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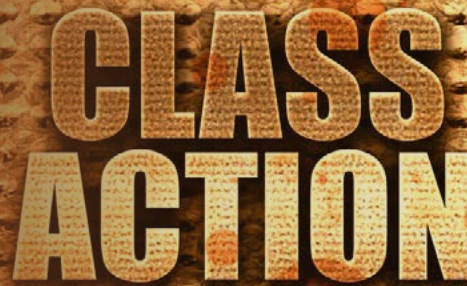

Class Action Roundup

Winter 2018

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Where the (Class) Action Is

Welcome to 2018 and the latest edition of *Roundup* covering significant decisions and settlements from the last quarter of 2017. On the docket this quarter is another slate of cases covering a variety of industries, products, and legal arguments that keep class action practitioners so busy. Consumer Protection and Products Liability cases were the most common in this quarter and dealt with issues that included the pricing of burritos and Super Bowl tickets as well as claims of odors in cars and alleged side effects of pills. Standing issues and the enforceability of arbitration agreements were common themes in these cases.

For the financial industry, notable cases covered issues of labor standards for bank employees and retirement plan participants, overlapping with other common employment issues of age bias and unpaid time while complying with company rules. Major settlements finalized this quarter included the Takata airbag MDL, with four settlements totaling more than $500 million, and a settlement of more than $200 million in an antitrust class action from student athletes over scholarships.

Looking ahead to the first quarter of 2018, we'll feature a summary of the recent *Hyundai* ruling overturning a nationwide class action settlement in an MDL on choice-of-law issues and establishing a "heightened need" to undertake choice of law analysis in the settlement context. This ruling could have far-reaching implications in the class action world. Another case worth watching will be an upcoming argument in the Ninth Circuit on a core *Spokeo* issue—more to follow when the decision comes in on that one.

Thank you for your continued interest in *Class Action Roundup*. As always, we appreciate your feedback and hope you will reach out with your comments or questions.

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

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Antitrust/RICO

Rail Shippers' Damages Model Runs Off the Tracks

In re Rail Freight Fuel Surcharge Antitrust Litigation, No. 1:07-mc-00489 (D.D.C.) (Nov. 13, 2017). Judge Friedman. Denying class certification.

Judge Friedman denied the direct purchaser rail shippers' motion for class certification, holding that the rail shippers could not satisfy Rule 23(b)(3)'s predominance requirement because their damages model contained too many uninjured shippers. Judge Friedman explained that to satisfy the predominance requirement at the class certification stage, the rail shippers had to show that "all or virtually all" of the class members' injuries can be proved through common evidence. Because 12.7 percent of the members were uninjured, Judge Friedman held that the rail shippers failed to meet that burden.

Uninjured Class Members Don't Hurt Plaintiffs' Bid for Class Certification

In re Asacol Antitrust Litigation, No. 1:15-cv-12730 (D. Mass.) (Nov. 9, 2017). Judge Casper. Granting class certification.

Purchasers of ulcerative colitis drugs moved for class certification. The defendant drug manufacturers argued that inclusion of potential uninjured purchasers in the proposed class precluded class certification because (1) there was no administratively feasible mechanism for distinguishing between injured and uninjured class members; and (2) the presence of uninjured class members meant that individual issues predominated. Judge Casper rejected both arguments because the purchasers could use affidavits and supporting documentation at the claims stage to distinguish between injured and uninjured class members. And, according to Judge Casper, since just 10 percent of class members were uninjured, individual issues did not predominate.

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Get smart: Join us for the Alston & Bird 2018 Class Action and Multidistrict Litigation (MDL) CLE Series on March 7 at our Atlanta office.

Common Corporate Parent Doesn't Provide Basis for Numerosity Challenge

In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation, No. 1:14-md-02503 (D. Mass.) (Oct. 16, 2017). Judge Casper. Granting class certification.

Direct purchasers of acne medication proposed a class of 48 members and argued that joinder was impracticable due to the size of the class and geographic dispersion of the members. The defendant drug manufacturers took issue with the purchasers' calculation of class size, contending that limiting class members to their common corporate parent resulted in a class of less than 40, which failed to satisfy the numerosity requirement. Judge Casper rejected the drug manufacturers' argument, finding no evidence that the plaintiffs were artificially inflating the class size and holding that the plaintiffs should be considered distinct entities for class certification purposes even though they share a common parent. ■

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Banking, Financial Services & Insurance

On Second Thought…

Ambulatory Surgical Center of Somerset, et al. v. Allstate Fire Casualty Insurance Co., No. 3:16-cv-05378 (D. N.J.) (Oct. 5, 2017). Judge Thompson. Reconsidering denial of motion to compel arbitration and reversing.

