ALSTON & BIRD

# CLASS ACTION & MDL roundup

QTR 4 | 2024

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## video highlight

**Jamie George |** Developments on Class Action Circuit Splits

**Litigation & Trial Practice** partner **Jamie George** discusses several prominent class action circuit splits and the trends for ascertainability standards, fail-safe classes, and the application of *Daubert* at the class certification stage.

### 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 fourth quarter of 2024.

The final chapter of 2024 has come to an end, but that didn't stop the courts from ruling on an array of class actions. To close out an eventful year, we kick off the *Roundup* with significant rulings from across the pond, where we see privacy representative actions expanding globally.

The circuit courts were busy in the fourth quarter, affirming most of the district courts' decisions in consumer protection matters related to free trials, data storage, and ticket promoters and sellers. On the other hand, district court decisions were varied across the board, including a rare reversal of a court's own prior decision in a greenwashing class action. Standing out among many dismissals, class certification was granted in the Northern District of California in a lawsuit involving real-time data collection, affirming that individualized issues of implied consent did not predominate over common issues despite multiple arguments from the defendant.

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.

# International

- **UK: Court of Appeal Confirms Strike Out of Representative Action for Misuse of Private Information**

  *Prismall v Google UK Limited* [2024] EWCA Civ 1516.

  The English courts have once again struck out a claim sought to be brought on behalf of a class of allegedly affected parties under the relatively new 'representative action' avenue provided by the Civil Procedure Rules.

  Andrew Prismall commenced a representative action on behalf of a purported class of 1.6 million individuals whose patient-identifiable electronic health care records had been shared by a part of the UK National Health Service with Google and DeepMind pursuant to an information-sharing agreement.

  Precedent required the plaintiff to show that each member of the 1.6 million-strong class represented by Prismall had the same interest in the claim. Therefore, Prismall had to identify, and claim only on behalf of, a claimant deemed to be the 'lowest common denominator', i.e. a person whose claim represents the irreducible minimum scenario for a claimant in the class of persons represented by Prismall.

  The Court of Appeal agreed with the decision of the lower court that Prismall failed to show a common issue on the first element of the sole remaining claim—misuse of private information—which requires a reasonable expectation of privacy held by the claimant

  The Court of Appeal held that the so-called lowest common denominator claimant did not have a reasonable prospect of establishing a reasonable expectation of privacy because:

  - Not all medical records import the same degree of privacy protection, as had been established by case law in the European Court of Human Rights.
  - The tort involves the consideration of a threshold of seriousness in each individual case.
  - Some individuals may well have made the contents of the medical notes public in any event (such as by publishing a visit to a hospital for tests on social media).

  It would therefore be necessary for the court to review evidence of the facts particular to each individual claimant to assess whether each individual had a reasonable expectation of privacy. The class action also foundered on substantive grounds because of the differences in the amounts of data shared across the class. Some patients will have had very little data shared (perhaps as little as the fact that they attended a particular hospital), and the lowest common denominator claimant must necessarily be within that group. This minor infringement on potentially private information did not cross the threshold of seriousness.

  The costs regime in this jurisdiction often means that individual claims are economically unviable. The Court of Appeal in this case has dealt another serious blow to the prospects of the more commercially attractive collective redress option for alleged breaches of data protection and privacy requirements. ■

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# Antitrust / RICO

## Ninth Circuit Cancels Ticket to Arbitration

*Heckman v. Live Nation Entertainment Inc.*, No. 23-55770 (9th Cir.) (Oct. 28, 2024). Affirming denial of motion to compel arbitration.

The Ninth Circuit affirmed the district court's order denying the defendants' motion to compel arbitration of a putative antitrust class action against ticket promoters and sellers based on alleged anticompetitive practices in online ticket sales. The plaintiffs' online ticket purchase included an agreement to comply with certain terms of use, which provided that any claim arising out of a ticket purchase would be decided by an arbitrator employed by a newly created entity, New Era ADR, using novel arbitration procedures.

Denying the defendants' motion to compel arbitration, the district court ruled that the arbitration clause was procedurally and substantively unconscionable because it delegated the arbitrator the authority to determine the validity of the arbitration agreement. The Ninth Circuit affirmed, holding that the delegation clause was part of an impermissible contract of adhesion and thus procedurally unconscionable. The court also held that New Era ADR's one-sided arbitration rules supported a finding of substantial substantive unconscionability. The court further determined that applying California's unconscionability law to the challenged terms and arbitration rules was not preempted by the Federal Arbitration Act because it did not disfavor arbitration nor interfere with the objectives of the Act. The court further determined that the underlying terms and arbitration rules were independently unconscionable under applicable California precedent.

## Video Game Developers Level Up, Achieve Class Status

*In re Valve Antitrust Litigation*, No. 2:21-cv-00563 (W.D. Wash.). (Nov. 26, 2024). Judge Whitehead. Granting motion for class certification.

The Western District of Washington certified a class of video game developers asserting antitrust claims against Valve, the market leader in digital game distribution through its Steam platform. The developers argued that Valve imposed a "most favored nations" policy on developers, refusing to sell a game if the developer offered a cheaper or better version elsewhere, which had the effect of generating supracompetitive commissions for Valve, prohibiting game companies from competing between distribution platforms, and killing off rival platforms. Valve argued that the developers could not satisfy the predominance requirement for antitrust impact, relying on evidence of games selling for less off the Steam platform and testimony from game companies explaining why they preferred to keep game prices uniform across platforms. The judge rejected that argument, concluding that evidence simply raised common questions about the classwide response to Valve's most favored nations expectations.

