ALSTON & BIRD LLP

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Class Action Round-Up

Winter 2014

ATTORNEY ADVERTISING

Where the (Class) Action Is

The final quarter of 2013 brought a number of class-action settlements, some interesting decisions about arbitration, and a couple rulings about less-known aspects of CAFA.

We hope that, during 2013, our Class Action Round-Up served as a helpful resource for following (and storing for future use) class cases across the full range of subject-matter areas. As we explained in our very first issue, this isn't meant to serve purely as a source of aggregated information, but rather to highlight those cases that reveal trends (or possible trends) in class litigation—and to do it with a distinctive Alston & Bird spin.

If you have suggestions or comments about the Round-Up and how we can make it even better and more useful to you in our second year of publication, please let us know. ■

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Banking

Arkansas Recording-Fees Dispute Subject To CAFA

Brown v. Mortgage Electronic Registration Systems, Inc., No. 12-3494 (8th Cir.) (Dec. 31, 2013). Affirming denial of motion to remand and grant of motion to dismiss.

The circuit clerk for Hot Springs County, Arkansas, filed a putative class action in Arkansas state court against several loan originators and servicers. The clerk alleged that that the lenders used the Mortgage Electronic Registration System to avoid paying recording fees on loans, depriving Arkansas counties of revenue. After the lenders removed the case to federal court, the district court denied two motions to remand and dismissed the complaint on the merits.

On appeal, the Eighth Circuit first held that the district court had jurisdiction under CAFA because claims for illegal exaction of tax money fall within CAFA's definition of "class action." The court also rejected the clerk's argument that the putative class failed to satisfy CAFA's 100-member threshold, holding that the putative class as alleged consisted of all Arkansas taxpayers, not just the circuit clerks for the 75 Arkansas counties.

The appellate court went on to affirm dismissal of the suit because Arkansas law does not impose a duty to record mortgages, which means that a purported "failure" to pay recording fees did not result in unjust enrichment or a "false" or "unconscionable" trade practice.

Borrowers Can't Force Certification of Force-Placed Insurance Action

Gustafson v. BAC Home Loans Servicing LP, No. 8:11-cv-00915 (C.D. Cal.) (Nov. 4, 2013). Judge Staton. Denying class certification.

CLASS-IFIED INFORMATION

Alston & Bird and Cornerstone Research are sponsoring "The Supreme Court and Class Expert Testimony: A Renewed Focus on the Predominance Requirement at Class Certification" on March 4.

Bank of America borrowers sued the bank and certain insurers over force-placed insurance policies, alleging that the bank used the policies to impose unauthorized and excessive charges on them.

Judge Staton denied the borrowers' motion for certification of a nationwide class, concluding that the mortgage contracts contained numerous variations across the putative class and that several affirmative defenses varied across state law.

Post-Filing Developments Do Not Deprive Court of CAFA Jurisdiction

Visendi v. Bank of America, NA, No. 13-16747 (9th Cir.) (Oct. 23, 2013). Reversing grant of motion to remand.

Borrowers sued several financial institutions alleging that they engaged in deceptive mortgage lending and securitization activities, purportedly decreased the value of their homes and damaged their credit scores. Bank of America removed the case under CAFA and moved to dismiss under Rule 20 for misjoinder due to the absence of common questions of law or fact. The district court agreed that there were not common questions of fact and law, but instead of dismissing,

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the court remanded the action to state court. The financial institutions conceded that the case was not removable, the court reasoned, when they argued that there were not common questions of law and fact.

The Ninth Circuit reversed, holding that the case was removable under CAFA because plaintiffs filed a complaint requesting a joint trial of 100 or more plaintiffs. The appellate court held the financial institutions' arguments on the merits did not affect the district court's jurisdiction. ■

Consumer Fraud

Proof of Citibank Arbitration Agreement Is in the Cards

Hirsch v. Citibank, N.A., No. 13-1172-cv (2nd Cir.) (Oct. 22, 2013). Vacating and remanding denial of Citibank's motion to compel arbitration.

Account holders sued Citibank, alleging unfair and deceptive trade practices in a promotional program that offered American Airlines miles to new checking and savings account customers. Citibank moved to compel arbitration, but the district court denied the motion, holding that a form signature card where a customer acknowledged that he would be "bound by any agreement governing any account opened in the title indicated on this card" was "insufficient to connect it to the Arbitration Agreement contained within [Citbank's] Client Manual."

The Second Circuit vacated and remanded, criticizing the district court for concluding that the signature cards did not sufficiently incorporate by reference the client manual "without deciding whether Citibank provided [plaintiffs] with the client manuals when they opened their accounts." The Second Circuit ordered the district court to decide whether Citibank had a corporate policy about giving client manuals to its customers.

