ALSTON & BIRD

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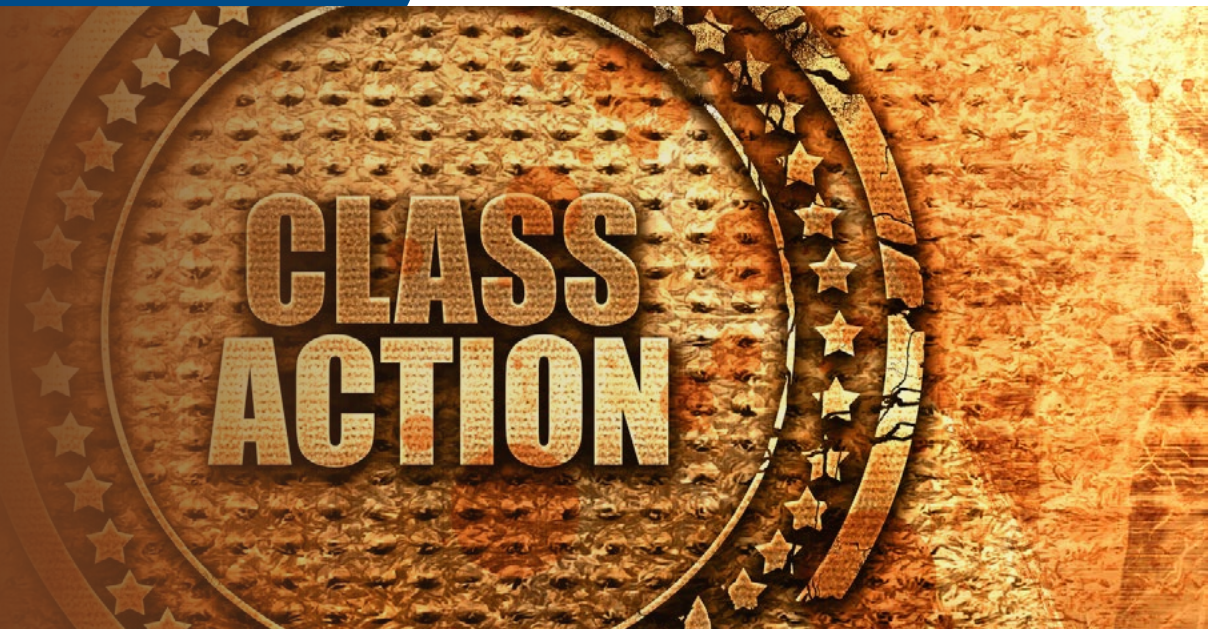

Class Action Roundup

Spring 2017

Where the (Class) Action Is

Happy New Year! While we acknowledge that it's nearly summer now, this issue of *Roundup* includes case highlights from the first quarter of 2017. The year kicked off with more activity than the last quarter of 2016, with cases in the areas of Consumer Protection and Employment again representing the lion's share of decisions. We continue to see *Spokeo* precedent being cited, this quarter in cases involving the FDCPA, FACTA, and TCPA, and with two out of the three being dismissed for lack of standing.

The slate of consumer protection cases shows that nothing is immune to claims of harm, from the size of eye drops or labels on soap and soup to rates charged by power companies, airline fuel surcharges, and even whether a consumer takes physical possession of a terms agreement. Companies continue to defend themselves this quarter in employment cases involving worker classification, "off the clock" pay rules, and even age discrimination. Data privacy cases this quarter saw TCPA issues front and center, showing the importance of maintaining compliance with these regulations. Our summary concludes this quarter with a handful of products liability and securities litigation matters as well as our usual inventory of settlements where Google shows up twice, once for settlement approved and once for preliminary settlement denied.

We hope you find this issue of *Class Action Roundup* insightful and useful in your practice. As always, we welcome any feedback you have on this or other publications from the firm.

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Antitrust/RICO

- **Truck Purchasers' Class Certification Effort Stalls**

  In re Class 8 Transmission Indirect Purchaser Antitrust Litigation, No. 15-3791 (3rd Cir.) (Feb. 9, 2017). Affirming denial of class certification.

  The Third Circuit affirmed denial of class certification in a case where indirect purchasers of trucks containing transmissions manufactured by Eaton Corporation alleged that Eaton and a group of truck manufacturers conspired to monopolize the truck transmissions market. The Third Circuit held that indirect purchasers had not established common proof that they paid higher prices. Instead, an individualized inquiry was required to determine whether overcharge was passed through to the indirect purchasers and whether rebates offered to some indirect purchasers may have offset the alleged overcharge altogether.

- **Ninth Circuit Gives Credit to Lower Court in Certifying RICO Classes**

  Just Film Inc. v. Buono, No. 14-16132 (9th Cir.) (Feb. 7, 2017). Affirming certification of two of five proposed classes.

  The Ninth Circuit affirmed class certification in a case alleging RICO violations for fraudulent leasing of point of sale credit and debit card processing equipment. The small-business-owner plaintiffs alleged that they leased equipment from the defendants, which charged them for taxes that the defendants never paid to the government. The Ninth Circuit rejected the defendants' typicality argument, holding that the class representative's injuries needed to arise only from the same general RICO scheme, not the same specific predicate act.

