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Class Action Litigation Newsletter | Fall 2020

In this Issue:

This GT Report Summarizes Recent Class-Action Decisions From Across the United States

Highlights from this issue include:

- Third Circuit continues to weaken the ascertainability requirement for class certification.
- Seventh Circuit addresses the complexity district courts face in securities class actions after *Halliburton I*, *Amgen*, and *Halliburton II*.
- Seventh Circuit holds that court can order disgorgement where objectors settle using the rights of the class to benefit them individually.
- Ninth Circuit holds that whether an agreement allows for class arbitration is presumptively for the court.
- Ninth Circuit rules that federal equitable principles apply in federal court even for state law claims, and plaintiffs cannot seek equitable relief without showing that an adequate legal remedy is unavailable.
- Ninth Circuit holds that CAFA cannot be used to circumvent the Magnuson-Moss Warranty Act's 100-named-plaintiff requirement.
- Tenth Circuit holds that courts must decide formation before enforcing a delegation clause in an arbitration agreement.
- Eleventh Circuit allows a plaintiff to pursue unfair trade practices claims based on practices at restaurants the plaintiff never visited.
- Eleventh Circuit holds that incentive awards to named plaintiffs cannot be part of class settlements.

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First Circuit

Chong v. Northeastern Univ., 2020 U.S. Dist. LEXIS 181622 (D. Mass. Oct. 1, 2020)

Court dismisses in-person learning contract claims in COVID-19-related class action against university.

In this case, one of many putative class actions brought against a university, two students alleged breach of contract or, in the alternative, unjust enrichment based on the university allegedly retaining the full amount of tuition and fees collected for the spring semester of 2020 despite ceasing in-person instruction and closing its on-campus facilities and resources. The university moved to dismiss for failure to meet *Twombly/Iqbal* pleading standards. Based on the language contained in the parties' contract, the district court agreed with the university that the parties' bargain did not include the right to in-person instruction. The court concluded that the students had not alleged sufficient facts to show that course descriptions about classes being taught in specific buildings on campus were part of that bargain. The district court also dismissed the students' unjust enrichment claims as barred by their contract claims, which provide for an available remedy even if those claims are not viable. According to the district court, "Massachusetts law does not allow litigants to override an express contract by arguing unjust enrichment." The district court, however, denied the university's motion to dismiss claims arising from paying campus recreation fees, ruling that those claims were plausible because the students lost the option to attend athletic games or use fitness facilities.

In re Intuniv Antitrust Litig., 2020 U.S. Dist. LEXIS 131237 (D. Mass. July 24, 2020)

Court allows intervention by class member after class representative deemed inadequate.

Two members of a direct-purchaser class (together referred to as Meijer) moved to intervene under Fed. R. Civ. P. 24 shortly after the district court found that the class representative could not adequately represent the class. In assessing the class members' motion, the district court concluded that Meijer had an interest relating to the action that would be impaired if it could not intervene under Rule 24(a) – explaining that "the second and third prongs of the Rule 24(a)(2) inquiry are satisfied by the very nature of Rule 23 representative litigation." The district court focused its attention on "the timeliness of the motion to intervene and on the adequacy of representation." As to timeliness, the district court concluded that the motion was timely, as Meijer moved to intervene only after it appeared that the prior class representative could no longer adequately represent the interests of absent class members due to its bankruptcy. The court also concluded that defendants would not be prejudiced by the intervention as Meijer offered to produce documents and make itself available for a deposition promptly to avoid any delay in the trial schedule. The district court explained that if it were to deny the motion, "there would be no other proposed class representative and the class would need to be decertified" and, as such, it "is obviously in the interest of all of the absent class members that a class member be permitted to intervene as a plaintiff." Although Meijer made a *prima facie* showing that it was an adequate class representative, the district court allowed defendants limited discovery into Meijer's adequacy.

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Landry v. Transworld Systems Inc., 485 Mass. 334 (2020)

Massachusetts Supreme Judicial Court relies on Massachusetts law to deny arbitration based on agency and third-party beneficiary principles.

In this case, the Massachusetts Supreme Judicial Court (SJC) considered whether a superior court judge properly denied defendant's motion to compel arbitration in a case arising out of alleged violations of the call frequency limits in the Massachusetts Debt Collection Regulations, 940 C.M.R. § 7.00. Affirming the ruling denying arbitration, the SJC focused on whether the parties had agreed to arbitrate their dispute. Defendant was not a party to the arbitration agreement between plaintiff and the company to which plaintiff owed the debt. Thus, whether defendant – a non-signatory to the contract – could enforce the contact against a signatory hinged on whether it could rely on third-party beneficiary or agency principles. The SJC rejected defendant's arguments under an agency and third-party beneficiary theory because the contract language was "susceptible of multiple interpretations" and was "at a minimum, ambiguous as to whether" defendant could enforce it. As such, the SJC concluded that defendant could not enforce the contract as an agent and had not met its burden to provide "clear and definite" evidence of intent that the parties to the contract had agreed that defendant could enforce the arbitration agreement as a third-party beneficiary.

