ALSTON & BIRD

# CLASS ACTION & MDL roundup

QTR 1 | 2022

## In this issue

ALSTON & BIRD

# overview

CLASS ACTION & MDL **roundup**

QTR 1 | 2022

## Where the (Class) Action Is

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

On the docket this quarter is another slate of cases covering a range of industries, including financial services, travel, retail, and insurance. It was a particularly busy quarter for Privacy & Data Security, with many TCPA violation lawsuits related to unwanted messages and advertisements. In other Privacy & Data Security news, a popular social media app was questioned by the Seventh Circuit for allegedly collecting facial recognition data from a minor without consent in violation of the Illinois Biometric Privacy Act.

The Massachusetts Supreme Judicial Court answered an independent contractor classification question certified by the First Circuit, shedding light on the nuances of state-law independent contractor tests and their application in the franchise context. Other interesting cases from this quarter include a Products Liability case alleging false and deceptive labeling. We also continue to see a variety of COVID-19 insurance cases pertaining to claims of improper denial of coverage and overpayment of premiums in both district and circuit courts.

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



## authors & editors

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

David Venderbush
david.venderbush@alston.com
212.210.9532

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

Nnola Amuzie
nnola.amuzie@alston.com
213.576.1190

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

Ashley De Vance
ashley.devance@alston.com
213.576.1072

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

Michelle Jackson
michelle.jackson@alston.com
404.881.7870

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

Matthew E. Newman
matt.newman@alston.com
404.881.7987

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

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

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

## Antitrust/RICO

### Trucking Companies Drive Wedge Through Proposed Damages Class

*Markson v. CRST International,* No. 5:17-cv-01261 (C.D. Cal.) (Feb. 24, 2022). Judge Blumenfeld. Denying motion for class certification.

Judge Stanley Blumenfeld denied class certification after finding that the plaintiff commercial truck drivers did not produce a reliable damages model that could be uniformly applied to all defendants such that common issues predominated over individual ones. The plaintiffs' antitrust theory was premised on the defendant trucking companies agreeing not to hire one another's truck drivers while they were "under contract"—which included the period during which the drivers paid back their trucking school tuition and training costs even after they were terminated or quit. The plaintiffs attempted to establish antitrust impact and damages by relying on a pay-scale differential between "under contract" and noncontract drivers. But the pay-scale differential only appeared in the data for two of the four trucking companies. If the differential was probative evidence of antitrust impact, then the lack of a differential was equally probative evidence of a lack of antitrust impact, leaving the plaintiffs without a reliable, uniform model for the entire class.

### Swimming Federation Sinks Swimmers' Bid for Classwide Damages

*Shields v. Federation Internationale de Natation*, No. 3:18-cv-07393(N.D. Cal.) (Feb. 11, 2022). Judge Corley. Denying motion for class certification.

A putative class of professional swimmers brought antitrust claims alleging that FINA, the governing body for Olympic swimming, used its control over Olympic aquatic sports to threaten member federations and swimmers from competing in swimming competitions organized by the International Swimming League (ISL). Judge Jacqueline Scott Corley denied the swimmers' motion to certify a Rule 23(b)(3) damages class because of intraclass antagonism. Under the ISL competition format, prize money awards vary depending on whether a swimmer was selected to compete from his or her team's roster, whether the swimmer placed in the meet, and how the swimmer's team performed throughout the season. The swimmers did not provide a methodology that could fairly determine individual damages, and Judge Corley noted that any such methodology would pit the swimmers against each other: each swimmer would have to argue that other swimmers in her club would not have been selected to swim, that she would have beaten the swimmers she raced against, and that other clubs would not have performed as well as her club over the course of the season. Judge Corley also refused to allow an injunctive-relief-only class to proceed. ■

"HBW Insight checks in with **Rachel Lowe** and **Sam Jockel** to learn how "'Green' Personal Care Proving Fertile Ground for Lawsuits in U.S. Courts."

Rachel Lowe

Sam Jockel

# CLASS ACTION & MDL roundup

QTR 1 | 2022

## Banking & Insurance

- **COVID Doesn't Cut It—Physical Damage Required for Business Insurance Recovery**

  *Rye Ridge Corp., et al. v. Cincinnati Insurance Co.*, No. 21-01323 (2nd Cir.) (Jan. 13, 2022). Affirming dismissal.

  Affirming dismissal of two restaurants' claims for improper denial of insurance coverage, the Second Circuit firmly reiterated its position that the term "direct physical loss" in an insurance policy governed by New York law does not extend to alleged business losses that resulted from the COVID-19 pandemic and related government restrictions. According to the Second Circuit, recent precedent clearly shows that physical loss or damage to property is required and that merely losing the use of a premises is insufficient. The court affirmed dismissal of the restaurants' complaint and declined to certify the question to the New York Court of Appeals.

- **Intraclass Conflict Totals Bid for Certification**

  *Prudhomme, et al. v. Government Employees Insurance Co., et al.*, No. 21-30157 (5th Cir.) (Feb. 21, 2022). Affirming denial of motion for class certification.

  The Fifth Circuit affirmed a district court's denial of class certification for a group of GEICO customers in Louisiana who alleged that the company's proprietary valuation system violated certain state laws when calculating payouts for total-loss automobile claims. The appellate court specifically focused on the inadequacy of the proposed class, noting that there was a potential conflict of interest within the class because a portion of the putative class members benefited from the allegedly unlawful valuation system by receiving higher payouts—i.e., they would be worse off if the valuation system changed in the manner requested. This undermined the plaintiffs' classwide theory of liability and rendered them inadequate representatives of a putative class, which doomed their bid for class certification.

- **COVID Coverage Denied Based on Virus Exclusion Clause & Lack of Physical Damage**

  *Chung, et al. v. American Zurich Insurance Co.*, No. 1:20-cv-05555 (E.D.N.Y.) (Dec. 29, 2021). Judge Garaufis. Granting dismissal.

  Judge Nicholas Garaufis granted American Zurich Insurance Company's motion to dismiss all claims in a putative class action brought on behalf gyms and health clubs for allegedly improper denial of insurance coverage and overpayment of premiums related to the COVID-19 pandemic. The plaintiffs had an "all-risk" commercial property insurance policy with Zurich that took effect in January 2020 and renewed in January 2021, but they alleged that a series of public health mandates from the government caused them to lose access to their fitness center and close their business before later reopening at a limited capacity. Citing similar cases applying New York law, Judge Garaufis ruled that the insurance policy did not cover the gym's closure because there was no direct physical loss or damage to the property, and the policy included an exclusion for viruses and bacteria that precluded coverage for losses related to COVID-19. Therefore, Judge Garaufis granted Zurich's motion to dismiss all individual and class claims. ■


Check out the first issue of the *Payments Docket*, our roundup of key litigation – including class actions – involving the payment industry. This edition features a $58 million settlement for 100 million class members.

