public's injury? As *Baptiste* and *Sines* make clear, courts continue to grapple with this tension in environmental torts and nuisance.

The success of a motion to dismiss may turn on how skillful litigants define (and the court interprets) the "general public."

Flint Class Action Survives

Mays, et al. v. Governor of Michigan, et al., Nos. 157335-7, 157340-2 (Mich.) (July 29, 2020).

A divided Michigan Supreme Court denied a motion for summary disposition by former Gov. Rick Synder, the Michigan Department of Environmental Quality (MDEQ), and other state officials against a class action brought by residents of Flint seeking damages related to the 2015 "Flint water crisis."

The majority held that summary disposition on the statute of limitations was premature because a question of fact existed on *when* damage related to water quality occurred. That is, whether the first drop of contaminated water could be said to have caused the damages alleged or alternatively if injuries may have occurred due to later exposures, for example in vitro exposures that did not occur until well after the time the water sources were switched.

The majority also rejected defenses related to sovereign immunity and economic damages. Because "[t]here is obviously no legitimate governmental objective in poisoning citizens," the court held that the government was not protected from the constitutional claims alleged. On the issue of damages, the court held that when, like here, plaintiffs allege a constitutional violation, economic recovery is available if the conduct is sufficiently egregious that it rises to a level that shocks the conscious. Following the reasoning of the lower court, the supreme court considered five factors for the nature of the constitutional violation, ultimately determining that damages could be available for the constitutional violations pleaded. The case was remanded back to the court of claims for further proceedings.

Some claims related to this case have been settled since the supreme court's decision; federal litigation concerning the Flint water crisis is also ongoing. ■

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ERISA

Second Circuit Takes ERISA's Long View

Falberg, et al. v. Goldman Sachs Group Inc., et al., No. 1:19-cv-09910 (S.D.N.Y.) (July 8, 2020). Judge Ramos. Denying motion to dismiss.

The Southern District of New York rejected Goldman Sachs's attempt to toss a putative ERISA class action based on statute of limitations, exhaustion, and standing arguments. An ex-employee alleged that the company mismanaged its 401(k) plan and put itself before plan participants, resulting in millions of dollars in losses to workers. The crux of the defendants' argument was that the parties had agreed to a statute of limitations shorter than the 24-month period provided by ERISA, and that the plan document set forth its own exhaustion procedure that the plaintiff failed to follow. The court rejected both arguments, applying the statute of limitations provided in ERISA rather than the shorter one agreed to by the parties, and ruling that no Second Circuit authority allowed parties to contract around the ERISA exhaustion requirement. The court also rejected the companies' other arguments on standing and breach of fiduciary duty. The decision clarifies procedural rules for bringing ERISA claims in the Second Circuit.

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Labor & Employment

Interstate Commerce Exemption Bars Attempt to Compel Arbitration

Rittmann v. Amazon.com Inc., 19-35381 (9th Cir.) (Aug. 19, 2020). Affirming denial of defendants' motion to compel arbitration.

The Ninth Circuit affirmed the lower court's denial of Amazon's motion to compel arbitration in a class action filed by AmFlex drivers alleging that Amazon misclassifies them as independent contractors rather than employees. The plaintiffs represent a proposed nationwide class of delivery drivers who independently contracted with Amazon.com and Amazon Logistics to provide "last mile" deliveries from Amazon warehouses to the products' destinations using the AmFlex smartphone application. The question before the Ninth Circuit on appeal was limited to the motion to compel, and the court considered "whether AmFlex delivery workers are exempt from the Federal Arbitration Act's (FAA) enforcement provisions because [the plaintiffs] are transportation workers engaged in interstate commerce." In a 2–1 decision, the majority found that the plaintiffs fit the definition of transportation workers engaged in interstate commerce and, as such, fell within the FAA's exemption. In short, the majority's decision exempts these Amazon delivery drivers from mandatory arbitration and allows them to continue pursuing their misclassification suit in court instead of private arbitration.