## Defendant Banks Come Up Short Opposing Class Certification in Short-Sale Market

*Iowa Public Employees' Retirement System v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, No. 1:17-cv-06221 (S.D.N.Y.) (Dec. 6, 2024). Judge Failla. Granting motion for class certification.

A New York federal court certified a class of borrowers and lenders in the U.S. stock loan market. Stock loans involve an owner of shares, such as a pension fund, lending its shares to a borrower, such as a hedge fund, which allows institutional investors to earn borrowing fees while facilitating short-selling. Those transactions are conducted through intermediate "agent lenders"—typically custodian banks—that collect fees from the borrower, keep a portion, and pass the remainder to the lender.

The borrowers and lenders alleged that a handful of banks conspired to prevent the stock loan market from transitioning to a transparent, direct electronic exchange to preclude market participants from price shopping and to keep them in the dark on the terms on which other participants were transacting. The defendant banks opposed class certification, arguing that there were fundamental conflicts of interest between the lenders and borrowers, who stood on opposite sides of the market: borrowers had an interest in demonstrating prices would have been lower in the but-for world, while lenders had an interest in arguing they would have been higher.

The court rejected that challenge, reasoning it concerned only the allocation of damages (a problem that presumably could be addressed during class administration) and that lenders and borrowers had a shared interest in maximizing recovery for the class.

"See you in D.C. at the 2025 ABA Antitrust Spring Meeting April 2–4! Find four Alston & Bird antitrust attorneys on panels for consumer protection, surveillance pricing, and employee mobility and a mock trial on digital advertising."

Kathleen Benway

Alex Brown

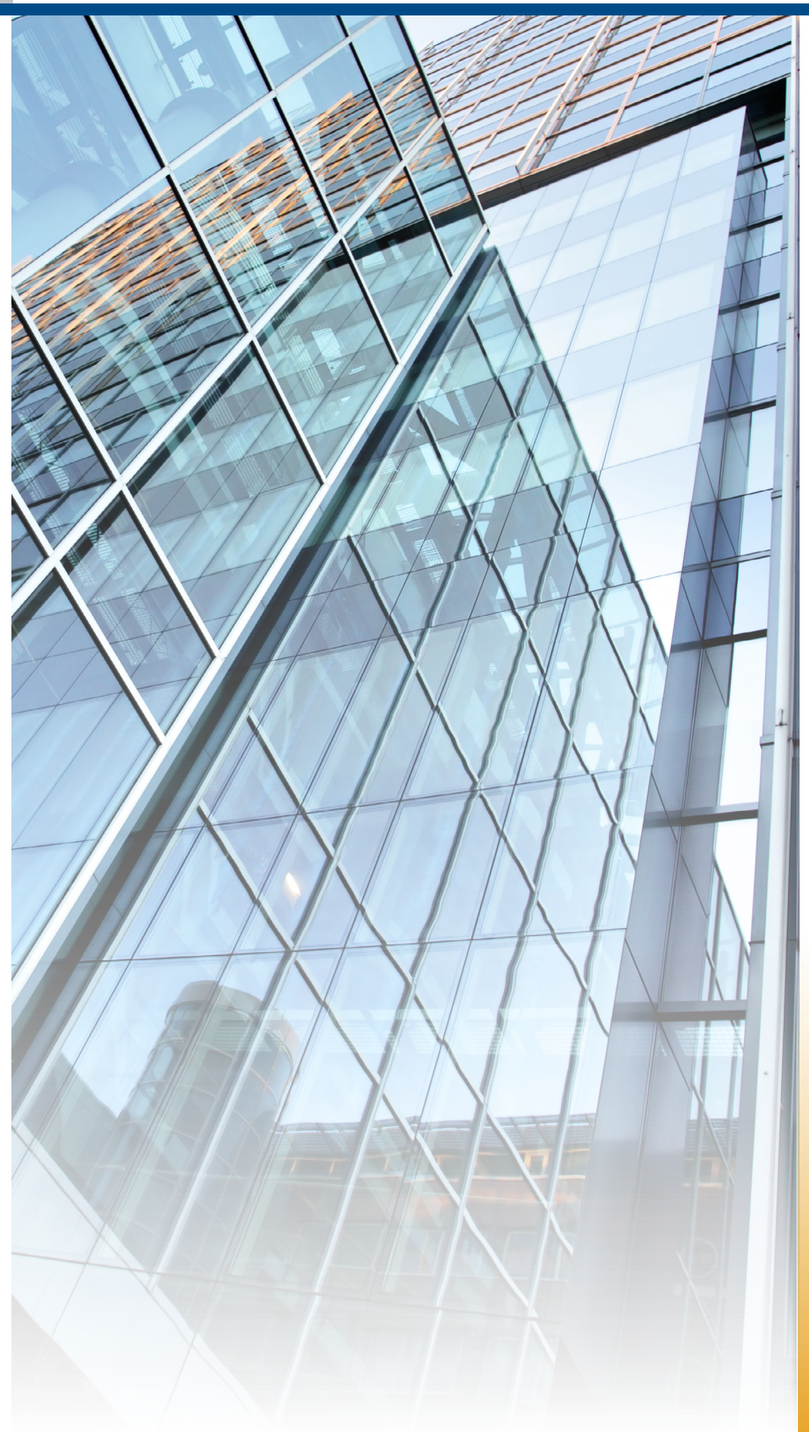
Matthew Kent

Valarie Williams

## Court Says Oh, No! to Certifying Class of NaOH Purchasers

*Miami Products & Chemical Co. v. Olin Corp.*, No. 1:19-cv-00385 (W.D.N.Y.) (Dec. 16, 2024). Judge Wolford. Denying motion for class certification.

