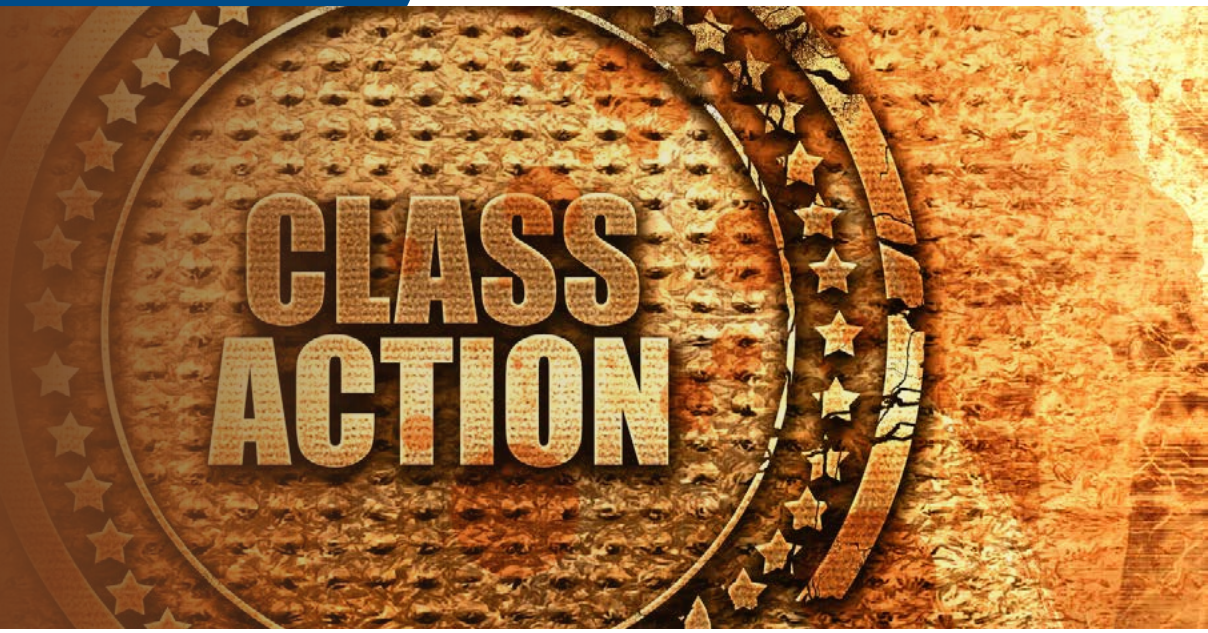
ALSTON & BIRD

- WHERE THE (CLASS) ACTION IS
- ANTITRUST/RICO
- BANKING, FINANCIAL SERVICES & INSURANCE
- CONSUMER PROTECTION
- ENVIRONMENTAL
- LABOR & EMPLOYMENT
- PRIVACY & DATA SECURITY
- PRODUCTS LIABILITY
- SECURITIES
- SETTLEMENTS



Class Action Roundup

Fall 2017

Where the (Class) Action Is

Welcome to the third quarter edition of *Class Action Roundup*, highlighting decisions and settlements from the summer of 2017. Notable highlights this quarter include the most recent *Spokeo* decision in the Ninth Circuit, reversing an earlier dismissal and finding that the plaintiff sufficiently established concrete harm in the reporting of false information. This case continues to be cited across the country in other matters involving the same rule of law. Another notable highlight is the drama that surrounded the rulemaking from the Consumer Financial Protection Bureau (CFPB) regarding the enforceability of arbitration agreements—and then the subsequent congressional override of the proposed rule.

Other interesting cases from this quarter include decisions related to product ingredients and labeling claims where the question of harm is frequently the debate. There were a number of employment discrimination cases this quarter, as well as those involving the question of classifying workers as independent contractor or employee in establishing claims. In the securities category, long-standing cases were finally resolved, and many cases in the privacy category deal with the hot issue of the Telephone Consumer Protection Act (TCPA). We wrap up the *Roundup* with a summary of settlement approvals, including a few where significant attorneys' fees were included in the settlement fund.

As always, we welcome your comments on the *Roundup* or any other publications from Alston & Bird. Thank you for reading!

We want to hear from you! As you may be aware, Alston & Bird provides clients and friends with opportunities for free CLE on class action topics ranging from strategies to defeat certification to trends in California consumer protection statues and even ethics and professionalism issues in class action cases. As we look ahead to 2018, we invite you to take a short survey about topics that most interest you and opportunities to attend CLE courses in a location near you. We thank you in advance for your feedback and interest.

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

Andrew M. Brown
andrew.brown@alston.com
404.881.7876

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

Isabella Lee
isabella.lee@alston.com
404.881.7163

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

Caroline M. Rawls
caroline.rawls@alston.com
404.881.7681

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

Plaintiffs Get All Tied Up in Cable-Box Dispute

In re Cox Enterprises Inc., No. 15-6218 (10th Cir.) (Sept. 19, 2017). Affirming judgment under Rule 50(b).