Ice Cream Lovers, Rejoice: No Class Certification Against Ben & Jerry's

Astiana v. Ben & Jerry's Homemade, Inc., No. C 10-4387 (N.D. Cal.) (Jan. 7, 2014). Judge Hamilton. Denying motion for class certification.

A customer sought to represent purchasers of Ben & Jerry's ice cream, frozen yogurt, and popsicles that contained alkalized cocoa and were labeled "all natural." The customer alleged that the "all natural" label violated California consumer law because the cocoa was alkalized with a "synthetic" agent.

Judge Hamilton denied the plaintiff's class-certification motion for two reasons. First, the class was not sufficiently ascertainable because the plaintiff did not present any evidence to show which Ben & Jerry's products "contained the allegedly 'synthetic ingredient' (assuming that alkali can be considered an 'ingredient')." Second, individual issues predominated because the plaintiff presented no evidence of a cost difference between the market price for "all natural" products and the market price for Ben & Jerry's products that contain synthetic ingredients. Under the Supreme Court *Comcast* decision, the court reasoned, a plaintiff "is required to provide 'evidentiary proof' showing a class wide method of awarding relief" consistent with the theory of liability.

Smoking Out Individual Injuries in Marlboro Lights Class Action

Cabbat v. Philip Morris USA, Inc., No. 10-00162 (D. Haw.) (Jan. 6, 2014). Judge Watson. Denying class certification.

Marlboro Lights purchasers sued under Hawaii law, alleging that Philip Morris engaged in unfair and deceptive practices by "induc[ing] cigarette smokers to continue smoking in spite of the growing public awareness of a connection between cigarette smoking and serious health problems by . . . marketing, and selling Marlboro Lights purporting to be 'Light' . . . as being healthier to smoke than regular cigarettes . . . ."

The court rejected the plaintiffs' class certification motion because individual questions of injury predominated.

Customer Who Visits One Website May Not Certify Class Action Involving 18 Other Sites

Yordy v. Plimus, Inc., No. C12-0229 (N.D. Cal.) (Oct. 29, 2013). Judge Henderson. Denying class certification.

A consumer filed a putative class action against Plimus under California law, alleging that Plimus misled customers into thinking that it offered

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unlimited downloads of bestselling e-books under its subscription plan. After registering with Plimus, the consumer allegedly discovered that the website did not offer the advertised e-books for download, but rather offered only links to e-books that were available for free elsewhere.

Judge Henderson denied class certification. According to the court, the consumer alleged that Plimus operated 19 separate "Unlimited Download Websites" but failed to provide evidence of commonality among Plimus' relationships with each of the websites. ■

ERISA

- **Fifth Circuit Says UBS ERISA Dispute Subject to Arbitration**

  Hendricks v. UBS Financial Services, Inc., No. 13-40692 (5th Cir.) (Nov. 11, 2013). Reversing denial of motion to compel arbitration.

  Former UBS branch managers and financial advisors sued UBS alleging that it violated ERISA by qualifying certain compensation benefits as "forfeited" once the employees left the company. UBS moved to compel arbitration of the employees' claims under their employment agreements. The district court denied UBS' motion, holding that the arbitration agreement did not extend to class claims.

  The Fifth Circuit reversed because the employment agreement covered "any disputes." ■

CLASS-IFIED INFORMATION

Read "Labor Department Disclosure Compliance Is Key to Turning Off Plan Fee Litigation" by Pat DiCarlo and Emily Hootkins.

■

Doug Hinson is co-chair of the American Conference Institute's 7th National Forum on ERISA Litigation on April 28-29, 2014.

Labor & Employment

- **Ugly, Mistaken, or Incorrect Arbitration Awards Still Confirmable, Eleventh Circuit Says**

  DIRECTV v. Arndt, No. 13-10033 (11th Cir.) (Oct. 22, 2013). Reversing vacatur of arbitration award.

  DIRECTV technicians filed a demand for class arbitration with the AAA alleging that the company failed to pay them overtime wages, in violation of the FLSA. The arbitrator concluded that the technicians' employment agreements allowed for collective arbitration of FLSA claims. The district court disagreed and vacated the arbitrator's order.

  The Eleventh Circuit reversed, holding that the Supreme Court's recent decision in *Oxford Health Plans* made clear that federal courts have little leeway in determining whether an arbitrator exceeded her authority. The sole question for a federal court is whether the arbitrator arguably interpreted the parties' contract, not whether the arbitrator got things right. Although "[t]he arbitrator's award may have been ugly, and could have been mistaken, incorrect, or in manifest disregard of the law," the court reasoned, the arbitrator arguably interpreted the contract, so there was no basis for vacating the arbitral award.

- **Ninth Circuit: *Concepcion* Not a "License to Tilt Arbitration in Favor of the Party with More Bargaining Power"**

  Chavarria v. Ralphs Grocery Co., No. 11-56673 (9th Cir.) (Oct. 28, 2013). Affirming the denial of Ralphs' motion to compel arbitration.