CLASS-IFIED INFORMATION

Alston & Bird climbs halfway to the stars, opens San Francisco office.

- **Bird Food Litigation Takes Flight as Court Certifies Class**

  In re Morning Song Bird Food Litigation, No. 12-cv-01592 (S.D. Cal.) (Mar. 31, 2017). Judge Houston. Granting motion for class certification.

  The district court certified a class of bird-food purchasers who accused The Scotts Company LLC of violating the RICO Act and state consumer protection statutes by selling bird food containing pesticides. Judge Houston rejected Scotts's ascertainability argument because, at class certification, plaintiffs needed to provide only a date range of relevant products and a list of customers who purchased the bird food within that date range. Judge Houston also rejected Scotts's individualized-injury argument, finding that the plaintiffs' benefit-of-the-bargain damages theory was sufficiently common to the class, even if certain class members might not actually have suffered any economic injury at all. ■

Banking, Financial Services & Insurance

- **Water You Mean This Is a Class Action?**

  Williams v. Employers Mutual Casualty Co., No. 15-3573 (8th Cir.) (Jan. 12, 2017). Affirming denial of insurance coverage.

  A certified class of residents at a mobile home park obtained an $82 million judgment against the property owner for claims relating to drinking water contaminated with radium and bacteria and for claims related to the property's management and development. After the property owner was unable to pay, the class representative went after the property's insurers, filing an equitable garnishment action in her capacity as class representative to recover the judgment in state court. The matter was removed to federal court under the Class Action Fairness Act, and the federal court ruled in favor of the insurers because the applicable policies contained exclusionary provisions regarding pollutants and excluded coverage for breach of contract claims. On appeal, the Eight Circuit affirmed and rejected the plaintiff's claim that the garnishment suit was not a class action and that it was improperly removed, in large part based on the fact that it was initially filed by the plaintiff in her capacity as class representative.

- **Madd About U(sury)**

  Madden v. Midland Funding LLC, No. 11-cv-08149 (S.D.N.Y.) (Feb. 27, 2017). Judge Seibel. Vacating denial of class certification.

  After a brief delay in this closely watched case, following a reversal by the Second Circuit on the issue of preemption under the National Bank Act and denial of certiorari by the U.S. Supreme Court, Judge Seibel addressed several important issues—including choice of law, applicability of criminal usury provisions, and class certification—in her most recent ruling. Midland purchased Madden's defaulted debt from FIA Card Services N.A., which had acquired the debt from Bank of America, where Madden originally opened a credit card account. Midland attempted to collect on the debt at a 27% annual interest rate, and Madden sued, alleging violations of the Fair Debt Collection Practices Act (FDCPA) and New York's usury laws, which impose a maximum rate of 25%. Ultimately, Judge Seibel certified a defined class under Rule 23(b)(2) and Rule 23(b)(3). In the choice-of-law analysis, Judge Siebel concluded that New York—not Delaware—law applied, despite provisions in the underlying loan agreement, because applying Delaware law, which does not cap interest rates, would violate the fundamental public policy of New York. That ruling may limit the ability of nonbank entities like Midland to enforce choice-of-law provisions in loan agreements in states that have criminal usury laws.

CLASS-IFIED INFORMATION

Food for thought: Join Bo Phillips on his webinar "Food and Beverage Class Actions: Litigating False Advertising, Labeling, Slack-Fill Packaging or Food Safety Claims," presented by Strafford on July 13.

Bo Phillips

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He Doesn't Even Go Here

Benali v. Afni Inc., No. 15-cv-03605 (D.N.J.) (Jan. 4, 2017) (unpublished). Judge Martinotti. Denying class certification and granting summary judgment.

Spokeo spoke against a plaintiff who brought a class action accusing debt collector Afni Inc. of violating the FDCPA by referencing a processing fee for electronic payments in collection letters sent to AT&T customers. The district court ruled that the plaintiff had no standing because he was not an AT&T customer and therefore there was no risk that he would actually pay the processing fee (also, he immediately believed the letter was a "scam" upon receipt). Judge Martinotti concluded that the plaintiff "admits he never suffered any actual harm as a result of Defendant's alleged FDCPA violations, and the alleged risk of harm to the Plaintiff in this case is entirely conjectural or hypothetical." Therefore, the plaintiff's claims constituted a "bare procedural violation divorced of any concrete harm" that do not satisfy Article III's standing requirements. The court acknowledged that recipients of the collection letter who were AT&T customers in New Jersey—some 31,000 people—may be able to satisfy the concreteness requirement and show that the alleged violations created a sufficient degree of risk of harm. ■

Consumer Protection

- **Oversized Eye Drops Too Small a Problem For Seventh Circuit**

  Eike v. Allergan Inc., et al., No. 16-3334 (7th Cir.) (Mar. 6, 2017). Vacating class certification and remanding with directions to dismiss the case with prejudice.

  The Seventh Circuit reversed a certification of eight consumer classes and ordered dismissal of all claims against manufacturers of glaucoma medicine. The classes contended that medicine eyedroppers wasted medicine and violated consumer protection laws by dispensing drops larger than the therapeutic amount. The Seventh Circuit held that the class members lacked standing because they failed to allege that the eye-drop price resulted from collusion or a misrepresentation. The claims amounted to little more than consumer dissatisfaction with a product.

