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CLASS ACTION & MDL roundup

QTR 2 | 2023

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overview

CLASS ACTION & MDL **roundup**

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video highlight

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TRACY YAO

Associate, Litigation & Trial Practice Group

Tracy Yao provides guidance on how to stop a class action wave when faced with novel claims.

Where the (Class) Action Is

Welcome back to the ***Class Action &MDL Roundup***! This edition covers notable class actions from the second quarter of 2023.

The courts saw an array of interesting class decisions in the second quarter, including cases involving dog food, fitness classes, and supplements in the consumer protection area. The insurance industry is one to look out for this quarter with the approval of a $3.8 million settlement and a Fifth Circuit ruling in connection with policyholders' claims that they were underpaid the actual cash value of their totaled vehicles. There continues to be no shortage of TCPA class actions. We are also seeing the use of AI becoming a growing concern and hot topic in the privacy area as well.

Moving to labor & employment, the Sixth Circuit challenges the traditional certification process that the courts have been using in FLSA collective actions for 35 years. As the second circuit court to challenge this process, it is becoming increasingly likely that the Supreme Court will weigh in on the question. Stay tuned as we keep tabs on this issue.

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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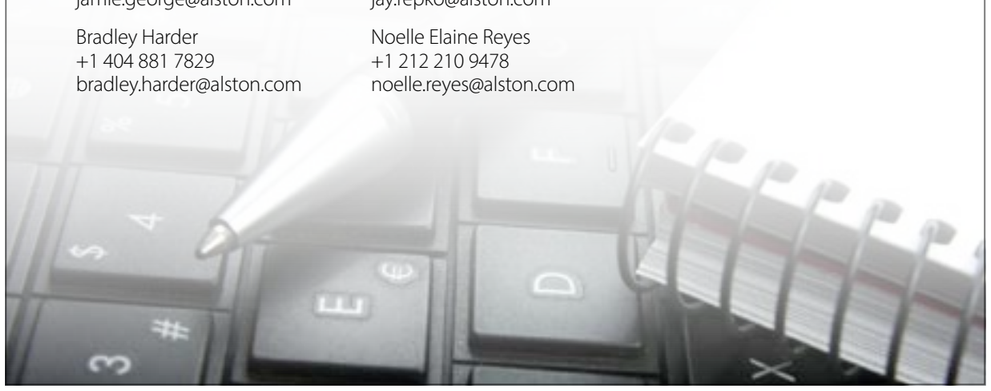

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Antitrust/RICO

Ascertainability Alive and Well in the Third Circuit

In re Niaspan Antitrust Litigation, No. 21-2895 (3rd Cir.) (Apr. 24, 2023). Affirming denial of class certification.

A unanimous Third Circuit panel upheld the district court's denial of class certification based on ascertainability grounds in a pay-for-delay case brought on behalf of end-payors who purchased, paid for, or provided reimbursements for the generic version of the cholesterol drug Niaspan. The Third Circuit found no clear error in the district court's factual finding that pharmacy benefit manager data did not reflect whether, in any given transaction, an entity was an end-payor or intermediary. As a result, the end-payor plaintiffs failed to show that the proposed class was ascertainable. In reaching its decision, the Third Circuit rejected the end-payor plaintiffs' invitation to abandon the ascertainability requirement. The panel first noted it has no authority to overrule the circuit's existing precedent before emphasizing that ascertainability serves several important objectives—eliminating administrative burdens, protecting absent class members by facilitating the best notice practicable, and protecting defendants by ensuring persons bound by a final judgment are clearly identifiable—and is true to the text, structure, and purpose of Rule 23.

Tenth Circuit Drills Down on Antitrust Impact in Mineral Rights Case

Black v. Occidental Petroleum Corp., No. 22-8040 (10th Cir.) (June 7, 2023). Affirming grant of class certification.

The Tenth Circuit affirmed the district court's order certifying a liability-issue class in a case in which plaintiff landowners alleged that an oil and gas company's intracompany practice of leasing its mineral interests to its affiliated operating company, with a 30% royalty rate, violated antitrust laws and reduced the value of the landowners' mineral interests. The Tenth Circuit held that the district court applied the correct standards for determining whether to certify an issue class under Rule 23 when it concluded that the plaintiffs were not required to prove antitrust impact to every class member at the class certification stage. The panel explained that a court should not certify a class that includes a significant portion of members who *could not* have been harmed by the defendant's allegedly unlawful conduct; but that a class may be properly certified even if it consists largely (or even entirely) of members who are *ultimately shown* to have suffered no harm. According to the panel, if no members of the certified class could ultimately show the defendant's alleged anticompetitive conduct proximately caused their injury, the result would be a verdict in the defendant's favor—not "devolution into a myriad of individual inquiries." ■

Leadership matters:
Alston & Bird Earns 16 Leadership Appointments to ABA Antitrust Law Section.

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Banking & Insurance

- **Third Circuit Defines Parameters of TILA's Itemization Requirement**

  Weichsel, et al. v. JPMorgan Chase Bank N.A., No. 21-03371 (3rd Cir.) (Apr. 11, 2023). Affirming dismissal.