  A Ralphs employee sued the grocery-store chain for violations of the California Labor Code and Business and Professions Code. The district court denied Ralphs' motion to compel arbitration based on the arbitration agreement in the employee's contracts.

  The Ninth Circuit affirmed, holding that the arbitration agreement was unconscionable under California law and that the FAA did not preempt California law. Although *Concepcion* outlaws state policies that disfavor arbitration, the court held that the California law at issue was "agnostic" toward arbitration—it did not disfavor arbitration but merely required that the process be fair.

- **Royal Caribbean Cruises to Arbitration in Wage Dispute**

  Downer v. Royal Caribbean Cruises, Ltd., No. 13-12391 (11th Cir.) (Nov. 18, 2013). Affirming grant of motion to compel arbitration.

  Royal Caribbean employees sued the cruise line alleging that it violated the Seamen Wage Act by withholding or delaying payment of wages. Royal Caribbean sought to enforce the arbitration clause in the employment and collective bargaining agreement. The employees argued that the arbitration agreements were contrary to public policy and unenforceable because they required the application of Norwegian law. The district court disagreed with the employees, holding that the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards required enforcement of the arbitration provisions.

  The Eleventh Circuit affirmed, because the employees agreed in writing to bind themselves to arbitration. The court also held that the employees could not raise their public policy affirmative defense because a party seeking to avoid arbitration under an international commercial agreement may not seek to avoid arbitration on the basis that it is contrary to public policy.

- **Fifth Circuit: Class Waivers Don't Run Afoul of NLRA**

  D.R. Horton, Inc. v. NLRB, No. 12-60031 (5th Cir.) (Dec. 3, 2013). Reversing in part NLRB's decision.

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In a 2-1 decision, the Fifth Circuit held that an employment agreement containing an arbitration clause with a class waiver does not violate the National Labor Relations Act. The panel reversed part of an NLRB decision concluding the NLRA's Section 7—which protects employees' right to act in concert—trumped (and rendered unenforceable) a class waiver.

▪ Class Denied for CVS Meal and Rest-Period Claims

Rai v. CVS Caremark Corp., No. CV 12-08717 (N.D. Cal.) (Oct. 11, 2013). Judge Bernal. Denying class certification.

Assistant managers and supervisors at California CVSs brought meal and rest-period claims against the pharmacy chain alleging that—as the designated "key carrier" employees—they were forced to miss or stay on premises during breaks. In rejecting class relief, Judge Bernal first pointed to ascertainability: The records didn't show which employee was the sole key carrier at any given time, and stores had different policies about who had key-carrying responsibilities. Individual issues would also predominate due to a lack of standardized policies and competing testimony about break procedure.

▪ Court Rejects Defendant's Argument that *Comcast* Precludes Class Certification Where Individual-Damages Calculations Required

Giles v. St. Charles Health Sys., Inc., No. 6:13-CV-00019-AA (D. Or.) (Oct. 22, 2013). Chief Judge Aiken. Granting class certification.

Registered nurses sued St. Charles Health System, their employer, alleging that the Oregon health care company violated the FLSA and Oregon labor laws by failing to compensate its employees for the study and test-taking time required to fulfill training and certification requirements. St. Charles opposed class certification, arguing based on *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), that individual class-member damage calculations precluded certification. The court rejected this argument, holding that *Comcast*'s presumption that damages in antitrust cases be measurable "based on a common methodology applicable to the entire class" did not necessarily apply to wage-and-hour claims and that, even if it did, *Comcast* did not bar class actions involving individual class-member damage calculations where plaintiffs could provide "a workable damages model."

▪ Class of Insurance Agents Defeated by Differences in Contractual Agreements

Comparetto v. Allstate Insur. Co., No. 11-CV-9206 (C.D. Cal.) (Nov. 20, 2013). Judge Kronstadt. Denying class certification.

A putative class of California-based insurance agents sued Allstate, alleging that the company imposed difficult sales quotas and exercised extensive control over the agents. The lawsuit alleged that as a result of these actions Allstate converted the agents into de facto employees and lowered the value of their individual insurance agencies. The district court denied class certification because individualized issues regarding the contractual language of each agreement predominated over common questions. ■

Privacy

- ***Google*: Google Withstands Second Attack to Privacy Policy**

  In re Google, Inc. Privacy Policy Litigation, No. C-12-01382 (N.D. Cal.) (Dec. 3, 2013). Judge Grewal. Granting Google's motion to dismiss with leave to amend, but notice that a third dismissal would likely be with prejudice.

  A putative class of users sued Google, alleging that the tech giant violated the Wiretap Act, as amended by the Electronic Communications Privacy Act, and the Stored Communications Act, among other federal and California laws, by permitting the commingling of user data across different Google products; disclosing that data to third parties; using their likenesses without permission; and contributing to drain on their smartphone battery lives. Google moved to dismiss.