In a class action brought by a hospital and car accident victims asserting claims for personal injury protection (PIP) coverage benefits for medical bills, Allstate moved to compel arbitration under the New Jersey Automobile Insurance Cost Reduction Act (AICRA) and New Jersey's "deemer statute." After initially denying the motion, Judge Thompson reversed herself and held that the broad arbitration language in the AICRA extended to the deemer statute. She explained that her prior decision was "misplaced," failed to consider the impact of amendments to the PIP statute that allow insurers to force arbitration, and to deny arbitration would be "unjust and inconsistent with the scheme set forth in the New Jersey legislature."

Insurer Not Required to Indemnify Class Action Under California Labor Code

The Talbots Inc. v. AIG Specialty Insurance Co., No. 1:17-cv-11107 (D. Mass.) (Sept. 29, 2017). Judge Stearns. Granting motion to dismiss.

A Massachusetts district court held that AIG had no duty to indemnify Talbots for a putative class action alleging labor violations arising from "a uniform policy and systematic scheme of wage abuse against" their employees. The plain language of the insurance policy excluded claims brought under either the Fair Labor Standards Act (FLSA) or the California Labor Code, and all of the claims were "either directly tied to, or a natural outgrowth of, the company's employment and labor practices."

CLASS-IFIED INFORMATION

Robert Long

Nanci Weissgold

Hillary Li

Gather "D&O Insurance Coverage Tips for Financial Institutions," winner of a 2018 Burton Award, from Robert Long, Nanci Weissgold, and Hillary Li, published in *Law360*.

Mortgage Servicer Finds Reporting Mortgage Interest to Be Taxing

Rovai v. Select Portfolio Servicing Inc., No. 5:14-cv-01738 (S.D. Cal.) (Oct. 18, 2017). Judge Bashant. Denying motion to dismiss.

Judge Bashant denied defendant Select Portfolio Servicing's (SPS) motion to dismiss the plaintiff's amended complaint for lack of subject-matter jurisdiction. SPS was the servicer of Rovai's mortgage loan. She filed suit alleging that the company sent her tax forms in 2011 and 2012 that incorrectly reported the amount of mortgage interest she paid to SPS. She alleged that her reliance on the incorrect forms caused her to file inaccurate

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tax returns and that she received smaller tax deductions as a result. SPS moved to dismiss, arguing that Rovai did not have Article III standing due to her failure to plead both injury-in-fact and causation. The court disagreed and held that allegations of receiving smaller tax deductions in 2011 and 2012 were sufficient to show economic injury, and those injuries were fairly traceable to SPS's failure to provide correct tax forms.

Judge Grants Class Certification to Retirement Plan Participants

Leber v. The Citigroup 401(k) Plan Investment Committee, et al., No. 1:07-cv-09329 (S.D.N.Y.) (Nov. 27, 2017). Judge Stein. Granting motion for class certification.

Judge Stein certified a class of Citigroup 401(k) plan participants alleging that the committees responsible for overseeing the plan breached their fiduciary duties of prudence and loyalty by favoring certain investment options that had higher management fees than comparable alternatives. The court rejected an argument that the named plaintiffs did not have standing to assert claims related to funds they did not invest in, and went on to find that the Rule 23 requirements were satisfied. The court held that common questions predominated, such as whether Citibank failed to prudently and loyally monitor the plan's investments, and that the plaintiffs' claims were typical of those of the class because Citibank's misconduct affected each of those funds in the same way.

Seventh Circuit Declines Relief to Elderly Insureds

Toulon v. Continental Casualty Co., No. 16-1510 (7th Cir.) (Dec. 14, 2017). Affirming dismissal.

Sophia Toulon argued that Continental Casualty had engaged in a scheme to lure elderly people into purchasing long-term care insurance by offering low premiums and not disclosing that premiums would substantially increase when the elderly insureds would be likely to need the coverage. Unfortunately for Toulon, neither the district court nor the Seventh Circuit was convinced that any of Continental's statements or actions were fraud since the policy expressly conferred upon Continental the right to increase premiums. ■

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Consumer Protection

GMO or Non-GMO: A Burrito Remains a Burrito

Reilly v. Chipotle Mexican Grill Inc., No. 16-17461 (11th Cir.) (Oct. 4, 2017). Affirming summary judgment on false advertising claims.

The Eleventh Circuit rejected a customer's claim that Chipotle falsely advertised its burritos as non-GMO and that Chipotle's allegedly GMO burritos were worth less than non-GMO burritos. The court explained that the market value of Chipotle's burritos did not change after Chipotle advertised its ingredients as non-GMO and found that the plaintiff paid the same for her Chipotle orders before and after the advertising campaign began. Any alleged damages would be speculative.

Third Circuit Refuses to Punt on NFL Ticket Price Dispute

Finkelman v. National Football League, No. 16-4087 (3rd Cir.) (Dec. 15, 2017). Reversing dismissal.