The Tenth Circuit Upholds Title VII

Frappied, et al. v. Affinity Gaming Black Hawk LLC, No. 19-1063 (10th Cir.) (July 21, 2020). Reversing district court dismissal of claims.

The Tenth Circuit became the first federal appellate court to find that employees can bring "sex-plus-age" claims against their employer under Title VII of the Civil Rights Act of 1964. Title VII protects against discrimination on the basis of race, color, religion, sex, and national origin, but does not protect against discrimination on age. In this case, female employees over the age of 40 sought to bring a claim against their employer, a casino operator, alleging that they were terminated because the employer discriminated against women over age 40.

The district court dismissed their "sex-plus-age" disparate impact claim, but the Tenth Circuit reversed, citing the U.S. Supreme Court's recent decision in *Bostock v. Clayton County, Ga.*, and explaining that an employer violates Title VII whenever the discrimination is "based *in part* on sex." Based on this reasoning, the Tenth Circuit found that the female employees '"sex-plus-age" claims were cognizable under Title VII because they were alleging sex discrimination even if the discrimination was only in part because of sex.

Franchisors Win Important Victory for Their Business Model in Independent Contractor Misclassification Case

Patel, et al. v. 7-Eleven Inc., et al., No. 1:17-cv-11414 (D. Mass.) (Sept. 10, 2020). Judge Gorton. Granting motion for summary judgment.

The District of Massachusetts rejected a putative class action brought by five 7-Eleven store owners, striking a blow to the increasingly popular trend of franchisee misclassification lawsuits. The store owners argued that they were employees under the Massachusetts Independent Contractor Law (ICL) based on the level of control that 7-Eleven exerted over them and thus were entitled to compensation under state wage-and-hour laws. The company argued on summary judgment that it was bound to exercise some level of control per a Federal Trade Commission (FTC) rule that franchisors have authority to exert a significant degree of control over the franchisee's method of operation to prevent unfair trade practices. 7-Eleven demonstrated that the regulation was in direct conflict with the Massachusetts ICL's definition of control, and the court agreed that the specific federal law should trump the more general state law on the issue. As the court noted, the contrary holding sought by the plaintiff would have posed a grave threat to the franchise business model because it would lead to the irrational conclusion that every franchisee under the FTC's definition should be considered an employee under state law.

"New year, new Administration. Join us for the L&E Executive Webinar "Labor & Employment Changes Under the Biden Administration, COVID-19, and Other Updates" on February 3, 2021."

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Privacy & Data Security

Dialing Up the Circuit Split

A*llan v. Pennsylvania Higher Education Assistance Agency*, No. 19-2043 (6th Cir.) (July 29, 2020). Affirming summary judgment.

The Sixth Circuit has taken sides in the circuit split on whether stored-number telephone systems qualify as autodialers under the Telephone Consumer Protection Act (TCPA), holding that they are. In a purported class action involving a student loan servicing agency, the agency argued that an Avaya dialing system was not an autodialer because the system automatically dials numbers from a stored list and thus the numbers are "not randomly generated." After noting the circuit split on whether devices like the Avaya system are banned under the TCPA, the Sixth Circuit determined that the "plain text reading of the autodialer definition is too labored and problematic" to solve the issue. So the court turned to a related consent exception of the statute, which it held "commands the plain text reading that the autodialer ban applies to stored-number systems."

Fourth Circuit Case Sent Back for Regularly Scheduled Programming …

Mey v. DirecTV LLC, No. 18-1534 (4th Cir.) (Aug. 7, 2020). Vacating denial of motion to compel arbitration.

