ALSTON & BIRD

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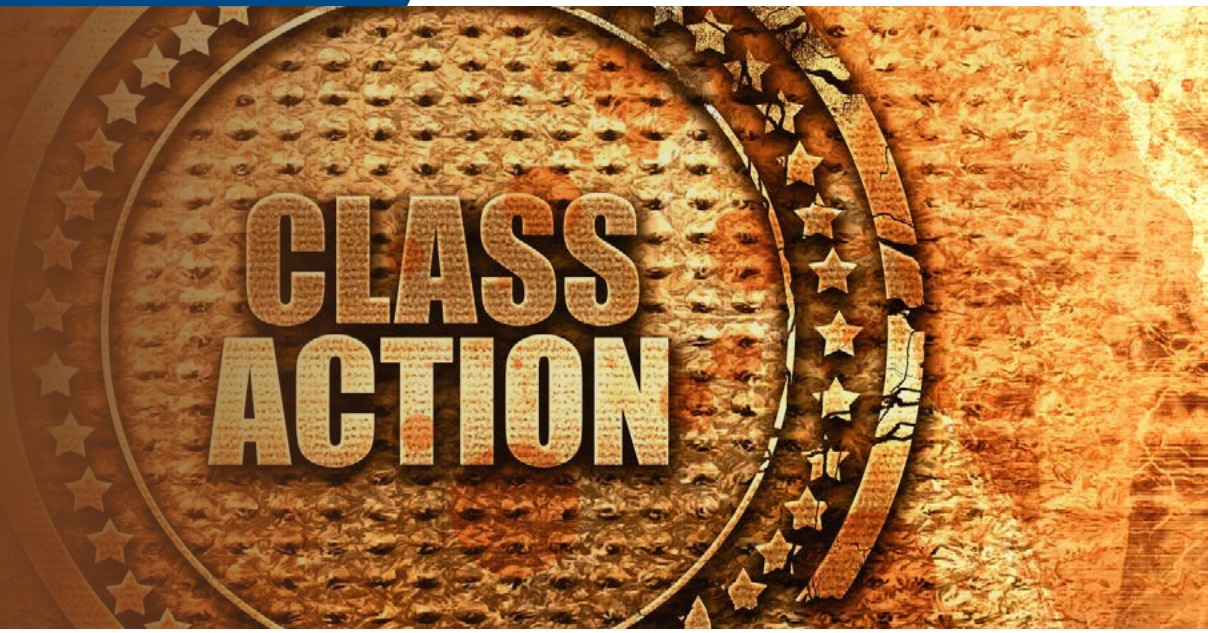

Class Action Roundup

Spring 2018

Where the (Class) Action Is

Welcome! The spring has sprung and we are here to round up the major class action opinions and settlements finalized during the first quarter of 2018. It was another active quarter with significant activity across all the areas we monitor. We continue to see the effects of the U.S. Supreme Court's *Bristol-Myers Squibb* decision, with several opinions citing the case when dismissing class members due to jurisdictional issues.

This quarter we saw cases concerning a wide range of products and services from noodles, eggs, and iced coffee to in-vehicle safety systems, massages, and even professional sports season ticket holders. The TCPA remains a hot topic with a handful of cases concerning text messages and autodialers.

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.

