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CLASS ACTION & MDL roundup

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video highlight

Greg Berlin | PFAS Litigation Trends

Environment, Land Use & Natural Resources partner **Greg Berlin** discusses recent trends in class action and multidistrict litigation involving PFAS.

Watch the video on alston.com

Where the (Class) Action Is

Welcome back to the *Class Action & MDL Roundup!* This edition covers notable class actions from the first quarter of 2025.

We made it through the winter with another active quarter in the books. New developments in collective proceedings continue across the pond, specifically in the Competition Appeal Tribunal (CAT), as the bar for certification rises. Moving stateside, we saw multiple price-fixing class actions brought on by turkey product purchasers and purchasers of coupon processing services with varying results.

The TCPA remains a hot topic in privacy litigation. We are also monitoring the rise of website tracking lawsuits as several cases involving the Video Privacy Protection Act (VPPA) made their way through district and circuit courts. And the U.S. Supreme Court weighed in on labor and employment and products liability class actions, providing rulings on FLSA exemptions and amended jurisdictions.

We wrap up the *Roundup* with a summary of class action settlements finalized in the fourth quarter. We hope you enjoy this installment and, as always, welcome your feedback on this issue.

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International

- **UK: Competition Appeal Tribunal Refuses to Certify Two Separate Collective Proceedings**

  Certification of a collective proceedings order is a necessary step to bring a competition class action in the Competition Appeal Tribunal (CAT). Previous CAT rulings have treated certification as a 'low bar' and, when deficient, have provided proposed class representatives with an opportunity to revise their case. However, two recent cases demonstrate the CAT's increased appetite to outright refuse certification.

- ***Christine Riefa Class Representative Limited v Apple Inc. & Others* [2025] CAT 5**

  In a first-of-its-kind judgment, the CAT refused to certify an opt-out collective proceedings order (CPO) because it did not consider it to be 'just and reasonable' for the proposed class representative (PCR) to act as the representative of the claimant class.

  The PCR's claim, the merits of which remain untested, contended that Amazon and Apple entered into anti-competitive agreements that limited the number of resellers of Apple products on Amazon Marketplace, allegedly increasing their prices. The PCR estimated the class would include 36 million people.

  To certify a CPO, the CAT must be satisfied that it is 'just and reasonable' for the PCR to act as the class representative in the proceedings, which includes confirmation that the PCR 'would fairly and adequately act in the interests of the class members'.

  In this case, the CAT found that Christine Riefa, the sole member and director of the PCR (which was a special purpose vehicle set up for the proceedings), did not demonstrate a good understanding of the PCR's role. The CAT reviewed both written and oral evidence (this was the first certification hearing in which a PCR was cross-examined).

  The CAT found that (1) the initial iteration of the funding arrangement included provisions which did not appear in the best interests in the class; (2) Riefa did not appear to fully understand the terms of the funding agreement or amendments made to it during the course of proceedings; (3) Riefa did not sufficiently consider class members' interests in accessing crucial information before agreeing restrictive confidentiality provisions in the funding agreement; and (4) Riefa did not act with sufficient independence from her legal advisers, nor have the requisite experience or support needed to sustain a claim of this magnitude and complexity. The CAT considered those considerations to have a cumulative effect, and so refused certification.

  The case warns prospective class representatives to have a full understanding of their responsibilities, which extends to their ability to critically appraise funding arrangements; navigate potential conflicts of interest between the funders, lawyers, and class members; act independently; and make informed decisions.

- ***Professor Carolyn Roberts v Severn Trent Water Limited & Others* [2025] CAT 17**

  In this judgment, the CAT refused to certify opt-out collective proceedings for very different reasons: not because of certification-related issues, but on account of a preliminary legal issue. For only the second time, the CAT refused certification without inviting the PCR to revise the claim and reattempt certification.

  In the first environmental claims to be brought before the CAT, PCR Carolyn Roberts contended that six water companies had under-reported pollution incidents (PIs) to their regulator Ofwat and, abusing their dominant position as statutory monopolists, charged higher prices to consumers than they would have if they had accurately reported their PIs.

  The CAT ruled that those claims could not be brought as competition claims because of the legislation that regulated the water companies. An exclusion clause in the Water Industry Act 1991 means that a water company's failure to adequately report its PIs is to be dealt with by the regulator Ofwat, not the courts.

  The CAT commented that, absent that legal obstacle, in all other respects it considered the six separate claims against the water companies to be suited to certification.

  This definitive judgment demonstrates the particular challenges of bringing claims in heavily regulated industries, where the oversight and involvement of regulators often provide alternative means for redress. ■

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Antitrust / RICO

- **Fourth Circuit Rejects Unholy Trinity of Class Definitions**

  Mr. Dee's Inc. v. Inmar Inc., No. 23-2165 (4th Cir.) (Feb. 12, 2025). Affirming denial of class certification.

  In a case involving an alleged horizontal price-fixing agreement in the coupon processing market, the district court denied class certification by rejecting three class definitions proffered by the plaintiff, a manufacturer that issues coupons and purchases coupon processing services. The Fourth Circuit affirmed. The first class definition—the "fixed list class"—defined the class by reference to a list of other manufacturers identified by the plaintiff's expert as having paid higher prices during the class period. According to the Fourth Circuit, fatal to the fixed list class was the fact that it failed to define a class at all. The second class definition failed because it included date restrictions and cutoffs for the volume of coupons processed, which excluded more than 2,000 manufacturers that were allegedly victims of the same Sherman Act violation. The large percentage of manufacturers injured in the same manner that were excluded from the class meant the class definition was untethered from the plaintiffs' evidence of harm and raised a superiority problem—certifying such an incomplete class might expose the defendants to continuous individual lawsuits. The third class definition failed as overbroad because 32% of class members could not demonstrate antitrust impact, raising standing concerns. Although the number of uninjured class members needed to defeat class certification was uncertain, 32% was "much too high."