The Tenth Circuit entered a judgment notwithstanding the verdict (JNOV) for defendant Cox, a cable services company, that negated a jury verdict for the plaintiff subscribers. The subscriber class alleged that Cox implemented an anticompetitive tying arrangement by not allowing subscribers to access certain programming and premium options unless they rented a set-top box from Cox. The Tenth Circuit agreed with the lower court that, as a matter of law, Cox's arrangement did not foreclose competition in the set-top market, refusing to apply a per se rule barring tying arrangements.

S.D.N.Y. Plaintiffs Face the Music

In re Digital Music Antitrust Litigation, No. 06-md-01790 (S.D.N.Y.) (July 18, 2017). Judge Preska. Denying certification.

Judge Loretta Preska in the Southern District of New York declined to certify a class claiming that producers and licensers of digital music controlled 80 percent of the market for digital music and conspired to restrain trade and fix prices of albums and music sold online. Judge Preska ruled that individualized issues predominated because many class members downloaded music illegally, creating an unclean hands defense as to those claims. And because the class representatives did not download the music illegally—and the unclean hands defense was not at issue in their claims—the representatives were not typical of the class.

CLASS-IFIED INFORMATION

Interested in a free class action CLE? Take our short survey to help us choose the topic and location.

Individual Inquiries Sink Antidepressant Class Action

In re Celexa & Lexapro Marketing & Sales Practices Litigation, No.14-cv-13848 (D. Mass.) (Aug. 15, 2017). Judge Gorton. Denying class certification.

Consumers brought a putative class action against a pharmaceutical company alleging that the company engaged in a fraudulent marketing scheme designed to induce consumers to purchase two antidepressants for pediatric uses. Consumers purchased the antidepressants based on physician recommendation.

Judge Morton denied class certification because determining but-for causation would require an individualized inquiry into whether physicians were exposed to the marketing scheme. Judge Morton also ruled that individualized injury questions would "overwhelm the class-wide determinations" because the effect of the antidepressants on minors varied. ■

Banking, Financial Services & Insurance

Congress Kills CFPB Arbitration Rule

Final rule disapproved by Congress.

On July 10, 2017, the Consumer Financial Protection Bureau (CFPB) passed a controversial rule prohibiting banks and credit card companies from forcing consumers into arbitration. The rule would have likely driven an increase in consumer class actions by imposing two limitations on financial services contracts. First, financial companies would not have been able to include class action bans in arbitration clauses. Second, companies would have had to submit certain arbitral and court records to the CFPB for monitoring.

But the Republican-controlled Congress repealed the rule, with Vice President Mike Pence casting the tie-breaking vote in the Senate. The President signed the resolution on November 1, and the CFPB published a notice removing the rule from the *Federal Register*.

Breaking with Precedent: Court Finds Insurance Agents Are ERISA Employees

Walid Jammal, et al. v. American Family Insurance Co., et al., No. 13-cv-00437 (N.D. Ohio) (Aug. 1, 2017). Judge Nugent. Ruling that insurance agents are employees under ERISA; staying case to permit interlocutory appeal.

After a 12-day bench trial, an Ohio federal judge ruled that 7,000 American Family insurance agents meet the definition of "employees" under ERISA because American Family retained some degree of control over the agents' work. The court explained that the degree of control that managers exercised over the agents was "inconsistent with independent contractor status"—the most important factor in determining whether an individual is an employee or contractor. The court, however, stayed the case to permit American Family to take an interlocutory appeal to the Sixth Circuit, in part because other courts have been nearly unanimous that insurance agents are not employees under ERISA.

CLASS-IFIED INFORMATION

Jessica Corley

Discover the "Implications of Section 11 Claims on Directors and Officers Insurance" pending in a U.S. Supreme Court case. Jessica Corley warns of the consequences for state and federal jurisdiction.

HOLA Doesn't Preempt Certain Breach of Contract Claims

Campidoglio LLC, et al. v. Wells Fargo & Company, Nos. 14-35898, 14-36091 (9th Cir.) (Sept. 12, 2017). Partially reviving class.

The Ninth Circuit reversed a district judge's ruling that the Home Owners' Loan Act (HOLA) preempted state-law breach-of-contract claims for interest rate miscalculation. The circuit court held that HOLA's admittedly broad scope did not preempt all state laws. In this particular case, HOLA did not come into play. The allegedly breached contracts did not impose requirements on Wells Fargo regarding banking regulations, but merely bound the bank to honor a contractual promise. Thus, the contracts only incidentally affected its lending operations.

(continued on next page)

Retirement Plan Participants Can Pursue 401(k) Losses in Class

Moreno, et al. v. Deutsche Bank Americas Holding Corp., et al., No. 15-cv-09936 (S.D.N.Y.) (Sept. 5, 2017). Judge Schofield. Certifying class.

A New York federal judge certified a class of individuals enrolled in a Deutsche Bank 401(k) plan alleging that the bank breached its duties of care and loyalty owed to class members by directing their investments into low-performing, high-fee funds. The court held that lead plaintiffs and class members have a common interest in remedying any plan mismanagement, and therefore certification was proper.

Court Grants Ameritrade's Motion for Summary Judgment in Dispute Over Fees

Malone v. TD Ameritrade Inc., et al., No. 16-cv-00614 (E.D. Tex.) (Aug. 8, 2017). Judge Mazzant. Granting motion for summary judgment.