ALSTON & BIRD

# CLASS ACTION & MDL roundup

QTR 1 | 2022

## Consumer Protection

- **Stem Cell Therapy Not a "Local Controversy"**

  ***Simring v. Greensky LLC, et al.***, No. 21-11913 (11th Cir.) (Mar. 28, 2022). Reversing grant of motion to remand.

  Joan Simring filed a class action in Florida state court alleging that Greensky falsely advertised "stem cell" treatments to senior citizens. Greensky removed the case to federal court, but Simring successfully moved for the case to be remanded back to state court under the Class Action Fairness Act's "local controversy" exception that limits original jurisdiction if "greater than two-thirds" of a proposed class are citizens of the state where the case was originally filed. Under Eleventh Circuit precedent, a plaintiff can prove this by limiting the class definition to citizens of a certain state or submitting evidence of class members' states of residence and their intent to remain in the state. The Eleventh Circuit reversed and remanded because the complaint's class definition did not explicitly limit the class to Florida citizens and the plaintiff failed to submit any evidence that Florida citizens composed 66% or more of the proposed class. This holding clarified a plaintiff's burden of proving this exception via complaint allegations in the Eleventh Circuit: "only the class definition itself—not other portions of the complaint—can restrict the scope of a class."

- **"Exit Fee" Class Action Flies Back to Federal Court**

  ***Cavalieri v. Avior Airlines***, No. 19-11330 (11th Cir.) (Feb. 3, 2022). Reversing grant of motion to dismiss.

  The Eleventh Circuit held that Roberto Cavalieri's putative class action properly stated a claim for breach of contract that was not preempted by the Airline Deregulation Act (ADA), which prohibits certain regulation of airline pricing. The suit alleged that Avior Airlines' $80 "exit fee" was "extra-contractual" and not disclosed in the "contract price" that the plaintiff paid for his flight. Citing to the Supreme Court's 1995 decision in *American Airlines v. Wolens*, the Eleventh Circuit found that the defendant airline had voluntarily contracted to a price for the plaintiff's flight that was inclusive of all fees and taxes—making this case a routine breach of contract action that was not preempted by the ADA.

- **Pay-for-Clicks Plaintiff Denied Certification in California**

  ***Singh v. Google LLC***, No. 5:16-cv-03734 (N.D. Cal.) (Jan. 10, 2022). Judge Freeman. Denying plaintiff's motion for class certification.

  The district court denied Gurminder Singh's motion to certify a nationwide class of individuals who advertised through Google's AdWords program and paid Google for clicks on those advertisements, on claims alleging that Google deceived advertisers through false and misleading statements about the program's effectiveness at identifying and filtering invalid and fraudulent clicks.

  The court ruled that Singh failed to satisfy Rule 23's typicality requirement because he opted out of the AdWords arbitration agreement, unlike the majority of advertisers in the putative class, and because not all advertisers were exposed to, or had the same understanding of, Google's allegedly misleading statements. The court also found that Singh was an inadequate class representative because he sought to represent AdWords advertisers that vary in level of sophistication and in AdWords spending. ■

"Mere "conjectural or hypothetical" harms just will not do to satisfy Article III standing. But maybe they do in the Ninth, say **Angela Spivey**, **Drew Phillips**, **Alan Pryor**, and **Taylor Lin** in *Law360*: A "Split Looms over 9th Circ. Injunctive Relief on False Labeling."

Angela Spivey

Drew Phillips

Alan Pryor

Taylor Lin

# CLASS ACTION & MDL roundup

QTR 1 | 2022

## Labor & Employment / ERISA

### Second Circuit Rejects Successor Liability for ERISA Claim

***New York State Teamsters Conference Pension and Retirement Fund, et al. v. C&S Wholesale Grocers Inc.***, No. 20-1185 (2nd Cir.) (Jan. 27, 2022). Affirming summary judgment dismissal.

A federal court of appeals rejected claims brought against a wholesale grocery company under the Employee Retirement Income Security Act of 1974 (ERISA). The Second Circuit affirmed the decision of the Northern District of New York that dismissed most of the ERISA claims brought by a union pension fund for failure to state a claim and affirmed a summary judgment decision on the issue of successor liability under ERISA. The defendant company had bought a substantial portion of a prior company where the union members worked, which later filed for bankruptcy in 2009. The court explained that successor liability for delinquent pension fund contributions under ERISA was appropriate in certain circumstances, but not here, where the defendant grocer had not "substantially continue[d]" the business of the prior company despite the acquisitions. The court's analysis turned primarily on the fact that the defendant did not employ the union members at issue or purchase the warehouse in Syracuse, NY where they worked. This decision adds clarity to the substantial continuity doctrine for claims of withdrawal liability under ERISA.

### ERISA Class Action Continues for Now

***Romano, et al. v. John Hancock Life Insurance Co.***, No. 1:19-cv-21147 (S.D. Fla.) (Jan. 14, 2022). Judge Goodman. Granting class certification.

A Florida district judge granted class certification to a group of retirement plan administrators claiming that John Hancock Life Insurance Company impermissibly benefited from foreign tax credits for taxes paid on investments made in foreign companies in violation of ERISA. The judge also concluded that the proposed class had standing to sue—a finding that is not expressly required under Rule 23, but is required under Eleventh Circuit precedent, as the district judge explained. In concluding his order, the district judge made clear that while the class was certified, his ruling "hardly means that Plaintiffs will prevail on the merits."

### Primed for Victory: COVID-19 Racial Bias Claims Dismissed with Prejudice

***Smalls v. Amazon.com Services LLC***, No. 1:20-cv-05492 (E.D.N.Y.). Judge Kovner. Dismissed with leave to amend (Feb. 7, 2022); dismissed with prejudice (Mar. 15, 2022).

On February 7, 2022, Judge Rachel Kovner dismissed a class action filed by Christian Smalls alleging that Amazon.com Services LLC fired him because he is African American and in retaliation for his opposition to the COVID-19 practices at Amazon, and that Amazon intentionally discriminated against minority workers by implementing inferior COVID-19 protections for line workers at its fulfillment center—most of whom were African American, Latino/a, or minority immigrants—compared to those protections implemented for Amazon managers, who were mostly caucasian.

Judge Kovner found that Smalls's discriminatory and retaliatory termination claims failed because he did not "allege circumstances giving even minimal support for an inference of racially discriminatory intent" and he never alleged that he told Amazon "that the company's COVID-19 policies were racially discriminatory, as opposed to simply unsafe." Judge Kovner also found that Smalls lacked standing to bring an intentional discrimination claim on behalf of minority line workers and, regardless, that he did "not adequately plead that the policies reflected intentional race discrimination."