- **Purchaser Plaintiffs Giving Thanks After Class Cert Granted in Turkey Antitrust Litigation**

  In re Turkey Antitrust Litigation, No. 1:19-cv-08318 (N.D. Ill.) (Jan. 22, 2025). Judge Harjani. Granting class certification.

  A federal judge in Illinois granted certification to classes of turkey product purchasers who alleged that the nation's largest turkey processors conspired to limit supply and increase prices in the turkey market in violation of Section 1 of the Sherman Act. The turkey processors challenged the sufficiency of the plaintiffs' common proof of antitrust impact. The processors argued that the plaintiffs' model measured only average price effects and that a single average percentage overcharge is improper when an industry does not have uniform prices. The court rejected that argument because the use of aggregate results of regression analyses had been accepted as evidence capable of showing common impact in other protein industry antitrust cases where the antitrust defendants priced their products in reference to market prices. The record evidence demonstrated that the turkey processors negotiated turkey sales in the context of a well-understood market price.

- **Social Media Users Must Face the Music in Antitrust Row**

  Klein v. Meta Platforms Inc., No. 3:20-cv-08570 (N.D. Cal.) (Jan. 24, 2025). Judge Donato. Denying class certification.

  Facebook users sought to certify a class of millions of Americans who used the social networking platform, alleging that Meta illegally acquired and maintained a monopoly in the personal social network services market through repeated misrepresentations of its data collection and use practices, which deprived its competitors of the ability to compete. The Facebook users advanced a single theory of antitrust injury: but for the misrepresentations about data privacy, Meta would have found itself in a competitive market that would have forced it to pay users for their data to retain robust user engagement. But the record evidence demonstrated that firms in the market, including Meta, consistently competed on quality, rather than price, and the users' expert failed to identify reliable and validated economic literature to support his conclusion that Facebook would have decided to compete on price in the but-for world. The court therefore excluded the expert's opinion, which meant the plaintiff users were unable to prove antitrust injury classwide. As a result, the court denied their motion for class certification.

- **College Coaches Score a Class Cert Win**

  Ray v. NCAA, No. 1:23-cv-00425 (E.D. Cal.) (Mar. 10, 2025). Judge Shubb. Granting class certification.

  NCAA bylaws limit the number of coaches that Division I schools can hire in a given sport. Before 2023, Division I programs (other than basketball and football) were permitted to hire a certain number of "unrestricted coaches" who had no restriction on compensation, plus one or two "volunteer coaches" who did not receive any compensation from the athletics department. In 2023, the volunteer coach designation was eliminated and the number of unrestricted coaches was increased by a corresponding amount. Coaches who were formerly designated as "volunteers" alleged that the NCAA violated Section 1 of the Sherman Act and sought class certification. The NCAA argued that the plaintiffs' model was incapable of providing

common proof of antitrust impact because it ignored that, in the but-for world, individuals other than proposed class members could have been hired for the additional unrestricted coaching spots. The plaintiffs countered that this "substitution effect" was irrelevant and the proper focus in constructing the but-for world is on what competitive wages would have been for the plaintiffs' coaching positions absent the NCAA bylaws. The court chalked the issue up to "a battle of the experts" over the merits and certified the class. ■

Banking, Financial Services & Insurance

- **No Classwide Article III Standing for Breach of Contract Claim**

  Alig v. Rocket Mortgage LLC, No. 22-2289 (4th Cir.) (Jan. 23, 2025). Reversing class certification.

  In a case with a long procedural history, the plaintiffs brought suit against Rocket Mortgage LLC, alleging that Rocket Mortgage breached its contracts and violated West Virginia law by providing "worthless" home appraisals during mortgage refinancing when it transmitted to the appraisers the homeowners' own estimates of their home value. The plaintiffs alleged this transmittal tainted the appraisal process and prevented the appraisals from being truly independent. In the first instance, the district court certified the plaintiffs' proposed class, which the Fourth Circuit affirmed. However, in the interim, the Supreme Court issued its decision in *TransUnion LLC v. Ramirez*, which required that under Article III, the plaintiff's injury in fact must be concrete to every member of a proposed class. After remand from the Supreme Court, the Fourth Circuit remanded *Alig* to the district court to apply *TransUnion* to the standing analysis.

  The district court did so but found that nothing in *TransUnion* affected the Fourth Circuit's initial affirmation of its class certification on standing grounds. The Fourth Circuit reversed that ruling, holding that each plaintiff paying a fee for the appraisal was not enough to show concrete harm because there was no evidence that the class members' appraisals were actually tainted or worthless. Therefore, the plaintiffs' classwide claims were too speculative to support Article III standing under the requirements of *TransUnion* and directed the action to proceed only for the individual named plaintiffs.

- **"Is a Movie a Video?" Becomes the New "Is a Hot Dog a Sandwich?"**

  Osheske v. Silver Cinemas Acquisition Co., No. 23-3882 (9th Cir.) (Mar. 27, 2025). Affirming dismissal.

