ALSTON & BIRD

CLASS ACTION & MDL roundup

QTR 2 | 2022

In this issue

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overview

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video highlight

SAM PARK

Partner, Litigation & Trial Practice Group

Sam discusses important updates in the *Olean v. Bumble Bee Foods* saga from the Ninth Circuit's 2022 en banc opinion that overruled the 2021 three-judge panel opinion.

Where the (Class) Action Is

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

With another quarter in the books, the *Roundup* is back to cover the cases taking the courts by storm. To kick us off, an effort by chicken producers to oppose class certification on the question of whether causation and injury could be demonstrated in a common fashion was not successful. This trend seems to continue in the consumer protection space—arguments against class certification were also unsuccessful in a multidistrict litigation matter alleging that the defendant deceptively advertised its products to minors.

Other notable decisions covered include an ERISA case in which plaintiffs sought to certify a class of 60,000 401(k) plan participants. The Third Circuit affirmed class certification based on the analysis in *Thole v. U.S. Bank N.A.*, becoming the first court of appeals to consider whether the standing analysis in *Thole* applies to defined contribution plans. The courts continued to see the unexpected throughout the second quarter. In an exceptionally rare event, a securities fraud class action went to trial in the Southern District of New York and resulted in a jury verdict.

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

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Antitrust/RICO

Class Action Defendants Left Swimming Against the Current

Olean Wholesale Grocery Coop Inc. v. Bumble Bee Foods LLC, No. 19-56514 (9th Cir.) (Apr. 8, 2022). Affirming grant of class certification.

The primary suppliers of packaged tuna in the United States appealed the district court's order certifying classes of tuna purchasers who alleged the suppliers violated federal and state antitrust laws. The circuit court affirmed, holding that a district court can weigh conflicting expert testimony and resolve expert disputes when determining whether there are common questions of law or fact. But that determination is limited to resolving whether the evidence establishes that a common question is capable of classwide resolution, and a district court cannot decline certification merely because it considers the plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to carry the day.

A withering dissent focused on the settlement pressure created by orders certifying classes, even for defendants with meritorious defenses. It notes that, while the majority opinion would leave most dueling experts' opinions for another day (at trial), that day will never come as a practical matter because class actions invariably settle when the court certifies a class. Thus, the dissent would have district courts more rigorously gatekeep key issues implicating Rule 23 requirements, including whether too many putative class members suffered no injury, at the class certification stage.

Safe to Say Fail-Safe Classes Still Fail Under Rule 23

Mr. Dee's Inc. v. Inmar Inc., No. 1:19-cv-00141 (M.D.N.C.) (Apr. 27, 2022). Judge Osteen. Denying motion for class certification.

In a putative antitrust class action alleging a conspiracy to allocate customers and fix prices in the retail coupon processing services market, the plaintiffs sought to certify classes of manufacturers and retailers that directly paid observably higher shipping fees during the class period. Judge William Osteen rejected the proposed classes as impermissible fail-safe classes because class membership is conditioned on having suffered antitrust impact or injury in the form of increased shipping fees. Judge Osteen further reasoned that identifying class members by determining which retailers and manufacturers paid observably higher fees was not straightforward and relied on disputed expert analysis, which would require a preliminary determination on the merits.

Chicken Producers Have No "Cluck" Defeating Class Certification

In re Broiler Chicken Antitrust Litigation, No. 1:16-cv-08637 (N.D. Ill.) (May 27, 2022). Judge Durkin. Granting motion for class certification.

In a sweeping class certification order, Judge Thomas Durkin certified classes of direct purchasers, indirect purchasers, and end-user consumers alleging that over a dozen major broiler chicken producers conspired to limit chicken production to raise prices. The chicken producers primarily focused their opposition to class certification on the question of whether causation and injury could be demonstrated in a common fashion. Judge Durkin was persuaded by the fact that supply decreased in historically unusual fashion from 2008 to 2019 and found that using overall market trends as opposed to isolated defendants' conduct was a reasonable approach: fundamental economic theory says that market supply directly affects market price, and the corresponding increase in prices could not be explained away by market factors like corn prices and the Great Recession. Although the producers might be able to demonstrate that certain producers had greater or lesser responsibility for market movement, that did not change the fact that there is evidence that market supply decreased overall. ■

LEADERSHIP MATTERS

"Alston & Bird Earns 13 Leadership Appointments to ABA Antitrust Law Section"

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Banking & Insurance

Collections Agency Intervenes Too Late, but No Word on Its Right to Subrogate

In re Automotive Parts Antitrust Litigation, No. 20-2260 (6th Cir.) (May 12, 2022). Affirming dismissal of motion to intervene.

The Sixth Circuit affirmed denial of a collection agency's untimely motion to intervene filed more than 18 months after final approval of settlements in a billion-dollar multidistrict litigation involving a subset of consumers and businesses that alleged automotive-part manufacturers fixed prices in violation of antitrust laws. During the claims process, Financial Recovery Services LLC (FRS), a third party that manages and files claims on behalf of insurer clients, submitted placeholder claims for its clients based on a theory of subrogation and argued that it could assume the right of its insureds to sue the party that caused their injury. The class plaintiffs did not agree that FRS was entitled to recovery, in part because its placeholder claims did not provide supporting information. FRS filed a motion to intervene at the claims-filing deadline, and the district court denied it as untimely without deciding the legitimacy of FRS's subrogation right. The Sixth Circuit found no abuse of discretion and affirmed the district court's denial of FRS's intervenor motion solely on the basis of untimeliness, noting that to hold otherwise would have delayed and prejudiced the class plaintiffs.

No Damage to Dental Offices

Glen R. Edwards Inc. v. Travelers Casualty Insurance, No. 21-3035 (8th Cir.) (May 13, 2022). Affirming dismissal.

The Eighth Circuit affirmed the dismissal of a breach of contract action brought by two Missouri dental practices against their insurers. The plaintiff appellants sought payment of their business income and other expense claims arising out of the near total shutdown of their dental offices due to the COVID-19 pandemic. But citing recent precedent, the Eight Circuit reasoned that the loss of use of their offices did not constitute "direct physical loss of or damage to" their property as required under the policy and agreed that the business interruption and extra expense coverage was not triggered.

COVID's Long Shadow Darkens Doors, but Doesn't Damage Them

SA Palm Beach LLC v. Certain Underwriters at Lloyd's London, et al., No. 20-14812; ***Emerald Coast Restaurants Inc. v. Aspen Specialty Insurance Co.***, No. 21-10190; ***R.T.G. Furniture Corp. v. Aspen Specialty Insurance Co., et al.***, No. 21-10490; ***Rococo Steak LLC v. Aspen Specialty Insurance Co.***, No. 21-10672 (11th Cir.) (May 5, 2022). Affirming dismissal in three cases; affirming in part and vacating in part one case.