  Although the N.D. Cal. found that the users could establish standing, the amended complaint did not allege any "interception" by Google that fell outside the broad "ordinary course of business" exception to the Wiretap Act. And since Google publicly announced changes to its privacy policy, users effectively consented to it and the conduct complained of by their voluntary use of Google products.

- **ACT Tests Rule 68 Offers in Class Actions**

  Bais Yaakov of Spring Valley v. ACT, Inc., No. 12-40088 (D. Mass.) (Dec. 16, 2013). Judge Hillman. Refusing to dismiss complaint.

  A putative class of recipients of allegedly unsolicited fax advertisements from ACT, Inc., that did not contain opt-out notices sued the college and career planning company for violating the TCPA and New York law. ACT moved to dismiss on the basis that plaintiffs' refusal to accept its Rule 68 offer of judgment mooted the existence of a case or controversy.

CLASS-IFIED INFORMATION

Privacy Group: 2013 Ends with a Bang – Northern District of California Denies Hulu's Motion for Summary Judgment in Video Tracking Case

Facing a circuit split and no controlling decision in the First Circuit, Judge Hillman relied upon the Ninth Circuit's recent decision in *Diaz v. First American Home Buyers Protection Corporation*, 732 F.3d 948 (9th Cir. 2013), which, in turn, relied heavily on Justice Kagan's dissenting opinion in *Genesis Healthcare Corp. v. Symczyk*, 133 S.Ct. 1523 (2013), in finding that an unaccepted Rule 68 offer becomes a "legal nullity" does not moot a plaintiff's claim, even if it is made before the plaintiff moves to certify the class. The court reasoned that a plaintiff still has an unsatisfied claim after a Rule 68 offer has lapsed that can be redressed by the court in a class action.

- **Consent to Claimed "Cramming" Scheme Prevents Certification of TCPA Class**

  Fields, et al. v. Mobile Messengers America, Inc., et al., No C 12-05160 (N.D. Cal.) (Nov. 18, 2013). Judge Alsup. Denying class certification.

  Two proposed classes (and one subclass) of cellphone users sued text message service providers for allegedly enrolling them in monthly short-message service text subscription plans—also known as a "cramming" scheme—in violation of the TCPA and California law. Defendants opposed class certification on the basis that plaintiffs consented to participation in the plans by entering their information in certain of a defendant's websites. All plaintiffs were sent a "confirmation text" of their subscription, were enrolled, and were charged $9.99/month for the plans.

Judge Alsup held that the plaintiffs carried, but did not meet, their burden of proving a lack of express prior consent that could be addressed with class-wide proof, refusing to certify the putative nation-wide text-receipt class. The court also refused to certify a nation-wide "enrollment class" (composed of users who purportedly did not receive a complete refund) alleging California state law claims and a California subclass, because plaintiffs did not sufficiently prove sufficient contacts with the state or the number of members from there. ■

Products Liability

- **The Early Bird Doesn't Always Get the Worm: Judge Denies Defendants' Attack on Class Certification**

  McCabe v. Daimler AG, 1:12-cv-2494-TCB (N.D. Ga.) (Dec. 2, 2013). Judge Batten. Denying Daimler's motion to deny class certification.

  A judge in the Northern District of Georgia denied as premature a motion to deny class certification filed by defendants Daimler AG and Mercedes-Benz, USA, LLC. The named plaintiffs have not yet moved to certify the putative class, comprising plaintiffs who alleged defects in the fuel systems of the E-Class Mercedes-Benz vehicles. Judge Batten, echoing sentiments from a prior order he entered denying a motion to strike class certification, noted that the motion was "premature" and stated that the court would wait until a motion for class certification is filed to determine whether this case can proceed as a class action.

- **Texas Court Hangs Up on Samsung's Motion to Arbitrate**

  Galitski v. Samsung Telecommunications America, LLC, 3:12-cv-4782-D, (N.D. Tex.) (Dec. 5, 2013). Judge Fitzwater. Denying Samsung's motion to compel arbitration.

  Samsung moved to compel arbitration in a class action brought by plaintiffs who claimed damages for allegedly defective cell phones. Samsung sought to compel arbitration based on the arbitration clause in the plaintiffs' service agreements with cell phone providers Verizon and Sprint. Samsung, a non-signatory third party to the service contracts, claimed that it was entitled to the benefit of the arbitration agreement under principles of equitable estoppel.

