ALSTON & BIRD

CLASS ACTION & MDL roundup

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Where the (Class) Action Is

Welcome back to the *Class Action & MDL Roundup!* This edition covers notable class actions from the first quarter of 2024.

The world of class actions knows no bounds! This year has begun with cases all over the map, from across the pond to the east and west coasts of the United States. Tune in to the *Roundup* for more coverage from our London office on the international class action landscape as we keep track of these developments in this new and changing space.

We follow with our Antitrust summaries, highlighting complex legal issues related to class certification and damages estimation. Then we go down the list to consumer protection cases, where we saw a mixed bag of decisions involving TCPA, labeling claims, and greenwashing allegations. Before reaching the end, we make a stop at Securities, where a case involving the status of special committee members reached the Delaware Supreme Court, holding that all members of a special committee, not merely a majority, must be "independent" to invoke business judgment protection.

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

The Class Action & MDL 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.

International

UK: High Court Strikes Out Securities Class Action

Wirral Council v Indivior PLC and Reckitt Benckiser Group PLC, [2023] EWHC 3114.

In the recent leading decision of *Lloyd v Google*, the UK Supreme Court laid the foundations for a bifurcated approach to pursuing class actions. *Lloyd* suggested that a representative action (on an 'opt-out' basis) could initially be pursued to decide issues that are common to the representative class (most often establishing conduct on the part of the defendant), leaving specific 'claimant side' issues (such as reliance, causation, and loss) to be determined later.

But in *Wirral*, the Court rejected an attempted bifurcated approach that the claimants proposed, namely by limiting the declarations sought to pure 'defendant side' issues of whether the defendants had published misleading statements to the market. That proposal would have left for another day claimant-side issues such as reliance and loss.

The Court struck out the representative action because the proposal removed the trial court's discretion to decide how best to manage the proceedings. The proposed structure also unfairly gave a significant tactical advantage to the claimants (by frontloading all the work onto the defendants).

UK: Environmental Claim Group Actions

Alame and others v Shell PLC, [2024] EWHC 510.

The UK High Court has given additional direction in the Niger Delta oil spill litigation against Shell, including postponing the plaintiffs' initial discovery requests. Local residents and community leaders previously brought claims pursuant to a 'group litigation order'. In November 2023, the High Court determined that the claims should proceed as 'global claims' rather than 'events-based claims' because all but a small number of the claimants were unable to sufficiently plead that a particular spill caused their loss and that Shell was liable for that spill. As a global claim, the claimants will now need to show that Shell was responsible for all the potential relevant events which led to the loss. It may be fatal to the claims for the defendant to prove that it was not responsible for an event which contributed significantly to the loss.

In a subsequent hearing, the court gave case management directions for a global claim. Of particular interest were the directions relating to:

1. **Lead claimants:** The court noted that the usual course in group litigation of this nature was to identify lead or test claimants and to proceed accordingly. However, in this case the lack of any pleaded detail on causation precluded any sensible identification of lead individuals at this stage. The claim would need to proceed as a global claim with losses considered on that global basis.
2. **Disclosure:** The claimants had sought wide-ranging disclosure in the hope of being able to further particularise their case on causation and therefore pursue specific events-based claims. However, the court held that this was putting the cart before the horse – disclosure had to be anchored to a pleaded case and could not turn into a fishing exercise. The fact that there was a significant 'informational asymmetry' between the claimants and defendant did not mean that wide-ranging disclosure could be ordered for issues that might be, but have not yet been pleaded as, relevant. ■

“Get schooled on "Cartels, Information Exchange, Tacit Collusions, and Oligopoly Issues" and "The Impact of Vertical Agreements on Competition" with **Jens-Olik Murach** at the Summer Course on European Antitrust Law, July 1–5, in Trier, Germany.”

Jens-Olik Murach

Antitrust / RICO

Debit Card Users Can Charge Ahead in Antitrust Row, But Credit Card Holders Cannot

Oliver v. American Express Co., No. 1:19-cv-00566 (E.D.N.Y.) (Jan. 9, 2024). Judge Garaufis. Granting in part and denying in part motion for class certification.

A New York federal court certified a class of debit card users, but declined to certify a class of credit card users in a case challenging Amex's anti-steering provisions under various state antitrust laws. The members of both proposed classes had not used Amex cards, but claimed that Amex's anti-steering rules precluded merchants from passing along the costs of accessing the Amex payment network and thus caused non-Amex consumers to effectively subsidize Amex card holders' consumption.

The court ruled that the credit card holders had not provided the requisite common evidence to show that, in the absence of the Amex anti-steering provisions, they would benefit because it was not clear how credit card issuers would adjust their annual fees net of rewards in response to the removal of those provisions. That was not an issue for debit card holders because federal regulations prohibit debit card rewards.