Authors & Editors

Cari K. Dawson
cari.dawson@alston.com
404.881.7766

Kyle G.A. Wallace
kyle.wallace@alston.com
404.881.7808

David R. Venderbush
david.venderbush@alston.com
212.210.9532

Charles W. Cox
charles.cox@alston.com
213.576.1048

Alexander Akerman
alex.akerman@alston.com
213.576.1149

Christina Bortz
christina.bortz@alston.com
404.881.4686

Sam Bragg
sam.bragg@alston.com
214.922.3437

David B. Carpenter
david.carpenter@alston.com
404.881.7881

Caitlin Counts
caitlin.counts@alston.com
919.862.2252

A. Nicole DeMoss
nicole.demoss@alston.com
404.881.4945

Matthew A. Durfee
matt.durfee@alston.com
214.922.3428

Ryan P. Ethridge
ryan.ethridge@alston.com
919.862.2283

Mia Falzarano
mia.falzarano@alston.com
214.922.3439

Jamie S. George
jamie.george@alston.com
404.881.4951

Anthony T. Greene
tony.greene@alston.com
404.881.7887

Bradley Harder
bradley.harder@alston.com
404.881.7829

Kandis Wood Jackson
kandis.jackson@alston.com
404.881.7969

Meredith Jones Kingsley
meredith.kingsley@alston.com
404.881.4793

Laura A. Komarek
laura.komarek@alston.com
404.881.7880

Matthew D. Lawson
matt.lawson@alston.com
404.881.4650

Hillary Li
hillary.li@alston.com
404.881.7142

Andrew J. Liebler
andrew.liebler@alston.com
404.881.4712

Jahnisa Tate Loadholt
jahnisa.loaadholt@alston.com
202.239.3670

Austin L. Lomax
austin.lomax@alston.com
404.881.7840

Ashley Miller
ashley.miller@alston.com
404.881.7831

Rachael A. Naor
rachael.naor@alston.com
415.243.1013

Christiane Nolton
christiane.nolton@alston.com
404.881.7165

Sarah N. O'Donohue
sarah.odonohue@alston.com
404.881.4734

Annalise Peters
annalise.peters@alston.com
404.881.7433

Kristi Ramsay
kristi.ramsay@alston.com
404.881.4755

Geoff C. Rathgeber
geoff.rathgeber@alston.com
404.881.4974

Jay Repko
jay.repko@alston.com
404.881.7683

Jason Rottner
jason.rottner@alston.com
404.881.4527

Marcus Sandifer
marcus.sandifer@alston.com
212.210.9551

Sheila A. Shah
sheila.shah@alston.com
213.576.2510

Tony A. Stram
troy.stram@alston.com
404.881.7256

Bradley M. Strickland
brad.strickland@alston.com
202.239.3839

Amanda M. Waide
amanda.waide@alston.com
404.881.4409

Jacob M. Ware
jake.ware@alston.com
404.881.7693

Derek Zotto
derek.zotto@alston.com
202.239.3017

Antitrust/RICO

- **Third Circuit: Direct Purchasers May Recover for All Eggs-penditures**

  In re Processed Egg Products Antitrust Litigation, No. 16-03795 (3rd Cir.) (Jan. 22, 2018). Reversing summary judgment and remanding.

  The Third Circuit held that direct purchasers of allegedly price-fixed eggs had antitrust standing to seek damages from price-fixing egg suppliers for overcharges paid on *all* egg products—regardless of whether the egg products were sourced from price-fixing conspirators or nonconspirators. The court's rationale was simple: the purchasers were suing the conspiring parties they bought the price-fixed product from, and antitrust standing does not turn on whether the conspirators, or some other party entirely, benefits from the overcharges.

- **Noodle-Makers Can't Wriggle Out of Class Cert**

  In re Korean Ramen Indirect Antitrust Litigation, No. 3:13-cv-04115 (N.D. Cal.) (Mar. 23, 2018). Judge Orrick. Denying motion to decertify class.

  Judge Orrick denied a bid to decertify a class of indirect purchaser plaintiffs (IPPs) on the eve of trial. He rejected the ramen producers' argument that the IPPs failed to show that the laws of affected states do not materially vary from California's as the plaintiffs failed to do in the Ninth Circuit's recent *In re Hyundai and Kia Fuel Economy Litigation* decision. Although the IPPs had not conducted an in-depth analysis of whether material conflicts existed among *Illinois Brick*-repealer-states' laws and the Cartwright Act, the IPPs cited—and Judge Orrick relied on—an intradistrict decision that had already conducted that analysis.

CLASS-IFIED INFORMATION

98 lawyers, 41 practices.
Chambers USA 2018 is out, and the verdict is in: Alston & Bird is again widely recognized.

- **S.D.N.Y. Clarifies Damages/Injury Distinction in LIBOR-Rigging MDL**

  In re LIBOR-Based Financial Instruments Antitrust Litigation, No. 1:11-md-02262 (S.D.N.Y.) (Feb. 28, 2018). Judge Buchwald. Granting motion for class certification in part.

  Judge Buchwald held that common questions predominated the over-the-counter investors' antitrust claims, rejecting the defendant banks' formulation of injury. The banks argued that determining injury entailed an analysis of the net impact of the alleged LIBOR suppression on each investors' portfolio, while the investors asserted that antitrust injury occurs the moment a purchaser incurs an overcharge. While declining to adopt wholesale the investors' position, Judge Buchwald nevertheless concluded that the only individual questions the banks identified related to damages—or at least injury in a manner that essentially overlaps with damages. The court held that individualized damages determinations cannot preclude class certification. ■

Banking, Financial Services & Insurance

- **Class Certification Denied for Mortgage Trust Investors Claiming $2 Billion in Losses**

  Blackrock Allocation Target Shares: Series S Portfolio, et al. v. U.S. Bank N.A., No. 1:14-cv-09401 (S.D.N.Y.) (Jan. 31, 2018). Judge Gardephe. Denying motion for class certification.

  A New York judge denied a motion to certify a class of about 270 investors seeking to recover $2 billion in damages for alleged losses in 25 home mortgage trusts. The federal court found that 21 of the 25 trusts suffered no injury at all under the Trust Indenture Act (TIA) and that 18 of the trusts had actually increased in value since the plaintiffs invested in them. As to the remaining for trusts, the court said that it had "grave concerns" that any damages model would require individualized assessments and said that TIA cases are not a "treasure hunt" for investors to profit off former investors' losses.

- **Fifth Circuit Affirms Dismissal of Enron Disclosures Class Action**

  Samuel Giancarlo, et al. v. UBS Financial Services Inc., et al., No. 16-20663 (5th Cir.) (Feb. 26, 2018). Affirming dismissal of putative class action.

  The Fifth Circuit affirmed a Texas district court's dismissal of a putative class action filed by retail investors claiming that UBS brokers concealed Enron's fraudulent behavior. The district court properly found that the plaintiff investors had not shown any intent of wrongdoing by UBS and that UBS did not have a duty to warn or owe inside information to retail investors or customers. The panel also held that the district court did not abuse its discretion in denying the plaintiffs' motion for leave to amend their complaint, noting that they had failed to properly state a claim in the 15 years since the case had been filed and that they were untimely in seeking to amend.

CLASS-IFIED INFORMATION

Donald Houser

Ashley Miller

Donald Houser and Ashley Miller explain why "Banks Suing After a Payment Card Breach Face Difficulty" in *Law360*.

- **Certificateholders of RMBS Trusts Lose Class Certification Bid**

  Royal Park Investments SA/NV v. HSBC Bank USA, N.A., No. 1:14-cv-09366 (S.D.N.Y.) (Feb. 1, 2018). Judge Schofield. Denying class certification.