Second Circuit

In re Allergan PLC Sec. Litig., 2020 U.S. Dist. LEXIS 179371 (S.D.N.Y. Sep. 29, 2020)

SDNY denies class certification in securities case on adequacy grounds after finding that plaintiff's behavior demonstrated that it was incapable of controlling its attorneys.

Lead plaintiff Boston Retirement System (BRS) brought a putative class action against Allergan PLC (Allergan), alleging that Allergan artificially inflated its stock price by making materially false and misleading statements about the health risks of one its products. BRS moved to certify a class of Allergan shareholders.

In opposing the motion, Allergan argued that BRS was an atypical and inadequate class representative. The court agreed and denied class certification on adequacy grounds because BRS was "unwilling or unable to protect the interests of the class against the possibly competing interests of the attorneys."

When the court appointed BRS as lead plaintiff, it gave an explicit instruction that there was to be only one law firm serving as lead counsel. The court gave this instruction based on its experience that the involvement of multiple law firms tended to inflate legal fees to the detriment of class members. Despite this instruction, BRS allowed a second law firm to work with its ostensible lead counsel. These two firms, without disclosure to the court, entered into an agreement to split fees earned from the lawsuit "almost down the middle." The court found that, by acquiescing in this arrangement, BRS showed that it was incapable of controlling its lawyers who were unwilling to abide by rulings of the court. Accordingly, BRS was an inadequate representative.

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Third Circuit

Hargrove v. Sleepy's LLC, ___ F.3d ___, 2020 WL 5405596 (3d Cir. 2020)

Third Circuit clarifies standards on renewed motion for class certification and ascertainability requirement.

In this wage and hour class action, the district court denied plaintiffs' initial motion for class certification because the proposed class included part-time delivery drivers. The court also denied the renewed motion for class certification because plaintiffs did not meet the standard for class certification and because the proposed class was not ascertainable.

The Third Circuit reversed. First, the panel ruled, on an issue of first impression, that the motion for reconsideration standard does not apply to a renewed motion for class certification, as some district courts in the circuit had held. Instead, Rule 23 "allows for multiple bites at the apple throughout the litigation, and … does not impose an additional requirement on parties to prove a change in law or show new evidence to succeed on a renewed motion for certification."

Second, on ascertainability, the panel noted that "judges on our Court have warned that the overzealous application of the 'administratively feasible' requirement will defeat the purpose of Rule 23 to protect the rights of individuals who may lack the resources to bring individual claims" and "that other Circuits to address ascertainability – including the Second, Sixth, Seventh, Eighth, and Ninth Circuits – have rejected it." The panel reversed the district court's ruling because it "was too exacting and essentially demanded that appellants identify the class members at the certification stage. But all that is required is that appellants show there is a 'reliable and administratively feasible mechanism,' for determining class membership," which plaintiffs had done through "several distinct data sets . . . taken together with the affidavits." Although the records obtained from Sleepy's were incomplete, the district court "failed to explain why, in light of our precedents, the records as a whole, together with the affidavits, did not provide a reliable and feasible mechanism to ascertain class members at the certification stage." The panel also "clarif[ied] that where an employer's lack of records makes it more difficult to ascertain members of an otherwise objectively verifiable class, the employees who make up that class will not be made to bear the cost of the employer's faulty record keeping."

Sixth Circuit

Linneman v. Vita-Mix Corp., 970 F.3d 621 (6th Cir. 2020)

Sixth Circuit allows courts to use lodestar method to calculate attorney's fees in coupon settlements.

The Sixth Circuit recently joined the Second, Seventh, and Eighth Circuits in holding that courts may use the lodestar method to calculate attorneys' fees in coupon settlements. In reaching this conclusion, the court rejected the Ninth Circuit's view that courts must use the percentage method to calculate some portion of the attorney's fees award.

At the heart of the panel's holding was its interpretation of subsection (a) of Section 1712, which states that, "[i]f a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed." According to the panel, this

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language requires the use of the percentage method "only where the district court uses the value of the coupons to calculate the fees" because "[o]nly then ... have the coupons 'produced' or 'generated' fees."

The panel explained that its interpretation was supported by the phrase "attributable to the award" in subsection (a), as well as the other subsections of section 1712. The panel reasoned that the overall structure of section 1712 supported its interpretation because that structure "contemplate[s] discretion in how district courts calculate fees" and nothing "mandate[s] that courts calculate fees based on the value of the coupons redeemed in every coupon settlement." As a result, the panel concluded that "section 1712 requires a district court to use the redemption rate [of coupons in a coupon settlement to calculate attorney's fees] only when the court calculates fees based on the percentage method" and that section 1712 does not "prohibit the court from using the lodestar method instead."