Indirect purchaser plaintiffs (IPPs) sought to certify a class in a case against chemical suppliers that allegedly conspired to artificially reduce or eliminate competition for the pricing of caustic soda (sodium hydroxide, or NaOH). The court found the IPPs could not satisfy the predominance requirement due to the unique nature of the caustic soda market. Caustic soda is generally sold under contracts that employ different pricing mechanisms. Moreover, supplier price increase announcements did not automatically result in consumer price increases, but usually just triggered a new round of price negotiations. As a result, to prove classwide injuries, the IPPs had to do more than show that the suppliers agreed to increase prices by issuing unjustified parallel price increase notifications. They needed to present common proof of a plausible mechanism through which these announced price increases could have caused customers with widely different contract terms to pay inflated prices. The IPPs failed to do so, and class certification was denied. ■



## Consumer Protection

- **Plaintiffs Obtain Partial Class Certification Victory in Storage Battle**

  *Orshan v. Apple Inc., No. 5:14-cv-05659* (N.D. Cal.) (Sept. 30, 2024). Judge Davila. Granting class certification motion in part.

  Plaintiffs alleging that they were misled about the storage capacity of their smartphones and tablets running iOS 8 partially prevailed at the class certification stage. The plaintiffs sought three putative classes—two nationwide subclasses and one California subclass. After denying the plaintiffs' first class certification motion on adequacy, typicality, and predominance grounds, a Northern District of California court certified only the California subclass.

  The plaintiffs came to this rematch armed with new class representatives and new evidence. The court determined that those new class representatives were typical and adequate and then turned to the predominance requirement. Choice-of-law issues defeated predominance for the two nationwide subclasses, but the California subclass satisfied each aspect of predominance. The court grappled with the right tests to apply for materiality and reliance, ultimately deciding that to demonstrate materiality, the plaintiffs must show that the alleged misrepresentations would be important to a reasonable consumer. For reliance, the plaintiffs need only demonstrate that the alleged misrepresentations were a factor in their purchasing decision, not the sole or decisive reason for the purchase.

- **Class Certification Doesn't Stick for Adhesive Pain Patch Consumers**

  *Hunt v. The Kroger Co.*, No. 1:22-cv-04744 (N.D. Ill.) (Oct. 21, 2024). Judge Kennelly. Denying class certification.

  The plaintiffs amended their way out of class certification in a case involving over-the-counter lidocaine adhesive patches. The patches were allegedly not sticky enough, falling off after a few minutes to a few hours. At the motion to dismiss stage, the Illinois federal court limited the plaintiffs' claims to allegations over two specific label representations: "Up to 8 Hours of Relief" and "Maximum Strength." Following the motion to dismiss, the original plaintiff was substituted for two new named plaintiffs, while the allegations remained the same. However, the new plaintiffs purchased the product from a different retailer than the original plaintiff, and the labeling of the product sold at this retailer did not contain either of the two representations at issue. Therefore, the plaintiffs did not see the alleged misrepresentations and, as a result, were not members of the class they sought to represent. The court denied the motion for class certification because neither of the named plaintiffs were proper class representatives.

- **Mac & Cheese False Ad Suit Largely Survives Defendants' Pleading Challenge**

  *Hayes v. The Kraft Heinz Company*, No. 1:23-cv-16596 (N.D. Ill.) (Nov. 13, 2024). Judge Rowland. Granting in part and denying in part motion to dismiss, or in the alternative, motion to strike plaintiffs' nationwide class allegations.

  An Illinois federal court mostly denied the defendants' motion to dismiss, or in the alternative, motion to strike nationwide class allegations, in a lawsuit alleging the defendants' macaroni and cheese products were mislabeled as having "No Artificial Flavors, Preservatives, or Dyes." The lawsuit complained that the products were deceptively advertised because they contain citric acid, sodium phosphate, and sodium triphosphate.

  The defendants argued that the lawsuit had not plausibly alleged that those ingredients are artificial, and even if it had, that the ingredients function as preservatives. The defendants separately argued that the plaintiffs lacked standing to seek injunctive relief because they were now aware of the presence of the allegedly artificial preservatives and thus do not face any future harm. Finally, the defendants moved to strike nationwide class allegations for fraud and unjust enrichment because each class member's claim would be governed by the law of his or her own state.

  The court found that the complaint sufficiently alleged that the products are artificial and act as preservatives, which was sufficient to withstand a motion to dismiss. The court also found that the motion to strike classwide allegations was more properly addressed at the class certification stage. The court did, however, agree that the plaintiffs lacked standing for injunctive relief because they were now aware of the allegedly artificial preservatives and could not claim to be at risk of future injury.