In a case alleging that the NFL unlawfully withheld Super Bowl tickets from consumers and increased prices on secondary ticket markets in violation of New Jersey's Ticket Law, the Third Circuit held that the plaintiff's additional factual allegations showed injury-in-fact sufficient to establish standing and pursue his claim. The Third Circuit had affirmed a prior dismissal for lack of standing. But this second time around the plaintiff presented economic evidence that the NFL's withholding of Super Bowl tickets actually increased the prices he paid on the secondary market.

Private Phone Company ≠ State Actor for First Amendment

Roberts v. AT&T Mobility, No. 16-16915 (9th Cir.) (Dec. 11, 2017). Affirming grant of motion to compel arbitration.

The Ninth Circuit ordered arbitration of Marcus Roberts and his consumer protection and false advertising claims against AT&T, rejecting his inventive argument that forcing arbitration would violate the First Amendment. The court recognized that AT&T's alleged conduct could not be fairly attributed to the state and, therefore, could not constitute state action needed for a First Amendment claim. The Ninth Circuit also rejected the plaintiffs' novel attempt to use the Federal Arbitration Act to label AT&T as a "state actor" under the "encouragement" test.

CLASS-IFIED INFORMATION

Bo Phillips

Tune in to *Comcast v. Behrens* with Bo Phillips in the webinar Classwide Damage Models in Misleading and False Advertising Consumer Class Actions.

Fans Strike Out in Lawsuit Against MLB over Protective Netting (But Get What They Want)

Payne v. Major League Baseball, No. 16-17131 (9th Cir.) (Dec. 8, 2017). Affirming dismissal.

Gail Payne and Stephanie Smith believe that major league ballparks lack sufficient netting to protect spectators from being struck by foul balls, and they filed suit against Major League Baseball to demand change. The Ninth Circuit held that there was no injury-in-fact for Article III standing because neither Payne nor Smith had not shown a "certainly impending" or

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"substantial risk" of future injury from a foul ball. Payne's chances of being hit by a foul ball in her chosen sections topped out at roughly 0.0027% per game, and Smith admitted she would never attend another game without increased netting. The court also rejected the argument that MLB's alleged lack of adequate safety precautions constituted "an invasion of a legally protected interest" for ticketholders.

Update: In a move unrelated to this case, the MLB announced on February 1, 2018, that all 30 teams will expand the protective netting at their ballparks for the 2018 season.

Slinging Advertisements Claim Falls Short

Heskiaoff v. Sling Media Inc., No. 17-1094 (2nd Cir.) (Nov. 22, 2017). Affirming dismissal.

Michael Heskiaoff complained that his Slingbox media player disseminated advertisements without advance warning in violation of New York consumer protection law. The Second Circuit agreed with the trial court that Heskiaoff did not meet his burden of showing that Sling engaged in a deceptive act or practice that was likely to mislead a reasonable customer. Not only did he fail to allege a deceptive act or practice, he also failed to identify any affirmative statement Sling made about advertising. On the contrary, nothing in the complaint indicated why a reasonable consumer would believe that Slingbox was, or would ever be, an ad-free product.

Flushable Wipes Create a Stink on Standing Question

Davidson v. Kimberly-Clark Corp., No. 15-16173 (9th Cir.) (Oct. 20, 2017). Reversing dismissal.

Professing concern about the potential impact of flushing pre-moistened cleansing wipes down the toilet, Jennifer Davidson sought damages and injunctive relief against Kimberly-Clark, claiming that it falsely labeled and advertised four types of wipes as flushable. The Ninth Circuit allowed her to proceed with her claims, holding that Davidson was only required to prove an economic injury (i.e., paying a premium for flushable cleansing wipes) and was not required to allege damage to her plumbing or pipes. Davidson was further allowed to continue pursuing her injunctive relief claims given her allegations of an impending risk of being further subjected to Kimberly-Clark's allegedly false advertising.

State Consumers Get a Health Boost When Judge Certifies Class

Farar v. Bayer AG, No. 3:14-cv-04601 (N.D. Cal.) (Nov. 15, 2017). Judge Orrick. Granting in part and denying in part motion for class certification and denying motion for summary judgment.

A California federal judge certified several state classes of consumers challenging Bayer AG's vitamin labels. The judge, however, denied the motion for a nationwide class certification of consumers. The state classes were united by common questions, unlike the nationwide class whose predominance requirements were not met. Judge Orrick also denied Bayer's motion for summary judgment, holding that there were disputed material facts, such as how beneficial multivitamins are to most Americans.

The plaintiff had presented expert evidence that the typical American derives *no* benefit from Bayer's products, which the court found was sufficient to create a genuine issue of material fact. ■

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Environmental

Residents Run Right Through Statute of Limitations Hurdle

Cole v. Marathon Oil Corp., No. 16-2660 (6th Cir.) (Oct. 26, 2017). Reversing and remanding the district court's dismissal of proposed class action.

Dealing a blow to Marathon Petroleum, the Sixth Circuit revived Detroit residents' nuisance and negligence claims. The residents allege that Marathon's refinery, which started operating in 1930, was discharging and emitting—and continues to discharge and emit—hazardous substances, noise, odors, and vapors that cause them personal injury and property damages.