  Judge Fitzwater denied Samsung's motion. Applying California law, the court concluded that principles of equitable estoppel did not apply because the plaintiffs did not have to rely on their service agreements with Verizon and Sprint to assert their claims against Samsung and their allegations were not "intimately connected" with the obligations under the service agreements. ■

CLASS-IFIED INFORMATION

Cari Dawson is co-chair of ACI's 7th Automotive Product Liability Litigation Summit, to be held June 4-5 in Chicago. ■

Cari Dawson, Beverlee Silva, Scott Elder, and Jenifer Keenan are speakers at the DRI's Product Liability Conference to be held April 9-11, 2014.

Settlements

Antitrust

In re Vitamin C Antitrust Litig., No. 1:06-md-01738 (E.D.N.Y.) (Oct. 2, 2013). Judge Cogan. Approving $23 million settlement.

Vitamin C purchasers accused several Chinese manufacturers and their affiliates of illegally colluding to fix prices for vitamin C and limit supply for exports. The approved settlements allowed China Pharmaceutical Group Ltd. and its subsidiary Weisheng Pharmaceutical Ltd. to exit the suit and escape claims from a direct-purchaser class in exchange for complying with any injunction entered against any non-settling defendant to settle the claims of an injunction class.

In re Elec. Books Antitrust Litig., No. 1:11-md-02293 (S.D.N.Y.) (Dec. 6, 2013). Judge Cote. Approving $95 million settlement.

Thirty-three state attorney generals and a class of private consumers accused publishers Penguin Group USA Inc. and Macmillan Publishers USA of conspiring with Apple Inc. and three other publishers to fix the prices of e-books. Under the approved settlement, Penguin will pay $75 million and Macmillan will pay $20 million to consumers of 33 states who bought e-books from them between April 1 and May 21, 2010. The consumers may choose to have their respective share of the settlement credited back to their e-book accounts or request a check.

In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., No. 1:05-md-01720 (E.D.N.Y.) (Dec. 13, 2013). Judge Gleeson. Approving record-breaking $7.25 billion antitrust settlement.

A class of roughly 12 million merchants accused Visa Inc. and MasterCard Inc. of conspiring to price-fix credit card swipe fees. Judge Gleeson approved the record-breaking $7.25 billion settlement despite objectors' protests that the settlement does not address the two companies' dominant hold over the credit card industry. Indeed, in his 50-page order approving the final settlement, Judge Gleeson referred to the objectors' protests as "hyperbole" and said his decision was supported "by the relatively small number of opt-outs and absence of objections from class members."

In re DDAVP Indirect Purchaser Antitrust Litig., No. 7:05-cv-02237 (S.D.N.Y.) (Dec. 18, 2013). Judge Brieant. Approving $4.75 million settlement.

Indirect purchasers of the antidiuretic DDAVP accused drug makers Ferring BV and Aventis Pharm. Inc. of conspiring to illegitimately obtain a patent and extend the drug's monopoly power. They also alleged that Ferring and Aventis filed sham patent infringement suits to shut generic versions out of the market. Ferring will pay the lion's share of the settlement, and Aventis will pay the remaining $800,000.

Consumer and Financial Fraud

Charron v. Weiner, No. 12-2834 (2d Cir.) (Sept. 30, 2013). Affirming district court's approval of class settlement.

22,000 tenants asserted claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), accusing landlord Pinnacle Group of conspiring to fraudulently increase rent charges in more than 400 buildings. The district court approved a settlement in August 2011.

On appeal, the Second Circuit affirmed the settlement even though damages may have varied by individual. The Second Circuit rejected adequacy challenges based on the failure to create subclasses and affirmed notwithstanding fact that all remaining class representatives objected to settlement.

Rossi v. Procter & Gamble Co., No. 2:11-cv-07238 (D.N.J.) (Oct. 3, 2013). Judge Linares. Approving settlement that refunds class members $4 each.

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Consumers sued Procter & Gamble Co., accusing the company of misleading them into paying extra for Crest toothpaste by promising faster relief from tooth sensitivity than it could actually deliver. The approved class settlement refunds class members $4 for one tube of toothpaste each and awards $700,000 to class counsel.

Cheifer v. JetBlue Airways Corp., No. BC4511887 (Cal. Sup.) (Oct. 29, 2013). Judge Edmon. Approving $3.2 million settlement.

Consumers accused JetBlue of violating California's eavesdropping law by recording almost all calls to its customer service agents without consistently disclosing that the calls were being recorded. Judge Edmon gave the $3.5 settlement final approval, but cut the $1 million requested attorneys' fees and costs to $650,000.

Timothy R. Peel v. BrooksAmerica Mortgage Corp., No. 8:11-cv-00079 (C.D. Cal.) (Oct. 29, 2013). Judge Staton. Rejecting $10 million settlement.

California residents sued BrooksAmerica Mortgage Corp., Washington Mutual Mortgage Securities Corp., WaMu Asset Acceptance Corp. and Residential Funding Co. LLC, alleging that they had been duped into buying sham mortgage loans. Judge Staton refused to approve the proposed $10 million settlement because the settlement class was much broader than the class certified by the court, which therefore raised "serious concerns" about Rule 23 commonality and typicality requirements.