Judge Kovner's order allowed Smalls 30 days to file a motion seeking leave to file a second amended complaint. When Smalls did not seek leave to amend, Judge Kovner dismissed the case with prejudice on March 15, citing her February order.

### Massachusetts High Court Rules in Favor of Franchisee Class in Independent Contractor Classification Case

***Patel, et al. v. 7-Eleven Inc., et al.***, No. SJC-13166 (Mass.) (Mar. 24, 2022). Answering certified question from First Circuit.

The Massachusetts Supreme Judicial Court answered an independent contractor classification question certified by the First Circuit on a long-standing dispute between 7-Eleven and a putative class of its franchisors. The decision rejected 7-Eleven's arguments that Massachusetts's "ABC Test" for independent contractors did not apply to franchisors because of the application of a more specific federal rule issued by the Federal Trade Commission (FTC). Instead, the court ruled there were no conflicts between the state test and the FTC rule and franchisors could abide by both, which paves the way for the First


**MEET THE NEXT GENERATION OF ATTORNEYS AT ALSTON & BIRD:**

**Alex Barnett**, named a 2022 "Rising Star" by ***Law360***.

**Emily Costin**, named a 2022 "Emerging Women Leader in Private Practice" by DCA Live.

**Alex Barnett**

**Emily Costin**

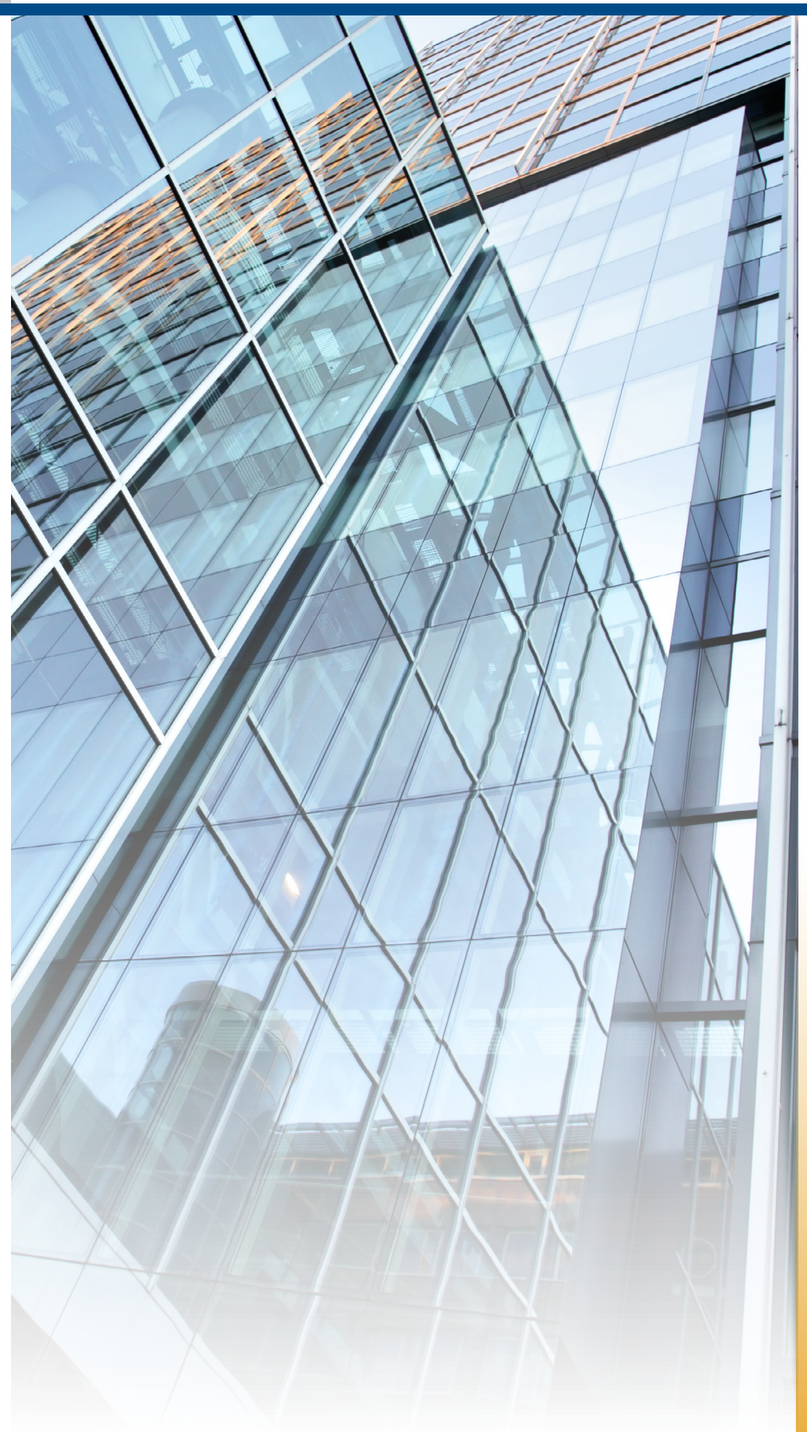
Circuit to allow the various misclassification and wage-and-hour claims against 7-Eleven to proceed. The court was careful to note, however, that the degree of control exerted by a franchisor over a franchisee (as provided by the FTC rule) does not render every franchisee an employee. This case sheds light on nuances of state-law independent contractor tests and their application in the franchise context.

## The Seventh Circuit's Reminder

***Hughes v. Northwestern University***, No. 19-1401 (S.C.) (Jan. 24, 2022). Vacating circuit court ruling and remanding.

The Supreme Court unanimously vacated the Seventh Circuit's finding that participants in Northwestern University's 403(b) retirement plans had failed to state a claim against plan fiduciaries for breach of fiduciary duty. The Seventh Circuit held that the participants' claims had failed as a matter of law because the plan fiduciaries provided a diverse menu of options, including the participants' preferred types of low-cost investment options, thereby excusing any allegedly imprudent funds retained in the plan. The Court rejected this reasoning as a categorical rule inconsistent with the "context-specific inquiry that ERISA requires," which includes consideration of fiduciaries' duty to monitor plan investments. The Court explained that the proper inquiry should instead consider the participants' allegations in light of the principles articulated in the Court's prior opinion in Tibble v. Edison International to determine whether participants have plausibly stated a claim.

In remanding the case and directing the Seventh Circuit to reevaluate the participants' claims in line with the Court's guidance in Tibble, the Court provided a reminder that ERISA fiduciaries must make difficult tradeoffs, and that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." ■



ALSTON & BIRD

CLASS ACTION & MDL roundup

QTR 1 | 2022

# Privacy & Data Security

## Should've Taken the Money: Research Study Not an Advertisement Under the TCPA

*Bruce Katz, M.D. P.C. v. Focus Forward LLC*, No. 21-1224 (2nd Cir.) (Jan. 6, 2022). Affirming grant of motion to dismiss.

