ALSTON&BIRD LLP

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Class Action Round-Up

Summer 2015

Where the (Class) Action Is

The big news this quarter is the U.S. Supreme Court's acceptance of *Tyson Foods, Inc. v. Bouaphakeo*, an employment case likely to have major ramifications across the whole spectrum of class action litigation. The Court is set to consider two huge issues: the use of statistical techniques and averaging and the inclusion of class members who were not injured. The 2-1 Eighth Circuit majority opinion being reviewed punted on many of the hard issues because the case was before them on a rare class action jury verdict. We expect the Supremes, especially the *Dukes/Comcast* majority, to give those hard issues a very hard look.

In other news, privacy continued to be a red hot area, and the Third Circuit's tightening of ascertainability requirements in consumer cases continued to face challenges. In the wake of Judge Posner's troika of settlement decisions, judges stepped up their scrutiny of attorneys' fees requests.

As always, we welcome your feedback about the *Round-Up*. Please let us know how we can make it better. We hope you enjoy the report.

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Supreme Court

- **Supreme Court Takes *Tyson Foods* Appeal, Primed to Show that *Walmart v. Dukes* Means What It Says**

  Tyson Foods, Inc. v. Bouaphakeo, No. 14-1146 (U.S.) (June 8, 2015). Granting petition for writ of certiorari.

  The U.S. Supreme Court has agreed to hear Tyson Foods' appeal in a wage-and-hour class action in which the Sixth Circuit affirmed certification of a class of Ohio workers asserting "donning and doffing" claims. The case raises two important and oft-litigated issues: (1) whether a class can be certified with use of a statistical sampling that treats all class members as the same "average" employee despite proof of liability and damages differences; and (2) whether a class can be certified when it contains hundreds of members that suffered no injury.

  The Court now has the opportunity to reinforce two recent pronouncements about the stringent requirements for class certification: the *Walmart v. Dukes* rejection of "Trial by Formula"—extrapolating damages from a "sample set" of class members—and the *Comcast v. Behrend* requirement that any classwide damages model be tailored to the theory of liability. ■

Antitrust

- ***Daubert* Throws Out Billion-Dollar Classes at the Plate**

  Garber v. Office of the Commissioner of Baseball, 1:12-cv-3704 (S.D.N.Y.) (May 14, 2015); *Laumann v. Nat'l Hockey League*, 1:12-cv-1817 (S.D.N.Y.) (May 14, 2015). Judge Scheindlin. Certifying injunction class; denying certification of damages class.

  Purchasers of out-of-market packages of Major League Baseball and National Hockey League broadcasts sued regional sports networks, multichannel video program distributers, MLB, and NHL in two related cases for allegedly conspiring to horizontally divide the broadcast market. After a pre-certification *Daubert* hearing, Judge Scheindlin excluded the plaintiff expert's damages testimony. That exclusion left the plaintiffs with no common damages evidence to satisfy Rule 23(b)(3). Judge Scheindlin did certify an injunction-only class, holding that denial of market choice is a sufficient injury under Rule 23(b)(2). That ruling is being appealed. ■

CLASS-IFIED INFORMATION

Our Antitrust Group examined the FTC's new Statement of Principles on when it will challenge an act or practice as an unfair method of competition in violation of Section 5 of the FTC Act.

Banking

- **Supreme Court Opens Door to Disparate Impact Class Actions Under the FHA**

  Texas Dept. of Housing & Community Affairs v. The Inclusive Community Project Inc., No. 13-1371 (U.S.) (June 25, 2015). Affirming judgment in favor of defendant on disparate impact claim.

  In a 5-4 decision, the U.S. Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act (FHA), but with specified limits. The FHA permits claims alleging that certain policies of lenders, insurers, and developers have a disparate impact on minority groups. FHA claims may rely on statistical analysis to determine discrimination without the need to prove discriminatory intent, making class treatment easier.