The Eleventh Circuit consolidated and mostly affirmed dismissal of four cases presenting a common question: Whether all-risk insurance policies providing coverage for "direct physical loss or damage" apply to losses caused by COVID-19 under Florida law. The court affirmed dismissal of three cases brought by restaurant operators and a furniture retailer, whose policies expressly required direct physical loss to a property, "because COVID-19 did not cause a tangible alteration of the insured properties." In doing so, the court rejected arguments that coronavirus particles could tangibly alter a structure, noting the structure could be cleaned without requiring repair.

The court vacated and remanded only one case, which the district court did not address, and which was based on a different provision that did not contain the same "physical loss or damage" language present in the other policies.

Another COVID Coverage Suit Denied

Café International Holding Co. v. Chubb Ltd., No. 21-11930 (11th Cir.) (May 13, 2022). Affirming district court's dismissal.

The Eleventh Circuit affirmed a Florida district court's judgment on the pleadings in favor of insurance providers battling an upscale Italian restaurant in Fort Lauderdale over a coverage suit stemming from losses incurred as a result of the public health emergency caused by the COVID-19 pandemic. The Italian eatery sought to recover losses sustained during the Florida-mandated closure, based on a policy providing coverage for "actual loss of Business Income" sustained during a necessary suspension of operations "caused by direct physical loss of or damage to" the insured property. The district court entered judgment on the pleadings in favor of the insurance providers, and the circuit court affirmed in a mere five-paragraph ruling. In cleaning its plate of the suit, the court explained that every appellate court in the country has reached the same conclusion about COVID-19 coverage suits: "loss of business as a result of government closure orders is not covered under such language because 'some tangible alteration of the property is required.'"

"Don't let your knowledge lapse. Join **Bo Phillips** and **Kristin Shepard** at their "Life and Annuity Class Actions Update" panel at the American Council of Life Insurers' 2022 Regional Roundtable, October 25 in Washington, D.C."

Bo Phillips

Kristin Shepard

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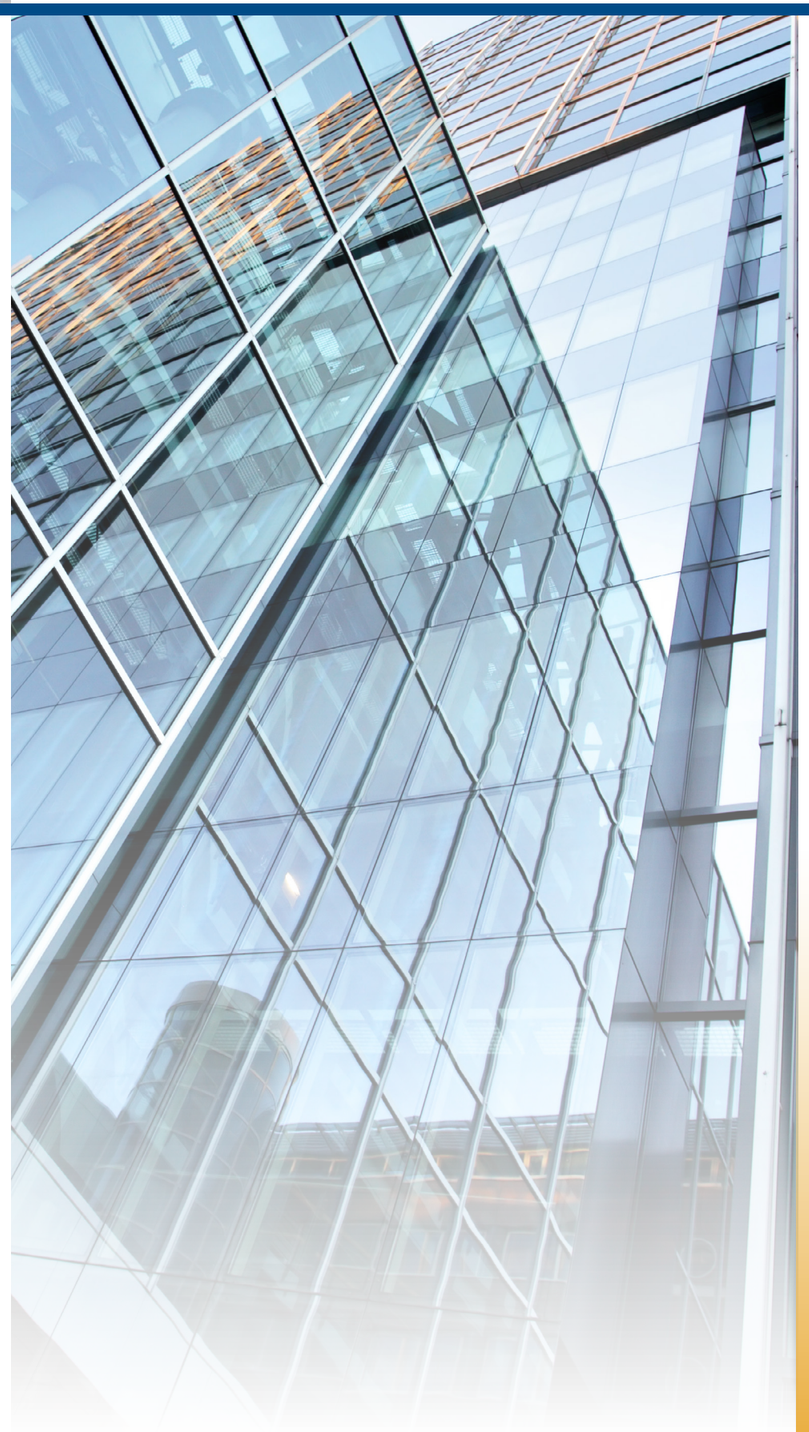
Feeling the Strain? Unusually Small Class Certified

Kazada, et al. v. Aetna Life Insurance Co., No. 3:19-cv-02512 (N.D. Cal.) (Apr. 26, 2022). Judge Orrick. Granting class certification.

A California district judge granted class certification to a group of approximately 25 patients covered by ERISA health plans administered by Aetna who claim that the insurer improperly denied coverage for lipedema-related procedures. Although the judge recognized that the proposed class was "smaller than what one might imagine when thinking of class action litigation," he nevertheless found that the numerosity requirement was met. In doing so, the judge added that "[g]iven the strain on our federal court system, the opportunity to avoid duplicative suits—even 23 to 25 of them—is welcomed." ■



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Consumer Protection

No Time Like the Present: When Does the 30-Day Removal Clock Start Running?

Tripicchio v. The UPS Store Inc., et al., Nos. 22-1379 and 22-1380 (3rd Cir.) (April 25, 2022). Reversing decision to remand case back to state court.

The plaintiff filed this case in New Jersey state court in 2020, alleging the UPS Store charged excessive "notary fees." The defendant removed the case to federal court in December 2021, when information produced during state court discovery showed over 1 million notary transactions, demonstrating that damages could exceed the Class Action Fairness Act's (CAFA) $5 million threshold. In their motion to remand, the plaintiffs argued that, while their initial pleadings did not allege damages exceeding $5 million, they still disclosed sufficient information to put the defendants on notice that the complaints were removable. The district court agreed that the removals were untimely and remanded.