Bruce Katz sued a market research company alleging that he had received two faxes offering $150 for the recipient's participation in a "market research study" in violation of the Junk Fax Prevention Act under the Telephone Consumer Protection Act (TCPA). The trial court granted the motion to dismiss, finding that invitations to participate in a survey did not constitute "unsolicited advertisement[s]" under the TCPA.

In affirming the dismissal, the Second Circuit held that faxes seeking a recipient's participation in a survey are not "advertising the commercial availability or quality of any property, goods, or services." The court based its holding on the TCPA's plain language and legislative history, relying in part on the fact that the House Committee on Energy and Commerce specifically noted, when recommending that the TCPA be enacted, that the term "telephone solicitation" was not intended to include market surveys.

## Too Young to Arbitrate? Seventh Circuit Sends Biometric Privacy Dispute to Arbitration

*K.F.C. v. Snap Inc.*, No. 21-2247 (7th Cir.) (Mar. 24, 2022). Affirming motion to compel arbitration.

K.F.C., a minor, sued the company behind Snapchat, alleging that the app violated the Illinois Biometric Privacy Act because it did not obtain her consent before collecting her facial recognition data. Snapchat moved to arbitrate pursuant to its terms, which must be agreed to when opening an account. K.F.C. asserted that the arbitration clause did not bind her because she lied about her age and was too young when she agreed to the terms. The trial court granted Snapchat's motion, finding that an arbitrator should determine whether youth was a defense to the contract's enforcement.

On appeal, the Seventh Circuit affirmed because under Illinois law, a contract between an adult and a child is voidable, not void, meaning it can be ratified once the child comes of age. Because Illinois permits a ratification of the contract, youth is a "defense rather than an obstacle to a contract's formation," and a defense is decided by an arbitrator.

## The Seventh Circuit Defends Denial of Class Certification

*Gorss Motels Inc. v. Brigadoon Fitness Inc.*, No. 21-1358 (7th Cir.) (Mar. 24, 2022). Affirming denial of class certification.

The Seventh Circuit held that a defendant does not need to prove a defense to defeat class certification. The plaintiffs alleged violations of the TCPA, but a key issue in the case was whether individuals had given express permission for the advertisements. The district court denied class certification because common issues of law and fact would not predominate over these individualized inquiries. On appeal, the Seventh Circuit rejected an argument that class certification should be granted because the defendants had not yet proved these defenses. The Seventh Circuit held that "it is not the final merits of the [affirmative defense] that matter for Rule 23(b)(3) purposes; it is the method of determining the answer and not the answer itself that drives the predominance consideration.… This analysis applies not only to the elements that plaintiffs must prove but also to affirmative defenses." Thus, if a district court reasonably concludes that a defense cannot be resolved with "generalized proof," it may deny certification, even if the defendant has not shown it will ultimately prevail on the merits of its defense.

## Credit Bureau's "Don't Investigate" Policy Leaves It Speculating About Investigation Results

*Rivera v. Equifax Information Services LLC*, No. 1:18-cv-04639 (N.D. Ga.) (Mar. 30, 2022). Judge Totenberg. Granting motion for class certification.

Francisco Rivera sued the defendant for failure to conduct a reasonable investigation after he complained that his credit report reported an unauthorized (and thus inaccurate) "hard inquiry" in violation of Section 1681 of the Fair Credit Reporting Act (FCRA). The defendant responded to Rivera's complaints with a form letter directing him to the third party that had pulled his credit report but did not itself investigate whether the third party had obtained Rivera's consent.

The district court certified the class, finding that the FCRA required only an allegation of inaccuracy to trigger the defendant's duty to investigate and concluding that Rivera's proffer of 330,000 consumer letters notifying the defendant of potential inaccuracies were sufficient to meet that initial burden on a classwide basis. The court rejected the defendant's argument that individualized issues challenging the accuracy of each hard inquiry would predominate, noting the defendant did not produce any evidence supporting its hypothetical scenarios in which consumers mistakenly challenged a hard inquiry

"Will the U.S. align with EU standards? In one sense – possibly. **Alex Brown**, **Kathleen Benway**, and **Dan Felz** report "FTC Blog Seems to Widen Scope of Breach Reporting Law" in *Law360*."