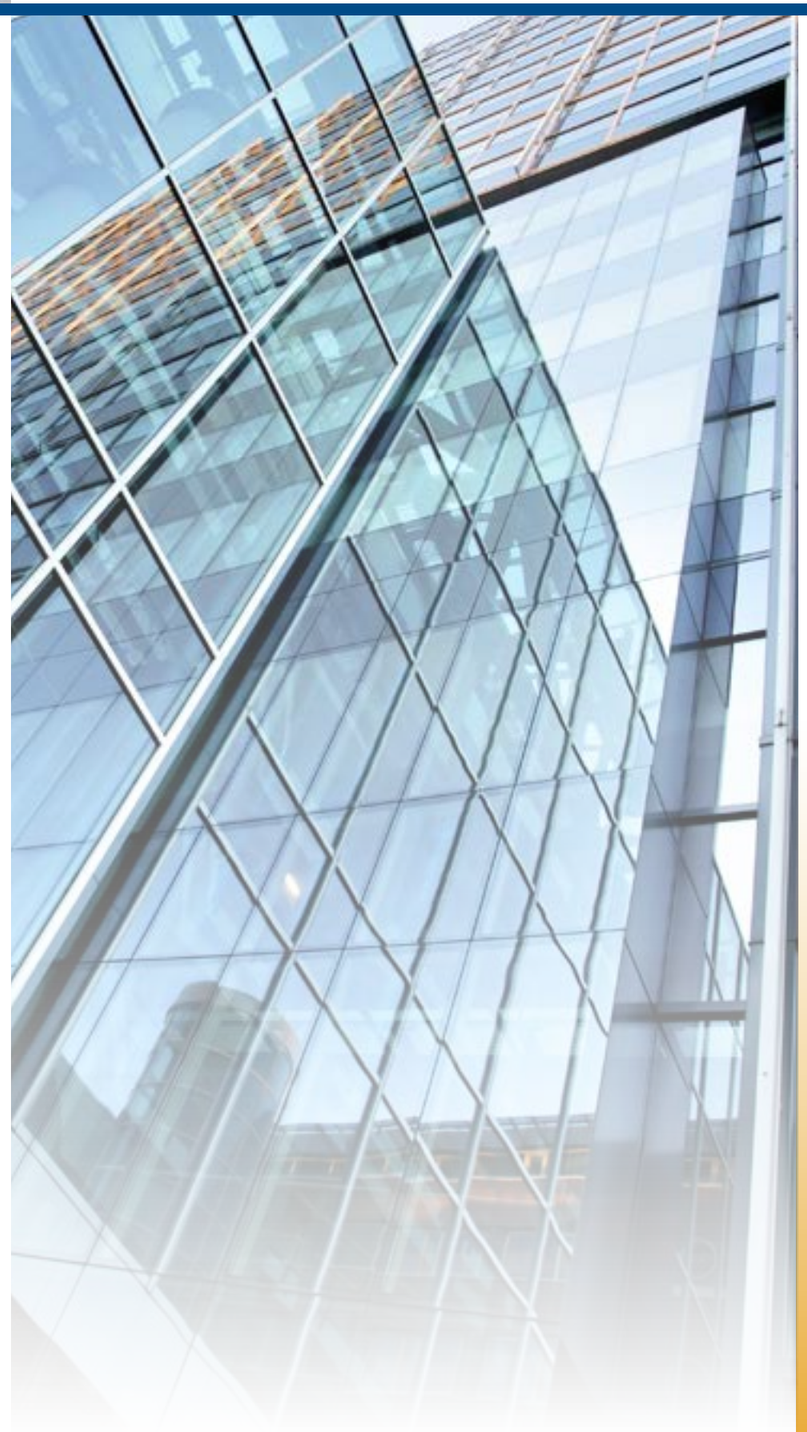
  The Third Circuit affirmed the dismissal of a consumer class action against JPMorgan Chase alleging that the bank violated the Truth in Lending Act (TILA) by failing to itemize fees on annual credit card renewal notices. The court concluded that the class claims lacked any basis because TILA does not require banks to itemize fees on renewal notices. It noted that the provisions of TILA and its implementing regulation, Regulation Z, governing solicitations and periodic disclosures include an itemization requirement and concluded that the lack of an express itemization requirement in the renewal notice provisions of TILA and Regulation Z indicate that no such requirement was intended. As a result, the court concluded that dismissal was appropriate.

- **Class Members Withstand Standing Challenge on Appeal**

  Angell v. GEICO Advantage Insurance Co., No. 22-20093 (5th Cir.) (May 12, 2023). Affirming plaintiffs' standing to sue.

  The Fifth Circuit upheld a Texas district court's holding that plaintiff policyholders had standing to sue on behalf of a proposed class. The policyholders alleged GEICO underpaid the actual cash value of their totaled vehicles by failing to pay the entirety of three required purchasing fees: the covered vehicle's sales tax, title fees, and registration fees. GEICO argued the named plaintiffs could not represent a class of individuals who are owed *all* the purchasing fees because no named plaintiff alleged that he or she was owed title fees and only one alleged that he was owed sales tax.

  The circuit court noted that courts evaluating a plaintiff's standing to represent a class are divided, with some applying the more intensive "standing approach," which compares the injuries or interests of the named plaintiff with those of the putative class, while others apply the more forgiving "class certification approach," which assesses only the named plaintiff's individual standing. The Fifth Circuit declined to decide which approach should control because it found the policyholders had standing under either approach. There was no dispute that each named plaintiff suffered some injury, and GEICO's failure to pay any of the three purchasing fees would amount to the same harm—breach of the policies—such that its liability would depend on interpretation of the same policy provisions. ■



"It only takes two to tango, but it takes a lot more to defend insurance litigation. **Steve Penaro** will be "Exploring Use Cases of Insurance Across the Litigation Landscape" at the 6th Annual Litigation Finance Dealmakers Forum, September 26–28 in New York."