  Nearly 40 years after the enactment of the Video Privacy Protection Act (VPPA), the Ninth Circuit dealt with the novel question of whether a movie is a video—or more precisely, whether selling tickets to and providing an in-theater movie experience constitutes a business subject to the VPPA. The question arose in the context of a class complaint filed by a Facebook user, who claimed that Landmark Theaters installed on its website a Facebook "pixel" programmed to contact Facebook and transmit user information whenever someone purchased a ticket while logged into their Facebook account. The VPPA imposes liability on any "video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider." Reviewing de novo whether Landmark Theaters was a videotape service provider, the Ninth Circuit held "under a straightforward construction of the statutory text" that it was not. The statute defined a "video tape service provider" as a person engaged in "the business … of rental, sale, or delivery of prerecorded video cassette tapes or similar audio visual materials." That language signifies "the transfer or conveyance of a good," not the provision of shared access to film screenings. Unlike viewers who rent prerecorded videocassette tapes, a movie patron does not obtain any control over audiovisual materials—for example, someone late to a theater showing cannot rewind the movie and someone falling asleep cannot stop it and start it again. ■

"Going once … going twice … It was a tall order, but **Jonathan Parente** came through for our client as *Law360* noted in "Judge Rejects Bid to Halt Sale of NBA Star's Viral Jersey."

Jonathan Parente

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Consumer Protection

- **Spirit-Seeking Plaintiffs Conjure Class Certification Victory**

  Andrews v. Sazerac Co., No. 1:23-cv-01060 (S.D.N.Y.) (Jan. 2, 2025). Judge Subramanian. Granting class certification in part.

  Plaintiffs who expected to find distilled spirits in the defendant's "malt beverage" product succeeded at the class certification stage. The Southern District of New York certified a class of New York malt-beverage purchasers suing under New York General Business Law (GBL) Sections 349 and 350. The defendant failed to dispute that its conduct was consumer-oriented, which was enough to satisfy the commonality requirement because "even a single common question will do." But commonality was satisfied on an even more fundamental level: GBL Sections 349 and 350 claims are analyzed under an *objective* "reasonable consumer" standard. Thus, there was "no need to determine whether individual consumers were actually deceived." Predominance was satisfied for the same reason: common questions predominated because the plaintiffs' theory of liability will be assessed based on whether a reasonable consumer (*not* individual class members) would be misled by the product's marketing. The defendant succeeded in dismissing one of the two named plaintiffs—the court determined that the plaintiff could not adequately represent a class because he didn't understand the basic theories of the case, may not have purchased the product at issue, and lied in his interrogatory answers.

- **Gummy Supplement Manufacturer Stuck with Litigation After Court Certifies Class**

  Newman v. Bayer Corp., No. 7:22-cv-07087 (S.D.N.Y.) (Mar. 19, 2025). Judge Karas. Granting class certification and overruling the defendant's discovery objection.

  The Southern District of New York certified a class of gummy supplement consumers alleging that they were misled about the serving size of chewable gummy supplements by the product's branding. The defendant argued that the named plaintiff could not satisfy typicality, adequacy, or predominance, citing (1) the plaintiff's deposition testimony to demonstrate that she has "atypical shopping habits"; (2) her criminal record to demonstrate that she lacks the honesty and trustworthiness needed to be an adequate class representative; and (3) flaws in the plaintiff's "simplistic" damages model to show that individual questions predominate. The court rejected the defendant's arguments, ruling the defendant failed to demonstrate that (1) the plaintiff's shopping habits were atypical; (2) her criminal history had any bearing on her ability to serve as a class representative; and (3) the damages model was incapable of measuring damages on a classwide basis. The court also overruled the defendant's objection to a discovery ruling that the plaintiff would not have to disclose survey data not used or reviewed by her consumer survey expert.

- **Butter-Spray Consumer's Motion for Class Certification Melts Under the Heat of Court's Analysis**

  Strow v. B&G Foods Inc., No. 1:21-cv-05104 (N.D. Ill.) (Mar. 19, 2025). Judge Cummings. Denying class certification.

  The district court denied certification of two consumer classes for failing to satisfy the Seventh Circuit's ascertainability requirement and Rule 23(b)'s predominance requirement. The complaint alleged that the labeling of the "Butter—No Stick Spray" product was false and misleading because the product contains no butter. The court agreed with the defendant that the plaintiff's certification motion suffered from "fatal infirmities." The two putative classes were overbroad, and thus unascertainable under binding Seventh Circuit precedent because inclusion in the class depended *solely on purchase* of the product rather than on *purchase and injury* due to deception, even though the plaintiff's claims required proof that class members were actually deceived. The plaintiff failed to meet the predominance requirement for similar reasons. The court concluded that the "key liability issues"—whether individual class members were injured by the allegedly deceptive marketing of the product—must be determined on an individual, rather than classwide, basis so that classwide questions did not predominate. ■

"Don't be slack – fill your need for "An Overview of Food Labeling Laws, Regulations, and the Components of a Compliant Label" with **Alan Pryor** during the ACI Food Law and Regulation Boot Camp webinar July 22."

Alan Pryor

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Labor & Employment

- **U.S. Supreme Court Rejects Heightened Standard for Proving FLSA Exemptions**

  E.M.D. Sales v. Carrera, No. 23-217 (U.S.) (Jan. 15, 2025). Resolving circuit split over FLSA standard.

  The U.S. Supreme Court has resolved a circuit split on the proper standard for proving exemptions from the Fair Labor Standards Act of 1938 (FLSA). In a 9–0 decision, the Court held that an employer need demonstrate only by a preponderance of the evidence that an employee is exempt from the statute's minimum-wage and overtime-pay requirements, rejecting a higher clear and convincing evidence standard adopted in some circuits. The Supreme Court reasoned that the FLSA is silent on the standard of proof and so the default standard, preponderance of the evidence, should apply.

- **Restaurant Workers Can't Get Class Status**

  Hale v. Brinker International Inc., No. 3:21-cv-09978 (N.D. Cal.) (Feb. 6, 2025). Judge Chhabria. Denying class certification.