- **Fight the Power (Company's Standard Form Contracts)**

  Gillis v. Respond Power LLC, No. 15-3877 (3rd Cir.) (Feb. 1, 2017). Vacating and remanding denial of class certification.

  The Third Circuit reversed the denial of class certification in an action charging that Respond Power had charged higher rates for its energy services than the rates it communicated to customers in marketing pitches and contracts. The district court found no commonality because of evidence that the named plaintiffs had different understandings—or no understanding at all—about whether the variable rate in Respond Power's contract provided a "rate cap" for electricity services.

  The Third Circuit held that extrinsic evidence of individual understandings is especially irrelevant in the context of standard form contracts. "Individual signatories to such contracts understand that they have no bargaining power as to specific terms, and they expect to be treated like all other signatories to the form document."

- **Samsung's Arbitration Argument (and Agreement) Can't Escape the Box**

  Norcia v. Samsung Telecommunications America, No. 14-16994 (9th Cir.) (Jan. 19, 2017). Affirming denial of motion to compel arbitration.

  The Ninth Circuit rejected an effort to compel arbitration of plaintiff Norcia's claim that Samsung misrepresented its Galaxy S4's storage capacity. Norcia had purchased a Samsung phone at a Verizon store in San Francisco. He paid for the phone at the register, and a Verizon employee provided a receipt entitled "Customer Agreement." The Customer Agreement did not reference Samsung or any other party other than Verizon. Norcia took the phone with him as he left the store,

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CLASS-IFIED INFORMATION

Eli Corbett, a former top staffer at the Consumer Financial Protection Bureau, talks to the *Consumer Financial Services Law Report* about the CFPB's future.

Elizabeth Corbett

but he declined to take the box and the rest of its contents, which included an arbitration agreement with Samsung.

The Ninth Circuit held that Norcia did not clearly assent to any agreement in the brochure, and that Samsung was unable to point to any principle of law that imposed a duty to act that would have compelled arbitration. There was also no previous course of dealing between the parties that might impose a duty on Norcia to act, and Samsung did not show that Norcia retained any benefit by failing to act. Finally, the court rejected Samsung's argument that the arbitration provision was enforceable as an "in-the-box" contract. While a customer may be bound by an in-the-box contract under certain circumstances, such a contract is ineffective when the customer does not receive adequate notice of its existence. Because Norcia did not give any "outward manifestations of consent [that] would lead a reasonable person to believe the offeree has assented to the agreement," no contract was formed between Norcia and Samsung, and Norcia was not bound by the arbitration provision contained in the brochure.

To Fly. To Serve. To Pass Through Fuel Surcharges?

Dover, et al v. British Airways PLC (UK), No. 12-cv-05567 (E.D.N.Y.) (Mar. 31, 2017). Judge Dearie. Granting motion to certify class.

The district court certified a class of British Airways flyers who alleged that the airline breached its frequent flier contract by not tying its fuel surcharges to fuel prices but instead used the fuel surcharge as an opportunity to charge its Executive Club members hundreds of dollars for each reward ticket. The court accepted the argument that whether the airline's frequent-flier contract permitted the fuel surcharges was common across the nearly 170,000 putative class members who used U.S. addresses to redeem frequent flier miles and paid surcharges. The court rejected British Airways' argument that "it is impossible to ascertain the size and scope of Plaintiffs' proposed class," noting that it was "belied by British Airways' own database, which tracks not only the names of all members of its frequent flyer program but also their addresses, and other relevant information."

Dial Plaintiffs Clean Up Their Class-Damages Theory

In re Dial Complete Marketing and Sales Practices Litigation, No. 11-md-2263 (D.N.H.) (Mar. 27, 2017). Judge McAuliffe. Granting amended motion for class certification.

Purchasers of Dial Complete soap accused Dial of misrepresenting the soap's ability to kill germs. The district court previously denied certification due to concerns about the damages model. But the court certified when the plaintiffs tried again. The court accepted the plaintiffs' economic and statistical consulting expert who used a conjoint analysis methodology to determine what portion of the price consumers paid for Dial Complete resulted from the company's claims about killing germs. Dial argued that the expert's methodology did not adequately analyze the impact of market supply factors. But the court ruled that the model was "capable of reliably calculating the class-wide damages recoverable" under the consumers' theories of liability. The court relied on the notion that, at class certification, damages need not be calculated to a mathematical certainty.

Court's Ruling "Mmm, Mmm Good" for Campbell Soup

Brower v. Campbell Soup Co., No. 16-cv-01005 (S.D. Cal.) (Mar. 21, 2017). Granting motion to dismiss.

Health-conscience consumers who purchased Campbell Soup claimed that the soup was not as healthy as the labeling made it seem.

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Specifically, the "Chunky Healthy Request Grilled Chicken & Sausage Gumbo" label, which describes the soup as heart healthy, among other things, was false and misleading because the soup contained artificial transfat. The buyers said they bought the soup in reliance on the label's healthy message.