Steve Penaro

Consumer Protection

- **First Circuit Drops Hammer on Glutamine Supplement Suit**

  Ferrari, et al. v. Vitamin Shoppe Industries LLC, No. 22-1332 (1st Cir.) (June 9, 2023). Affirming order granting summary judgment.

  The First Circuit affirmed the district court's order granting summary judgment in favor of the defendant supplement manufacturer on claims that the plaintiffs were misled by statements that glutamine leads to muscle growth and recovery. The court held the products' statements about glutamine were structure/function claims under the Federal Food, Drug, and Cosmetic Act (FDCA). And because the defendant complied with the FDCA's requirements to make such claims, any state-law claims attacking those statements were expressly preempted.

- **Second Circuit Revives Essential Oil False Ad Lawsuit**

  MacNaughton v. Young Living Essential Oils LC, No. 22-0344 (2nd Cir.) (May 2, 2023). Vacating in part and affirming in part order granting motion to dismiss.

  The Second Circuit largely ruled in favor of consumers alleging the defendant's essential oil product was mislabeled as "therapeutic grade" and providing physical and mental benefits to its users. Relying on its recent decision in *International Code Council Inc. v. UpCodes Inc.*, the court held that the labeling statements were in fact provable and did not fail for lack of substantiation (rendering claims alleging violations of the New York General Business Law viable). The Second Circuit also vacated dismissal of the plaintiffs' unjust enrichment claim because it satisfied Rule 9(b)'s pleading standard. The court did, however, affirm the district court's dismissal of the breach of warranty claims for lack of pre-suit notice and privity.

- **Ninth Circuit Melts Appeal Challenging Labeling on Spray, Not Butter**

  Pardini, et al. v. Unilever United States Inc., No. 21-16806 (9th Cir.) (Apr. 18, 2023). Affirming order granting motion to dismiss.

  The Ninth Circuit affirmed the district court's dismissal of the plaintiffs' claims challenging the label on "I Can't Believe It's Not Butter! Spray" as being mislabeled as a spray (and not butter). The lawsuit alleged that the product's label made misrepresentations about fat and calorie content based on artificially low serving sizes. Because the defendant properly characterized Butter! Spray as a "spray type" fat or oil, however, the serving size on its nutrition label complied with federal law. The court held that the plaintiffs' claims about fat and calorie content were preempted as a result.

- **Eleventh Circuit Rapidly Affirms Dismissal of Delivery Suit**

  Marquez v. Amazon.com Inc., No. 21-14317 (11th Cir.) (June 7, 2023). Affirming dismissal with prejudice.

  In 2021, the plaintiffs filed a putative class action against the marketplace delivery giant alleging that its suspension in 2020 of "rapid delivery" services (two-hour, same day, or one-day delivery) was a breach of their subscription contract. The district court dismissed the suit with prejudice because the contract provided the company with discretion to unilaterally end programs like the rapid delivery service without the need to notify its subscription customers. On appeal, the plaintiffs alleged that the contract is substantively and procedurally unconscionable because it granted the company unlimited discretion to modify the terms of the agreement.

  The Eleventh Circuit court held that the contract itself is clear that services were provided on an "as is" and "as available" basis, and that the plaintiffs' recourse if they were unsatisfied was to cancel their subscription. Citing the defendant's "discretionary authority" to modify the terms of its services, the court likewise affirmed dismissal of the claims for breach of good faith and fair dealing and violation of the Washington Consumer Protection Act.

- **Defendant Dodges Certification of Lawsuit Alleging Restaurant Shortchanged Customers During Coin Shortage**

  McMahon, et al. v. Chipotle Mexican Grill Inc., No. 2:20-cv-01448 (W.D. Penn.) (Apr. 3, 2023). Denying motion for class certification.

  A Pennsylvania federal court denied certification of a putative class action alleging the defendant restaurant chain was shortchanging customers at the cash register. The court found that the plaintiffs had failed to explain how they would substantiate their theory of liability, given that the restaurant's electronic data does not document whether a customer is provided with correct change, and the plaintiffs' proffered videotape footage of transactions at the cash register would not definitively establish which customers were shortchanged. The court also rejected the consumers' argument that

"Get the hard "Truth in Packaging: Legal Insights for RTD Alcohol Labels" from **Alan Pryor** in *Packaging Digest*."

Alan Pryor

shortchanging could be proven by customer declarations, given this would inevitably "require mini trials to test the credibility of declarants."

Stationary Bike Lawsuit Fails to Move Forward

Passman, et al. v. Peloton Interactive Inc., No. 1:19-cv-11711 (S.D.N.Y.) (May 2, 2023). Judge Liman. Denying class certification.

A New York federal judge denied class certification in a lawsuit against Peloton accusing the company of falsely advertising an "ever-growing" library of online fitness classes that were removed because of music copyright concerns. The plaintiffs alleged that Peloton defrauded them by taking their subscription payments for on-demand classes while withholding the information that they "would not be able to use the full on-demand class library because the size of [it] was materially decreasing." In denying class certification, the court found that individual questions of causation, injury, and damages predominate over common questions, noting that class members bought Peloton products in different ways and that the plaintiffs failed to offer evidence that Peloton's statement at issue caused increased costs and a so-called "price premium."