The Third Circuit reversed, holding that the 30-day clock for removal never started because neither of the plaintiffs' complaints contained "sufficient facts from which damages can be readily calculated." The appellate court also rejected the argument that the defendants had knowledge that the notary fees at issue were so numerous that they would necessarily exceed CAFA's damages threshold—the question is what the complaint alleges, not what knowledge a defendant possesses. The court remanded to the district court to consider whether CAFA's local controversy exception "requires it to decline to decide these timely removed cases."

Freedom to Use Website Includes Freedom to Avoid Arbitration

Berman v. Freedom Financial Network LLC, No. 20-16900 (9th Cir.) (Apr. 5, 2022). Affirming denial of motion to compel arbitration.

The Ninth Circuit affirmed the district court's decision to deny Freedom Financial's motion to compel arbitration in a Telephone Consumer Protection Act (TCPA) class action. Freedom Financial's website contains a fine-point notice stating, "I understand and agree to the Terms & Conditions which includes mandatory arbitration." Freedom argued that Daniel Berman's use of the websites signified agreement to the mandatory arbitration provisions even though he claimed he did not see the notice.

The Ninth Circuit disagreed, ruling that the design and content of the webpages did not adequately call visitors' attention to either the existence of the terms and conditions or the fact that they were agreeing to be bound by those terms by clicking on the "continue" button. Berman and other class members did not unambiguously manifest their assent to the terms and conditions when navigating through the websites and never entered into a binding agreement to arbitrate their dispute.

Defendants Burned by Consumers' Class Certification Bid

In re JUUL Labs Inc. Marketing, Sales Practices, and Products Liability Litigation, No. 3:19-md-02913 (N.D. Cal.) (June 28, 2022). Judge Orrick. Granting motion for class certification.

A federal court presiding over multidistrict litigation against JUUL certified two nationwide classes and two California classes alleging that JUUL deceptively advertised its products to minors. In certifying the class, the court rejected the defendants' arguments that issues regarding individual members' decisions to purchase and continue using JUUL products would predominate. The court concluded that such differences were "largely immaterial" to the legal standards underlying the class's fraud, unfair conduct, unjust enrichment, and warranty claims, and that any purported differences would be subject to competing expert testimony and resolved by the trier of fact. In short, the court found that JUUL's best argument was that there should be a battle of the experts—one that could be played out at trial. ■

"A beer giant calls for "Closing Time: Court Approves Proposed Classwide Settlement in Cocktail-Themed Drinks Suit." **Angela Spivey**, **Alan Pryor**, and **Reagan Drake** break down a labeling case whose implications could reverberate throughout the industry."

Angela Spivey

Alan Pryor

Reagan Drake

Labor & Employment / ERISA

- **Dismissal of Employees' Claims Based on BLM Face Masks Affirmed**

  Suverino Frith, et al. v. Whole Foods Market Inc., et al., No. 21-1171 (1st Cir.) (June 28, 2022). Affirming dismissal.

  The First Circuit upheld a district court decision dismissing claims brought by a putative class of employees who asserted race discrimination and retaliation based on their employer's response to their wearing Black Lives Matter face masks in the workplace. The court reasoned that the employees failed to state a race discrimination claim because their allegations were conclusory and not sufficiently tied to race, finding there were nondiscriminatory explanations for the employer to enforce its policy prohibiting displays "of a controversial message in its stores by its employees." Although the court conceded that the actions could potentially raise free speech concerns, it concluded that there could be no First Amendment claim because Whole Foods is a private employer.

- **Standing Challenge to Class of 60,000 401(k) Plan Participants Rejected**

  Boley v. Universal Health Services, No. 21-2014 (3rd Cir.) (June 1, 2022). Affirming grant of class certification.

  The Third Circuit became the first court of appeals to consider whether the standing analysis in *Thole v. U.S. Bank N.A.* applies to defined contribution plans. *Thole* held that participants in a defined benefit plan lacked standing to challenge conduct that did not impact their benefits—the participants would not receive a penny less or a penny more if they won the lawsuit.

  The *Boley* plaintiffs sought to certify a class of 60,000 401(k) plan participants, alleging that the plan fiduciaries violated ERISA by selecting imprudent investment funds with excessive fees and poor performance. The named plaintiffs, however, did not personally invest in every fund challenged in the complaint. Based on the analysis in *Thole*, the defendants argued class certification was improper because the named plaintiffs lacked Article III standing to challenge funds in which they never invested. Moreover, the named plaintiffs did not satisfy Rule 23(a)(3)'s typicality requirement because they had no incentive to pursue claims for funds in which they never invested. The district court rejected these arguments and certified the class.

  The Third Circuit affirmed, finding that the plaintiffs "alleged the kind of concrete, personalized injuries traceable to the challenged conduct by defendants that *Thole* requires." Each plaintiff invested in at least one imprudent investment and thus had standing to pursue claims on behalf of all plan participants. The court held that the claims concerned the same courses of conduct—the plan fiduciary's allegedly flawed process for selecting or monitoring investment options. Additionally, the court held that claims of intraclass conflicts were speculative and typicality was satisfied.

- **Plaintiffs Failed to State a Claim in 401(k) "Excessive Fee" Cases**

  Smith v. CommonSpirit Health, et al., No. 21-5964 (6th Cir.) (June 21, 2022). Affirming dismissal.

  Forman v. TriHealth Inc., et al., No. 21-3977 (6th Cir.) (July 13, 2022). Affirming dismissal in part, reversing in part, and remanding to the district court.

  The Sixth Circuit affirmed dismissal of a pair of 401(k) plan "excessive fee" cases following the Supreme Court's decision in ***Hughes v. Northwestern*** earlier this year.

  CommonSpirit and *Forman* involved similar claims by participants for breaches of the duty of prudence under ERISA regarding excessive fees and investment underperformance in their 401(k) retirement plans. In *CommonSpirit*, the Sixth Circuit held that the plaintiff's allegations that the plan offered actively managed funds as opposed to offering only passively managed options failed to state a claim of imprudence (and noted that not offering any actively managed options may itself be imprudent). Because actively managed and passively managed funds are not meaningful comparators given their differences in investment strategies and potential risks, the plaintiff's investment underperformance claims failed, as she did not allege a meaningful benchmark for comparison. The Sixth Circuit also held that the plaintiff's allegations of excessive recordkeeping fees were insufficient because the plaintiff failed "to allege that the fees were excessive relative to the services rendered" or that the services provided to the plan were equivalent to those provided to other plans the plaintiff had relied on for the industry average cited.