How 'Bout Them Apples? Phone Users Secure Class Certification Despite Uninjured Class Members

In re Apple iPhone Antitrust Litigation, No. 4:11-cv-06714 (N.D. Cal.) (Feb. 2, 2024). Judge Gonzalez Rogers. Granting motion for class certification.

A California federal court certified a class of iPhone users in which up to 7.9% of the class may have been uninjured. The court had previously denied class certification on the same claim that Apple charged iOS app developers supracompetitive commissions that were then passed on to consumers. The plaintiffs had conceded in that round that their expert's model showed 14.6% of class members were uninjured. The plaintiffs then narrowed their class definition so that an estimated 7.9% of the class were uninjured.

In the wake of the Ninth Circuit's *Olean* decision, which rejected the argument that Rule 23 has an uninjured class member cutoff beyond which class certification is impermissible, trial court remained "concerned" that 7.9% of the revised class were uninjured class members (which totaled millions of users). But the court could not "flatly reject" class certification based on the 7.9% number alone. The court also noted that the number could be reduced once the model was fully run and if there were further revisions to the class definition.

Plaintiff's Yardstick Damages Model Fails to Measure Up

City of Rockford v. Mallinckrodt ARD Inc., No. 3:17-cv-50107 (N.D. Ill.) (Mar. 29, 2024). Judge Johnston. Denying motion for class certification.

An Illinois federal court rejected class certification because it found an unreliable "yardstick" damages model. The plaintiff sought to certify a class of direct and indirect purchasers in a case against a pharmaceutical manufacturer and drug distributor that allegedly conspired to raise the price of the drug Acthar to supracompetitive prices. The plaintiff's expert tried to estimate class damages by calculating the difference between the actual price of Acthar and the price that would have prevailed but for the anticompetitive practices. To estimate but-for prices, the expert employed the "yardstick" method, in which the prices in a similar market, unaffected by the anticompetitive conduct present in the market at issue, are assumed to be a reasonable stand-in.

But because Acthar is a specially distributed drug, it was difficult to find an appropriate comparison, so the expert used the pharmaceutical industry as a whole as the relevant comparison market. This posed numerous problems and ultimately rendered his model unreliable. For example, he did not show that Acthar was an "average" drug so that it would be appropriate to use the average industry growth in drug prices as an analogue. In addition, he implicitly assumed, but failed to prove, that the nonconspiratorial factors relevant to drug price always varied systematically between Acthar and the comparison market. ■

Alston & Bird was named **Litigation Department of the Year** at the 2024 Southeastern Legal Awards by the *Daily Report* (a Law.com brand). Three of our attorneys were named "On the Rise":

Andrew Hatchett

Alison LeVasseur

Amanda Waide

Banking, Financial Services & Insurance

Data Breach Settlement

In re Snap Finance Data Breach Litigation, No. 2:22-cv-00761 (D. Utah) (Jan. 23, 2024). Judge Stewart. Approving $1.8 million settlement.

The District of Utah approved a $1.8 million settlement agreement between a class of plaintiffs and defendant Snap Finance arising out of a data breach. The class was individuals who provided financial information to Snap to secure a loan and were notified in December 2022 that they were affected by the data breach and are eligible to recover. A further subclass of California class members was deemed eligible to recover additional compensation under the California Consumer Privacy Act. Class counsel was awarded 30% of the settlement, for a total of $540,000 in awarded fees.

COVID-19 Insurance Rates Challenged in UCL Lawsuit

Day v. Geico Casualty Company, No. 5:21-cv-02103. (N.D. Cal.) (Mar. 21, 2024). Judge Freeman. Granting summary judgment for the defendant.

The Northern District of California granted summary judgment for Geico against claims it had violated the California Unfair Competition Law (UCL) with unfair rate practices during the COVID-19 pandemic. The plaintiffs, a class of individuals who purchased automobile policies from Geico after March 1, 2020, claimed Geico violated the UCL by charging allegedly unfairly high rates during the COVID-19 pandemic when there was a much lower risk for individuals driving due to low automobile usage. The court rejected those claims as a matter of law, in part because Geico provided customers the COVID-related "Geico Giveback," a rate-return program that had been previously approved by the California Department of Insurance. ■

"Have an obligation? "Briefly, Do Respond: Overview of Borrower Defense to Repayment (BDR) Regs & Best Practices" with **Tery Gonsalves** is the panel for you at the National Association of College and Universities Annual Conference in Columbus, OH, June 29."

Tery Gonsalves

Consumer Protection

"Peak Horsepower" Labeling Claim Posts Win at Second Circuit

Montgomery v. Stanley Black & Decker Inc., No. 23-735 (2nd Cir.) (Mar. 5, 2024). Affirming district court's dismissal of the plaintiffs' claims.