The district court granted Campbell Soup's motion to dismiss, finding that the consumers' claims were preempted by federal law. Campbell Soup's label was pre-approved by the U.S. Department of Agriculture's Food Safety and Inspection Service, and the Poultry Products Inspection Act and the Federal Meat Inspection Act preempt state law if it imposes labeling requirements that are "in addition to, or different than" what is required under federal law.

▪ TruNature Ginkgo Sellers on Alert: Class Action Moves Forward

Korolshteyn v. Costco Wholesale Corp., No. 15-cv-00709 (S.D. Cal.) (Mar. 16, 2017). Judge Bencivengo. Granting motion for class certification.

Tatiana Korolshteyn bought TruNature Ginkgo with Vinpocetine and sued manufacturer NBTY Inc. and Costco on the grounds that the product's label falsely claimed it helped with mental awareness and memory. The shopper sought to certify two proposed classes of California consumers who bought the supplement.

The district court granted the motion for class certification, finding that Korolshteyn adequately represented the class, despite uncertainties regarding when she first took TruNature Ginkgo and whether it was before or after she had reason to question its effectiveness. Costco and NBTY further contended that common questions did not predominate, arguing that some consumers may have been better off because of the TruNature Ginkgo. The court rejected this argument because the class claims were not based on whether any purchasers experienced a benefit but, rather, whether the labeling was deceptive. The court was not persuaded by the argument that some customers may have bought the product based on other companies' advertising about Ginkgo biloba because that did not relieve Costco and NBTY of liability for their own potentially false statements. The court also rejected the defendants' claim that allowing unsatisfied customers to return the product to Costco without a receipt would be a better option, because it would be a hassle for customers and would not address whether Costco and NBTY made any material misrepresentations. ■

Environmental

- **Coal Plant's Expired License in the Clear**

  Little v. Louisville Gas & Electric Co., No. 13-cv-01214 (W.D. Ky.) (Feb. 13, 2017). Judge McKinley. Dismissing landowners' Clean Air Act claim.

  The owner of a Kentucky coal-fired power plant defeated neighboring landowners' claim that the plant operated without a valid Clean Air Act permit. The plant's 2002 air permit expired in October 2007 and was not officially renewed until November 2014. But the Louisville Air Pollution Control District's regulations permitted the plant to continue operating under an expired permit as long as certain conditions were met. The district court ruled that the plant complied with those conditions, which foreclosed the landowners' federal claim.

  Little is a reminder that diligent environmental compliance can pay off in the long run—not only by preventing regulatory enforcement actions but also by creating defenses for private-party litigation. ■

Labor & Employment

- **Costco Workers Can't Pursue Claims in Bulk After Class Decertification**

  Stiller and Moro, et al. v. Costco Wholesale Corp., No. 15-55361 (9th Cir.) (Jan. 20, 2017). Affirming class decertification.

  The Ninth Circuit affirmed a California district court's order decertifying a class of Costco employees alleging a failure to pay wages for time after clocking out while supervisors performed various closing activities. The Ninth Circuit held that the district court did not abuse its discretion in finding that individualized questions predominated over common issues because Costco established that its company policy of requiring employees to stay in the building after clocking out was not uniformly applied.

- **Third Circuit Breathes Life into Age Bias Claims**

  Karlo v. Pittsburgh Glass Works LLC, No. 15-3435 (3rd Cir.) (Jan. 10, 2017). Reversing grant of summary judgment.

  In an age bias appeal under the Age Discrimination and Employment Act (ADEA), the Third Circuit held that the ADEA allows disparate-impact claims by workers within the 40-and-older protected class even when an employment decision disproportionately affects only a subgroup of workers within the protected class. That decision creates a circuit split. Pittsburgh Glass Works laid off a group of 100 employees after giving broad discretion to area directors—instead of implementing any polices or conducting any disparate impact analysis. As a result, the plaintiffs claimed that the layoffs disproportionately impacted workers over 50 but did not harm employees in their forties, the latter of whom are also protected by the ADEA.

CLASS-IFIED INFORMATION

Brett Coburn reads the tea leaves of restaurant servers' fortunes with *SHRM* in "Tipped P.F. Chang's Workers Seek Full Minimum Wage."

Brett Coburn

The Third Circuit reversed the lower court's entry of summary judgment on the plaintiffs' disparate impact claims. According to the court, the ADEA prohibits any action that has a significantly disproportionate adverse impact based on the age of employees, not merely a disparate impact based on "forty-and-older identity." The court warned that companies may need to become more vigilant about the effects of their employment practices.

- **Certification Can't Fly on YouTube Video**

  Valdez, et al. v. Air Line Pilots Association International, No. 16-cv-02256 (W.D. Tenn.) (Jan. 9, 2017). Judge McCalla. Denying class certification.

  A Tennessee district court declined to certify a class of FedEx pilots alleging that their union breached its duty of fair representation by misrepresenting—in an informational YouTube video—the compensation package included as part of a proposed collective bargaining agreement. Because one of the suit's central issues was whether each class member viewed and relied on the video, the court concluded that individual issues predominated over issues common

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to the class. The court also found that the named plaintiffs—three of whom voted for the collective bargaining agreement and one who of whom did not—did not adequately represent the interests of the class.