Seventh Circuit

Carpenters Pension Trust Fund for N. Cal. v. Allstate Corp. (In re Allstate Corp. Secs. Litig.), 966 F.3d 595 (7th Cir. 2020)

Seventh Circuit addresses the complexity facing district courts in securities class action cases after *Halliburton I*, *Amgen*, and *Halliburton II*.

In *Allstate,* a direct appeal under Fed. R. Civ. P 23(f), the Seventh Circuit reviewed and remanded a district court's decision granting class certification to purchasers of Allstate's stock in an alleged securities class action.

The decision is notable for how it wrestles with the complex questions facing a district court on class certification in a securities case, in light of what the Seventh Circuit called the "trilogy" of relevant Supreme Court opinions – *Halliburton I*, *Amgen*, and *Halliburton II*. Each of these decisions is grounded in the Supreme Court's seminal 1988 decision in *Basic v. Levinson,* which adopted what is known as the "fraud on the market" theory, which is how securities class actions generally satisfy the commonality requirement of Fed. R. Civ. P. 23(b)(3). Under the fraud on the market theory, the market is presumed to incorporate all material information, which is how different shareholders exposed to different information (or no information at all) are able to join together as a class. They are all presumed to have relied on the efficient market and the market's ability to incorporate information into a stock's price. That presumption of reliance, however, can be subject to challenge by defendants, and the trilogy of Supreme Court cases the Seventh Circuit refers to concern different, arguably related and hard to distinguish attempts at challenging the *Basic* presumption.

The Seventh Circuit observed that courts face difficulties when it comes to following faithfully the decisions that make up the trilogy: "We are obligated to follow all three cases, and we must read them together. A district court deciding whether the *Basic* presumption applies must consciously avoid deciding materiality and loss causation. *Halliburton I* and *Amgen* require that much. At the same time, a district court must be willing to consider evidence offered by the defense to show that the alleged misrepresentations did not actually affect the price of the securities. *Halliburton II* requires that. And yes, the same evidence is likely to have obvious implications for the off-limits merits issues of materiality and loss causation. *Halliburton II* teaches, however, that a district court may not use the overlap to refuse to consider the evidence. The court must still consider the evidence as relevant to price impact (also known as transaction causation)."

In the end, the Seventh Circuit sent this case back to the district court to consider Allstate's expert witness report. That report contended that (i) there was no evidence of price impact because Allstate's supposedly misleading statements did not result in a statistically significant increase in Allstate's price; and (ii) the news about Allstate's claims experience could not have caused a price impact because it was not in fact "news" in light of Allstate's prior disclosures about its change in underwriting policies.

The Seventh Circuit was dismissive as to Allstate's argument on the first point, reiterating its prior adoption of the "price maintenance" theory, which is the proposition that the lack of stock price decline following certain announcements/disclosures does not necessarily mean that there has not been a fraud, because the fraud itself could have perpetuated the (allegedly) inflated price.

As to the second point, the Seventh Circuit sent the case back to the district court for a determination whether the alleged misrepresentations did not actually affect the stock price, consistent with the holding of *Halliburton II*. The Seventh Circuit cast doubt on whether Allstate's expert opinion should be considered persuasive ("that argument is difficult for us to square with the 10 percent price drop on August 4, 2105"), but the court said that the issue should have been considered at class certification, while acknowledging that it was requiring the district court to "split some very fine hairs."

Of some note, Justice Amy Coney Barrett was on the panel but did not author the opinion.

Pearson v. Target Corp., 968 F.3d 827 (7th Cir. 2020)

The Seventh Circuit rebukes "objector blackmail" in class actions, holding that district courts have authority to grant disgorgement against settling objectors who benefit individually from the rights of the entire class.

This appeal stemmed from challenges to a putative class action settlement in the Northern District of Illinois. After a settlement was approved, three class members objected and appealed the district court's approval. The objectors later withdrew their appeals after receiving side payments from defendants totaling $130,000. One of the named plaintiffs filed a motion for disgorgement of these payments, but the district court denied that request.

The Seventh Circuit reversed the district court's denial of disgorgement, admonishing the "selfish" use of "objector blackmail" and finding the assertion of class rights for individual gain to be inequitable. The court held that the Supreme Court's decision in *Young v. Higbee Co*. imposed a fiduciary duty on a class-based objector "who, by appealing the denial of his objection on behalf of the class, temporarily takes 'control of the common rights of all' the class members and thereby assumes 'a duty fairly to represent those common rights.' Thus, the court found disgorgement of individual gains to be an appropriate remedy.