## Greenwashing Class Action Dismissed on Reconsideration

*Dorris v. Danone Waters of America*, No. 7:22-cv-08717 (S.D.N.Y.) (Nov. 14, 2024). Judge Román. Granting motion to reconsider and dismissing complaint with leave to amend.

In a rare reversal of its own prior motion to dismiss order, the Southern District of New York granted a motion for reconsideration to reevaluate greenwashing allegations against a bottled water manufacturer. In the initial order, the court granted a motion to dismiss in part, allowing the plaintiff's challenges to the product's "carbon neutral" label to proceed. The court initially found that the phrase "carbon neutral" was ambiguous and "lacked precision" and could mislead a reasonable consumer under Massachusetts and California law.

On reconsideration, the defendant argued that "carbon neutral" is unambiguous and no reasonable consumer could believe the statement "carbon neutral" indicates that the product is made without any carbon emissions. Because the statement is unambiguous, the court (and a reasonable consumer) could consider other additional sources of information to learn more about the representation and evaluate the claim.

The court compared the Federal Trade Commission's Green Guides assessment of other environmental benefit claims, noting that "carbon neutral" is more specific than claims listed in the Green Guides, the product's back label provides further information on the source of the product, and the product's webpage provided more information about the product's certification process and the defendant's definition of "carbon neutral." Considering each of these sources of information, the court concluded a reasonable consumer would not have been misled by the "carbon neutral" label and dismissed the complaint with leave to amend.

## Defendant Is on iCloud Nine After Ninth Circuit Affirms Dismissal

*Rutter v. Apple Inc.*, No. 24-715 (9th Cir.) (Dec. 4, 2024). Affirming dismissal without leave to amend.

The Ninth Circuit affirmed the dismissal without leave to amend a *third* amended complaint filed by iCloud users. The plaintiffs alleged that the defendant misled consumers into paying for iCloud data storage by making false representations about the consumers' ability to reduce their iCloud storage usage. The operative complaint brought claims for violations of California's Consumers Legal Remedies Act and Unfair Competition Law and breach of contract. The California consumer protection claims failed because the plaintiffs failed to plead an actionable omission or misrepresentation. The plaintiffs had previously alleged that only 20% of the defendant's users decided to pay for iCloud storage, negating their theory that customers would inevitably be forced to buy additional storage. Furthermore, the plaintiffs themselves were able to remain within the free-storage limit. The breach of contract claim met a similar fate. No enforceable promise had been made, and even assuming the challenged representations were enforceable promises, the plaintiffs did not demonstrate how those promises were breached. The court also upheld the denial of leave to amend; three bites at this apple were enough to demonstrate that future amendments would be futile. ■

"State legislation can affect even Fortune 500 companies. **Jenny Hergenrother** and **Andrea Galvez** break down why a "Georgia Tort Reform Bill May Help Dampen 'Nuclear' Verdicts" for *Law360*."

Jenny Hergenrother

Andrea Galvez

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## Privacy & Data Security

- **Plaintiffs' Bar Scores: Second Circuit Expands VPPA Liability**

  *Salazar v. National Basketball Association*, No. 23-1147 (2nd Cir.) (Oct. 15, 2024). Reversing dismissal of complaint.

  Michael Salazar alleged the NBA transmitted his video-watching history and Facebook ID to Meta after he signed up for the NBA's email newsletter and watched videos on its website. He filed a putative class action under the Video Privacy Protection Act (VPPA), seeking to advance claims on behalf of all individuals who subscribed to the NBA's digital subscriptions and had their personal viewing information disclosed to Meta.

  The district court dismissed Salazar's complaint, finding that his newsletter subscription did not qualify as a purchase of "goods or services from a video tape service provider" under the VPPA. The Second Circuit reversed, holding that Salazar stated a claim under the VPPA because the phrase "goods or services" is broad enough to include the NBA's online newsletter and is not limited solely to "audiovisual goods or services" under the statute.

- **Time for a Facelift? Face-Swapping App Can't Use California Anti-SLAPP Statute to Avoid Celebrity Misappropriation Claim**

  *Young v. NeoCortext Inc.*, No. 23-55772 (9th Cir.) (Dec. 5, 2024). Affirming denial of motion to strike.

  NeoCortext is the creator and distributor of Reface, an app that allows users to swap their faces for those of popular celebrities. One of those celebrities, reality-TV star Kyland Young, sued NeoCortext for misappropriation under California Civil Code Section 3344, alleging that its use of his image in its Reface marketing violated the statute's prohibition against the knowing use of an individual's photograph or likeness under certain circumstances. The trial court denied NeoCortext's motion to strike the allegations against it under California's anti-SLAPP statute and the Ninth Circuit affirmed, with both courts concluding that Young had shown he was likely to prevail on his claim.

  The Ninth Circuit held Young had plausibly alleged NeoCortext acted knowingly because it allowed Reface's users to search its database for specific celebrities by name, including Young's. The court also held that the Copyright Act did not preempt Young's claim because his claim concerns his name and likeness, not a work of authorship, and sought to vindicate his likeness's misuse, which is not a right within the scope of the Copyright Act. Finally, the court rejected NeoCortext's "transformative use" defense, holding that a trier of fact could reasonably conclude that Reface's use was not transformative because the final images and clips showed Young in the roles for which he is known.