A putative class with Roth IRA accounts at Ameritrade claimed that certain agreements barred the defendants from charging fees for exchanges within certain mutual fund families. The trial court granted summary judgment to the defendants because the unambiguous agreements allowed exchange fees and the "no load" funds that the plaintiff purchased permitted transaction fees. ■

Consumer Protection

Amazon Primed to Enforce Its Arbitration Provision

Allen Wiseley v. Amazon.com Inc., No. 15-56799 (9th Cir.) (Sept. 19, 2017). Affirming grant of motion to compel arbitration.

Andrea Fagerstrom and Allen Wiseley claimed that Amazon's practice of comparing a product's "listed price" to its own price misled customers into believing they were saving money. The Ninth Circuit affirmed Amazon's motion to compel arbitration, finding no indicia of procedural unconscionability in the company's conditions of use (COU), which were close enough to the action buttons on the checkout and account registration pages to give consumers sufficient notice to create a valid contract. The court also held that the COU were not substantively unconscionable.

Ninth Circuit Has Spoken Again, Finding Spokeo Caused Article III Injury

Robins v. Spokeo Inc., No. 11-56843 (9th Cir.) (Aug. 15, 2017). Reversing dismissal.

In what is now probably the most famous Fair Credit Reporting Act (FCRA) case in history, Thomas Robins alleged that Spokeo violated the FCRA because his Spokeo profile contained inaccuracies about his personal information, including his age, marital status, wealth level, and graduate degrees. Robins claimed that the inaccuracies harmed his employment prospects, but he did not identify the loss of any specific job opportunity. In 2014, the Ninth Circuit reversed the lower court and found sufficient standing. The Supreme Court remanded, holding that the Ninth Circuit had not properly analyzed the "concreteness" prong of the "injury-in-fact" requirement.

On its second go-round, the Ninth Circuit determined that Robins had sufficiently pled a concrete injury. The Ninth Circuit endorsed the Second Circuit's standard for determining concreteness in the context of a statutory violation: "an alleged procedural violation [of a statute] can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents 'a risk of real harm' to that concrete interest." Therefore, to establish concrete harm, a plaintiff must demonstrate that "(1) … the statutory provisions at issue were established to protect his concrete interests (as opposed to purely procedural rights), and if so, (2) … the specific procedural violations alleged in the case actually harm, or present a material risk of harm to, such interests."

According to the Ninth Circuit, Congress established the FCRA provision at issue for the express purpose of protecting consumers from the transmission of inaccurate information in consumer reports. The FCRA's procedural requirements therefore protect interests that are "'real,' rather than purely legal creations," and the "dissemination of false information in consumer reports *can* itself constitute a concrete harm" and has "real-world implications." The alleged inaccuracies regarding Robins's age, graduate degrees, and wealth level are not the sort of "'mere technical violations' which are too insignificant to present a sincere risk of harm to the real-world interests that Congress chose to protect with [the] FCRA."

Controversial Price Tag ≠ Cognizable Injury

Judith Shaulis v. Nordstrom Inc., d/b/a Nordstrom Rack, No. 15-2354 (1st Cir.) (July 26, 2017). Affirming district court's motion to dismiss.

This action arises from a cardigan sweater with a controversial price tag. The cardigan's price tag listed both the purchase price, $49.97, and a higher "Compare At" price of $218, noting the difference between the two numbers as "77%" worth of savings. The plaintiff alleged that the cardigan was never

(continued on next page)

sold nor intended to be sold at the "Compare At" price advertised on the price tag. The district court granted Nordstrom's motion to dismiss because the plaintiff failed to allege a legally cognizable injury.

The First Circuit affirmed on two bases. First, although Shaulis alleges she suffered an "induced" purchase, she did not identify a distinct injury or harm arising from the deceptive conduct itself. Second, Shaulis failed to identify any bargained-for characteristic of the sweater that she has not received; her subjective belief of the nature of the value she received did not constitute a legally cognizable injury.

"No Sugar Added" Labeling Suit Not Packaged Well Enough to Earn Certification

Rahman v. Mott's LLP, No. 15-15579 (9th Cir.) (July 5, 2017). Affirming denial of motion for class certification.

According to Mohammed Rahman, the statement "No Sugar Added" on Mott's 100% Apple Juice does not comply with FDA regulations and, by extension, California consumer protection laws. Seeking to circumvent the rest of Rule 23's requirements, Rahman sought issue-certification under Rule 23(c)(4) for liability.

But simply wanting to speed things along was insufficient for both the district court and the circuit court. Rahman failed to show how damages would be resolved if the liability issues were certified and failed to convince anyone that certifying a liability-only class would materially advance the litigation.

Spotify Class Rep Not Spotted in Putative Class

Ingalls v. Spotify USA Inc., No. 16-03533 (N.D. Cal.) (July 27, 2017). Judge Alsup. Order denying motion for class certification.

Gregory Ingalls sought to lead a class of music lovers who signed up for Spotify's free or reduced-price trials and were subsequently charged upon expiration of the trial without having ever used the paid service. The district court refused to certify the class due to Spotify's uncontroverted declaration showing that Ingalls had used Spotify's paid service upon expiration of the trial period. While the district court was admittedly inclined to certify a class based on Ingalls's allegations, it denied his motion given the high likelihood that he was not a member of the proposed class. ■

Environmental

- **CERCLA Claims Are the Nuisance**

  LeRithea Rolan, et al. v. Atlantic Richfield Co., et al., No. 16-cv-00357 (N.D. Ind.) (July 26, 2017). Judge Springmann. Dismissing nuisance claims and granting CERCLA claim.