  Chili's employees alleged that the chain restaurant's parent company failed to provide them with 30-minute meal breaks. According to timekeeping evidence, more than 96% of shifts exceeding six hours did not have any recorded meal periods. The court ruled, however, that the evidence showed many reasons for the missed breaks, including jeopardizing tips, lack of hunger, and coercion by management. The court, therefore, denied class certification because common questions would not predominate. ■

"Join **Ashley Brightwell**, **Brett Coburn**, and **Charlie Morgan** for our latest Labor & Employment Webinar, "Wage & Hour Changes and Making Unions Unnecessary" on June 25."

Ashley Brightwell

Brett Coburn

Charlie Morgan

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Privacy & Data Security

- **Is This Spam? Seventh Circuit Holds TCPA Does Not Bar Calls and Texts Encouraging Use of Free Services**

  Hulce v. Zipongo Inc., No. 24-1623 (7th Cir.) (Mar. 17, 2025). Affirming summary judgment in favor of the defendant.

  The plaintiff's health care plan contracted with the defendant, a nutrition company, to offer consultations to its members. Under the deal's terms, members wouldn't pay anything and the health care plan would pay the defendant only for services used. Motivated to get users so that it could get paid, the defendant called and texted the plaintiff 20 times to encourage him to use its free-to-the-plaintiff services. The plaintiff sued, alleging the defendant's communications were "telephone solicitations" that violated the TCPA. The district court disagreed, and a split panel of the Seventh Circuit affirmed.

  The majority held that, to qualify as "telephone solicitations," it was not enough that the defendant's communications had a "commercial" or "profit-seeking" purpose, as the plaintiff argued. Rather, the communications must be made with the specific "purpose of encouraging" *the recipient* to pay for a service. The majority reasoned that, because the defendant's services were free to the plaintiff, the defendant's communications could not have been made with the intent to encourage the plaintiff to buy anything.

- **West Virginia Court Certifies Class in TCPA Battle Against Absent Law Firm**

  Mey v. Principal Law Group LLC, No. 5:23-cv-00046 (N.D. W. Va.) (Jan. 7, 2025). Judge Bailey. Granting class certification.

  Despite previously listing her number on the National Do Not Call Registry, Diana Mey found herself bombarded with automated calls soliciting legal services for the Camp Lejeune Litigation. The calls, placed by MCM Hustle LLC on behalf of Principal Law Group, a plaintiffs' law firm, aimed to sign up clients for mass tort claims related to contaminated water at Camp Lejeune. Mey discovered that MCM was cold-calling potential clients and then transferring them to Principal for client onboarding. Mey filed a class action against Principal and MCM, alleging that the calls violated the TCPA. After Principal's attorneys withdrew from the case, Principal failed to retain new counsel, and the court concluded that Principal had abandoned its defense. The court therefore struck Principal's brief and deemed all allegations admitted, setting the stage for class certification. The court certified the class, ruling that the proposed class met all Rule 23 requirements.

- **Class Certification Granted in VPPA Dispute Involving Website Tracking Code**

  Jancik v. WebMD LLC, No. 1:22-cv-00644 (N.D. Ga.) (Feb. 20, 2025). Judge Thrash. Granting motion to certify class.

  Jancik alleged that WebMD violated the Video Privacy Protection Act (VPPA) by using Facebook's tracking code, referred to as the "Facebook Pixel," to record information about users of WebMD's website and to transmit that information to Facebook to inform WebMD's targeted advertisements. Jancik sought to represent a class of individuals who "had the same email address associated with a subscription to webmd.com and a Facebook account" and for whom WebMD had transmitted information to Facebook about those individuals' video viewing behavior on WebMD's website.

  WebMD argued that Jancik's class definition did not satisfy Rule 23's implicit ascertainability requirement because her proposed method for collecting class members' data was too unreliable. The court found it "difficult to fathom what the possible confusion is" and pointed to testimony of a Facebook software engineer responsible for maintaining the Facebook Pixel code, who testified that Facebook was "probably" able to match user data to identify class members using Jancik's proposed method. Without any evidence to the contrary, the court found this testimony sufficient to satisfy Jancik's burden.

  The court also rejected WebMD's argument that Jancik's numerosity analysis was too speculative, reasoning that it could rely on "common sense" to demonstrate that the class would exceed the 40-person benchmark. The court also found that common issues predominated over individual issues such that class certification was warranted under Rule 23(b)(3) because the evidence Jancik intended to use to prove each element of the VPPA claim "will not differ in the slightest from one class member to another" and because the VPPA provides for the recovery of statutory damages. Finally, the court granted Jancik's request to certify a class under Rule 23(b)(2), rejecting WebMD's argument that the injunctive relief requested was not incidental to the plaintiff's request for monetary damages because the VPPA's statutory damages did not require individualized damage determinations. ■

Products Liability

Using Amendments to Amend Jurisdiction

Royal Canin U.S.A. Inc. v. Wullshleger, No. 23-677 (U.S.) (Jan. 15, 2025). Ordering remand to state court of removed putative class action.

The U.S. Supreme Court held that a plaintiff may divest a federal court of jurisdiction over a lawsuit after removal from state court by amending the complaint. The plaintiff filed suit in Missouri state court alleging false advertising of the defendant's dog food products and asserting causes of action under state law and for violations of the Federal Food, Drug, and Cosmetic Act (FDCA). The defendant successfully removed the case to federal court because the FDCA claim provided federal question jurisdiction and the court had supplemental jurisdiction over the intertwined state-law claims. The plaintiff then amended the complaint to remove all references to the FDCA and requested remand, which the district court denied. On appeal, the Eighth Circuit reversed, holding that remand was appropriate.