Detainees Get Certified

Menocal, et al. v. GEO Group Inc., No. 14-cv-02887 (D. Colo.) (Feb. 27, 2017). Judge Kane. Granting class certification.

The District of Colorado certified two classes of immigrant detainees who were ordered to clean a detention facility for either no pay or $1 per day. The first class included roughly 60,000 detainees alleging that the detention center violated the Trafficking Victims Protection Act by forcing them to clean without pay. The second class included an additional 2,000 detainees alleging that the detention center was unjustly enriched when the detainees cleaned for at most $1 per day.

The district court rejected the detention center's argument that the unique background of each detainee would cause individual issues to predominate over common ones. The court ruled that a class was superior because, without a class, it was unlikely that the individual detainees would be able to bring separate suits.

With No Meaningful Opportunity to Opt Out, Temp Workers Not Bound to Arbitrate

Echevarria v. Aerotek Inc., 16-cv-04041 (N.D. Cal.) (Jan. 3, 2017). Judge Freeman. Denying motion to compel arbitration.

A California district court recently denied a motion to compel arbitration in a putative class action against a temporary staffing agency for unpaid work hours. Relying on *Morris v. Ernst & Young*—a 2016 Ninth Circuit decision—the court held that an electronically signed arbitration provision prohibiting class actions was not enforceable because it did not give plaintiffs a "meaningful opportunity" to opt out of the arbitration agreement. The court noted that the motion to compel arbitration might have been meritorious before the *Morris* decision, but found that there was no evidence that Aerotek informed its workers of how they could opt out of the arbitration agreement.

PAGA Claims Can't Be Arbitrated in California State Court

Hernandez v. Ross Stores Inc., E064026 (Ca. Ct. of App.) (Dec. 7, 2016). Affirming denial of motion to compel arbitration.

A California Court of Appeal affirmed a denial of Ross Stores' motion to compel arbitration of the plaintiff's Private Attorneys General Act (PAGA) claim. The appellate court affirmed the trial court's finding that the plaintiff's PAGA claim was brought on behalf of the state and did not include individual claims, and thus the plaintiff was not required to arbitrate her dispute in order to show that she was an "aggrieved party" before proceeding to court. The court of appeal rejected Ross's argument that an employer can require an employee to arbitrate the individual aspects of her PAGA claim while maintaining the representative claim in court. The Ninth Circuit has reached the opposite conclusion.

Judge Activates Class Claims for Time Warner Cable Technicians

Luviano v. Multi Cable Inc., No. 15-cv-05592 (C.D. Cal.) (Jan. 3, 2017). Judge O'Connell. Granting collective-action certification and partial class certification.

A California district court granted class certification to a group of Time Warner Cable technicians who had alleged that the company

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misclassified them as independent contractors and deprived them of overtime pay and benefits. The technicians argued that Time Warner exercised a level of control over them that was more akin to employees as opposed to independent contractors because the company controlled their uniforms, schedule, hours, and tools used. They also claimed that they were subject to a complicated compensation scheme based on both the number of installations and customer satisfaction ratings, which meant they had no way of knowing how much they would be paid on a given day.

The court rejected Time Warner's argument that the technicians failed to establish a co-employer relationship with Multi Cable Inc., the company that actually employed the technicians. The court also rejected a challenge to the individual class representative, allowing him to continue representing the class under the condition that a replacement be named in the event he is disqualified during trial. ■

Privacy & Data Security

- **Standing in Line to Buy Bread, but No Standing to Bring Suit**

  Cruper-Weinmann v. Paris Baguette America Inc., No. 12-cv-07013 (S.D.N.Y.) (Jan. 20, 2017). Judge Rakoff. Granting motion to dismiss.

  Judge Rakoff granted Paris Baguette's motion to dismiss a putative class action claiming that it violated the Fair and Accurate Credit Transactions Act (FACTA) by providing the plaintiff with a receipt that contained credit card expiration dates. Judge Rakoff agreed with Paris Baguette that its procedural violation of FACTA did not present a risk of real harm to the plaintiff's concrete interest in protecting her identity because she did not allege that she suffered an increased risk of identity theft or that anyone else saw or accessed her receipt. So the plaintiff lacked standing under *Spokeo*.

- **False Statement Provides Standing**

  Medina v. AllianceOne Receivables Management Inc., No. 16-cv-04664 (E.D. Pa.) (Jan. 19, 2017). Judge Bartle. Denying motion to dismiss.

  Judge Bartle denied AllianceOne's motion to dismiss a putative class action alleging that the debt collection company violated the FDCPA when it sent the plaintiff debtor a letter stating that AllianceOne would report the debt forgiveness to the IRS "as required" by the IRS, which he claimed was false and misleading. According to Judge Bartle, the use of "as" could cause a reasonable recipient of the letter to believe that IRS reporting was mandatory for any debt forgiveness, which is not the case. That made AllianceOne's letter potentially deceptive under the FDCPA.

CLASS-IFIED INFORMATION

"Will I get sued?" That's one question Donald Houser answers in his *Law360* article "What Counsel at Retailers Should Know About Data Breaches."