- **It Paints a Picture: Class Challenging Real-Time Data Collection Practices Certified**

  *Torres v. Prudential Financial Inc.*, No. 3:22-cv-07465 (N.D. Cal.) (Nov. 26, 2024). Judge Breyer. Granting motion to certify class.

  Judge Breyer certified a consumer class on claims alleging that Prudential intercepted and recorded the keystrokes, mouse clicks, and data inputs of customers applying for a life insurance quote on its website. The plaintiffs contend Prudential created a "session replay" of the users' interaction with the form, permitting it to see information that was deleted before the form was submitted, and that it did not disclose this data-collection practice until after the customer submitted the completed form.

  In opposing certification, Prudential argued that some putative class members were on notice of its data-collection practice, that this resulted in implied consent, and that issues relating to the implied consent were individualized and predominated over common questions. The court disagreed, concluding that neither Prudential's general privacy policy nor news articles discussing its data collection practice would have put readers on notice because neither explain the details of how Prudential's software collected data in real time. Accordingly, individualized issues of implied consent did not predominate over common issues, and the court certified the plaintiffs' class. ■

"There's more to discover with **Melissa Dalziel** and her panel "Thinking Beyond Document Review: Examining AI's Expanded Role in Modern Discovery," part of ALM Law.com 2025 LegalWeek in New York City, March 24–27."

Melissa Dalziel

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## Products Liability

- **Plaintiffs Benefit from Third Circuit's Interpretation of Benefit-of-the-Bargain Theory**

  *Huertas v. Bayer US LLC*, No. 23-2178 (3rd Cir.) (Nov. 7, 2024). Reversing in part district court's dismissal for lack of standing.

  The Third Circuit held that plaintiffs have standing to pursue claims related to recalled products that they were instructed to discard, but only if they plausibly alleged that the product they purchased was contaminated.

  The plaintiffs brought suit claiming economic losses stemming from their purchase of benzene-contaminated antifungal products, which the defendant recalled after discovering the contamination. The district court dismissed the complaint for lack of standing, but the Third Circuit reversed in part. The circuit court held that the plaintiffs plausibly alleged injury-in-fact under a benefit-of-the-bargain theory: the products they purchased (contaminated products) had less value than the products they paid for (uncontaminated products).

  The court distinguished precedent involving speculative risk, reasoning that here the defendant's recall directed consumers to discard the product, and common sense dictates that if a product contains a defect rendering it unusable, it must be worth less than the full purchase price. But the court held that not all the plaintiffs plausibly alleged that *their* products were contaminated. Although the plaintiffs need not plausibly allege that *all* products were contaminated, the mere fact of a recall is not sufficient. Thus, the circuit court affirmed the dismissal of those plaintiffs that failed to allege they purchased a product that was in one of the affected lots, but it remanded for the district court to determine if the allegations were sufficient as to those plaintiffs that identified their products by lot number.

- **Sixth Circuit Hits the Brakes on Class Certification in Case Against Car Maker**

  *In re Nissan North America Inc. Litigation*, No. 23-5950 (6th Cir.) (Nov. 22, 2024). Vacating class certification and remanding for further proceedings.

  The district court certified 10 statewide classes of Nissan car owners and lessees in a case alleging that the automatic braking systems in their cars is defective. The Sixth Circuit vacated and remanded because the district court failed to identify a single legally significant common question. In particular, Nissan released various software updates to remedy the alleged defects in some cars, but the district court did not "grapple with those updates to answer whether the existence of a defect can be established in one stroke." The court also stressed that "not every question with a common answer meets Civil Rule 23(a). It's only 'central' issues that matter."

  On remand, the district court must conduct an element-by-element analysis of each claim to assess whether the common answer helps to resolve at least one element of each claim asserted. Because the district court failed to identify at least one common issue, it must also take a "second look" at the predominance inquiry. And finally, the Sixth Circuit joined the Third, Fifth, Seventh, and Eleventh Circuits in holding that a district court must perform a full *Daubert* analysis if challenged expert testimony is material to a class certification motion. ■

*class*-ified


Alston & Bird welcomes **Kara McCall** and **Beth Chiarello** to our mass and toxic torts practices in Chicago.

Kara McCall

Beth Chiarello

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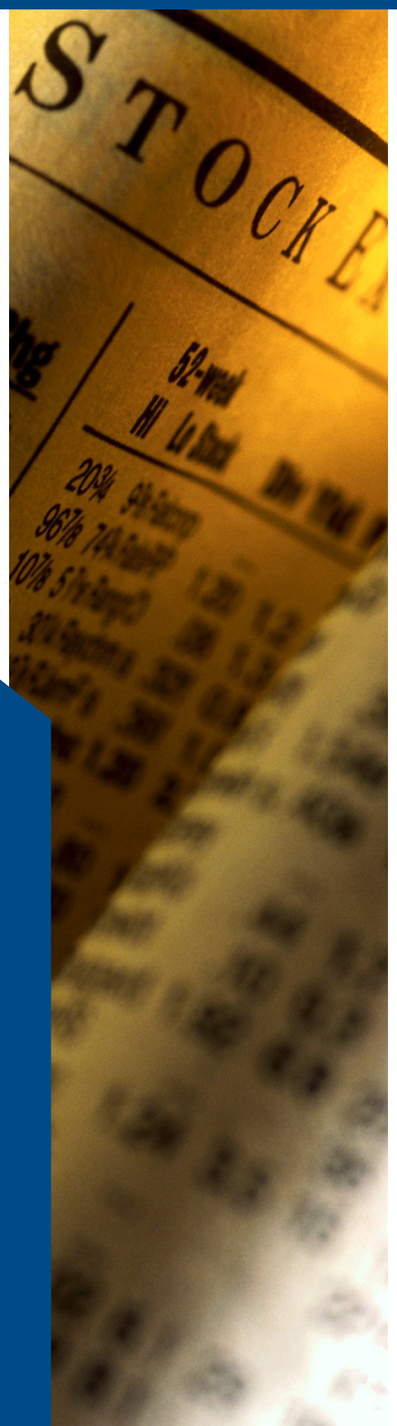