  Judge Schofield denied class certification to certificateholders of residential mortgage-backed securities (RMBS) trusts suing HSBC Bank, as trustee, for breach of contract and breach of trust on the ground that the class members could not show predominance. The class members included individuals from across the U.S., as well as Europe and Asia, and many of the certificateholders sought losses incurred by previous holders of their securities. The court also ruled that investors who sought to recover such losses may not have standing to sue, depending on the terms of their assignments. The court noted that determining standing would involve examining the jurisdiction whose law governed each assignment, which in turn would require the

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court to apply New York's fact-intensive "center of gravity" choice-of-law framework. The court also ruled that the statute of limitations varied by class member, depending on the applicable jurisdiction. The court would have to conduct individualized inquiries to determine standing and the applicable statutes of limitations, which the court concluded would undermine any economies achieved by class treatment.

American Express and Payments Processor Dragged into Party

Medrano, et al. v. Party City Corp., No. 2:16-cv-02996 (E.D. Cal.) (Jan. 22, 2018). Judge Shubb. Granting class certification.

Judge Shubb granted Party City customers' unopposed motion for class certification alleging that the company violated the Fair and Accurate Credit Transactions Act (FACTA) by printing the expiration date of the customers' American Express card receipts. Judge Shubb found that "there are questions of law or fact common to the class" and that the putative class members satisfied the predominance and superiority requirements of Rule 23.

In the same opinion, Judge Shubb also granted Party City's unopposed motion to file a third-party complaint against AmEx, whom Party City blamed for the printing error, and Cayan LLC, the card processor tasked with updating Party City's payment system to accept chip credit cards and to comply with AmEx's guidelines. Party City alleged that it did not willfully violate FACTA, and even if it did, AmEx and Cayan have a duty to indemnify it.

Private Mortgage Insurance Class Action Dismissed

Menichino, et al. v. Citibank N.A., et al., No. 2:12-cv-00058 (W.D. Pa.) (Jan. 19, 2018). Judge Hornak. Granting motion for judgment on the pleadings.

A putative class of individuals alleged that Citibank engaged in unlawful practices related to mortgage insurance and asserted claims for violation of the Real Estate Settlement Procedures Act (RESPA) and unjust enrichment. The class members had obtained residential mortgage loans and made payments of less than 20 percent of the market value of their homes, so Citibank required them to purchase private mortgage insurance. According to the class members, the insurer's practice of contracting for reinsurance from their own captive companies violated RESPA's anti-kickback and anti-fee splitting provisions.

Citibank moved for judgment on the pleadings after the Third Circuit Court of Appeals affirmed summary judgment in a substantially similar case—*Cunningham v. M&T Bank Corp*. In *Cunningham*, the Third Circuit found that equitable tolling did not apply to the plaintiffs' RESPA claim because the plaintiffs had received a disclosure form that explained that the reinsurance could be with an affiliate of the mortgagee, and the plaintiffs never took any steps to investigate the reinsurance scheme. The *Menichino* plaintiffs received substantially similar disclosures as the *Cunningham* plaintiffs, and therefore Judge Hornak held that equitable tolling did not apply to their claims. Judge Hornak also found that the plaintiffs' unjust enrichment claim was barred by the statute of limitations and filed rate doctrine. The court granted Citibank's motion in its entirety and dismissed the case.

Court Appraises, Certifies RICO Class Action

Waldrup v. Countrywide Financial Corp., et al., No. 3:13-cv-08833 (C.D. Cal.) (Feb. 6, 2018). Judge Snyder. Granting motion for class certification.

Certifying a nationwide RICO class, a California district court found a "systemic, corrupt relationship" between Countrywide and LandSafe—Countrywide's wholly-owned appraisal company—in violation of the Uniform Standards of Professional Appraisal Practice's (USPAP) independent appraiser requirement. The court rejected the defendants' predominance argument that the plaintiffs' RICO claims turned on an analysis to determine whether each individual class member's appraisal was overvalued. Instead, it endorsed the plaintiffs' contention that companywide policies and practices resulted in systematic and uniform violations of USPAP, regardless of appraisal value. ■

Consumer Protection

Unexpected Arbitration Clause Unenforceable

Kathryn M. Robinson v. OnStar LLC, No. 16-56412 (9th Cir.) (Mar. 15, 2018). Reversing and remanding district court's dismissal of plaintiff's complaint.

Kathryn Robinson had enrolled in a one-year trial subscription with OnStar, an in-vehicle security and emergency services feature. When Robinson called to activate her one-year trial subscription, OnStar never informed her of its additional terms and conditions, which included the arbitration clause that the trial court relied upon in ordering arbitration. Because Robinson was never put on actual or constructive notice of the arbitration clause at the time of her agreement with OnStar, the court ruled that she never assented to the arbitration clause and cannot be bound by it.

Massaging the Truth of Plaintiffs' Fraud Claims

Haywood, et al. v. Massage Envy Franchising LLC, No. 17-02402 (7th Cir.) (Mar. 13, 2018). Affirming motion to dismiss for failure to state a claim.

Kathy Haywood decided to sue Massage Envy for advertising and selling one-hour massage sessions with only 50 minutes of actual massage time. One problem with her lawsuit: she had never paid for a massage. Her pleading made it "clearly evident" that her receipt of a gift card for a massage, and not any deceptive statements by the defendant, was the but-for cause of her alleged injuries. The appellate court also agreed with the district court that Haywood and her fellow class representative had failed to plead their deception claims – which "sound[ed] in fraud" – with the particularity required under Federal Rule of Civil Procedure 9(b).

CLASS-IFIED INFORMATION

Grant Alexander

Get a venti view of de minimis rules in the Starbucks off-the-clock case in California from Grant Alexander in *Law360* and *The Recorder*.