The Second Circuit affirmed a Connecticut district court's ruling dismissing the plaintiffs' deceptive business practice claims under New York and Virginia law. The plaintiffs filed suit against Stanley Black & Decker, alleging that the "Peak HP" labeling on the packaging of Craftsman vacuums is misleading because the vacuums do not achieve the advertised horsepower. The appellate court agreed with the district court that no reasonable consumer would be misled by the packaging because the dagger or asterisk symbol next to the "Peak HP" label directs the consumer to fine print explaining that "Peak HP" is the horsepower achieved in laboratory testing, not ordinary use.

No Paper? No Problem. Fourth Circuit Affirms Judgment in TCPA Fax Action

Career Counseling Inc. v. AmeriFactors Financial Group LLC, No. 22-1119 (4th Cir.) (Jan. 22, 2024). Affirming denial of class certification and award of summary judgment.

The Fourth Circuit confirmed that the Telephone Consumer Protection Act (TCPA) does not apply to online fax services. In December 2019, the Federal Communications Commission (FCC) declared that "an online fax service . . . is not a 'telephone facsimile machine' and thus falls outside the scope of the statutory prohibition [on sending unsolicited advertisements by fax]." Relying on that declaratory ruling, the district court denied certification of a fax recipient class as not ascertainable because individualized inquiries would be required to determine if each person received a fax on a traditional fax machine or through an online fax service.

Defendant Must Accept That Its Suit Is Not Arbitrable

McBurnie v. RAC Acceptance East LLC, No. 22-16868 (9th Cir.) (Mar. 14, 2024). Affirming denial of motion to compel arbitration and remanding for further proceedings.

The Ninth Circuit affirmed the denial of a motion to compel arbitration because California law invalidates contractual agreements that waive the right to seek public injunctive relief and that law was not preempted by the Federal Arbitration Act. The court remanded for the district court to address the defendant's argument that one of the plaintiffs lacked standing to challenge an expedited payment fee because she did not actually pay it.

App Store Achieves Partial Win Against Unhappy Crypto Owners

Diep v. Apple Inc., No. 22-16514 (9th Cir.) (Mar. 27, 2024). Affirming in part and remanding in part dismissal of electronic privacy and consumer protection claims.

The Ninth Circuit has weighed in on claims of negligence and violations of privacy based on allegations of stolen cryptocurrency. The court affirmed in part and remanded in part the district court's decision to dismiss the plaintiffs' claims based on their use of the Toast Plus app, a third-party app that appeared in the defendant's app store. According to the plaintiffs, the Toast Plus app stole their cryptocurrency, and because the defendant represented that its app store is a "safe and trusted place," the defendant should be liable.

The Ninth Circuit determined that the plaintiffs' negligence claim and claims based on violations of various electronic privacy acts were barred by Section 230(c)(1) of the Communications Decency Act (CDA), which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The Ninth Circuit reasoned that the plaintiffs sought to treat the defendant as a "publisher or speaker" because the dismissed claims were based on the defendant's alleged failure to monitor or remove Toast Plus from its app store. In contrast, the plaintiffs' consumer protection claims were not barred by the CDA because the claims did not arise from the defendant's "publication decisions" but rather "for its own representations concerning the App Store." The Ninth Circuit determined that the plaintiffs failed to adequately plead these claims but still remanded them with instructions that the plaintiffs can amend.

Call Blocked: Illinois Judge Denies Second Bid for TCPA Class Certification

Hossfeld v. Allstate Insurance Co., No. 1:20-cv-07091 (N.D. Ill.) (Jan. 29, 2024). Judge Gottschall. Granting motion to strike second motion for class certification.

A federal judge in Illinois rejected a second class certification attempt by plaintiffs accusing Allstate of violating the TCPA. The plaintiff claimed Allstate allowed a telemarketer service to call individuals on its internal

"If you were wondering how the "*Marriott* Case Will Affect Class Action Waiver Enforceability," find out from **Daniella Main** and **Brooke Bolender** in *Bloomberg Law*."

Daniella Main

Brooke Bolender

"do-not-call" list. However, the plaintiff failed to provide any evidence the class size satisfied the numerosity standard of Rule 23. Considering denial of the plaintiff's initial motion for class certification, the judge stated that the plaintiff failed to demonstrate a material change in circumstances or a "manifest error of fact or law" to warrant a "second bite at the apple." Rejecting the plaintiff's citation to out-of-circuit authority contemplating a lower standard for a successive class certification motion, the court declined to reconsider its denial of class certification.