Richardson v. L'Oreal USA, Inc., No. 1:13-cv-00508 (D.D.C.) (Nov. 6, 2013). Judge Bates. Rejecting proposed settlement and refusing to certify the class.

A class of consumers brought consumer fraud claims alleging that L'Oreal falsely and deceptively labeled some of its high-end products as "salon-only" even though those products are readily available at mass-market stores such as Target, Kmart, and Walgreens. The proposed settlement provided attorneys with $1 million. As for the consumers, their claims would extinguish in return for L'Oreal agreeing to remove the offending terms from the labels of certain brands for a minimum of five years. Judge Bates found this proposed settlement unfair for two reasons: first, the attorneys were being paid while class members were not, and second, class members would not be allowed to seek damages as a class later on.

Davis v. Cole Haan, Inc., No. 11-cv-01826 (N.D. Cal.) (Nov. 14, 2013). Judge White. Approving a coupon settlement.

Consumers filed suit against Cole Haan, alleging it wrongfully collected their personal identification information during credit card transactions in violation of California's Song-Beverly Act. Under the terms of the agreement, Cole Haan will issue a voucher for $20 off any merchandise purchase to class members who submit claim forms, and a voucher for 30 percent off to the remaining class members.

Fouks v. Red Wing Hotel Corp., No. 12-cv-2160 (D. Minn.) (Nov. 21, 2013). Judge Ericksen. Approving settlement but reducing incentive awards and rejecting request for attorneys' fees.

Consumers from Wisconsin and Minnesota brought claims against Red Wing Hotels alleging that the receipts from the St. James Hotel contained more than five digits of their credit or debit card numbers in violation of the Fair and Accurate Credit Transaction Act's (FACTA) truncation requirement. The settlement provides the 161 class members who submitted claims with a non-transferable voucher valid for nine months for either 40 percent off a stay at the St. James Hotel (not to exceed a $500 value) or 30 percent off a meal at the hotel restaurant (not including alcohol and not to exceed a $100 value). The proposed settlement also provided for direct cash payments of $4,000 to both class representatives and a cy pres donation of $20,000 to the Red Wing Environmental Learning Center.

Judge Ericksen reduced the incentive awards for the class representatives from $4,000 each to $1,000 and $500, citing difference in the settlement value for the class members versus the class representatives. While the parties reached a "clear-sailing" agreement, the court scrutinized the unopposed attorneys' fees request and found it to be unreasonable, both in the hours expended and the rate sought, given the modest relief to the class. The court directed class counsel to resubmit a fee request following completion of the voucher redemption period.

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Labor & Employment

Fosbinder-Bittorf v. SSM Health Care of Wis. Inc., No. 3:11-cv-00592 (W.D. Wis.) (Oct. 23, 2013). Judge Conley. Approving $3.5 million settlement.

1,416 nurses accused SSM Health Care of automatically deducting meal periods from their pay while requiring them to remain on duty. The settlement provides for payment of around $1,625 to each nurse, incentive awards of $5,000 each to the three class representatives, and an attorneys' fees and costs award of $1,166,666.66 to class counsel. The court noted that there were no objections and only 27 individuals, less than two percent of the class, had opted out of the settlement.

Jeremy Cioe v. Verizon Commc'ns Inc., No. 1:11-cv-01002 (N.D. Ill.) (Oct. 29, 2013). Judge Valdez. Approving $7.7 million settlement.

Verizon store employees alleged that Verizon violated the Fair Labor Standards Act and Illinois state wage laws by failing to pay them overtime and bonuses. The settlement creates a $7.7 million fund for class members and will be distributed by a claims administrator who will determine how much each class member would have earned had he or she been paid overtime.

Ladore v. Ecolab Inc., No. 2:11-cv-09386 (C.D. Cal.) (Nov. 12, 2013). Judge Olguin. Approving $29 million settlement.

A class of former and current Ecolab employees alleged that Ecolab owed them overtime wages and attendant penalties and interest and should be ordered to pay various penalties for unpaid overtime wages. The settlement amount of $29 million includes payments to claimants, $750,000 in Private Attorney General Act (PAGA) penalties to the California Labor and Workforce Development Agency, settlement administration costs, awards of attorneys' fees and costs of more than $8.1 million, and incentive awards to named plaintiffs totaling $40,000. The settlement agreement also requires Ecolab to implement a new compensation model for its pest-elimination service specialists, senior pest-elimination service specialists, and select segment specialists, treating them as non-exempt, overtime-eligible employees under California law. After payments are made to the participating class members, any remaining funds equal to or less than $50,000 are to be paid to the cy pres designee, the California Rural Legal Assistance, Inc.