The Supreme Court affirmed, holding that amending a complaint to eliminate the federal-law claims removal was based on divests the federal court of supplemental jurisdiction over the remaining state-law claims. Federal jurisdiction is determined based on the amended, not the original, complaint. The Court looked to the supplemental jurisdiction statute, 28 U.S.C. § 1367, which does not distinguish between removed cases and those originally filed in federal court, and judge-made procedural rules link jurisdiction to the amended, rather than the initial, complaint. The Court distinguished case law cited by the defendant, explaining that the allegedly contradictory statements in those cases were dicta.

Nationwide Standing Should Not Be Deferred

Miller v. General Motors LLC, No. 2:22-cv-12739 (E.D. Mich.) (Mar. 28, 2025). Judge Grey. Granting in part and denying in part motion to dismiss.

A Michigan district court ruled that whether plaintiffs lack standing to bring claims under other states' laws should be decided at the motion to dismiss stage.

The plaintiffs sued General Motors (GM) based on allegations of defective battery engine control modules in their Chevrolet Volts, asserting various causes of action on behalf of a nationwide class and 20 state subclasses. GM moved to dismiss for lack of subject-matter jurisdiction and failure to state a claim. GM argued that the named plaintiffs lacked standing to assert claims under the laws of the states where they neither reside nor suffered an injury. The plaintiffs did not argue that they had standing to assert claims under other state's laws; rather, they asserted that the ability to maintain nationwide claims is an issue for class certification, not an issue of standing.

The court noted that the Eastern District of Michigan is split on whether standing for nationwide class claims should be decided at the motion to dismiss stage or postponed to class certification, and the Sixth Circuit and Supreme Court have not directly addressed this issue. However, relying on the Sixth Circuit's analysis in *Fox v. Saginaw County*, the court found that standing should be addressed "now rather than later." As in *Fox*, GM was not arguing that putative class members not before the court lacked standing, but that the named plaintiffs lacked standing. "Named plaintiffs are parties from the start," said the court in *Fox*. "A court thus must immediately concern itself with their standing because jurisdictional issues precede the merits." The court therefore dismissed the nationwide class claims for lack of standing and ruled that the plaintiffs could only assert claims on behalf of themselves and their subclasses. ■

"It's a beautiful day to read up on "Cosmetic Co. Considerations as More States Target PFAS" from **Greg Berlin** and **Andrew Boyer** in *Law360*."

Greg Berlin

Andrew Boyer

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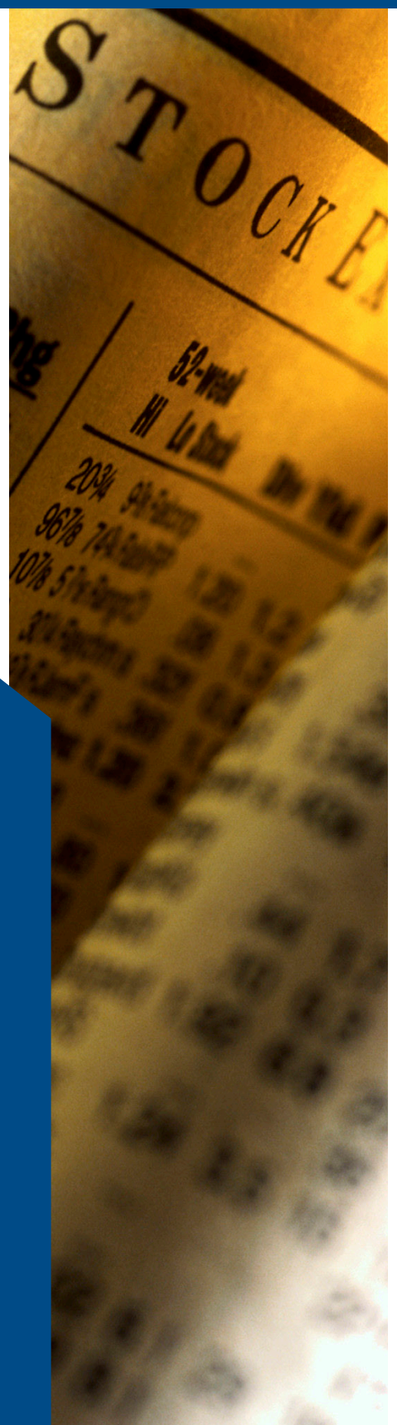

Securities

- **Second Circuit Declines to Audit Decision on Auditors**

  New England Carpenters Guaranteed Annuity v. Decarlo, No. 20-1643 (2nd Cir.) (Jan. 7, 2025). Denying rehearing of decision reversing dismissal of investor action.

  The Second Circuit declined to reconsider whether securities fraud claims against AmTrust Financial Services and BDO USA should be dismissed. The plaintiffs alleged that AmTrust and BDO, AmTrust's former auditor, made misstatements about AmTrust's accounting policies and brought suit after AmTrust restated five years of its financial results. The district court granted the defendants' motion to dismiss after finding that alleged misstatements by BDO, including in its audit certification, were immaterial. The district court also found that the plaintiffs impermissibly argued that statements of opinion about subjective accounting methodologies should be treated as statements of fact, and were "attempting to show that the statements were inaccurate by alleging that defendants believed they were inaccurate."

  The Second Circuit initially upheld the district court's decision, holding that BDO's audit statements were "so general" that a reasonable investor would not depend on them. The plaintiffs asked the Second Circuit to reconsider and were joined by the SEC, which filed an amicus brief asking the court to reconsider its materiality analysis of BDO's certification and arguing that statements in an audit certification are not immaterial simply because the language is standardized. The Second Circuit later amended its opinion, holding that the alleged misstatements by BDO "subjected unknowing investors to the risk that AmTrust's financial statements were unreliable." BDO moved for the panel to rehear its case, but the court denied both requests. ■

"There's no wrongdoing when you read "4th Circ. Latest to Curb Short-Seller Usage in Securities Suits" by **Tim Fitzmaurice**, **Madeleine Davidson**, and **Elizabeth Clark** in *Law360*."