Dempsey v. Winski, 149 N.E.3d 1243 (Ind. Ct. App. 2020)

Indiana Court of Appeals holds that commonality, predominance and superiority were not met where the class representative was unable to identify any other members of a broadly defined class.

This case involved a claim for interest on plaintiff's overpayment of real property taxes. Plaintiff attempted to represent a class of taxpayers who had received tax refunds since 2006 without interest payments. After the trial court denied class certification, plaintiff's interlocutory appeal was accepted by the Indiana Court of Appeals. Affirming the denial, the Indiana Court of Appeals emphasized that "the

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concepts of commonality and predominance are difficult, if not impossible, to apply when [plaintiff] at best received one taxpayer credit on his own behalf and has identified no other individual in like circumstances." The court also found that the superiority requirement was not satisfied because plaintiff could not show that class proceedings were more efficient or superior to other administrative remedies.

McDonald v. Symphony Bronzeville Park LLC, 2020 IL App (1st) 192398

Illinois Appellate Court holds that the exclusivity provisions of the Workers' Compensation Act do not bar a claim for statutory damages under the Illinois Biometric Information Privacy Act.

The plaintiff in this case filed a putative class action alleging that her employer collected biometric information using a finger-scan timekeeping system without proper notice or consent in violation of the Illinois Biometric Information Privacy Act (BIPA). Defendants moved to dismiss, arguing, among other things, that plaintiff's BIPA claims were barred by the exclusivity provisions of the Illinois Workers' Compensation Act (IWCA). The circuit court denied the motions to dismiss, following the prevailing view that the exclusivity provisions of the IWCA exclude injuries "not compensable under the [Compensation] Act." Defendants appealed. The Appellate Court upheld the circuit court's ruling, finding that, because "a claim by an employee against an employer for liquidated damages under [BIPA]" does not fit within the purview of the IWCA, a claim for liquidated damages under BIPA is not barred by IWCA's exclusivity provisions.

Eighth Circuit

In re: Centurylink Sales Practices and Securities Litigation, 2020 WL 5517483 (D. Minn. Sept. 14, 2020)

District of Minnesota certifies class alleging securities fraud through customer overbilling.

Plaintiffs alleged that defendants committed securities fraud by systematically overbilling customers, thereby artificially inflating the stock's price. In certifying the class, the court observed that numerosity was uncontested and then applied the fraud-on-the-market theory to find that commonality was satisfied, concluding that plaintiffs had established the required elements, namely – publicity, timing, and market efficiency. The court also rejected defendants' attempt to defeat class certification by arguing a lack of price impact (as permitted by *Halliburton II*), citing significant price drops directly following certain alleged corrective disclosures.

Moore v. City of Little Rock, 2020 WL 5520889 (E.D. Ark. Sept. 14, 2020)

Eastern District of Arkansas certifies class challenging the constitutionality of Little Rock's Rental Inspection Code.

This case concerns a putative class action filed against the City of Little Rock. The complaint alleged that Article IX of the City of Little Rock's Code of Ordinances, or the Rental Inspection Code, was unconstitutional. More specifically, plaintiffs claimed that the Rental Inspection Code required home owners to obtain a certificate of compliance before renting any property, and that the certificate of compliance could be obtained only by consenting to unlawful searches of the properties.

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The court determined that the class satisfied numerosity with over a thousand class members and that they all presented the same common question as to whether the Rental Inspection Code was unconstitutional. The court also determined that the common issue concerning constitutionality would predominate over any individual issues concerning individual searches. After narrowing the class definition to include only licensed owners and agents who were subject to a search or a request for a search, as opposed to all owners and agents regardless of licensure, the court certified the class.

Ninth Circuit

Shivkov v. Artex Risk Sols., Inc., No. 19-16746, 2020 WL 5405687 (9th Cir. Sept. 9, 2020)

The availability of class arbitration is a gateway issue and presumptively for the court.

Plaintiffs were 81 individuals and entities who entered into agreements with defendants relating to captive insurance companies that plaintiffs owned, and to which plaintiffs paid insurance premiums. Plaintiffs claimed the premium payments as tax-deductible business expenses without recognizing them as taxable income. The IRS subsequently audited plaintiffs, issued delinquency notices, and sought to impose penalties.

After settling with the IRS, plaintiffs brought a putative class action against defendants, alleging the captive insurance companies were illegal and abusive tax shelters about which defendants failed to inform plaintiffs. Defendants moved to compel arbitration under an arbitration clause in the parties' agreement, and the district court granted the motion, ordering arbitration of the individual claims, and dismissing the complaint (including the putative class allegations) without prejudice pending arbitration.