Class Certification Granted in California Greenwashing Suit

Bush v. Rust-Oleum Corp., No. 3:20-cv-03268 (N.D. Cal.) (Feb. 5, 2024). Judge Beeler. Granting class certification.

A California federal magistrate judge granted class certification to customers' "greenwashing" allegations against Rust-Oleum Corporation's degreaser products. This decision came shortly after the judge denied Rust-Oleum's motion to dismiss and motion for summary judgment. The class alleges that Rust-Oleum misleadingly labeled its Krud Kutter cleaning products as "non-toxic" and "Earth friendly," despite containing certain allegedly harmful ingredients. Rejecting the company's argument that the proposed class lacked commonality, the judge ruled that a reasonable consumer's interpretation of the product message was amenable to common proof among California residents who purchased the products. This decision underscores the challenges companies face in defending against greenwashing lawsuits and signals a growing trend in litigation targeting environmentally friendly claims.

Plaintiffs Not Smiling After Court Denies Certification of Dental Provider Class

Ciccio v. SmileDirectClub LLC, No. 3:19-cv-00845 (M.D. Tenn.) (Feb. 12, 2024). Judge Trauger. Denying motion for class certification.

A Tennessee federal court denied class certification to a group of dentists and orthodontists who sought to certify a putative nationwide class and two subclasses for allegedly deceptive marketing of its plastic aligners for orthodontic use. The plaintiff providers asserted that this marketing injured their businesses.

The court ruled the plaintiffs' approach to injury and damages was fundamentally flawed. The plaintiffs and their expert did not establish that it would be possible for the court to "identify the effects of specific marketing statements on a vast universe of consumers; determine which class members would have benefited from different actions by those consumers; and then determine how much each of those class members was harmed." No plaintiff could be considered typical or adequate, and variations between plaintiff provider practices would predominate over shared questions. The court also denied the plaintiffs' request to certify an "issue class," which would bifurcate the determination of individual damages from issues of liability, because the flaws impacting the question of damages also bore on questions of liability.

Putative Gummy Vitamins Class Fails to Stick Together for Lack of Adequate Class Representative

Cabrera v. Bayer Healthcare LLC, No. 2:17-cv-08525 (C.D. Cal.) (Feb. 23, 2024). Judge Kronstadt. Denying motion for class certification.

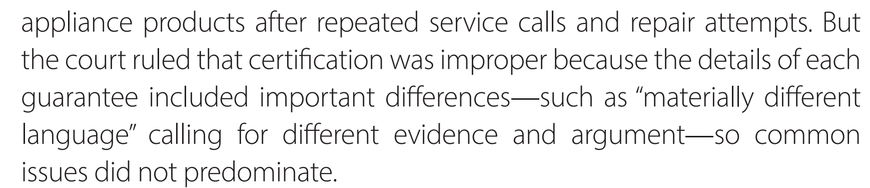
A California district court denied a gummy vitamin consumer's motion for class certification because of unhelpful admissions from the representative plaintiff. The complaint alleged that the word "complete" on the vitamins' label was misleading because the vitamins did not contain several essential vitamins. But the lead plaintiff testified that she had never thought about the word "complete" in the context of the vitamins' label until engaging with plaintiff's counsel. Furthermore, the plaintiff stated that she was not concerned with whether the product provided "all vitamins" and that her primary concern was that the product have "some vitamins." The court ruled that this testimony showed that the lead plaintiff was subject to unique defenses, making her neither adequate nor typical.

The court's decision also discussed other requirements for class certification if an alternate named plaintiff was proposed. Predominance requirements were satisfied for the plaintiff's UCL, False Advertising Law (FAL), California Consumers Legal Remedies Act (CLRA), express warranty, fraud, intentional and negligent misrepresentation, quasi-contract, unjust enrichment, and restitution claims. Common questions did not predominate for the implied warranty claim due to California's vertical privity requirement for implied warranty claims. The plaintiff's damages model was sufficient for actual damages, but not restitutionary relief.