  At the same time, the Court clarified that "[d]isparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid … policies." The Court imposed a burden-shifting framework under which a plaintiff must satisfy a "robust causality requirement" by identifying "a defendant's policy or policies causing [a] disparity." Those limitations are meant to protect "defendants from being held liable for racial disparities they did not create" and prevent against "abusive disparate-impact claims."

CLASS-IFIED INFORMATION

Frank Hirsch

Richard McAvoy

Frank Hirsch and Richard McAvoy loan their insights to the *Consumer Financial Services Law Report* in their article "FCA and Fraudulent FHA Loan Underwriting: Quicken Balks at HUD/DOJ Settlement Demands."

- **Third Circuit: FDCPA Claims Not Foreclosed in Foreclosure Complaint**

  Kaymark v. Bank of America N.A., No. 14-cv-01816 (3d Cir.) (Apr. 7, 2015). Reversing dismissal of FDCPA claims.

  A Third Circuit panel held that a foreclosure complaint can provide a basis for Fair Debt Collection Practices Act (FDCPA) claims in a putative class action. The district court had dismissed a suit alleging that the defendant law firm violated the FDCPA by labeling in a foreclosure complaint yet-to-be-incurred fees as due and owing and by trying to collect fees not authorized by the mortgage agreement. The appellate court reversed, concluding that "a communication cannot be uniquely exempted from the FDCPA because it is a formal pleading or, in particular, a complaint"— a principle it characterized as "widely accepted by our sister Circuits."

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▪ Borrowers Cannot Maintain Loan Racial Bias Class Claims

Adkins v. Morgan Stanley, No. 12-cv-07667 (S.D.N.Y.) (May 14, 2015). Judge Caproni. Denying motion for class certification.

Judge Caproni denied certification of a class of African-American borrowers in an action alleging that Morgan Stanley violated the FHA by funding allegedly discriminatory subprime mortgage loans. The certification attempt faltered on the nature of "combined-risk" loans, which entail various distinct risk factors, each of which "affects borrowers differently—and the manner in which each risk factor affects a borrower is context-dependent." As a result, the plaintiffs could not satisfy the typicality, predominance, or superiority prerequisites of Rule 23. Judge Caproni recognized "the likelihood that [her] ruling constitutes a 'death knell' for Plaintiffs' lawsuit," and noted that appellate review under Rule 23(f) may be appropriate.

▪ Wells Fargo May Face Millions of Class Members in Overdraft Case

In re Checking Acct. Overdraft Litig., No. 09-md-02036 (S.D. Fla.) (June 8, 2015). Judge King. Granting motions to certify two classes.

Judge King certified two classes of Wells Fargo customers who allege that the bank engineered its debit card processing to generate overdraft fees. The district court first rejected the bank's attacks on the class definition, holding that the class was not impermissibly vague and was ascertainable from the bank's own records. On the Rule 23 factors, the court relied on evidence of a common corporate policy, thus distinguishing *Walmart v. Dukes*. The court also held that common issues would predominate on state law claims of unjust enrichment and unconscionability. ■

Consumer Protection

Literal Truth Sets Supplement Retailers Free

In re: GNC Corp; Triflex Prods. Mktg. & Sales Practices Litig., No. 14-1724 (4th Cir.) (June 19, 2015). Affirming grant of motion to dismiss.

Osteoarthritis sufferers alleged that GNC and Rite Aid violated the consumer protection laws of various states by falsely marketing supplements containing glucosamine and chondroitin as promoting joint health even though many scientific studies showed that the ingredients are no more effective than a placebo. The district court granted the retailers' motion to dismiss, holding that the consumers had "failed to adequately plead the falsity of the allegedly misleading marketing representations."

The Fourth Circuit affirmed, holding that "marketing statements that accurately describe the findings of duly qualified and reasonable scientific experts are not literally false" and therefore not actionable as false statements. The court notably passed on deciding "whether any of the representations made on the Companies' products are misleading, because Plaintiffs chose not to include such allegations in" their complaint.