  Residents who live near an East Chicago Superfund site sued DuPont/Chemours and Atlantic Richfield over lead and arsenic contamination. Because the contamination ceased more than 50 years ago and is not "ongoing," the manufacturers were successful in dismissing the residents' nuisance claims. But neither manufacturer could dodge the residents' Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claims—to recover costs to investigate contamination and possibly relocate.

  Atlantic Richfield also won dismissal of the residents' negligence claim. Despite long ago owning the land where the residents' public housing now sits, Atlantic Richfield did not owe a duty to future landowners and could not have foreseen residential use of the land. DuPont/Chemours, however, who owns and operated neighboring property, was not so successful—the court held that their duty to neighboring landowners was clear and foreseeable. Historical manufacturers continue to find it difficult to avoid negligence claims from neighboring residents. ■

CLASS-IFIED INFORMATION

Getting better all the time: Alston & Bird awarded 109 Tier 1 rankings in the latest *U.S. News–Best Law Firms* report, 26 national, 83 metropolitan.

Labor & Employment

Turner Broadcasting Avoids Race-Based Class Action

Celeslie Henley, et al. v. Turner Broadcasting System Inc., et al., No. 16-cv-04506 (N.D. Ga.) (July 25, 2017). Judge Duffey. Granting defendants' motion to dismiss.

A Georgia federal judge granted the defendants' motion to dismiss a class action complaint alleging that they used hiring and performance review systems that blocked the promotion of minorities in violation of Title VII. The complaint, brought by a female, African American former employee and a male, African American employee, claimed that the defendants maintained an evaluation system that resulted in lower ratings for minorities. The judge focused on the lack of clarity in the compliant, noting that the complaint was "littered with conclusory assertions, rank speculation, confusing statements," and explained that the complaint failed to identify which allegations corresponded to which defendant, as well as the policies in question. The court also noted that a plaintiff without a cognizable claim cannot represent others who do possess valid claims.

Plaintiffs Prevail in Obtaining Leave to Amend ADEA Complaint

Heath v. Google Inc., No. 15-cv-01824 (S.D. Cal.) (Sept. 12, 2017). Judge Freeman. Granting plaintiffs' motion for leave to file second amended complaint.

A federal judge granted the plaintiffs' leave to amend in an ongoing collective action alleging that Google has a practice of discriminating against software engineer applicants based on age grants. Here, the court relied on *Rabin v. PricewaterhouseCoopers LLP*, which was decided earlier this year and held that the Age Discrimination in Employment Act (ADEA) extends to any adversely affected individual *regardless* of whether he or she is an applicant or employee. Because *Rabin* was decided after the deadline for the plaintiffs to amend, the court found that the plaintiffs did not unduly delay in seeking leave to amend the complaint. Likewise, the court found that allowing the plaintiffs leave to add a disparate impact claim at this time would not prejudice Google since the trial was scheduled for more than 18 months.

CLASS-IFIED INFORMATION

Emily Costin

Kathy Huang

Emily Hootkins

Learn tips from pros Emily Costin, Kathy Huang, and Emily Hootkins at the 44th Annual TIPS Midwinter Symposium on Insurance and Employee Benefits in Coral Gables, FL, January 11–13.

(continued on next page)

Eleventh Circuit Scatters and Smothers "Wholly Groundless Exception" in Arbitration Ruling

Jones v. Waffle House Inc., No. 16-15574 (11th Cir.) (Aug. 7, 2017). Vacating district court's denial of motion to compel arbitration.

A job applicant filed a putative class action against Waffle House in Florida for allegedly failing to provide him copies of background checks in violation of the FCRA, and then failing to hire him. The plaintiff obtained employment at a different Waffle House in Kansas, where he signed an arbitration agreement that covered "all claims and controversies … arising out of any aspect of or pertaining in any way to [his] employment." Subsequently, Waffle House moved to compel arbitration in the Florida case. The district court denied the motion and Waffle House appealed to the Eleventh Circuit.

The Eleventh Circuit relied on *Rent-A-Center, West Inc. v. Jackson*, in which the U.S. Supreme Court established that when parties have agreed to delegate "gateway" questions to an arbitrator—those that concern the scope, applicability, and enforceability of an arbitration agreement—the court may address only challenges to such a provision. The Eleventh Circuit vacated the district court's denial of the motion to compel arbitration, holding that the arbitration agreement contained a valid and enforceable delegation provision that expressed the parties' intent to arbitrate gateway questions of arbitrability. In making this determination, the Eleventh Circuit joined the Tenth Circuit as the only other circuit court to reject the "wholly groundless exception" by which a court may deny a motion to compel arbitration if the assertion of arbitrability is deemed groundless.

Workers Denied Class Certification in Race-Based Discrimination Suit

Vernon Ross, et al. v. Lockheed Martin Corp., No 16-cv-02508 (D.D.C.) (July 28, 2017). Judge Jackson. Denying class certification and denying proposed settlement.