  The Sixth Circuit's opinion in *Forman* acknowledged that *CommonSpirit* largely resolved the plaintiffs' claims of excessive fees, leaving only the plaintiffs' share class claim unresolved. The opinion again highlighted that "a sound basis for comparison" is critical in

"When HR professionals asked ***HR Dive*** "How Do Emerging Leave Laws Intersect with the FMLA?," they turned to **Alex Barnett**."

Alex Barnett

stating a claim for imprudence under ERISA, but the Sixth Circuit held that the *Forman* plaintiffs had plausibly stated a claim of imprudence by alleging that the plan offered retail shares of mutual funds when lower-cost institutional shares with the same investment strategy, portfolio, and management team were available to the plan. While the court acknowledged that the plan's fiduciaries might have an equally plausible explanation for failing to offer institutional shares, it held that evaluating the alternative explanations was premature at the pleadings stage.

California Work-from-Home Reimbursement Case Can Proceed

Williams v. Amazon Services LLC, et al., No. 3:22-cv-01892 (N.D. Cal.) (June 1, 2022). Affirming in part and denying in part motion to dismiss.

The Northern District of California denied Amazon's attempt to dismiss a claim under California Labor Code Section 2802 that seeks reimbursement for COVID-19 work-from-home expenses. The plaintiff is seeking to represent a class of employees who incurred expenditures such as internet and electricity and alleges that each employee spent approximately $50–$100 per month that should be reimbursed. The labor code section generally requires employers to reimburse employees for work-related expenses, and the plaintiff argued that his expenditures were required for his job duties as a senior software development engineer. The court was unpersuaded by Amazon's argument that the expenses were caused by stay-at-home orders and interpreted Section 2802 to focus on whether the expenditures were required for an employee to discharge his or her duties. ■

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Privacy & Data Security

Using an ATDS Is Not the Same Thing as *Using* an ATDS

Panzarella v. Navient Solutions Inc., No. 20-2371 (3rd Cir.) (June 14, 2022). Affirming summary judgment.

In this putative class action brought under the TCPA, the district court ruled that the defendant did not use an automatic telephone dialing system (ATDS) when it called the plaintiffs using a dialer connected to a database server that stored a list of numbers. The Third Circuit held that the system qualified as an ATDS because it had the capacity to both call stored numbers from a pre-generated list and generate 10-digit random or sequential numbers to call. Nonetheless, the Third Circuit affirmed the grant of summary judgment, holding that the plaintiffs did not produce any evidence that the defendant had used the ATDS's automatic dialing mode and the defendant's use of the list mode was not actionable under the TCPA because it did not result in the kind of harm that the TCPA is intended to target. Though the defendant used a system that qualified as an ATDS under the TCPA, it did not "use" an ATDS to place any prohibited calls within the meaning of the statute.

Confusion and Worry Are Not Concrete Harms for Debt-Collection Act

Pierre v. Midland Credit Management, Nos. 19-2993, 19-3109 (7th Cir.) (Apr. 1, 2022). Vacating judgment.

The plaintiff brought class claims against the defendant, alleging that the letter it sent, offering to resolve a long-unpaid debt at a discount, violated the Fair Debt Collection Practices Act (FDCPA). The letter clearly stated that the company could not sue her for payment and that her credit score would not be adversely impacted, but she became worried and confused, and she filed suit. The district court certified the class and entered summary judgment for the class on the merits, and a jury awarded $350,000 in statutory damages.

On appeal, the Seventh Circuit vacated the judgment for lack of Article III standing. The appellate court held that, after the Supreme Court's decision in *TransUnion LLC v. Ramirez*, the plaintiff needed actual harm, not mere "risk of harm," to sue for damages. Here, the plaintiff did not have standing based on her response to the letter because she did not act "to her detriment in response to anything in or omitted from the letter," such as paying the debt or agreeing to pay the debt. The court also held that "[p]sychological states induced by a debt collector's letter likewise fall short" in the FDCPA context.

No Harm, No Foul: No FCRA Standing If Violations Did Not Cause Injury

Schumacher v. SC Data Center Inc., No. 19-3266 (8th Cir.) (May 3, 2022) Reversing denial of motion to dismiss for lack of standing.

SC Data rescinded a job offer to Ria Schumacher after a background check revealed an undisclosed felony conviction. Schumacher sued, alleging that the recission violated the Fair Credit Reporting Act (FCRA) because SC Data failed to provide her with an opportunity to explain the negative information before the withdrawal, SC Data's disclosure form did not comply with FCRA, and Schumacher did not authorize SC Data to obtain a consumer report. SC Data moved to dismiss for lack of standing. The district court denied the motion and SC Data appealed.

The Eighth Circuit reversed, finding that Schumacher lacked standing to bring any of her three claims because she failed to allege that she suffered any injury-in-fact. Specifically, the court held that Schumacher failed to establish that the FCRA violations caused her injury and FCRA does not provide a right to explain a negative, but accurate consumer report before the employer's adverse action.

Who Did It? BIPA Action Dismissed After Failure to Allege Who and Where

Vaughan v. Biomat, No. 1:20-cv-04241 (N.D. Ill.) (Apr. 29, 2022). Judge Aspen. Granting motion to dismiss for failure to state a claim.

Brian Vaughan and Jason Darnel brought a class action against three plasma donation center operators, contending that their data collection practices violated the Illinois Biometric Information Privacy Act (BIPA). Vaughan and Darnel allege the various donation centers they visited in Illinois collected donors' fingerprints to generate a biometric template for each donor, stored these templates to track donations, and never notified donors why and for how long the biometric data was being collected.

The defendants moved to dismiss the complaint, arguing, in part, that the plaintiffs engaged in impermissible group pleading because they failed to plead specific facts as to each defendant, such as "which plasma donation center(s) [Plaintiffs] visited" and which defendant operated which facility. The court agreed and dismissed the complaint, holding the plaintiffs must be able to articulate and plead where their biometric data was collected and how the defendants were connected to the facilities collecting the data to bring a BIPA claim.