Defendants Avoid Being Tagged on Class Certification

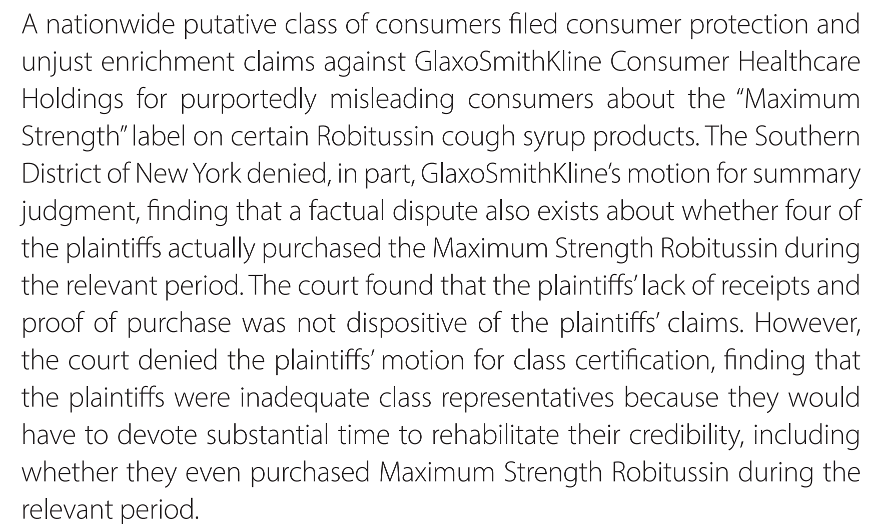
Elliot v. Warrantech Consumer Product Services, No. 4:22-cv-00091 (N.D. Ga.) (Feb. 29, 2024). Judge Brown. Denying motion for class certification.

A Georgia federal court denied certification of a putative class action because of different language in different extended service plans. The plaintiffs complained about the defendants' failing to replace home


appliance products after repeated service calls and repair attempts. But the court ruled that certification was improper because the details of each guarantee included important differences—such as "materially different language" calling for different evidence and argument—so common issues did not predominate.

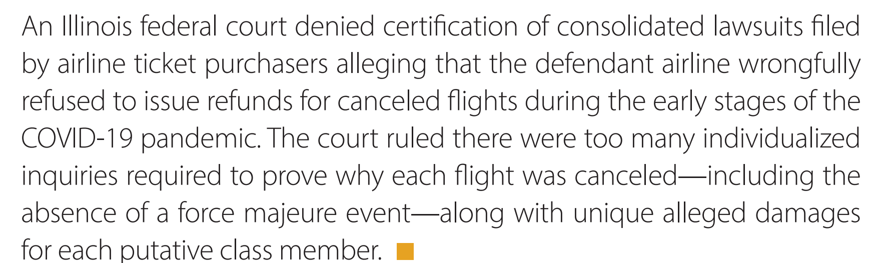
- **Court Swallows Cough Syrup Purchaser Class Certification Bid**

Woodhams v. GlaxoSmithKline Consumer Healthcare Holdings (US) LLC, No. 1:18-cv-03990 (S.D.N.Y.) (Mar. 21, 2024). Judge Oetken. Granting in part and denying in part defendant's motion for summary judgment and denying class certification.


A nationwide putative class of consumers filed consumer protection and unjust enrichment claims against GlaxoSmithKline Consumer Healthcare Holdings for purportedly misleading consumers about the "Maximum Strength" label on certain Robitussin cough syrup products. The Southern District of New York denied, in part, GlaxoSmithKline's motion for summary judgment, finding that a factual dispute also exists about whether four of the plaintiffs actually purchased the Maximum Strength Robitussin during the relevant period. The court found that the plaintiffs' lack of receipts and proof of purchase was not dispositive of the plaintiffs' claims. However, the court denied the plaintiffs' motion for class certification, finding that the plaintiffs were inadequate class representatives because they would have to devote substantial time to rehabilitate their credibility, including whether they even purchased Maximum Strength Robitussin during the relevant period.

- **Airline Dodges Certification of COVID Flight Cancellation Suit**

Rudolph v. United Airlines Holdings Inc., No. 1:20-cv-02142 (N.D. Ill.) (Mar. 28, 2024). Judge Harjani. Denying motion for class certification.


An Illinois federal court denied certification of consolidated lawsuits filed by airline ticket purchasers alleging that the defendant airline wrongfully refused to issue refunds for canceled flights during the early stages of the COVID-19 pandemic. The court ruled there were too many individualized inquiries required to prove why each flight was canceled—including the absence of a force majeure event—along with unique alleged damages for each putative class member. ■

Labor & Employment / ERISA

Receipt of Perks Does Not Undermine "Volunteer" Status Under FLSA

Adams v. Palm Beach County, No. 23-11065 (11th Cir.) (Mar. 12, 2024). Affirming dismissal of a putative class action.

The Eleventh Circuit held that three volunteer golf attendants could not maintain inadequate compensation claims against Palm Beach County because the discounted golf fees they received were not "wages in another form" under any economic reality. Therefore, the attendants were not entitled to wages because they were covered by the "public-agency volunteer" exemption to the Fair Labor Standards Act (FLSA). The court found the discounted golf rounds were "reasonable benefits" for the attendants' services and noted they could not show any "promise, expectation, or receipt" of employee compensation because they specifically applied for non-paying volunteer positions. It also noted that the attendants knew when they applied for these positions that they were crucial to providing civic benefits to citizens of Palm Beach County, an important component to the federal definition of a volunteer.