A federal judge denied both class certification and the parties' proposed settlement agreement and ordered the parties to submit a joint proposed schedule for further proceedings in the matter. The plaintiffs allege that Lockheed Martin Corporation engaged in a pattern or practice of race-based employment discrimination in Lockheed's use of a performance appraisal system resulting in lower salaries and bonuses, as well as a lower retention rate and fewer promotions, for African American employees. Relying in part on the U.S. Supreme Court's reasoning in *Walmart v. Dukes*, the court declined to certify a class of 5,500 workers. Judge Ketanji Brown Jackson found that the plaintiffs did not present any theory of how the performance appraisal system resulted in racially disparate outcomes. In a memorandum supporting the order, Judge Jackson noted that the plaintiffs also did not present any evidence that the performance appraisal system discriminated against all class members in the same way, so the proposed class did not meet the commonality element of Rule 23(a) of the Federal Rules of Civil Procedure.

CVS Has the Medicine to Defeat Class Certification

Lamarr-Arruz, et al. v. CVS Pharmacy Inc., No. 15-cv-04261 (S.D.N.Y.) (Sept. 26, 2017). Judge Koeltl. Denying motion for class certification.

A New York federal court denied a motion to certify a class to pursue hostile work environment claims on behalf of all black and Hispanic CVS market investigators and store detectives who worked under the same regional loss prevention managers (RLPMs) in New York. The plaintiffs claim that those RLPMs instructed them over the course of their employment with CVS to racially profile black and Hispanic customers and that the RLPMs also used racially degrading language. In rejecting class certification, the court explained that the plaintiffs failed to establish that common questions of law or fact exist that can be answered on a classwide basis because the plaintiffs adduced evidence of racially hostile remarks by only four of the relevant 12 RLPMs and the interactions between potential class members

(continued on next page)

and those RLPMs necessarily varied. Similarly, the court held that common issues do not predominate over individual issues because the proposed class members worked independently at various CVS locations throughout New York for different periods and lengths of time under the supervision of different RLPMs, and there is no evidence that a majority of the RLPMs engaged in the alleged wrongful conduct.

Insurance Policy Does Not Cover Failing to Pay Employee Wages

W.G. Hall LLC v. Zurich American Insurance Co., No. 17-cv-00646 (N.D. Cal.) (Aug. 31, 2017). Judge Cousins. Granting motion for summary judgment dismissing plaintiff's claims.

A California federal court granted summary judgment dismissing W.G. Hall's breach of contract and other claims against its insurer, Zurich American Insurance Company. WGH, a staffing services company, settled a wage and hour class action lawsuit relating to its alleged failure to compensate its employees for orientations, consultations, client interviews, related travel, and other work off the clock. Before and after settling the class action, WGH sought coverage from Zurich, its professional liability insurer, for the amount it would pay out in the settlement. In granting summary judgment in favor of Zurich, the court analyzed the meaning of the applicable insurance policy, including particularly whether the allegations in the underlying class action fall under the policy's coverage of "wrongful acts." Ultimately, the court concluded that the claims in the underlying class action are not covered because the obligation to pay the claimants' wages preexisted the suit and is independent of any wrongful act by WGH. In other words, WGH's failure to pay its employees' wages is not covered by the insurance policy. ■

Privacy & Data Security

D.C. Circuit Analyzes Clapper and Revives Data Breach Suit

Chantal Attias, et al. v. CareFirst Inc., et al., No. 16-7108 (D.C. Cir.) (Aug. 1, 2017). Reversing dismissal.

The D.C. Circuit reversed a district court's dismissal of a putative class action that policyholders brought against CareFirst BlueCross BlueShield concerning a 2014 data breach. The district court ruled that the plaintiffs lacked standing under *Clapper* because they had not alleged any present injury or sufficient likelihood of a future injury.

But the D.C. Circuit disagreed. Unlike *Clapper*, in which injury was premised on a series of speculative events, injury in this case was not merely speculative but "plausible" given the plaintiffs' allegations that an unauthorized party accessed sensitive personal data and the inference that the party was likely to use that data "for ill."

Third Circuit Puts the Brakes on Ascertainability in TCPA Case

City Select Auto Sales Inc. v. BMW Bank of North America Inc., No. 15-3931 (3rd Cir.) (Aug. 16, 2017). Vacating and remanding denial of class certification.

A used-car dealership filed a Telephone Consumer Protection Act (TCPA) class action in response to unsolicited faxes sent by BMW Bank of North America. City Select sought to certify a class of auto dealerships identified in a database who were sent messages by BMW. The district court denied the class certification motion on ascertainability grounds. Even though City Select could identify the "potential universe" of fax recipients, the court found that there was no objective way to determine who was actually sent the BMW fax. The Third Circuit disagreed, reasoning that while the potential class was vast, the database, combined with other records such as affidavits, could provide a feasible and reliable means of determining whether putative class members actually fell within the class.

Third Circuit Sets Out Two-Pronged Test for Standing Under *Spokeo*

Susinno v. Work Out World Inc., No. 16-3277 (3rd Cir.) (July 10, 2017). Reversing district court.