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David Teske

BJay Pak

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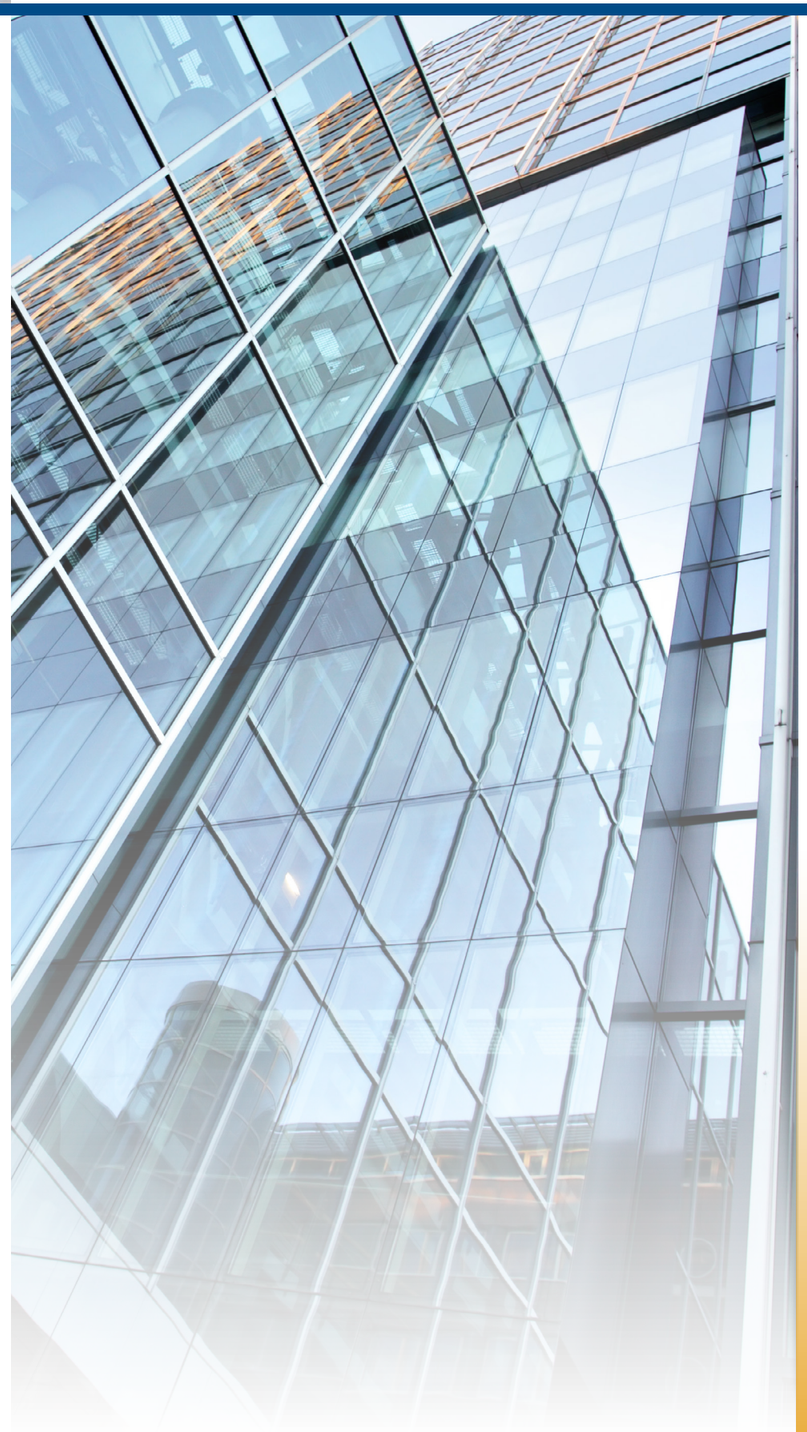
Data Breach Decision Leaves Hotel Chain Locked Up in Class Litigation

In re Marriott International Inc. Consumer Data Security Breach Litigation, No. 8:19-md-02879 (D. Md.) (May 3, 2022). Judge Grimm. Granting in part and denying in part motion for class certification.

In a data breach case, the consumer plaintiffs moved to certify 13 classes and subclasses for damages. The district court granted certification for eight classes and subclasses, allowing them to pursue claims of negligence, consumer fraud, and breach of contract on a classwide basis, and rejecting the defendant's argument that the plaintiff's "overpayment" damage model requires an overly individualized inquiry. However, the court declined to certify the remaining five classes, which relied on the alleged loss of the "market value" of their personal information, finding the predominance requirement was lacking because "too many open questions remain as to individualization." ■



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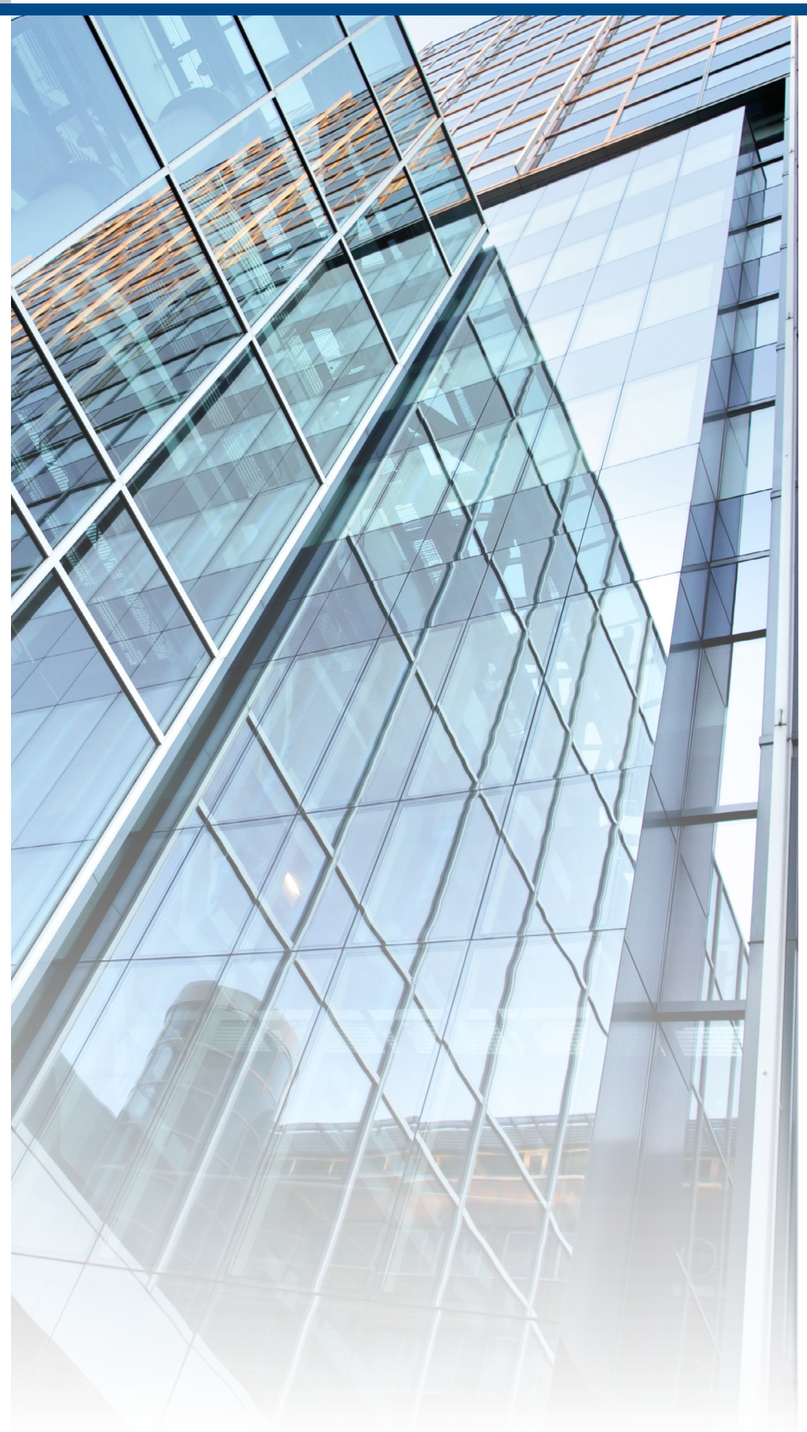
Products Liability

- **Limited Issues Class Certified in Baby Sleeper MDL**

  In re Rock 'n Play Sleeper Marketing, Sales Practices, and Products Liability Litigation, No.1:19-md-02903 (W.D.N.Y.) (June 2, 2022). Judge Crawford. Certifying issues class.