Highly Paid CEO Not Overpaid

International Brotherhood of Teamsters, Garage Employees Local 272 Labor Management Pension Fund v. Apple Inc., No. 1:23-cv-01867 (S.D.N.Y.) (Feb. 7, 2024). Judge Rochon. Dismissing complaint with prejudice.

The court dismissed a pension fund's executive compensation claims, finding no violations of any securities laws or U.S. Securities and Exchange Commission (SEC) rules. In January 2023, Apple filed its proxy statement for a March 2023 shareholder meeting that included disclosures about a vote on executive compensation. One week before the meeting, the pension fund sued Apple and its CEO, alleging that Apple paid its executive nearly $32 million more than the intended compensation disclosed in the proxy statement. The court granted Apple's motion to dismiss, agreeing that the law recognizes a company's discretion over compensation and finding that the company's disclosures fully complied with legal and regulatory requirements because its 2023 proxy statement described its pay methods in detailed compensation tables "precisely" as securities laws and SEC rules require. ■

"To prepare for potential employee push back, **Ian Wright** and **Kaitlin Owen** suggest that "HR Should Review Job Descriptions, Arbitration Agreements in Light of *Bissonette*" in HR Dive."

Ian Wright

Kaitlin Owen

Privacy & Data Security

Trillion-Dollar Statutory-Damages Valuation of Class Claims Is "Unreasonable Baseline"

In re Facebook Inc. Internet Tracking Litigation, Nos. 22-16903, 22-16904 (9th Cir.) (Feb. 21, 2024). Affirming order approving class action settlement.

The Ninth Circuit confirmed that due process limitations are relevant to evaluating the adequacy of class action settlements. In 2011, a class of Facebook users sued Facebook for tracking their internet activity without consent. The case settled for $90 million, which was then the seventh-largest amount in a privacy class action. Three class members objected, arguing that, in analyzing the settlement as fair, reasonable, and adequate, the district court should have measured actual damages by aggregating statutory damages at $10,000 per violation under the federal Wiretap Act. On appeal, the Ninth Circuit rejected this argument and upheld the approval of the settlement, holding that the district court properly rejected the statutory-damages valuation, which would have valued the claims at $1.24 trillion, as an "unreasonable baseline that would violate due process."

Privacy? Not Under the Contract

Hammerling v. Google LLC, No. 22-17024 (9th Cir.) (Mar. 5, 2024). Affirming order granting motion to dismiss.

The Ninth Circuit affirmed that a company's unambiguous policy language can preclude privacy claims. Google's privacy policy allows it to collect data about users' "[a]ctivity on third-party sites and apps that use [Google's] services," including the "Android operating system." A group of consumers brought fraud, breach of contract, and invasion of privacy claims in a class action in the Northern District of California, alleging that Google's collection of data from their Android phones violated its privacy policy. The Ninth Circuit concluded that the claims were properly dismissed, relying entirely on the language of Google's privacy policy, which expressly permitted Google to collect activity data in third-party apps.

No Damages? No Problem for Class Certification on a Breach of Contract Claim

Attias v. CareFirst Inc., No. 1:15-cv-00882 (D.D.C) (Mar. 29, 2024). Judge Cooper. Granting motion to certify class.

The D.C. federal district court certified a class of claimants pursuing only nominal damages, finding a contractual injury gave them standing to maintain their data breach claims against their insurer, even without actual damages. The court previously denied the Carefirst Inc. policyholders' initial motion for class certification, finding the plaintiffs had not met their burden to establish predominance because it was unclear whether the putative class members had suffered a concrete injury under *TransUnion*. It also dismissed the plaintiffs' consumer protection claims at summary judgment and limited their breach of contract claim to recovery of nominal damages. On the plaintiffs' renewed motion for class certification on that remaining claim, the court found the plaintiffs established standing even without demonstrating actual harm because CareFirst's failure to safeguard the data caused proposed class members to suffer a contractual injury. Because there was no need to separate those plaintiffs who suffered actual damages from those who did not, the court then found the predominance requirement was satisfied, and it certified the class. ■

class-ified

information

We're there when you need us most. Partners **Kim Peretti** and **Kate Hanniford** have been named to Cybersecurity Docket's 2024 "Incident Response 50."

Kim Peretti

Kate Hanniford

Products Liability

Eleventh Circuit Casts Shade on Plaintiffs' Standing in Proposed Sunglasses Warranty Class Action

Smith v. Miorelli, No. 22-10663 (11th Cir.) (Feb. 26, 2024). Vacating and remanding district court's approval of class action settlement.