CLASS-IFIED INFORMATION

Our Class Action Group explained how *Spann v. J.C. Penney Corp.* is yet another reminder for retailers to closely examine pricing models.

Subtle Distinction Saves Supple in Advertising Class Action

Cabral v. Supple, LLC, No. 13-55943 (9th Cir.) (June 23, 2015). Reversing class certification.

Cabral contended that Supple misrepresented that one of its dietary supplements "is clinically proven effective in treating joint pain." The district court found that the question of whether such statement was a misrepresentation provided the common question needed to certify a class.

The Ninth Circuit reversed on the principle that, in cases based on advertising, "it is critical that the misrepresentation in question be made to all of the class members." While some variability in the specific wording in advertisements may not be fatal to class certification, the record presented did not show that all of the class members "saw or otherwise received" the substance of the alleged misrepresentation.

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Hold the Cheese: California Federal Court Defers Merits Consideration in Kraft Class Action

Morales v. Kraft Foods Group, Inc., et al., 14-cv-04387 (C.D. Cal.) (June 23, 2015). Judge Kronstadt. Granting motion for class certification.

Purchasers of Kraft's Natural Cheese Fat Free Shredded Cheddar Cheese alleged that the company's use of "natural" violated California consumer protection law. The plaintiffs claimed that they would not have purchased the cheese had they known it contained artificial coloring.

The court certified a class, accepting the plaintiffs' sworn testimony that they relied on the "natural" representations and deferring classwide analysis until the trial stage. The court believed that "other evidence … may be developed and offered in the course of the pre-trial and trial processes" that could show "that a reasonable consumer is … likely to be confused" by the representations. Coupled with the fact that the plaintiffs "presented a method for calculating damages that is tied to their theory of liability," the court held that predominance was established.

Appellate Court Rejects Ascertainability Requirement Under New Jersey State Law

Daniels v. Hollister Co., No. A-3629-13T3 (N.J. App.) (May 13, 2015). Affirming class certification.

The New Jersey appellate court rejected Hollister's argument that the putative class of gift card owners "fails the ascertainability requirement and violates due process" because Hollister had no ability "to test class membership." New Jersey courts have "never viewed" the state's class certification rule "as requiring that a class be 'ascertainable' as a condition for certification." The court opined that "federal experimentation with the ascertainability doctrine seems far from over and, indeed, this doctrinal wave may have broken before ever cresting." The U.S. Supreme Court's decision in *AmChem*, according to the *Daniels* Court, underscores the problem with enforcing the burdensome ascertainability rule: "The policy at the very core of the class action mechanism" was the desire "to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights" and the mechanism "solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." ■

CLASS-IFIED INFORMATION

Jesus Torres

Jesus Torres dishes advice for "Courts' Love-Hate Relationship with Equitable Estoppel" in *Law360*.

Employment

When Is an Unpaid Intern an Employee? Second Circuit Enters the Fray

Glatt v. Fox Searchlight Pictures, Inc., Nos. 13-4478-cv, 13-4481-cv (2d Cir.) (July 2, 2015). Vacating grant of summary judgment and class certification.

In a case brought by interns who worked on the film *Black Swan*, the Second Circuit issued a banner decision addressing whether and when an unpaid intern is an employee entitled to compensation under the Fair Labor Standards Act (FLSA). The panel held—as a matter of first impression—that the test is "whether the intern or the employer is the primary beneficiary of the relationship." Because that newly announced inquiry is "highly individualized," the Second Circuit reversed the district court's decisions to certify a Rule 23 class action and conditionally certify an FLSA collective action.

Washington Farm Can't Avoid Class Certification

Torres v. Mercer Canyons, Inc., No. 1:14-cv-3032 (E.D. Wash.) (Apr. 9, 2015). Judge Bastian. Granting motion for class certification.