The district court had dismissed the proposed class action's claims because they were barred by Michigan's three-year statute of limitations. But the Sixth Circuit unanimously reversed. The panel held each discharge alleged in the complaint gave rise to a separate claim. Because the complaint alleged the refinery's past *and* present conduct caused violations, claims based on discharges from the past three years were timely.

Whether each alleged violation is a separate claim with a separate time of accrual for the statute of limitations varies by state. For those states, like Michigan, where each violation does constitute a separate claim, *Cole* now serves a roadmap to defang the statute of limitations. ■

CLASS-IFIED INFORMATION

Jeffrey Dintzer

Matt Wickersham

Jeffrey Dintzer and Matt Wickersham will dish some dirt on "PFAS – Not Your Typical Emerging Contaminant" at LACBA's 32nd Annual Environmental Law Spring Super Symposium, April 13 in Los Angeles.

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Labor & Employment

Converse Kicks Out Bag Check Class Action

Eric Chavez v. Converse Inc., No. 5:15-cv-03746 (N.D. Cal.) (Oct. 11, 2017). Judge Cousins. Granting summary judgment.

The famous shoe company successfully defeated a California class action lawsuit claiming that non-exempt employees were not being paid for time spent during mandatory exit inspections at the end of the employees' shifts.

The district court accepted the employer's defense that the duration of the mandatory bag checks was de minimus – i.e., any alleged off-the-clock time amounted to fewer than 10 minutes per day (the standard threshold for de minimus). The court noted that the California Supreme Court was reviewing the California de minimus doctrine. The district court ruled that, despite that uncertainty, current Ninth Circuit precedent required applying the de minimus doctrine to California state-law wage claims.

Going the Distance: Bank Employee Class Certified to Pursue Mileage Expenses

Gina McLeod v. Bank of America N.A., No. 3:16-cv-03294 (N.D. Cal.) (Dec. 13, 2017). Judge Chen. Granting class certification and appointing class counsel.

A California federal judge recently certified a class of approximately 1,900 Bank of America loan officers employed from May 2012 to the present. The putative class alleges that the bank systematically failed to reimburse loan officers for work-related mileage expenses in their personal vehicles in violation of California law. The court agreed, noting that the evidence supports a "widespread practice" of the bank's failure to reimburse given that only 30 percent of class members actually received reimbursement during the class period. ■

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Isabella Lee

Whet your appetite for the gala and join Isabella Lee on the Labor & Employment/ Immigration panel at the 2018 NAPABA Southeast Regional Conference, April 12–13 in Atlanta.

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Privacy & Data Security

Plaintiff Remains Scoreless in ESPN Video Privacy Appeal

Eichenberger v. ESPN, No. 15-35449 (9th Cir.) (Nov. 29, 2017). Affirming dismissal.

In the continuing development of *Spokeo* issues, the Ninth Circuit joined the Eleventh and Third Circuits in holding that a plaintiff need not allege harm from the disclosure of personally identifiable information and his or her video-viewing history to possess Article III standing to prosecute a claim under the Video Privacy Protection Act of 1988. Nevertheless, the Ninth Circuit affirmed the dismissal of this particular case because Eichenberger's Roku device serial number and video-viewing activity did not constitute personally identifiable information. That information, on its own, could not identify an individual unless combined with other information in the receiving party's possession.

Plaintiffs Cannot Save Face in Biometric Privacy Appeal

Vigil v. Take-Two Interactive Software Inc., No. 17-303 (2nd Cir.) (Nov. 21, 2017). Affirming dismissal in part and vacating dismissal in part.

The district court dismissed, for lack of Article III standing and failure to state a claim, a complaint brought by video gamers alleging that the creators of the NBA 2K15 video game violated the Illinois Biometric Information Privacy Act by collecting face scans and using them as avatars during game play. The Second Circuit held that the plaintiffs' allegations that the defendants' transmission of their biometric data over the unencrypted "open, commercial Internet" failed to confer standing because they failed to allege that the purported statutory violations presented a material risk that third parties would improperly access their biometric data. Therefore, the gamers failed to allege a "risk of real harm" under *Spokeo* and lacked Article III standing.

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Cari Dawson

Cari Dawson reminds you that "You Can't Please All of the People – or – How to Settle Class Actions" at the 2018 ABA Litigation Section Annual Conference, May 2–4 in San Diego.

Seventh Circuit Cites Driver for Late Claim, Affirming Dismissal of Suit

Collins v. Village of Palatine, Illinois, No. 16-3395 (7th Cir.) (Nov. 16, 2017). Affirming dismissal.