Ninth Circuit Puts "Cold Drink" Suit on Ice

Forouzesh v. Starbucks Corp., No. 16-56355 (9th Cir.) (Mar. 12, 2018). Affirming dismissal with prejudice of diversity action.

Alexander Forouzesh sued Starbucks, alleging that Starbucks defrauds customers by advertising that its cold drinks contain more liquid than they really do. Forouzesh alleged that the ruse is accomplished by underfilling cups with liquid and then adding ice to make the cups appear full. The district court did not show much patience for Forouzesh's claim: if children can figure out that including ice in a cold beverage decreases the amount of liquid one receives, a reasonable consumer would not be deceived by advertised sizes. The Ninth Circuit concurred, holding "no reasonable consumer would think (for example) that a 12-ounce 'iced' drink, such as iced coffee or iced tea, contains 12 ounces of coffee or tea and no ice."

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Rams Can't Fleece Fans in Move to L.A.

McCallister v. The St. Louis Rams LLC, No. 4:16-cv-00172 (E.D. Mo.) (Mar. 13, 2018). Judge Limbaugh. Granting motion for class certification.

Ronald McCallister owned personal seat licenses (PSLs) for St. Louis Rams football games at the time the Rams moved from St. Louis to California. He alleged that the move entitled him and his putative class of PSL holders to either refunds or the Rams' "best efforts" to procure season tickets for them at the Rams' new stadium location in California.

The district court found that McCallister had satisfied all class certification factors, notably rejecting the Rams' arguments regarding manageability, ascertainability, and predominance. The court held that the Rams could not argue that the proposed PSL owner classes were unmanageable or unascertainable because the Rams' own internal spreadsheets created for business purposes would not readily provide a list of class members. On predominance, the court found that the absence of a classwide damages method was not fatal to class certification because both classes had proposed viable classwide damage models and formulas that could be better assessed on summary judgment.

California: Experts Should Be Scrutinized at Class Certification Stage

Apple Inc. v. Superior Court, No. D072287 (4th Cal. Dist. Ct. App.) (Jan. 29, 2018). Granting and denying in part writ of mandate.

In this writ proceeding, the California Court of Appeal addressed an issue of first impression: whether the California Supreme Court's analysis of the admissibility of expert opinion evidence in *Sargon Enterprises Inc. v. University of Southern California* applies on a motion for class certification. The court answered the question in the affirmative, holding that the trial court's gatekeeping role in keeping out improper expert opinion testimony applies with equal force at the class certification stage. According to the appeal court, it was prejudicial for the trial court to disregard *Sargon* in deciding the plaintiffs' class certification motion. Specifically, the court found that the plaintiffs' damages expert methodologies were either conclusory or contained analytical gaps rendering them unsound. Had the trial court undertaken an analysis of the admissibility of the plaintiffs' expert opinions under *Sargon*, the court likely would have excluded substantial portions of the plaintiffs' expert evidence and declined to certify the proposed class. ■

Environmental

No Escaping California's Jurisdiction

In re Morning Song Bird Food Litigation, No. 3:12-cv-01592 (S.D. Cal.) (Mar. 19, 2018). Judge Houston. Denying motion to dismiss.

A California district court would not dismiss out-of-state class members, rejecting Scotts Miracle Gro's argument that the U.S. Supreme Court's recent *Bristol-Myers Squibb* decision was a qualifying "intervening change" in jurisdictional law.

In March 2017, just months before the *Bristol-Myers Squibb* decision, Judge Houston granted class certification to consumers who purchased more than 70 million bags of bird seed containing toxic pesticides. Looking to piggyback on *Bristol-Myers Squibb*'s strict restriction on specific personal jurisdiction over nonresident defendants with claims brought by nonresident plaintiffs, Scotts quickly filed a motion to dismiss. But according to Judge Houston, Scotts had long ago waived a challenge to personal jurisdiction and could not marshal new case law this late in the game.

The opinion may, in the short term, signal courts' unwillingness to apply *Bristol-Myers Squibb* long after jurisdictional disputes have been settled. But when timely raised by parties challenging courts' jurisdiction, the effect of *Bristol-Myers Squibb*'s significant restrictions on specific jurisdiction remains to be seen.

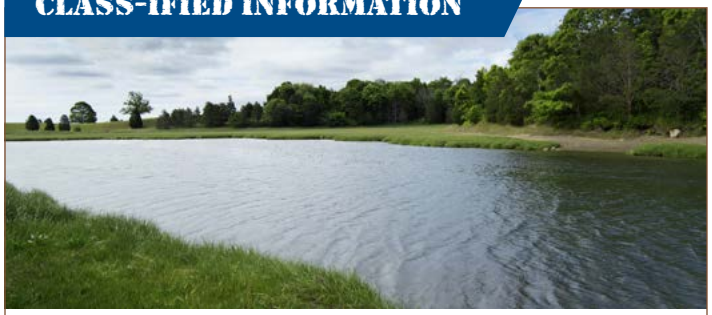
Trial Court Dams Class of Homeowners

Navelski v. International Paper Co., No 3:14-cv-00445 (N.D. Fla.) (Feb. 26, 2018). Judge Rodgers. Granting judgment as a matter of law.

In 2014, a dam on International Paper's property collapsed during a slow-moving rainstorm, discharging water into Elevenmile Creek in Florida. The discharges caused the creek to flood approximately 160 homes in nearby neighborhoods. Current and former homeowners sought damages from the company under negligence, nuisance, trespass, and strict liability theories. At trial, the company argued that the homeowners failed to provide evidence to support their nuisance and trespass claims and that impounding stormwater was not an ultrahazardous activity. Judge Rodgers dismissed those claims as a matter of law. And, after just an hour of deliberation, the jury found that International Paper was not negligent in the design, maintenance, or operation of the abandoned dam.