Interpreting the U.S. Supreme Court decision *Spokeo v. Robins*, the Third Circuit reversed a district court's dismissal of a proposed class of Work Out World Inc. customers for lack of standing. The circuit court held that when someone sues under a statute alleging the very injury the statute was intended to prevent, and the injury has a close relationship to a harm on which someone could traditionally sue, a concrete injury has been pleaded. So it was enough that Work Out World Inc.'s customers complained that the company violated the TCPA by sending them prerecorded sales calls—a sufficiently concrete injury to confer standing.

(continued on next page)

No Room at the Inn for Hotel Guest Class

Guarisma v. Hyatt Corporation, No. 17-cv-20931 (S.D. Fla.) (Sept. 28, 2017). Judge Ungaro. Denying motion for class certification.

A proposed class of Hyatt guests who alleged Fair and Accurate Credit Transactions Act (FACTA) violations based on the chain's alleged practice of printing too much credit card information on receipts was denied certification by a Florida district court. The court found the proposed class problematic because it was composed of hotel guests who had paid with a credit or debit card but did not necessarily receive a printed receipt. Fatal to the certification effort was the fact that the class could not be ascertained without examining printed receipts that the 219,087 individual class members may or may not have received or collecting affidavits from every member. The plaintiff's inability to offer an administratively feasible solution was "plainly inadequate" to prove ascertainability. Separately, the court held that the plaintiff had standing to sue under *Spokeo* and rejected Hyatt's arguments that the class plaintiff had not identified a concrete injury or imminent risk of injury. Instead, the court cited uniform holdings that FACTA creates a substantive right for consumers to have their credit card information truncated on receipts.

Volkswagen Plaintiffs Dial Up Two TCPA Classes in California

Brian Trenz v. On-Line Administrators Inc., et al., No. 15-cv-08356 (C.D. Cal.) (Sept. 25, 2017). Judge Birotte. Granting motion for class certification and denying defendants' motion for summary judgment, in part.

Consumer plaintiffs alleging TCPA violations against Volkswagen and its marketing vendor stemming from unsolicited, autodialed phone calls won certification of two classes in the Central District of California. The litigation involves a Volkswagen customer outreach program and various allegedly autodialed calls made under the program to customers between 2011 and 2015. The court held that two classes—representing two marketing campaign time periods—should be certified on the common issues of whether Volkswagen used an automatic telephone dialing system, whether customers had consented to the calls, and whether alleged violations were willful. In addition, the court denied Volkswagen's motion for summary judgment against three of the four class plaintiffs, finding that they had not provided consent broad enough to cover the marketing calls.

Data Breach Suit Against Noodles & Co. Does Not Stick

SELCO Community Credit Union v. Noodles & Co., No. 16-cv-02247 (D. Colo.) (July 21, 2017). Judge Jackson. Granting motion to dismiss.

A collection of credit unions that sued Noodles & Co. for damages resulting from its data breach saw their suit dismissed when a Colorado federal judge ruled that the credit unions' negligence claims failed because the credit unions had not shown that Noodles & Co. breached any obligations other than those in a series of contracts connecting the banks and the restaurant. Because the credit unions failed to show any duties Noodles & Co. may have had that differed from the duties arising out of its payment network contracts, the economic loss rule applied to bar recovery for the purely financial loss allegedly caused by Noodles & Co.'s negligence in the performance of its contractual duty. ■

Products Liability

- **Vehicle Owner Gets Green Light for Class Action Alleging Defects in Several Models**

  Riaubia v. Hyundai Motor America, No. 16-cv-05150 (E.D. Pa.) (Aug. 22, 2017). Judge Jones. Denying motion to dismiss.

  A Pennsylvania federal judge ruled that a Sonata owner has standing to bring a class action on behalf of buyers of any Hyundai model that incorporated the allegedly defective self-opening trunk feature. Judge Jones held that, like the absent class members, the plaintiff suffered an economic injury from purchasing a vehicle with Smart Trunk technology that failed to live up to Hyundai's representations. Once a named party demonstrates that he is properly before the court, adequacy of representation turns on compliance with the class certification provisions of Rule 23 rather than Article III standing.

- **Proposed Class Action Can Proceed Despite Settlement Offer to Lead Plaintiff**

  Laurens v. Volvo Cars of North America LLC, No. 16-03829 (7th Cir.) (Aug. 22, 2017). Reversing district court order dismissing case for lack of standing.

  A Seventh Circuit panel reversed the district court's finding that the lead plaintiff in a proposed class action lacked standing to sue Volvo because she had been offered a full refund on her hybrid vehicle before filing the lawsuit. The panel cited the U.S. Supreme Court's recent holding in *Campbell-Ewald Co. v. Gomez* and explained that "unaccepted contract offers are nullities; settlement proposals are contract offers; and therefore unaccepted settlement proposals are nullities." Because the plaintiff did not accept Volvo's settlement offer, she suffered an injury in fact and can seek damages to redress the financial harms that flowed from alleged misrepresentations about how long her vehicle would hold an electric charge. A short concurrence highlighted that the district court must decide on remand whether the plaintiff met her burden to show standing for injunctive relief.

- **Court Upholds Class Certification in Coffee False Labeling Suit**

  Suchanek v. Sturm Foods Inc., No. 11-cv-00565 (S.D. Ill.) (Aug. 28, 2017). Judge Rosenstengel. Denying motion for class decertification and cross motions to exclude damages experts.