Donald Houser

- **Second Circuit Invites TCPA Plaintiffs Back to Court**

  Physicians Healthsource Inc. v. Boehringer Ingelheim Pharmaceuticals, No. 15-288 (2nd Cir.) (Feb. 3, 2017). Vacating dismissal and remanding.

  The Second Circuit vacated a dismissal of a putative junk fax Telephone Consumer Protection Act (TCPA) class action brought by recipients of faxed invitations to a dinner meeting on sexual disorders. The Second Circuit disagreed with the Connecticut district court's narrow reading of "commercial purpose" under the TCPA's exemptions for informational communications. Under the FCC's view cited by the Second Circuit, TCPA liability can flow from material promoting "free consultations and seminars" if a nexus exists between the invitation and a company's business. The decision reflects a broader reading of "unsolicited advertisement" under the TCPA at the pleadings stage.

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Theft of Doc's Docs Not Enough for Standing in Fourth Circuit

Beck v. McDonald, No. 15-1715 (4th Cir.) (Feb. 6, 2017). Affirming dismissal.

An attempt to revive two putative data-breach class actions failed because neither plaintiff's pleadings demonstrated nonspeculative, imminent injuries from the theft of a laptop and boxes of patient files from a VA hospital in South Carolina sufficient to confer standing. The Fourth Circuit noted that while the Sixth, Seventh, and Ninth Circuits had recognized standing for "increased risk" injuries, each of those cases involved instances where personal information was specifically targeted or the stolen data was actually misused. The plaintiffs could not demonstrate injury from the mere theft of the laptop and files without alleging either circumstance, nor did the allegations meet the lesser "substantial risk" of future harm standard under *Clapper v. Amnesty International USA*. That the VA had offered credit monitoring to the plaintiffs did not change the Forth Circuit's conclusion.

End of the Runway for This TCPA Suit

Leyse v. Lifetime Entertainment Services LLC, Nos. 16-1133, 16-1425 (2nd Cir.) (Feb. 15, 2017). Affirming denial of class certification.

The Second Circuit upheld a denial of certification to a putative class of consumers who allegedly received robocalls promoting *Project Runway* in violation of the TCPA. The panel held that the putative class was not ascertainable, in part because no list of numbers that were called existed or was likely to emerge. The plaintiff, a call recipient, argued that the Southern District of New York's denial decision rewarded Lifetime's failure to maintain call records, but the Second Circuit disagreed, explaining that the list was not necessary to ascertain the class, but that the plaintiff's claim failed because he had not demonstrated any sufficiently reliable method to identify the proposed class. The Second Circuit also affirmed both the district court's finding that the plaintiff could pursue his individual TCPA claim and conclusion that Lifetime's unaccepted offer of judgment did not prevent an entry of judgment in favor of the plaintiff on his individual claim.

Snack Company Granted Sweet Dismissal

Vera v. Mondelez Global LLC, No. 16-cv-08192 (N.D. Ill.) (Mar. 17, 2017). Judge Durkin. Granting motion to dismiss.

Judge Durkin dismissed a putative class action against Mondelez Global alleging that the multinational snack company violated the Fair Credit Reporting Act (FCRA) by using an improper disclosure format to inform job applicants that it would conduct background checks. Although Judge Durkin determined that Mondelez Global's online job application violated the FCRA's "stand-alone disclosure requirement" because it failed to use the statutory form of disclosure, that procedural violation was not enough for the plaintiff former employee to survive dismissal where he did not allege that Mondelez Global actually failed to disclose that it intended to investigate his private information; i.e., the plaintiff did not allege that he suffered an injury-in-fact.

E-ZPass Speeds Through Dismissal

St. Pierre v. Retrieval-Masters Creditors Bureau Inc., No. 15-cv-02596 (D.N.J.) (Mar. 24, 2017). Judge Wolfson. Granting motion to dismiss.

Judge Wolfson granted dismissal to Retrieval-Masters Creditors Bureau, which collects debts owed by E-ZPass users, finding that the plaintiff's obligation to pay delinquent tolls did not constitute a "debt" within the meaning of the FDCPA. The plaintiff adequately alleged a concrete injury via Retrieval-Masters's toll collection envelopes that displayed his

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account information, which disseminated information about his status as a debtor as well as E-ZPass's debt collection efforts. But, "because the obligation to pay tolls clearly arises out of state law, and because the use of toll roads is not 'primarily for personal, family, or household purposes,' but for the benefit of the general public," it was not an FDCPA violation.

- **Sender of Unsolicited Texts Receives Unwanted Order**

Mohamed v. Off Lease Only Inc., No. 15-cv-23352 (S.D. Fla.) (Mar. 22, 2017). Judge Cooke. Ordering that the plaintiff established standing.

Judge Cooke held that plaintiff Ray Mohamed had established standing in his TCPA suit because he received unsolicited text messages and phone calls from used-car dealer Off Lease Only in response to an automobile advertisement he placed on Craigslist. After requesting briefing on whether the plaintiff had standing under *Spokeo*, Judge Cooke found that Mohamed's alleged injury, although an intangible harm, was sufficiently particularized to confer standing because he personally received a text message. That receipt implicated the substantive privacy rights the TCPA was enacted to protect, namely the "right to be free from certain types of phone calls and texts absent consumer consent." ■

Products Liability

- **Fosamax Class Action Is Not Broken**

  In re Fosamax, No. 14-1900 (3rd Cir.) (Mar. 22, 2017). Reversing district court's grant of summary judgment.