Alex Brown

Kathleen Benway

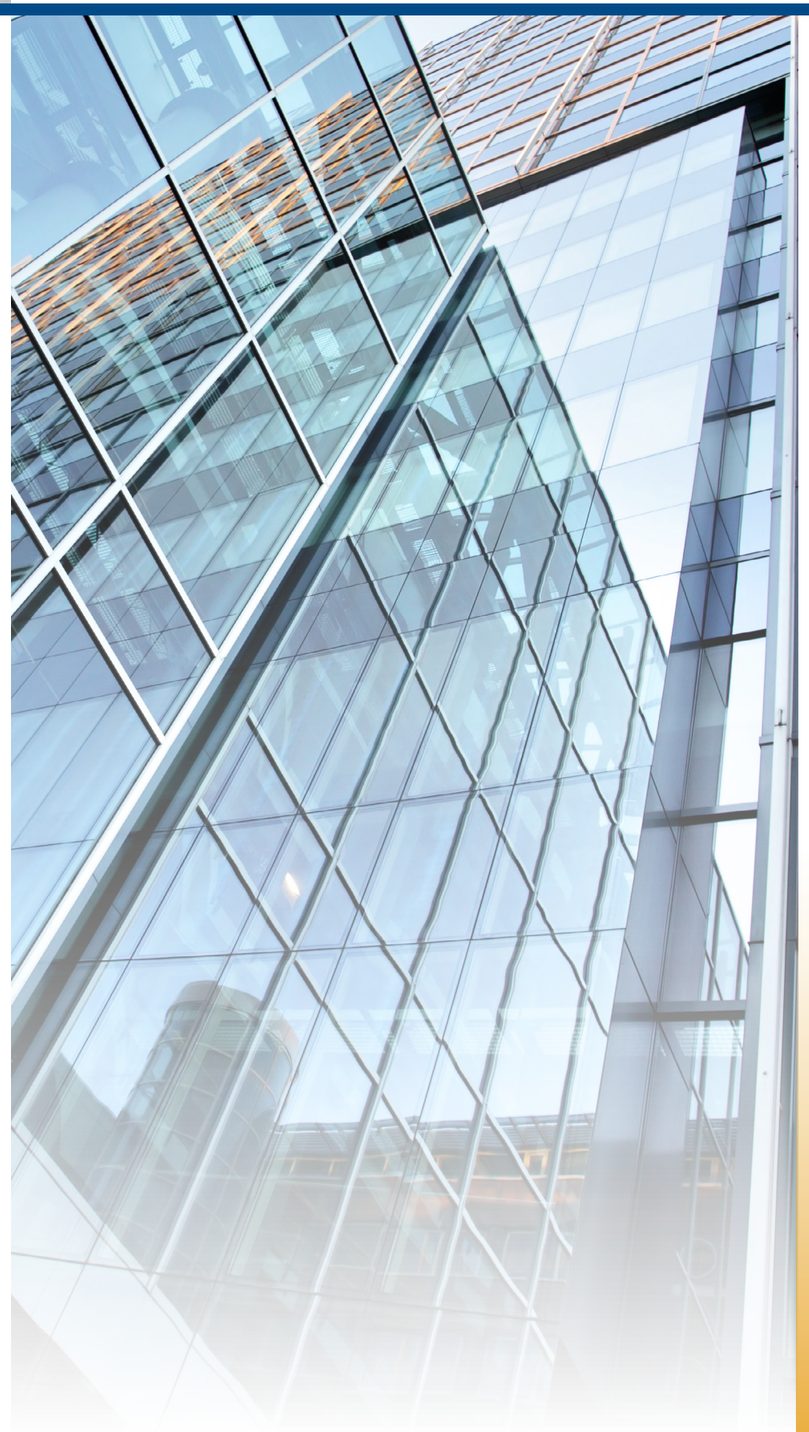
Dan Felz

as unauthorized and that its "do not investigate" policy may have rendered it incapable of producing such evidence. Against Rivera's proffered evidence, the defendant's argument was too speculative to warrant denying class certification.

### Fat-Finger Misdial Not Typical of Proposed TCPA Class

***Bustillos v. W. Covina Corp. Fitness***, No. 2:21-cv-04433 (C.D. Cal.) (Jan. 3, 2022) Judge Blumenfeld. Denying motion for class certification.

Joanne Bustillos sued a gym for violating the TCPA after a single wrong digit entered into a gym member's profile resulted in an unauthorized pre-recorded message being sent to Bustillos instead of the gym's actual customer. The district court denied Bustillos's motion for class certification, finding that she was not a typical or adequate class representative because the majority of the proposed class were current or former customers who had consented to the communications and Bustillos lacked standing to challenge those consents. Bustillos's failure to produce evidence that there were any proposed members like her in the class—members who did not consent to receiving calls from the gym—only underscored the atypical nature of her alleged injury. ■



ALSTON & BIRD

# CLASS ACTION & MDL roundup

QTR 1 | 2022

## Products Liability

- **Nestlé Can't Beat Class Labeling Claims Related to Child Slave Labor**

  *Walker v. Nestlé USA Inc.*, No. 3:19-cv-00723 (S.D. Cal.) (Mar. 28, 2022). Judge Lorenz. Denying motion to dismiss.

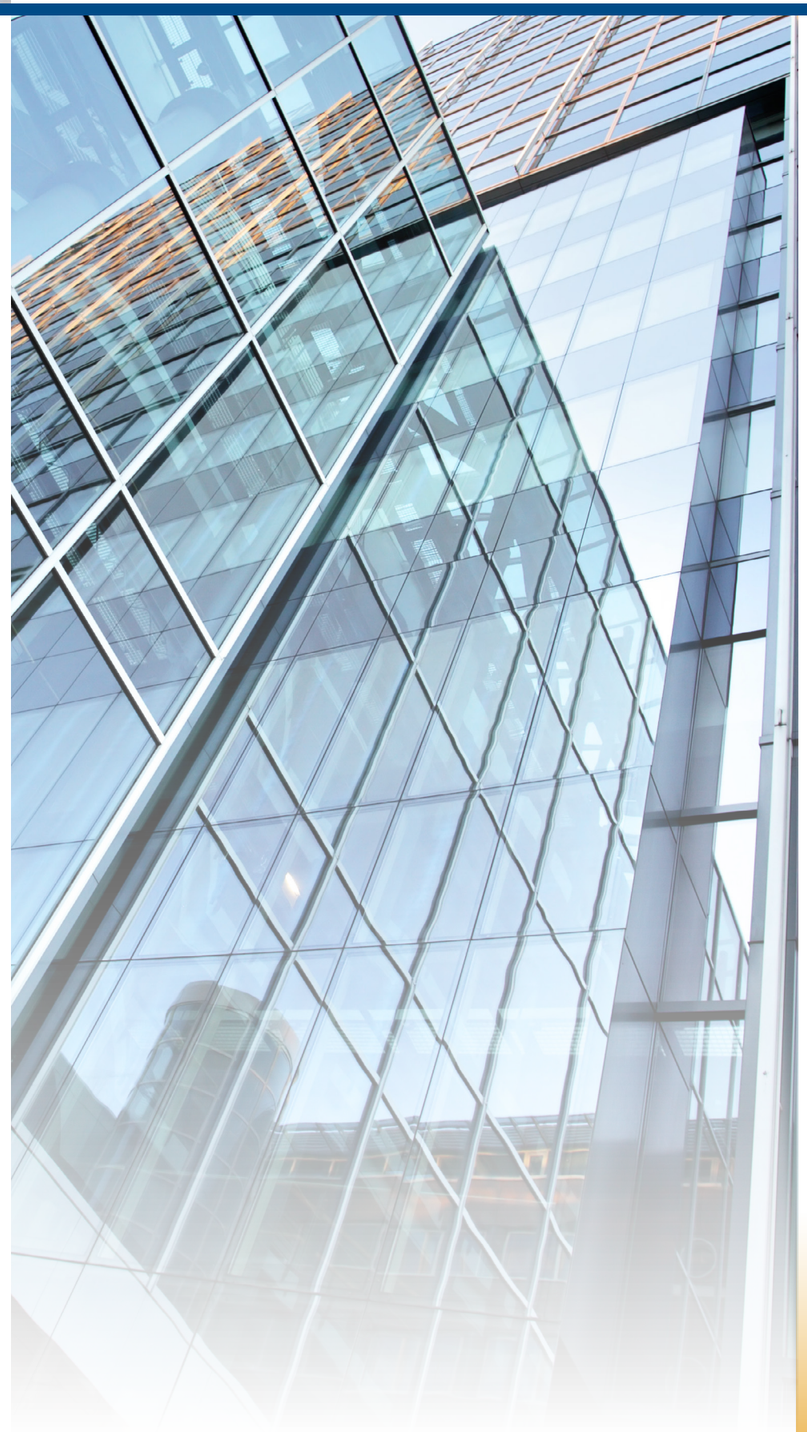
  Judge M. James Lorenz denied Nestlé's bid to dismiss a proposed class action alleging that it falsely and deceptively labeled its cocoa products regarding the use of child slave labor in Nestlé's supply chain. Judge Lorenz relied on data in the complaint that the number of children working on cocoa farms nearly doubled from 2017 to 2019 to conclude that "[t]he statements on [Nestlé]'s products that the cocoa is 'sustainably sourced' based on the 'Nestlé Cocoa Plan,' … [is] at odds with the fact that the child labor problem the Nestlé Cocoa Plan is said to address has grown more, and not less, severe."