  The district court granted limited certification to New York consumers alleging that Fisher-Price falsely advertised its Rock 'n Play Sleeper as safe for infant sleep. The court certified the class on liability issues only, concluding that damages will need to be determined individually.

  In certifying the class, the court rejected Fisher-Price's argument that the proposed class representative lacks standing because she participated in Fisher-Price's recall program and is not entitled to additional compensation. The court found "no basis" for barring the plaintiff's claim pursuant to the standing doctrine, noting that participation in a refund program generally does not disqualify a representative on typicality grounds. The court noted that Fisher-Price bears the burden on any accord and satisfaction defense, and that questions involving value and an offset are merits issues that do not defeat typicality. Further, while the court noted the "theoretical conflict" between a class representative who received a refund versus class members who received nothing, it determined the conflict was offset by the class representative's "commitment" to the class action, satisfying the adequacy requirement. ■



class-ified

information

Our own **Derin Dickerson** has been elected to the Executive Committee of the National Bar Association's Commercial Law Section, a dynamic group of leaders from different industries around the country.

Derin Dickerson

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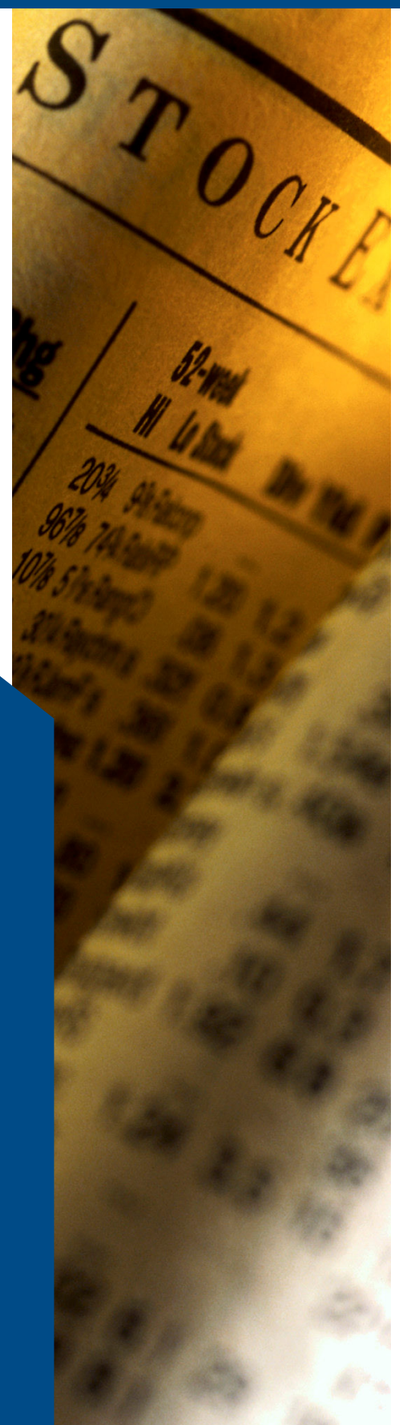
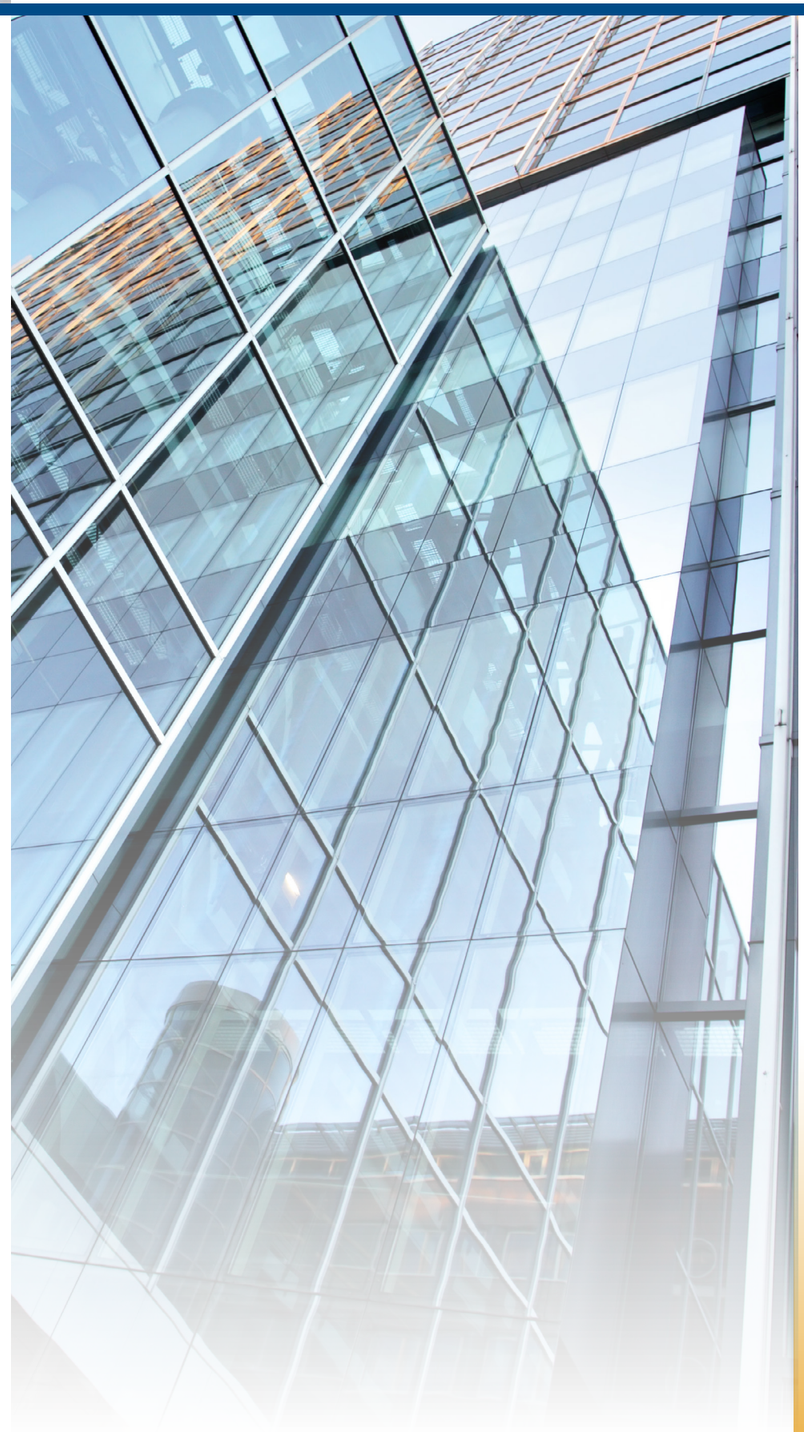


Securities

- **Jury Finds Oil Company Cofounder Liable for Securities Fraud**

  Gruber v. Gilbertson, et al., No. 1:16-cv-09727 (S.D.N.Y.) (June 14, 2022). Judge Rakoff. Jury verdict.