Patrick v. AK Steel Corp., No. 1:05-cv-00681 (S.D. Ohio) (Nov. 22, 2013). Judge Barrett. Approving $2.5 million settlement.

The surviving spouses of AK Steel workers claimed that AK Steel's pension plan allowed the company to deduct half the amount of the surviving spouse's widow or widower benefits from the Social Security Administration when calculating monthly pension payments owed to them under the deceased spouse's plan. Under the terms of the approved settlement, AK Steel is to pay $1.7 million to class members and $800,000 in attorneys' fees.

Sola v. CleanNet USA Inc., No. 1:12-cv-10580 (D. Mass.) (Nov. 26, 2013). Judge Tauro. Approving $7.5 million settlement.

A class of more than 100 individuals accused CleanNet of engaging in unfair and deceptive practices by misclassifying employees as independent contractor "franchisees" to avoid timely payment of wages and overtime pay. The complaint specifically alleged that CleanNet "represents to potential cleaning 'franchisees' that they are buying a lucrative business, when in fact they are buying the right to become CleanNet's low-paid janitorial cleaning workers." The settlement provides for a $7.5 million payment, including $2.5 million in attorneys' fees.

CLASS-IFIED INFORMATION

Labor & Employment Advisory – NLRB Accepts Defeat: Notice-Posting Rule Effectively Void

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McReynolds v. Merrill Lynch & Co., No. 1:05-cv-06583 (N.D. Ill.) (Dec. 6, 2013). Judge Gettleman. Approving $160 million settlement.

African-American financial advisers accused Merrill Lynch of "systemic and pervasive racial discrimination" that impacted their pay and future earning potential. They specifically challenged the company's teaming policy, which allowed brokers to work in teams to boost business, and its account distribution policy, which reassigned the clients of brokers who were leaving the company to brokers who were still working there. The settlement agreement requires Merrill Lynch to pay $160 million and take proactive measures to increase opportunities for its African-American financial advisers and financial adviser trainees.

In re Bank of Am. Wage & Hour Emp't Practices Litig., No. 2:10-md-02138 (D. Kan.) (Dec. 18, 2013). Judge Lungstrum. Approving $73 million settlement.

Approximately 185,000 Bank of America employees accused the company of forcing them to work off-the-clock in violation of the Fair Labor Standards Act and state wage-and-hour laws. Workers will receive their proportional share of the $73 million settlement fund based on their hourly wage and the number of hours they worked since October 2006. About a fourth of the fund will be used for attorneys' fees and plaintiffs' counsel will receive separate payment for costs and expenses up to $900,000. Part of the fund will also be used to pay the California Workforce Development Agency for claims under the California Labor Code Private Attorney General Act.

▪ Products Liability

In re Hydroxycut Marketing & Sales Practices Litig., No. 3:09-md-02087 (S.D. Cal.) (Nov. 19, 2013). Judge Moskowitz. Rejecting $25.3 million settlement.

A class of consumers alleged that Kerr Investment Holding Corp., the parent corporation for Hydroxycut-maker Iovate Health Sciences, Inc., and certain retailers, including Wal-Mart and Vitamin Shoppe, marketed Hydroxycut-branded products as safe and effective treatments for weight loss but failed to disclose that the advertising lacked scientific support.

CLASS-IFIED INFORMATION

Partner Dominique Shelton will present on mobile privacy and "big data" as part of the 2014 Net Diligence Cyber Risk & Privacy Liability Forum taking place June 12-13, 2014, at the Hyatt Bellevue in Philadelphia.

Judge Moskowitz declined to grant final approval because the cy pres distribution fund did not satisfy the standards set forth by the Ninth Circuit. Specifically, the proposed cy pres distribution did not benefit the class. "Cy pres distributions to personal injury claimants in this action reduce the amount that Iovate must pay into the personal injury fund while providing no additional benefit to the personal injury claimants and no benefit at all to the class members who suffered no personal injury." The settlement distribution was rejected because it would have provided a grossly disproportionate distribution of settlement funds to personal injury claimants, while failing to take into account the interests of class members, most of whom did not suffer any personal injury. The proposed distribution was incongruent with the nature of the action, which concerns unfair competition, consumer protection, and product warranty claims, not personal injury liability.

▪ Privacy

Dryer v. Nat'l Football League, No. 09-cv-02182 (D. Minn.) (Nov. 4, 2013). Judge Magnuson. Approving $50 million settlement.

Retired NFL players alleging that the NFL violated their common-law and statutory rights of publicity by using images from their playing days in NFL Films productions. The settlement establishes a Common Good Fund to benefit the former players. The fund will pursue goals

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such as medical research and career transition and cover medical and mental health costs and housing, among other items. The settlement also establishes a licensing agency that will market former players' publicity rights. 75 percent of licensing fees generated will be paid to the licensed player, and 24 percent will go to the Common Good Fund.