On appeal, plaintiffs argued that the arbitration clause contained in some of their agreements was unenforceable because it did not survive termination. Addressing an issue of first impression in the Ninth Circuit concerning the survival of arbitration obligations following contract termination, the court held that the agreements at issue did not expressly negate the presumption in favor of post-termination arbitration or clearly imply that the parties did not intend for their arbitration obligations to survive termination.

The court also joined seven other circuits in holding that the availability of class arbitration under a given arbitration clause is a gateway issue that a court must presumptively decide, unless the parties clearly and unmistakably delegated that issue to the arbitrator. Since the agreements at issue did not do so, the court addressed the issue of class arbitrability and found that, because the agreements were silent as to class arbitration, they did not permit it. Thus, the court found that the district court properly compelled individual rather than class arbitration pursuant to the parties' agreements.

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Sonner v. Premier Nutrition Corp., No. 18-15890, 2020 WL 317756 (9th Cir. Aug. 20, 2020)

Federal courts must apply traditional equitable principles before awarding restitution under California's Consumer Legal Remedies Act (CLRA) and Unfair Competition Law (UCL), and federal courts sitting in diversity cannot award equitable restitution if an adequate legal remedy exists.

After years of litigating state law unfair competition claims in a putative class action involving alleged false advertising regarding the purported health benefits of a nutritional product known as "Joint Juice," plaintiff voluntarily dismissed her sole state law damages claim under the CLRA so she could try the class action as a bench trial rather than to a jury. The district court granted defendant's motion to dismiss, holding that plaintiff could not proceed on her equitable claims for restitution under the UCL in lieu of a claim for damages.

Upholding the district court's decision, the Ninth Circuit held, as a threshold jurisdictional matter, that a federal court sitting in diversity must apply federal equitable principles, rather than state law, including the inadequate-remedy-at-law doctrine requiring a plaintiff to show a legal remedy is not available before pursuing equitable relief. The court held that federal courts still apply the inadequate-remedy-at-law doctrine and upheld the district court's decision because plaintiff could not pursue equitable relief given that damages were available under the CLRA.

Salter v. Quality Carriers, Inc., No. 20-55709, 2020 WL 5361459 (9th Cir. Sept. 8, 2020)

Factual attacks on a notice of removal under the Class Action Fairness Act (CAFA) in cases where an amount in controversy is not alleged by plaintiff must be supported by admissible evidence.

Plaintiffs filed a putative class action in California superior court alleging that defendants failed to provide truck drivers with meal breaks, rest periods, overtime wages, minimum wages, and reimbursement for necessary expenditures as required by California law. The crux of plaintiffs' claim was that defendants misclassified the truck drivers as independent contractors rather than employees. Defendants removed the action to district court, and plaintiffs filed a motion to remand. The district court granted the motion, finding that defendants failed to adequately show that the amount in controversy exceeded $5 million. Specifically, the district court found that the declaration of defendants' chief information officer filed in support of removal did not attach or authenticate business records showing that defendants had deducted more than $5 million in expenses from truck drivers' weekly settlements and assumed that plaintiffs sought return of 100 percent of the deductions without setting forth any basis in the complaint for that claim.

On appeal, the Ninth Circuit focused on what a defendant must show for removal of a class action under CAFA when the amount in controversy is not clear from plaintiffs' complaint (which did not allege a specific amount). The court noted that plaintiffs mounted a facial attack on defendants' notice of removal, rather than a factual attack in which they contest the truth of defendants' contentions, and for which plaintiff must offer *evidentiary* support. Plaintiffs did not, for example, offer any evidence to controvert defendants' contention that they deducted more than $5 million from the truck drivers' settlements, or that there were over 100 contractors who performed work for defendants during the putative class period. The Ninth Circuit held that the district court erred in treating defendants' presentation as a factual, rather

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than facial, challenge. Accordingly, the Ninth Circuit vacated the district court's order and remanded the case back to district court.

Floyd v. American Honda Motor Co., Inc., 966 F.3d 1027 (9th Cir. July 28, 2020)

Ninth Circuit holds that the Class Action Fairness Act (CAFA) does not override the numerosity requirement in the Magnuson-Moss Warranty Act (MMWA).

This case addressed the overlap in two federal statutes providing for federal jurisdiction in class actions asserting warranty claims. Plaintiffs brought a putative class action in federal court asserting warranty claims arising from an alleged "rollaway effect" of certain vehicles, including claims under the MMWA. The MMWA provides for express and implied warranty claims, to be pursued in state or federal court. But federal jurisdiction is subject to limitations, including that, "if the action is brought as a class action," the number of named plaintiffs must be at least one hundred. Meanwhile, CAFA confers jurisdiction on a federal court in any action involving minimal diversity–meaning one named plaintiff or class member is a citizen of a state different from any defendant–and more than $5,000,000 in controversy. CAFA jurisdiction does not exist "if the number of members of all proposed plaintiff classes in the aggregate is less than" one hundred, but CAFA does not require naming one hundred plaintiffs.