All Dogs Go to Heaven, and All Dog Foods Contain Heavy Metals?

Rydman v. Champion Petfoods USA Inc., No. 2:18-cv-01578 (W.D. Wash.) (May 17, 2023). Judge Zilly. Granting in part and denying in part defendants' motion for summary judgment, denying motion for class certification.

Under a price premium theory, a plaintiff in Washington district court alleged she and others purchased the defendant's dog food products based on false and misleading labeling touting the products as "fresh," "regional," and "biologically appropriate," despite the presence of heavy metals and non-fresh ingredients in the food. In its order, the court granted summary judgment for the defendant on the plaintiff's Washington state consumer protection claims based on the defendant's "biologically appropriate" labels, finding that a "plain reading of the phrase 'biologically appropriate' conveys that the dog food is fit for dogs to consume" and not that the dog food would lack heavy metals. The court then found for the plaintiff on her consumer protection claims based on labels touting "fresh" and "regional" ingredients, given she had proffered expert surveys showing these statements could mislead a reasonable consumer.

The court then considered the plaintiff's bid to certify 10 subclasses of consumers (one for each of the different flavors of dog food purchased), which she based solely on her misleading omissions theory. Given the court's rulings on summary judgment, the only remaining question was whether the court could certify one or more classes on the plaintiff's theory that the defendant failed to adequately disclose the inclusion of "non-fresh" ingredients—specifically, "regrinds" and expired ingredients. The court found that common questions would not predominate over individualized questions for this claim because not every package contained regrinds and/or expired ingredients, meaning that determining whether any particular consumer purchased a product inconsistent with its packaging was an issue requiring an "individualized assessment about which production lot or lots of the specific diet each person bought." On this basis, the court denied the plaintiff's motion for class certification.

Surprise! Court Declines to Certify Surprise Billing Class

Leslie v. Quest Diagnostics Inc., No. 2:17-cv-01590 (D.N.J.) (June 8, 2023). Judge Padin. Denying motion for class certification.

In 2017, the plaintiffs filed suit against the defendant medical services provider alleging that its "surprise billing" practice of charging excessive prices for clinical laboratory testing without patients' consent violated several state consumer protection laws. Analyzing each of the elements for class certification, the court found that while the typicality and adequacy requirements were established, none of the national or state subclasses satisfied numerosity or commonality, given the myriad differences in state laws and the inability to analyze putative class members through "groupings or manageable patterns." The court also found that individualized issues such as the following predominated over common questions: whether the proposed class members were billed or agreed to be billed at a certain rate, whether that rate was reasonable, whether they received any discounts, the internal costs to the defendant for the different services, and the nature and timeframe of the services. This opinion, while unpublished, offers further support for defendants arguing that differing state consumer protection laws precludes the certification of a nationwide class.

Labor & Employment / ERISA

- **Not So Fast: Third Circuit Says Wrong-Forum Tolling Should Be Considered**

  Williams v. Tech Mahindra (Americas) Inc., Nos. 21-1365 & 21-1394 (3rd Cir.) (June 14, 2023). Vacating dismissal order and remanding.

  The Third Circuit revived a lawsuit by a former sales employee accusing the U.S. arm of an Indian information technology firm of engaging in a pattern of hiring and firing practices that favors South Asian job applicants and employees. The plaintiff originally tried to bring his claims as an additional class representative in a preexisting 2018 North Dakota class action. When that case was dismissed, he then filed his own class action in New Jersey in 2020—almost five years after the plaintiff was terminated.

  The district court dismissed the class action as time-barred under Rule 12(b)(6), concluding that *American Pipe* tolling did not allow the employee to file a successive class action. The unanimous circuit court panel agreed with this conclusion, but it disagreed that the grounds for this conclusion—"the Supreme Court's decision in *China Agritech*—also bars wrong-forum tolling." According to the circuit court, *China Agritech* was simply "a 'clarification of *American Pipe*'s reach,' not a broad holding announcing a limit on other traditional forms of equitable tolling." The Third Circuit vacated the order and remanded for the district court to consider whether wrong-forum tolling applied to extend the plaintiff's claims.

- **Sixth Circuit Adopts New Certification Process in FLSA Collective Actions**

  Clark v. A&L Homecare and Training Center LLC, Nos. 22-3101 & 22-3102 (6th Cir.) (May 19, 2023). Vacating conditional certification order and remanding.

  The Fair Labor Standards Act (FLSA) allows plaintiffs to pursue claims as a collective action if they can show there are other "similarly situated" employees. For 35 years, many federal courts have applied a two-stage conditional certification approach: courts grant conditional certification, and authorize notice, based on a "modest factual showing" that potential plaintiffs are similarly situated; then, after merits discovery is complete, the court examines more closely whether the putative class members are, in fact, similarly situated and either grants "final certification" or decertifies the conditionally certified class.

  A divided Sixth Circuit expressly rejected this framework and its lenient conditional certification standard. The Sixth Circuit reasoned that certification of a collective action was a provisional decision comparable to that of a preliminary injunction proceeding. Under the new standard, plaintiffs in the Sixth Circuit must demonstrate a "strong likelihood" that other employees are similarly situated, which requires a showing "greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance." The Sixth Circuit's decision will accelerate the discovery process for both plaintiffs' claims and defendants' defenses and benefit employers now that plaintiffs face a heavier burden. Moreover, the Sixth Circuit is now the second circuit court to expressly reject the familiar two-step certification procedure, broadening the split among federal courts of appeals and rendering it increasingly likely that the Supreme Court will weigh in on the question. ■

"**Jim Evans**, **Ian Wright**, and **Kaitlin Owen** make compelling arguments that "With California Cases, Arbitration Isn't Always the Best Choice" in *Bloomberg Law*."