The H-2A program imposes certain obligations on employers to protect domestic workers. Those obligations include a positive recruitment period requiring an employer to hire any qualified worker who is either referred or walks in seeking a job. Two prospective migrant workers brought suit against Mercer Canyons, a farm and vineyard in eastern Washington, claiming that the farm failed to inform the local workers about the availability of $12 per-hour jobs that had been approved under the H-2A program. The court granted class certification, primarily because of the common questions of (1) whether Mercer Canyons had a policy or practice of withholding information pertaining to H-2A jobs; and (2) whether such withholding constituted providing false or misleading information. ■

CLASS-IFIED INFORMATION

Brett Coburn

Brooks Suttle

Brett Coburn and Brooks Suttle are "Examining Wave of Employment Class Actions Under Fair Credit Reporting Act: How to Avoid Being Next Target" in the *Bloomberg BNA Daily Labor Report*.

Environmental

- **Ninth Circuit Limits Scope of the "Event" in CAFA Exception**

  Allen v. Boeing Co., No. 2:14-cv-00596 (9th Cir.) (Apr. 27, 2015). Vacating order remanding to state court and remanding to district court for further proceedings.

  The Ninth Circuit held that the Class Action Fairness Act's (CAFA) local single-event exception encompasses only those claims based on a "singular happening," thus restricting the temporality of the "event." For environmental cases—where contamination often occurs over the course of many years—the court's holding buoys the argument for applying CAFA and staying in federal court. The Ninth Circuit decision creates a circuit split with the Third Circuit, paving the way for possible Supreme Court consideration.

- **Sustainability Claims Under Fire in Novel Lawsuit**

  Campbell v. Chiquita Brands Int'l, Inc., No. 2:15-cv-2860 (C.D. Cal.) (Apr. 17, 2015). Judge Otero.

  California plaintiffs have filed a novel suit attacking use of the marketing and branding concept of "sustainability." The plaintiffs allege that fruit company Chiquita misled consumers and violated California law by touting sustainable practices such as conserving habitats and promoting community well-being while actually contaminating areas of Guatemala. *Campbell* is a case to watch as one of the first attempts at leveraging sustainability marketing for class actions complaints.

CLASS-IFIED INFORMATION

Farah Lisa Whitley-Sebti

Best practices: Farah Lisa Whitley-Sebti taught a Strafford CLE webinar on "Defeating Rule 23(b)(3)'s Predominance Requirement Using Defenses and Counterclaims: Evaluating Effectiveness of Strategy in Light of Differing Lower Court Approaches and Developing Case Law."

- **Plaintiffs Expend the Resources for Remand Under CAFA's Local Controversy Exception**

  Keltner v. SunCoke Energy, Inc., No. 3:14-cv-01374 (S.D. Ill.) (May 26, 2015). Judge Herndon. Remanding case to state court.

  The plaintiffs spent much time and expense to win remand to state court of nuisance and trespass claims against the owner of an Illinois steel mill. Judge Herndon held the affidavits and statistical evidence of domicile satisfied CAFA's local controversy exception by proving that more than two-thirds of a putative class of landowners were Illinois citizens. ■

ERISA

- **ERISA's Six-Year Limitations Period Does Not Bar Investors' Claims**

  Tibble v. Edison International, No. 13-550 (U.S.) (May 18, 2015). Vacating dismissal and remanding for further proceedings.

  The U.S. Supreme Court has made it harder to dismiss stale ERISA claims. A group of current and former 401(k) plan beneficiaries filed suit against Edison International, claiming that the company violated ERISA's fiduciary duty of prudence by offering more expensive shares of mutual funds instead of relatively cheaper shares of the same funds. The Ninth Circuit held that the company had no continuing duty to monitor the investments, and thus the claims were barred by ERISA's six-year statute of limitations. The funds at issue had been added to the plan more than six years before suit.