The Fourth Circuit vacated a denial of defendant DirecTV's motion to compel arbitration, holding that Diana Mey was contractually obligated to arbitrate her claims. Mey had sued DirecTV based on the company's alleged automated and prerecorded telemarketing calls made to her AT&T phone number. When opening her phone line in 2012, Mey signed an arbitration agreement with AT&T, which, the Fourth Circuit held, extended to TCPA claims against DirecTV after the company was acquired by AT&T in 2015. The court held the arbitration agreement was a long-term, "forward-looking" document applicable to "successors," and that it was reasonable that DirecTV would constitute an "affiliate" of AT&T within the scope and meaning of the agreement. The court rejected the plaintiff's alternative argument that the agreement did not bind her because

the account was in her husband's name because the plaintiff was also an "authorized user" under the contract.

… But Ninth Circuit Sees Things Differently

Revitch v. DirecTV LLC, No. 18-16823 (9th Cir.) (Sept. 30, 2020). Affirming denial of motion to compel arbitration.

In a split with the Fourth Circuit, the Ninth Circuit affirmed denial of DirecTV's motion to compel arbitration of a TCPA dispute brought by a consumer and AT&T subscriber. The Ninth Circuit held that to enforce a 2011 agreement between the consumer and AT&T to compel arbitration against DirecTV (acquired in 2015) would lead to "absurd results." The court reasoned that under DirecTV's interpretation of the arbitration agreement, a consumer signatory "would be forced to arbitrate any dispute with any corporate entity that happens to be acquired by AT&T Inc., even if neither the entity nor the dispute has anything to do with providing wireless services to [the consumer]—and even if the entity becomes an affiliate years or even decades in the future." ■

class-ified

The gold standard for the "absolute best levels of service": Three Alston & Bird partners named 2020 "Client Service All-Stars" by BTI Consulting Group.

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Products Liability

Appeals Court Nixes Novel Negotiation Class

In re National Prescription Opiate Litigation, Nos. 19-4097, 4099 (6th Cir.) (Sept. 24, 2020). Reversing class certification.

The Sixth Circuit declined to adopt a novel "negotiation class" adopted by the MDL judge overseeing the sprawling opioid litigation. More than 30,000 local governments brought claims against dozens of prescription opioid manufacturers and distributors. The plaintiffs proposed a class action in which the class members would agree up front to a structure for allocating settlement funds. The class would then approach the defendants to see whether they would settle and for how much. Reversing class certification, the Sixth Circuit concluded that the "negotiation class" was beyond the scope of Rule 23, which contemplates the litigation of common issues rather than the facilitation of global settlement.

A Word to the Wise on Communications with Class Members

In re Allergan Biocell Textured Implant Litigation, No. 2:19-md-02921 (D.N.J.) (July 14, 2020). Judge Dickson. Granting in part emergency motion to limit communications with class members.

A ruling in the District of New Jersey provides helpful guidance to defendants on communications with putative class members. In a case asserting products liability claims against a medical implant manufacturer, the plaintiffs requested that the court prohibit the defendant from approaching putative class members and offering them warranty-related benefits in exchange for a release of their claims. Using its managerial authority under Rule 23(d), the court ordered the defendant to provide specific information to class members sufficient to enable them to make informed and meaningful choices about whether to release their claims. When communicating with putative class members, defendants should be mindful of the court's authority to limit any communications that, in the court's estimation, threaten the fairness of the litigation process or the administration of justice.

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Early Resolution of Expert Challenges Shatters Class Certification Bid

Kondash v. Kia Motors America Inc., No. 1:15-cv-00506 (S.D. Ohio) (Sept. 30, 2020). Judge McFarland. Denying class certification.

The Southern District of Ohio denied the plaintiff's motion for class certification in a case alleging that a design defect caused car sunroofs to shatter spontaneously. The plaintiff's expert testimony was the only evidence of a common defect, but the defendant moved to exclude that expert testimony under *Daubert*. After acknowledging that neither the Sixth Circuit nor the Supreme Court has determined whether the district court should undertake a *Daubert* analysis at the class certification stage, the court adopted a new approach holding that the district court should resolve *Daubert* issues at the class certification stage as long as the expert testimony is "critical to the question of class certification." When litigating in courts that endorse that approach, defendants should look for expert challenges on core issues in conjunction with their opposition to class certification.