Jim Evans

Ian Wright

Kaitlin Owen

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Privacy & Data Security

- **Ambiguous Insurance Exclusion Learns That Specificity Is Key**

  Citizens Insurance Company of America v. Wynndalco Enterprises LLC, No. 22-2313 (7th Cir.) (June 15, 2023). Affirming the grant of a judgment on the pleadings.

  Defendant Wynndalco Enterprises sold AI facial identification and database software to the Chicago Police Department that used social media to "scrape" images and create a database of facial scans that could then be used to identify individuals based on photographs. According to two putative class actions, this sale violated Illinois' Biometric Information Privacy Act (BIPA) by intentionally selling access to consumers' biometric information.

  Wynndalco sought a defense from its insurer, Citizens Insurance Company of America. Citizens sued Wynndalco, seeking a declaration that there was no coverage under the policy's "Distribution of Material in Violation of Statutes" exclusion that excludes coverage for damages arising out of the Telephone Consumer Protection Act (TCPA), CAN-SPAM Act of 2003, Fair Credit Reporting Act (FCRA), Fair and Accurate Credit Transaction Act (FACTA), and "[a]ny other laws, statutes, ordinances, or regulations, that address, prohibit or limit the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information."

  Wynndalco moved for a judgment on the pleadings, which the district court granted, finding that the "any other laws" provision was overly broad and ambiguous and must be construed in favor of coverage. On appeal, Citizens argued that the provision was unambiguous because the four statutes preceding it limited its meaning to include only statutes that regulated privacy, like BIPA. The Seventh Circuit disagreed, holding that the listed statutes encompass two distinct types of privacy: seclusion and secrecy. Seclusion is the right to be left alone (regulated by the TCPA and CAN-SPAM) and secrecy is the right to maintain the confidentiality of one's personal information (regulated by the FCRA, FACTA, and BIPA). Because the "any other laws" provision covers privacy statutes generally, and not statutes that regulate a specific form of privacy, the court held it was ambiguous and affirmed the underlying ruling obligating Citizens to defend Wynndalco.

- **Stop! Or My Mom Will Sue!**

  Hall v. Smosh Dot Com Inc. dba Smosh; Mythical Entertainment LLC, No. 22-16216 (9th Cir.) (June 30, 2023). Reversing dismissal for lack of Article III standing.

  The question before the Ninth Circuit was whether the owner of a cell phone number listed on the Do-Not-Call Registry has Article III standing to maintain a TCPA claim if she was not the "actual user" of the phone nor the "actual recipient" of text messages. The Ninth Circuit answered yes and reversed the district court's dismissal of the plaintiff's complaint.

  The plaintiff owned the cell phone and placed it on the Do-Not-Call Registry. She allowed her 13-year-old son to use the phone "at times." During one of those times, he opted into receiving text messages from Smosh.com, a sketch comedy video website aimed at teens. Smosh later sent five text messages to the phone her son used, which the plaintiff contends were "irritating, exploitative and invasive." The Ninth Circuit held that the owner and subscriber of a phone number listed on the Do-Not-Call Registry need not also be the "actual user of the phone number" nor the actual recipient of the text messages, and that she had suffered an injury in fact sufficient to confer Article III standing. The court did not consider whether the plaintiff's son's opting in to receive text messages from Smosh was legally sufficient consent under the TCPA, reserving that inquiry for the district court.

- **Large Employer Owes Duty to Safeguard Employees' Personal Information Under Georgia Law**