  But the Court disagreed, holding that the ERISA fiduciary duty does create a continuing obligation to monitor trust investments, which is separate from the initial duty to choose investments carefully. So long as the breach of the continuing duty occurred within six years of filing, ERISA's limitations period does not bar the claim. ■

CLASS-IFIED INFORMATION

Doug Hinson

Doug Hinson will co-chair and speak on the interplay between ERISA and securities Law at ACI's 10th National Forum on ERISA Litigation.

Insurance

- **Two Courts Analyze Class Action Requirements and Deny Certification at the Pleadings Stage**

  Kraetsch v. United Services Automobile Association, No. 4:14-cv-00264 (E.D. Mo.) (Mar. 30, 2015). Judge Jackson. Striking class allegations. *Myska v. New Jersey Manufacturers Ins. Co.*, 114 A.3d 761 (N.J. Super.) (May 8, 2015). Affirming trial court's decision to strike class allegations.

  In unrelated actions, a federal court and a state court independently held that class certification issues can be decided at the pleadings stage based on allegations in a plaintiff's complaint. In *Kraetsch*, the plaintiffs sued USAA for refusing to pay property damage claims arising from water damage that resulted from negligently installed artificial stucco. A Missouri district judge struck the class allegations from the plaintiffs' complaint because they would require an individualized analysis to determine whether each class member had a valid claim against USAA.

  Separately, in *Myska*, the Appellate Division of the Superior Court of New Jersey upheld the striking of class allegations from the complaints of plaintiffs bringing claims for wrongful denial of diminished value claims resulting from accidents with uninsured or underinsured motorists. The *Myska* court held that the individual terms of each insurance policy and the facts and circumstances surrounding each claim (including each insured's compliance with claim requirements) precluded the plaintiffs from being able to satisfy predominance and warranted striking the class allegations.

CLASS-IFIED INFORMATION

Dan Jarcho

Law360 defers to Dan Jarcho on the Supreme Court's ruling in *King v. Burwell*.

- **California Court Reiterates: No Arbitration Without Valid Agreement**

  Kirk v. First American Title Insurance Co., No. B252238 (Cal. Ct. App.) (Apr. 7, 2015). Affirming denial of motion to compel arbitration.

  A California state appellate court confirmed the defendant's obligation to present prima facie proof of arbitrability when moving to compel arbitration of absent class members' claims. The court rejected a proof attempt using exemplar copies of contracts that contained arbitration provisions. Even before the identities of class members who are attempting to litigate claims against the defendant are known, a defendant must submit prima facie proof identifying the counterparties to any arbitration agreement and the terms of that agreement before it can demand specific performance and compel claims into arbitration. ■

Privacy

Equifax Plaintiffs Obtain Narrow Class After Second Bite of the Apple

Soutter v. Equifax Information Services, LLC, No. 3:10-cv-107 (E.D. Va.) (April 15, 2015). Judge Payne. Granting class certification.

A Virginia district court judge granted a consumer's second attempt to certify a class because the amendments to her proposed class definition satisfied Rule 23(a) and 23(b)(3). The Fair Credit Reporting Act (FCRA) suit alleges that Equifax improperly reported the disposition of judgments it collected through LexisNexis on credit reports it supplied. The plaintiff's revised class definition narrowed the applicable time period and judgments in question and limited the class to consumers who had notified Equifax of a judgment's disposition before Equifax published an inaccurate report.

Consenting Plaintiffs Lose Background Check Suit Against Bank of America

Newton, et al. v. Bank of America N.A., et al., No. 2:14-cv-03714 (C.D. Cal.) (May 12, 2015). Judge Marshall. Granting defendants' motion for summary judgment.

A California district court judge granted summary judgment for Bank of America against a putative FCRA class alleging the bank illegally obtained consumer reports on prospective employees during background checks. Judge Marshall held that the plaintiffs consented to Bank of America's actions by signing a clear and conspicuous authorization prior to a third-party vendor's collection of prospective employees' consumer reports. The authorization notice also had a foundation in the FCRA's statutory text, and thus could not support the theory of "willful violation" of the FCRA required for plaintiffs to claim statutory and punitive damages.