  The Third Circuit reversed the district court's grant of summary judgment to Merck in a class action alleging that the manufacturer failed to warn users of the osteoporosis drug Fosamax about the risk of hip fractures. The appellate court rejected the district court's ruling that the plaintiffs' claims were preempted by federal law because the success of the preemption argument rests on a factual determination of whether Merck proposed a clear and accurate warning to the FDA.

- **Class Certification Only a Pipe Dream**

  In re Fluidmaster Inc. Water Connector Components Products Liability Litigation, No. 14-cv-05696 (N.D. Ill.) (Mar. 31, 2017). Judge Dow. Denying motion for class certification.

  An Illinois federal judge denied a motion for class certification in a lawsuit against plumbing manufacturer, Fluidmaster. The proposed class of homeowners claimed that Fluidmaster manufactured plumbing connectors with poor quality steel that easily corrodes and causes fluid lines to rupture. The plaintiffs sought to certify a nationwide class under the California Consumer Legal Remedies Act and several subclasses based on state-law breach of warranty, negligence, and strict liability claims. The court declined to certify a nationwide class, reasoning that the plaintiffs could not show that common issues of law and fact predominate because the homeowners' claims are governed by different state laws. In addition, the plaintiffs did not define the subclasses based on the parameters of state law, and the court refused to do it for them. ■

CLASS-IFIED INFORMATION

Rugby player (and lawyer) Todd Benoff connects with AutoSens about "Cybersecurity, OTA Updates, and Working with Hackers."

Todd Benoff

Securities

Liquidity Projection Costs J.C. Penney

Marcus, et al. v. J.C. Penney Company, et al., No. 13-cv-00736 (E.D. Tex.) (Mar. 8, 2017). Judge Schroeder. Granting class certification.

The Eastern District of Texas certified a class of investors claiming that J.C. Penney violated the Securities Exchange Act of 1934 and Rule 10b-5 by making false statements about the company's liquidity. Specifically, the investors alleged that J.C. Penney officials made false or misleading statements when informing the public that they expected to have $1.5 billion in excess liquidity at the end of 2013. In opposition to class certification, J.C. Penney argued that the putative class did not have viable claims because the company issued disclosures correcting any allegedly false statements. Ultimately, the district court rejected J.C. Penney's argument and certified the class because the company failed to show that its prior disclosures did not cause its stock price to drop.

Costly Kickbacks

Mauss, et al. v. NuVasive Inc., et al., No. 13-cv-02005 (S.D. Cal.) (Mar. 22, 2017). Judge Miller. Granting class certification.

A California district court certified a class of investors claiming that NuVasive, a surgical device developer, violated the Securities Exchange Act of 1934 and Rule 10b-5 by concealing a kickback scheme and off-label product promotion—actions for which NuVasive later paid $14 million to the U.S. Department of Justice. In opposition to class certification, NuVasive argued that the class representatives could not adequately represent the interests of the class because they were unfamiliar with certain factual and legal issues. Similarly, the company argued that class counsel was inadequate because they had not maintained regular contact with the class.

Ultimately, however, the court found both the class representatives and class counsel adequate. In rejecting the defendant's arguments, the district court found that the class representatives had enough familiarity with the allegations and that class counsel were regularly communicating with the class members.

Spinal Therapy Company's Nerves Gone After Case Dismissed

Gan*em v. InVivo Therapeutics Holdings Co., et al.*, 15-1544 (1st Cir.) (Jan. 9, 2017). Affirming dismissal.

The First Circuit affirmed the dismissal of a putative class action brought by investors of InVivo, a spinal cord therapy company. The investors allege that InVivo made false public statements about the timing of

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CLASS-IFIED INFORMATION

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drug trial opportunities in order to gain investors. They also claim that the company failed to disclose a letter from the FDA that could impact the timing of the testing. The First Circuit affirmed the lower court's conclusion that InVivo did not make any material misrepresentations and held that it is not "unlawful for a company to publicize an aggressive timeline or estimate for a proposed action without disclosing every conceivable stumbling block to realizing those plans."

Seventh Circuit Kicks Goldberg Plaintiffs Out of the Ring

Goldberg v. Bank of America N.A., No. 11-2989 (7th Cir.) (Jan. 23, 2017); *Holtz v. JPMorgan Chase Bank N.A.*, No. 13-2609 (7th Cir.) (Jan. 23, 2017). Affirming dismissal.

In two different cases, the Seventh Circuit held that securities claims based on omissions and nondisclosures of important facts must proceed under federal law, not state law. Both cases centered on breach of contract and breach of fiduciary duty claims regarding the nondisclosure of certain fees charged to customers. The plaintiffs argued that they could prove their claims without relying on any fraud or omissions, but the two panels disagreed, saying that artful pleading could not avoid the omission that formed the lynchpin of the claims. The *Goldberg* plaintiffs are seeking an en banc appeals panel to reconsider the case.