It's rare to see an environmental class action go to verdict. *International Paper* is a reminder that class certification is not the endgame in class action litigation—trial is. ■

CLASS-IFIED INFORMATION



Environmental groups have navigated their way to a class action. Find out how the "Fourth Circuit Expands the Scope of the Clean Water Act."

Labor & Employment

- **Coal Workers Dig Their Way to Class Certification** *Treadway, et al. v. Bluestone Coal Corp., et al.*, No. 5:16-cv-12149 (S.D. W. Va.)(Mar. 5, 2018). Judge Berger. Granting motion for class certification.

  A West Virginia federal district court certified a class of workers at a coal mine who, over a period of three months, were terminated by the defendants from full-time employment or were subject to a reduction in force as full-time employees. The plaintiffs allege that the defendants violated the Worker Adjustment and Retraining Notification (WARN) Act by failing to provide a 60-day written notice for the layoff, not providing mandatory graduated days or holiday pay, and improperly terminating the employees' medical and dental coverage. In granting class certification, the court held that the plaintiffs had standing under the WARN Act because, under the statute, the defendants constitute a "single employer" and the coal mine constitutes a "single site of employment."

CLASS-IFIED INFORMATION

It's not always as easy as 1-2-3 to classify employees and independent contractors. Our Labor & Employment Group breaks it down in "The New ABCs of Misclassification in California."

Privacy & Data Security

- **Ninth Circuit Decides That the Shoe Fits in Granting Standing to Plaintiffs**

  In re Zappos.com Inc. Customer Data Security Breach Litigation; *Stevens, et. al. v. Zappos.com Inc.*, No. 16-16860 (9th Cir.) (Mar. 8, 2018). Reversing district court's dismissal.

  In 2012, hackers breached Zappos's servers and stole the personal and financial information of more than 24 million customers. The resulting case involved two separate plaintiff groups—one alleging actual fraud and one that failed to allege instances of actual fraud. The district court found that the former group of plaintiffs had Article III standing, but dismissed the latter group's claims, saying that they lacked standing.

  The Ninth Circuit reversed the district court's dismissal of the second plaintiff group's claims, finding that the second plaintiff group had alleged sufficient harm to establish standing due to the "increased risk of future identity theft" that constituted a "credible threat of real and immediate harm," which was enough to bestow standing.

- **Second Circuit Sneezes at Pair of Claims That Flu Shot Phone Reminders Violate TCPA**

  Latner v. Mount Sinai Health System Inc., No. 17-00099 (2nd Cir.) (Jan. 3, 2018). Affirming lower court judgment.

  Zani v. Rite Aid Corp., No. 17-01230 (2nd Cir.) (Feb. 21, 2018). Affirming lower court judgment.

  Daniel Latner filed suit after his health care provider hired a vendor to send a mass text message. The message reminded all active patients who had been in for an office visit within the past three years that it was time for an annual flu shot. The district court found that the text message qualified for the Federal Communications Commission's (FCC) health care exception, which exempts health care messages made by health care providers or their business associates from the express consent requirement.

  The Second Circuit affirmed, but on the ground that Latner had provided his prior express consent to receiving the single text message. Latner consented to receiving text messages about health-related benefits when he provided his cell phone number to his provider and later signed a form acknowledging that he agreed that Mt. Sinai could share his information for "treatment" purposes.

  And in a summary order, the Second Circuit affirmed summary judgment in favor of defendant Rite Aid, noting that the case presented issues under the Telephone Consumer Protection Act (TCPA) "virtually identical" to those presented in *Latner*. Robert Zani argued that the district court incorrectly categorized the automated phone call he received reminding him to "[g]et your flu shot at Rite Aid today" as a "health care message." Although the plaintiff had given Rite Aid prior express consent when he provided his phone number in connection with a flu shot he received in a previous year, he argued the message nevertheless violated the TCPA because he had not provided express *written* consent, which he claims was required for a non-"health care message." The Second Circuit disagreed for the same reasons provided in the *Latner* decision.

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CLASS-IFIED INFORMATION

The GDPR goes into effect on May 25.
We're ready – are you?

TCPA Text Message Class Receives Unwelcome Decertification Order

Rachel Johnson v. Yahoo! Inc., No. 1:14-cv-02028 (N.D. Ill.) (Feb. 13, 2018). Granting defendant's motion to decertify class.

Rachel Johnson sued Yahoo! for its part in transmitting "Welcome Messages" to recipients using a Yahoo! instant messaging service (Yahoo! Messenger). The court eventually granted certification of a class of recipients who received the message in March 2013 at a cell phone number not already associated with a Yahoo! user.

Yahoo! moved to decertify the class due to manageability concerns, arguing that individualized issues relating to prior express consent outnumbered any classwide common factual or legal questions. Yahoo! pointed to records from Sprint showing that tens of thousands of potential class members may have consented to receipt of Yahoo! Messenger messages. The court agreed with Yahoo! that those who accepted its terms of service provided appropriate consent and that individual questions of consent would predominate.

A Quality Class Gets Quality Certification

Sarah Toney v. Quality Resources Inc., et al., No. 1:13-cv-00042 (N.D. Ill.) (Feb. 12, 2018). Granting motion to certify class.

Sarah Toney alleged that telemarketer Quality Resources used computerized autodialers to make telemarketing calls to class members. Quality obtained the class members' phone numbers from an infomercial sales company that collected the numbers during sales.