California Court Hangs Up on Recorded Call Lawsuit Against Quicken

Maghen v. Quicken Loans, Inc., No. 2:14-cv-03840 (C.D. Cal.) (May 13, 2015). Judge Gee. Granting defendant's motion for summary judgment.

A California district court judge granted summary judgment for Quicken Loans, holding that the online retail mortgage lender had not violated California's Invasion of Privacy Act by recording a phone conversation with the plaintiff. Judge Gee found that the plaintiff doubly consented to the call's recording by: (1) agreeing to speak with Quicken Loans following a disclosure that the call would be recorded; and (2) agreeing to the terms of use of a third party used by the plaintiff to compare loans from various lenders.

CLASS-IFIED INFORMATION

Cari Dawson

Cari Dawson will speak on "Litigation Trends Involving the Duty to Warn" at the DRI Data Breach & Privacy Law conference in Chicago, November 4–6.

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▪ Uber Faces a Roadblock in Enforcing Arbitration Provisions

Mohamed v. Uber Technologies Inc., No. 3:14-cv-05200 (N.D. Cal.) (June 9, 2015); *Gillette v. Uber Technologies*, No. 3:14-cv-05241 (N.D. Cal.) (June 9, 2015). Judge Chen. Denying Uber's motions to compel arbitration.

Uber drivers in San Francisco and Boston sued the transportation company in November 2014, alleging that it violated the FCRA by running unauthorized background checks. Judge Chen ruled that arbitration provisions in the drivers' employment contracts were unenforceable because drivers' opt-out rights were difficult to identify in the text of the agreements. The arbitration provision also failed because the opt-out provision permitted notice only by hand delivery of a note to Uber's corporate offices in San Francisco or by overnight delivery service, which created obstacles that would inhibit drivers from exercising their rights.

▪ You've Got (Scanned) Mail: Judge Certifies Nationwide Class in Lawsuit Against Yahoo

Holland v. Yahoo Inc., No. 5:13-cv-04980 (N.D. Cal.) (May 26, 2015). Judge Koh. Granting class certification.

A California district court judge certified a nationwide class of non-Yahoo email users who sent emails to Yahoo email addresses. The non-Yahoo subscribers allege that Yahoo illegally scans their messages and shares the content with third parties to target ads for Yahoo subscribers in violation of the federal Stored Communications Act. That some claimants emailed Yahoo subscribers *after* learning of Yahoo's scanning practices did not thwart certification.

▪ Denim Debate Decided: Levi's Can Ask for Customers' Email Addresses

Harrold v. Levi Strauss & Co., No. A142747 (Cal. Ct. App.) (May 19, 2015). Affirming denial of class certification.

A putative class of consumers alleged that the retailer violated the Song–Beverly Credit Card Act by requesting and recording email addresses during credit card purchases. The California Court of Appeal affirmed the denial of class certification, concluding that such personal information was not a condition of purchase since Levi Strauss employees only collect email addresses from customers who voluntarily provide it after a transaction has taken place and the customer has a receipt in hand. ■

Securities

Tenth Circuit Expands Scienter to Revive Shareholder Claim

Nakkhumpun v. Taylor, No. 14-1060 (10th Cir.) (Apr. 7, 2015). Reversing district court's grant of motion to dismiss.

A group of shareholders brought suit against former executives of Delta Petroleum, claiming that a press release issued by the company misled investors about a proposed $400 million transaction. But because the press release was designed to attract a buyer and thus would have ultimately helped the investors, the district court found that the plaintiff could not establish scienter. The Tenth Circuit disagreed, holding that scienter is not limited to situations in which a defendant acted with the primary purpose of misleading shareholders. Instead, reckless disregard of a substantial likelihood of misleading investors is enough to satisfy the scienter requirement.