  The court also rejected Nestlé's contentions that the plaintiff lacks standing to assert claims on behalf of a putative nationwide class for products she did not purchase. Judge Lorenz concluded that the plaintiff adequately alleged Article III standing as a putative class representative and that Nestlé's arguments were better reserved for resolution at the class certification stage.

- **Federal Opioid Suit Remanded to State Court**

  *Cherokee Nation v. CVS Pharmacy Inc., et al.*, No. 6:18-cv-00056 (E.D. Okla.) (Mar. 23, 2022). Judge White. Remanding to state court.

  Judge Ronald R. White remanded to an Oklahoma state court the Cherokee Nation's bellwether suit against pharmacy giants CVS, Walgreens, and Walmart. Prior defendant McKesson Corp. originally removed the suit to the Eastern District of Oklahoma, successfully arguing that the federal officer removal statute applied because McKesson may have supplied the opioids to Cherokee reservations through a contract with the Indian Health Service and the U.S. Department of Veterans Affairs. Because McKesson joined a $75 million settlement with the Cherokee Nation last year, however, Judge White concluded that the federal court no longer had jurisdiction and that the state court must resolve the tribe's negligence and unjust enrichment claims. The defendants have appealed the remand order. ■



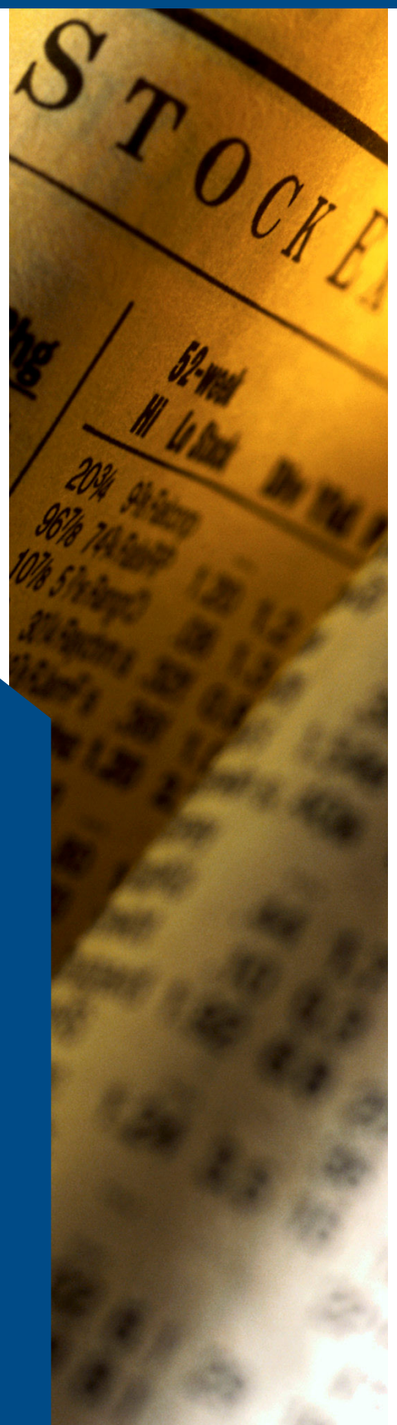
"Get the real story from **Bo Philips** at the webinar "Classwide Damages Models in Misleading & False Advertising Class Actions" on August 25."

Bo Philips

ALSTON & BIRD

CLASS ACTION & MDL roundup

QTR 1 | 2022




## Securities

### Plaintiffs Cannot Revive Securities Class Action over Failed Drug Study

*Arkansas Public Employees Retirement System v. Bristol-Myers Squibb Co., et al.*, No. 20-3716 (2nd Cir.) (Mar. 11, 2022). Affirming order granting motion to dismiss.

The Second Circuit upheld the dismissal of a putative class action accusing Bristol-Myers of securities violations over its failed clinical trial to determine the efficacy of a lung cancer drug. The investors alleged the company failed to disclose the precise protein threshold for patients subject to the trial and misrepresented that the study focused on patients "strongly" expressing that protein. The Second Circuit affirmed the finding that the plaintiffs had not sufficiently alleged scienter or facts giving rise to a duty to disclose the precise protein expression threshold.

### Ninth Circuit Affirms Dismissal of Data Breach Suit

*Local 353, I.B.E.W. Pension Fund, et al. v. Zendesk Inc., et al.*, No. 21-15785 (9th Cir.) (March 2, 2022). Affirming dismissal.

A proposed class of Zendesk investors faced a loss when the Ninth Circuit affirmed the dismissal of their complaint. The investors alleged that Zendesk's public pledge that its data security was "of the highest quality" deceived them before a 2019 data breach disclosure, which resulted in a 4% drop in the company's stock price. The Ninth Circuit agreed with the Northern District of California that the investors had not pleaded scienter, an essential element of securities fraud claims that requires a showing that the defendants acted with the intent to deceive, manipulate, or defraud investors. The Ninth Circuit also agreed that the investors failed to plead that the allegedly fraudulent statements were false or misleading, in part because the statements at the center of the action did not suggest that a reasonable investor would have believed that the company had made data security improvements following earlier data security incidents.

### Crypto Promoters "Solicited" Sales of Unregistered Securities Through Online Videos

*Wildes, et al. v. BitConnect International PLC, et al.*, No. 20-11675 (11th Cir.) (Feb. 18, 2022). Reversing dismissal.

The Eleventh Circuit overturned a dismissal, allowing investors in failed cryptocurrency BitConnect to proceed with a putative class action alleging that its promoters used online videos to "solicit" the purchase of unregistered securities in violation of Section 12 of the Securities Act. The putative class alleged that BitConnect was a fraudulent enterprise—part Ponzi scheme, part pyramid scheme—and that its team of promoters duped U.S. investors into paying them over $7 million a week by posting thousands of pro-BitConnect YouTube videos that were viewed millions of times. The district court had ruled that the promoters could not be liable under the Securities Act because their videos were publicly available and did not target the plaintiffs individually. But the Eleventh Circuit held that sales pitches for unregistered securities can be unlawful "solicitations" under the Securities Act even when they are made through online videos and other mass communications that are broadly directed to the public at large. ■

"**John Jordak**, **Kellen Dwyer**, and **Sierra Shear** explain why "China's Regulatory Crackdown Is Increasing Securities Litigation Risk" for ***Bloomberg Law***."