  In an exceptionally rare case where a securities fraud class action went to trial and resulted in a jury verdict, a Southern District of New York jury found the cofounder of oil company Dakota Plains Holdings Inc. liable on two claims. The class alleged that defendant Michael Reger and his cofounder had conducted a complex scheme whereby they secretly controlled Dakota Plains, engaged in market manipulation to artificially inflate the price of the company's stock, and ultimately used the inflated price to siphon off over $32 million from the company before it went bankrupt. All other parties settled before trial, including the other cofounder who had been criminally convicted for the same alleged conduct. Reger took his chances with a jury, which found that he was personally liable for securities fraud, that he was liable as a control person for the company's securities fraud, and that the company's stock was inflated by 57% during the class period. The jury, however, found that Reger was not liable on a claim of insider trading. ■



"Shareholder activists – and the lawsuits they bring – continue to plague companies even after the pandemic. Learn what you need to do to prepare at Alston & Bird's 2023 Proxy Season Outlook Seminar in Atlanta and online, November 16."

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CLASS ACTION & MDL roundup

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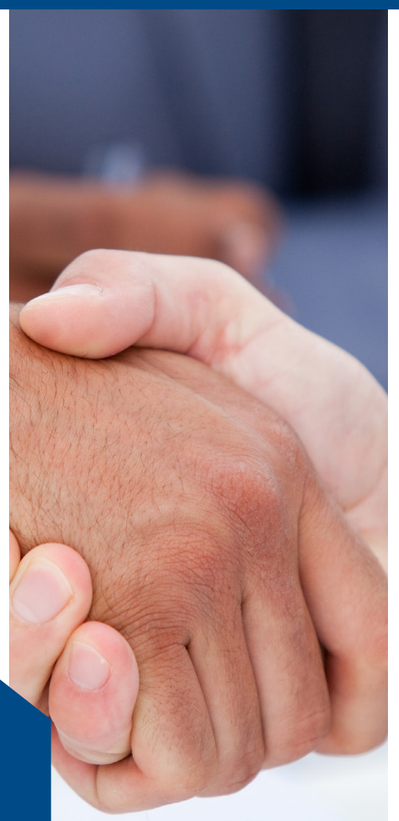


Settlements

Too Much Marijuana and Not Enough Disclosures Spark $13 Million Pot for Investors

Ortiz v. Canopy Growth, et al., No. 2:19-cv-20543 (D.N.J.) (June 7, 2022). Judge McNulty. Approving $13 million settlement.

Judge Kevin McNulty approved a $13 million settlement between a cannabis company, several of its executives, and a class of investors who alleged that the company misled them about the strength of Canada's cannabis market and knowingly concealed overproduction problems. The defendants denied the allegations but agreed to a settlement that will deposit $13 million into an escrow account primarily used to pay pro rata shares to each class member who submits a valid proof of claim. The court's order also awards $4.3 million in attorneys' fees, which represents approximately one-third of the settlement fund, plus $91,000 in expenses and $5,000 to each of the lead plaintiffs.

Court Approves Reduced Settlement in False Advertising Suit

Hesse, et al. v. Godiva Chocolatier Inc., et al., No. 1:19-cv-00972 (S.D.N.Y.) (Apr. 20, 2022). Judge Preska. Approving $7.2 million settlement.

A New York federal court approved a reduced settlement against Godiva over allegations that the company's "Belgium 1926" label misled customers into believing the chocolate was produced exclusively in Belgium. The parties originally agreed that Godiva would pay up to $15 million to the class and that class members submitting a valid claim form would receive $1.25 per product purchased, with the maximum recovery capped at $15 without proof of purchase and $25 with proof of purchase. However, the court approved a reduced settlement of $7.2 million due to the low claims rate, brushing aside concerns from six different attorneys general that the cap served to depress the claims rate and that Godiva should have placed notice of the settlement on its website. The court determined that the cap was a reasonable negotiated term of the settlement and that additional notice procedures were unlikely to "meaningfully increase the claims rate." In light of the reduced class recovery, the court reduced the attorneys' fees from $5 million to $2.7 million.

Claims of Deceptively Small Health Insurance Plans Bring Big Settlement

Belin, et al. v. Health Insurance Innovations Inc., et al., No. 0:19-cv-61430 (S.D. Fla.) (Apr. 15, 2022). Judge Singhal. Affirming $27.5 million award of attorneys' fees, expenses, and service awards.

Judge Raag Singhal affirmed an award of $9.2 million in attorneys' fees and $198,000 in expenses for class counsel in an action involving allegedly fraudulent insurance plans, but reserved jurisdiction to approve service awards to the lead plaintiffs following resolution of a determinative case on appeal. In the underlying action, nine lead plaintiffs alleged the defendants employed a fraudulent scheme that caused the plaintiffs to purchase insurance plans covering a much smaller portion of medical costs than expected. While final approval of the proposed $27.5 million settlement was pending, the plaintiffs sought approval of attorneys' fees, costs, and service awards.

In adopting the magistrate judge's report and recommendation, the court agreed that attorneys' fees constituting 33% of the overall settlement amount were reasonable, in part because class counsel had "less than 20 attorneys combined" and "a case of this magnitude limited their ability to pursue other matters with guaranteed compensation from clients." Class counsel's itemized breakdown of $198,000 in expenses also supported the award of costs. However, the court reserved jurisdiction as to the request for $6,250 in service awards for each of the lead plaintiffs and instead directed that $56,250 be held in escrow pending adjudication of the Eleventh Circuit's *Johnson v. NPAS Solutions LLC*, which would determine whether such awards were permissible.