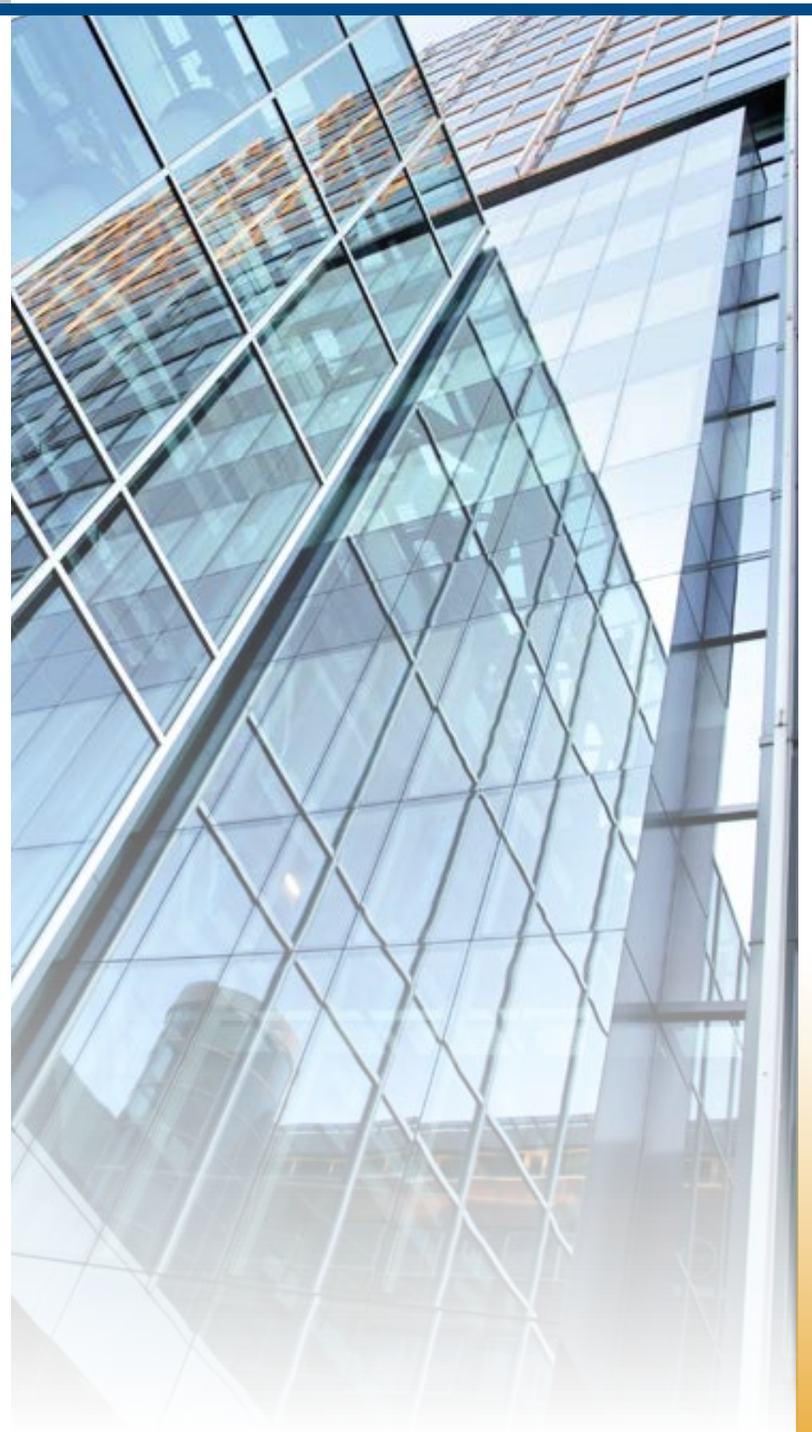
  Ramirez v. The Paradies Shops LLC, No. 22-12853 (11th Cir.) (June 5, 2023). Dismissal affirmed in part and vacated in part.

  Former employee Carlos Ramirez sued a large retail corporation after a cyber-attack resulted in the disclosure of his Social Security number to criminals. The district court dismissed his negligence and breach of implied contract claims under Georgia law. The Eleventh Circuit affirmed the dismissal of the contract claim, holding that the plaintiff could not establish a "meeting of the minds as to" any data protection or retention. But the appellate court reversed the dismissal of the negligence claim. The court determined that, while there was no explicit statutory or common-law duty to safeguard personal information under Georgia law, the state's traditional negligence principles were "flexible enough" to cover Ramirez's allegations. The Eleventh Circuit held that the complaint had plausibly alleged that, as an employer, the defendant owed a special duty of care to

"Be sure you don't get your signals crossed. **Peter Swire** will moderate our seminar "Rationalizing U.S. Cross-Border Data Policy Across the EU, China, and Global CBPRs," co-hosted with the Cross Border Data Forum, in person and online October 4."

Peter Swire

its employees and Ramirez's allegations that the defendant left employees' personal information in an unsecured, internet-accessible database created a foreseeable risk of harm. The court relied on the complaint's allegations about the corporation's size and annual sales revenue to determine that the cyber-attack was foreseeable. ■



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Products Liability

- **Under CAFA, Sixth Circuit Takes Allegations of "A Trial" at Face Value**

  Adams v. 3M Co., No. 23-5232 (6th Cir.) (Apr. 19, 2023). Reversing district court order remanding cases to state court.

  The Sixth Circuit held that two cases filed by Kentucky coal miners, each joining more than 300 plaintiffs, are subject to federal jurisdiction under the Class Action Fairness Act (CAFA) because the complaints implicitly proposed a joint trial. The miners sued 3M and other out-of-state designers and manufacturers of respirators (as well as in-state distributors of those respirators), alleging that they failed to protect their lungs from coal dust. 3M removed the cases to federal court on CAFA, federal question, and diversity grounds. The district court remanded, ruling that the plaintiffs had not intentionally proposed a joint trial.

  The Sixth Circuit reversed. It determined that, consistent with the plain terms of CAFA, the plaintiffs "proposed" to try their co-plaintiffs' claims jointly because both complaints sought a trial by jury and a singular judgment and were predicated on a common question of law or fact. It does not matter that a joint trial may never result (for example, because of a motion to bifurcate or sever certain claims). Jurisdictional rules should be simple, and "[r]equiring district courts to divine counsels' unexpressed intentions and compare different cases' trial-management plans would be anything but." The court also rejected the plaintiffs' additional argument that the remand should be affirmed under CAFA's local controversy exception, holding that the "real target" is out-of-state defendant 3M—not the Kentucky retailers that distributed the respirators.

- **Judge Certifies Colorado Class in Engine Defect Suit**

  White v. General Motors LLC, No. 1:21-cv-00410 (D. Colo.) (May 5, 2023). Judge Sweeney. Granting motion for class certification.