The Seventh Circuit agreed with the district court that the plaintiff's claim under the Driver's Privacy Protection Act (DPPA), brought nearly nine years after an officer left a traffic citation containing personal information about the plaintiff under his windshield wiper blades, should be dismissed as time-barred by the DPPA's four-year statute of limitations period. While the subsequent filing of a class-action complaint tolled the limitations period for everyone in the proposed class, including the plaintiff, the statute of limitations resumed when the class action was dismissed shortly after it was filed and before class certification—regardless of whether dismissed with or without prejudice. Therefore, the DPPA claim in this case had long expired.

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Surveillance Lawsuit Disappears on Mootness Grounds

Klayman v. National Security Agency, Nos. 1:13-cv-00851 & -00881 (D.D.C.) (Nov. 21, 2017). Judge Leon. Granting motion to dismiss with prejudice.

The D.C. district court dismissed two lawsuits from 2013 alleging that the government violated the plaintiffs' First, Fourth, and Fifth Amendment rights by engaging in a bulk metadata gathering program exposed by Edward Snowden, concluding that a 2015 law barring the bulk of the alleged metadata collection mooted the plaintiffs' claims for declaratory and prospective injunctive relief. The 2015 law—the USA FREEDOM Act—removed a justiciable controversy, despite the plaintiffs' desire to reach discovery, because it not only barred the conduct but prevented the Foreign Intelligence Surveillance Court from accepting any future requests to restart the program.

Fax Recipients Can't Send Claims Together

Alpha Tech Pet Inc. v. LaGasse LLC, Nos. 1:16-cv-00513 & -04321 (N.D. Ill.) (Nov. 3, 2017). Judge Durkin. Granting motion to deny class certification.

Pet supply company Alpha Tech Pet Inc. lost its bid for class certification in its Telephone Consumer Protection Act (TCPA) lawsuit over unsolicited fax advertisements after an Illinois federal district judge concluded that it would be too difficult to determine which class members actually solicited the faxes. Judge Durkin agreed with LaGasse that the TCPA covers only unsolicited fax advertisements and denied class certification after the defendant put forth evidence showing that some putative class members actually consented to the faxes. ■

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The streak continues – Alston & Bird named to *Fortune's* "100 Best Companies to Work For®" list for the 19th consecutive year.

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Products Liability

Toyota Buyers Raise a Stink over Camrys

Salas v. Toyota Motor Sales USA Inc., No. 2:15-cv-08629 (C.D. Cal.) (Sept. 29, 2017). Judge Olguin. Granting in part and denying in part motion for summary judgment.

A California federal judge denied most of Toyota's summary judgment bid to escape proposed class action claims that the automaker concealed a defect in its Camry models that emit a foul odor after developing mold.

The judge determined that there were triable issues of fact on the design defect claim based on the plaintiffs' engineering expert report, which stated that the design of the HVAC system in the subject vehicles "lack[s] efficient drainage and contain[s] nooks and crevices that form ideal habitats for biological matter growth." Further, evidence that Toyota knew about the defect but did not recall the vehicles was sufficient enough for fraud claims under the California Consumer Legal Remedies Act. The court also ruled that the car did not have to become unusable for plaintiffs to proceed on a breach of implied warranty claim.

Hard Pill to Swallow: *Microsoft* Ruling Prescribes Decertification for Cymbalta Labeling Suit

Strafford v. Eli Lilly & Co., No. 15-56808 (9th Cir.) (Oct. 12, 2017). Granting motion to dismiss appeal of district court's order denying class certification.

Applying the U.S. Supreme Court's recent decision barring litigant-created appellate jurisdiction (*Microsoft Corp. v. Baker*), the Ninth Circuit dismissed an appeal of a putative class action brought by three consumers alleging that Eli Lilly & Co. hid the magnitude of withdrawal symptoms for its antidepressant drug Cymbalta. The appellate court lacked jurisdiction over the case because the plaintiffs voluntarily dismissed their cases after they were denied class certification in an attempt to obtain appealable final orders. The Ninth Circuit applied the Supreme Court's holding that such tactics are impermissible because it "invite[s] protracted litigation and piecemeal appeals."

CLASS-IFIED INFORMATION

Andy Tuck

A brave new world or *plus ça change*? Learn more when Andy Tuck moderates the panel "The Year in Review – Cases, Institutional Developments, Politics" at Global Arbitration Review Live Atlanta on March 6.

Court Puts Honda Nationwide Class Action in Park

Miles v. American Honda Motor Co., No. 1:17-cv-04423 (N.D. Ill.) (Oct. 19, 2017). Judge Gettleman. Granting in part motion to dismiss and to strike.

An Illinois federal judge struck allegations seeking a nationwide class of consumers alleging that the interiors of their Honda CR-V sport utility vehicles occasionally smelled like an "open pool of gasoline." Judge Gettleman reasoned that "applying the warranty, unjust enrichment and misrepresentation laws of 50 different states, or even the 4 states that the named plaintiffs represent, is unmanageable on a class-wide basis because those state laws may conflict in material ways." However, the court allowed

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subclasses for Illinois, Indiana, Maryland, and Wisconsin to proceed, provided that the class definitions are limited to people who bought or leased their vehicles in those states. Honda also sought dismissal of the unjust enrichment claims because none of the subclass states recognize that cause of action where a detailed contract governs the transaction. The court determined that the unjust enrichment claims remained viable because they were based on the same conduct underlying the consumer fraud claims, such as failure to disclose and failure to warn.