Tim Fitzmaurice

Madeleine Davidson

Elizabeth Clark

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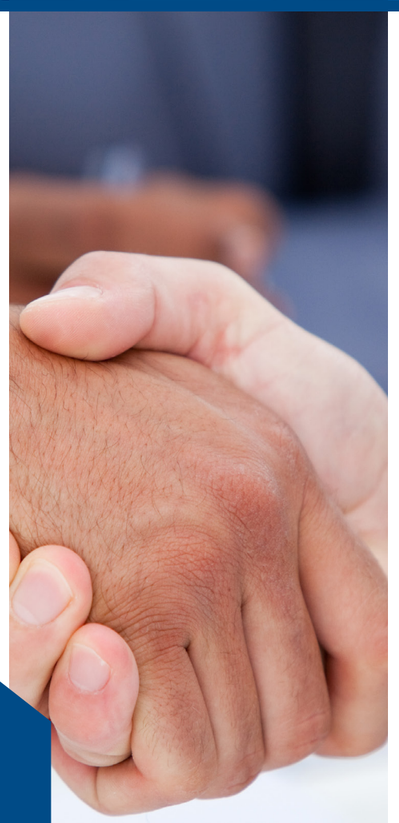

Settlements

Ninth Circuit Affirms Settlement but Reverses Award of Attorneys' Fees in Data Breach Action

In re California Pizza Kitchen Data Breach Litigation, No. 23-55288 (9th Cir.) (Feb. 24, 2025). Affirming settlement but reversing attorneys' fee award.

In an extensive opinion, the Ninth Circuit affirmed the district court's approval of a settlement for a lawsuit brought by a group of California Pizza Kitchen employees who alleged that their personal information was compromised by a cyberattack. The settlement allowed (1) class members to claim up to $1,000 in reimbursement for expenses incurred by the breach; (2) up to $5,000 in compensation for monetary loss from identity theft; and (3) 24 months of credit monitoring.

The Ninth Circuit reversed the district court's approval of the attorneys' fees award, which constituted 45% of the settlement value to the class, when calculating the total settlement number based the maximum monetary value of the claims—well above the 25% benchmark for percentage of total recovery the court typically relies on in assessing the reasonableness of fees. The court reversed the award because the district court failed to provide any explanation to justify the "excessive" award of attorneys' fees, and remanded for recalculation.

College Students' Prayers Answered with Settlement on COVID Restrictions

Gustavson v. The Catholic University of America, No. 1:20-cv-01496 (D.D.C.) (Jan. 18, 2025). Judge Friedrich. Approving $2 million settlement.

The District of D.C. approved a settlement of $2 million for students of Catholic University who were transitioned to remote learning in spring 2020 following the university's suspension of in-person instruction at the outset of the COVID-19 pandemic. The plaintiff alleged that the university breached its contracts with the class by depriving them of benefits it had been promised in exchange for tuition payments. The class of individuals eligible for settlement payment includes all students enrolled in spring 2020 classes at the university who paid tuition or fees for spring 2020 that were not otherwise refunded by the university. Class counsel was awarded one-third of the settlement amount in attorneys' fees.

Let's Get Real

Elder v. Reliance Worldwide Corp., No. 1:20-cv-01596 (N.D. Ga.) (Jan. 28, 2025). Judge Totenberg. Approving $3.8 million settlement and granting in part motion for attorneys' fees.

A Georgia district court ruled that attorneys' fees in common-fund settlements should be based on actual benefits to the class, not the theoretical maximum benefits that class members could receive.

The plaintiffs filed a class action alleging certain water heater connectors were defective. The parties then entered into a settlement that required the defendants to pay $3.8 million into a common fund to cover claims for cash reimbursement and property damage, settlement expenses, and attorneys' fees and costs. The settlement also provided class members with the option of receiving replacement connectors whose cost would not come out of the common fund. Over 12,000 claims were received (from the more than 1.7 million potential class members), but only 4,600 claims were approved for payment.

The court granted final approval of the settlement but decreased the requested $2.1 million in attorneys' fees to $1.9 million. Class counsel argued that their fee request should be measured against "the potential benefit to the class," which was $105 million, i.e., the cost to replace all 7 million allegedly defective connectors. The court rejected this approach, finding that class counsel improperly based its fees on the maximum hypothetical valuation of class member benefits, which was especially problematic given the actual claims paid to class members were significantly lower ($142,240) and the hypothetical benefit was based on the improbable assumption that 100% of the class would submit and prevail on their claims. Instead, the court awarded fees equal to 50% of the benefits actually conferred on the class (the $3.8 million common fund plus the $32,130 in distributed replacement connectors).

Investor Class Hits Bullseye with Final Settlement Approval

Ashe v. Arrow Financial Corp., No. 1:23-cv-00764 (N.D.N.Y.) (Feb. 13, 2025). Judge Nardacci. Granting final approval of $850,000 and awarding attorneys' fees.