Second Circuit Clarifies and Relaxes SLUSA Preclusion

In re Kingate Management Limited Litigation, 11-1397-cv (2d Cir.) (April 23, 2015). Vacating dismissal of class claims and remanding for further proceedings.

The Second Circuit recently made it easier for plaintiffs to bring class actions asserting state-law claims involving securities. The *Kingate* decision gives a comprehensive analysis of the preclusion provisions in the Securities Litigation Uniform Standards Act of 1998 (SLUSA), which bar certain types of securities-related claims under state law. The statutory text would preclude any state-law class claim alleging "an untrue statement or omission" relating to covered securities transactions, but the Second Circuit held that the SLUSA bar is triggered only if the claim "accus[es] the *defendant* of *complicity* in the false conduct." The panel added that the alleged falsehood must "form the basis" of the state claim; there's no SLUSA preclusion if false conduct is merely "extraneous" to the underlying liability.

General Corporate Optimism Does Not Support Securities Class Actions in the Second Circuit

IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC, No. 14-402-cv (2d Cir.) (2015). Affirming motion to dismiss.

Affirming the district court's dismissal of a putative securities class action, the Second Circuit declined to hold Royal Bank of Scotland Group (RBS) subject to suit for allegedly defrauding investors in its American depository shares by downplaying its subprime asset exposure prior to the global financial crisis. The court found that RBS's allegedly false statements were not material but were merely "inactionable puffery," noting that "[s]tatements of general corporate optimism, such as these, do not give rise to securities violations." ■

CLASS-IFIED INFORMATION

Tod Sawicki

Mel Gworek

Tod Sawicki and Mel Gworek will speak at the NRS 30th Annual Fall Investment Adviser & Broker-Dealer Compliance Conference in San Diego, October 13–15.

Settlements

Antitrust

Allen v. Dairy Farmers of America Inc., No. 5:09-cv-00230 (D. Vt.) (Apr. 1, 2015). Judge Reiss. Denying $50 million settlement.

Judge Reiss denied final approval of a $50 million proposed settlement between Dairy Farmers of America Inc. and two subclasses of farmers after concluding the proposed settlement was not in the subclasses' best interest. A group of about three dozen class members argued that the $4,000 recovery per dairy farm was "functionally irrelevant" and that the injunctive relief was insufficient because it allowed the defendants to continue the alleged conspiracy under the "full-supply agreements" at issue in the litigation and left the farmers open to retaliation. Although the value of the deal was not "on its face inadequate or unreasonable," Judge Reiss held that the monetary recovery could be perceived as modest given the broad release and the absence of what objectors contended is meaningful injunctive relief. Because the denial was without prejudice, the parties may submit another proposed settlement.

Banking

Tanasi v. New Alliance Bank, No. 14-cv-01389 (2d Cir.) (May 14, 2015). Affirming denial of motion to dismiss.

The Second Circuit ruled that the plaintiff may proceed with his claims against two banks for wrongful overdraft fees because his failure to accept a settlement offer did not moot the action. In so ruling, the Second Circuit has joined the minority view (along with the Ninth and Eleventh Circuits) in holding that the failure to timely accept a settlement offer under Rule 68 does not render a case moot, for purposes of Article III standing, prior to entry of judgment against the defendants. The Third, Fourth, Fifth, Seventh, Tenth, and Federal Circuits have reached the opposite conclusion. The U.S. Supreme Court will address the circuit-splitting issue of mooting in *Campbell-Ewald Co. v. Gomez*.

Rose v. Bank of America, N.A., No. 11-cv-2390 (N.D. Cal.) (May 18, 2015). Judge Davila. Denying motion for attorneys' fees.