Even in MDLs, Law of the Case Is Case-Specific

City & County of San Francisco v. Purdue Pharma L.P., No. 3:18-cv-07591 (N.D. Cal.) (Sept. 30, 2020). Judge Breyer. Granting in part defendants' motion to dismiss.

A federal judge rejected plaintiff San Francisco's attempt to broaden the law-of-the-case doctrine in multidistrict litigation. Before remanding the San Francisco case to its original venue, the MDL court denied motions to dismiss a bellwether case brought by other plaintiffs. San Francisco argued that the MDL court's bellwether ruling was the law of the case, which precluded the defendants from moving to dismiss San Francisco's claims. The court rejected that invitation to extend the doctrine and emphasized that it applies only within a specific case. Although the MDL court's bellwether rulings were persuasive, they did not bind the parties or the court in this separate case. Reviewing the issues independently, Judge Breyer dismissed the city's RICO claims and denied all other bases for dismissal.

class-ified

The Digital Transformation of Health Care has been front and center since "COVID-19" entered the lexicon – and will remain long after it's gone. Alston & Bird has stood by our clients who have led the way.

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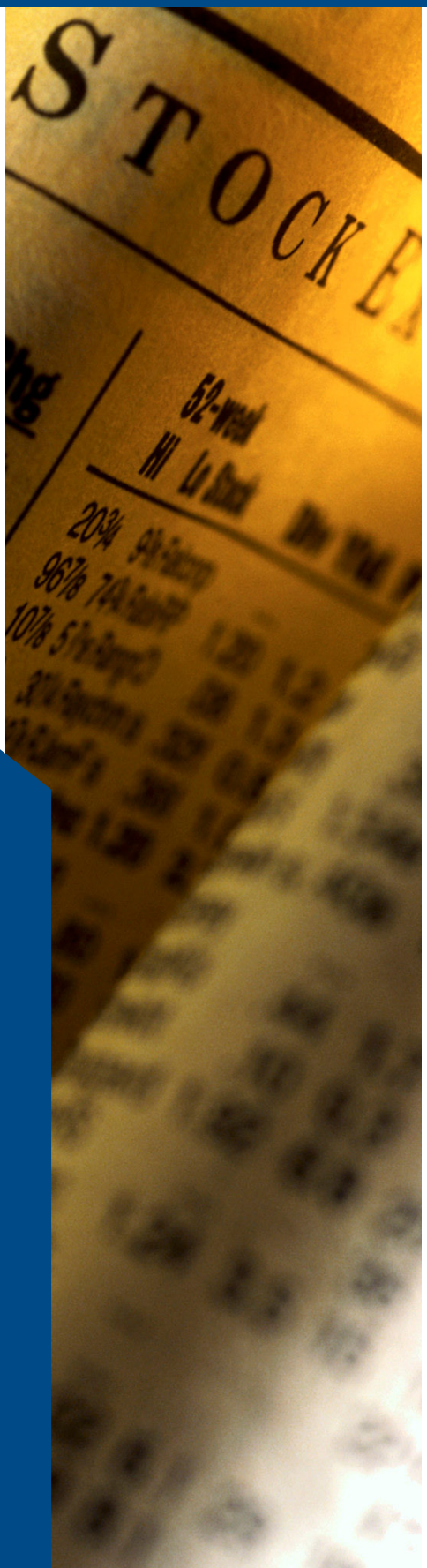

Securities

Second Circuit Triages Investor Suit Against Health Care REIT for Failure to Disclose Tenant Loan

Setzer, et al. v. Omega Healthcare Investors Inc., et al., No. 19-1095 (2nd Cir.) (Aug. 3, 2020). Reversing dismissal and reviving suit.