## Securities

- **No Mind Reading Necessary: First Circuit Upholds Dismissal of Unpreserved Investor Claims**

  *Zhou v. Desktop Metal Inc.*, No. 23-1843 (1st Cir.) (Oct. 28, 2024). Upholding dismissal of investor action.

  The First Circuit dismissed a putative shareholder class action against Desktop Metal and certain of its management. The plaintiff alleged that Desktop Metal violated FDA labeling rules for resin used in dental practices and brought claims under Section 10(b) of the Exchange Act through a material misrepresentation theory and a separate scheme liability claim. In its motion to dismiss, Desktop Metal and the individual defendants focused on the material misrepresentation theory and did not address the scheme liability theory. Likewise, the plaintiff did not address the scheme liability theory in her opposition brief or at oral argument.

  The district court granted the defendants' motion to dismiss on the material misrepresentation theory and the plaintiff appealed, arguing that the lawsuit should continue because Desktop Metal failed to address her alternate scheme liability theory in its briefing. The First Circuit affirmed the district court decision and held that the plaintiff failed to substantially air her alternate theory during briefing and argument, ultimately waiving the claim. In reaching its decision, the court held that litigants are responsible for raising all relevant arguments because "overburdened trial judges cannot be expected to be mind readers."

- **Second Circuit Affirms Dismissal of Claims Concerning Merger Materials**

  *Ohio Public Employees Retirement System v. Discovery Inc.*, No. 24-646 (2nd Cir.) (Nov. 1, 2024). Upholding dismissal of investor action.

  The Second Circuit affirmed the dismissal of a putative shareholder class action arising from the 2022 merger of Discovery Inc. and WarnerMedia. The plaintiffs alleged that the resulting entity, Warner Bros. Discovery Inc. (WBD), misled investors by failing to disclose that some of its streaming service subscribers were "non-paying" because they received their streaming access as part of an AT&T bundle or "non-core" because they subscribed to one of Discovery's secondary streaming services. Discovery's pre-merger documents reported a total of 95.8 million subscribers for direct-to-consumer offerings. In post-merger documents, WBD made clear that the 95.8 million subscriber number included 10 million non-paying HBO Max subscribers who had not activated their accounts and other non-core subscribers. The court held that the pre-merger documents were not materially misleading because they made clear that Discovery Inc. may refer to the aggregate number of subscriptions across direct-to-consumer services as subscribers. The court's decision noted that the pre-merger documents provided accurate subscriber counts based on disclosed methodology, "which is not actionable even if investors would have preferred that Defendants had begun using the post-merger methodology earlier." ■

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Cara Peterman

Sierra Shear

Carissa Lavin

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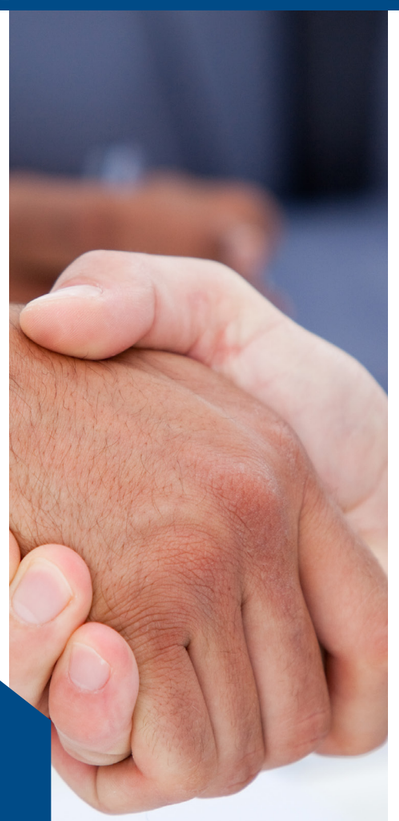

# Settlements

## Three Manufacturers Settle for Nearly $45 Million

*In re Generic Pharmaceuticals Pricing Antitrust Litigation*, No. 2:16-md-02724 (E.D. Pa.) (Oct. 15, 2024). Judge Rufe. Approving $45 million settlements.

The Eastern District of Pennsylvania approved three separate settlement agreements between three different manufacturers of prescription drugs and a class of plaintiffs who purchased one or more named generic drugs from the manufacturers between May 1 and December 31, 2009. The plaintiffs had accused the manufacturers of engaging in an antitrust conspiracy to fix prices, including numerous non-settling manufacturers still engaged in the massive multidistrict litigation. All three settlement amounts are subject to be slightly adjusted due to class opt-outs and a most favored nation clause that considers similar settlement agreements. Because the multidistrict litigation is still ongoing against a number of defendants, class counsel elected to not seek attorneys' fees yet.