Judge Davila ruled that objectors to a $32 million settlement resolving claims that Bank of America violated the Telephone Consumer Protection Act (TCPA) do not deserve their requested fee award of almost $400,000. In August 2014, the court granted final approval to the settlement, but it reduced class counsel's requested fees from $8 million to $2.4 million based on what it found to be "particularly excessive" estimated hours. Judge Davila rejected the objectors' request because the court did not rely on the objectors' arguments in reducing the fee award. Thus, the objectors did not "increase the fund or otherwise substantially benefit the class members." In addition, their participation was limited to filing one eight-page brief.

CLASS-IFIED INFORMATION

Peter Masaitis

All about the benjamins: Peter Masaitis wrote "Class Action Settlements: Top Reasons Why Counsel's Fee Bid Will Be Challenged" for *Inside Counsel*.

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Gutierrez v. Wells Fargo Bank N.A., 07-cv-5923 (N.D. Cal.) (May 21, 2015). Judge Alsup. Awarding reduced attorneys' fees.

Judge Alsup slashed class counsel's $50.7 million attorneys' fees request, awarding just $18.5 million of the $203 million megafund that Wells Fargo must pay for manipulating debit card transactions. The court lauded Lieff, Cabrasser, Heimann & Bernstein LLP for "pull[ing] victory from the jaws of defeat" after predecessor counsel "nearly wrecked the class litigation." Nonetheless, the court found that the $50.7 million request—which constituted 25 percent of the megafund—was "ridiculous." Applying the lodestar method, the court held that $18.5 million fee appropriate because "the vast recovery is not entirely attributable to class counsel's skill" but to "the sheer size of the class." Original trial counsel was awarded only $2.26 million for its "slapdash" efforts.

▪ Consumer Protection

Reid v. Unilever U.S. Inc., No. 12-cv-6058 (N.D. Ill.) (June 10, 2015). Judge Castillo. Approving in part and denying in part motion for attorneys' fees.

Judge Castillo reduced by more than half the fees requested by class counsel in connection with a $10 million settlement resolving claims against Unilever that its Keratin treatment caused hair loss. The court determined that the lodestar method applied instead of the percentage-of-the-fund approach suggested by class counsel. As a result, Judge Castillo reduced the requested fee of $3.4 million to $1.5 million, plus $36,000 in expenses.

▪ Employment

In re Nat'l Football Players Concussion Injury Litig., MDL No. 2323 (E.D. Pa.) (Apr. 22, 2015). Judge Brody. Approving $765 million settlement.

The court granted final approval of a $765 million settlement of ex-player head-injury claims after the National Football League adopted changes sought by Judge Brody, who is overseeing the multidistrict litigation. The changes included the removal of caps on a $675 million compensation fund and a $75 million fund for medical monitoring, as well as extending payments to cover deaths of players from chronic traumatic encephalopathy (CTE). Although the deal is valued at $765 million, the removal of these caps means the league could pay more. The NFL estimates that it will have to pay no more than $900 million. Judge Brody found the deal was "more favorable" to the class of more than 20,000 retired football players, most of whom endorsed the deal.

Haddock v. Nationwide Fin. Servs. Inc., No. 01-cv-1552 (D. Conn.) (Apr. 9, 2015). Judge Underhill. Approving $140 million settlement.

A $140 million settlement between Nationwide Life Insurance Company and the trustees of more than 24,000 profit-sharing plans has garnered final approval, bringing to a close more than a decade of litigation. The substantial settlement is one of the largest ever achieved in a revenue-sharing case under ERISA. Class counsel will receive more than $50 million in fees and expenses.

▪ Securities

In re Bear Stearns Mortgage Pass-Through Certificates Litigation, No. 08-8093 (S.D.N.Y.) (May 27, 2015). Judge Swain. Approving $500 million settlement.

Judge Swain approved a $500 million settlement between JPMorgan Chase & Co. and a class of pension funds that purchased allegedly overvalued mortgage-backed securities in the run-up to the financial crisis. The settlement—approved without objection—is the largest ever involving the sale of mortgage-backed securities. The court also approved an $81.25 million award for class counsel. ■