The court certified the class of more than 35,000 individuals whose unique numbers were obtained, noting that: (1) the class was ascertainable because it was limited to those numbers appearing on an admissible, expert-produced class list; (2) class members' loss of time and privacy in responding to the communications was sufficient to confer Article III standing and satisfy commonality requirements; (3) predominance requirements were met because Quality did not show that determinations of consent would differ among class members (i.e., that members would interpret the relevant privacy policy differently or that class member interaction with the privacy policy differed); and (4) the court could make a classwide determination of prior express consent under the FCC's interpretation of the standard without resolution of individual legal questions. ■

Products Liability

Vehicle Owners Get Green Light for Trial

Victorino, et al. v. FCA US LLC, No. 3:16-cv-01617 (S.D. Cal.) (Feb. 27, 2018). Judge Curiel. Granting, in part, defendant's motion for summary judgment.

Judge Curiel granted, in part, the defendant's motion for summary judgment in a class action alleging that defects in the defendant's vehicles cause the vehicles' clutches to fail and stick to the floor. Judge Curiel held that parts of the plaintiffs' California unfair competition law (UCL) and California Consumer Legal Remedies Act (CLRA) claims failed as a matter of law because the plaintiffs failed to show that the defendant had knowledge of one of the purported defects before the plaintiffs purchased their vehicles. For the same reasons, the plaintiffs' unjust enrichment claim failed because it was based on the UCL and CLRA claims. However, the court held that the plaintiffs' claims for the other purported defects could proceed because the plaintiffs "presented a genuine issue of material fact as to whether the clutch defect alleged was not due to 'normal wear and tear' and whether an unreasonable safety hazard exists." The plaintiffs likewise presented a genuine issue of material fact as to whether the defendant knew about those defects before at least one of the lead plaintiffs bought his vehicle.

Plaintiffs' "Parasitic" Battery-Killing Suit Lives On

Aberin, et al. v. American Honda Motor Co. Inc., No. 3:16-cv-04384 (N.D. Cal.) (Mar. 26, 2018). Judge Tigar. Granting, in part, defendant's motion to dismiss.

A California federal judge allowed a majority of the plaintiffs' claims to move forward in a putative class action suit alleging that the defendant's vehicles have a "parasitic electrical drain, requiring frequent battery replacement." At the heart of the allegations, the plaintiffs claim that the vehicles' hands-free Bluetooth devices do not turn off and therefore drain the vehicles' batteries. Judge Tigar granted the motion for the plaintiffs' express warranty claim, finding the claim failed because "the warranty had expired by the time the defect arose" for each plaintiff. He also held that the implied warranty claim failed for lack of privity to the extent it was brought under Florida law. However, Judge Tigar denied the motion to dismiss the consumer protection claims, finding that the plaintiffs sufficiently alleged that the defendant fraudulently concealed the defect and that the alleged defect eluded diagnosis, defeating the defendant's tolling arguments. Further, the court declined to strike the plaintiffs' claims for restitution and for equitable relief.

CLASS-IFIED INFORMATION

Kara Kennedy

Turn your knowledge up to 11 with Kara Kennedy at the 11th National Advanced Forum on Defending & Managing Automotive Product Liability Litigation in Chicago, July 18–20.

Home Surveillance System Owners' Proposed Nationwide Class Left in the Dark

Anderson, et al. v. Logitech Inc., No. 1:17-cv-06104 (N.D. Ill.) (Mar. 7, 2018). Judge Leinenweber. Dismissing a proposed nationwide class.

An Illinois federal judge dismissed a proposed nationwide class that alleged that the digital home video surveillance systems they purchased were defectively designed and prone to fail. Judge Leinenweber found the Supreme Court's recent *Bristol-Myers Squibb* decision applicable to

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nationwide classes such as this one, and therefore dismissed the nationwide class for lack of personal jurisdiction because the defendant "is not incorporated in Illinois, is not headquartered in Illinois, is not registered to do business in Illinois, has no facility in Illinois, and neither owns nor leases real estate in Illinois." However, Judge Leinenweber allowed the plaintiffs' putative Illinois subclass to proceed under a number of different claims, including breaches of express and implied warranty. The court further gave the plaintiffs leave to amend their Illinois Consumer Fraud Act, unjust enrichment, and declaratory judgment claims.

Claims Shifted to Lower Gear in Engine Defect Class Action

Duncan, et al. v. Nissan North America Inc., et al., No. 1:16-cv-12120 (D. Mass.) (Mar. 29, 2018). Judge Casper. Granting motion to dismiss in part.

A Massachusetts federal court dismissed certain claims in a proposed class action against Nissan Motor Co. brought based on defective engine parts. Nissan drivers filed suit against the company after engine components damaged their engines, costing them thousands in repair bills. They claimed that Nissan did not disclose a known defect in its timing chain tensioning system to them—but did tell dealerships. According to a mechanic at a Nissan dealership, the problem arose because a piece of the system was made from an inferior plastic that deteriorates easily. The drivers filed suit in October 2016, and Nissan moved to dismiss. Judge Casper granted the motion in part, dismissing claims based on consumer protection statutes in various states and a breach of implied warranty claim, finding that they fell outside their respective statutes of limitations. She allowed claims based on breach of contract, breach of express warranty, unjust enrichment, and violations of federal and Massachusetts consumer protection laws to proceed. In doing so, she rejected Nissan's arguments that the express warranties only covered problems within certain time and mileage restrictions. The court held: "The plaintiffs have pled a lack of meaningful choice over the terms of the warranty, a disparity of bargaining power, a purposeful limitation of the warranty period to exclude the defect, and a defect known at the time of sale to the manufacturer but concealed from the purchaser."