The Second Circuit reversed the dismissal of a stock-drop suit against real estate investment trust Omega Healthcare for its failure to disclose a $15 million loan to a tenant whose facilities represented 7% of the REIT's investment portfolio. The lower court's dismissal was based on a finding that the plaintiffs failed to adequately allege scienter because the REIT had "disclosed [the tenant's] financial predicament repeatedly to investors." But the Second Circuit disagreed and held that—despite having raised concerns about that tenant's solvency on multiple occasions—the REIT's repeated failures to disclose the loan were "actionably misleading," especially in light of the fact that some of the tenant's rent payments were sourced by the loan.

Smackdown Continues After Investors Survive Dismissal in Wrestling Suit

City of Warren Police & Fire Retirement System, et al. v. World Wrestling Entertainment Inc., et al., No. 1:20-cv-02031 (S.D.N.Y.) (Aug. 6, 2020). Judge Rakoff. Denying dismissal.

The tussle continues in a shareholder suit against World Wrestling Entertainment Inc. (WWE), Vince McMahon, and other WWE executives after the Southern District of New York denied WWE's motion to dismiss. The suit relies on optimistic statements made about international media-rights negotiations: (1) statements that WWE was working on "renewing" a media-rights agreement with a Middle East and North Africa broadcaster when the broadcaster had already terminated its agreement with WWE and expressed intent not to renew; and (2) optimistic statements about subsequent negotiations of a media-rights deal with Saudi Arabia, negotiations that had allegedly soured following a debacle during a WWE event in Saudi Arabia that allegedly angered the country's Crown Prince

and led him to "refuse[] to let certain wrestlers leave the country" and "hold[] them 'hostage' for some hours in an airplane before letting them take off." In denying WWE's motion to dismiss, the court rejected WWE's arguments that it had only made opinion or forward-looking statements and instead held that the investors had "successfully allege[d] at least some actionable representations."

Investors Get Green Light in Suit Against Lighting Co.

In re Acuity Brands Inc. Securities Litigation, No. 1:18-cv-02140 (N.D. Ga.) (Aug. 25, 2020). Judge Cohen. Granting class certification.

Investors were granted class certification in a stock-drop suit against a lighting business. Stockholders alleged that the business downplayed its business slowdown and misrepresented the company's true financial status after rival businesses flooded the lighting market and sales fell. The court rejected the company's arguments that the plaintiffs' method of calculating damages was flawed, ruling that the class satisfied the Rule 23 factors.

Student Loan Servicer Faces Pared-Down Class of Investors

Lord Abbett Affiliated Fund Inc., et al. v. Navient Corp., et al., No. 1:16-cv-00112 (D. Del.) (Aug. 25, 2020). Judge Noreika. Granting class certification in part.

The District of Delaware granted in part and denied in part investors' motion seeking certification of an Exchange Act class and a separate Securities Act class in a suit against a student loan servicer. In their opposition to class certification, the defendants argued that certain investors could not be included in the class because they were not included in the class definition pleaded in the operative complaint. Judge Noreika rejected that argument because no Third Circuit precedent supported the proposition that plaintiffs are "bound by the class proposed in their complaint." However, Judge Noreika said that investors who purchased notes from the student loan servicer could not be included in the Exchange Act class because they failed to show that the market for the notes was efficient. ■

"Don't wait nine months to find out "What to Expect from Securities Litigation in 2021" from **Robert Long** and **Elizabeth Gingold Clark** in *Law360*."