A New York district court judge granted final approval for an investor class suing multibank holding company Arrow Financial Corp. over claims the company concealed defective internal controls that led to missed financial filings. The class swung an $850,000 deal after suing the company for making allegedly untrue statements and omissions of

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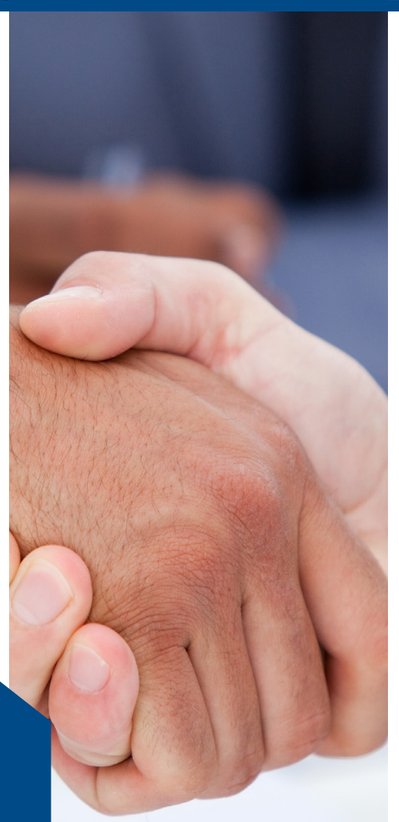
Cara Peterman



material facts designed to deceive the investing public and artificially inflate the price of Arrow securities. Shots fired by the investor class included allegations that the company maintained defective disclosure controls and procedures over financial reporting that led to an increased risk that the company would be delisted from Nasdaq and that following disclosure of the deficiencies, the company downplayed the severity of the issues and associated risks.

The settlement provides $850,000 for the settlement class in addition to more than $280,000 in attorneys' fees and over $40,00 in expenses, as well as a service award of $4,000 to the named plaintiffs.

University Pens Record COVID-19 Settlement with Students

Ramey v. The Pennsylvania State University, No. 2:20-cv-00753 (W.D. Pa.) (Feb. 18, 2025). Judge Colville. Granting final approval of $17 million settlement.

A Pennsylvania federal judge approved "the largest COVID-19 tuition recovery" settlement in history, according to the plaintiff students. The settlement established a $17 million common fund for students and former students who claimed they paid for access to campus facilities and in-person services and education as part of their tuition and fees to Penn State but did not receive on-campus access or in-person services when the university shifted to online instruction during the pandemic. Class counsel were awarded one-third of the settlement fund ($5,666,100) and roughly $18,000 in litigation expenses. The plaintiffs touted the settlement as an "excellent result," emphasizing that the notice plan reached 99.9% of the provisionally certified settlement class, there were no opt-outs or pending objections, and all settlement class members who do not opt out will automatically receive payment.

Clear Eyes, Full Pockets, Final Approval

Schmidt v. Vision Service Plan, No. 2:20-cv-02400 (E.D. Cal.) (Mar. 3, 2025). Magistrate Judge Kim. Granting final approval of $3.45 million settlement and granting in part motion for attorneys' fees.

A California magistrate judge granted final approval for a $3.45 million settlement for a former employee seeking recovery from his former employer—a vision insurer that allegedly failed to pay employees proper minimum and overtime wages for work performed off the clock and for not providing settlement class members reasonable opportunities to take meal and rest periods. The settlement awards just over $2.1 million for class members with payouts ranging from $700 to $3,000. The underlying complaint asserted violations of the Fair Labor Standards Act and California Labor Code, and the plaintiff also brought claims for penalties pursuant to the California Private Attorneys General Act.

The court also awarded the plaintiff a service award of $10,000, down from the requested $15,000 because he failed to assert how many hours he spent working on the case. And the court cut the requested attorneys' fees down to 25% from the 33% requested of the overall award to align with the Ninth Circuit's benchmark for settlements.

Fighters Pin Down Massive Settlement in Hard-Fought Antitrust Suit

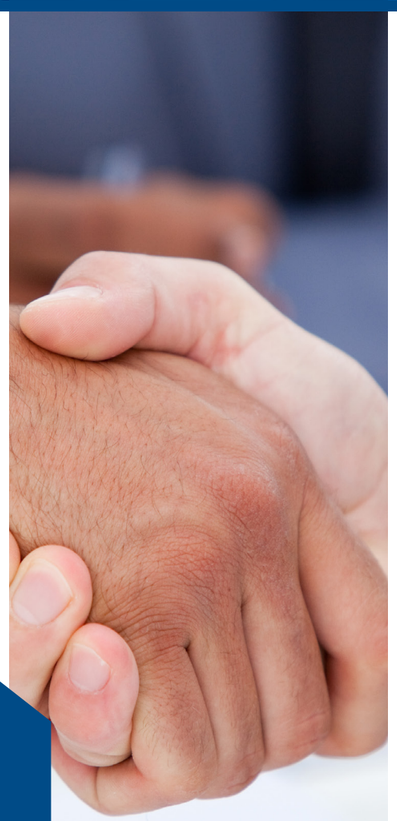
Le v. Zuffa LLC, No. 2:15-cv-01045 (D. Nev.) (Mar. 3, 2025). Judge Boulware. Granting final approval of $375 million settlement.

A Nevada federal judge granted final approval to a $375 million settlement, ending a decade-old antitrust suit brought by fighters who accused the UFC of suppressing their wages through exclusive contracts and the purchase of rival promoters. The gross settlement amount represented nearly 70% of the total compensation the UFC paid to its entire roster of fighters during the class period. After netting out $115 million in approved legal fees and $9.5 million in approved expenses, the remainder of the $375 million fund will be distributed among the 1,100 class members based on two pro rata factors: the total compensation the fighter received from the UFC for participating in UFC bouts and the total number of UFC bouts fought during the class period. All class members who submitted a valid claim would receive a minimum recovery of $15,000, with some class members potentially receiving over $1 million.

Settlement Against University for Mismanagement of Employee Retirement Plans Approved

Rzepkoski v. Nova Southeastern University, No. 0:22-cv-61147 (S.D. Fla.) (Mar. 11, 2025). Judge Dimitrouleas. Approving $1.5 million settlement.