Court Grants Cert. to Allergan Investors in Insider Trading Suit

In re Allergan Inc. Proxy Violation Securities Litigation, No. 14-cv-02004 (C.D. Cal.) (Mar. 15, 2017). Judge Carter. Granting class certification and denying motion to dismiss without prejudice.

A California district court certified a group of Allergan investors asserting insider trading claims against Valeant Pharmaceuticals and a hedge fund. The investors allege that Valeant tipped off the hedge fund about a planned takeover bid, allowing the hedge fund to make billions of dollars by buying and then selling Allergan stock. In certifying the class, the court rejected the defendants' arguments that some of the plaintiffs actually profited while others lost money. According to the court, the plaintiffs were bound by the core question of whether the defendants withheld improper information and improperly traded on that information. ■

Settlements

Third Time's the Charm? Judge Denies Third Proposed Settlement

Hofmann v. Dutch LLC, No. 14-cv-02418 (S.D. Cal) (Mar. 2, 2017). Judge Curiel. Denying preliminary settlement approval.

Judge Curiel denied preliminary approval of a proposed class settlement for the third time. Plaintiff Sonia Hoffman originally filed the class action lawsuit against Current/Elliot jeans in September 2014, claiming the company improperly labeled its jeans "Made in the USA" when the jeans contained foreign-made components. The third proposed settlement consisted of a tote bag with a retail value of $128 and an electronic gift card of $20 for each class member, and up to $175,000 for the plaintiff's attorneys' fees with a "clear-sailing" provision attached. Judge Curiel rejected the settlement because it required class members to purchase additional items from Current/Elliott to redeem the settlement gift card and because he believed the clear-sailing provision was not in the best interests of the class.

Google Pays $5.5 Million for "Zombie Cookies"—but to Whom?

In re Google Inc. Cookie Placement Consumer Privacy Litigation, No. 12-md-02358 (D. Del.) (Feb. 2, 2017). Judge Robinson. Granting final settlement approval.

Judge Robinson approved a $5.5 million settlement fund to be used for cy pres contributions to the indirect benefit of the Google settlement class. The case involved Google's use of zombie cookies that continued to collect consumer browsing data even after those same consumers had blocked the use of cookies. Judge Robinson agreed that direct monetary payments to absent class members would be infeasible and instead approved cy pres distributions to various law and technology centers at UC Berkeley, Harvard University, and Stanford University. Though the settlement class is not entitled to cash payouts, the class members receive prospective relief in the form of Google's assurances that it has taken actions to delete all third-party Google cookies that exist in the members' browser files.

Eighth Circuit Not Grossed Out by Gross Settlement Calculation

Huyer, et al. v. Buckley, No. 16-1681 (8th Cir.) (Feb. 16, 2017). Affirming award of attorneys' fees.

A three-judge panel of the Eighth Circuit unanimously denied the appeal of three objectors to a class settlement, finding that the district court did not abuse its discretion in approving attorneys' fees worth one-third of the gross settlement amount. In December 2015, Wells Fargo reached a $25.7 million settlement, and class counsel requested attorneys' fees of one-third of the total settlement fund. Three class

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Fall into Emily Costin's panel "ERISA Plan Investment Committee Governance: Avoiding Breach of Fiduciary Duty Claims," hosted by Strafford on September 12.

Emily Costin

members objected, arguing that attorneys' fees should be based only on the net settlement—which wouldn't include more than $3 million in costs. The Eighth Circuit ruled that the administrative costs could be considered part of the "benefit" in applying the "percentage-of-the-benefit" calculation for attorneys' fees and affirmed the district court's approval. On top of that, the Eighth Circuit found that the award was in line with others frequently approved in the circuit.

Google Left Searching for New Settlement Agreement

Matera v. Google Inc., No. 15-cv-04062 (N.D. Cal.) (Mar. 15, 2017). Judge Koh. Denying preliminary settlement approval.

Judge Koh decisively refused a proposed settlement between Google and a class of non-Gmail users whose emails were intercepted and scanned by Google for advertising purposes. After a stern reprimand of both parties during the preliminary settlement hearing, Judge Koh reiterated the shortcomings of the proposed settlement. Not only was the settlement unlikely to prevent future abuses by Google, but the disclosures to class members did not clearly disclose Google's prior actions, nor did they explain what changes would be made to resolve them. Judge Koh made clear that something more would be required to obtain preliminary approval.

A Typical Problem: Wage and Hour Class Reps Found to Be Atypical

Roberts v. Marshalls of CA LLC, No. 13-cv-04731 (N.D. Cal.) (Mar. 28, 2017). Judge James. Denying preliminary settlement approval.

Magistrate Judge James denied a putative class of TJ Maxx employees' motion for preliminary approval in a wage and hour class action, finding that the employees failed to satisfy Rule 23(a)'s typicality requirement. Judge James faulted the named plaintiffs for failing to identify their positions relative to the putative class, which prevented her from finding that there were no dissimilarities among the class that would impede resolution of the litigation. Judge James also noted that the named plaintiffs failed to show that they worked the same number of hours per day as the other class members. Those failures were enough to derail the settlement given that under the terms of the settlement, *all* employees were class members, regardless of position.