  The parties' experts developed competing models to measure the harm suffered by consumers in eight states who purchased Grove Square Coffee pods, which were allegedly filled with instant coffee despite being labeled as fresh-ground. Judge Rosenstengel ruled that both damages models developed by the plaintiffs' expert were legally sound, and the jury can determine which one to apply. The retail model concludes that the pods had no value whatsoever and calculates damages as the entire cost to consumers, while the price-premium model determines the difference between the fresh-ground coffee the class members thought they were buying and the instant coffee they actually received. In addition, the court held that decertification of the entire class was inappropriate because some of the state claims only require proof of injuries and provide for automatic recovery of statutory damages. ■

CLASS-IFIED INFORMATION

Stephanie Jones

Stephanie Jones helps you keep up with "Recent Developments in California's Automatic Renewal Law" in the *Bloomberg Law Product Safety & Liability Reporter*.

Securities

- **Not So "Royal" Treatment**

  Royal Park Investments SA/NV v. The Bank of New York Mellon, No. 14-cv-06502 (S.D.N.Y.) (Aug. 30, 2017). Judge Woods. Denying class certification.

  A district judge in New York denied a motion to certify the proposed class of investors suing Bank of New York Mellon Corp., trustee of the five residential mortgage-backed securities (RMBS) trusts at issue in this case, because the proposed class was not sufficiently ascertainable. Judge Woods denied the plaintiff's motion for class certification, reasoning that the proposed class was not defined using objective criteria that establish a membership with definite boundaries. The proposed definition did not reference a fixed date, window of acquisition, or length or continuity of ownership. The court rejected the plaintiff's argument that by including certificate holders who "held" the certificates that this alleviated the fundamental problem of an "ever-changing composition" of the class. Because the plaintiff failed to meet its burden for that threshold inquiry, the court did not evaluate here the remainder of the arguments presented by the defendant in opposition to the motion. The motion was denied without prejudice, with leave to file a renewed motion that proposes an appropriately redefined class.

- **Stock Fraud Claims Against Whole Foods Dismissed**

  Markman v. Whole Foods Market Inc., et al., No. 15-cv-00681 (W.D. Tex.) (Aug. 25, 2017). Judge Yeakel. Granting motion to dismiss.

  A district judge dismissed a class action suit against Whole Foods, CEO John P. Mackey, and five other executives over alleged systematic overpricing between July 2013 and July 2015, finding that a twice-amended complaint made no credible allegation that the grocery powerhouse intended to deceive shareholders. Specifically, the plaintiffs alleged that Whole Foods made false and misleading statements about the company's competitive prices, high standards for quality and transparency, and favorable financial results. The court granted the motion to dismiss, without leave to amend, finding that the plaintiffs failed to adequately plead the essential elements of (1) false or misleading statements of material fact; (2) scienter; and (3) loss causation, and noting that the amended complaint "[did] not add any credible factual allegations to support the Retirement System's theory of a systemwide scheme that was known to each individual defendant." Specifically, the judge rejected the plaintiff's attempt to use analyst statements that Whole Foods overcharged by $117 million in total to bolster support, finding no direct correlation between the analyst's data regarding aggregate sales and the weight-related overcharges. ■

CLASS-IFIED INFORMATION

Robert Long

You felt it too? Robert Long comments on the reasons for the "Increase in Class Action Securities Fraud Filings Felt Across Industry" in *Corporate Counsel*.

Settlements

Complexity Leads to Settlement

In re Comverge Inc. Stockholders Litigation, No. CA-7368 (Del. Ch.) (Sept. 12, 2017). Vice Chancellor Montgomery-Reeves. Approving settlement.

The Delaware Chancery Court approved a $5.9 million settlement resolving shareholder claims that Comverge's former board of directors acted improperly in HIG Capital LLC's $50 million acquisition of the company. Specifically, the shareholders maintained that the board approved the merger without fully understanding its terms and failed to fully apprise shareholders of the deal terms before they ratified the transaction. Ultimately, in light of the complexities associated with proving the shareholders' claims and the broad liability release they provided to Comverge, the court found that the parties' settlement figure—giving shareholders $0.25 more per share than they received under the merger—was reasonable.

MGM Shareholders Cash In

In re MGM Mirage Securities Litigation, No. 16-15534 (9th Cir.) (Sept. 17, 2017). Approving settlement.

The Ninth Circuit recently affirmed the approval of a $75 million class action settlement resolving shareholder claims that MGM Resorts and its top executives failed to disclose construction and financing issues associated with the company's City Center project—a new luxury hotel and casino on the Las Vegas Strip. While the lead objector had standing to appeal the approval, the court rejected his class notice contentions since the claims administrator had mailed more than 200,000 notices of the proposed settlement to potential class members. Moreover, citing the lack of special circumstances indicating that a benchmark award of 25 percent of the settlement fund was too large or too small, the Ninth Circuit also rejected the objector's attorneys' fees argument.

Another Payday Under the TCPA

Medical & Chiropractic Clinic Inc. v. Ancient Nutrition LLC, No. 16-cv-02342 (M.D. Fla.) (July 11, 2017). Judge Merryday. Approving settlement.

In a TCPA case involving faxed advertisements for bone broth protein, Judge Merryday approved a settlement fund equivalent to full recovery of statutory damages by all 176 class members identified through discovery—$88,000. Judge Merryday also awarded attorney's fees, costs, and an incentive award, which were all to be drawn from the settlement fund. In total, those costs and fees accounted for half the fund.