Court Grants Class Certification in Case of False Advertising for Supplements

Racies v. Quincy Bioscience LLC, No. 4:15-cv-00292 (N.D. Cal.) (Dec. 15, 2017). Judge Gilliam. Granting motion for class certification.

A California federal judge certified a class of California consumers of dietary supplements who alleged that Quincy Bioscience falsely represented that the supplements improved memory and brain function. Judge Gilliam approved class certification for three Quincy Bioscience supplements but excluded two of the company's other supplements due to a delay in the motion to add them to the case. The court noted that because the supplements are "not marketed for uses other than improving brain health and memory, it follows that representations about these purported benefits were a 'substantial factor' in Plaintiff's—and all consumers'—purchasing decision."

Alleged Touchscreen Malfunctions Not Enough for a Nationwide Class

Rasnic v. FCA US LLC, No. 2:17-cv-02064 (D. Kan.) (Dec. 15, 2017). Judge Vratil. Granting in part and denying in part motion to strike and motion to dismiss.

A Kansas federal judge dismissed several claims in a class action alleging that touchscreen dashboards in some Fiat Chrysler vehicles shut down, leaving drivers with no ability to control the radio, temperature, or internal GPS system and instead left them with flashing lights that create a safety hazard. The court also dismissed nationwide class allegations because the differences in state laws would create "manageability concerns prohibiting class certification," but found that car owners in Kansas sufficiently pled claims for breach of state and federal warranty laws. Judge Vratil struck claims for misrepresentation and unequal or deceptive bargaining.

Motorists Hit a Red Light for Class Action Alleging Clutch Failure in Mazdas

Gonzalez v. Mazda Motor Corp., No. 3:16-cv-02087 (N.D. Cal.) (Dec. 18, 2017). Judge Chesney. Granting motions to strike and dismiss.

A California federal judge granted Mazda's motion to dismiss certain claims brought by Florida and North Carolina drivers in a proposed class action regarding an alleged clutch failure. The drivers claimed that Mazda violated the states' deceptive and unfair trade practices laws by failing to disclose that some models contained the defect. The court, however, held that the dealers' conduct was not the same as the automaker's conduct; therefore, there was no active and willful concealment on the part of Mazda that led consumers to purchase the vehicles. ■

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Securities

Aveo Investors Win Class Certification in Pharmaceutical Row

In re Aveo Pharmaceuticals Inc. Securities Litigation, No. 1:13-cv-11157 (D. Mass.) (Nov. 14, 2017). Judge Capser. Granting class certification.

A Massachusetts federal district court granted class certification to a group of investors in Aveo Pharmaceuticals. The class alleges that Aveo received a recommendation from the FDA to conduct new trials of the drug Tivopath because of toxicity concerns, yet Aveo hid this information from investors and expressed confidence in the drug. Judge Casper determined that the investors satisfied typicality because all members of the class purchased stock at an inflated price and were later harmed when the company's material omissions surfaced.

SeaWorld Investors Get Class Certification in "Blackfish" Suit

Baker, et al. v. SeaWorld Entertainment Inc., et al., No. 3:14-cv-02129 (S.D. Cal.) (Nov. 29, 2017). Judge Anello. Granting class certification.

A California federal court certified a class of investors bringing a stock-drop suit alleging that SeaWorld Entertainment Inc. intentionally concealed that the popular documentary *Blackfish* caused attendance to drop at SeaWorld parks. *Blackfish* premiered in 2013 and highlights problems within the seapark industry. The plaintiffs claimed that SeaWorld concealed this connection in its initial public offering. Judge Anello rejected SeaWorld's arguments that the two lead plaintiffs did not satisfy the typicality requirement of class certification. Additionally, the judge found that the plaintiffs' proposed damages model is sufficiently linked to their theory of liability, and SeaWorld has not "sever[ed] the link between the alleged misrepresentation and the price received (or paid) by plaintiffs."

CLASS-IFIED INFORMATION

Eli Corbett

Eli Corbett breaks out her crystal ball for "Regulatory Update: Examining New Initiatives and Predicting the Future" at the ACI Women Leaders in Financial Services Law & Compliance conference May 9–11 in New York.

Mutual Fund Investors Denied Second Opportunity for Class Certification

Mark Youngers v. Virtus Investment Partners Inc., et al., No. 1:15-cv-08262 (S.D.N.Y.) (Dec. 4, 2017). Judge Pauley. Denying request to amend complaint.