## Court Drives a Truck Through Class Objections and Approves Class Settlement

*Yanez v. Knight Transportation Inc.*, No. 2:15-cv-00990 (D. Ariz.) (Oct. 16, 2024). Judge Tuchi. Approving $2.5 million class settlement.

Judge Tuchi approved a class settlement on claims by California truck operators alleging that Knight Transportation violated wage laws. As an initial matter, Judge Tuchi declined the class objectors' request for a second opportunity to opt out of the class, finding their objections could be addressed in deciding whether the settlement is fair, reasonable, and adequate. Judge Tuchi then decided—over various objections—that the settlement satisfied Rule 23 because the class representatives and class counsel were adequate, the settlement agreement was the result of a good-faith and arm's-length negotiation, and the relief—$2.5 million, or $7,000 per class member—was adequate, particularly in light of the costs, risks, and delay of a trial and appeal. On the last point—the relief achieved—Knight agreed to pay. The approval order also awarded $833,333 (33%) to the plaintiffs' attorneys and $80,000 to the class representatives.

## Models' Settlement Not a Model of Success

*Cipolla v. Team Enterprises LLC*, No. 3:18-cv-06867 (N.D. Cal.) (Oct. 28, 2024). Judge Alsup. Granting final approval of $500,000 settlement.

A California federal judge approved a common fund settlement of $500,000 in a Fair Labor Standards Act settlement brought by "promotional specialists"—part-time models who go to various venues and advertise beer and spirits products during social events—against their marketing-company employer. The judge noted the path from the plaintiffs' first complaint to settlement had been long and winding, including a prior appeal, an arbitration that led back to court, and four motions for class certification. The plaintiffs finally saw a "minor breakthrough" when their fourth motion for class certification was granted *in part*. The judge acknowledged there was some tension in the approved settlement relief, which included $125,000 in attorneys' fees, costs and service awards of nearly $75,000, and class recovery of roughly $300,000 (with $100,000 set aside as a California Private Attorneys General Act (PAGA) penalty). On the one hand, the case "did not start as, and is not now, a strong case," so the plaintiffs were fortunate to recover the amount they did. On the other hand, the significant difficulties faced in even getting to the point of settlement, including six years of active litigation and dogged attempts at class certification, supported the attorneys' fees (though the court expressed misgivings during oral argument).

## NFT-Related Settlement Gets Final Approval

*Friel v. Dapper Labs Inc.*, No. 1:21-cv-05837 (S.D.N.Y.) (Oct. 28, 2024). Judge Marrero. Certifying settlement class and approving $4 million settlement.

Judge Marrero granted final approval to a class settlement in an action brought by individuals who purchased or acquired "NBA Top Shot Moments" non-fungible tokens (also known as NFTs). The plaintiffs claimed that the defendants violated securities laws by selling the NFTs without filing a registration statement with the SEC. In a short order with little analysis, Judge Marrero ruled that the proposed class satisfied the requirements of Rule 23 and that the settlement was fair, reasonable, and adequate. Judge Marrero also awarded $1,333,333.33 to the plaintiffs' attorneys (representing one-third of the settlement fund) and $10,000 in incentive awards.

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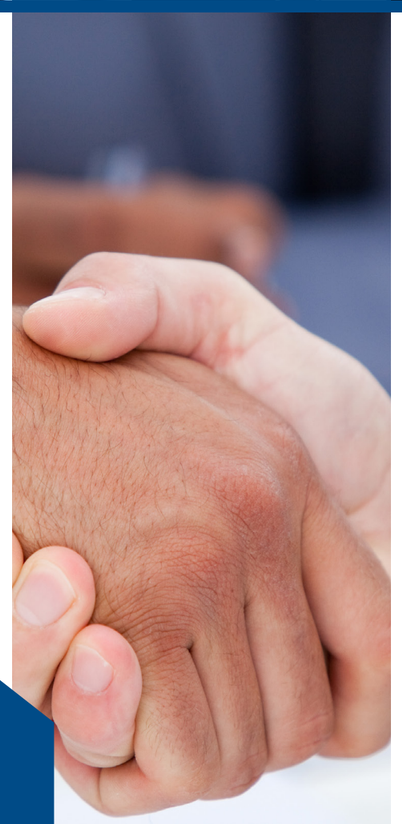

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## Four Classes Settle After Private Info Went Public

*Ramos v. ZoomInfo Technologies LLC*, No. 1:21-cv-02032 (N.D. Ill.) (Nov. 21, 2024). Judge Kocoras. Approving $25 million settlement.

The Northern District of Illinois approved settlements between defendant technology company ZoomInfo and four distinct classes of plaintiffs whose private information and identity were publicly published by ZoomInfo and viewed by the public at various points between January 9, 2020 and March 27, 2024. The four classes of plaintiffs are made up of individuals in California, Illinois, Indiana, and Nevada. The settlement payments total $25,766,835. The court also approved 35% of the total class payments to be awarded as attorneys' fees.