The Southern District of Florida entered a final judgment approving a $1.5 million settlement for a class of employee plaintiffs who alleged Nova Southeastern University mismanaged their retirement plans by choosing poorly performing investments and high-cost mutual fund shares and by causing the plans to pay unreasonable and excessive fees for recordkeeping and other administrative services, allegedly in violation of various provisions of the Employee Retirement Income Security Act.



Sufferers of Alleged Gastrointestinal Injuries Swallow Settlement

Peni v. Daily Harvest Inc., No. 1:22-cv-05443 (S.D.N.Y.) (Mar. 11, 2025). Judge Cote. Approving $7.7 million settlement.

The Southern District of Illinois entered a final judgment approving a $7.7 million settlement for a wide class of plaintiffs who allegedly had suffered personal injuries and monetary damages from the purchase and consumption of the defendants' French Lentil + Leek Crumbles product in the United States. The court preliminarily approved the settlement in October 2024, with ample time provided for objections and opt-outs by eligible class members. Following the expiration of those periods, the court entered this final judgment to formally approve the settlement. Due to the complexities of the allocation of the settlement amount, the court ordered attorneys' fees to be paid by the settlement administrator pursuant to the retainer agreements between the plaintiffs, class members, and their counsel.

Philly Paper Papers Up Data Breach Settlement

In re Philadelphia Inquirer Data Securities Litigation, No. 2:24-cv-02106 (E.D. Pa.) (Mar. 18, 2025). Judge Marston. Granting final approval of $525,000 settlement.

A Philadelphia federal judge approved a final settlement resolving data breach claims brought against the Philadelphia Inquirer by certain subscribers, employees, and former employees following a cyberattack that may have exposed their Social Security numbers, driver's license numbers, and other sensitive personal information. The settlement provides for a $525,000 nonreversionary settlement fund that will be used to pay for one year of credit monitoring and insurance services. In addition, each class member is entitled to elect between two settlement payment options, to be paid from the settlement fund: either cash payments up to $5,000 per class member for reimbursements of certain documented losses or pro rata cash payments from the settlement fund. The settlement fund will also be used to pay the costs of settlement administrative expenses, court-approved service awards, and an attorneys' fee award of $175,000.

Plaintiffs Scrape Up 23% Stake in Company That Sold Their Biometric Data

In re Clearview AI Inc. Consumer Privacy Litigation, No. 1:21-cv-00135 (E.D. Ill.) (Mar. 20, 2025). Judge Johnson Coleman. Approving $51.75 million settlement.

The Eastern District of Illinois approved a class settlement of $51.75 million for a class of plaintiffs who had their biometric data "scraped" from publicly available internet sources, analyzed by AI, and sold to customers for profit, including to federal and state law enforcement agencies. The plaintiffs alleged that defendant Clearview AI assembled a massive biometric database of individuals using this scraped data and sold it for profit, mainly for government facial recognition technology, allegedly in violation of a plethora of federal and various states' laws. The settlement class includes a nationwide class of all U.S. residents whose biometric information was contained in the database, as well as state-specific subclasses for violations of Illinois, California, New York, and Virginia law. The agreement derived the $51.75 million settlement from the agreed-upon payout of a 23% equity stake in Clearview, which the court lauded as a "Goldilocks percentage." Due to the complexity of the multidistrict litigation, class counsel was awarded 39.1% of the settlement fund in attorneys' fees.

Final Approval Granted Liftoff by Court

Chenoy v. Lyft Inc., No. 4:20-cv-09257 (N.D. Cal.) (Mar. 28, 2025). Judge Gilliam. Granting final approval of shareholder derivative action settlement.

A California district court judge granted final approval for a shareholder derivative class action settlement against ridesharing giant Lyft Inc. Facing four federal shareholder derivative actions filed against individual defendants on behalf of nominal defendant Lyft, the global settlement agreement parks allegations that Lyft officers and directors breached their fiduciary duty by failing, among other things, to (1) prevent or remediate the rampant sexual and physical assault committed by Lyft drivers against passengers; (2) provide adequate reporting mechanisms; and (3) implement adequate background checks. The underlying lawsuits alleged that the individual defendants made a number of false and misleading statements in Lyft's March 2019 IPO in connection with the alleged offenses.

As part of the settlement, Lyft will incorporate governance reforms for at least three years, including changes to Lyft's code of business conduct and ethics, compensation committee charter, and corporate governance guidelines, as well as incorporate a number of additional safety initiatives. The approval order also granted over $600,000 in attorneys' fees and expenses and $1,500 service awards for three named plaintiffs. ■

CLASS ACTION & MDL roundup

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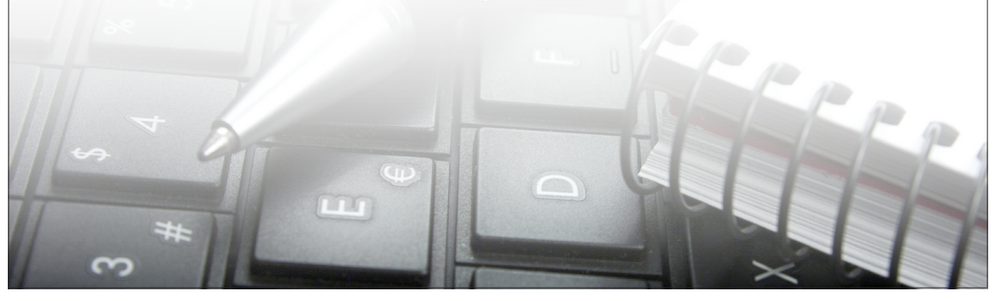

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