Last year, Virtus Investment Partners settled with the U.S. Securities and Exchange Commission for offering an investment strategy without disclosing that its performance record was hypothetical or backtested. One group of investors won class certification, but the Youngers group was denied certification because that group was not entitled to the presumption that they relied on the misstatement at issue. Several months later, Judge Pauley rejected Youngers's request to amend his complaint because the delay "wasted the parties' and the court's resources," an amendment after both fact and expert discovery had closed "would unduly prejudice defendants," and amending the suit would not change the outcome of their first motion for class certification. ■

ALSTON & BIRD

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Settlements

Slam-Dunk Settlement for Student Athletes

In re NCAA Grant-in-Aid Cap Antitrust Litigation, No. 4:14-md-02541 (N.D. Cal.) (Dec. 6, 2017). Judge Wilken. Granting final approval of $208 million settlement.

Judge Wilken granted final approval of a $208 million settlement in an antitrust class action involving claims that the NCAA and several athletic conferences deprived student athletes of the full cost of attendance by way of anticompetitive caps on scholarships. The average recovery for a class member that played a college sport for four years was approximately $6,000, sent in the form of a check with no claim form required and no right of reversion to the defendants—which the court commended as an exceptional result for the class. The settlement also awarded $41 million in attorneys' fees and $3 million in expenses and costs.

Green Light Given to Four Automakers' $553 Million Exit from Takata Airbag Litigation

In re Takata Airbag Products Liability Litigation, No. 1:15-md-02599 (S.D. Fla.) (Nov. 1, 2017). Judge Moreno. Granting final approval of four settlements totaling $553 million.

Upon final approval of settlements totaling $553 million, Toyota, BMW, Subaru, and Mazda recently exited this massive multidistrict litigation involving vehicles equipped with defective airbags manufactured by Takata. The final orders released claims by classes of vehicle consumers and dismissed claims of economic loss against the four automakers. Class counsel argued that, when accounting for extended warranties on replacement airbags, the value of the combined settlements increased from $553 million to a total value of $741 million. Although the court made no finding on the total value of the settlements, it nonetheless approved $166 million in attorneys' fees for class counsel, which represented close to 30% of the total payments.

CLASS-IFIED INFORMATION

Keep your eyes peeled for our next CLE in Dallas this fall!

$60 Million Pay-for-Delay Antitrust Settlement Receives Final Approval 16 Years After Suit Started

In re K-Dur Antitrust Litigation, No. 2:01-cv-01652 (D.N.J.) (Oct. 5, 2017). Judge Chesler. Granting final approval of $60 million settlement.

Issuing final approval ending an antitrust action that began in 2001, Judge Chesler's sign-off on a $60 million settlement agreement resolved claims of a pay-for-delay scheme involving the potassium supplement K-Dur and generic versions of the drug manufactured by Upsher-Smith (later acquired by Merck & Co). The class of K-Dur purchasers alleged that the defendant manufacturers were paid to delay their release of generic versions of K-Dur as part of a prior reverse-payment settlement with the drug's brand-name manufacturer. The delayed release of the generic versions may have artificially inflated prices for brand name K-Dur between 1998 and 2001, causing damages of up to $189 million. Drawing no objections from class members, the settlement included attorneys' fees totaling more than $20 million, plus $3 million in costs and expenses.

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30 Percent Attorneys' Fees Awarded over Objections

Boise v. Ace American Insurance Company, No. 1:15-cv-21264 (S.D. Fla.) (Oct. 18, 2017). Judge Cooke. Granting final approval of settlement.

Judge Cooke approved a $9.76 million settlement in a TCPA case claiming that Ace American Insurance placed calls to numbers on the Do Not Call Registry. The settlement also included attorneys' fees of $2.93 million (30 percent of the settlement fund), as well as costs of $151,714.26, to be disbursed from the settlement fund. Judge Cooke approved the award of 30 percent attorneys' fees despite receiving objections from class members, who urged the court to award the typical Eleventh Circuit benchmark of 25 percent. Judge Cooke determined that 30 percent was "fair and reasonable in the circumstances of this case" and "consistent with similar TCPA class settlements."

Something for Nothing? Court Approves $2 Million in Fees Despite No Award of Damages

In re Frito-Lay North America Inc. All Natural Litigation, No. 1:12-md-02413 (E.D.N.Y.) (Nov. 14, 2017). Judge Mauskopf. Granting final approval of settlement.

Judge Mauskopf signed off on a settlement resolving a class action alleging that Frito-Lay deceptively labeled food products as "all natural" when they were actually made with ingredients containing genetically modified organisms (GMOs). Pursuant to the settlement, Frito-Lay removed its "Made with All Natural Ingredients" label from the products at issue and agreed not to label the products as "natural" if they continued to contain GMOs. The settlement did not provide for any award of damages to the class members. Nevertheless, in light of the "substantial value" of the injunctive relief, Judge Mauskopf awarded more than $2 million in attorneys' fees and expenses, as well as $17,500 in incentive awards for the class representatives.