## Two Manufacturers Settle for Nearly $200 Million in Tuna Price-Fixing Suit

*In re Packaged Seafood Products Antitrust Litigation*, No. 3:15-md-02670 (S.D. Cal.) (Nov. 22, 2024). Judge Sabraw. Approving $200 million settlements.

Following an extensive antitrust suit for allegations of illegal price-fixing, the Southern District of California approved settlement payments between two manufacturers of packaged tuna products and two different classes of plaintiffs. First, the court approved a settlement agreement between the manufacturers and the direct purchaser plaintiffs, a set of mainly large retailers and wholesalers that purchased the packaged seafood products directly from the manufacturers.

The second order from the court was the approval of settlement payments between the same two manufacturers and the end payer plaintiffs, which consist of the end consumer of the packaged tuna products. The court declined to enter attorneys' fees at the time of approval of either settlement, instead choosing to retain jurisdiction to make a determination on fees at a later date. Additionally, both settlements were just the latest in a number of settlements agreed to by different manufacturers of the packaged tuna product allegedly involved in the price-fixing conspiracy.

## Real Estate Commission Class Action Goes Under Contract and Closes

*Burnett v. National Association of Realtors*, No. 4:19-cv-00332 (W.D. Mo.) (Nov. 27, 2024). Judge Bough. Approving $418 million settlement.

In a thorough 88-page order, Judge Bough granted final approval to certain settlements reached in a class action brought against various real estate brokerages. The class action asserted violations of the Sherman Act and arose out of allegations that the brokerages created and implemented rules that required home sellers to pay commissions to the buyers' agents and caused the sellers to pay commissions at inflated rates. In deciding that the settlements were fair, reasonable, and adequate, Judge Bough noted that the class representatives and class counsel adequately represented the class in obtaining significant relief and that the settlements were reached at arm's length, obtained almost $700 million in recovery and certain practice changes, and treated class members fairly and equitably relative to each other. More than 60 pages of Judge Bough's order involved carefully overruling various objections to the settlement.

## Plaintiffs' Attorneys Achieve Uber-Favorable Attorneys' Fees in Settlement

*Boston Retirement System v. Uber Technologies Inc.*, No. 3:19-cv-06361 (N.D. Cal.) (Dec. 4, 2024). Judge Seeborg. Granting final approval of $200 million settlement.

A California federal judge approved a settlement including a $200 million common fund, with $58 million in attorneys' fees, against Uber. The settlement resolved claims brought by investors that the company's registration statements associated with its IPO were materially inaccurate, misleading, and incomplete after the stock dropped over 40% in value from May to November 2019. The $58 million in attorneys' fees—29% of the common fund—was a departure from the Ninth Circuit's 25% benchmark (and was 1.8 times the lodestar amount), but was, according to the judge, "fair and reasonable under the circumstances of this case, … given the extraordinary results, the difficulty and complexity of the claims, and the obstacles and challenges faced by Plaintiffs' Counsel." No class member objected to the 29% attorneys' fee award.

## Truckers Drive Away with Final Approval of Wage Deal

*Perkins v. Ryder Integrated Logistics Inc.*, No. 3:23-cv-00502 (N.D. Cal.) (Dec. 16, 2024). Judge Orrick. Granting final approval of $3 million settlement and awarding attorneys' fees, expenses, and enhancements.

A California district court judge granted final approval of a $3 million settlement between truck drivers and Ryder Integrated Logistics Inc., putting an end to litigation alleging wage-and-hour violations and claims under PAGA. The final approval order certifies a settlement class that includes truckers who claim they were denied overtime pay, meal and rest breaks, bonuses and incentive payments, and timely payment of wages by Ryder. The order also approved $60,000 under PAGA, which


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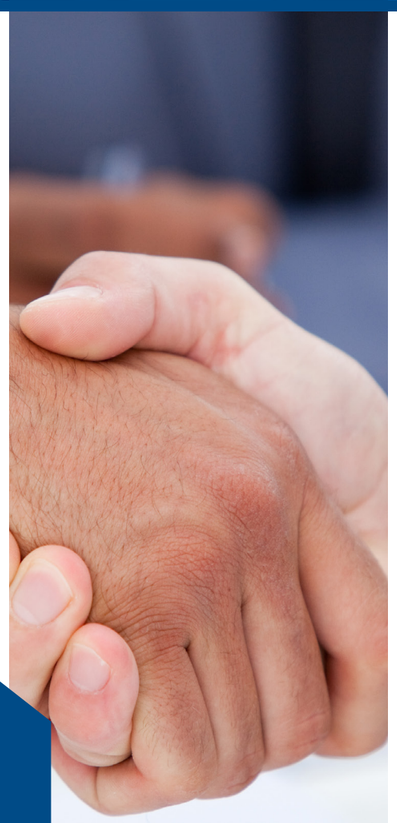

allows workers to sue employers on behalf of the state for labor code violations. A portion of that payment is to be paid to the class members as set forth in the settlement agreement.

The court also awarded plaintiffs' counsel 25% of the total settlement in attorneys' fees as well as $37,000 in litigation costs after determining that an upward adjustment from the 25% benchmark for attorneys' fees was not warranted given the minimal amount of work required from counsel before settlement. It likewise limited named plaintiff service awards to $3,500 each, finding no additional award was warranted because the plaintiffs only provided basic informal discovery and did not attend mediation in person. ■

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