Plaintiffs argued that, even without 100 named plaintiffs, the court had jurisdiction over the MMWA claim based on CAFA. But the court found the text of MMWA to be clear and declined to "repeal" the requirement of naming one hundred plaintiffs "by implication." The court explained that, "when two statutes are 'capable of co-existence, it is the duty of the courts,' absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" Therefore, the court held that CAFA may not be used to circumvent MMWA's specific numerosity requirement and that the MMWA claim was properly dismissed.

Greene v. Harley-Davidson, Inc., 965 F.3d 767 (9th Cir. July 14, 2020)

Ninth Circuit holds that, in meeting the Class Action Fairness Act's (CAFA) $5 million amount-in-controversy requirement, a defendant seeking removal may include punitive damages that are "reasonably possible."

In a case involving false advertising claims relating to fees charged for dealer setup for motorcycle purchases, Plaintiff alleged that, after his purchase, he learned that the setup on his motorcycle had already been performed, and the manufacturer had reimbursed the dealership for the cost. Plaintiff claimed that, had he known these facts, he would not have paid the setup costs, and that he had been defrauded by statements suggesting that the retail price did not include dealer setup. Plaintiff filed a proposed class action in California state court, asserting various claims, including for violation of the Consumers Legal Remedies Act, false advertising and fraud and deceit and seeking damages in an amount not less than $2,000,000, plus attorneys' fees, punitive damages, and injunctive relief.

Defendants removed under CAFA, arguing that punitive damages should be included in the amount-in-controversy calculation based on a 1:1 punitive/compensatory damages ratio. Thus, defendants argued that CAFA's $5 million threshold was met based on the following figures, extrapolated for the class period – $2,166,666 in compensatory damages, $2,166,666 in punitive damages and $1,083,333 in attorneys' fees (25% of the amount in controversy). Plaintiff argued, among other things, that punitive damages had to be measured only on his own claims, rather than as to the class. Ultimately, the district court remanded, concluding that the defendant had not presented sufficient evidence for punitive damages to be included in the calculation.

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The Ninth Circuit reversed, finding that a defendant meets the amount-in-controversy requirement if it is "reasonably possible" that it may be liable for an amount exceeding CAFA's threshold. The court held that the defendant satisfied this burden by citing cases where juries had awarded punitive damages based on ratios higher than 1:1. As the court noted, defendants had "relied on a reasonable chain of logic" to show a similar amount at stake, and the district court had improperly required a showing about the probability that plaintiff would prevail, rather than simply the amount "at stake."

Cheslow v. Ghirardelli Chocolate Co., No. 19-cv-07467-PJH, 2020 WL 4039365 (N.D. Cal. July 17, 2020)

On a motion to dismiss, a consumer survey could not transform plaintiffs' unreasonable understanding that the term "white chips" refers to white chocolate into a reasonable one, particularly where the packaging did not mention chocolate.

Plaintiff filed a putative class action alleging claims for false advertising based on the contention that the term "white chips" on defendant's product packaging misleads consumers into believing that the products contain chocolate. On a prior motion to dismiss, the court concluded that, as a matter of law, no reasonable consumer would understand the term "white chips" as referring to white chocolate, particularly where the package labels do not include the word "chocolate."

Having been allowed leave to amend, plaintiff added allegations regarding a consumer survey that she had commissioned. According to plaintiff, the survey showed that: almost 92% of "reasonable consumers" who reviewed the front panel of the package believed that the chips were white chocolate; and a majority would be less satisfied with the product if they learned it did not contain white chocolate. However, defendant again moved to dismiss, and this time the court granted the motion with prejudice.

Citing *Becerra v. Dr Pepper/Seven Up, Inc*., 945 F.3d 1225, 1231 (9th Cir. 2019), the court held that a consumer survey could not "transform plaintiffs' unreasonable understanding of the meaning of the term 'white chips' into a reasonable one." The court noted that this conclusion was bolstered by the fact that the survey participants were only shown the front of product packaging, which did not affirmatively represent that the products contained chocolate, and were not shown the ingredients list on the back, which also showed the products contained no chocolate. Thus, the court ruled that the survey actually "undermine[d], rather than supporte[d]," plaintiffs' claims because it "only showed respondents the front panel of the product … . By omitting the back panel, the survey deprived respondents of relevant information, namely the ingredient list."

Susan Tran v. Sioux Honey Association, Cooperative, No. 8:17-cv-00110-JLS-SS, 2020 WL 262916 (C.D. Cal. July 13, 2020)

On a motion for summary judgment, a consumer survey could not establish that reasonable consumers would interpret the terms "pure" and "100% pure" to mean that honey cannot contain 41 parts per billion of glyphosate, given that it is the result of the bees' foraging habits and not the manufacturing process.