Coffee Company Grounded

In re: Kristie Farnham v. Caribou Coffee Company, No. 3:16-cv-00295 (W.D. Wisc.) (Nov. 27, 2017). Judge Conley. Granting final approval of settlement.

Judge Conley approved a settlement in which Caribou Coffee agreed to pay $8.5 million and ground itself from text message marketing. The agreement settles claims between Caribou and a proposed class of consumers who received daily, automated, unsolicited text messages in violation of the TCPA. Each class member will receive roughly $200 from the settlement, and Caribou Coffee will implement a TCPA compliance program on top of ceasing its text message marketing program.

Two Percent Enough for Preliminary Approval

In re: Dakota Medical Inc. v. RehabCare Group Inc., No. 1:14-cv-02081 (E.D. Cal.) (Sept. 21, 2017). Judge Drozd. Granting final approval of settlement.

Judge Drozd approved settlement and certification of a settlement class in a TCPA action involving junk faxes sent to long-term health care facilities, even though the proposed settlement only amounted to 2 percent of total liability. The plaintiff sued both Cannon & Associates, who orchestrated the junk fax campaign, and its former parent, RehabCare Group. Although Judge Drozd recognized the "low settlement amount," he accepted the plaintiff fax recipients' argument that they would have had a difficult time proving liability against RehabCare Group. The plaintiffs were only proceeding on a vicarious liability theory against RehabCare Group. And although they had a strong case against Cannon, any sizable judgment would likely have been uncollectable from Cannon.

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Delta Employees Agree to Settle Wage and Hour Dispute

In re: Reynaldo Lopez, et al. v. Delta Air Lines Inc., et al., No. 2:15-cv-07302 (C.D. Cal.) (Nov. 30, 2017). Judge Wilson. Approving $4.25 million settlement.

A $4.25 million settlement has been approved by a California federal court to settle wage-and-hour claims brought by a class of approximately 3,400 employees of Delta Air Lines Inc. against the airline.

In 2015, a class of non-exempt Delta employees who worked at Los Angeles International Airport in customer services capacities sued Delta, alleging that the airline maintained an unlawful meal and rest period policy, that it shorted workers by paying them only for the time they were scheduled to work rather than all of the time they actually worked, that it failed to pay overtime, and that it failed to reimburse mandatory work-related items from third-party vendors such as cellphones. Judge Wilson granted class certification on the issue of whether Delta improperly excluded certain kinds of compensation when calculating the employees' regular rate of pay for overtime purposes. The other claims—for missed meal and rest breaks, unpaid wages, and expense reimbursements—were not certified.

Nonetheless, the plaintiffs moved for the court to approve a class action settlement that would compensate the class members for their overtime claims, as well as the non-certified meal/rest breaks, unpaid wages, and expense reimbursement claims. Delta filed a notice of non-opposition to the motion. Judge Wilson granted the plaintiff's motion for approval of the $4.25 million settlement.

Seagate to Pay Out $5.7 Million to Current and Former Employees Affected by Data Phishing

Castillo, et al. v. Seagate Technology LLC, No. 3:16-cv-01958 (N.D. Cal.) (Oct. 19, 2017) Judge Seeborg. Granting preliminary approval of class action settlement and approving notice program.

A California federal judge gave initial approval of the parties' class action settlement resolving litigation of a 2016 data phishing incident affecting approximately 12,000 current and former employees of Seagate Technology LLC. The plaintiffs originally brought suit in 2016 alleging that a Seagate employee had fallen victim to a phishing scam and had forwarded the prior year's W-2 data to cybercriminals, who then used the information to file fraudulent tax returns. Judge Seeborg found that the proposed settlement agreement "fulfills the purposes and objectives of the class action, and provides beneficial relief to the settlement class," which is composed of all employees whose W-2 information was involved in the data phishing incident as well as qualifying spouses and adult dependents whose information was also involved. According to the terms of the settlement, class members and affected family members who were listed on W-2 tax forms stolen by hackers would get two years of identity theft protection and up to $3,500 for out-of-pocket costs caused by the breach.

Federal Court Preliminarily OK's $6.5 Million Settlement for Criminal Screening Policy

Little, et al. v. Washington Metropolitan Area Transit Authority, et al., No. 1:14-cv-01289 (D.D.C.) (Dec. 7, 2017). Judge Collyer. Granting preliminary approval.

A Washington D.C. district court granted preliminary approval to a $6.5 million settlement in a case where the named plaintiffs allege that WMATA's implementation of a criminal screening policy directly impacted them by improperly disqualifying them from employment based on criminal history that was not related or relevant to their job. The court previously refused to certify a proposed class that would have included all African American individuals who were terminated, suspended, or denied employment since the policy was implemented, but instead certified three separate classes that are included in the settlement, each of which is defined to include persons who were disqualified, suspended, or terminated as the result of a specific appendix in the challenged policy. The settlement agreement creates a $6.5 million settlement fund for the class members, awards nine class representatives a total of $62,500, and approves $1.625 million for attorneys' fees and costs. ■