The circuit court held that the district court should not have considered the value of injunctive relief provided under a proposed settlement because the named plaintiffs lacked standing to pursue injunctive relief. The district court approved a class action settlement resolving three lawsuits over Costa Del Mar's allegedly deceptive sunglasses warranty and repair policies. The settlement consisted of product vouchers, cy pres payments, and injunctive relief requiring the defendant to change its marketing and warranty practices. On appeal, the Eleventh Circuit agreed with the objectors' argument that the named plaintiffs lacked Article III standing to pursue injunctive relief because they did not allege any risk of future injuries. It held that the district court abused its discretion by considering relief that it had no jurisdiction to grant when assessing whether the settlement was fair, reasonable, and adequate.

Plaintiffs Can't Escape Individual Arbitration Provisions

Porter v. Tesla Inc.; Van Diest v. Tesla Inc., Nos. 4:23-cv-03878, 4:23-cv-04098 (N.D. Cal.) (Mar. 7, 2024). Judge Rogers. Granting motion to compel individual arbitration.

In its order compelling individual arbitration of consumer protection claims, the Northern District of California declined to extend *McGill* to claims under non-California law. The plaintiffs brought two related false advertising class actions against Tesla, and the automaker moved to compel arbitration of the plaintiffs' claims individually. The plaintiffs acknowledged that they signed arbitration agreements when purchasing their vehicles but argued their claims under the CLRA, UCL, and FAL, or the equivalent laws in other states, were not subject to arbitration based on the California Supreme Court's 2017 ruling in McGill v. Citibank, which held that any agreement—including an arbitration agreement—that precludes a plaintiff from seeking public injunctive relief is unenforceable under California law.

The court declined to extend *McGill* to claims brought under the consumer protection laws of states other than California and granted the defendant's motion as to all non-California plaintiffs. It also granted the motion to compel arbitration as to all the California plaintiffs' claims, finding the class waiver did not preclude the arbitrator from ordering public injunctive relief, which "is brought on behalf of an individual for the benefit of the public, not as a class or representative claim." The court stayed the case pending resolution of arbitration proceedings and retained the right to issue public injunctive relief under the California statutes to the extent it was not available in arbitration. ■

"Lock in the guidance you need at our webinar "SCOTUS Spotlight: *Chevron* Deference on the Chopping Block – Part 2" on July 10 with **Dan Jarcho** and **CJ Frisina**."

Dan Jarcho

CJ Frisina

Securities

- **Second Circuit Revives Claims Against Decentralized Cryptocurrency Exchange**

  Williams v. Binance, No. 22-972 (2nd Cir.) (Mar. 8, 2024). Reversing dismissal of securities class action and remanding for further proceedings.

  The Second Circuit reversed a district court's dismissal ruling and held the plaintiffs had adequately alleged that non-U.S.-based exchange Binance engaged in domestic securities transactions. The district court originally found that transactions on the Binance exchange could not have taken place in the United States because Binance did not have a principal place of business within the country. The Second Circuit, however, reversed, holding that Binance's digital infrastructure was located primarily within the United States and the claims against it could proceed in federal court. The court emphasized that the analysis was fact-specific and could lead to a different result for other decentralized traders or exchanges.

- **"Enthusiastic" Statements About COVID Cure Do Not Rise to Fraud**

  In re Sorrento Therapeutics Inc. Securities Litigation, No. 22-55641 (9th Cir.) (Mar. 25, 2024). Upholding motion to dismiss proposed class action.

  The Ninth Circuit held that a pharmaceutical company's May 2020 statements that there was a "cure" for COVID-19 that "works 100 percent" were enthusiastic and overblown but could not support a claim for fraud. The opinion also included a detailed discussion of the required mental state for securities fraud claims, which the Ninth Circuit held the plaintiffs had failed to satisfy. The court concluded the plaintiffs failed to show that the defendants made improper stock sales and noted that the defendants used forward-looking language such as "if" and "potentially" in statements about the potential COVID cure, which militated against a finding of scienter. ■

"Litigation can be as unpredictable as a river. **Matthew Kent** explains how "Whitewater Kayaking Makes Me a Better Lawyer" for *Law360*."

Matthew Kent

Settlements

Built to Last: Employees Receive Final Approval for FLSA Settlement

LaPorte v. CareerBuilder Inc., No. 1:22-cv-06096 (N.D. Ill.) (Jan. 16, 2024). Judge Maldonado. Granting final approval of $925,000 settlement.

An Illinois federal judge granted final approval to a $925,000 settlement, resolving FLSA claims brought by account executives alleging that the company failed to pay them for work exceeding 40 hours per week, despite their classification as non-exempt, hourly employees. The FLSA settlement class included 152 members, and an Illinois subclass included 107 members. The court approved attorneys' fees of $308,333.33, as well as service awards of $10,000 for each class representative and $500 to each opt-in plaintiff. No class member objected to the settlement.