John Jordak

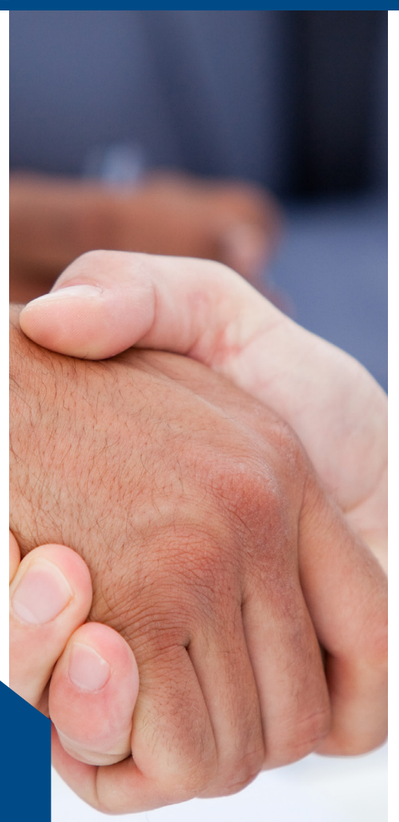
Kellen Dwyer

Sierra Shear

ALSTON & BIRD

CLASS ACTION & MDL roundup

QTR 1 | 2022



## Settlements

### Food Manufacturer Pays for Fingerprints

*Gonzalez, et al. v. Richelieu Foods Inc.*, No. 1:20-cv-04354 (N.D. Ill.) (Jan. 24, 2022). Judge Durkin. Approving $877,000 settlement.

An Illinois district judge approved an $877,000 class settlement resolving claims that food manufacturer Richelieu Foods violated the state's biometric privacy law by requiring workers to use a fingerprint-based timekeeping system without first making certain disclosures and obtaining the workers' written consent. Of the $877,000 settlement amount, the district judge concluded that just under $285,000 (roughly 32%) should be paid to class counsel for costs and fees. The district judge also concluded that a service award of $7,500 for the class representative was appropriate.

### Partial Resolution of PFOA Class Action

*Baker, et al. v. Saint-Gobain Plastics Corp., et al.*, No. 1:16-cv-00917 (N.D.N.Y.) (Feb. 4, 2022). Judge Kahn. Approving $65 million settlement.

A New York judge approved a $65 million class settlement resolving claims that Saint-Gobain Performance Plastics, Honeywell International, and 3M Company contaminated water in Hoosick Falls, New York with perfluorooctanoic acid (PFOA). He approved a $13.4 million award for attorneys' fees and expenses, noting that the award represents 19% of the common fund and that the Second Circuit has approved fee awards as high as 33% of a common fund. The district court also found that each of the 10 class representatives were entitled to a $25,000 service award for their work in prosecuting the case. The class's claims against E.I. Dupont de Nemours & Co. were not resolved as part of the settlement.

### Another Settlement in Chicken Case

*In re Broiler Chicken Antitrust Litigation*, No. 1:16-cv-08637 (N.D. Ill.) (Jan. 27, 2022). Judge Durkin. Approving two settlements totaling $11.3 million.

An Illinois district judge approved two more settlements—worth a total of nearly $11.3 million—resolving claims that chicken producers conspired to fix the price of broiler chicken. This time, the settling defendants were Mar-Jac Poultry and Harrison Poultry, which follow in the footsteps of Tyson Foods, Pilgrim's Pride, Peco Foods, and Fieldale Farms, whose settlements were worth a combined total of approximately $181 million and received final approval in December 2021. While three direct action plaintiffs opted out of the settlements with Mar-Jac Poultry and Harrison Poultry, there were otherwise no objections to the deals.

### Extended Auto Warranties Drive Settlement Valued Above $33 Million

*Conti, et al. v. American Honda Motor Co., Inc.*, No. 2:19-cv-02160 (C.D. Cal.) (Jan. 4, 2022). Judge Carney. Approving $33 million settlement.

Judge Cormac J. Carney approved a settlement valued at more than $33 million to resolve a class action complaint alleging that Honda sold certain types of cars with infotainment systems that frequently malfunctioned. The class of automobile customers also alleged that Honda failed to remedy the defects as required by its warranties. In exchange for a release of all such claims, Honda has agreed to provide a panoply of benefits to the class members. Honda will automatically extend the affected cars' warranties to cover qualified infotainment system repairs for an additional two years or 24,000 miles, which is a benefit valued at approximately $33 million. In addition, Honda will conduct an independent review of the measures used to address defects in the infotainment systems, provide ongoing software updates, facilitate dealership assistance with infotainment systems, maintain an online resource for infotainment systems, and compensate class members for certain costs related to delayed warranty claims connected to infotainment systems.

After plaintiffs' counsel initially requested $972,200 for attorneys' fees, the parties agreed to approximately $637,000 for attorneys' fees, and the court approved that amount. The court addressed four individuals' objections related to their personal vehicles and found that none of them undermined the settlement. The court also noted that there had only been 3,248 claims to date in a class of approximately 450,000 members, but it was not unduly concerned because there was no indication of ineffective notice to the class and the warranty extension valued at $33 million would apply to any member of the class without them having to file a claim.

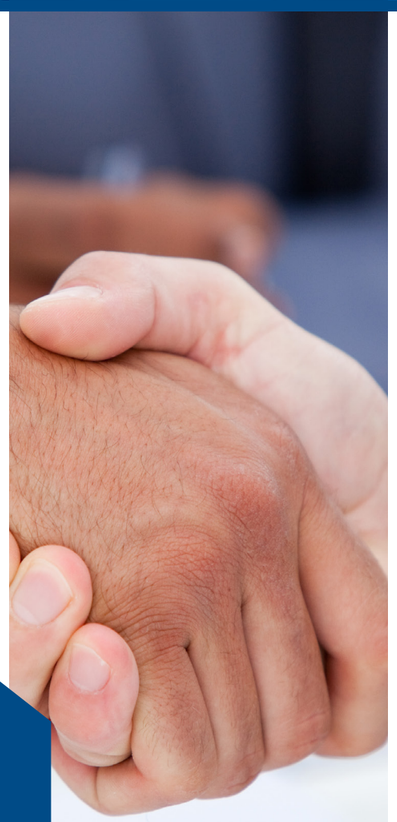

*Cybersecurity Docket* names **Kim Peretti** one of the best data breach response lawyers in the business in its 2022 "Incident Response 40."

Kim Peretti

ALSTON & BIRD

# CLASS ACTION & MDL roundup

QTR 1 | 2022



## $65 Million Settlement Paid by D&O Insurer Separates Funds from Ongoing Bankruptcy

*In re Mallinckrodt PLC*, No. 1:20-bk-12522 (Bankr. D. Del.) (Feb. 23, 2022). Judge Dorsey. Approving $65.75 million settlement.