Plaintiff filed a putative class action against a producer of honey, alleging that defendant violated California's consumer protection statute by labeling the honey as "pure" and "100% pure," when it contained trace amounts of glyphosate. The parties stipulated that the glyphosate was present in the honey because of bees' foraging habits, not because of any manufacturing process, and was not added to by defendant.

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Defendant moved to dismiss, arguing that no reasonable consumer would understand "pure" or "100% pure" to mean the honey did not contain trace amounts of substances other than honey. The court denied the motion at the pleading stage because it could not make this determination as a matter of law. Specifically, the court explained that "[r]easonable consumers may understand that trace amounts of pesticide could end up in their honey from the bees' interaction with the modern world, or they may interpret the word 'pure' (and particularly, '100% pure') to mean that the final product does not contain any substance (even trace amounts) that is not essential to the honey, particularly synthetic substances such as glyphosate." The court stated that it would have been simple for plaintiff to present the survey participants with a question going to whether the participant viewed a honey product containing trace amounts, or 41 parts per billion, of glyphosate, as less than "pure" or "100% pure." But in the court's view, plaintiff "did not come close to doing so … ."

Defendant subsequently moved for summary judgment. In opposing the motion, plaintiff offered a consumer survey designed to determine whether consumers expect chemicals in a product labeled "pure." The court found that the answer to this generic, binary question did not advance plaintiff's theory that reasonable consumers interpret the term "pure" to exclude trace amounts of glyphosate, even if it is a result of bees' foraging habits and not the result of a manufacturing process. Plaintiff argued that she did not need to rely on her survey because the word "pure" was false as a matter of law, but the court disagreed, pointing to plaintiff's own deposition where she testified that "pure" means "without *added* ingredients or chemicals."

Tenth Circuit

Fedor v. United Healthcare, Inc., 2020 U.S. App. LEXIS 29444 (10th Cir. Sept. 16, 2020)

Tenth Circuit concludes that courts must determine whether an arbitration agreement exists before enforcing delegation clause.

This case concerns whether the district court erred in compelling arbitration based on a finding that plaintiff challenged the validity of the insurance contract as a whole, as opposed to the delegation clause specifically. The delegation clause dictated that certain decisions would be left to the arbitrator, including interpretation and enforcement of the insurance policy at issue. On appeal, the Tenth Circuit cited Supreme Court precedent holding that, if a party challenges an arbitration agreement, but fails to specifically challenge the delegation clause, typically the court will compel arbitration and allow the arbitrator to decide the validity of the arbitration clause.

But the Tenth Circuit held that not all arbitrability issues can be delegated, and courts must always determine whether an arbitration agreement was actually formed. Based on Supreme Court precedent, the court concluded that the issue of contract formation can never be delegated to an arbitrator because a court cannot order arbitration of a dispute unless it is satisfied that the parties agreed to arbitrate that particular dispute. Because the Tenth Circuit found that the district court erred in compelling arbitration without finding formation, it remanded the case for a decision on whether the parties formed an agreement to arbitrate.

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Eleventh Circuit

Fox v. Ritz-Carlton Hotel Co., LLC, No. 19-10361, 2020 WL 5784768 (11th Cir. Sept. 29, 2020)

Eleventh Circuit permits plaintiff in unfair trade practices action to establish class representative standing and amount-in-controversy requirement based on automatic gratuities allegedly charged at restaurants he did not visit.

Before this decision, district courts in the Eleventh Circuit were nearly unanimous in holding that a named plaintiff in an unfair trade practice action lacked standing to assert claims arising from alleged practices that occurred at restaurants the plaintiff never visited. *See, e.g.*, *Fox v. Loews Corp.*, 309 F. Supp. 3d 1241, 1250 (S.D. Fla. 2018). ("Plaintiff cannot pursue … claims of deceptive and unfair practices … arising from inadequate disclosures in menus he never saw."). The underlying rationale was that, because the gratuity policies at the unvisited restaurants may have differed from those at the restaurant(s) the named plaintiff did visit, the plaintiff could not have suffered any injury-in-fact arising from those unvisited restaurants. *See, e.g.*, *Heckman v. SBE ENT Holdings, LLC*, No. 18-cv-22258, 2019 WL 1468555, at *4 (S.D. Fla. Feb. 25, 2019).