Labor & Employment Class Action Settlement Approved

Lopez v. Eurofins Scientific Inc., No. 3:21-cv-08652 (N.D. Cal.) (Feb. 15, 2024). Judge Beeler. Approving $1.7 million class settlement.

The Northern District of California approved a $1.7 million settlement of claims alleging the defendants violated various California wage-and-hour laws by providing inadequate compensation. Class counsel was awarded one-third of the settlement for attorneys' fees, for a total of $566,666.67.

Class Members Score a Touchdown

Treviso v. National Football Museum Inc., No. 5:17-cv-00472 (N.D. Ohio) (Feb. 22, 2024). Judge Boyko. Approving $750,000 class settlement.

The Northern District of Ohio approved a $750,000 settlement agreement between a class of plaintiffs and the Pro Football Hall of Fame, which hosts the annual Hall of Fame Game. After the Pro Football Hall of Fame canceled the 2016 game due to "dangerous field conditions," a defined class of over 3,850 ticketholders sued for breach of contract. The settlement provided that the class could recover either full compensation for documented expenses or a set partial compensation amount without any documentation. Class counsel was awarded attorneys' fees of no more than one-fourth of the settlement, totaling of $187,500.

Settlement Agreement Reached for Protesters

Sow v. City of New York, No. 1:21-cv-00533 (S.D.N.Y.) (Mar. 3, 2024). Judge McMahon. Approving $13,731,000 class settlement.

The Southern District of New York approved a $13,731,000 settlement of the claims brought against the City of New York by George Floyd protestors over their illegal arrests. The defined class included individuals who were arrested during the George Floyd protests in the summer of 2020, but it excluded all individuals arrested under lawful means. The court noted that just under a thousand eligible class members filed claims and were eligible to recover a portion of the class settlement. The court approved $5,850,000 in attorneys' fees through June 15, 2023, and the parties agreed to negotiate fees incurred after June 15, 2023 once the case concluded.

From Kerplunk to Ka-Ching: Investors Reach Settlement over Dropped Stock Price

In re Splunk Inc. Securities Litigation, No. 4:20-cv-08600 (N.D. Cal.) (Mar. 4, 2024). Judge Tigar. Granting final approval of $30 million settlement.

A California federal court granted final approval to a $30 million settlement resolving a securities class action over software company Splunk's allegedly false assurances that it was continuing to invest in marketing and to hire sales personnel when, in fact, it was scaling back its expenses to alleviate temporary cash flow concerns. The $30 million settlement was consistent with the recommendation of a private mediator, with payments from the settlement fund to be distributed pro rata based on the date class members purchased and sold Splunk stock, as well as the total number and amounts of claims filed. Plaintiffs' counsel also received attorneys' fees of 25% of the settlement fund, net of litigation expenses, for a total of $7.4 million. No class member objected to the settlement, and the court received only 11 opt-outs.

$2 Million Settlement Retires Former Employees' ERISA Claims

Gotta v. Stantec Consulting Services Inc., No. 2:20-cv-01865 (D. Ariz.) (Mar. 14, 2024). Judge Snow. Granting final approval of $2 million settlement.

An Arizona federal judge granted final approval to a $2 million settlement, ending over three years of litigation over claims that an engineering and design company, its board, and its investment committee breached their fiduciary duties and ERISA by choosing

investments for its employee retirement plan that were poor-performing and/or had excessive fees. The court awarded class counsel attorneys' fees equal to one-third of the common fund ($666,666.67) and approved contribution awards of $10,000 for both named plaintiffs. Finally, the defendants agreed to retain an independent fiduciary to act on behalf of the plan and review the settlement for purposes of determining whether to authorize the plaintiffs' released claims on behalf of the plan and settlement class.

Gift Cards Settlement Approved over Objection

Shay v. Apple Inc., No. 3:20-cv-01629 (S.D. Cal.) (Mar. 19, 2024).
Judge Ohta. Approving $1.8 million class action settlement.

The Southern District of California approved a class action settlement over Apple's alleged failure to refund or replace gift cards purchased by consumers that were fraudulently redeemed by unknown third parties. After certifying the settlement class and finding that the settlement of $1.8 million was fair, reasonable, and adequate, the court overruled objections filed by a single objector, finding the settlement's release of claims against non-party retailers that sold the gift cards was not overly broad because the release is "common practice" when the released claims concern an identical injury. The court further ruled that notice by publication was adequate given the lack of contact information for unknown class members and that the claims process was adequate because proof of purchase is necessary to weed out fraudulent claims. Separately, under the cy pres doctrine, the court approved the distribution of the remainder of the unclaimed settlement to the Consumer Federation of America and the Consumer Federation of California. ■

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