  A Colorado federal judge certified a class of consumers claiming that General Motors breached the implied warranty of merchantability by selling or leasing vehicles with allegedly defective engines. In addition to the usual Rule 23 factor arguments, the defendant argued that the plaintiff and the class lacked standing, pointing to evidence that less than 1% of the vehicles manifested the alleged defect during the warranty period.

  The court rejected that argument, ruling that the plaintiff's alleged overpayment constituted a concrete injury under Article III. Analyzing the commonality and predominance requirements, the court ruled that, at the class certification stage, the plaintiff is not required to produce evidence from a "technical expert" proving a common defect in all class vehicles. Although the court acknowledged that, without a technical expert, the plaintiff would "perhaps" be unable to prove a defect in all class vehicles, the court nonetheless found the plaintiff's evidence sufficient to demonstrate that common questions existed on the engine defect and that common questions predominated. The court also said that it was unnecessary for the plaintiff to present a reliable classwide damages model because individualized damages calculations do not defeat predominance. GM's petition to appeal the court's ruling is currently before the Tenth Circuit. ■

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Settlements

- **Breaking Open the Piggy Bank to Reach a $75 Million Settlement**

  In re Pork Antitrust Litigation, No. 0:18-cv-01776 (D. Minn.) (Apr. 11, 2023). Judge Tunheim. Approving $75 million settlement and awarding attorneys' fees.

  Judge Tunheim approved a settlement involving a class of individuals who purchased pork from the defendants from 2009 until 2021. According to the plaintiffs' allegations, the defendants conspired to stabilize the price and supply of pork in the United States, which resulted in overcharges for pork consumers. Judge Tunheim found that the settlement was fair, reasonable, and adequate because it provided for $75 million in compensation and injunctive relief and did not invite a single objection. The numerosity requirement was easily met because household pork consumption is "nearly ubiquitous." Likewise, the remaining requirements were all satisfied in light of the "common contentions"—namely, the defendants' alleged agreement to "fix, raise, maintain, and stabilize pork prices" and the plaintiffs' overcharges when purchasing pork. In a separate order issued the same day, Judge Tunheim awarded 33.3% of the $75 million settlement fund in attorneys' fees. Among other reasons, Judge Tunheim ruled that the award was proper because the case spanned four years, plaintiffs overcame 22 motions to dismiss, and the parties reviewed millions of pages and took over 100 depositions.

- **Sizeable Class Representative Incentive Awards Scrutinized … but Still Approved**

  Mostajo v. Nationwide Mutual Insurance Co., No. 2:17-cv-00350 (E.D. Cal.) (Apr. 12, 2023). Judge Drozd. Approving $3.8 million settlement and awarding attorneys' fees and class representative incentive awards.

  Judge Drozd approved a settlement involving a class of California claims adjusters who contended the defendant failed to pay for their overtime and accrued vacation. Judge Drozd approved the settlement as fair, reasonable, and adequate, but only after expressing some concern regarding the sizeable incentive awards sought by the two class representatives—$25,000 each, which was "noticeably higher" than the "typical" award, such as $5,000. After inviting the plaintiffs, in his order granting preliminary approval, to provide additional information justifying the proposed incentive awards, Judge Drozd ultimately approved the requested awards based on the hundreds of hours spent by the class representatives attending multiple depositions and assisting class counsel in the five-plus years of litigation.

- **Settlement's Here! Extra, Extra, Read All About It!**

  Sanchez v. Hearst Communications Inc., No. 3:20-cv-05147 (N.D. Cal.) (Apr. 25, 2023). Judge Chhabria. Granting final approval of class settlement.

  The largest distributor of print news subscription products in the San Francisco Bay Area settled a complaint lodged by "newspaper dealers" and "newspaper carriers." The defendant owns and operates the *San Francisco Chronicle* and manages delivery of many other print newspapers such as *The New York Times* and *The Wall Street Journal*. According to the complaint, the defendant misclassified its dealers and carriers as independent contractors, rather than as employees, in violation of California's Labor Code, allegedly failing to adequately compensate the named plaintiffs and class members for all hours worked, rest and recovery periods, and minimum and overtime wages, among other wage-related issues.

  The settlement creates a $950,000 common fund settlement for the class of 56 individuals to resolve their wage-and-hour claims. Under the settlement, the class members will receive an average pre-tax award of over $9,280, named plaintiffs will receive service awards of $15,000, and class counsel will receive over $360,000 in attorneys' fees and costs. In addition to granting final approval of the class settlement, Judge Chhabria dismissed the plaintiffs' claims with prejudice.

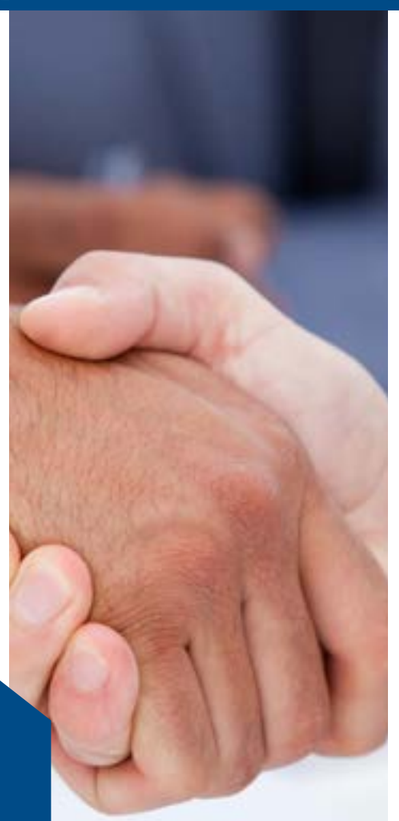
- **Employees Collect After Biometric Timekeeping**

  Wordlaw, et al. v. Enterprise Leasing Company of Chicago, et al., No. 1:20-cv-03200 (E.D. Ill.) (May 8, 2023). Judge Shah. Approving $505,000 settlement.