Marek v. Lane, No. 13-136 (U.S.) (Nov. 4, 2013). The Supreme Court's recent denial of certiorari ends a years-long struggle to undo a 2009 settlement between Facebook Inc. and class members who alleged that the social network's "Beacon" feature—which automatically posted certain "trigger" activity and the user's personally identifiable information to Facebook—violated various federal and state consumer privacy laws.

In the settlement, approved by the Northern District of California in 2010, Facebook agreed to discontinue the Beacon program and to pay $9.5 million. Plaintiffs' counsel received nearly a quarter of the funds in fees and costs and named plaintiffs received modest incentive payments, but unnamed class members received none of the remaining $6.5 million, which was earmarked for what objector Megan Marek alleged was an improper cy pres award. According to the settlement's terms, Facebook would use the funds to establish a new charity organization called the Digital Trust Foundation, whose purpose would be to promote the interests of internet privacy and security.

The Ninth Circuit affirmed the district court's approval of the settlement. In her petition for writ of certiorari, Marek asked the Supreme Court to consider whether, or in what circumstances, a cy pres award comports with Rule 12(e)(2)'s requirement that a binding class settlement must be "fair, reasonable, and adequate."

▪ Securities

In re Winstar Commc'ns Sec. Litig., No. 1:01-cv-03014 (S.D.N.Y.) (Nov. 13, 2013). Judge Daniels. Approving $10 million settlement.

Plaintiffs brought a securities fraud class action over Grant Thornton's audit of now-bankrupt Internet provider Winstar. In 1999, Winstar reported to its investors that it lost $1.5 billion, though its actual loss was $2.4 billion. Grant Thornton issued an unqualified audit letter supporting Winstar's accounting. In the settlement, Grant Thornton agreed to pay $10 million and $4.5 million in attorneys' fees and costs.

In re Merck & Co. Inc. Vytorin/Zetia Sec. Litig., No. 2:08-cv-02177 and ***In re Schering-Plough Corp. Enhance Sec. Litig.***, No. 2:08-cv-00397 (D.N.J.) (Oct. 1, 2013). Judge Cavanaugh. Approving $688 million settlement.

Investors alleged that Merck and its subsidiary Schering-Plough had concealed test results on the efficacy of anti-cholesterol drug Vytorin. The court approved a $688 million class settlement and a $140 million award of attorneys' fees, resolving all such claims against the company concerning this drug, minus the 187 class members who opted out of the settlement.

Katz v. China Century Dragon Media Inc., No. 2:11-cv-02769 (C.D. Cal.) (Oct. 10, 2013). Judge Kronstadt. Approving $778,333 settlement.

Shareholders of U.S. advertising company China Century Dragon Media accused the company of inflating revenues from its Chinese television commercials to increase its stock price. The final settlement amounts to just a fraction of the $6.3 million in damages the plaintiffs had initially sought.

In re Google Inc. Class C Shareholder Litig., No. 7469 (Del. Ch.) (Oct. 28, 2013).

Chancellor Strine Jr. Approving corporate governance settlement but significantly reducing requested attorneys' fees.

Investors sued Google in attempt to halt the company's planned stock reclassification, claiming that the new class of nonvoting shares would unfairly allow Google founders and directors Larry Page and Sergey Brin to entrench their corporate control. Chancellor Strine Jr. approved the proposed corporate governance settlement, which restricts Page and Brin's ability to transfer nonvoting Class C shares for super-voting Class B shares between the two of them; however, he slashed the requested $25 million in attorneys' fees to $8.5 million plus expenses.

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In re Fannie Mae Sec. Litig., No. 1:04-cv-01639 (D.D.C.) (Dec. 6, 2013). Judge Leon. Approving $153 million settlement.

Investors accused Fannie Mae and KPMG of issuing misleading financial reports. The $153 million settlement—the largest of its kind in the D.C. Circuit since 1996—includes about $29 million in attorneys' fees and costs. In approving the settlement, Judge Leon noted that the deal favored investors and avoided the risk of proposed Federal Housing Finance Authority rules blocking any recovery at all for the investors.

Luther v. Countrywide Fin. Corp., No. 2:12-cv-05125 (C.D. Cal.) (Dec. 6, 2013). Judge Pfaelzer. Approving $500 million settlement resolving three class actions.

Plaintiffs brought three class actions against CountryWide Financial Corp., accusing the company's subsidiaries of making false statements about the quality of CountryWide's underwriting standards for mortgage-backed securities. Judge Pfaelzer gave final approval to the settlement and the $85 million in attorneys' fees requested by plaintiffs despite objections from the Federal Deposit Insurance Corp. The court held that the fees were justified by the substantial risk plaintiffs' attorneys faced in aggressively pursuing the case through several jurisdictional battles and adverse rulings. ■