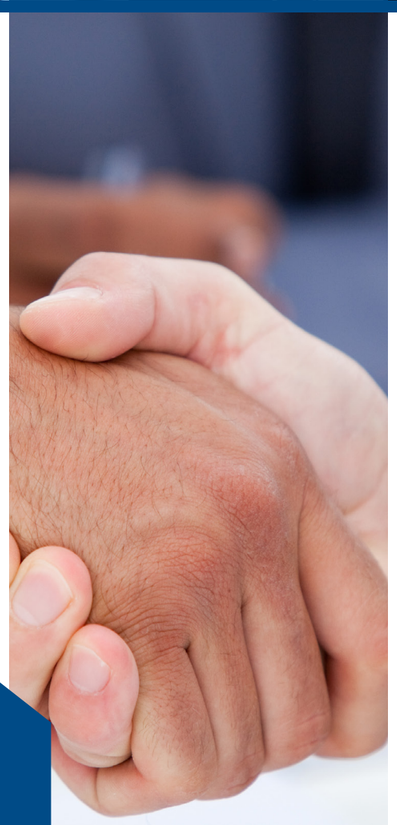
Calls for Settlement Zoom Ahead

In re Zoom Video Communications Privacy Litigation, No. 3:20-cv-02155 (N.D. Cal.) (Apr. 21, 2022). Judge Beeler. Approving $85 million settlement.

In a consumer-privacy class action against Zoom Video Communications, the plaintiffs alleged that Zoom improperly shared their data through third-party software, falsely claimed to have end-to-end encryption, and failed to prevent "Zoombombing," or disruptions of Zoom meetings by third-party actors. The parties agreed to settle, and the court granted the motion for final approval and awarded attorneys' fees, expenses, and service payments. Following a fairness hearing, the court awarded the $85 million net settlement fund and over $21 million in fees and other expenses.

The "best of the best": **Cari Dawson** honored among *Savoy*'s 2022 Most Influential Black Lawyers, showcasing visionaries, leaders, and advocates within the legal profession.

Cari Dawson



Attorneys' Fees Questioned

Cameron, et al. v. Apple Inc., No. 4:19-cv-03074 (N.D. Cal.) (June 10, 2022). Judge Gonzalez Rogers. Approving $100 million settlement.

A California district judge approved a $100 million class settlement resolving antitrust claims asserted by app developers against Apple. The district judge did not, however, approve class counsel's request for a fee award of $27 million, which would be higher than the Ninth Circuit's 25% benchmark for such awards. Instead, the district judge awarded $26 million, explaining that a 1% increase over the benchmark was appropriate in light of the significant value of the non-monetary relief conferred to the class, including Apple's maintenance of a small business program and an appeal process that would allow developers to appeal rejection of apps.

Social Media Giant Settles Illinois Privacy Suit

In re Tiktok Inc. Consumer Privacy Litigation, No. 1:20-cv-04699 (N.D. Ill.) (Aug. 22, 2022). Judge Lee. Approving $92 million settlement.

An Illinois federal judge granted final approval of a class action settlement in multidistrict litigation against a social media giant. The MDL stemmed from allegations that the social media platform violated the Illinois Biometric Information Privacy Act. The settlement includes a net fund of nearly $88 million, which includes $2,500 service awards for class representatives, and distributes one-third to the plaintiffs' attorneys for fees. The settlement also includes a bevy of affirmative obligations by the social media platform, including that it will refrain from using its app to collect or store a user's biometric information or identifiers, collect geolocation or GPS data, collect information in users' clipboards, or transmit or store domestic user data outside the United States. The settlement also requires the platform to institute new compliance training for data privacy laws and to provide a written verification under oath of compliance with its affirmative obligations.

Judge Allows False Ad Claims to Wilt in Pesticide Settlement

In re Roundup Products Liability Litigation, No. 3:16-md-02741 (N.D. Cal.) (Jun. 21, 2022). Judge Chhabria. Approving $45 million settlement.

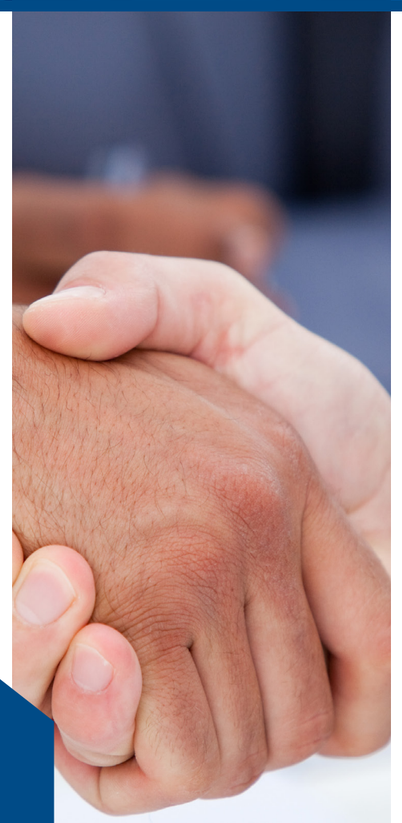
Judge Vince Chhabria granted approval of a $45 million settlement to resolve multidistrict litigation alleging that a well-known pesticide producer made false claims about the dangers of its Roundup pesticide products. The court found the settlement amount and compensation rates were "adequate given the many risks inherent in [the] litigation," including that the defendant would have had colorable defenses that may have wholly absolved it of liability and the fact that the plaintiffs faced an uphill climb in demonstrating they were entitled to any damages under their "price premium" theory. Though the court blessed the settlement of the false ad claims, Judge Chhabria noted that it was "vital that consumers understand" they maintain their right to sue based on any illness or injury they may suffer as a result of using Roundup. The court had previously rejected inadequate notice language to this effect and required submission of revised notices to apprise plaintiffs of their rights to pursue claims for any illness or injury.

Objection About Offsets from Related Settlements Denied

McCormick, et al. v. Adtalem Global Education Inc., et al., No. 1-20-1197 (Ill. App. Ct.) (May 4, 2022). Affirming final approval of $45 million settlement and denial of objections.

The Appellate Court of Illinois affirmed a trial court's decision that approved a $44.95 million settlement for DeVry University students and rejected an objector's claims that the settlement was unfair or awarded too much in attorneys' fees. The class of DeVry University students claimed that defendants DeVry and Adtalem Global Education Inc. were able to recruit students and charge higher tuition during 2008–2016 by making misleading and deceptive statements about the income and employment statistics of DeVry graduates. Already having been subject to other litigation related to its advertising, including settlements with the Federal Trade Commission and the Department of Education, DeVry settled this Illinois action by agreeing to form a $44.95 million settlement fund, provide career counseling services, and request that credit reporting bureaus delete negative credit events about certain student debt. Payments from the settlement fund were to be pro rata in proportion to students' credit hours and offset by debt forgiveness or money that claimants had already received from any previous government actions against DeVry.

Class member Richardo Peart objected to final approval of the settlement, arguing that the settlement was unfair because it harmed those class members whose compensation would be offset by compensation from prior settlements and that the attorneys' fee award of 35% of the settlement was improper.



The lower court rejected these arguments and the appellate panel affirmed, finding that the offset provisions were fair to all claimants and key to negotiating the settlement. The attorneys' fees of $15.7 million were found to be reasonable because lodestar cross-checks were not required and class counsel won significant relief for class members based on "thin" liability even though some of the settlement fund would revert to DeVry via the offset provisions. ■

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