Judge John T. Dorsey approved a $65.75 million settlement in a securities class action involving the now-bankrupt drug company Mallinckrodt, senior Mallinckrodt employees, and a class of investors led by the State Teachers Retirement System of Ohio. The investors alleged that Mallinckrodt violated federal securities laws by making false representations about its hormone drug, Acthar.

Under the settlement agreement, Mallinckrodt's insurer will pay $65.75 million into a settlement fund used to pay class members' claims, attorneys' fees, and administration costs, among other expenses. The class includes all persons or entities who suffered damages as a result of purchasing Mallinckrodt stock between October 6, 2015, and November 6, 2017, and notice of the settlement agreement explains that the estimated average recovery per share will be $0.49. The notice also explains that the settlement was partly motivated by Mallinckrodt's bankruptcy and ongoing restructuring, which require significant time and attention from the same senior executives involved in this case.

The parties also noted in other filings that using Mallinckrodt's insurance policy for the settlement fund would keep the funds separate from Mallinckrodt's bankrupt estate and largely preserve them for class members' claims without risking additional depletion of those resources for continued litigation. In approving the settlement agreement, Judge Dorsey noted that it did not constitute an admission that any claims against Mallinckrodt were valid and that it did not permit any claims against Mallinckrodt's estate.

## SEC Claims Slam on Brakes with Settlement

*In re Stellantis N.V. Securities Litigation*, No. 1:19-cv-06770 (E.D.N.Y) (Feb. 23, 2022). Judge Komitee. Approving $5 million settlement.

A New York district judge approved a $5 million settlement resolving claims that Stellantis N.V., formerly known as Fiat Chrysler, violated federal securities laws by making false and misleading statements about Fiat Chrysler's role in a highly publicized bribery scheme involving Stellantis and the effects the scheme had on a collective bargaining agreement negotiated with United Auto Workers. In doing so, the judge certified a settlement class of all persons or entities that acquired Fiat Chrysler and/or Stellantis common stock from February 2016 to January 2021. The judge also awarded attorneys' fees of $1,665,000, plus expenses.

## Stem Cell Company Settles with Class of "Sick" and "Disabled" Consumers

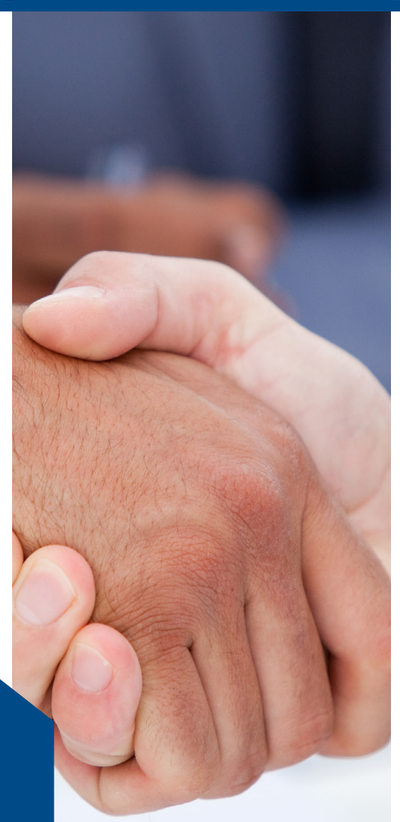
*Moorer v. StemGenex Medical Group Inc., et al.*, No. 3:16-cv-02816 (S.D. Cal.) (Feb. 25, 2022). Judge Battaglia. Approving $3.65 million settlement.

A California federal court approved a $3.65 million class action settlement against now-bankrupt StemGenex Medical Group. The class alleged that the stem cell therapy provider misleadingly advertised the efficacy of stem cell treatments to the "sick or disabled" and to those with "incurable diseases." The lead plaintiffs alleged that their expensive stem cell treatments for lupus, diabetes, and other conditions were completely ineffective and that StemGenex had no reasonable basis for marketing them as otherwise. StemGenex, which filed bankruptcy shortly after the court certified the class, will pay $1.15 million through its liability insurance provider. Osteopathic provider Andre Lallande, whom the class alleged was partly responsible for the misleading advertising, agreed to settle for $2.5 million.

## TikTok Talked into Settlement with Parents' Concern over Privacy Rights

*T.K., et al. v. Bytedance Technology Co. Ltd., et al.*, No. 1:19-cv-07915 (N.D. Ill.) (Mar. 25, 2022). Judge Blakey. Approving $1.1 million settlement.

An Illinois district judge approved a $1.1 million settlement resolving claims by parents that Bytedance Technology, Musical.ly, and TikTok violated federal and state laws by processing personally identifiable information and data of children under the age of 13 without obtaining parental consent. The parents accused the companies of violating children's privacy rights and potentially endangering them by retaining email addresses, phone numbers, usernames, full names, short biographies, and profile pictures and allowing the information to be public and searchable by other users. While one objector argued that the settlement provided little value for the plaintiffs' release of their claims, the district judge ultimately overruled the objection, emphasizing the plaintiffs' low likelihood of success on the merits.



## Drug Distribution Case Settles After Valiant Efforts

***In re Valeant Pharmaceuticals International Inc. Third-Party Payor Litigation***, No. 3:16-cv-03087 (D.N.J.) (Feb. 22, 2022). Judge Shipp. Approving two settlements totaling $23 million.

A New Jersey district judge approved two settlements—for a combined $23.125 million— resolving claims that Valeant Pharmaceuticals and Philidor, among others, caused third-party payors to pay artificially inflated prices for brand-name drugs in violation of the Racketeer Influenced and Corrupt Organizations Act. According to the payors, Valeant secretly controlled a captive pharmacy network through Philidor through which pharmacies would sell significantly more expensive brand-name drugs rather than their cheaper generic equivalents. After extensive discovery, which included over 8.6 million pages of document discovery and 39 depositions, the judge approved the settlement, which included an award of attorneys' fees equal to 30% of the settlement.

## Investment Claims Retire by Settlement

***Allegretti, et al. v. Walgreen Co., et al.***, No. 1:19-cv-05392 (N.D. Ill.) (Feb. 16, 2022). Judge Norgle. Approving $14 million settlement.

An Illinois district judge approved a $13.75 million settlement resolving claims by nearly 200,000 Walgreens 401(k) participants. According to the class, Walgreens, its board of directors, the retirement committee of the 401(k) plan, and the trustees of the retirement plan trust breached their fiduciary duties under ERISA by imprudently selecting, retaining, and monitoring poor mutual funds. Citing a $34 million damages model presented by the plaintiffs' experts, the district judge concluded that the settlement—which would also remove the Northern Trust Focus Retirement Trusts from the 401(k) profit-sharing retirement plan—was fair and reasonable. ■

ALSTON
& BIRD

www.alston.com