Robert R. Long

Elizabeth Gingold Clark

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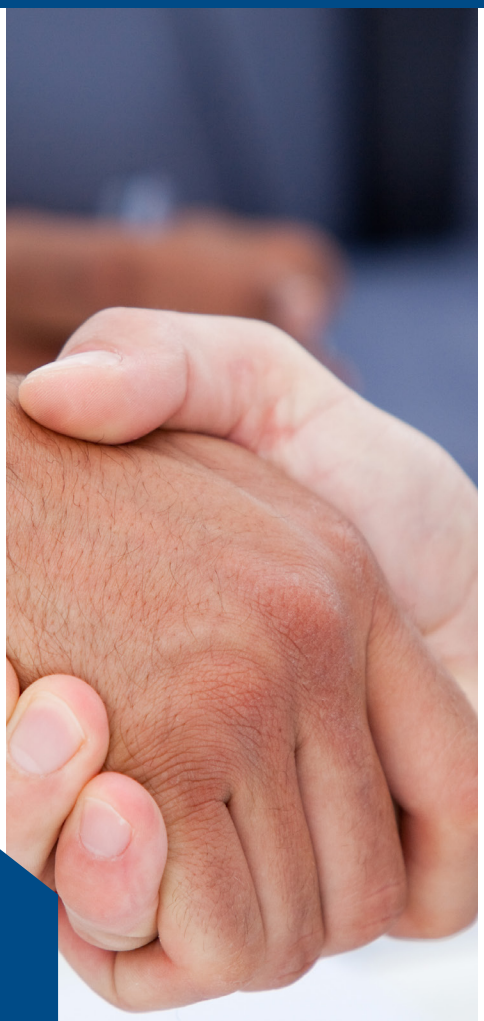

Settlements

Ninth's Approval Twice as Nice

Jabbari, et al. v. Wells Fargo & Co., No. 18-16213 (9th Cir.) (July 20, 2020). Affirming $142 million settlement approval.

The Ninth Circuit affirmed a California district court's approval of a $142 million class settlement resolving customers' claims that unauthorized accounts had been opened in their names. The Ninth Circuit issued two opinions—one published and one unpublished. In the published opinion, the Ninth Circuit affirmed the district court's class certification ruling, holding that courts need not conduct a choice-of-law analysis before concluding that Rule 23's predominance requirement has been met. In the unpublished opinion, the Ninth Circuit held that class counsel's $21 million fee award was proper, citing the "substantial results" achieved and the fact that the award was "well below" the 25% benchmark.

Settlement with City Pays Back Municipal Employees for Overtime

Kries, et al. v. City of San Diego, et al., No. 3:17-cv-01464 (S.D. Cal.) (July 2, 2020). Judge Curiel. Approving $6 million settlement.

Judge Curiel approved a $6 million settlement between the City of San Diego and a class of 2,537 municipal employees who claimed they were entitled to overtime compensation under the Fair Labor Standards Act (FLSA) based on the Ninth Circuit's interpretation of that statute in *Flores v. City of San Gabriel*. In 2016, *Flores* held that employees who do not spend all of their allocated flex benefit plan dollars should receive those unused portions as cash payments, and that such cash payments must be included in calculating the regular rate of pay for overtime payments under the FLSA. The plaintiffs claimed that the City of San Diego miscalculated their overtime under the FLSA and *Flores*, while the city disputed the amount and method of calculation for retroactive underpaid overtime. The settlement provides that the city will pay $6 million to settle all of the plaintiffs' FLSA claims, and the parties agreed that half of this amount represents overtime backpay and the other half represents

liquidated damages. The court found the agreement to be fair and reasonable given a wide range of potential recoveries, noting that the agreed-upon settlement is twice the maximum value of the plaintiffs' damages if the city's methodology was adopted. The court dismissed the plaintiffs' claims with prejudice and ordered the parties to file a motion for attorneys' fees and costs on a later date.

Second Season of TV Component Settlement Concludes with Identical Relief for IPPs

In re Cathode Ray Tube (CRT) Antitrust Litigation, No. 3:07-cv-05944 (N.D. Cal.) (July 13, 2020). Judge Tigar. Approving amended settlement.

Judge Tigar granted final approval of proposed amended settlements between indirect purchaser plaintiffs and a number of large manufacturers of cathode ray tubes (CRTs), vacating a 2016 final approval order and dismissal. The sprawling MDL alleged that a decades-plus-long conspiracy to price-fix CRTs—a core component of tube-style screens for everyday devices, like TVs and computer monitors—by major electronic producers resulted in overcharges of billions of dollars to U.S. companies and consumers. The court first approved a settlement requiring the defendants to pay $540 million in 2016, but after two objectors appealed that decision to the Ninth Circuit, the district court determined that it had erred in approving the settlement because it had required persons or entities in states whose laws prohibited recovery to indirect purchasers to release their claims without any compensation. Rather than reversing the court's settlement approval, the Ninth Circuit remanded for the court to "reconsider its approval of the settlement." Upon reconsideration, the court vacated its prior final approval order and dismissed with prejudice as to certain defendants.