Final Settlement Calls for Prior Consent to Debt Collector's Calls

Tannlund v. Real Time Resolutions Inc., No. 14-cv-05149 (N.D. Ill.) (Aug. 23, 2017). Judge Chang. Approving settlement.

Judge Chang approved a $1.3 million settlement of claims brought against debt collector Real Time Resolutions under the TCPA. The proposed class included anyone in the U.S. who received a call to his or her cell phone from Real Time's automated telephone dialing system without having consented to those calls. Real Time admits no fault under the settlement terms and notes the significant enhancements to its automated telephone dialing system that are meant to ensure that no calls are made unless the recipient has provided prior express consent.

(continued on next page)

Class Counsel Wins Big with One-Third of Halliburton Settlement Fund

Erica P John Fund Inc., et al. v. Halliburton Company, et al., No. 02-cv-01152 (N.D. Tex.) (Jul. 31, 2017). Judge Lynn. Approving settlement.

More than 15 years ago, Halliburton investors brought suit against the oil giant alleging it artificially inflated its stock price by issuing misstatements about its financial liability for asbestos claims. After two trips up to the U.S. Supreme Court, Judge Lynn certified a class of investors in July 2015. The parties finally reached a $100 million settlement agreement and its fee award of one-third of the settlement fund to class counsel. Judge Lynn conceded that the one-third award is slightly above the norm for the Northern District of Texas, but ruled that the award was reasonable in light of counsel's work throughout the long history of the case and the risk associated with the litigation.

MDL Attorneys Finally Get Their Payday

Downing, et al. v. Goldman Phipps PLLC, et al., No. 13-cv-00206 (E.D. Mo.) (Sept. 12, 2017). Judge Perry. Granting settlement approval.

Three law firms brought suit for unjust enrichment and expenses incurred while performing common-benefit work in the genetically modified rice multidistrict litigation. Specifically, certain state court litigants implicated by the MDL proceedings failed to contribute to the common benefit fund that had been established by court order to compensate those attorneys performing common benefit services on behalf of all MDL plaintiffs and other state court litigants. Judge Perry granted final approval of the settlement after holding a fairness hearing and noting that no class members objected to the settlement. According to the plaintiff law firms, the settlement represents a successful effort to "prevent attorneys in mass tort MDLs from free-riding off the efforts of others by using limited federal jurisdiction as a means to prevent compensating those attorneys who provided common benefit work."

Construction Workers Reach $3.75 Million Settlement in Wage and Hour Dispute

David L. Totten v. Kellogg Brown & Root LLC, et al., No. 14-cv-01766 (C.D. Cal.) (July 31, 2017). Judge Gee. Approving settlement.

A California federal judge granted preliminary approval of a settlement between engineering and project management firm Kellogg Brown & Root LLC (KBR) and a class of construction workers who alleged that the company failed to pay them for travel time, second meal periods, and overtime. The court approved the class under Rule 23 for purposes of the settlement. The settlement requires the company to pay at least 50 percent of a $3.75 million settlement to 137 participating claimants. The company had previously argued that the employees were prohibited from bringing class actions by arbitration agreements. The parties reached settlement in April after a mediation session while the case was stayed pending resolution of *Morris v. Ernest Young*, a case about the enforceability of such class waivers that was heard by the U.S. Supreme Court in early October. The parties agreed that class counsel would receive $937,000 in attorneys' fees and the named plaintiff would receive an enhancement award of $20,000.

As part of the settlement, KBR will also pay penalties of $75,000 to the California Labor and Workforce Development Agency under the state's Private Attorneys General Act.

Better Late than Never

In re Harman International Industries Inc. Securities Litigation, No. 07-cv-01757 (D.D.C.) (Sept. 28, 2017). Judge Contreras. Granting final approval.

Nearly a decade after the case was initially filed, Judge Contreras granted approval of a settlement between automotive tech company Harman International and its shareholders. The proposed class of shareholders alleged that Harman intentionally misrepresented its sales numbers during

(continued on next page)

2007 negotiations of a private equity merger in an attempt to inflate stock prices. After the court dismissed the claims in 2014 on the ground that Harman was unaware its statements were false or misleading, the D.C. Circuit revived the class's claims in mid-2015, finding that Harman's claims were "misleading in light of historical fact." Harman will now pay the proposed class $28.3 million to settle the claims with its shareholders.

Litigation History Is Evidence of Noncollusive Negotiations

Beaver v. Tarsadia Hotels, a California Corporation, No. 11-cv-01842 (S.D. Cal.) (Sept. 28, 2017). Judge Curiel. Granting approval of settlement.

Judge Curiel granted approval of a settlement for a class of condominium-hotel purchasers. In granting approval, Judge Curiel afforded great weight to the previous posture of the case, which indicated that the settlement was the product of serious, informed, noncollusive negotiations. The settlement was the product of more than five-and-a-half years of litigation, two failed court-assisted settlement conferences, a failed mediation, a recent second mediation, and follow-up negotiations. Additionally, the parties reached settlement after completion of discovery and the Ninth Circuit's affirmance of a partial summary judgment in the plaintiffs' favor. ■