Ninth Circuit Allows Defective Brakes Suit to Go One Louder

Barakezyan v. BMW of North America LLC, No. 16-56094 (9th Cir.) (Mar. 22, 2018). Reversing and remanding dismissal of class action.

The Ninth Circuit revived a previously dismissed putative class action alleging that the defendant's vehicles' carbon ceramic brakes (CCBs) were defective because they emit a loud, shrill squeal when used. The panel held that the plaintiffs sufficiently pleaded a breach of express warranty claim because they alleged that the brakes contained tension relief cracks, which deviate from the defendant's design. The panel further found that the plaintiffs sufficiently alleged that the defect constituted a substantial safety hazard, permitting a claim for implied warranty of merchantability. Specifically, the plaintiffs alleged facts that when taken as true show that the brakes "emit an extremely loud, long, high-pitched noise, which has, on numerous occasions, distracted Barakezyan and other BMW drivers, as well as nearby pedestrians." That, coupled with plaintiffs' "allegations that the noise is intermittent and manifests at different mileages, meaning that the noise has the potential to surprise, at least plausibly pleads a safety hazard." The panel further clarified that a plaintiff "need not wait for a dangerous situation to occur to vindicate his right to a vehicle free of substantial safety hazards." Because the warranty claims were revived, the plaintiffs' Unfair Competition Law claim was revived for the same reasons.

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Delaware Supreme Court Helps Banana Plantation Workers Appeal

Marquinez, et al. v. The Dow Chemical Company, et al., No. 231, 2017 (Del. Sup. Ct.) (Mar. 15, 2018). Finding that the tolling period was not terminated for class claims in response to a certified question.

In response to certified questions from the Third Circuit, the Delaware Supreme Court held that class-action tolling did not end when a Texas federal court dismissed a lawsuit with similar allegations for forum non conveniens, but rather that "cross-jurisdictional class action tolling ends only when a sister trial court has clearly, unambiguously, and finally denied class action status." The Delaware justices answered the certified questions following the appeal of a dismissal of a putative class action in Delaware federal court in which the plaintiffs alleged that exposure to pesticides containing the chemical dibromochloropropane used on banana plantations led to adverse health effects among workers. In answering the certified questions, the court explained that in this case, the class action tolling did not end in 1995 when a Texas federal court dismissed similar claims for forum non conveniens, but rather in 2010, when a Texas state court explicitly denied class certification for those claims. Because the putative class action in Delaware federal court that led to the certified questions submitted to the Delaware Supreme Court was filed in 2012, less than two years after the Texas state court's 2010 denial of class certification, the Delaware Supreme Court's decision could lead to the revival of the underlying Delaware federal court litigation. ■

Securities

- **RMBS Investor's Class Bid Put in Park**

  Royal Park Investments SA/NV v. Deutsche Bank National Trust Co., No. 1:14-cv-04394 (S.D.N.Y.) (Mar. 29, 2018). Judge Nathan. Denying class certification.

  A New York federal court denied Royal Park Investments' revised motion for class certification in its suit against Deutsche Bank National Trust Co. for losses from RMBS. Royal Park first filed suit in June 2014, alleging that Deutsche Bank, as trustee to 10 RMBS trusts, failed to properly oversee thousands of associated loans. Judge Nathan denied Royal Park's first motion for class certification in March 2017, finding the class of RMBS investors to be "insufficiently ascertainable." This time around, the judge found that similar problems prevented certification. While Royal Park had clarified the time window on the class, and sufficiently asserted that its claims presented common questions, Judge Nathan held that each class member still had too many individualized issues of items like standing, applicable statutes of limitations, and causation and damages that would vary. The judge held that Royal Park did not establish "that common issues predominate over individualized ones, nor that the class action would be a superior method of adjudicating its claims."

- **Dollar General Allowed to Exit Securities Class Action**

  Iron Worker Local Union No. 405 Annuity Fund v. Dollar General Corp., et al., No. 3:17-cv-00063 (M.D. Tenn.) (Mar. 8, 2018). Judge Zouhary. Granting motion to dismiss.

  A Tennessee federal court granted Dollar General's motion to dismiss a securities class action, finding that investors failed to prove the company intentionally misled them during earnings calls. The plaintiff filed suit against Dollar General and its executives in early 2017 on behalf of a proposed class of investors, alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5. The plaintiff's allegations stemmed from a 2016 cutback in the federal government's food stamps program. The plaintiff claimed that, because of the negative financial impact of a similar cutback in 2013, Dollar General knew about the effect the 2016 cuts would have on its business. Therefore, Dollar General did not adequately disclose the impact to investors and misled investors about future financial growth. Judge Zouhary held that these allegations were not sufficient to allege violations of the federal securities laws. Among other reasons, he found that the 2013 cutbacks were substantially different from the 2016 cutbacks, the executives of Dollar General could not have predicted the impact of the decision, and "statements about future financial growth must be viewed in light of the identified risk factors, which serve as a background to otherwise optimistic projections."

CLASS-IFIED INFORMATION

Robert Long

Nanci Weissgold

Congratulations to Robert Long and Nanci Weissgold on their Burton Award for their *Law360* article "D&O Insurance Coverage Tips for Financial Institutions."

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Investors' Stock-Drop Suit Is Made for Walking

Washtenaw County Employees' Retirement System v. Walgreen Co., et al., No. 1:15-cv-03187 (N.D. Ill.) (Mar. 29, 2018). Judge Coleman. Granting class certification.