The amended settlement, now once again blessed by the court, carves off those plaintiffs who have yet to receive compensation from the class definition and eliminates the nationwide class from the amended settlements. Despite a 5% reduction in each defendant's settlement contribution, the amount available to be distributed among the IPPs was left unchanged because the reductions in contribution were offset by a $29 million reduction in attorneys' fees awarded under the new final settlement.

"One symptom the COVID-19 vaccine brings: more questions. Get some answers from our advisory, "COVID-19 Vaccines: Seven Questions for Employers."

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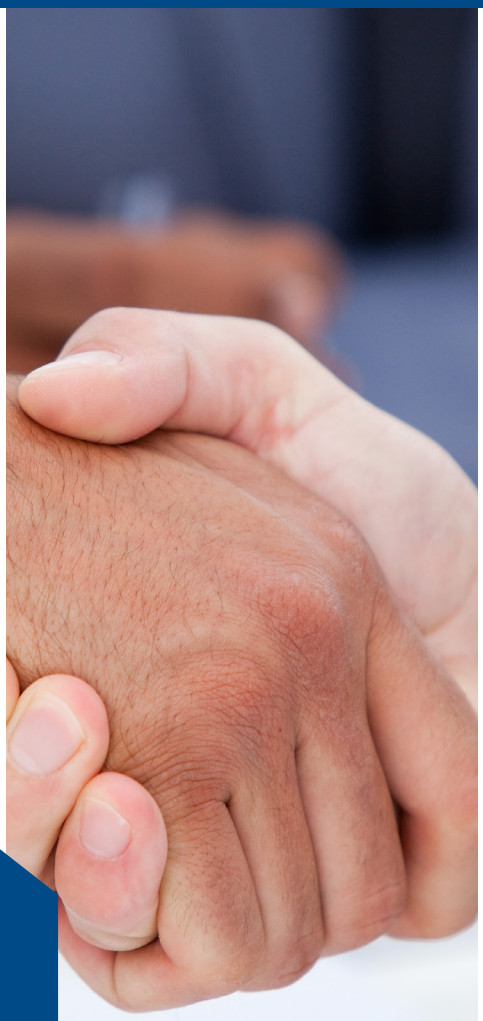

Shareholders Forage for Settlement in Securities Suit

Ronge v. Camping World Holdings Inc., et al., No. 1:18-cv-07030 (N.D. Ill.) (Aug. 5, 2020). Judge Pallmeyer. Approving $12.5 million settlement.

Judge Pallmeyer certified a settlement class and approved a $12.5 million all-cash settlement fund, ending a case filed against Camping World and its CEO Marcus Lemonis (host of CNBC show *The Profit*) involving alleged misrepresentations of Camping World's financial performance. Judge Pallmeyer also granted plaintiffs' counsel's $3.75 million fee request. In approving the settlement, Judge Pallmeyer noted that the settlement was the product of genuine arm's-length negotiations between capable counsel. Only a single potential class member opted out of the class.

Investor Challenge to Sale of Energy Company Pays Off

Riche, et al. v. James C. Pappas, et al., No. 2018-0177 (Del. Chancery Ct.) (Sept. 16, 2020). Vice Chancellor Laster. Approving $6.5 million settlement.

Vice Chancellor Laster approved a $6.5 million settlement on behalf of public stockholders in an investor challenge to a $110 million sale of a U.S. energy company. The suit sought damages based on a claim that the $5.45-per-share sale was the unfair result of a flawed sales process. The parties reached the settlement agreement following multiple attempts at mediation. ■

CLASS ACTION & MDL roundup

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