In a significant departure from prevailing district court decisions, the Eleventh Circuit held that, because the named plaintiff "alleged that the [Ritz Carlton] employed th[e] same practices at all forty-nine of its restaurants in Florida across a four-year period and that the class members therefore suffered the same economic injury from the illegal automatic gratuities," plaintiff had established class representative standing "to sue on behalf of the customers that paid automatic gratuities at Ritz-Carlton restaurants that [the plaintiff] did not visit." In dicta, the Eleventh Circuit also questioned, without deciding, whether Florida's unfair trade practices act limits damages to the difference between what customers would have paid and what they were required to pay, or instead allows the class to recover the full amount of the deceptive charge.

Johnson v. NPAS Sols., LLC, 975 F.3d 1244 (11th Cir. 2020)

Eleventh Circuit invalidates class action individual incentive awards

This case involved a putative class action filed under the Telephone Consumer Protection Act (TCPA). Less than eight months after the suit was filed, the parties reached a $1,432,000 million settlement, which the district court approved, stating that plaintiff Johnson could "petition the Court to receive an amount not to exceed $6,000 as acknowledgment of his role in prosecuting this case on behalf of the class members." One class member, Jenna Dickenson, objected to the settlement, and then appealed the district court's approval order, including the award of attorneys' fees and the incentive award to the named plaintiff.

The Eleventh Circuit reversed as to the plaintiff's incentive award, finding that such awards are prohibited by the Supreme Court's decisions in *Trustees v. Greenough* and *Central Railroad & Banking Co. v. Pettus*, both dating from the late 1800s. The Eleventh Circuit remanded to allow the district court to adequately explain its fee award, its denial of Dickenson's objections, and its approval of the settlement.

The Eleventh Circuit construed the rule of *Greenbough* and *Pettus* to be that "[a] plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses." The Eleventh Circuit found that

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"[i]ncentive awards are intended not only to compensate class representatives for their time (i.e., as a salary), but also to promote litigation by providing a prize to be won (i.e., as a bounty), in violation of *Greenbough* and *Pettus*. The Eleventh Circuit concluded "[a]lthough it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them."

Disagreeing with the majority's decision to take away the incentive award for the named plaintiff, Judge Beverly Martin observed: "In reversing this incentive award, the majority takes a step that no other court has taken to do away with the incentive for people to bring class actions."

D.C. Circuit

Harris v. Medical Transportation Management, Inc., No. 17-CV-01371, 2020 WL 5702085 (D.D.C. Sept. 24, 2020)

D.C. district court denies certification based on lack of predominance but leaves open the possibility for plaintiffs to seek issue class certification under Rule 23(c)(4).

In this putative class action, current or former drivers for transportation service companies that provide non-emergency medical transportation for Medicaid patients filed suit against Medical Transportation Management Inc. (MTM), a private company. MTM functioned as a "transportation broker" in that it had contracts with and hired entities like plaintiffs' employers to fulfill the requested transportation services. Plaintiffs alleged they were underpaid in violation of federal and local wage laws and that MTM was liable under a "joint employer" theory. Plaintiffs moved for class certification, and the district court denied that request under Rule 23(b)(3), finding that plaintiffs could not establish the necessary predominance requirement. The court, however, declined to address issue class certification under Rule 23(c)(4), finding it premature to certify such a class based on the limited briefing the parties had submitted on the topic.

In arguing they had established predominance under Rule 23(b)(3), plaintiffs argued that "two issues underlie every putative class member's claim": (1) whether MTM is in fact a joint employer of the class members, and (2) whether MTM's flat-rate payment system "failed to ensure that the drivers were paid for all compensable time." While the court agreed with plaintiffs as to the former, it disagreed as to the latter, noting that "[i]ndividualized proof, as opposed to representative evidence, ultimately will be necessary to determine whether MTM violated wage laws with respect to any particular class member, and that individualized proof will overwhelm the common questions presented." Notably, the court declined to find plaintiffs' expert economist's analysis persuasive, finding that it "on its face fails to propose a method by which a fact-finder could find liability on a class-wide basis" and "requires a logical leap to conclude that MTM's flat-rate compensation policy is responsible for the underpayment for any specific driver."

As to plaintiffs' alternative request that the court certify a Rule 23(c)(4) class, the court declined to address that conclusory request "because neither party has briefed the legal complexities associated with issue certification." Notably, the court flagged that there is a circuit split "on the proper application of Rule 23(c)(4) given its inherent tension with Rule 23(b)(3)'s requirement that common issues predominate." The court noted that some circuits, such as the Second Circuit, follow the "broad view" and permit issue class certification. Other circuits, like the Fifth Circuit, follow the "narrow view," viewing Rule 23(c)(4) as a mere "housekeeping rule" that does not permit another independent route to class certification where plaintiffs can skirt the predominance requirement. The district court noted that the Supreme Court and the D.C. Circuit have yet to weigh in on the matter and so fulsome briefing would be

required. The district court did, however, suggest that it would be open to considering issue class certification, noting that certification of an issue class could "materially advance the resolution" of this particular litigation.

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