An Illinois federal court certified a class of investors bringing a stock-drop suit alleging that Walgreen Co. misrepresented the company's financial health following the acquisition of Alliance Boots GmbH. Walgreens acquired a 45 percent stake in Alliance Boots GmbH, a European drugstore beauty chain, and the rest of the company in 2014. In 2014, however, the price of generic drugs increased, and the profits from the acquisition fell short of projections by hundreds of millions. When Walgreens disclosed this, its stock fell more than 14 percent in one day. Investors filed suit in 2015, alleging that Walgreens and its former CEO misled them about the effect of the drug prices on its finances. Judge Coleman limited the case in 2016 to certain statements by Walgreens executives and a certain class period. In the fight for class certification, Walgreens argued that the class representative was not adequate, damages could not be calculated for the class, and it would not be possible to distinguish the effect of the news of the drug prices on the stock from other factors that may have contributed at the time. Judge Coleman was not persuaded by these arguments and granted class certification. She found that the class fulfilled the size and common claim requirements, and the possibility of inadequacy of the class representative was not enough to deny certification. In ruling, she held, "… it is undisputed that the class action mechanism is superior to available alternatives and, in light of the nature of the plaintiffs' claims, the class action mechanism is clearly the fairest and most efficient means by which the plaintiffs' claims against the defendants can be adjudicated." ■

Settlements

- **Flickering Screens Lead to $6.5 Million Settlement**

  Rutledge, et al. v. Hewlett-Packard Co., No. 1:03-cv-817837 (Cal. Sup. Ct.) (Jan. 26, 2018). Judge Kuhnle. Approving settlement.

  A California superior court recently approved a $6.5 million class action settlement resolving consumer claims that Hewlett-Packard concealed that certain HP Pavilion laptops had defects that could cause their display screens to appear dim or flicker. In December 2017, the court initially withheld approval of this settlement amount—$3 million of which would be allocated to the named plaintiff for attorneys' fees, costs, and other expenses—because it was concerned about a flurry of last-minute claims that could significantly reduce each class member's recovery. However, by late January 2018, the deadline for new claims had passed, and the court concluded that the settlement—which would provide each claimant with 90 percent of the value of her claim—was appropriate.

- **$45 Million Settlement Finalized for Female Store Managers**

  Scott, et al. v. Family Dollar Stores Inc., No. 3:08-cv-00540 (W.D.N.C.) (Mar. 14, 2018). Judge Cogburn. Approving settlement.

  Judge Cogburn granted final approval of a $45 million settlement in an employee discrimination class action involving allegations that Family Dollar paid female store managers less than their male counterparts since 2002. The settlement includes monetary relief such as service payments of $10,000 and $5,000 to class representatives and comprehensive programmatic relief via a systematic review of Family Dollar's process for setting store managers' starting salaries. The court also approved attorneys' fees of one-third of the common fund—totaling $15 million.

CLASS-IFIED INFORMATION

Todd Benoff

Get connected with Todd Benoff on the panel "Keeping the Autonomous Car Safe & Secure" at TU-Automotive Detroit 2018.

- **Trump University Settlement Affirmed, Objector's Last-Minute Opt-Out Request Rejected**

  Simpson, et al. v. Trump University LLC, et al., No. 17-55635 (9th Cir.) (Feb. 6, 2018). Affirming settlement and rejecting one objector's request to opt out of class.

  The appellate panel affirmed the district court's order approving Trump University's settlement over Sherri Simpson's objections, and it also rejected Simpson's request to opt out. The case arose out of two California class actions and a suit by the New York attorney general based on allegations that Trump University used false advertising to lure prospective students to free investor workshops where they were sold expensive educational seminars promising benefits that were not delivered. The parties settled in December 2016 for payments of $21 million to class members and $4 million to the New York attorney general.

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Simpson received a settlement notice and submitted her claim, but later she objected to the settlement and sought to opt out. On appeal from the district court, the appellate panel acknowledged that Simpson had standing to bring her claim that the settlement's approval improperly denied her a second, settlement-stage opportunity to opt out. However, the panel rejected Simpson's arguments that the class notice language provided a second opt-out right and that due process required such an opportunity. The panel found that no such right was included in the class notice or required by due process, and it affirmed the district court's final approval of the settlement.

Negotiating in the Valley of the Shadow of Doubt

In re Wheaton Franciscan ERISA Litigation, No. 1:16-cv-04232 (N.D. Ill.) (Jan. 16, 2018). Judge Feinerman. Approving final settlement.

Judge Feinerman approved a $29.5 million class settlement accusing Wheaton Franciscan and Ascension Health of violating ERISA, despite a recent adverse U.S. Supreme Court ruling that called the viability of the plaintiffs' claim into question. The plaintiffs alleged that Wheaton Franciscan had denied ERISA protections to plan participants by improperly relying on the "church plan" exemption, which excludes benefits plans established for church employees or associations from certain ERISA minimum funding and disclosure requirements. The plaintiffs contended that the plans at issue were not established or maintained by a church and therefore did not qualify for the exemption. But in *Advocate Health Care Network v. Stapleton* (2017)—decided before the parties reached a settlement—the Supreme Court held that a retirement plan may still be able to otherwise satisfy the exemption if it is established by an entity other than a church. The parties negotiated for settlement in light of this risk, and, according to the plaintiffs' unopposed motion for final approval, "approached the negotiations in the context of a quickly-changing legal setting." Judge Feinerman agreed, finding the settlement was fair and reasonable, even taking into account "the U.S. Supreme Court's decision on statutory issues in this case." ■