  An Illinois district judge approved a $505,000 class settlement resolving Biometric Information Privacy Act claims asserted by employees of rental car company Enterprise who claim that the company required them to use a fingerprinting timekeeping system without first obtaining their consent. In its approval order, the district court concluded that class counsel was entitled to $173,000 in attorneys' fees and litigation expenses—roughly one-third of the settlement fund—in light of their substantial work. The district court also found that the services performed by the class representative—which included sitting for two depositions—entitled her to a service award of $12,500.

"Universities are learning the hard way that "Going Online During Covid Is Costing Colleges Millions, And It May Get Worse," **Tery Gonsalves** tells ***Forbes***."

Tery Gonsalves



Court Flushes Objection in Wipes Settlement, Grants Final Approval

Kurtz v. Kimberly-Clark Corporation, No. 1:14-cv-01142 (E.D.N.Y.) (June 12, 2023). Judge Chen. Granting final approval of $20 million settlement.

A New York federal judge granted final approval to a $20 million reversionary, nationwide class settlement in a case alleging that Kimberly-Clark falsely advertised its wipes as flushable, over the objections of a class member (a serial class settlement objector). Among other things, the objector challenged the low claims rate (2%) and argued that the $20 million settlement amount was purely hypothetical because the unclaimed portion of the "made available" fund would revert to Kimberly-Clark. Judge Chen rejected the objector's challenge, reasoning that he could not dispute that class members would be fairly compensated under the financial terms of the settlement and that any unclaimed funds would result from class members failing to accept the settlement offer, not from an inherently deficient offer. Judge Chen also noted that claims-made settlements are not themselves inherently unfair and are regularly permitted, and further emphasized that the objector ignored the risks of non-recovery class members would face if their claims went to trial.

Outrage over Outage Hits Bull's-Eye

In re Robinhood Outage Litigation, No. 3:20-cv-01626 (N.D. Cal.) (June 15, 2023). Approving $9.9 million settlement.

The Northern District of California approved a $9.9 million settlement over Robinhood service outages in March 2020. Robinhood users alleged that they incurred approximately $20 million in losses when Robinhood faced outages on a day that the Dow Jones Industrial Average rose more than 1,294 points. The settlement follows a fight over class certification in which Robinhood argued that some investors' harms were purely speculative.

Overdraft Fee Suit Is Over

Wellington v. Empower Federal Credit Union, et al., No. 5:20-cv-01367 (N.D.N.Y.) (June 27, 2023). Judge Hurd. Granting final approval of $5 million settlement.

Judge Hurd approved a settlement involving claims alleging defendant Empower Federal Credit Union charged overdraft fees and non-sufficient funds fees in breach of its contracts with its members and in violation of Federal Reserve Regulation E's requirements for clear and accurate disclosures of financial institutions' overdraft services. The parties valued the settlement at $5,185,538, composed of $2 million in cash; the defendant's agreement to change its disclosures to members and to stop charging overdraft fees until such time as members opted in using an opt-in form that disclosed the usage of a member's available balance for such fees (resulting in approximately $885,583 in reduced overdraft fees for the credit union's members); and the defendant's agreement to forgive and release any claims it may have to collect any at-issue fees, totaling approximately $2.3 million. The settlement also provided for any residual settlement funds to be paid to one or more public interest organizations determined by the parties following the final approval order. Judge Hurd further approved class counsel's request for $948,812 in attorneys' fees.

NYC Restaurants Tip Out for Failure to Pay Wages and Tips

Maldonado, et al. v. New York Beer Co LLC, et al., No. 1:20-cv-10309 (S.D.N.Y.) (June 28, 2023). Judge Carter. Granting final approval of $1 million settlement.

Judge Carter approved a $1,050,000 settlement resolving claims alleging violations of the Fair Labor Standards Act, the New York Labor Law, and various related regulations based on New York City restaurants' failure to pay wages and tips. Of the $1.05 million settlement amount, one third ($350,000) is to be paid to class counsel for attorneys' fees. The district judge recognized the settlement as fair and reasonable.

Court OKs $100 Million Settlement in Gender Bias Case

McCracken v. Riot Games Inc., No. 18STCV03957 (Cal Super. Ct.) (June 15, 2023). Judge Berle. Granting final approval of $100 million settlement.

A Los Angeles County judge granted final approval of a $100 million settlement to resolve gender bias and pay disparity claims against Riot Games, the creator of the popular online game *League of Legends*, brought on behalf of all current and former female workers. The settlement includes a minimum settlement fund of $80 million, of which $77 million will be distributed to the roughly 1,600 class members and $3 million will be paid to the state of California as Private Attorneys General Act penalties. The final settlement also allocated $8.5 million in attorneys' fees (and $350,000 in litigation expenses) to class counsel, as well as $6.9 million in fees (and $276,409 in litigation expenses) to California's Civil Rights Department, which intervened in the case in 2020. ■

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